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Influence of the General Principles of Community Law on Polish Antitrust Procedure

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by

Marcin Kolasiński*

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Abstract

This article presents the new legal problems related to the decentralization of the enforcement of Community competition law. The study shows that Regulation 1/2003 did not only give national antitrust authorities new rights and competences in that context but obligated them also to respect the general principles of Community law¹. This article contains an analysis of the first decisions issued by the UOKiK President on the basis of Community law and shows that the right of defence applicable to Polish proceedings differs from the standards developed by the European Commission and courts. The paper concludes with a number of suggestions concerning changes in Polish antitrust procedure regarding not only the application of Community law but also national provisions.

Résumé

Le présent article traite des problèmes liés à la décentralisation de l'application du droit communautaire de la concurrence. Une analyse démontre que le Règlement 1/2003 a attribué aux organismes nationaux de concurrence non seulement de nouveaux droits et de nouvelles compétences dans ce domaine, il les a également obligés à respecter les principes générales du droit communautaire. L'article comporte une analyse des premières décisions rendues par le Président de l'UOKiK sur le fondement du droit communautaire. Il démontre que le droit à la protection qui est appliqué dans les procédures polonaises diffère des standards développés par la Commission européenne et les juridictions. L'article se termine par des suggestions des modifications dans la procédure de concurrence polonaise portant non seulement sur l'application du droit communautaire mais aussi sur des dispositions légales nationales.

Classifications and key words: competition; general principles of Community law; Community proceedings; right of defence; right to a fair hearing; statement of objections; decentralisation.

¹ This article uses term 'general principles of Community law', 'Community law', 'Community proceedings' etc. as they are used in the majority of case law and publications issued to date cited in the text. However, texts prepared after the issue of TFEU also cited in this article, refer instead to the European Union, such as, for instance, 'general principles of EU law', 'EU law' etc.

I. Introduction – new competences of the Polish antitrust authority to apply Community competition law directly

By virtue of Regulation 1/2003², the full and direct application of Community competition law has been entrusted equally as of 1 May 2004 to the European Commission, EU courts, national antitrust authorities, such as the UOKiK President, and national courts³.

According to Article 3(1) Regulation 1/2003, where national antitrust authorities or courts apply domestic competition law to agreements, decisions by associations of undertakings or concerted practices, within the meaning of Article 81(1)⁴ TEC, which may affect trade between Member States within the meaning of that provision, they shall also apply to them Article 81 TEC. Where they apply national competition law to any abuse prohibited by Article 82 TEC, they shall also apply Article 82 TEC. It is clear therefore that when a given practice can affect Community trade, national competition authorities are not only allowed but in fact obliged to apply relevant EU antitrust rules simultaneously with national law⁵.

The competences in the field of Community competition law that used to be exclusive to the European Commission were thus simply delegated to Member States. The latter were given great autonomy in terms of the choice of institutions responsible for competition protection and the procedure of relevance to their activities. Under Article 35(1) Regulation 1/2003, Member States were obliged to designate their own competition authority or authorities responsible for the application of Articles 81 and 82 TEC so as to ensure their effective observance. That position has been given in Poland to the UOKiK President. According to Article 29(2) of the Act of 16 February 2007 on Competition and Consumer Protection⁶ (Competition Act 2007), the UOKiK President has the power to

² Council Regulation No. 1/2003/EC of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, OJ [2003] L 1/1; OJ Polish special edition, chapter 08, volume 02, p. 205.

³ K. Kohutek, 'Stosunek między art. 81 i 82 Traktatu a krajowym prawem konkurencji (reguły konwergencji)' (2006) 4 *Przegląd Ustawodawstwa Gospodarczego* 14-20.

⁴ Because cases and publications are cited in this article, which refer to the previously binding EC Treaty (TEC), there are used old numbers of the Treaty provisions regarding anticompetitive practices (Article 81) and abuse of a dominant position (Article 82). New numbers of the above provisions are used in parts of the text referring to the Treaty on the Functioning of the European Union (TFEU), OJ [2008] C 1151, respectively Article 101 and Article 102 TFEU.

⁵ Confirmed in the Resolution of the Supreme Court of 23 July 2008, III CZP 52/08 (2009) 7-8 *OSNC*, item 107.

⁶ Act of 16 February 2007 on Competition and Consumer Protection (Journal of Laws 2007 No. 50, item 331, as amended).

exercise in Poland the tasks imposed upon Member States' authorities pursuant to Articles 84 and 85 TEC. In particular, the UOKiK President is the competent competition authority within the meaning of Article 35 Regulation 1/2003. Under Article 31(6) of the Competition Act 2007, the scope of the activities of the UOKiK President includes the performance of tasks and the exercise of competences of a competition protection authority of a Member State, as specified in Regulation 1/2003.

