



Organisation for Economic Co-operation and Development

DAF/COMP/AR(2019)27

Unclassified

English - Or. English

31 May 2019

Directorate for Financial and Enterprise Affairs  
COMPETITION COMMITTEE

## Annual Report on Competition Policy Developments in Poland

-- 2018 --

5-7 June 2019

This report is submitted by Poland to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 5-7 June 2019.

JT03448286

## *Table of contents*

<b>1. Changes to competition laws and policies, proposed or adopted .....</b>	<b>3</b>
1.1. Other relevant measures, including new guidelines.....	4
1.1.1. Whistle-blower programme.....	4
<b>2. Enforcement of competition laws and policies.....</b>	<b>4</b>
2.1. Actions against anticompetitive practices.....	4
2.1.1. Summary of activities of competition authority and courts .....	4
2.1.2. Description of significant cases.....	6
2.2. Mergers and acquisitions .....	8
2.2.1. Summary of significant cases.....	8
<b>3. The role of competition authorities in the formation and implementation of other policies, eg. Regulatory reform, trade and industrial policies. ....</b>	<b>10</b>
<b>4. Resources of competition authorities.....</b>	<b>11</b>
4.1. Resources overall (current numbers and change over previous year).....	11
4.1.1. Annual budget .....	11
4.1.2. Number of employees .....	11
4.2. Human resources applied to:.....	11
4.3. Period covered by the above information: .....	11
<b>5. Summaries of or references to new reports and studies on competition policy issues .....</b>	<b>12</b>
5.1. Information and educational activities.....	12

### Tables

Table 1.....	5
Table 2.....	5
Table 3.....	5
Table 4.....	7
Table 5. Merger cases handled by UOKiK in 2018 including: .....	8
Table 6.....	11
Table 7.....	11
Table 8. Staff's role .....	11

## *Poland*

### 1. Changes to competition laws and policies, proposed or adopted

1. In 2018 important steps were undertaken to reform the **Act of 16 February 2007 on Competition and Consumer Protection**. The aim of the proposed changes is to i.a. implement into the Polish legal order some of the provisions of the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers as well as to ensure the proper functioning of the internal market. We aim also to adjust the Polish competition law to the provisions of the Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.

2. It is important to notice the key elements of the proposed competition law reform, the important points are as follows:

- Adaptation of new regulations in the field of geo-blocking.
  - As the regulation on geoblocking applies directly in the Polish legal order it is still needed to guarantee that art. 7 and art. 8 of the regulation are properly addressed in the national legal order. There is an legal obligation to declare the body responsible for the proper application of the regulation and also a body responsible for addressing consumer notified problematic issues resulting from the regulation.
- Strengthening the institutional position of the President of UOKiK by introducing (in fact restoring) the term of office of this body and improving the current system of election of the President and Vice-Presidents of UOKiK.
- Improving the effectiveness of detecting infringements by enabling the exchange of information., with the financial supervision authority, regarding proceedings being conducted and access to legally protected secrets, such as tax secrecy and bank secrecy.

3. The proper legislation is still pending for the decision of the Council of Ministers. After acceptance it will be possible to submit the project of the law to the Polish parliament.

4. A further important legislative step was the enacting and entrance into force of changes in the **Act of 156 December 2016 on counteracting unfair use of contractual advantage in agricultural and food products** – the proper piece of legislation came into force in December, 2018. The amendment to the above-mentioned law makes it presently possible to hold responsible the company – **as an minimum condition** – that has a stronger economic potential than its suppliers (or buyers), for unfair trade practices in the food supply chain. Originally, it had to be proven **also** that the potentially harmed party could not have sufficient options to sell its products elsewhere (or, respectively, buy it from other company). The Office can now take up any cases, regardless of mutual turnover of interested parties nor the revenue of the stronger one (minimum turnover

thresholds were crossed out). After the amendment, it is also easier to collect information on violations and much easier to protect the identity of the complainant, as anyone can inform about alleged unfair practices and the Office may not disclose their identity to the charged party at any stage of the proceedings.

## 1.1. Other relevant measures, including new guidelines

### *1.1.1. Whistle-blower programme*

5. For years now a dedicated hotline and email address is functioning for anyone who wishes to inform about a possible breach of competition law.

6. In 2018, the Authority received about 1600 notifications (1024 emails, 538 phone calls), out of which a number pertained to possible competition infringements. the programme is regarded as an effective one. We strongly believe that It should be further developed and promoted.

