

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****The standard of review by courts in competition cases – Note by Poland****4 June 2019**

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<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

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## Poland

### 1. General information – proceedings before the competition authority

1. The proceedings conducted by the Polish national competition authority - President of the Office of Competition and Consumer Protection – UOKiK (hereinafter referred to as: “the President of UOKiK” and “competition authority”) in competition cases (both cartels and antitrust) constitute a type of **complex (hybrid) proceedings**. In general, these proceedings are regulated in the Act of 16 February 2007 *on competition and consumer protection*<sup>1</sup> (hereinafter referred to as: “u.o.k.k.” or “the antimonopoly act”). In addition, they combine elements of administrative proceedings<sup>2</sup>, civil proceedings<sup>3</sup> and - in cases involving searches - criminal proceedings<sup>4</sup>.

2. The antimonopoly act establishes two types of proceedings taking place before the President of UOKiK: **(1) explanatory proceedings; and (2) antimonopoly proceedings**. These proceedings are independent of each other, although explanatory investigation usually precede the antimonopoly proceedings. Both types of proceedings are instituted *ex officio*<sup>5</sup>. Explanatory proceedings are conducted “in a given case”, not against a particular undertaking – there are no parties to such proceedings. Explanatory investigation aim at initial examination of the situation on the market and is instituted where the circumstances indicate a possibility that the provisions of the antimonopoly act have been infringed. The actual (antimonopoly) proceedings end with an **administrative decision which can then be subject to judicial review**<sup>6</sup>.

### 2. Judicial review of the decisions of the President of UOKiK

3. The **Court of Competition and Consumer Protection** (hereinafter referred to as: “SOKiK”), which is a branch of the Regional Court in Warsaw, has exclusive jurisdiction to hear competition cases at first instance, and in particular appeals against decisions of the President of UOKiK, as it specializes in competition and consumer protection cases<sup>7</sup>, while

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<sup>1</sup> Consolidated text: Journal of Laws of 2019, item 369.

<sup>2</sup> Art. 83 of u.o.k.k.: in matters not regulated in u.o.k.k., the provisions of the Code of Criminal Procedure shall apply.

<sup>3</sup> Art. 84 of u.o.k.k.: in cases concerning evidence, Art. 227-315 of the Code of Civil Procedure shall apply accordingly.

<sup>4</sup> By applying the selected provisions of the Code of Criminal Procedure referred to in Art. 105q(3) of u.o.k.k.

<sup>5</sup> But of course may be triggered by a signal from the market or an official complaint.

<sup>6</sup> Art. 81 of u.o.k.k.: decision of the President of UOKiK is subject to appeal to the Regional Court in Warsaw – Court of Competition and Consumer Protection.

<sup>7</sup> Art. 479<sup>28</sup> §1 of the Code of Civil Procedure specifies a closed list of competition cases which fall under the jurisdiction of SOKiK. In addition, SOKiK tries regulatory cases, e.g. in the field of power industry, transport and telecommunications and postal service regulation.

the **Court of Appeal in Warsaw** serves as the appellate court. Judgments of the court of second instance are final. However, in competition cases, judgments of the court of second instance are subject to cassation appeal to the **Supreme Court**, regardless of the value of the subject of such appeal.<sup>8</sup> Such extraordinary appeal may be allowed for hearing only in specific circumstances, e.g. involving the so-called significant legal issue<sup>9</sup>. The Supreme Court is a court of law and doesn't adjudicate on the facts of case.

## 2.1. Court of Competition and Consumer Protection

4. Basic element of the model of court proceedings established in the Code of Civil Procedure for competition cases is the normative<sup>10</sup> principle of **substantive nature of the SOKiK judgments**, which implies the obligation to hear the case from the beginning and make the court's own findings.