The number of Polish cases applying Community competition law directly is gradually increasing. The UOKiK President is thus becoming a 'Community' competition authority as part of the process of the decentralisation of Community competition law enforcement.⁷

Unfortunately, the provisions of Regulation 1/2003 do not resolve all the procedural problems which can arise from the delegation of powers from the Commission to national competition authorities. One of the first difficulties to arise in this context in Poland was the specification of what type of decisions may the UOKiK President issue when applying Community law. The Polish Supreme Court has submitted a prejudicial question concerning this problem to the European Court of Justice (ECJ) under Article 234 TEC (currently Article 267 TFEU)⁸. The Supreme Court stated that the provisions of the Act of 15 December 2000⁹ on Competition and Consumer Protection (Competition Act 2000) designated the UOKiK President as the relevant competition authority within the meaning of Article 35 Regulation 1/2003 and conferred on it the competences and obligations described in Regulation 1/2003. However, the said act did not specify in what way was the authority to exercise its competences regarding the application of Community competition law. The Supreme Court repeated also that national competition authorities are obliged to apply Community competition law in all proceedings conducted under national law when the scrutinised practice can affect trade between Member States. While the material grounds for such an assessment are found in national and EU law simultaneously, procedural issues are solely determined by domestic legislation with a limited degree of restraints arising from EU law, in particular, from the provisions of Regulation 1/2003¹⁰.

These limitations will be analysed later in this article.

⁷ K. Kowalik-Bańczyk, 'Pojęcie wpływu na handel w decyzjach Prezesa UOKiK' (2010) 5 *Europejski Przegląd Sądowy* 42.

⁸ Resolution of the Supreme Court of 15 July 2009 (III SK 2/09), not reported.

⁹ Act of 15 December 2000 on competition and consumer protection (consolidated text: Journal of Laws 2005 No. 244, item 2080, as amended).

¹⁰ D. Miąsik, 'Najnowsze orzecznictwo Sądu Najwyższego i Naczelnego Sądu Administracyjnego. Głosa do postanowienia SN z 15.07.2009 r. (III SK 2/09)' (2010) 1 *Europejski Przegląd Sądowy* 61.

II. Obligations of national administrative authorities related to the application of Community law

Regulation 1/2003 prepared the substantive law basis for national antitrust authorities to apply Community competition law. It failed however to set out their procedural grounds¹¹ because, in general, Community competition law is not designed to alter national procedural rules.

Nevertheless, the EU does not have a general code of administrative procedure which would be common for all Member States and thus applied in antitrust proceedings under Regulation 1/2003. The concept of the decentralised application of Community competition law was thus based on the optimistic assumption that different national systems of administrative procedure would act in a consistent manner, using similar legal tools guaranteeing a level playing field for all participants. For that purpose, national competition authorities should refer to the jurisprudence of the ECJ concerning the application of Community law rather than the application of competition law by national administrative authorities.

The situation in which a Member State acts on behalf of the Community, performing certain legal duties in its stead, is described by legal doctrine as an agency relationship whereby the Member State acts as an agent or proxy of the Community¹². In their application of Community law, national antitrust authorities become thus administrative bodies of the Community. This peculiar 'lease' by the Community of the administrative structure of its members places an obligation on domestic authorities to apply Community law according to the principle of superiority¹³. Clearly, the principle of superiority cannot be limited to the enforcement of the law only but must also, importantly, apply to the sphere of its implementation – public administration must safeguard the efficient application of its rules in line with the requirements of *acquis communautaire* at national level¹⁴. By ratifying the Accession Treaty, Poland

¹¹ Communication from the Commission to the European Parliament and the Council – Report on the functioning of Regulation 1/2003, SEC(2009)574, para. 31: 'Regulation 1/2003 does not formally regulate or harmonise the procedures of national competition authorities, meaning that they apply the same substantive rules according to divergent procedures and they may impose a variety of sanctions. Regulation 1/2003 accommodates this diversity'.

¹² A. Wyrozumka, 'Ochrona praw podstawowych w Unii Europejskiej – problemy pluralizmu porządków prawnych' [in:] J. Kranz (ed.), *Suverenność i ponadnarodowość a integracja europejska*, Warszawa 2006, p. 162.

¹³ T. Koziół, 'Rozstrzygnięcie sprzeczności ustawy ze wspólnotowym prawem pierwotnym – glosa do postanowienia TK z 19.12.2006 r. (P 37/05)' (2009) 5 *Europejski Przegląd Sądowy* 46.

¹⁴ A. Nowak-Far, 'Krajowa administracja rządowa a Unia Europejska. Strefy relacyjne i podstawowe aspekty ich funkcjonowania' [in:] A. Nowak-Far (ed.), *Dostosowanie polskiej*

has simultaneously adopted the achievements of the Communities – *acquis communautaire* – that consists not only of EU legal rules but also e.g. the accepted methods of their interpretation and application as well as ECJ jurisprudence¹⁵.

The activities of national administrative authorities applying *acquis communautaire* are characterized by the fact that Community law serves as direct legal grounds for the proceedings. Nonetheless, that law affects also Member States' administrative laws¹⁶. It is not easy to accept this fact. It requires a radical change in the understanding of the law and the way in which it is applied. Controversies in this matter are illustrated, perhaps somewhat ironically but also quite accurately, by the words of Lord Thomas Denning, an English judge who said that 'Community law is a roller destroying our breakwaters and flooding our lands and houses'¹⁷. Those destroyed breakwaters are, of course, the consolidated legal terms of national laws and their interpretation which frequently differ from those of EU law.

Although European jurisprudence regarding the obligations of domestic authorities applying Community law precedes Regulation 1/2003, the findings of the ECJ are fully applicable to situations in which national competition authorities apply Articles 101 or 102 TFEU. Because they act 'on behalf of the European Commission', they should obey the same rules and obligations deriving from the jurisprudence of the ECJ as a part of *acquis communautaire*. This obligation is binding regardless of whether it is clearly expressed in Community legislation or in national competition provisions.

