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Simple procedural infraction or a serious obstruction of antitrust proceedings - are fines in the region of 30-million EURO justified? Case comment to the decisions of the President of the Office for...

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**Simple procedural infraction or a serious obstruction of antitrust proceedings – are fines in the region of 30-million EURO justified?
Case comment to the decisions of the President of the Office for Competition and Consumer Protection of 4 November 2010
Polska Telefonia Cyfrowa Sp. z o.o. (DOK-9/2010)
and of 24 February 2011 *Polkomtel SA (DOK-1/2011)***

Facts

This case comment concerns two decisions issued by the Polish antitrust authority with respect to inspections carried out in December 2009 as part of an ongoing antitrust investigation relating to the Polish mobile television market. Simultaneous inspections were carried out in the premises of five Polish telecom companies: Polska Telefonia Cyfrowa Sp. z o.o. (PTC), Polkomtel SA (Polkomtel), P4 Sp. z o.o., Info-TV-FM Sp. z o.o. and NFI Magna Polonia S.A.

The first decision (DOK-9/2010) was issued by the President of the Office for Competition and Consumer Protection (in Polish: *Urząd Ochrony Konkurencji i Konsumentów*; hereafter, UOKiK, antitrust authority) on 4 November 2010 against Polska Telefonia Cyfrowa Sp. z o.o. (hereafter, PTC). The Polish antitrust authority imposed here a fine of 123-million ZŁOTY (equal to EUR 30 million) for preventing UOKiK officials from contacting the person or persons authorised to represent PTC as well as for refusing entry to the company premises during a dawn raid carried out on 2 December 2009. The inspection was conducted pursuant to an authorization in the form of a decision to carry out a control procedure issued by the UOKiK President and a search authorisation issued by the Court of Competition and Consumers Protection (in Polish: *Sąd Ochrony Konkurencji i Konsumentów*; hereafter, SOKiK)¹. After the inspection, PTC refused to sign a post-control protocol because some of the company's comments to its content were not taken into account².

According to the facts set out in the *PTC* Decision, the inspectors and the police entered the building where the seat of PTC is located at 10:10 A.M on 2 December 2009. The officials were not allowed to proceed to the company offices and were left waiting in the downstairs lobby. Twenty minutes after entering the building, they were repeatedly denied entry by the reception and security employees. The building personnel

¹ Order of the SOKiK of 26 November 2009, XVII Amo 22/09.

² Par. 10 of the *PTC* Decision.

refused even to accept the authorization documents issued by the antitrust authority and court. The refusal was justified by the statement that as staff members they ‘must respect their internal procedures’. At 10.45 A.M., an employee of PTC’s Department of Corporate Security appeared and accepted the authorisations documents. After an hour, two employees of PTC’s legal department appeared in the lobby to speak with the officials. Still, the inspectors were not allowed to enter the premises.

It was not until 11:30 A.M., one hour and twenty minutes after the officials entered the building, that they were finally allowed to proceed to the PTC offices and started the dawn raid ten minutes later. Even then however, they were not allowed to speak with any of the members of PTC’s Managerial Board and thus the inspectors started to search for authorised PTC personal on their own. While searching, they found out that a meeting concerning mobile phone television was actually in progress in the offices being inspected. The information given to the officials by PTC staff concerning the possibility to meet their board members was not coherent³. The company justified the long delay by the necessity to contact those authorised to represent it. According to PTC, ‘the visit of the inspectors was far from standard circumstances’. The fact that two-thousand employees work at the company offices made it difficult, according to PTC, to include such a situation (i.e. dawn raid) in the relevant company procedures.

PTC argued that even though the proceedings were carried out in its opinion without a legal basis, the company cooperated with the officials during the entire inspection. The scrutinised undertaking claimed also that no procedural violations occurred since the inspectors were allowed to enter the premises. PTC argued furthermore that the prerequisites of Article 106(2)(3) of the Competition and Consumer Protection Act of 17 February 2007 (hereafter, Competition Act⁴) were not fulfilled, among other things. This provision concerns imposition by the UOKiK President of a fine of the equivalent EUR 50,000,000 on an undertaking if the undertaking, even unintentionally, does not collaborate during the inspection performed within proceedings.