5. An appeal against the decision of the President of UOKiK brought to SOKiK initiates **first-instance civil proceedings** in a case which was previously heard within administrative proceedings conducted by the President of UOKiK. SOKiK is a civil court and it hears a civil case initiated as a result of an appeal against the decision of the President of the Office according to the rules of adversarial civil proceedings<sup>11</sup>. There is a well-established view in the national case law that court of first instance hearing a case brought in appeal against the decision of President of UOKiK should not limit its jurisdiction to reviewing legality of the decision of the competition authority<sup>12</sup>. The purpose of court proceedings is not to simply review administrative proceedings, but to factually decide the case involving the dispute between the parties – i.e. the President of UOKiK and an undertaking subject to the decision of the President of UOKiK filing an appeal against this decision. Thus, proceedings before SOKiK are an adversary procedure that takes into account the evidence gathered in administrative proceedings, which, however, does not preclude the parties from submitting new factual claims and new evidence, in accordance with the rules applicable in civil proceedings.

6. As mentioned above, in the course of the proceedings before SOKiK<sup>13</sup>, **the parties are allowed to submit new evidence** and they often exercise this right. It usually involves motions for admission and taking of evidence from the hearing of witnesses and/or the

<sup>8</sup> Art. 479<sup>35</sup> §2 of the Code of Civil Procedure.

<sup>9</sup> The detailed requirements of a cassation appeal will be discussed later in the paper.

<sup>10</sup> Art. 479<sup>31a</sup> of the Code of Civil Procedure.

<sup>11</sup> Thus SOKiK is not an administrative court that only reviews the administrative decision. Judgments of the Supreme Court: of 29 May 1991, File Ref. No. III CRN 120/91, of 19 January 2001, File Ref. No. I CKN 1036/98 and of 20 September 2005, File Ref. No. III SZP 2/05, resolution of the Supreme Court of 7 October 1998, File Ref. No. I CKN 265/98; judgment of the Court of Appeal in Warsaw of 31 May 2011, File Ref. No. VI ACa 1299/10.

<sup>12</sup> Judgment of the Supreme Court of 13 May 2004, File Ref. No. III SK 44/04.

<sup>13</sup> Taking into account the principle set out in Art. 207 §6 of the Code of Civil Procedure: The Court omits late-filed claims and evidence, unless the party lends credence to the fact that they have not included them in the lawsuit, the statement of defence and/or further preparatory letter without any fault on their part, or that the inclusion of late-filed claims and evidence will not delay the case resolution or that there are other exceptional circumstances (evidence preclusion).

party or expert opinion evidence<sup>14</sup>. It is worth remembering that, like any other evidence, an expert opinion is subject to the judgment of the adjudicating court – both as to its completeness and compliance with formal requirements, as well as its persuasiveness. If the adjudicating court has no reservations in that area, expert opinion may constitute a reasonable basis for factual findings and case resolution, since it is the reason the court consults an expert in the first place.

7. The court dismisses the appeal of the party when there are no grounds to consider it. However, if the appeal is upheld, SOKiK has the power to reach a verdict to annul (overrule) or to amend (change) the decision of the President of UOKiK, in whole or in part, and to adjudicate on the substance of the case. The provisions of the Code of Civil Procedure do not specify in which cases SOKiK should annul the appealed decision, and in which cases it may change it. However, the Supreme Court emphasizes that decisions of the competition authority should be overruled only in exceptional circumstances – only in the cases of such formal and procedural failures of decisions or administrative proceedings of the President of UOKiK that are not subject to validation in the course of court proceedings due to different competences of the competition authority and the courts and their tasks in appeal proceedings<sup>15</sup>.

8. In conclusion, SOKiK is authorized to review a decision of the President of UOKiK in all of its aspects: **legal, factual as well as with respect to sanctions imposed**, and to adjudicate in all of these respects. There is no doubt that the ruling of SOKiK determines the legal status of the appealed decision, **by either withdrawing it from legal order or keeping it there in its initial or a changed form**<sup>16</sup>.

