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## **Fines for Failure to Cooperate within Antitrust Proceedings – the Ultimate Weapon for Antitrust Authorities?**

by

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### ***Abstract***

The aim of this article is to analyse a powerful competence available to antitrust authorities in Europe in the form of the imposition of fines for the failure to cooperate within antitrust proceedings. While fines of that type are imposed in practice very rarely, the article considers the existing decisional practice of the Polish antitrust authority as well as the European Commission, and presents the way in which their approach has evolved throughout the years. The article analyses also the question of the formal initiation of proceedings concerning procedural violations and the importance of the use of a uniform and fair approach towards the scrutinized undertakings, especially as fine graduation is concerned. For that purpose, the article provides also a comparative analysis of past proceedings conducted by the European Commission and selected judgments of EU Courts.

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## Résumé

Le but de cet article est d'analyser la compétence puissante des autorités de la concurrence en Europe qui est l'imposition des amendes pour l'absence de coopération dans la cadre d'une procédure administrative en matière de concurrence. Quoique ces amendes sont imposées très rarement dans la pratique, l'article considère les expériences actuelles de l'autorité de la concurrence polonaise et de la Commission européenne et présente la manière dont leur approche de cette question a évolué dans le temps. De plus, l'article comporte une analyse du problème de l'ouverture formelle de la procédure et d'importance de l'approche juste et uniforme aux entreprises engagés dans cette procédure, en particulier concernant la graduation de l'amende. Dans ce but, l'article aussi comporte l'analyse comparative des procédures déjà conduites par la Commission européenne et des jugements sélectionnés des cours de l'Union européenne.

**Classifications and key words:** fines; antitrust proceedings; dawn raid; inspection; cooperation; procedural infringements.

## I. Introduction

In Europe, both state antitrust authorities as well as the European Commission (hereafter, Commission<sup>1</sup>) are equipped by their respective laws with the competence to discipline undertakings<sup>2</sup>. Those infringing competition rules can be fined at the level determined (and limited) by the size of their revenue generated in past fiscal years. Recent case law shows a very decisive approach being taken towards violators as a result of which a number of severe fines have been imposed both in Poland and the EU<sup>3</sup>. Clearly, there are other factors influencing the size of the fine aside from the company's economic

<sup>1</sup> The term antitrust authorities will in this article apply to both EU member states' antitrust authorities as well as to the Commission when acting on the basis of Treaty provisions on competition protection.

<sup>2</sup> It should be noted that the term 'undertaking' is used mainly in EU legislation and case law whereas Polish antitrust generally refers to companies and other entities participating in antitrust proceedings as 'entrepreneurs'. In this article the term 'undertaking' and the term 'entrepreneur' are used as synonyms.

<sup>3</sup> Exemplified best by the record fines imposed by the UOKiK President in the *Grupa Ożarów* decision of 8 December 2009, DOK-7/09 (fines of PLN 411,586,477, see further comments herein) and by the Commission in the *Microsoft* Case T-201/04 of 17 September 2007 (fine of EUR 497,000,000). As calculated by John M. Connor, the severity of the 2007–2009 cartel fines under the 2006 Commission Guidelines is more than five times higher than those figured under the 1998 Guidelines, John M. Connor, 'Has the European Commission become more severe in punishing cartels? Effects of the 2006 Guidelines' (2011) 32(1) *ECLR* 27–36.

strength. They include: the scale, character and severity of the infringement and possibly even the social response to the imposed penalty<sup>4</sup>. Before determining and imposing fines, antitrust authorities are thus obliged to diligently analyze the facts of each case and gather evidence that supports their final evaluation. Proving that an infringement of competition law took place may at times turn out to be extremely difficult because unlawful market practices are often agreed upon and conducted in secret. As a result, it is frequently difficult to find hard proof and/or witnesses to a competition law infringement. At times therefore, even the sole support of 'soft evidence' is permissible when building a case against the culprits<sup>5</sup>. Furthermore, the fines themselves need to be directly related to the facts and character of the infringement committed. Although they may be of substantial value (as past experience shows), the rules and policy followed by the authorities as regards the imposition of fines for antitrust infringements are generally transparent. They can be found in the extensive body of case law relevant to the imposition of fines in competition law proceedings as well as in the official guidelines issued by the respective antitrust authorities. Two soft law acts should be emphasized here that are of particular relevance to both the Polish and European market: (i) Commission Guidelines on the method of setting fines imposed pursuant to Article 23 (2)(a) of Regulation No. 1/2003<sup>6</sup> and (ii) Explanations regarding the setting of the level of fines for practices restricting competition of the Polish Antitrust Authority (hereafter, UOKiK)<sup>7</sup> (hereafter, Commission Guidelines and UOKiK Guidelines respectively)<sup>8</sup>. However, neither of these acts refers expressly to fines for procedural infractions committed within antitrust proceedings which may be imposed on the basis of Article 106(1) (2) of the Polish Act on Competition and Consumer Protection<sup>9</sup> (hereafter, Competition Act), Article 23(1) of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in

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<sup>4</sup> This issue was addressed recently by EU Commissioner Joaquín Almunia in his speech given at the Revue Concurrences conference: 'New Frontiers of Antitrust 2011' in Paris on 11 February 2011, available at <http://europa.eu>, section press releases, reference SPEECH/11/96.