The company stated that the hypothesis of Article 105d (1)(2) of the Competition Act⁵ was not fulfilled primarily because entry was actually granted. The fact that the

³ Para. 21 and 22 of the *PTC* Decision – the members of the managerial board have a meeting (the same argument is repeated at para. 67). Para. 32 of the *PTC* Decision indicates that the employees tried to establish which member of the board was present in the company premises. In the same paragraph, there was only one member of the board present at the time of the inspection (the same is repeated in footnote no. 12).

⁴ Journal of Laws 2007 No. 50, item 331, as amended.

⁵ Article 105d states as follows:

1. The inspected party, the person authorised thereby, the holder of the apartments, premises, buildings or means of transportation referred to in Article 91, paragraph 1 shall be obliged to:
 - 1) provide the requested information;
 - 2) provide access to the site and buildings or other premises and means of transportation;
 - 3) provide access to files, books and all kinds of documents or other data carriers.
2. The persons referred to in paragraph 1 may refuse the provision of information or collaboration only when that could lead to criminal responsibility for themselves or their spouses, ascendants, descendants, brothers and sisters as well as relatives in

inspectors were kept wait was not sufficient, according to PTC, to ‘automatically’ establish that the prerequisites of Article 106(2)(3) of the Competition Act were fulfilled.

The UOKiK President listed in its decision several procedural infractions committed by PTC during the inspection including: the refusal by its receptionist to accept the authorisation documents; refusing entry to the premises; delaying contact with authorised company representative(s). Such behaviour fulfilled, according to the PTC Decision, the prerequisites of Article 106(2)(3) of the Competition Act because it violates its Article 105a and following. Specifically, Article 105d (1)(2) of the Competition Act imposes an obligation upon a scrutinised company to give access to its premises.

The UOKiK President did not agree with PTC’s argument concerning the need to respect its internal procedures regulating the work of its two-thousand staff. The antitrust authority refuted also the fact that no member of the Managerial Board was available to meet the inspectors, nor to authorise any other person to interact with the officials. According to the UOKiK President, even if PTC’s behaviour was not ‘intentional, it is beyond a shadow of a doubt that it made the control more difficult’⁶. The antitrust authority stressed also that not only were its officials refused entry to the company premises, but a meeting concerning the object of the main investigation took place in the PTC office at the time when they were kept waiting. The UOKiK President considered therefore that the delay was intentional and meant to postpone the beginning of the dawn raid.

According to Article 106(2)(3) of the Competition Act, the UOKiK President may impose by way of a decision a fine of up to the equivalent of EUR 50,000,000 on an undertaking if the latter, even unintentionally, does not cooperate with an inspection carried out within proceedings pursuant to Article 105a. This rule is subject to an exception provided by Article 105d paragraph 2 which makes it possible to refuse to provide the requested information or to cooperate in the event that one has a special relationship [defined by the law] with a person to whom criminal responsibility may be established.

In calculating the level of the fine, according to Article 111 of the Competition Act⁷, the UOKiK President took into account that PTC’s behaviour must have been considered a serious infringement of the public interest. It could not be excluded also, according to the UOKiK President, that a significant part of the evidence sought could have been lost during the delay. The maximal fine that can be imposed for procedural violations in Poland is 50,000,000 EUR, an amount not linked to the turnover of the

the same line or degree and co-habiting persons as well as persons who have been adopted, stay under the guardianship or care thereof. Such right to refuse information or collaboration shall survive the marriage or the relationship of adoption, guardianship or care.

⁶ Para. 68 of the *PTC* Decision.

⁷ When determining the level of a fine referred to in Articles 106 to 108, the duration, gravity and circumstances of the infringement of the provisions of the Competition Act as well as previous infringement should be taken into account in particular.

company concerned. The penalty imposed upon PTC constituted 60% of the maximal possible fine – an adequate level, according to the PTC Decision, in view of the degree of the law infringement at hand. This amount would have, in the opinion of the antitrust authority, fulfilled the repressive and deterrent function of a procedural fine without however being overly excessive when compared to the turnover of PTC.