## 2.2. Court of Appeal

9. **Court of Appeal in Warsaw - the court of second instance**, hearing the appeals against the SOKiK's judgments, is also a court adjudicating on the substance. Therefore, holding substantive hearings, it may adopt other grounds for its judgment than the court of first instance<sup>17</sup>. The principle of full appeal adopted in Polish civil proceedings means that the court of second instance hears the case again within the limits of appeal<sup>18</sup>, or basically, it once again fully tries the case. For this purpose, it can supplement the evidence or re-hear the existing evidence. Therefore the court of second instance adjudicates on the basis of evidence gathered both in proceedings before the court of first instance and during the appellate procedure. Consequently, the appeal is also an examination of substantive

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<sup>14</sup> In cases requiring special information, the court may summon one or several experts or request an opinion from an appropriate scientific and/or research institute to seek their opinion. It is the court that decides whether special information is required in a specific case. It is indicated that the resolution of a case requires special information when the hearing reveals a problem whose resolution goes beyond the scope of the information and life experience of a person without special knowledge in a specific field.

<sup>15</sup> Judgments of the Supreme Court: of 13 August 2013 r., File Ref. No. III SK 57/12, of 24 June 2015, File Ref. No. III SK 59/12 and of 5 November 2015, File Ref. No. III SK 55/14.

<sup>16</sup> Judgment of the Court of Appeal in Warsaw of 8 March 2012, File Ref. No. VI ACa 1150/11.

<sup>17</sup> Judgment of the Supreme Court of 15 February 2019, File Ref. No. I NSK 11/18.

<sup>18</sup> Art. 378 §1 of the Code of Civil Procedure.

character, and from a methodological point of view, it is a continuation of the proceedings conducted at first instance.

### 2.3. Supreme Court

10. In competition cases, the final judgment of the court of second instance may be subject to a **cassation appeal to the Supreme Court**, which is an extraordinary form of appeal and is therefore highly formalized. Unlike with appeal proceedings, in cassation proceedings the Supreme Court hears a cassation appeal – not a case, which means that it remains bound not only by the scope of the cassation appeal, but also by cassation grounds (pleas) indicated by the appellant<sup>19</sup>. A cassation appeal cannot be based on pleas concerning the establishment of facts or the appraisal of evidence, it is also not allowed to appoint new facts and evidence, and the Supreme Court is bound by the factual findings that form the basis of the appealed judgment of the Court of Appeal.

11. The Supreme Court starts, however, with assessing whether the cassation appeal qualifies for hearing (the so-called "**pre-trial**"). For this purpose, the appellant is obliged to put forward a reasoned motion for the cassation appeal to be heard. Therefore, a cassation appeal may be considered in substance only if the motion for it to be heard is accepted by the Supreme Court. The Supreme Court allows a cassation appeal for hearing if: (1) the case includes a significant legal issue; (2) there is a need to interpret legal provisions raising serious doubts or causing discrepancies in court rulings; (3) the proceedings are invalid or (4) the cassation appeal is clearly justified<sup>20</sup>.

12. The Supreme Court dismisses a cassation appeal if the cassation appeal has no reasonable grounds or if the appealed judgment is legal, despite its defective statement of reasons<sup>21</sup>. Further, the Supreme Court may overturn the appealed ruling (in whole or in part) and refer the case to the court of second instance; or overturn the ruling of the court of first instance (in whole or in part) and refer the case back to that court. The Supreme Court may also overrule the appealed judgment and adjudicate on the substance of the case.

### 3. Judicial review of certain resolutions and other activities of the President of UOKiK

13. In addition to appeals against administrative decisions of the President of UOKiK, the court of first instance (SOKiK) also handles **complaints against certain resolutions issued by the President of UOKiK in the course of proceedings or against other measures, such as e.g. a complaint against inspection (search) activities**. Similarly to an appeal, a complaint is a legal measure initiating proceedings before SOKiK. It should be pointed out that there is a general assumption<sup>22</sup> that a complaint should be admissible only in cases strictly prescribed by law. Not all manifestations of the administrative

<sup>19</sup> With the exception of invalid proceedings taken into account ex officio by the Supreme Court within the limits of the cassation appeal.

<sup>20</sup> Art. 398<sup>9</sup> of the Code of Civil Procedure.

<sup>20</sup> Art. 479<sup>31a</sup> of the Code of Civil Procedure.