The first experiences in the application of Community competition law by the UOKiK President under Regulation 1/2003 show that the need to obey general principles of Community law constitutes one of the main practical problems in this context, a fact analysed later in this article.

administracji do członkostwa w Unii Europejskiej, Studia z dziedziny Unii Europejskiej, Warszawa 2005, p. 52.

¹⁵ S. Biernat, 'Źródła prawa Unii Europejskiej' [in:] J. Barcz (ed.), *Prawo Unii Europejskiej. Zagadnienia systemowe*, Warszawa 2003, p. 182.

¹⁶ S. Biernat, 'Europejskie prawo administracyjne i europeizacja krajowego prawa administracyjnego (zarys problematyki)' [in:] M. Seweryński, Z. Hajn (eds), *Studia Prawno-Europejskie, t. VI*, Łódź 2002, p. 71-111.

¹⁷ T.T. Koncewicz, 'Radcowie prawni a skuteczne stosowanie prawa wspólnotowego' (2002) 6 *Radca Prawny* 63.

III. General principles of Community law

1. Origin and nature of the general principles of Community law

Although Community law was designed primarily to achieve purely economic objectives, it was bound to evolve into a much more comprehensive set of legal rules through, *inter alia*, the gradual recognition of its general principles. Greatly inspired by the legal traditions of EU Member States but tailored to the specific needs of Community law, general principles of Community law were developed and refined by the Court of Justice in order to secure its smooth operation. More specifically, the recognition of the general principles of Community law allowed the Court to recognize rights to the benefit of individuals that have not been foreseen by the Treaty¹⁸.

General principles of Community law can be traced back to the jurisprudence of the ECJ, which derives them from the European Convention on Human Rights and the legal orders of EU Member States (constitutional traditions)¹⁹. Although their interpretations were made by the ECJ with reference to national legal orders, their final version is a compromise not necessarily reflected in the legislation of all Member States. However, even those countries which do not have domestic principles similar to those defined by the ECJ must obey them when applying EU law. General principles bind both Community institutions and Member States which apply Community law²⁰. According to the ECJ, the general principles of Community law reflect its most important principles contained in its primary legal acts. As such, they take precedence

¹⁸ J. Bourgeios, T. Baumé, 'Decentralisation of EC Competition law Enforcement and General Principles of Community Law' (2004) 4 *Research Papers in Law, College of Europe*, available at <http://www.coleurop.be>.

¹⁹ A. Kalisz, 'Reguły interpretacyjne stosowane przez ETS' (2007) 2 *Europejski Przegląd Sądowy* 20.

²⁰ E.g. 230/78 *SpA Eridania-Zuccherifici nazionali and SpA Società Italiana per l'Industria degli Zuccheri v Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades, and SpA Zuccherifici Meridionali* [1979] ECR 2749, para. 31 '(...) the general principles of community law (...) are binding on all authorities entrusted with the implementation of community provisions'; 5/88 *Wachauf v. Federal Republic of Germany* [1989] ECR 2609, para. 19: 'Having regard to those criteria, it must be observed that Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements'.

over Community secondary legislation and thus cannot be excluded or restricted by it²¹.

The list of general principles of Community law is not closed but subject to dynamic interpretation by the ECJ. General principles can be categorised according to their features. This article is interested in those general principles which are applicable to administrative proceedings: (1) good administration; (2) duty of sound financial management; (3) precision and completeness of relevant facts and interests; (4) right of defence; and (5) duty to state the reasons and access to administrative documentation²².

Competition policy is one of the most important areas of direct implementation of Community law. Competition proceedings constitute therefore the 'Rolls Royce' of administrative adjudication influencing the development of procedural rights in other areas of Community administration²³. Not surprisingly, the concept of general principles was first established in Community competition proceedings.

2. General principles of Community law identified in antitrust cases; right to a fair hearing (guaranteed by the *statement of objections*)

Competition law cases dealt with by the ECJ identified several general principles of Community law such as: the right to a fair hearing, the right to access case files, the right to legal representation and to a privileged nature of lawyer-client correspondence. Similarly to the principles identified in other areas of Community law, the aforementioned list remains open and subject to change. In light of this case law, the European Commission applies special procedural safeguards deriving from these general principles. As a result, the right of defence granted to the participants of antitrust proceedings ensures that the fight against competition-restricting activities takes place without prejudice to consolidated legal standards. Thus, the limitation of the right of defence cannot be justified by the argument that this is required by the battle against a 'worse evil', that is, anticompetitive practices.

Because of the limited size of this article, it is not possible to analyse in detail all the types of general principles of Community law identified by the ECJ in its antitrust cases. The right to a fair hearing is described below as

²¹ See, e.g. C-260/94 *Air Inter SA v Commission* [1997] ECR II-997, para. 60.

²² C. Franchini, 'European principles governing national administrative proceedings' (2004) 68(1) *Law and Contemporary Problems* 190.

²³ F. Bignami, 'Three generations of participation rights before the European Commission' (2004) 68(1) *Law and Contemporary Problems*.

one of their key examples. It is also used in the comparative analysis of its observance in Community proceedings conducted by the UOKiK President.

The right to a fair hearing is a general principle of Community law in all proceedings involving sanctions, especially fines – it must be obeyed even in administrative proceedings²⁴. The ECJ specified that the right to a fair hearing is safeguarded by giving a party to the proceedings the right to present its own position with regard to the claims against it.