In the course of the same antitrust proceedings concerning the Polish mobile television market, the UOKiK President issued on 24 February 2011 another decision (DOK-1/2011) imposing a fine of 130,689,900 PLN (33,000,000 EURO) on Polkomtel SA (Polkomtel Decision) – a competitor of PTC. Polkomtel was fined for its conduct during a dawn raid conducted simultaneously to the inspection carried out at PTC. Polkomtel was penalised because it prevented the inspectors and police from establishing contact with a person authorised to represent it; delaying the dawn ride; not fulfilling the inspectors' request to provide all the documents concerning its participation in the contested mobile television project (rather than only those documents chosen by Polkomtel); and refusing to hand over a hard-drive containing data from Polkomtel's servers.

The inspection was carried out pursuant to a decision of the UOKiK President as well as an authorisation of the SOKiK⁸. The dawn raid started on 2 December 2009, simultaneously to that at the PTC office; the inspection lasted overall until 31 January 2010. On the contested day, UOKiK officials waited for an hour and fifteen minutes to meet the President of Polkomtel's Managerial Board even though he was, alongside other board members, present in the company premises⁹. The inspection begun only after the officials met with the President.

The inspectors copied onto a hard-drive the e-mails of five Polkomtel employees that had participated in the mobile television project under investigation. After copying them, the officials have secured the hard-drive in a closed and sealed closet inside the company premises. The following day, all the data was copied onto a disc belonging to the UOKiK President. Subsequently, the inspectors asked the representative(s) of Polkomtel to give the copied disc to the policeman who was assisting the inspection. However, the company's proxy stated that she would not permit the disc to leave the office. The disc was thus left in the sealed closet in the room that was secured by both the officials and Polkomtel staff.

Two days after the beginning of the inspection, Polkomtel submitted to the UOKiK President a complaint against the carrying out of the inspection on the basis of Article 84c (1) of the Freedom of Economic Activity Act¹⁰. The company claimed in its submission: (1) the lack of objectivity of the inspectors; (2) the attempt to commence the dawn ride with a controller – a UOKiK employee; (3) the suspicion of starting the inspection without a legally valid authorisation; (4) the fact that the inspection carried out exceeded the scope of the authorisation for instance, by attempting to remove from the premises a hard-drive containing private data of company employees

⁸ Order of SOKiK of 26 November 2009, XVII Amo 23/09.

⁹ *Polkomtel* Decision, p. 27.

¹⁰ Consolidated text: Journal of Laws 2010 No. 220, item 1447.

and PTC secrets; (5) the disproportionate nature of the inspection with respect to the subject matter of the primary proceedings and; (6) the carrying out of the inspection after company working hours. The complaint was rejected by the UOKiK President on 8 December 2009 and thus the control proceedings continued. Polkomtel appealed the UOKiK President's refusal to accept its submission to SOKiK but the court rejected the appeal¹¹.

On 9 and 14 December 2009, prior to SOKiK's ruling, the company provided the antitrust authority with the requested documents. After the rejection of the appeal, the inspection continued. However, the contested hard-drive remained at the company premises and has never been handed over to the UOKiK President. During the proceedings, Polkomtel submitted a number of evidentiary motions including proof concerning the meaning of the notion of 'a copy of an e-mail inbox'. The scrutinised company questioned also the allegation of how long the inspectors actually waited to begin the dawn raid. In addition, Polkomtel argued that the UOKiK President had not actually synchronised the dawn raids of the scrutinised telecoms operators. Thus, any allegation that Polkomtel had interfered with the simultaneous start of all dawn rides would be unfounded. The company claimed finally that the procedural fine imposed on it was disproportionate to the object of the proceedings.

In the justification of the Polkomtel Decision, the UOKiK President stressed the lack of cooperation of the company during the dawn raid which made it impossible for the officials to commence the inspection. The authority stated also that Polkomtel delayed contact with those authorised to represent it, who were in fact present in the company premises at the time the controllers tried to begin the dawn raid.