## 2. Enforcement of competition laws and policies

### 2.1. Actions against anticompetitive practices

#### *2.1.1. Summary of activities of competition authority and courts*

7. In 2018 UOKiK received **539** notifications, launched **54** preliminary and **11** antitrust proceedings. The antimonopoly proceedings included:

- Horizontal agreement: 8
- Vertical agreement: 2
- Abuse of dominant position: 1

8. In 2018 the President of the Office issued **3** decisions concerning anticompetitive conduct. Furthermore, the UOKiK, as almost in every year, counteracted anticompetitive practices with so called soft interventions. This mean of intervention consist mainly in educating market undertakings on the best practices to follow when complying with competition law provisions and calling on them to voluntarily stop applying competition-restrictive practices. Such actions are a proof of the Authority's policy of transparency and open dialogue with the business community, which also includes enforcement of competition law through negotiations.

9. By sending an official letter, the UOKiK calls upon the parties to cease anticompetitive practices. This form of direct communication with undertakings enables the UOKiK to swiftly react to market distortions and restore fair competition without the need to carry out a formal and usually time-consuming antitrust procedure.

**Table 1.**

Decisions	Number of decisions	Including
Concerning competition-restricting practices including:	3	fines totalled 254 087 euro Commitment decision: 1
Horizontal agreements	2	
Vertical agreements	0	
Abuse of a dominant position	0	

**Table 2.**

Other activities	Total
Soft measures: UOKiK contacted undertakings without instituting proceedings (so called „soft calls“)	52
Unannounced inspections (no search warrant)	5
Dawn-raids (with search warrant)	8

*Court decisions in antitrust matters in 2018:*

10. In this regard the legal status and legal framework for launching complaints to courts remains unchanged. Entrepreneurs may lodge appeals against UOKiK's decisions and complaints about the UOKiK's resolutions to the Court of Competition and Consumer Protection at the Regional Court in Warsaw (SOKiK). Appeals against decisions of the Court of Competition and Consumer Protection may be heard by the Warsaw Court of Appeals. It is also possible to file a cassation complaint to the Supreme Court. The Court of Competition and Consumer Protection acts as a court of the first instance for judicial review of the decisions of both the UOKiK's president and the sector-specific regulators. The appeal may be lodged within one month from the date of delivery of the president's decision.

11. The court can dismiss the appeal, overrule that decision and adjudicate on the merits or change the decision completely or partially, and adjudicate on the merits. Judgments of the Court of Competition and Consumer Protection may, in turn, be appealed to the Warsaw Court of Appeals. The ultimate appeal before the Supreme Court is possible, provided the Supreme Court agrees to take the case. In 2018, over 40 judgments were issued in anti-trust cases. In circa 22 cases the decision was changed or revoked by the court.

12. The statistics of judgements in antitrust proceedings are as follows:

**Table 3.**

	Court of Competition and Consumer Protection	Court of Appeal	Supreme Court
<b>Court decisions in antitrust matters in 2018:</b>	<b>25</b>	<b>12</b>	<b>8</b>
Vertical agreements	11	3	0
Horizontal agreements	6	4	1
Abuse of a dominant position	8	5	6
Concentration control	0	0	1

### *2.1.2. Description of significant cases*

13. In 2018, a total of 4 penalties with a total value of PLN 1 095 112.94 were imposed for practices restricting competition. The decisions with penalties were as follows.

- RKR-3/2018 - 3 entities punished;
- RPZ-11/2018 - 1 entity punished.

14. The decisions were issued by branch offices in Kraków and Poznań. In addition, in 2018, it is worth mentioning that the Kraków branch office won all cases in the field of competition protection in courts of various instances.

15. (RKR-3/2018). The case concerned conclusion of an agreement restricting competition on the domestic market of hosting and collocation services servers, consisting in agreeing on the terms of offers by entrepreneurs submitted in proceedings for the award of a public contract, which the subject was server hosting and collocation services and undertaking activities. The agreement aimed at causing the selection of the entrepreneur who offered the higher price.

16. (RPZ-11/2018). Conclusion of an agreement restricting competition in the passenger transport market by agreeing that a concrete line that will be served only by certain individual entrepreneurs.

17. There were also other important decisions. The President of UOKiK issued a decision in which it was established that PKP PLK was in the position to use its market position in relations with suppliers of railway products and technologies. The company committed to change the practice that could restrict competition. Also in the opinion of UOKiK, it could not be allowed to transfer all liability for damages caused as a result of operational tests to the potential supplier, including damages arising from third parties.

