

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2022 – Poland

Maciej Janik, Marta Sznajder (Centre for Antitrust and Regulatory Studies, Faculty of Management, University of Warsaw) · Tuesday, May 23rd, 2023

In 2022, the activities of the Polish Competition Authority (Urząd Ochrony Konkurencji i Konsumentów, hereinafter: UOKIK), and thus the developments in competition law in Poland, were affected by the aftermath of the COVID-19 pandemic as well as the war in Ukraine and the following energy crisis. Moving ahead with the times, the UOKIK undertook various initiatives to tackle challenges to competition and consumers present on online platforms.

While most of these activities related to consumer protection and spreading consumer awareness, the UOKIK also issued its first-ever decision concerning digital markets, where it found the biggest Polish e-commerce platform, Allegro, to have abused its dominance. It also was the only abuse of dominance decision adopted this year. The number of UOKIK's decisions concerning the prohibition of anti-competitive agreements was also scarce and of rather limited importance to competition law enforcement in Poland. The most significant development in terms of mergers related to the involvement of state and state-owned enterprises in the economy, as seen in the PKN Orlen/PNGiG concentration, as well as to the role of media pluralism in control of concentrations with two controversial media mergers proceedings culminating with court rulings.

The outlined issues, such as limited competition law enforcement, focus on more minor cases or consumer protection, asserting the importance of state-owned companies, remain [characteristic of the impact of illiberal politics on competition law enforcement](#). In fact, one of the key challenges stemming from such developments in Central-Eastern European countries, the question of actual independence of competition authorities, has been a vivid subject of debate in Poland in 2022 following [the General Court's ruling in the Sped-Pro case \(T 791/19\)](#).

Statistics

[In terms of statistics](#), 2022 shows a rather limited decision-making practice of the UOKIK as far as anti-competitive practices are concerned. With even fewer decisions than in the previous years, the UOKIK adopted a total of eight decisions concerning anti-competitive practices – seven on prohibited agreements and one on abuse of a dominant position. None of the decisions concerning agreements tackled major competition issues, such as cartels, but rather focused on vertical agreements.

Nonetheless, it initiated 35 explanatory and anti-monopoly proceedings concerning competition-restricting practices and issued 52 soft notices to businesses. The total amount of fines for anti-competitive practices imposed by the UOKiK exceeded PLN 241 million, with the highest one levied on Allegro for abusing its dominant position. In two cases, sanctions were reduced due to leniency, while the authority received three leniency applications in total. The UOKiK conducted nine dawn raids, searching the offices of 30 entrepreneurs. Compared to the previous year, the UOKiK received four times more signals under the whistleblower scheme (2396). The office also broke its record of merger proceedings. With 342 merger proceedings initiated, the UOKiK issued 326 approval decisions and one conditional decision. In one merger case, it signalled competitive concerns, which led to the parties, ArcelorMittal and Moris, to withdraw the notification.

Main policy developments

2022 marked further delays in implementing the ECN+ Directive, a legal act aimed at increasing the effectiveness of enforcement of antitrust rules in Poland and harmonizing it with the current EU procedural standard. As the enactment of the amendment took place on 27 April 2023, almost 2.5 years had to pass in relation to the transposition date. The long delay cannot come as a big surprise given the current political context in Poland and in view of the fact that the Directive is meant to empower national competition authorities by increasing their autonomy from their respective countries' executive powers.

Antitrust enforcement

Horizontal agreements

Remondis – further clarifications on antitrust analysis of bidding consortia

In December 2022, Remondis and six other undertakings active in the municipal waste collection services market were hit with a fine of PLN 7.2 million for bid-rigging carried out under the guise of a legitimate consortium. Under Polish jurisprudence, a consortium, i.e. an agreement between entrepreneurs who combine their capabilities in order to take part in a public tender, is allowed under competition law if participants offer complementary services and none of its participants has the capacity to carry out the contract subject to the public bid on its own. In other cases, consortia may be found to restrict competition as each self-sufficient undertaking should participate in tenders individually to exert appropriate competition pressure on other bidders.