Key legal issues of the case

It should be stressed that the current legal basis for inspections is not free from ambiguity¹². First of all, inspections are carried out pursuant to the provisions of four different legal acts: the Competition Act, the Freedom of Economic Activity Act, the Code of Administrative Procedure and the Code of Penal Procedure. In the Polish theoretical literature, it is postulated that UOKiK President publishes the guidelines including the principles governing inspections¹³. However, the soft-law act issued by the UOKiK President is criticized by the doctrine as not having a sufficient legal basis¹⁴.

¹¹ Order of SOKiK of 22 December 2009, XVII Amz 54/09/A.

¹² B. Turno, [in:] J. Baehr, J. Krüger, T. Kwieciński, M. Radwański, A. Stawicki, E. Stawicki, B. Turno, A. Wędrychowska-Karpińska, A. Wiercińska-Krużewska, A. Wierciński, *Komentarz do art. 8 ustawy o ochronie konkurencji i konsumentów* [Commentary to Article 8 of the Competition and Consumer Protection Act], LEX, Art. 105(a).

¹³ *Ibidem*.

¹⁴ M. Król-Bogomilska, 'Kary pieniężne – główne kierunki ewolucji w okresie 20 lat rozwoju polskiego prawa antymonopolowego' ['Pecuniary penalties – main direction of evolution during 20 years of development of Polish antimonopoly law'] (2010) 5 *Europejski Przegląd Sądowy* 11.

Antitrust inspections were covered already by the provisions of the Act of 28 January 1987 on counterfeiting the monopolist practices in national economy¹⁵. Their current legal basis was set up by the Act of 2004¹⁶, amending the Competition Act of 2000¹⁷ (which introduced into Polish competition law the principles established in Regulation 1/2003) and by the Competition Act of 2007. The latter set out a number of practical issues that had arisen in the earlier decisional practice of the UOKiK President including questions such as who can the authorization to carry out an inspection be handed to, police assistance and recording of the control¹⁸.

The very aim of carrying out an inspection by an antitrust authority is to obtain evidence which can often not be attained by any other means, and which is in danger of being destroyed by those participating in illegal conduct (the so-called ‘smoking gun’). This aim justifies the unexpected character of a dawn ride and the necessity to provide the requested documents as soon as possible after its commencement. In cartel cases, the UOKiK President’s ability to carry out simultaneous¹⁹ inspections in the premises of multiple competitors suspected of collusive behavior is of great importance. Cartel agreements are often known to only a few individuals in each of the participating companies as their conclusion and performance are kept in secret.

As far as fines are concerned, the UOKiK President may pursuant to Article 106(2) (3) of the Competition Act impose by way of a decision a fine of the equivalent of EUR 50,000,000 on an undertaking if the latter, even unintentionally, does not cooperate during an inspection performed within antitrust proceedings pursuant to Article 105a subject to Article 105d(2) of the Competition Act. The fine, even if it concerns a procedural violation within the main proceedings, has in itself an autonomous character²⁰. In procedural terms, separate proceedings concerning the imposition of a fine for the lack of cooperation must be instituted.

The aim of fines imposed for procedural infractions is to ensure the correct course of proceedings before the UOKiK President²¹. Lack of cooperation during an inspection may make it impossible to verify the existence of evidence²². Moreover,

¹⁵ Journal of Laws 1987 No. 3, item 18, as amended.

¹⁶ Act of 16 April 2004 on the amendment of the competition and consumer protection act and some other acts (Journal of Laws 2004 No. 93, item 891).

¹⁷ Act of 15 December 2000 on competition and consumers protection (Journal of Laws 2000 No. 122, item 1319).

¹⁸ B. Turno, [in:] J. Baehr and others, *Komentarz do art. 8....*, LEX, Art. 105(a).

¹⁹ M. Swora, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), *Ustawa o ochronie konkurencji i konsumentów, Komentarz*, Warszawa 2009, Art. 105a, Nb 4, p. 1529.

²⁰ C. Banasiński, E. Piontek, *Ustawa o ochronie konkurencji i konsumentów, Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2009, p. 945; K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów, Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2008, p. 1026.

²¹ M. Król-Bogomilska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), *Ustawa...*, Art. 106, Nb 37, p. 1615.