<sup>5</sup> Especially visible when it comes to coordinated parallel behavior which, as stated by the European Court of Justice (presently: Court of Justice) 'may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market' (judgment of 14 July 1972 48/69 *Imperial Chemical Industries*), see also K. Kohutek 'Komentarz do art. 1 Rozporządzenia 1/2003 (WE) nr 1/2003 z dnia 16/12/02 r. w sprawie wprowadzenia w życie reguł konkurencji ustanowionych w art. 81 i 82 Traktatu', SIP Lex el/2006.

<sup>6</sup> OJ [2006] C 06/3.

<sup>7</sup> UOKiK Official Journal [2009] 1, p. 1–3.

<sup>8</sup> On the character of Commission Guidelines – see judgment of the European Court of Justice of 28 June 2005 in combined cases C-189/02 P, C-202/02 P, C- 205/02 P, C-208/02 and C-213/02 P. in the *Dansk Rørindustri and others v European Commission*, ECR [2005] I-5425.

<sup>9</sup> Journal of Laws 2007 No. 50, item 331, as amended.

Articles 81 and 82 of the Treaty (hereafter, the Regulation 1/2003) and Article 14(1) of Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (hereafter, Regulation 139/2004) (the latter two referred here as EU Regulations). The terms ‘fines for procedural infractions/violations’ and ‘fines for the lack of cooperation’ within antitrust proceedings shall be understood widely in this article and apply to fines imposed as a consequence of all violations of a procedural character which may take place within such proceedings, that is, also during inspections. In practice, they are often referred to as ‘procedural fines’, as opposed to ‘substantive fines’ for competition law infringements – this however seems imprecise due to the also ‘procedural’ character of periodic penalty payments referred to in Article 107 of the Competition Act.

Considering that case law on fines for procedural violations is extremely sparse and at times incoherent, the question remains therefore – how and exactly in what circumstances should such fines be imposed by European antitrust authorities, and how far does their discretion go with respect to their size? Can this instrument be seen as the ‘ultimate weapon’ of competition law enforcement allowing antitrust authorities to impose multimillion fines on undertakings without conducting a full investigation of their alleged breach of competition law?

## **II. Grounds and level of fine imposition on the basis of the Polish Competition Act, Regulation 1/2003 and Regulation 139/2004**

There are currently three legal acts which regulate fine imposition for the lack of cooperation within antitrust proceedings. Deciding which act is applicable in any given case is determined firstly by the ‘host’ of the primary proceedings (i.e. the Competition Act when conducted by the UOKiK President or one of the EU Regulations when conducted by the Commission), and secondly, by the subject matter of the main case (i.e. Regulation 1/2003 in alleged violations of Article 101 and 102 TFEU and Regulation 139/2004 for alleged violations of merger control rules<sup>10</sup>). The construction of the respective rules is rather similar (Article 106(1)(2) of the Polish Competition Act, Article 23(1) of Regulation 1/2003 and Article 14(1) of Regulation 139/2004), almost identical in fact in the case of the two EU Regulations. There are nevertheless some differences that deserve attention.

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<sup>10</sup> The latter division is relevant to EU competition law only which, unlike the Competition Act, regulates separately the issue of restrictive practices and merger control.

Pursuant to the Polish Competition Act, fines for procedural infractions within antitrust proceedings may be imposed by the UOKiK President generally in two cases only – when a given undertaking, intentionally or unintentionally,

- (i) either refuses to provide the UOKiK President with requested information or documents, or provides false or misleading information or documents (Article 106(2)(1) and Article 106(2)(2) of the Competition Act), or
- (ii) fails to cooperate with the UOKiK President in the course of an inspection conducted within the primary antitrust proceeding (Article 16(2)(3) of the Competition Act).