18. **UOKiK also initiated proceedings against the Polish Post (PP).** The Office will check whether the company uses its position to eliminate other entrepreneurs from the market. There are doubts about the terms and conditions of contracts that PP has with contractors who provide universal postal services. For example, the counterparty must provide commercial information about the clients for whom it provides the service. Possession of this data by PP already at the contracting stage does not seem to be justified. There is also no fixed price list for services. The valuation is carried out each time individually. This, in turn, may mean that an independent entrepreneur providing postal services can not immediately offer a quote for postal services for his clients. This may negatively affect its attractiveness as a business partner. **UOKiK has initiated proceedings against 16 entrepreneurs, including the operators of the Calypso, Fabryka Formy, Zdrofit, Fitness Platinum and Fitness Academy clubs.** Penalties up to PLN 2 million also threaten managers involved in possible violations. **The Office of Competition and Consumer Protection initiates proceedings against Gazprom and five international entities responsible for financing the Nord Stream 2 gas pipeline.** Two years ago, the company that was supposed to deal with the construction of the Nord Stream 2 gas pipeline did not receive approval from UOKiK for this transaction. Unfortunately, as the investigation showed, despite our objection, the entities decided to finance this project. This may mean a violation of antitrust law.

*Act on contractual advantage in practice*

19. In 2018, UOKiK led several investigations based on the Act on Counteracting Unfair Use of Contractual Advantage in agricultural and food products. In March, the Office closed its first ever proceedings concerning unfair trading practices in the food supply chain (UTPs) which concerned mainly lengthy payment periods for carrot supplies. In a final decision, the investigated processor committed to pay no later than in 45 days for weekly deliveries (instead of previous 60 days counted from the end of all deliveries by one supplier) and also to establish a non-discriminatory time schedule for supplies. Beforehand, a carrot producer had had to be ready to be called any time between 15 August and 30 March which was unfavourable for those supplying only in the later months due to winter conditions.

20. In April, a report on UTPs in a dairy sector was published. It comprised conclusions from a market investigation based on requests for information addressed to a dozen of biggest Polish dairies. Major irregularities influencing commercial relations between milk producers and the processors were listed and the Office's recommendations presented. Among unfair practices the most often were restricting possibility to end up co-operation (due to long termination periods), forcing suppliers to supply exclusively only to one dairy without the latter's obligation to accept milk every day.

21. After explanatory proceedings, the Office also brought charges against one of the biggest sugar producers in Poland. The still on-going case is about long payment periods for sugar beets and vague contractual provisions on price calculations.

22. In Q2 and Q3 of the year a special focus was put on the fruit sector. The Office held 6 inspections of notable apple concentrate and frozen fruit producers and also one big intermediary. Other 70 intermediaries (apple and soft fruit purchasing centres) were inspected by the Trade Inspection controllers acting on the Office's order. This vast action, together with RFIs sent to major juice producers, was meant to assess business relations within the industrial fruit supply chain. In December, the Office published a report describing the national fruit market, recognized unfair practices of companies having stronger bargaining power and recommendations (English version available on the website [https://www.uokik.gov.pl/news.php?news\\_id=15031](https://www.uokik.gov.pl/news.php?news_id=15031)). Apart that, 4 investigations were launched against big fruit processors which allegedly sets too long payment periods, exceeded even these, while some of them did not give clear information on price or a method of its calculation in a contract.

23. In the transnational dimension, The Office along with the Ministry of Agriculture, consulted the European Commission's proposal for the directive on unfair trading practices in business-to-business relationships in the food supply chain, and also took an active part in the works of European Competition Network – Food Subgroup.

24. The statistic of our activities concerning contractual advantage in 2018:

**Table 4.**

Preliminary proceedings	11
Proceedings concerning the unfair use of contractual advantage in the trade in agricultural and food products	6
Searches during preliminary proceedings	7
Notifications	57
Soft measures/Soft calls	26

## 2.2. Mergers and acquisitions

25. According to the provisions of applicable laws concerning control of concentration, a transaction is subject to notification to the antitrust authority if it involves undertakings whose aggregate turnover generated in the preceding year exceeded EUR 1 billion worldwide or EUR 50 million in Poland. The maximum amount of the fine for failure to notify the UOKiK of the intended concentration is 10% of the turnover of the given undertaking generated during the year preceding the year in which the decision in question is adopted.

26. The amendment to the Act on competition and consumer protection, that entered into force in in January 2015, has streamlined merger control procedures. Instead of the previous two-month deadline all cases followed, a two-step procedure is now in place. It allows UOKiK to issue decisions in simple cases within a month, while taking an additional four months to resolve more complex cases or those that require additional market analysis.

27. Summing up merger control in 2018, UOKiK instituted 252 merger and acquisition (M&A) cases and issued 229 decisions. Average length for completing merger control proceedings was maintained at a satisfactory level and for the first stage of the procedure amounted to 36 days. Within this period, no transaction was prohibited; 220 received the green light for their implementation. 8 merger and acquisition (M&A) cases were marked for further analysis within Phase II. Furthermore, The President of UOKiK did not impose fines.