<sup>21</sup> For example, even though the court of second instance has not applied the relevant substantive law, the application of the provision indicated by the appellant would have led to the same resolution.

<sup>22</sup> This general rule has been undermined in the case-law that will be discussed in details below.

authority of the President of UOKiK are subject to complaints. For example, request for information addressed to undertakings on the basis of Article 50 of u.o.k.k.; statements of objections; resolutions to launch or complete explanatory proceedings; or resolutions to initiate antimonopoly proceedings may not be subject to complaints.

14. The first-instance complaints procedure ends with SOKiK issuing a resolution. Not all of them may be subject to further complaints to the court of second instance. The details of the admissibility of complaints are specified in the provisions of the Code of Civil Procedure – in general, the resolutions of the court of first instance which may be subject to complaints are those that end the proceedings and the resolutions listed in Article 394 of the Code of Civil Procedure.

#### 4. Recent case-law

15. When discussing the issue of judicial review in competition cases in Poland, it is impossible to disregard the observable trend towards increasing guarantees of procedural justice, including the right of defence. In the last two years, there have been several cases which ended with non-standard court rulings affecting either the way the competition authority proceeds or the legal situation of undertakings.

##### 4.1. Scope of search activities – File Ref. No. XVII Amz 15/17

16. The SOKiK's resolution of 7 March 2017 issued as a result of an undertaking filing a complaint against the inspection activities, necessitated a change of the UOKiK's previous practice and introduction of far-reaching modifications into the organization of searches. Until the resolution, the UOKiK's practice of acquisition and use of electronic evidence, ie.: making binary copies of electronic data on site of the inspection and subsequently analysing the material gathered and selecting evidence at the UOKiK's office, had not been questioned by the courts. **As a result of the ruling, the President of UOKiK now selects the collected (electronic) evidence only at the entrepreneur's premises and in his presence.**

17. Case details: In the course of the explanatory proceedings, the President of UOKiK obtained the court's (SOKiK) consent to conduct a search at the premises of several undertakings. One of the activities undertaken by the searching team at the entrepreneur X's seat was to copy all contents (so-called binary copies) of hard drives of computers used by three employees. The resulting material was "taken outside" the entrepreneur's premises, i.e. to the office of the competition authority. The searched entrepreneur filed a complaint against the search activities carried out in his premises.

18. The complaint boiled down to **whether secured electronic data could be selected at the UOKiK's office or whether evidence should be selected on site of the inspection and the searched undertaking should be allowed to participate in these activities.**

19. In response to the complaint, the President of UOKiK indicated that it was permissible to copy all electronic data carriers in order to secure the information contained thereon, and then to select the acquired material in the UOKiK's office. In the statement of reasons, the competition authority pointed *inter alia* to: (1) technical conditions; (2) significantly longer time of inspections as a result of selecting the materials at the searched undertaking's premises (translating into a significant burden for the competition authority and for the searched entrepreneur); (3) the existing case law of the court of first instance

(SOKiK), which has been consistent in dismissing complaints related to competition authority copying full contents of email boxes during the search<sup>23</sup>.

20. In its ruling of 7 March 2017, SOKiK did dismiss the entrepreneur's complaint, but did not share the arguments presented by the President of UOKiK.

21. The statement of reasons of the ruling provides the court's guidelines for the way competition authority should search the electronic data carriers. SOKiK underlines the need for high standards of protecting entrepreneurs' rights and, above all, the right of defence, while stressing the importance of selecting evidence contained on electronic carriers in terms of the right of defence. As a consequence, the court pointed out **the need to search and select the electronic evidence at the entrepreneur's premises and in their presence**. In this respect, the Court stated the following: (1) There are no contraindications for the analysis of IT data carriers using the right forensic IT tools to be performed at the entrepreneur's premises and in their presence. The fact that this may be burdensome for the entrepreneur, e.g. due to how long analysis of electronic data is, cannot release the competition authority from respecting the entrepreneurs' rights to participate in the search of information carriers; (2) Therefore search activities cannot be carried out in the office of the competition authority, but only at the registered office of the inspected undertaking or its other place of business. Browsing copies of electronic data and selecting evidence at the premises of UOKiK should not be seen simply as a technical activity; (3) Thus in the Court's opinion, the act of copying the IT data carriers in their entirety and making a binary copies of them should be treated as securing the evidence.

