Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2021 – Poland

Maciej Janik, Maciej Bernatt, Marta Sznajder (Centre for Antitrust and Regulatory Studies, Faculty of Management, University of Warsaw) · Wednesday, May 18th, 2022

Central-Eastern European countries such as Poland may serve as an interesting point of reference for generally studying major trends in competition law and policy and, more specifically, in post-transformation countries. Their experience may reveal characteristics not present in the case of Western European EU Member States. Moreover, they face specific challenges linked to the way in which political and socio-economic systems operate in these countries. For example, recent studies demonstrate the influence exercised by illiberal politics and democratic backsliding on the competition law system. Other challenges involve the role of state and state-owned enterprises in the economy as well as a different socio-economic culture related to their communist past. The limited actual independence of competition authorities and their insufficient resources, low(er) due process standards, the agency's broad portfolio as well as challenges faced by independent and expertise-driven judicial review are relevant too. Keeping this broader picture in mind is useful when reading about recent developments in countries such as Poland. This is not to say that Central-Eastern European countries do not offer interesting lessons. There is growing research, including in-depth national case studies, worthy of attention.

Statistics

In terms of statistics, 2021 shows a moderate decision-making practice of the President of the Office of Competition and Consumer Protection (Urz?d Ochrony Konkurencji i Konsumentów, the "UOKIK") as far as anticompetitive practices are concerned. The UOKIK adopted 12 decisions (11 concerning anticompetitive agreements, 1 concerning abuse of dominance), out of which 10 are infringement decisions and 2 are commitment decisions. The infringement decisions consist of 2 decisions in DAF truck dealer cartel, 3 decisions in resale-price-maintenance cases and 5 decisions in small, local bid-rigging cases issued by the UOKIK regional offices. Commitment decisions include one decision against Poczta Polska in an abuse of dominance case and one decision in a vertical agreement case against an operator of sports and recreation packages. On the merger side, the UOKIK issued over 300 decisions including 4 conditional clearances and one prohibition decision.

Main policy developments

Delayed amendment of the Polish Competition and Consumer Protection Act. On 14 January 2021, the UOKIK released a draft amendment of the Polish Competition and Consumer Protection Act meant to implement the ECN+ Directive (Directive 2019/1). Given the implementation deadline of 4 February 2021, the proposal appeared at a moment that could not be seen as anything but very belated, especially in view of the significant changes it was meant to bring to the Polish legal order. Since it was published, the draft bill has been undergoing both internal and public consultations and until now – almost 1.5 years past the transposition date – it has not yet been introduced to the Polish Parliament.

New guidelines on setting fines for anticompetitive practices. At the end of March 2021, the UOKIK published the latest version of a soft law instrument – previously updated in 2015 – which aims to explain the fine-setting methodology applied by the authority in antitrust infringement cases. One of the most significant changes introduced therein is the considerable increase of the significance of the duration of the anticompetitive practice for calculating fines. For infringements lasting more than a year, the basic amount are to be multiplied by the number of years that the infringement lasted. Formerly, long-term infringements risked facing only up to double the basic fine amount. Moreover, aggravating and attenuating circumstances are now to play a smaller role in calculating the total fine, as they are now able to only result in an increase or reduction of the final amount by up to 50%, and not 80% like before. Finally, the UOKIK will now be entitled to increase the fine if the final amount, calculated according to the methodology set out in the guidelines, was to be grossly disproportionate compared to the total annual turnover of an undertaking. Hitherto, it was only possible to reduce the fine or waive it altogether if the circumstances of a case called for such a decision. The new guidelines apply to cases where statements of objections were issued after 5 April 2021.

Antitrust enforcement

Agreements restricting competition

Horizontal agreements

The DAF truck dealers' cartel – questions over vertical collusion and due process guarantees for individuals. In December 2021, the UOKIK handed down two hybrid settlement decisions in cases concerning anticompetitive agreements allegedly concluded by DAF truck dealers. The first decision was addressed to five companies which divided the Polish market among themselves. DBK, ESA Trucks Polska, TB Truck & Trailer Serwis, Van Tilburg-Bastianen Groep and WTC, all agreed that each would sell DAF trucks in a specific area and would not compete for customers in other parts of Poland. Moreover, they all shared information related to pricing and in some cases, the exchanges also concerned bids submitted in tenders. That arrangement lasted for at least seven years – from February 2011 to March 2018 – and resulted in a situation where a potential buyer wanting to purchase a DAF truck could only do so from a particular seller and at a price specified by the seller.