The first judgment to thoroughly analyse the right to a fair hearing was the 17/74 *Transocean Marine Paint Association*²⁵ case. The ECJ stated that an individual whose interests are affected by a decision of a public authority must have the right to present his/her own views on the case. Relying on the argumentation presented by English Advocate General Warner, the ECJ introduced a new approach into its judicature, previously based only on the *civil law* doctrine, in which a party to proceedings may only challenge an administrative decision before a court. This new approach is typical of the *common law* system, giving a party the right to challenge a decision before an administrative authority only before this decision is issued. In order to guarantee the right of defence, the ECJ made its position even more clear in other judgments. It stated that before the Commission issues a decision, it should provide the parties not only with the details of the complaints but also other relevant information such as the facts and evidence on which it was relying. It was also obliged to give the parties the opportunity to present their views on the truthfulness and relevance of the facts and circumstances relied on by the Commission²⁶. The required data is presented in practice in a special document called a *statement of objections* (*notice of complaints* in earlier cases), an act very similar to the form and content of a final decision. An entity is thus granted the right to a fair hearing because it is able to present

²⁴ 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461 para. 9: ‘Observance of the right to be heard is in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed a fundamental principle of community law which must be respected even if the proceedings in question are administrative proceedings’.

²⁵ 17/74 *Transocean Marine Paint v Commission* [1974] ECR 1063, para. 15.

²⁶ 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461, para. 9: ‘Article 19(1) of Council regulation No 17 obliges the Commission, before taking a decision in connexion with fines, to give the persons concerned the opportunity of putting forward their point of view with regard to the complaints made against them’; para. 11 ‘Thus it emerges from the provisions quoted above and also from the general principle to which they give effect that in order to respect the principle of the right to be heard the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Article 86 of the Treaty’.

its views on specific circumstances of the case as well as its own arguments and position on them.

Importantly, in cases where the right to a fair hearing was not guaranteed because of mistakes in the *statement of objections*, the ECJ declared the decisions of the Commission void to the extent caused by the mistakes. In *SA Musique Diffusion*²⁷ for instance, the *statement of objections* specified a shorter infringement period than the final decision (used to set the amount of the fines). The ECJ did not accept the extension and based its judgment on the shorter infringement period only as specified in the *statement of objections*²⁸.

IV. Right to a fair hearing in Polish antitrust proceedings based on Community law

1. Lack of legal provisions

Unfortunately, Polish antitrust procedure does not contain any rules that could provide the parties with safeguards similar to the *statement of objections* during national proceedings enforcing Article 101 or 102 TFEU under Regulation 1/2003. Before issuing a decision, the UOKiK President does not present the parties with any information on e.g. the assessment of the facts and evidence gathered in the case files, the length of the violation, the identity of those that participated in the infringement or of those against whom the authority plans to impose fines etc. The resolution regarding the initiation of antitrust proceedings merely informs the parties of the content of the claim. Case file access given before the issuance of a decision does not constitute a sufficient guarantee of the right to a fair hearing, as defined by the ECJ. Undertakings frequently review hundreds of pages of case files without being aware of the relevance of the specific facts or evidence included and how to identify of the issues they should comment on. Therefore, their right of defence is limited. Stressed here must therefore be the different nature of the right to a general access to case files and the right to a fair hearing (where

²⁷ Joined cases 100 to 103/80 *SA Musique Diffusion francaise and others v Commission of the European Communities* [1983] ECR 1825.

²⁸ Joined cases 100 to 103/80 *SA Musique Diffusion francaise and others v Commission of the European Communities*, para. 16-17: 'In the present case it is not disputed that the Commission did not indicate to the applicants its intention to establish the existence of infringements of a longer duration than was mentioned in the statement of objections and that the undertakings had no opportunity of making known their views as regards periods which were not mentioned therein. In these circumstances, in assessing the duration of the infringements, found by the contested decision, regard must be had only to the period late January/Early February 1976'.

the statement of objections informs the parties of the relevant circumstances). Such differentiation is reflected in the jurisprudence of the ECJ that treats them as two separate rights.

2. Right to a fair hearing in the first decisions of the UOKiK President based on Community law

Between 2003 and 2010²⁹, the UOKiK President issued 5 decisions on penalised practices restricting Articles 81 or 82 TEC (currently Articles 101 or 102 TFEU) including the imposition of fines (2 decisions regarding abuse and 3 decisions regarding anticompetitive agreements).

None of them suggests that the UOKiK President respected the parties' right to a fair hearing by the application of a procedure similar to a *statement of objections*. As far as procedural requirements are concerned, these decision only have two features in common i.e. they see the right to access case files as a safeguard of the right of defence and emphasise their compatibility with procedural rules because they were consulted with and accepted by the European Commission

The relevant extracts from the aforementioned decisions showing the way in which the UOKiK President refers to procedural issues in Community cases are presented below.

1) Decision of the UOKiK President, DOK-166/06³⁰

The decision stated that Telekomunikacja Polska S.A. breached Article 9 of the Competition Act 2000 and Article 82 TEC.

It was explained that '(...) The President of the Office informed the party and the participant of the proceedings about the closure of the evidentiary proceedings'³¹ and 'The President of the Office informed the European Commission no later than 30 days before issuing this decision, by sending it a summary and the envisaged decision'. Thus, the decision was issued in line with binding procedural norms³².

