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Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE

Annual Report on Competition Policy Developments in Poland

-- 2022 --

This report is submitted by Poland to the Competition Committee FOR INFORMATION.

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Poland

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

1.1. Summary of new legal provisions of competition law and related legislation

1. See point 1.3.

1.2. Other relevant measures, including new guidelines

2. See point 1.3.

1.3. Government proposals for new legislation

3. In 2022, Office of Competition and Consumer Protection (hereinafter: “UOKiK” or “the Office”) continued the legislative procedure concerning draft act transposing Directive (EU) 2019/1 of 11 December 2018 (hereinafter: the Directive or Directive ECN+) to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. Some of the principles that are now set out by the Directive had already been introduced into Polish law in the past, but some areas require new provisions to be enacted to transpose the Directive.

4. In order to enhance independence, it is proposed that the President of UOKiK will be appointed for a 5-year term in office. According to the proposal, the dismissal of the President of the Office will only be possible in precisely defined situations. The amendment will include provisions on turnover-based fines for procedural infringements. The penalty shall be up to 3 per cent of the turnover in the year preceding the decision.

5. The Directive also introduces periodic fines which will amount to up to 5 per cent of the undertaking’s average daily turnover in the year preceding their imposition. These sanctions will be imposed, inter alia, for each day of delay in implementing the decisions of the President of UOKiK or court judgments related to them. There are detailed rules on imposing fines on associations of undertakings. The draft extends the obligation to provide UOKiK with information and documents on natural persons. The draft foresees that individuals will have the right to refuse to provide information and documents if doing so could lead to criminal liability (freedom from self-incrimination).

6. The implementation of the Directive will allow more effective international cooperation. In addition, the draft proposal includes changes to the leniency program, inspections, and searches in order to adapt them to the requirements of the Directive ECN+. It also sets forth more detailed rules concerning undertakings’ procedural rights e.g. with regard to statements of objections and legal professional privilege.

7. In May 2023, the provisions of the Directive ECN+ came into force.

2. Enforcement of competition laws and policies

2.1. Action against anticompetitive practices, including agreements and abuses of dominant positions

2.1.1. Summary of activities of:

competition authorities

8. In 2022, UOKiK adopted 8 decisions. Seven of them regarded anticompetitive agreements (bid rigging in public tenders and one RPM) and one of them involved abuse of dominance. In addition, we issued one decision concerning procedural infringements.

9. The fines imposed by UOKiK amounted to PLN 241,039,124.21. The highest penalty was imposed on e-commerce platform Allegro and amounted to over PLN 206 million for abusing its market power by favouring its own sales on its online shop. The second highest penalty was imposed on Karcher for imposing minimum and fixed prices and amounted to over PLN 26 million. Decisions on bid-rigging cases were related to, inter alia, the forestry, transport and waste collection sector and total fines amounted to almost PLN 8 million.

10. In 2022, UOKiK opened 24 preliminary proceedings and 11 antitrust proceedings alleging competition-restrictive practices, e.g. with regard to Kia and its car dealers, with regard to Dahua, which is active in the business of monitoring devices (security systems), against Dell for possible market sharing agreement, as well as against several pharmaceutical wholesalers and software suppliers that might have exchanged sensitive information.

11. A large and stable number of dawn raids still remains one of UOKiK's priorities. In 2022 UOKiK secured court authorisations to search undertakings in 9 cases and also conducted 2 inspections.

12. It is also worth mentioning that compared to the preceding year, the number of signals reported as part of the whistle-blower programme more than quadrupled. UOKiK received 2396 signals in the previous year, while there were 547 a year before.

13. UOKiK received 3 leniency applications.

14. An overview of the most significant cases mentioned above, along a review of other relevant cases, is provided below in section 2.1.2.

courts

15. 17 of our decisions were upheld, 5 of our decisions were overturned.

16. Overall, we consider 2022 to be a good year for us in terms of litigation. Court proceedings in our jurisdiction tend to be lengthy, but in 2022 we both saw final judgements in some of our very old cases, as well as a number of non-final judgements with regard to our very recent decisions.