Interestingly, during the proceedings some of the undertakings attempted to convince the UOKIK that the horizontal cartel was, in fact, a form of vertical, intra-brand collusion as they suggested that the truck manufacturer was also implicated in the arrangement. However, according to the

UOKIK this was not substantiated by the considerable evidence at the authority's disposal. This will be certainly one of the crucial aspects of the case at the appeal level. In the proceedings, two of the five scrutinized companies, TB Truck & Trailer and Van Tilburg-Bastianen Groep, applied for leniency and benefited from a 50% fine reduction for their significant contributions to the investigation. Moreover, these companies entered into a settlement with the agency, which earned them a further 10% reduction in fines.

During the proceedings, the authority established that the companies' management was involved in the actual implementation of the anticompetitive agreement by, among other things, disciplining their salespeople to stick to the arrangement, even under the threat of being dismissed or losing their salaries. Consequently, the UOKIK imposed fines not only on the undertakings (in the amount of ca. €25.9 million) but also on eight managers running the companies (in the amount of ca. €373,500).

The proceedings brought to light certain questions concerning the sufficiency of fair trial guarantees for individuals, as opposed to the rights foreseen for undertakings, during the administrative stage of antitrust proceedings, e.g. their right of defence during dawn raids. Moreover, in the decision imposed a fine on the parent company of one of the dealers, Van Tilburg-Bastianen Groep, even though the Polish Competition Act does not provide for a clear legal basis in this respect, given the non-implementation of the ECN+ Directive into the Polish legal order.

In the second decision, the UOKIK found that three companies, Wanicki Company, DBK and WTC, jointly agreed that each of them would only participate in public tenders in a certain territory and would not submit bids in areas that were allocated to one of the remaining companies. The total fine imposed on the participants of this collusion amounted to over €583,000. In this case, the UOKIK did not accept the leniency applications of two of the cartel participants. However, Wanicki agreed to settle the case and received a 10% fine reduction.

Vertical agreements

Benefit Systems – further decisions in the fitness club sector collusion. In December 2021**,** the UOKIK imposed commitments on Benefit Systems, an operator of sports and recreation packages for employees, in order to increase the level of competitiveness in the Polish fitness industry. This is a follow-up to the 2020 decision, where the UOKIK established that the said company entered into an anticompetitive agreement with several premium fitness clubs. In the 2020 decision, the UOKIK imposed fines also on eight out of the sixteen investigated undertakings amounting to ca. €7 million in total. Moreover, the authority also levied penalties of ca. €175,000 on six managers – for infringing both Polish and EU competition law.

Benefit Systems operates the leading sports card programme in Poland targeted at employers, who purchase the cards for their employees as non-wage benefits giving them free or reduced-price access to a wide range of sports and recreational facilities. At the same time, Benefit owns over a hundred fitness clubs. The UOKIK established that the investigated undertakings had concluded market-sharing arrangements so as not to compete with one another. They exchanged information in order to coordinate their development strategies, in particular in regard to locations of planned new gym openings. Benefit Systems supervised the functioning of the agreement, also serving as a

coordinator and an arbiter resolving any disputes between the other participants.

The 2021 commitment decision concerns one of the issues examined during the previous investigation, , which was eventually left out of the 2020 decision. The evidence obtained by the UOKIK identified as highly probable that Benefit Systems, among other charges, may have required some fitness chains not to cooperate with competing sports package operators, especially the OK System (currently Medicover Sport). Furthermore, the UOKIK found it likely that the investigated undertaking only worked with clubs that were willing to enter into collusive arrangements, which may have unduly favoured the position of those clubs on the market. The sports cards operator accepted an obligation to take pro-competitive measures in relation to both the market for sports and recreation packages and the market for fitness clubs. Most importantly, Benefit Systems took it upon itself to provide access on FRAND terms to its own proprietary fitness clubs to at least one competing sports and recreation package operator. The decision specifies the conditions upon which such access should be granted, taking into account *inter alia* possible contingencies related to the COVID-19 pandemic.