An appeal was filed against the decision with the Competition and Consumer Protection Court (SOKiK). The judgment suggests however that the appeal was not based on the claim of a breach of the general principles of Community

²⁹ Available at http://www.uokik.gov.pl/decyzje_prezesa_uokik3.php; visited last time on 5 August 2010.

³⁰ Decision of the UOKiK President 29 December 2006, DOK-166/06.

³¹ Ibidem, p. 6.

³² Ibidem, p. 64.

law. SOKiK's judgment³³ was subject to further judicial review by the Court of Appeals³⁴ and ultimately the Supreme Court³⁵. Neither of them referred to a breach of the general principles of Community law.

2) Decision of the UOKiK President, DOK-98/07³⁶

This was another decision against Telekomunikacja Polska S.A. for an infringement of Article 9 of the Competition Act 2000 and Article 82 TEC.

The wording of the decision suggests that the procedure of a *statement of objections* was not applied in this case. It was only indicated that 'The case files may be reviewed by the party at all times with the possibility of presenting its views on the evidence contained therein'³⁷.

The decision explains that its draft was consulted with and accepted by the Commission. The UOKiK President concluded thus that 'This decision was issued in line with binding procedural rules'³⁸.

An appeal was filed against it but the case is still pending before SOKiK. It is impossible to tell whether the appeal referred to a breach of general principles of Community law because the appeal documents are not available for viewing.

3) Decision of the UOKiK President, DAR-15/2006³⁹

The decision stated that Polish banks have concluded a set of anticompetitive agreements with Visa infringing the provisions of the Competition Act 2000 and Article 81(1) TEC. In this decision, the antitrust authority stated that '(...) the President of the Office informed the parties about the closure of the evidence gathering stage of the proceedings and simultaneously stated that they may review the files (...)'⁴⁰.

The claim of a breach of general principles of Community law was not made in the appeal. Neither SOKiK⁴¹ nor the Court of Appeals⁴² referred to this

³³ Judgment of SOKiK of 28 February 2008, XVII AmA 52/07, LEX no. 402189.

³⁴ Judgment of the Court of Appeal in Warsaw of 29 January 2009, VI Aca 1202/08, not reported.

³⁵ Judgment of the Supreme Court of 17 March 2010, II SK 41/09, not reported.

³⁶ Decision of the UOKiK President of 20 December 2007, DOK-98/07.

³⁷ Ibidem, point 435, p. 75.

³⁸ Ibidem, point 482, p. 83.

³⁹ Decision of the UOKiK President of 29 December 2006, DAR-15/2006.

⁴⁰ Ibidem, p. 17.

⁴¹ Judgment of SOKiK of 12 November 2008 r., XVII AmA 109/07, not reported.

⁴² Judgment of the Court of Appeal in Warsaw of 22 April 2010, VI ACa 607/09, not reported.

issue. Still, the latter dismissed the judgment of the former in its entirety and remanded the case to SOKiK for renewed consideration.

4) Decision of the UOKiK President, DOK-6/2008⁴³

The decision stated that the Association of Authors ZAiKS and the Association of Polish Film Producers concluded anticompetitive agreements infringing the provisions of the Competition Act 2000 and Article 81(1a) TEC.

There was said that ‘The President of UOKiK closed the evidentiary proceedings and informed the parties to the proceedings as well as other interested parties about it and gave them the possibility to review the evidence gathered in the files (...)’⁴⁴ and ‘(...) The President of UOKiK informed the European Commission on 3 July 2008 about the planned solution (applied in this decision) sending it its draft. The European Commission did not raise any objections to the adjudication in this decision’⁴⁵.

An appeal was filed against this decision to SOKiK; the case is pending.

5) Decision of the UOKiK President, DOK-7/09⁴⁶

The decision stated that Polish cement producers concluded anticompetitive agreements infringing the provisions of the Competition Act 2000 and Article 81(1a) TEC.

It was explained that ‘During the proceedings, the parties took advantage of the right to review the files (...). On 14 September 2009, the antitrust authority informed the parties about the closure of the evidentiary proceedings, about their ability to review the whole of the evidence and called them to present their final positions in the case’⁴⁷ and ‘(...) The President of the Office provided the draft decision to the Commission which did not raise any objections’⁴⁸.

An appeal was filed against this decision with SOKiK; it is pending.

The above quotes clearly show that the UOKiK President misunderstands the right to a fair hearing by believing that it equates to the right of the parties to present their views on the evidence gathered and the right to review the files without however knowing which of the data will be used as evidence in

⁴³ Decision of the UOKiK President of 29 August 2008, DOK-6/2008.

⁴⁴ Ibidem, point 9, p. 7.

⁴⁵ Ibidem, point 10, p. 7.

⁴⁶ Decision of the UOKiK President of 8 December 2009, DOK-7/09.

⁴⁷ Ibidem, point 9, p. 9.

⁴⁸ Ibidem, point 10, p. 9.

the final decision. Moreover, even though the authority refers to the term ‘evidence’, it is confusing it with the documents gathered in the files. Those documents contain a variety of information and data which might not be ultimately used as evidence in antitrust decisions. Therefore, the right to access the files cannot be equated with the right to a fair hearing, as defined in ECJ case law.