In the case of the seven undertakings subject to UOKiK's decision, after winning 14 out of 15 tenders organized by the city of Poznań, each consortium member continued to act primarily independently. This was a clear indication that the real reason to form a consortium was only to secure the award of the contract and not for its joint realization. Remondis played a lead role in this collusion by inter alia recruiting consortium members. Moreover, the company also decided on individual tasks each participant would complete in various parts of Poznań once the bid is awarded.

The undertakings tried to defend themselves by invoking the novel character of the case and its negative economic implications for businesses, which would be discouraged from cooperating in

the framework of consortia – agreements that are expressly allowed under public procurement law. The UOKiK, however, could not agree that competitors were unable to assess the risk of the possible negative impact of their cooperation since, as competitors, they can easily tell whether the size of the bidding group is greater than necessary to submit an offer and perform the order upon winning. The decision in the bid-rigging case involving Remondis is in line with the earlier strict approach of the competition authority to bidding consortia, as shown e.g., in the seminal *Astwa* decision of 2012. This position focuses on the “*necessity*” condition and downplays the role of any efficiency-related defences that the participants may invoke in relation to, e.g., allocation of resources, sustainability benefits, or cost savings.

Polish Basketball League – first Polish decision related to anti-competitive employment practices

In October 2022, the UOKiK found the Polish Basketball League and 16 associated basketball clubs to have infringed both the Polish and EU rules prohibiting agreements restricting competition, [which marked the end of proceedings initiated a year before](#). The undertakings were jointly fined PLN 946 440,50 for coordinating their HR policy towards athletes and coaches after the 2019/20 season which ended prematurely as a result of the COVID-19 pandemic. In a joint statement, the clubs declared that they would not pay the entirety of the agreed remuneration for that season and later pursued this aim by terminating or amending the players’ contracts. Moreover, they all acted this way regardless of whether their economic situation really merited such measures. Not all of the clubs were comparably affected by the losses sustained in the 2019/20 season. Many clubs even invoked the same jointly developed arguments in their termination notices. The authority considered these activities as a type of wage-fixing collusion. As independent undertakings, they are obliged to autonomously make decisions concerning their economic activity. By engaging in a coordinated action, however, they exchanged sensitive information and eliminated a significant element of competitive pressure between them, i.e., relating to the competition for recruiting new valuable players. The cooperation allowed them to reduce the players’ salaries without fearing losing them to other clubs in the following season. Athletes have a direct influence on the market position of their respective clubs. The better the players the club hires, the better its results in matches. This, in turn, leads to more income for the clubs from selling tickets and merchandise and makes it easier to secure sponsors. It is the first decision of the UOKiK concerning employment-related practices.

Interestingly, the decision was issued under both Polish and EU law. The authority found that in accordance with settled case-law practices covering the entire territory of a country should be presumed to affect trade between EU states as, by their very nature, they contribute to the fragmentation of the European single market. Furthermore, nowadays, sports clubs in every country regularly employ athletes from all over the world, which means they should be seen as direct competitors for the athletes’ services. On a more general note, such legal qualification of the infringement seems to fall into the relatively recent tendency of the UOKiK [compared to the past](#) to ensure the application of more than just national competition law whenever it is merited.

Vertical agreements

Karcher – vertical resale price fixing agreements in the cleaning equipment market uncovered