Solgar and Fellowes – vertical price setting in dietary supplements and office equipment. In 2021, the UOKIK issued 3 decisions concerning RPM restrictions. One of them concerned Solgar Polska, a company selling in Poland dietary supplements, including vitamins, herbs and microelements, produced by the US company Solgar Inc. The authority established that Solgar Polska arranged with its retailers for them to apply minimum resale prices. The undertaking engaged in the investigated practices from at least March 2010 through at least October 2017. Initially, the unlawful provisions were contained in written agreements concluded between Solgar Polska and its distributors. Later, the wording of contracts was changed to *inter alia* remove any suspicious clauses. However, the company and its retailers continued the practices informally, e.g., through e-mails, telephone contacts. Furthermore, Solgar actively monitored the prices applied by its trading partners and took action in case of non-compliance with agreed minimum. Retailers who failed to fulfil their obligation were threatened with retaliatory measures, such as loss of preferential terms or even termination of the agreement. Distributors also scrutinised one another's prices and informed Solgar about any deviations. The undertaking received a fine of ca. €264,000 for the abovementioned infringements. The authority also fined two company executives who were personally responsible for the collusion for a total of ca. €61,538.

Another decision targeting RPMs was issued against Fellowes Poland, an authorised local distributor of Fellowes, the manufacturer of office equipment such as paper shredders, binding machines, etc. The UOKIK established that the undertaking initiated a long-term vertical price-fixing scheme operating between 2011 and 2019. Distributors selling office equipment via the online channel were obliged to apply specified minimal prices. Evidence gathered by the authority demonstrated that arrangements were made by e-mail, over the phone, and during individual meetings or group trips. Fellowes Poland controlled whether its trading partners were not deviating from the agreements. Distributors were also engaged in mutual monitoring of their activities and informed Fellowes about any instances of non-compliance. Entities that did not want to participate in the prohibited arrangements sometimes had to face retaliatory measures, e.g. the loss of advantageous conditions in the form of special price lists, marketing support, training and product delivery. Due to Fellowes's successful leniency application and its participation in the settlement procedure, the UOKIK imposed a reduced fine amounting to only ca. € 95,384. The evidence provided by the undertaking showed that the infringement lasted longer and involved more products than suggested by the evidence held by the UOKiK.

New investigations

Basketball and speedway – anticompetitive agreements concerning athletes' salaries. The UOKIK initiated two sets of proceedings concerning activities related to arrangements regarding the salaries of basketball and speedway athletes. The first one, a full-fledged antitrust investigation, concerns the supposed coordination, between Energa Basket Liga and 16 associated clubs, with respect to the conditions of terminating players' contracts and withholding their remunerations. The 2019/20 season of the league had its premature end in March 2020 due to the COVID-19 pandemic. Consequently, the basketball clubs participating in the competition issued a joint statement and announced that the financial losses they suffered made it impossible for them to entirely fulfil their obligations regarding the salaries of players and coaches, especially since their counterparties were also unable to provide the expected services.

The UOKIK noted that clubs, as undertakings, are obliged to take all decisions concerning their economic activity, including issues related to cooperation with players, independently and autonomously – regardless of the existence of a legitimate economic rationale behind even drastic steps. However, by engaging in a coordinated action, they might have infringed antitrust rules by exchanging sensitive information and eliminated a significant element of competitive pressure between them, i.e. as regards the competition for recruiting new valuable players. The cooperation allowed them to reduce the players' salaries without having to fear that they would transfer to other clubs the following season. Moreover, by making such a joint decision, clubs could disregard the differences in their respective economic situations – not all of them were equally justified in taking the reproached actions. The UOKIK announced that its investigation was carried out in coordination with the Lithuanian Competition Authority, which was piloting its own investigation into basketball players' pay. The matter was also discussed with the European Commission in view of the necessity to carry out a twofold analysis both under Polish and EU competition law.