Additionally, the fact that the Commission was each time consulted on the draft is presented as sufficient evidence that the decision was compatible with ‘binding procedural rules’, a clearly untrue conclusion. It would be very interesting to find out about what type of review did the Commission conduct under Article 11(4) Regulation 1/2003. It did indeed not object to any of the drafts even though they did not observe the right to a fair hearing because Poland lacks a procedure similar to the *statement of objections*. Nevertheless, its review was likely to have been limited to the substantive part of the decision without considering their procedural aspects. If this assumption is correct, it would mean that the Commission’s review process is missing a key part even though it was enacted in order to ensure that the decisional practice of national competition authorities is compatible with the findings of the Commission and the jurisprudence of EU courts. It is also possible however, that the Commission did analyse their procedural aspects but incorrectly understood some of the terms used in the drafts. Perhaps the expression that ‘the party reviewed the files and had the possibility to present its views on the gathered evidence’ was interpreted by the Commission in such a way that all requirements regarding the right to a fair hearing arising from the jurisprudence of the ECJ were satisfied? This problem should be clarified directly and as soon as possible by the UOKiK President and the Commission because this uncertainty undermines the consultation process under Article 11(4) Regulation 1/2003.

The last decision mentioned, DOK–7/09, is very important in the context of this article as it shows that the UOKiK President is aware of the concept of ‘the general principles of Community law’ and that the authority knows how to apply it in practice. When justifying the evidence gathered in the case, the UOKiK President referred to Point 5 of the Preamble to Regulation 1/2003, which reads as follows: ‘This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law’.

Stating that procedural rules in antitrust proceedings must be compatible with the general principles of Community law, the UOKiK President added ‘in particular, with the principle of effectiveness (*effet utile*)’. The authority later added that ‘This means that the standard of proof applied by national

authorities cannot be so high as to render the application of Article 81 TEC (currently: Article 101 TFEU) impossible or excessively difficult⁴⁹.

Nonetheless, why would the authority refer to some general principles of Community law in places suiting its views, but not obey others, i.e. the right to a fair hearing, where that would be favourable for the parties? This approach is all the more controversial in the light of the following declaration, expressed in a different part of the same decision: 'Taking the above into account and because, in the present case, the parties were accused of breaching Article 81 TEC (currently: Article 101 TFEU) and because the Polish antimonopoly law on competition-restricting practices is directly based on Community law, when analysing the activities of the parties to the proceedings, the President of the Office relied on the consolidated case law of the Commission and Community courts, as well as the legal doctrine regarding Community competition law. The President of the Office has the obligation to apply *acquis communautaire* in the case of parallel application of Article 5 of the above act [MK – the Competition Act 2000] and Article 81 TEC (currently: Article 101 TFEU)⁵⁰.

V. Consequences of breaching general principles of Community law by the UOKiK President

1. Judicial review

All decisions issued by the UOKiK President are subject to judicial review by SOKiK. When assessing the competences and obligations of the latter, it is essential to stress that, from the functional point of view, the national judiciary plays the role of EU courts in their application of Community law⁵¹.

The norms of Community law may be an independent source of rights and obligations for civil and legal persons – they may base their claims on these rights before courts and administrative authorities. Thus, the addressees of the decisions issued by the UOKiK President under Articles 81 or 82 TEC (currently Articles 101 or 102 TFEU) may appeal them claiming a breach of general principles of Community law. If proprietary rights of entities – citizens and entrepreneurs from a given Member States – arise from the

⁴⁹ Ibidem, point 429, p. 76.

⁵⁰ Ibidem, point 417, p. 74.

⁵¹ A. Wróbel, 'Pytania prawne sądów państw członkowskich do Europejskiego Trybunału Sprawiedliwości (Sądu Pierwszej Instancji)' [in:] A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, Kraków 2005, p. 778.

provisions of Community law, national courts must ensure the protection of these rights⁵².

It should be said therefore that in their application of Articles 81 and 82 TEC [MK - currently Articles 101 or 102 TFEU], national courts are obliged to rely on the general principles of Community law (arising from primary law) and others which are included in the provisions of Regulation 1/2003⁵³. As indicated above, general principles of Community law are a consequence of ECJ's interpretation of EU law which is, according to the Supreme Court, universally binding⁵⁴.

If SOKiK does not obey the general principles of Community law, its judgments are in conflict with EU law. Provisions were established in the Polish legal order which ensure effective proprietary rights protection in cases of judgments that are in conflict with EU law (legally binding or not yet). The Supreme Court acknowledges that a breach of EU law may be used as grounds for an appeal (against a 1st instance judgment not yet binding), a cassation (against a binding 2nd instance judgment) and a complaint to find that a legally binding judgement is in conflict with the law (against binding 1st and 2nd instance judgments).

According to the Supreme Court, an appeal and a cassation lead to 'the elimination of the invalid judgment and, in consequence, to an adjudication which is compatible with Community law'. A complaint, which leads to the finding that a legally binding judgement is in conflict with the law, 'has the objective of obtaining a prejudication, allowing for a claim to be filed for damages caused by the illegal activities of the authorities in separate proceedings'. The Supreme Court clearly stated that a breach of Community law may act as the grounds for all of these legal actions⁵⁵.

2. Impact of general principles of Community law on the case law of the Supreme Court

A very interesting legal issue arises from the fact that an appeal based on an objection regarding a breach by the UOKiK President of general principles of Community law does not apply to an appeal on its merits, but on procedural issues.

⁵² K. Kohutek, 'Stosowanie reguł prawa konkurencji przez sądy krajowe' (2006) 8 *Europejski Przegląd Sądowy* 14.

⁵³ *Ibidem*, p. 15.