17. When it comes to older cases, we managed to obtain favourable judgements with regard to cases litigated against state-owned enterprises, namely PKP Cargo (rail transport) and Orlen (oil refinery). The PKP Cargo case concerned our 2006 abuse of dominance investigation with regard to PKP's refusal to deal with its competitors. In 2009, we imposed a fine in this case, but while the decision was upheld by the first and second instance courts, the Supreme Court overturned these court judgements on procedural grounds. In 2015, we re-imposed the fine, which then led to further litigation. In 2022, the Supreme Court

confirmed our decision. Over 15 years of litigation is a lot, but we believe this sends a strong signal that once we have a conviction that an infringement took place, we are not going to back down easily – and recently, we have been seeing a change of attitude on the part of undertakings in our jurisdiction and more willingness to settle cases with us rather than to litigate against us.

18. The case against Orlen, on the other hand, concerned a market-sharing agreement between Rafineria Nafty Jedlicze and a number of undertakings involved in waste oil collection. The case was litigated against Orlen, after its take-over of Jedlicze. The second instance court confirmed our decision and Orlen did not appeal it to the Supreme Court.

19. Apart from that, the second instance court also confirmed two of our older cases concerning bid-rigging: Thales/Quomak and COP19. The former concerned a 2014 decision that imposed fines for a bid-rigging scheme in the railway sector – we welcome the court’s favourable judgement in this case, since initially this decision had been overturned. The latter concerned our 2019 bid-rigging decision that had imposed fines for collusion in procurements organised by the Polish Ministry of Environment, which had sought services in relation to organisation of international conferences.

20. The most recent cases that underwent court scrutiny were connected to our investigation in the Polish fitness market. The court of first instance confirmed our dawn raid obstruction decision against Platinum Wellness. In a separate case, the court of first instance also fully confirmed our 2020 decision concerning market-sharing between some of the largest Polish fitness chains. This judgement concerned only Platinum Wellness, since some of other companies covered by our investigation (Calypso and its subsidiaries) decided to settle the case with us. The appeal filed by Benefit Systems, on the other hand, was rejected by the court of first instance before even reaching a hearing (the court concluded that Benefit Systems missed its deadline to appeal the case – this is now reviewed by the second instance court).

21. Our track record was more mixed when it comes to mergers. The court of first instance overturned our decision against Gazprom and its Nord Stream business partners, concluding that we had not been in a position to impose fines for gun-jumping. The court also overturned our merger prohibition concerning Agora-Eurozet. We appealed both of these judgements. At the same time, the court of first instance confirmed our clearance of the merger between Orlen and Polska Press – this was a novel and controversial case in which our decision had been appealed by the Polish ombudsman, based mostly on free speech arguments.

2.1.2. Description of significant cases, including those with international implications.

22. Our key achievement in 2022 was the conclusion of the Allegro abuse of dominance case. Allegro is the leading Polish online trading platform that provides services to independent traders. It also runs its own official store on the platform and sells goods to consumers (and thus competes with independent traders). In our 2022 decision, we found that Allegro abused its dominant position by unfairly favouring its own retail offers and its official store. This consisted in e.g. Allegro exercising undue influence over its search engine. This was our first decision concerning a large digital case and – as other leading antitrust authorities – we put e-commerce and digital markets high on our enforcement agenda.

23. In another important decision, a penalty of PLN 26 million was imposed on the Kärcher, a member of a capital group producing cleaning equipment. The gathered evidence show that since the end of the 1990s the entrepreneur, in consultation with its distributors, has set minimum and fixed retail prices for cleaning devices and systems. As

the company benefited from the leniency programme, the penalty imposed turned out to be significantly lower.

24. In 2022, we also closed our investigation in relation to the Polish Basketball League and major Polish basketball clubs. The case concerned an agreement between the clubs to coordinate their actions in relation to professional basketball players in the context of the COVID pandemic. More specifically, the clubs had coordinated their actions to suppress players' remuneration. Apart from that, we also opened a similar investigation in relation to remuneration paid to speedway riders – in this case, however, our investigation is broader and concerns measures that had been in place for a longer period of time than just the pandemic. Both of these cases can be seen as part of a broader global trend to exercise more scrutiny over agreements entered into by employers (no-poach agreements, wage-fixing etc.).