after more than 20 years

In December 2022, the UOKiK issued a decision against Karcher, a manufacturer of cleaning appliances, for running a long-term vertical resale price-fixing scheme with its distributors already since the late 90s. The parties agreed to apply fixed and minimum resale prices in distribution agreements concerning cleaners for home and professional use, e.g. vacuums, electric mops, high-pressure cleaning equipment, and floor polishers. Until 2005 the manufacturer set resale prices for digital and brick-and-mortar sales. Later the provisions applied mostly to sales in Internet stores. Distributors who refused to apply the prices imposed by Karcher risked losing rebates, marketing support, or even terminating their contract with Karcher. Some distributors played an active role in supporting the enforcement of measures meant to discipline non-compliance with the agreements, e.g. by informing about deviations from the set prices. The UOKiK imposed a fine of PLN 26 million on Karcher as the organizer of the vertical scheme. This amount would have been considerably higher if not for Karcher's successful leniency application. The fine could not have been waived entirely because Karcher, as the instigator, was found to have induced the other undertakings into participation. Moreover, the UOKiK, even without the manufacturer's cooperation, already disposed of the necessary evidence to initiate antitrust proceedings against the company after obtaining them during a dawn raid in the undertaking's offices in 2021. This may exemplify the ineffectiveness of leniency schemes for vertical agreements, which controversially are possible in Poland. The company initially filed for voluntary submission to the fine but later withdrew once it learned about the amount that was to be imposed on it. This means that despite the considerable evidence, the undertaking is still considering filing an appeal against the decision.

Pending cases and new investigations

Polish speedway federation and league – developments in the investigation into wage-fixing practices

In May 2022, [following the explanatory proceedings initiated in 2021](#), the UOKiK decided to open a full-fledged antitrust investigation into wage-fixing agreements of the Polish Automobile and Motorcycle Federation, an entity responsible for organizing and governing the speedway sports discipline in Poland, and Speedway Ekstraliga, organizer of Poland's top-tier speedway competition. The authority found that maximum wage caps were included in the organizational regulations that the Federation adopts jointly with Ekstraliga.

The reproached provisions seem to have been in force since 2014, distorting competition between Speedway Ekstraliga's teams in terms of athlete hires. In fact, salary restrictions may have prevented teams with sufficient financial capacities from acquiring better speedway riders. As was already held above in relation to the Polish basketball case, it is the players that drive a team's market position and influence the levels of ticket sales and the perspectives for sponsorships. Polish speedway races are seen as one of the best in Europe, which attracts riders from all over the world to join teams in Poland and makes the salaries they offer benchmarks for other countries. Consequently, similarly to the basketball case, the UOKiK considers that the agreements may have affected trade between EU states. This, in turn, would justify qualifying the practices as an infringement of EU antitrust law as well. The investigated undertakings have already declared their intention to cooperate with the authority fully.

Dahua Technology

In November 2022, UOKiK obtained evidence suggesting that Dahua Technology Poland, the national exclusive importer and wholesaler of Dahua, a manufacturer of monitoring equipment, may be running a vertical resale price-fixing and market-sharing scheme. The watchdog initiated antitrust proceedings against six undertakings and seven managers involved in implementing collusion. Apart from the exclusive importer, the participants comprised five direct distributors of the company, who are responsible for further wholesale and retail sales of the Dahua brand products. Already since its entry into the Polish market in 2016, Dahua Technology Poland supposedly started exerting influence on the pricing policies of its distributors by means of, e.g., fixed resale prices, maximum levels of discounts, and fixing the conditions for offering promotions to the distributors' customers. All the companies participating in the scheme were actively involved in maintaining it and enforcing compliance by deviating members. The undertaking may have also instructed its distributors to impose resale price restrictions on their clients. Furthermore, UOKiK allegedly found proof of market-sharing since one of the retaliatory measures foreseen for applying prices exceeding the agreed levels was to give privileges to other compliant distributors in the form of, e.g., temporary exclusivity in relation to certain customers.

The evidence justifying these allegations was obtained during a dawn raid carried out in September 2021 in Dahua Technology Poland's registered office. During the inspection, the authority encountered hindrances from the undertaking's representatives who disregarded UOKiK's request, made at the outset of the proceedings when the inspection notice was to be served, not to alert other employees about the search. One of the managers warned the rest of the staff about the inspection by sending a message on his mobile phone. Consequently, the UOKiK imposed a fine of PLN 700 000 for obstructing the dawn raid.