⁵⁴ Resolution of the Supreme Court of 22 October 2009, IUZ 64/09, LEX no. 560531.

⁵⁵ D. Miąsik, 'Orzecznictwo Sądu Najwyższego i Naczelnego Sądu Administracyjnego. Głosa do postanowienia SN z 22.10.2009 (I UZ 64/09)' (2010) 4 *Europejski Przegląd Sądowy* 62.

Consolidated case law suggests that SOKiK's holds the position of a 1st instance court obliged to examine the case on its merits⁵⁶. Therefore, procedural breaches by the UOKiK President should be repaired by SOKiK. Thus, the Court of Appeals is not obliged to refer to procedural grounds in the appeal⁵⁷. The Supreme Court indicated recently that it is only possible to reverse the decision of the competition authority in cases of errors which cannot be repaired by an amendment of the decision by the court. Such failures include situations where the decision was issued without legal grounds or with a major infringement of substantive rules or if it was addressed to the wrong party or was in breach of the *ne bis in idem* rule⁵⁸. Current jurisprudence gives the impression that procedural errors can be healed by the court. It seems however that a breach of general principles of Community law (in particular the right of defence) in administrative proceedings constitutes a type of fault which cannot be repaired after the decision is issued.

Although Member States enjoy procedural autonomy, commentators indicate that national procedural rules have a somewhat subsidiary nature – they should be applied only if no EU law is in effect⁵⁹. Therefore, if consolidated European jurisprudence provides guidelines regarding the exercise of general principles of Community law in antitrust proceedings, these norms are binding on the UOKiK President and national courts. It is also up to the courts to ensure effective legal protection of rights derived from EU law⁶⁰. Thus, the principle of effectiveness defines the duties of Member States' courts examining cases with a European element. In this respect, the principle of effectiveness limits their procedural autonomy⁶¹.

With decisions issued by the UOKiK President under Article 101 or 102 TFEU, overlooking the infringement of fundamental procedural rights would put the party in a far worse position than if the case was examined by the European Commission and courts.

⁵⁶ Judgment of the Court of Appeal in Warsaw of 21 September 2006, VI ACa 142/06, LEX no. 272753; Judgment of the Supreme Court of 13 May 2004, III SK 44/04, LEX no. 137437.

⁵⁷ Judgment of the Supreme Court of 19 August 2009 r., III SK 5/09, LEX no. 548862.

⁵⁸ Ibidem.

⁵⁹ W. Postulski, 'Sądy państw członkowskich jako sądy wspólnotowe' [in:] A. Wróbel (ed.), *Stosowanie prawa...*, p. 461.

⁶⁰ C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-243, para 19; D. Miąsik, 'Application of General Principles of EC Law by Polish Courts' [in:] U. Bernitz, J. Nergelius, C. Cardner (eds.) *General principles of EC law in a process of development: reports from a conference in Stockholm, 23-24 March 2007, organized by the Swedish Network for European Legal Studies*, 2008, p. 387.

⁶¹ D. Miąsik, 'Zasada efektywności prawa wspólnotowego' [in:] A. Wróbel (ed.), *Stosowanie prawa...*, p. 318–319.

As a result, if a party raises an objection regarding the infringement of general principles of Community law, SOKiK should apply a pro-European approach as well as the principle of effectiveness. In that light, it should remand the whole of the antitrust decision for a renewed assessment.

It does not matter that the Polish civil law procedure and case law based on it to date do not expressly allow for such a possibility. These regulations cannot provide for such a procedure for claiming the entity's proprietary rights arising from Community law, which would make actually exercising these rights impossible or excessively difficult (the so-called principle of effectiveness of Community law⁶²). National courts have the right and duty to refuse to apply an inconsistent provision without the need to wait for a reaction by the legislator or other authorities such as the Constitutional Tribunal which was established in order to remove incorrect legal acts. These competences of national courts guarantee that the principle of priority of Community law is applied immediately and effectively⁶³.

Polish courts are however likely to be reluctant to rule on the compatibility of Polish antitrust procedure with the general principles of Community law. They are far more likely to submit instead a prejudicial question to the ECJ. Although an answer given by the ECJ is only binding in the case at hand, it is likely to influence other rulings also, even though the legal system of the EU does not have a case law nature. Considering that EU jurisprudence on its general principles is uniform and consolidated, it can be assumed that it will have a significant impact on Polish antitrust procedure in the near future.

VI. Conclusions

1. Comments on changes needed in the procedure applied by the UOKiK President in cases based on Community law

Entrusting EU Member States with the competences to apply Articles 101 and 102 TFEU directly (previously Articles 81 and 82 TEC) has resulted in an improvement of Community competition law enforcement. The ability of direct referral to the extensive EU jurisprudence and the decisions of the European Commission contribute to the quality of domestic antitrust enforcement. However, while national competition authorities were given new rights and competencies, they were also obliged to observe the general principles of Community law.

⁶² K. Kohutek, 'Stosowanie...', p. 16.

⁶³ C-106/77 *Ammisnistrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 639, para. 22–23.

These principles are binding on national authorities in Community proceedings regardless of whether or not they are part of domestic legal orders. Considering however the need to increase legal awareness concerning these specific EU rules, it would be advisable to create explicit legal grounds for their application in national legislation on antitrust procedure. For example, the Competition Act 2007 should include a separate section regarding *statements of objections* in EU proceedings.