²² Compare SOKiK judgment of 11 August 2003, XVII Ama 130/02, concerning the refusal by an undertaking to respond to UOKiK’s demand for information. M. Król-Bogomilska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), *Ustawa...*, Art. 106, Nb 55, p. 1622.

a decision imposing a fine is always subject to judicial control. The court will verify whether all the legal obligations placed on the scrutinized undertaking were fulfilled during an inspection. The imposition of a fine does not depend on the question of guilt²³ but upon the scrutinized undertaking's conduct during the inspection and its compliance with the law.

Polkomtel argued that the procedural fine imposed on it was disproportionate in view of the fact that the main antitrust proceedings concerned the market for mobile television – an economic field of minor importance which is only beginning to emerge. It must be emphasized however that the principles governing inspections are of procedural character and concern the particular relationship between the inspector and the inspected²⁴. It is thus difficult to sustain Polkomtel's argued concerning the proportionality of the fine in relation to the subject of the main proceedings. However, this is a point of general relevance, in other words, whether the legal basis for such a high level of procedural fines (up to 50,000,000 EUR) is at all justified.

Polkomtel claimed also that the inspection was not carried out in the course of existing UOKiK proceedings as required by Article 105a of the Competition Act. This argument may difficult to accept. The UOKiK President initiated explanatory proceedings concerning the Polish mobile television market on 25 November 2009. Explanatory proceedings is a preliminary investigation meant to ascertain whether it was necessary to open full antitrust proceedings²⁵ (i.e. whether an infringement of the material provisions of the Competition Act took place and whether the case had an antitrust character). The scrutinised company does not need to be informed about the institution of explanatory proceedings²⁶ – it is also not considered to be a party to the preliminary investigation. Indeed, dawn raids are in practice most commonly performed in the course of explanatory proceedings because this is when they are most efficient²⁷. SOKiK issued its authorisation of the inspection on 26 November 2009 and the dawn ride was carried out on 2 December – the day when the officials presented the relevant authorisations to Polkomtel's President.

Polkomtel's argument concerning the character of the data saved on the contested hard-drive is also difficult to sustain in court. The general practice of transferring digital files from the computers of a scrutinized company has never been questioned and the use in antitrust proceedings of data obtain wherefrom has been repeatedly accepted by SOKiK.

²³ Understood as an awareness of the illegality of a behavior. K. Kohutek, M. Sieradzka, *Ustawa...*, p. 1026.

²⁴ *Ibidem*, Nb 7, p. 1530 and the literature there quoted.

²⁵ A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), *Ustawa...*, Art. 48, Nb 2, p. 1193.

²⁶ Judgement of the Supreme Court of 7/04/04, III SK 22/04 (2005) 3 *OSNAPiUS* 46.

²⁷ K. Kohutek, M. Sieradzka, *Ustawa...*, p. 802. M. Swora, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), *Ustawa...*, Art. 105a, Nb 19, p. 1533.

Finally, it must be pointed out that the authorization issued by the NCA cannot be a subject of judicial control, which is critically assessed by commentators²⁸. In the case of the Polkomtel Decision, the company submitted a complaint according to the procedure provided for in the Freedom of Economic Activity Act which was the subject of judicial review but subsequently rejected by SOKiK. It is impossible to uphold therefore Polkomtel's claim that its right to the equivalent of a 'fair trial' was infringed.

Significance of the decisions

The commented decisions concern the rights of the UOKiK President to carry out inspections and the right of defense of companies under investigation. The aforementioned UOKiK decisions are respectively the third and the fourth example of a fine being imposed for the lack of cooperation during an antitrust inspection in Poland²⁹. Undoubtedly, these are the highest fines ever to be imposed by the UOKiK President. Hence, they send a strong message to the market that any obstructions of an antitrust inspection will be severely punished. The commented decisions illustrate also that any infractions committed in the course of an inspection are extremely difficult to justify and sustain by the company concerned.

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²⁸ B. Turno, [in:] J. Baehr and others, *Komentarz do art. 8...*, LEX, Art. 105(a). (consulted 13th July 2011).

²⁹ According to www.uokik.gov.pl the fines were imposed on: PTK Centertel in 2002 and on Cementownia Ożarów in 2007 (2 mln PLN).