Investigation into the coal market

In response to the rise of fuel prices resulting from the energy crisis aggravated by Russia's invasion of Ukraine, the UOKiK, like many other EU antitrust authorities, focused its scrutiny on the fuel market in order to rule out whether any anti-competitive practices may have affected price levels. In July 2022, the watchdog started a preliminary investigation into the coal market, which involved an audit of 3900 coal depots in Poland, carried out with the help of the Trading Standards Inspection, which looked into such parameters as the number of employees or sales volumes. This was intended to define the structure of the retail market for coal sales and confirm the UOKiK President's initial suspicions concerning the possible existence of price collusions. The majority of the relevant undertakings were sole proprietors, usually running only one depot each as a secondary form of business activity. In most cases, the rocketing prices in coal depots were the result of increasing purchase costs brought about by the crisis in the wake of the war in Ukraine. However, UOKiK did initiate antitrust proceedings against one undertaking active in the import and sale of hard coal, Atex. Evidence was allegedly found suggesting that the entrepreneur engaged in resale price-fixing arrangements with its distributors in relation to heating fuel.

Abuse of dominance

Allegro – Polish e-commerce platform charged with abuse of dominance

At the end of 2022, the UOKiK issued two decisions regarding the proceedings against Allegro, a Polish e-commerce platform, fining the company a total of PLN 210 million. While one of the decisions regards violation of competition rules, the other relates to consumer protection and shall be left out of the scope of this analysis. In the former decision, Allegro was held to have unlawfully abused its market position by favouring its own online store at the expense of its competitors operating on allegro.pl platform.

Allegro is a popular Polish online shopping platform that has been present on the market for many years now. According to the UOKiK, it thus enjoys a significant advantage over other e-commerce platforms. Moreover, for smaller entrepreneurs, the platform remains the primary tool for reaching access to a broader group of potential customers. Allegro's relationship with the sellers operating on the platform is two-fold. On the one hand, it provides an online trading platform for them to sell their products, while on the other hand, it competes with them, particularly thanks to its online store – Allegro Official Store (AOS). Importantly, due to selling their own products on the platform through Allegro Official Store, Allegro became the platform's biggest trader in 2016, which according to the UOKiK accounted for 1% of the platform's total revenue.

The proceedings in the case began in 2017 when the UOKiK conducted a raid of Allegro's premises following complaints from competitors. After more than five years, the UOKiK concluded Allegro had unlawfully abused its market position. The UOKiK ruled that Allegro held a dominant position both due to the turnover generated by the transactions concluded on the platform and due to the company's revenues from services rendered for the benefit of third-party suppliers operating on the platform and competitive platforms. Allegro's anti-competitive conduct consisted in favouring the items sold by the Allegro Official Store on the platform over those offered by independent sellers. Consequently, the consumers' search ability was limited. Allegro was able to perform self-preferencing due to the 'dual role' it played on the platform. It took advantage of the inside knowledge regarding the operation of the platform, such as search matching algorithms and buyer behaviour information. Allegro also pursued various sales and promotional activities to boost its own sales on the platform, using features unavailable to independent sellers. These practices altogether resulted in the products of independent sellers being less visible on the platform and thus less frequently bought.

This decision possibly opens a new chapter in Polish competition law enforcement, namely one that deals with digital markets. Importantly, it is [the first-ever infringement decision concerning online platforms issued by the UOKiK](#). In the summary of its reasoning, the UOKiK largely follows the theory of harm related to self-preferencing put forward by the European Commission in the Google Shopping and Amazon cases. Unfortunately, four months since the decision was announced, the UOKiK has not published the full version of the decision, which would include its justification. Perhaps given the length of the proceedings itself, this should not be surprising, yet it remains disappointing. The lack of justification seems particularly confusing given the extraordinarily high fine, which may bring a sense of legal uncertainty.