**Table 5. Merger cases handled by UOKiK in 2018 including:**

New proceedings	Total
<b>Preliminary proceedings</b>	0
Concerning control of concentration	12
<b>Types of conclusions reached in merger cases in 2018</b>	
Consents to concentration	228
Conditional consent	0
Decision imposing a fine for failure to notify intention to concentrate	0
Decision imposing a fine for undertaking's failure to provide information	0
discontinued merger proceedings	1
Notification withdrawn	6
Proceedings examined in the second stage	8
Average length of proceedings (days)	36
UOKiK issued opinions on the proceedings conducted by the European Commission with regard to the impact of concentration on the Polish market	390

### 2.2.1. Summary of significant cases

#### *Vistula Group SA- Bytom SA (Menswear)*

28. The application for approval of the merger between Vistula Group and Bytom was filed with the UOKiK towards the end of August 2017. Both Bytom SA as well as Vistula Group SA specialise in designing and retailing, branded men's clothing in their own and franchise stores in Poland. Additionally, Vistula Group SA through its subsidiaries sells women's clothing and luxury jewellery and watches.

29. Vistula specialises in clothing for both men and women as well as in wristwatches and jewellery. Through a network of subsidiaries, the company owns brands such as Lantier, Vesari, Wólczanka, Lambert, W.KRUK and Deni Cler. The company sells the majority of its products in Poland. Bytom, on the other hand, focuses primarily on the menswear market. It sells its products through a network of company-owned and franchise stores as well as online. In addition, it also maintains limited-scale wholesale operations under the Intermoda brand. Bytom operates exclusively in the Polish territory.

30. The proceedings have entered the second phase in November 2017. The UOKiK conducted market testing in order to gather information pertaining, among others, to the characteristics of the local retail markets for menswear as well as to the market shares of Vistula and Bytom and of their competitors. The absence of this data makes it impossible for the anti-monopoly authority to make an appropriate assessment of the contemplated concentration.

31. Market research covered 27 competitors of Vistula Group and Bytom. UOKiK's questions related to the value of sales revenues in stores and on-line, the number and location of stores, as well as opinions on the concentration and its effects. The necessity to conduct a thorough market research along with the time of waiting by UOKiK for supplementing the application by the undertakings involved in the concentration scheme significantly extended the duration of proceedings.

32. The analysis of the concentration scheme led the Authority to conclusion that its participants compete with each other and other entities on the market of elegant middle-class menswear. However, they do not compete with manufacturers of luxury brands and the cheapest clothes as well. Children's, youth and women's clothing are also separate products.

33. In turn, in geographic terms, the Authority examined both the impact of the transaction on competition in individual towns, where Vistula and Bytom operate, as well as in the country as a whole.

34. Finally the analysis carried out by UOKiK demonstrated that there would be no restriction of competition on any of the markets where Vistula Group and Bytom operate. That is why the Authority approved the merger of these undertakings.

#### *Eurocash/Mila (FMCG Retail Sector)*

35. The UOKiK initiated the second stage of proceedings concerning the takeover of control over the owner of Mila store chain by Eurocash. The activities of undertakings involved in the concentration scheme overlap in the retailing of fast-moving consumer goods (FMCG). Eurocash is an organiser of retail chains such as Delikatesy Centrum, Groszek and Lewiatan. It is also involved in wholesale of FMCG. The Mila store chain is owned by Domelius company registered in Cyprus.

36. Also in this case The UOKiK initiated the second stage of proceedings. In accordance with existing case-law, the UOKiK assumed the geographic market in which the undertakings compete with each other is an area within 10-15 minute drive of acquired outlet. The undertakings involved in the concentration scheme compete with each other on 21 local markets defined as above. Moreover, there is a supplier-buyer relationship between Eurocash and Domelius. Eurocash is a wholesaler of manufactured tobacco and impulse goods (i.e. goods exposed near the checkout counter), while the Mila store chain is its potential customer.