22. The President of UOKiK, did not appeal against the SOKiK's resolution of 7 March 2017. Instead, competition authority introduced far-reaching practical changes in the way searches are organized, as specified in the SOKiK's resolution.

#### **4.2. The SOKiK's resolution giving consent to carry out a search is appealable - File Ref. No. P 19/17**

23. On 16 February 2019, the Constitutional Tribunal ruled that Art. 105n par. 4, second sentence of the antimonopoly act reading that the resolution of SOKiK on giving consent to carry out an inspection is not appealable<sup>24</sup> is incompatible with Art. 78 in connection with Art. 45 par. 1 of the Constitution of the Republic of Poland. Therefore the provision expired and legislative changes in this respect are to be introduced<sup>25</sup>.

##### Case details:

24. In its resolution of 17 January 2017 SOKiK agreed for the search of all rooms and items of several entrepreneurs (including the entrepreneur Y). On 1 February 2017, the entrepreneur Y filed a complaint against the resolution giving a consent to carry out the

<sup>23</sup> SOKiK's decisions: of 16 December 2009, File Ref. No. XVII Amz 53/09/A; of 22 December 2009, File Ref. No. XVII Amz 54/09/A; of 21 June 2011, File Ref. No. XVII Amz 28/11, XVII Amz 30/11, XVII Amz 31/11; of 14 November 2012 r., File Ref. No. XVII Amz 6/12 and XVII Amz 7/12.

<sup>24</sup> Art. 105n par. 4 sentence 2 in the version in force until 21 January 2019: The resolution of the Court of Competition and Consumer Protection is not appealable.

<sup>25</sup> Journal of Laws item 128.

inspection. In its resolution of 21 February 2017<sup>26</sup>, SOKiK rejected the complaint. Due to the wording of Art. 105n par. 4, second sentence of u.o.k.k. stipulating that the resolution of the Court of Competition and Consumer Protection giving a consent to carry out the inspection is not appealable, SOKiK found the complaint against the Court's resolution inadmissible.

25. Entrepreneur Y filed a complaint against this resolution to reject the complaint to the court of second instance. When adjudicating on the above complaint, the Court of Appeal in Warsaw rose doubts as to the compliance of Art. 105n par. 4, second sentence of u.o.k.k. with the Constitution of the Republic of Poland. Accordingly, in its resolution of 22 August 2017<sup>27</sup>, the Court of Appeal addressed a legal question to the Constitutional Tribunal whether the provision is compliant with Art. 45 par. 1<sup>28</sup>, Art. 78<sup>29</sup> and Art. 176 par. 1<sup>30</sup> of the Constitution of the Republic of Poland. The Court of Appeal emphasized that the solution adopted by the legislator does not seem to respect basic constitutional guarantees when it comes to the right to a fair trial.

26. In its ruling of 16 February 2019, the Constitutional Tribunal confirmed that Art. 105n par. 4, second sentence of u.o.k.k. is incompatible with Art. 78 in connection with Art. 45 par. 1 of the Constitution of the Republic of Poland and therefore **SOKiK's resolution regarding the consent to conduct a search should be appealable.**

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<sup>26</sup> File Ref. No. XVII Amo 5/17.

<sup>27</sup> File Ref. No. VI ACz 1223/17.

<sup>28</sup> Art. 45 par. 1 of the Constitution of the Republic of Poland: Everyone shall have the right to a fair and public hearing of their case, without undue delay, before a competent, impartial and independent court.

<sup>29</sup> Art. 78 of the Constitution of the Republic of Poland: Each party shall have the right to appeal against judgements and decisions made at first instance. Exceptions to this principle and the procedure for such appeals shall be specified by statute.

<sup>30</sup> Art. 176 par. 1 of the Constitution of the Republic of Poland: Court proceedings shall have at least two stages.