A few months later, the UOKIK declared the initiation of preliminary proceedings into the activities of the Polish Automobile and Motorcycle Federation, speedway competition organisers and speedway clubs. The authority received signals that these undertakings engaged in anticompetitive agreements, including *inter alia* joint arrangements concerning maximum salaries for speedway riders, and reductions for the 2020/21 seasons. As in the case of the basketball investigation, the coordinated action between independent clubs related to athletes' salaries, may have led to the elimination of competition between these undertakings for new riders. Clubs could afford to cut remuneration for athletes without incurring the risk of losing them to other teams. Both cases also highlight the need for caution when invoking the COVID-19 pandemic as a justification for anticompetitive conduct.

Abuse of a dominant position

Poczta Polska (Polish Post) – the universal service provider abusing its dominance. In its only 2021 abuse of dominance decision, the UOKIK imposed commitments on the Polish Post (PP) after having established that it is likely that it abused its dominant position as Poland's leading postal operator. Due to the company's unrivalled infrastructure, as the former postal monopolist, it acts as the universal service provider for the provision of so called universal postal services, i.e. a

basic selection of services offered under specific regulated conditions in order to guarantee affordable uniform prices and a minimum level of quality. As regards other (non-universal) services, PP must compete with other undertakings which operate, to the extent possible, their own postal networks. However, in many parts of the country they cooperate with PP as contractors, as they must rely on its infrastructure in order to reach remote customers, e.g. when delivering packages.

In the course of the proceedings, the UOKIK identified the existence, since 2016, of two practices that might constitute an abuse of PP's likely dominant position in the national wholesale markets for postal services for addressed letters and for addressed advertising letters. Firstly, in order to obtain a price offer from PP, its would-be contractors were required to provide commercially-relevant information about their customers. The UOKIK found that PP's expectation of obtaining this data at such an early stage was unjustified and could have enabled the company to snatch customers from its competitors. Secondly, PP had no fixed price tariff and pricing was carried out for each contractor individually. As a result, PP's competitors were unable to provide their customers with comprehensive pricing information, which could have had a negative impact on the attractiveness of their offer. Moreover, PPs contractors were required to indicate the volume of mailed items for a given period in advance. If the final quantity turned out to be lower by even one item, PP was entitled to apply a rate for smaller mailing volumes thus effectively increasing the overall price.

Under the commitments imposed by the UOKIK, PP was to cease the aforementioned practices, i.e. no longer require contractors to provide customer-related information to obtain a price offer, keep a fixed price list of services that would be valid for 12 months, and assume a more flexible approach in its volume-related price-setting methodology. Hence, price lists would be based on the number of items sent and more than two price thresholds were to be indicated, thus preventing drastic price changes in case of small discrepancies between the declared and actual quantity of shipments. Contractors were also to obtain a possibility of increasing mailing volume ranges declared in the contract once during the term of the agreement.

New Investigations

Polsat and Discovery Group – investigation into distribution practices concerning TV channel bundles. In 2021, the UOKIK solidified its intensive enforcement towards foreign-owned media in Poland. In 2017, the President of the UOKIK at that time, has outspokenly supported the government in their plans to introduce rules governing the maximum level of foreign capital in the media sector, justifying his stance with the necessity to protect media plurality. What's more, the initiation in May 2021 of two sets of antitrust proceedings, against Polsat Television and four undertakings belonging to the Discovery Group, can raise doubts in the eyes of external observers if one takes into account legislative developments meant (unsuccessfully) to drastically limit foreign ownership in the Polish media sector, the so-called Lex TVN, which is directly aimed at the Discovery Group, the sole owner of TVN.

In this context, the proceedings against Polsat and the Discovery Group can be a source of concern. Yet, according to the UOKIK, it acted upon numerous complaints from operators, industry associations and consumers who felt impacted by restrictions on the freedom to shape their programming offer or the choice of TV channels.

The companies, that produce and later sell TV channels to TV operators, such as cable networks, are suspected of abusing their dominant position on the market for the distribution of TV channels. The companies' market power is determined by the popularity of the channels they offer, some of which are perceived as necessary ("must-have") by consumers and TV operators. Their absence may lead consumers to completely disregard an operator's offer. The investigated undertakings sell channel packages to operators, with Polsat offering 28 channels, and the Discovery Group at least six. The main issue lies in the fact that buying individual channels makes no economic sense. For example, the purchase of only two channels from Polsat may be more expensive than the entire package of channels, including these two channels. Moreover, package purchase agreements require that pay-TV operators include certain channels in their basic TV channel bundles, i.e. the ones that are most commonly offered to viewers. The UOKIK sees potential abuse in the fact that operators are forced into buying many channels and made to add some of them to their basic bundles. Apart from being exploitative, this may negatively affect the competitive situation for smaller broadcasters competing with Polsat and the Discover Group, and provide the probed companies with undue advantages in terms of advertising revenues.