These proposals are not limited to EU proceedings which end with sanctions, in particular, fines. Such a precondition was applicable to the right of defence in the form of a *statement of objections*. However, other aspects of the right of defence, such as *the legal professional privilege*, should also be observed in all Community proceedings. It is important to stress here however that what falls into the category of ‘Community cases’ covered by the scope of the application of EU law⁶⁴ are also national proceedings where the claims that arose from directly applicable EU rules are not proven (e.g. Article 101 TFEU). As a result, even if a case conducted on the basis of Articles 101 or 102 TFEU ends without establishing an antitrust infringement but is, for instance, dismissed instead, the case itself is a ‘Community proceeding’ that must respect the general principles of Community law.

Finally, it would be advisable for the UOKiK President and national courts ruling on antitrust issues to draw on the experience of other Polish administrative bodies and courts that already started to refer to the general principles of Community law. Especially relevant in this context are the judgments of the Supreme Administrative Court (NSA) issued in tax matters based on the inconsistency of domestic administrative decisions with one of the main general principles of Community law – the principle of proportionality⁶⁵.

2. Call for changes in the procedure applied in cases based on Polish competition law

While conducting proceedings based on Community law, the UOKiK President must apply procedural rules similar to those used by the European Commission. The authority is not obliged however to do so with respect to proceedings based on Polish competition law only.

⁶⁴ D. Miąsik, ‘Sprawa wspólnotowa przed sądem krajowym’ (2008) 9 *Europejski Przegląd Sądowy* 20.

⁶⁵ E.g. Judgment of the Supreme Administrative Court 11 March 2010, I FSK 267/0, available at: <http://orzeczenia.nsa.gov.pl/doc/4048338E91>; judgment of the Supreme Administrative Court of 24 February 2010, I FSK 2000/08, not reported.

Similarly, legal doctrine emphasises that the obligation placed on national courts to apply Community law as part of their national legal order is limited to Community proceedings only⁶⁶. Commentators refer here to the jurisprudence of the ECJ which clarifies that, when deciding on a case from outside the scope of Community law, a national court is not bound to interpret domestic legislation in line with Community law or to refrain from the application of national rules⁶⁷.

It might be worth considering however whether the degree of protection granted to the right of defence should not also increase in proceedings based on domestic laws only conducted by administrative authorities and courts.

The jurisprudence of the Supreme Court is not-uniform on this matter. In some judgments, the view was expressed that the obligation to conduct a pro-Community interpretation of national legislation does not apply to cases based only on the Polish Competition Act. According to the Supreme Court, Article 3 Regulation 1/2003 suggests that when a competition-restricting practice does not affect trade between Member States, national courts apply domestic antitrust rules only. The Supreme Court explained also that ECJ judgments and the decisions of the European Commission regarding Articles 81 and 82 TEC constitute only – in cases where Articles 81 and 82 TEC are not applied [MK – currently Articles 101 and 101 TFEU] – a source of intellectual inspiration, an example of legal reasoning and understanding of certain notions⁶⁸. The Supreme Court mentioned also that the referral to Community law in national cases has a comparative and persuasive advantage only.

A different position was expressed however in the resolution of the Supreme Court III CZP 52/08⁶⁹ where the problem of the prejudicial nature of antitrust decisions was analysed for judgments of common courts regarding competition law offences. In the said resolution, the Supreme Court supported the independence of common courts adjudicating on antitrust matters. It stated referring to Community law and Regulation 1/2003 in particular, that civil courts may independently assess whether the conditions required for the application of Community competition law in litigations between private entities are satisfied – in other words, courts do not have to wait for an antitrust decisions in the same case. Following this line of thought, the Supreme Court expressed the even further-reaching view that even if no effect on Community trade was established and thus the court was to apply domestic law only, a

⁶⁶ D. Kornobis-Romanowska, *Sąd krajowy w prawie wspólnotowym*, Kraków 2007, p. 123.

⁶⁷ C-264/96 *Imperial Chemical Industries* [1998] ECR I-4695, para. 34.

⁶⁸ Judgment of the Supreme Court of 9 August 2006, III SK 8/06 (2007) 13–14 *OSNP* 208; judgment of the Supreme Court of 6 December 2007, III SK 16/07, (2009) 1–2 *OSNP* 31.

⁶⁹ Resolution of the Supreme Court of 23 July 2008, III CZP 52/08, (2009) 7–8 *OSP*, item 86.

legal interpretation 'which would eliminate substantial procedural divergences in the application of Community and national laws would be desirable'.

Legal doctrine calls also for the consideration of Community experiences regarding the increasing standard of proof expected from an antitrust authority⁷⁰.

The requirement for Polish antitrust procedure concerning domestic cases to provide the same degree of protection of the right to defence as proceedings conducted in Community cases, is not only a matter of the law but simply a matter of honesty and objectivity of the UOKiK President. References to Community jurisprudence and doctrine are made in the majority of Polish antitrust decisions based only on national competition law where it supports the approach taken by UOKiK. Still, they contain no reference whatsoever to Community standards concerning the right of defence. The antitrust authority should be consistent in its approach. Reference should be made either to all *acquis communautaire* in domestic proceedings, including the general principles of Community law, or no reference should be made at all even when that would be favourable to the arguments of the authority.

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⁷⁰ D. Miąsik, 'Wpływ prawa UE na stosowanie polskiego prawa ochrony konkurencji przez sądy' (2010) 7 *Europejski Przegląd Sądowy* 40.

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