25. When it comes to enforcement, we also consider it to be a success that we managed to keep a steady number of investigations and dawn raids concerning more covert anticompetitive agreements. In 2022, we opened full antitrust proceedings with regard to Kia and its car dealers, and with regard to Dahua, which is active in the business of monitoring devices (security systems).

26. We initiated antitrust probe against Dell for possible market sharing agreement, as well as against several pharmaceutical wholesalers and software suppliers that might have exchanged sensitive information.

2.2. Mergers and acquisitions

2.2.1. Statistics on number, size and type of mergers notified and/or controlled under competition laws

27. There were 342 merger filings received between 1 January and 31 December 2022.

28. 317 mergers were cleared in phase I and 10 mergers were cleared in phase II. UOKiK distinguishes between so-called “phase I” and “phase II” proceedings. An in-depth review is defined as one that takes place when a case is transferred to the phase II. Such transfer is initiated when the case is complex and requires market inquiry or preliminary assessment shows competition issues that need to be investigated. According to Article 96a of the Act of Competition and Consumer Protection (hereafter: Competition Act), UOKiK may initiate phase II in cases:

- which are particularly complicated,
- in which it appears from the information contained in the notification of intent to concentrate or from other information, including information obtained by the President of the Office in the course of conducted proceedings, that there is reasonable probability of competition being impeded on the market as a result of the concentration, or
- where a market study is required.

29. In 2022, the average number of days that in-depth merger reviews lasted 283 days.

2.2.2. Summary of significant cases.

30. As regards mergers, a particularly important case to us was the Orlen-PGNiG merger, which we conditionally cleared. The remedy that we applied is that Gas Storage Poland – which is a company managing PGNiG's gas storage facilities – needs to be divested by Orlen. By separating the ownership of storage facilities from their management, access to this infrastructure will be easier for external operators, i.e. the competitors of

PGNiG and Orlen. The essence of the remedy is that the new owner of Gas Storage Poland cannot be active on natural gas trading markets. This remedy will remain in force as long as the share of now merged Orlen-PGNiG in the gas storage market in Poland is above 40 per cent. It is noteworthy that the Orlen-PGNiG case was initially notified to the European Commission, which nonetheless referred the case to us. The European Commission concluded that the merger would have an impact on Polish markets and that UOKiK has proper experience in assessing them. In consequence, we conducted an in-depth market investigation of the merging parties' competitors in the wholesale and retail sale of natural gas – this also included consulting the national energy regulator and Gaz System, which is the operator of gas pipelines in Poland. The analysis showed that there would be a risk that once merged, Orlen-PGNiG could limit access to gas storage facilities to its competitors on the wholesale and retail gas markets – we therefore concluded that remedies are necessary.

31. The President of UOKiK has authorised DOZ's acquisition of control over Europharm. The participants in this concentration provide services in the sale of pharmaceutical products in pharmacies and pharmacy outlets. DOZ conducts these activities nationwide, while Europharm operates locally - through nine pharmacies located in the Lower Silesian voivodship. According to the notifying party, the transaction affected several local markets for retail sales of pharmaceuticals by pharmacies and pharmacy points in Wrocław and Legnica. In order to verify this information, UOKiK referred the case to phase II of the proceedings and conducted a market investigation. The investigation showed that the transaction would not lead to a restriction of competition.

32. The President of UOKiK has approved Allegro.pl's acquisition of control over the Czech companies Mall Group and WE|DO. The former is active in e-commerce in Central and Eastern Europe, while the latter operates on the courier services market in the Czech Republic and Slovakia. In Poland, the Allegro Group operates an online shopping platform of the marketplace type - Allegro.pl, an online price comparison engine - Ceneo.pl, as well as an online ticket sales service for culture, entertainment and sports - eBilet.pl. Due to Allegro's position on the Polish e-commerce market, it was necessary to conduct phase II of the proceedings. It showed that this position would not change substantially in the domestic market and the situation of consumers would not deteriorate. Consequently, the Office concluded that the concentration would not lead to a restriction of competition.

3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

33. UOKiK evaluates drafts of legal acts in terms of their impact on competition in the relevant markets and compliance with competition law. In this manner, UOKiK cooperates with government, parliament representatives and other public bodies.