37. The proceedings have been moved to the second stage, because a market research was required. First of all, the UOKiK has to check the market shares of the parties involved in the concentration scheme and their competitors. This would allow to assess, if the concentration does compromise competition. The UOKiK asked about it 16 undertakings which compete with the participants of the concentration scheme. A potential threat to competition could have taken place primarily on the FMCG market. The UOKiK's findings suggested that the competition will not be compromised in any town where Eurocash and Domelius stores operate. The undertakings will have to compete there with other sellers. It also means that consumers will still be offered a large choice of stores. Consequently, the Authority approved the concentration

#### *Smithfield/Pini Polonia (Meat Sector)*

38. The transaction concerning Smithfield Foods' take-over of Pini Polonia had been originally notified to the European Commission. [The EC, however, referred it to UOKiK](#), as it was decided that the concentration affected the Polish market only. The Authority was also considered to possess the knowledge and experience necessary to investigate the case. Smithfield Foods is a global corporation operating on the meat production and processing market. In Poland, it controls, inter alia, the Animex Group and owns 8 meat production and processing plants, including six slaughterhouses. Pini Polonia belongs to the Pini capital Group, owning companies in Poland, Italy and Hungary. It operates a slaughterhouse in Kutno, and supplies meat to shops and processing plants.

39. The Authority decided that the case required that a market survey be conducted. UOKiK needs to verify whether the individual slaughterhouses compete with one another nationwide, in the region, or within specific distance from the plant. It was also necessary to verify the market shares that concentration participants and other entrepreneurs operating on that particular market. That is why the proceedings had been moved to the second phase.

40. The analysis of the effects of the concentration had shown that it would not restrict competition. Smithfield Foods will have to compete with other slaughterhouses, therefore there is no reason to worry that the entrepreneurs will lower the purchase prices of livestock, especially in view of the fact that prices on the domestic market are transparent. In the opinion of the Office, the concentration would not affect the access of small and medium market participants to large meat recipients (e.g. retail chains). So finally the UOKiK gave permission for Smithfield Foods to take over Pini Polonia.

### **3. The role of competition authorities in the formation and implementation of other policies, eg. Regulatory reform, trade and industrial policies.**

41. In general in each year over a thousand governmental legislative proposals are sent for an opinion of the UOKiK, in some cases UOKiK proposes changes to the pending legal acts. It is not an advocacy opinion in a strict sense, it is an legal expertise in the competence of UOKiK e.g. correcting system errors or guaranteeing system integrity. Officials regularly correspond and meet with representatives of the parliament.

## 4. Resources of competition authorities

### 4.1. Resources overall (current numbers and change over previous year)

#### 4.1.1. Annual budget

**Table 6.**

2017		2018	
PLN	USD	PLN	USD
71 000 000	20 000 000	74 006 968,43 PLN – including also budget for consumer protection and other.	19 733 333

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#### 4.1.2. Number of employees

**Table 7.**

1 January 2017	31 December 2017	1 January 2018	31 December 2018
496	498	503	489

**Table 8. Staff's role**

	2017	2018
Lawyers	193	185
Economists	72	69
Others	77	76

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### 4.2. Human resources applied to:

- enforcement against anticompetitive practices: 101
- merger review and enforcement: 15
- advocacy efforts: ca. 99

### 4.3. Period covered by the above information:

42. 2017-2018

## 5. Summaries of or references to new reports and studies on competition policy issues

### 5.1. Information and educational activities

43. As part of advocacy activities, UOKiK organized free conferences for lawyers, economists, judges, entrepreneurs and representatives of public administration. Workshops from the cycle "Economy in competition law" were also organized. The above mentioned workshop was a continuation of the initiative taken up in 2017.

44. In 2018 the following meetings were held:

- February 28 - fourth workshop devoted to vertical concentration. During the meeting, the role of economics in controlling this type of concentration was presented. The most interesting British issues in this field were discussed as well as economic tools in the assessment of vertical effects. Practical problems with the assessment of vertical concentration were also discussed.
- June 21 - fifth workshop dedicated to horizontal concentration. The most important economic tools to assess these concentrations and the latest trends in concentration control in the European Union, including Poland, were discussed.
- Conference "Competition in the Digital Age" - on December 5, UOKiK organized a conference accompanying the celebrations of the World Day of Competition. During the meeting, issues related to the application of competition law and economy in the context of online platforms, price algorithms and new technologies (including blockchains) were presented. In addition, new solutions in Polish antitrust law were discussed in the light of EU regulations: the directive on the effective enforcement of competition rules - ECN Plus and the directive on the protection of whistleblowers. The discussion also concerned legal and procedural-material tools as well as the effectiveness of programs for whistleblowers.
- UOKiK also provided free on-line training (bid rigging) . The trainings were available as part of the e-learning platform (<https://szkoleniazmu.uokik.gov.pl>). They were implemented as part of a project financed from the European Social Fund under the Operational Program Knowledge Education Development 2014-2020.
- In 2018, UOKiK organized a competition for the best master's thesis (tenth edition) and a doctoral dissertation (second edition) devoted to the subject of competition protection. The aim of the competition is to draw the attention of students and doctoral students to the issues of competition protection.