Merger Review

The UOKIK's activity on media markets in 2021 was further noticeable in terms of merger review. Namely, in 2021 the UOKIK handed down two controversial decisions concerning the Polish media market, which can be considered as landmark cases in terms of the actual independence of the UOKIK.

Agora/Eurozet – prohibition of acquisition due to arising coordinated effects and collective dominance. In January 2021, the UOKIK prohibited the acquisition of Eurozet sp. z o.o., a producer and broadcaster of radio programmes that also sells advertising time, by Agora S.A., the head of a corporate group operating in the press, publishing and radio industry as well as selling advertisements. The proceedings have been ongoing since October 2019 when Agora and Eurozet filed an application for the clearance of this transaction. The case was then referred to the second phase and had undergone market research. In November 2020, the UOKIK presented his objections to the concentration, and two months later issued a decision prohibiting the concentration. Most notably, the lengthy duration of the proceedings (15 months) is one of the longest in the history of Polish merger review proceedings. During the proceedings, Agora proposed remedies, which were, however, not accepted by the UOKIK.

Justifying the prohibition, the UOKIK held that the activities of both capital groups overlapped primarily within the scope of broadcasting radio programmes, selling advertising time as well as intermediation in selling advertising time on the radio. Thus, the transaction would have resulted in an establishment of a powerful radio group that would be able to limit competition on the market for radio advertising and the broadcasting of radio programmes. The UOKIK further argued that the transaction might have led to the formation of a duopoly and the marginalisation of the remaining groups and radio stations – the two leading radio groups (Eurozet and RMF FM) would have jointly held approximately 70% of the market share.

The case raised a lot of controversies, both due to the disputable competition analysis applied by the UOKIK, related to the dubious duopoly concept as a theory of harm, the political dimension of the prohibition in light of the antigovernment (current opposition) character of the content

disseminated by Agora, and its overall impact on the freedom of media in Poland. Despite basing its assessment on the risks of coordinated effects, the UOKIK did not conduct a proper analysis, which is required both by EU and its own decisional practice, to prove an actual risk of the occurrence of collective dominance leading to anticompetitive coordination between the remaining undertakings. As Agora-owned media outlets are known for their criticism of the current government and its policies, in light of the prohibition lacking sufficient justification, one can have doubts as to the UOKIK's actual independence. In this context it is important that on 12 May 2022 the Warsaw Competition Court issued an unprecedented judgement overturning the UOKIK prohibition decision in Agora/Eurozet case. Employing its competence of *de novo* review, the court ruled on the merits of the case and cleared the transaction. In line with the expert opinion submitted during the proceedings, the court criticized the speculative character of the theory of harm applied by the UOKIK, lack of direct anticompetitive impact of the concentration on the relevant market and weak evidence illustrating the risk of coordinated effects.

PKN Orlen/Polska Press – clearance of the takeover of a regional publisher by the state-owned oil refiner. In February 2021, the UOKIK cleared the takeover of Polska Press, a corporate group publishing 20 regional dailies, 120 weeklies and freesheets, by Polski Koncern Naftowy Orlen S.A. (PKN Orlen), a state-controlled oil refiner and petrol retailer. When justifying the decision, the UOKIK held that potential vertical effects on the regional markets for press advertising and on the market for wholesale press distribution, as well as potential conglomerate effects on the national press printing market, would not significantly impede competition. The decision was challenged before the Warsaw Competition Court by the Polish Ombudsman on the grounds that it threatened media pluralism and media freedom by restricting competition on the market for free speech, the right to reliable information, the transparency of public life, social scrutiny and criticism – Polska Press had been realising all of these functions, aside from its advertising role. Following the Ombudsman's request, the UOKiK clearance decision was suspended by the Court and the case is currently pending for judicial review. However, PKN Orlen ignored the Court's order and took over the control of Polska Press effectively completing the merger before the UOKiK decision became final.