Merger Review

Conditional approval for the PKN Orlen/PGNiG concentration

In March 2022, the UOKIK conditionally cleared the acquisition of PGNiG by PKN Orlen. The transaction between PKN Orlen, an oil refiner and petrol retailer, PGNiG, an oil and gas producer, was initially notified to the European Commission due to the parties' global turnover. Following the parties' request, the European Commission, however, referred the case for the UOKIK's assessment as the merger impacted Polish markets. Unlike in [PKN Orlen's acquisition of the Lotos Group](#), the Commission decided UOKIK had adequate experience in assessing the characteristics of energy markets. The Commission's decision to refer this case to UOKIK came as a surprise, particularly in light of the debate on the independence of the UOKIK, which followed the mentioned Spe-Pro judgement.

Throughout the proceedings, the UOKIK conducted market research involving the parties' competitors in the wholesale and retail sale of natural gas. The UOKIK also consulted the Energy Regulatory Office and Gaz System, the operator of gas pipelines in Poland. The investigation indicated the strengthened position of PGNiG in the natural gas market, as well as the limited activity of PGNiG and PKN Orlen's competitors in the wholesale natural gas market. There was thus a risk that the merged entity could limit access to gas storage facilities as PGNiG's subsidiary Gas Storage Poland was responsible for managing PGNiG's gas storage facilities to its competitors on the wholesale and retail gas markets. Nonetheless, the UOKIK decided that it was possible to issue a conditional decision with positive effects on competition. The office thus allowed the merger on the condition that Gas Storage Poland was sold to an approved buyer who is not active in the natural gas trading markets.

The PKN Orlen/PGNiG merger is another step in the process of creating a multi-energy conglomerate and the biggest Central-Eastern European oil/energy company. The merger of these two state-owned energy enterprises should be seen in the context of the also controversial PKN Orlen's acquisition of the Lotos Group, another state-owned refiner, and the Energa Group, an electricity provider. These proceedings perceived together bring not only interesting findings with regard to merger control of state-owned enterprises but also a comparison of EU merger control vis-a-vis national merger control. The PKN Orlen's acquisition may also have impacts beyond energy markets, and we may indeed be observing the rise of a national champion with significant influence on crucial aspects of consumers' daily lives ranging from gas or oil prices to media pluralism and editorial independence.

Court ruling in the media mergers cases: Agora/Eurozet, PKN Orlen/Polska Press

The [2021 media merger cases](#) remained an important subject of debate, as both the Agora/Eurozet merger prohibition decision and the PKN Orlen/Polska Press clearance decision were the subject of an appeal to the Warsaw Competition and Consumer Protection Court (Sąd Ochrony Konkurencji i Konsumentów, hereinafter: SOKIK).

In May 2022, the SOKIK overturned the UOKIK prohibition decision in the Agora/Eurozet case. It further decided to make use of its competence of de novo review, wherein it ruled on the merits of the case and cleared the acquisition. Firstly, the SOKIK underlined that the burden of proof was placed on the UOKIK, who had to show a high probability that a merger would have negative consequences for competition. Secondly, the SOKIK clarified the methodology of merger

assessment in relation to anti-competitive coordinated effects, also elaborating on the high standard of proof. However, it held that the *ex-ante* control of concentration does not require the authority to provide objectively true evidence. Finally, the SOKIK concluded that the theory of harm applied by the UOKIK has to indicate sufficiently credible and highly probable negative effects of a merger on competition in order to justify its prohibition. Given the speculative character of the theory of harm applied by the UOKIK, supported by [the expert opinion submitted during the proceedings](#), the lack of direct anti-competitive impact of the concentration on the relevant market, and weak evidence illustrating the risk of coordinated effects, the Court was compelled to change the UOKIK's decision. Following the judgment, the UOKIK made an appeal to the Warsaw Court of Appeals. In January 2023, the Court of Appeals, however, dismissed the appeal and upheld the SOKIK's unconditional clearance. The Court of Appeals confirmed that all the conditions for granting approval for the transaction had been met as regards the SIEC test as well as the Airtours case (T-342/99) criteria. The Court of Appeals further upheld the standard of proof outlined by the SOKIK and asserted the judicial power to reverse the competition authority's prohibition. After almost three and a half years, this ruling puts an end to the Agora/Eurozet saga (unless UOKIK resorts to the extraordinary means of a cassation complaint), providing valuable takeaways for both the functioning of the competition law enforcement in Poland and the systemic effectiveness of judicial protection in reviewing competition authorities' decisions.