34. In the field of enforcement, UOKiK cooperates with sector- specific regulators on regular basis.

4. Resources of competition authorities

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

35. As per the Budget Act of 2022 the planned budget for UOKiK was PLN 117,459,000.00 giving an increase of 4,9 per cent compared to PLN 123,188,070.00 in

2021. However, due to the reasons listed below, the planned budget of 2022 needed to be increased to PLN 127,329,490.78:

- grants for financing state tasks in the field of consumer protection delegated to associations;
- tasks related to national defence.

4.1.1. Annual budget:

Table 1. Annual budget (in your currency and USD)

UOKiK annual budget, according to the Budget Act, after changes:	PLN 127,329,490.78	USD 28,926,686.99
- budget for competition law and policy:	PLN 35,386,934.22	USD 8,039,196.29

4.1.2. Number of employees (person-years):

- economists – 33*
- lawyers – 96*
- other professionals – 9* (*data scientists*)
- support staff – 21*
- all staff combined – 159*

*staff that is works on competition enforcement in 2022

4.2. Human resources (person-years) applied to:

- Enforcement against anticompetitive practices

There were 159 people working on competition enforcement at the Office. Of this total, 60 individuals were directly involved in dealing with cases concerning abuse of dominance and anticompetitive agreements under Articles 101 and 102 TFEU and their national counterparts.

- Merger review and enforcement

There were 16 people at the Office who worked on merger review and enforcement

- Advocacy efforts.

There were 20 people working on Advocacy efforts

4.3. Period covered by the above information:

36. The above information concerns the period from 1 January to 31 December 2022.

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

5.1. Survey of retail chains

37. The completed proceedings concerned, among others, competition between large-format chain stores (hypermarkets, supermarkets, and discount stores). The survey covered 35 entities operating 52 retail chains. The results show that between 2016 and 2020 the

number of large-format stores increased by 22 per cent. Private label sales also went up – by 1/3 during the survey period, while the number of private label suppliers in discount chains decreased. Large-format chains (mainly supermarkets) expanded in smaller municipalities during the period under review. A noticeable trend is the consolidation of the position of discount stores, which by 2020 will account for more than 50 per cent of stores in the large-format chains market. An important part of the survey was the analysis of the fees charged by retail chains to the suppliers of agri-food products for their sales-related services. Some of these fees raised doubts as to the legitimacy and fairness of their application. On the basis of the information gathered, the President of UOKiK instituted proceedings to examine in detail the practices of retail chains. The Office also prepared a report on sales-related fees (more information: 1.4 Contractual advantage).

5.2. Market survey for commodities exchange

38. UOKiK received complaints about entities operating popular commodities exchanges. These are online platforms for, among others, the exchange of information between hauliers and commodity forwarders regarding free cargo and transport options. The purpose of the survey was to determine the relevant market and its structure. As a result of the analysis, the Office defined the relevant market as the market for commodities exchanges available to Polish users which collect offers of free vehicles and freight to be transported on routes in Poland. The survey showed that Trans.eu had the largest market share, well over 40 per cent. Next in line, although with much smaller shares, were the Transporeon and Teleroute exchanges.

5.3. Market survey for passenger car sales and service

39. The survey was initiated in connection with notifications submitted to UOKiK concerning the passenger car sales and service market. One of the purposes of the completed proceedings was to define the structure of the market and its degree of concentration. The survey covered 14 importers, as well as more than 70 dealers and approved repairers (ASO) belonging to the network of investigated importers. UOKiK also analysed whether there may be a collusion between importers and dealers as regards the sale of new passenger cars and spare parts, as well as whether the entities willing to operate as approved repairers have the same conditions for joining an authorised service network. In addition, the survey found that the terms of warranties offered by certain entities may raise doubts as to their compatibility with competition law. On the basis of the information gathered, UOKiK sent soft calls to car importers (more information: 1.1 Competition-restricting practices).

5.4. Property development survey

40. The President of UOKiK launched market research into the development industry, which covered nearly 90 undertakings. The aim of the investigation is to verify whether developers use the so-called inflation adjustment clauses in their model contracts with consumers. Such provisions will be examined for abusiveness, including attempts to pass on the costs of the negative effects of a complex economic situation to consumers.