The decision raises several questions. Firstly, the case sparked an intense debate regarding the role which the protection of the fundamental right to free and pluralistic media should (could) have when conducting a merger review by a competition authority. Secondly, the merger seems to have entailed important competitive concerns on the relevant markets. The UOKIK's reasoning, why the vertical effects on the regional markets for press advertising on the territory of 14 voivodships and the vertical effects on the national market for wholesale press distribution would not significantly impact competition, seems to be in contradiction with other parts of the decision, as well as previous decisional practice. On the one hand, the decision justifies the lack of significant competitive concerns by the lack of PKN Orlen's economic incentive to foreclose access to the affected markets, on the other hand, it shows no economic motives for the takeover overall, as Polska Press is not a profitable undertaking, and its operations are not significant for PKN Orlen. Thus, the question arises whether PKN Orlen had actually pursued an economic interest when initiating the transaction or whether this merger was in fact politically motivated instead (what PKN Orlen denies).

The potential vertical effects could result in foreclosure, even if it is not to PKN Orlen's economic benefit, but rather political gains in the shape of nationalisation and uniformisation of content published in the acquired media outlets. In particular, the UOKIK claims that despite the relatively high market shares of Polska Press on the regional markets for press advertising, press advertising

is not significant for PKN Orlen's business activity and the type of business the refiner conducted. It highlights that PKN Orlen would lack incentives to foreclose its competitors, such as other gas stations, or the opportunity to advertise in Polska Press's publishing, as the entire press advertising market seems to be in decline, which would thus lack economic reasoning. In parallel, the UOKIK holds that despite the high concentration on the national market for wholesale press distribution, PKN Orlen would also lack incentives to foreclose access to outlets published by Polska Press to RUCH's competitors (RUCH is Poland's major press distributor that was acquired by PKN Orlen in 2020), as it would negatively impact the volumes of sales of the press published by Polska Press. While the economic sensibility of this argument cannot be denied, the political motives behind PKN Orlen's decision-making can make it questionable. Comparing this merger proceeding with the earlier decision concerning the PKN Orlen/RUCH merger, one can easily notice it not only took UOKIK much longer to review, but also that it had already then considered the potential vertical effects on the market for wholesale press distribution, as outlined in the UOKIK's press release justifying the decision. Given that the concerns on the wholesale press distribution market had already been present to some extent in the 2020 decision, PKN Orlen's merger with Polska Press, which is active on a related market to RUCH, further strengthens this vertical coordination between press publishing (Polska Press), its wholesale distribution (RUCH) and its retail sales (PKN Orlen's gas stations' shops). Finally, the doctrine criticised the UOKIK's decision in light of the Agora/Eurozet prohibition decision discussed above, for applying a contradictory approach to both the substantive assessment and the enforcement procedure.

Conclusion

In conclusion, despite the moderate activity of the President of the UOKIK in 2021, its enforcement practice provided ample room for interesting proceedings and raised discussion-worthy controversies. The small number of infringement decisions concerning anticompetitive practices has been a characteristic feature of the decision-making of the UOKIK in recent years. The rather scarce enforcement and the fact that it focused on small cases as a general trend in the UOKIK, with proceedings in high-profile cases following the government's political agenda, can hint to the negative influence of illiberal politics and democratic backsliding on the competition law system as discussed in recent studies. The overall activity of the UOKIK in 2021 further highlights the importance of an actual independence of competition authorities.

Finally, following the pandemic-struck years, which significantly highlighted the importance of the digital economy, the scarce competition law enforcement of the UOKIK on digital markets is worrying. The only publicly activity undertaken by the UOKIK in 2021 in that regard concerns the opening of an investigation into the compliance of Apple's new privacy and data protection rules with competition law. It thus remains to be seen how the investigation into Apple, as well as the proceedings initiated in 2019 against Allegro, a Polish e-commerce platform, will unfold and whether the UOKIK will join other European competition agencies in ensuring competition in the digital realm.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

This entry was posted on Wednesday, May 18th, 2022 at 5:45 pm and is filed under Competition Law 2021, Poland
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.