In June 2022, however, the SOKIK upheld the UOKIK's clearance decision in the PKN Orlen/Polska Press case. The decision was initially appealed by the Polish Ombudsman (Commissioner for Human Rights) on the grounds of the negative effects of the transaction on media pluralism and freedom of speech. The SOKIK rejected the Ombudsman's definition of the relevant market as 'market for media' as too broad. In terms of criteria for assessing concentrations, it held that the competition authority approves a merger, which will not significantly limit competition on the market, in particular through the creation or strengthening of a dominant position on the market. With this, it ruled that the Polish competition law does not allow for considering non-economic values, such as media pluralism, in merger control. Besides the lack of a legal basis, the SOKIK explained that accounting for such values would negatively affect legal certainty. The SOKIK stated it is ultimately for the consumers to decide which media to follow. The transaction could proceed as the Ombudsman did not appeal the SOKIK's judgment. This development in the Ombudsman's stance could be attributed to the change in the Ombudsman itself. Interestingly, ever since the acquisition was completed, PKN Orlen made various changes to the Polska Press' staff, arguably affecting editorial independence. While the judgment appears sceptical towards considering non-economic values and media pluralism in Polish competition law, the matter may be more complex and remain unresolved in light of the general obligation to protect media freedom and pluralism under EU law or the media pluralism test introduced in Article 21 of the draft European Media Freedom Act (EMFA).

Conclusion

Despite relatively limited competition law enforcement and few competition policy developments, the experiences of Poland in 2022 can offer various interesting insights. The rather scarce competition law enforcement exhibits various symptoms of the impact of illiberal politics on competition law enforcement, typical for Central-Eastern European countries struck by the rule of law crisis. These also include a focus shift to insignificant antitrust cases or other areas of activity within the broad mandate of competition authorities, such as consumer protection, as well as

mellow enforcement towards state-owned enterprises leading to the creation of government-friendly national champions. Moreover, the delay and failure to implement the ECN+ directive and reluctance to consider the impact of concentrations on media pluralism in light of the potential media pluralism test included in the EMFA draft speak to a widening gap between Polish law and its enforcement and EU law standards.

Nonetheless, to some extent, substantive lessons may be drawn from the first-ever Polish competition decision concerning online platforms as well as from the elaboration of the court on the assessment of mergers' coordinated effects. However, it remains to be seen, when the decision with a justification is finally published, whether the former contributes anything new beyond the well-established theories of harm in the digital economy. Finally, it is worth noting the novelty and interesting antitrust matters under UOKIK's review in the past year, such as the matters of employment or consortia. This development could hint at the office's interest and readiness to take on bigger and bolder cases, however, the questions of its independence to deal with political issues as well as of its sufficient resources remain problematic.

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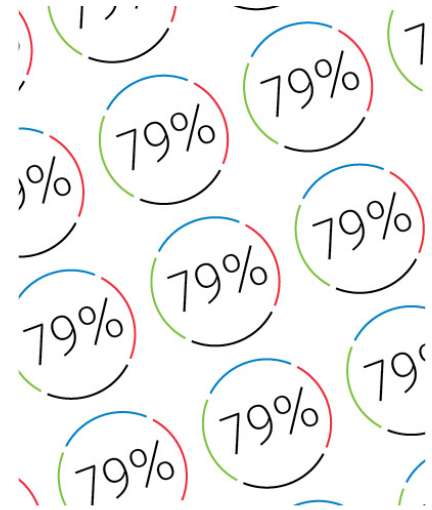
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