With respect to fines, the term ‘failure to cooperate’ is thus expressly used only in relation to inspections (Article 106(2)(3) of the Competition Act). On the other hand, neither Regulation 1/2003 nor Regulation 139/2004 address the obligations placed on undertakings in this context in general as ‘obligations to cooperate’ and indicate specific behavior which is considered as an infringement. Aside from inspections, cases in which undertakings are threatened with fines for their lack of cooperation are all related to situations concerning the provision of information and documents. This terminological discrepancy in Article 106(2) of the Competition Act is partially explained by the fact that antitrust proceedings generally have a written character. The contact between UOKiK (or the Commission) and the scrutinized undertaking(s) is therefore limited to the exchange of procedural writs on the ‘inquiry – answer’ basis. The vast majority of cases in which a given undertaking may ‘fail to cooperate’ take place during the provision of documents in writs addressed to the antitrust authority. By contrast, inspections conducted in the course of antitrust proceedings are situations where the undertaking and its employees come into direct contact with UOKiK officials. Hence, the forms in which the company (its employees) can obstruct an inspection are virtually unlimited<sup>11</sup>. Thus, the premise of a ‘failure to cooperate’ referred to in Article 106(2)(3) of the Competition Act allows the UOKiK President to impose a fine upon an undertaking which obstructs in any way the course of an inspection performed

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<sup>11</sup> Practice shows that the ‘creativity’ of such undertakings and their staff is also ‘unlimited’ when it comes to making the officials’ job in the course of an inspection as difficult as possible. E.g. in one of the inspections carried out by the Spanish antitrust authority, a company CEO almost literally tried to run away with a series of documents and photos removed from his closet in the presence of the inspectors. (*Extraco* case, Resolución de la Comisión Nacional de la Competencia of 6 May 2010, case ref. SNC/0007/10. About the power of inspection see also: M. Pedraz Calvo, ‘Competition authorities’ power of investigation and respect of fundamental rights: Inviolability of domicile’ [in:] M. Krasnodębska-Tomkiel, *Zmiany w polityce konkurencji na przestrzeni ostatnich dwóch dekad*, Warszawa 2010, pp. 113–124.

according to Articles 105a – 105l of the Competition Act, irrespective of the form of the obstruction<sup>12</sup>.

The different approach adopted in Article 106 of the Competition Act with respect to antitrust proceedings as a whole and inspections in particular, makes its construction incoherent and can thus lead to legal problems in practice. Above all, the closed catalogue of illegal behaviors specified in Article 106(2) (1) and 106(2)(2) of the Competition Act can leave some situations beyond the scope of penalization. In Article 106(2)(2) for example, the legislator refers precisely to situations where an undertaking is obliged to provide the antitrust authority with specific information when summoned to do so<sup>13</sup>. Polish doctrine correctly indicates<sup>14</sup> that information requests authorized by Article 28(3) of the Competition Act are omitted. As a result, there is currently no legal basis to impose a fine on an undertaking that fails to comply with an information request issued by the UOKiK President regarding the scope of the fulfillment of its obligations imposed by a decision issued pursuant to Article 28(1) of the Competition Act. This problem would have been eliminated if the Polish legislator used a general premise of a ‘failure to cooperate’ with respect to the entirety of antitrust proceedings (similarly to inspections conducted therein) complemented by an exemplary catalogue of procedural violations.

Unlike Article 23(1) of Regulation 1/2003 and Article 14(1) of Regulation 139/2004, Article 106(2) of the Polish Competition Act does not specifically list the ‘breaking of official seals’ affixed in the course of an inspection. Both EU Regulations address this issue in provisions<sup>15</sup> separate from those concerning general cooperation (lack thereof) during antitrust inspections – a fact that shows the particular importance associated with this matter by the EU legislator. Furthermore, both Regulations (‘seals affixed have been broken’) set a very high level of liability of the scrutinized undertaking where broken seals are found, irrespective of who and in what circumstances was responsible for their breaking. As a result, the construction of this legal provision *de facto* causes the reversal of the burden of proof normally associated with antitrust proceedings as it is the undertaking that must prove that it had nothing to do with the breaking of the seal<sup>16</sup> rather than the authority. Seeing as the Polish legislator failed to create a separate premise for fine imposition in such cases,

<sup>12</sup> Similarly A. Stawicki, E. Stawicki, ‘Komentarz do ustawy o ochronie konkurencji i konsumentów – Komentarz do art. 106’, points 3.2.2. SIP LEX el/2011.

<sup>13</sup> I.e. referred to in Art. 94(2), Art. 12(3), Art. 19(3) or Art. 50 of the Competition Act.

<sup>14</sup> M. Król-Bogomilska [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), *Komentarz do ustawy o ochronie konkurencji i konsumentów*, Warszawa 2009, p. 1617.

<sup>15</sup> Art. 23(1)(e) Regulation 1/2003 and Art. 14(1)(f) Regulation 139/2004 respectively.

<sup>16</sup> That was precisely the case in the *E.ON. Energie* case (see pt. IV.2 herein) where the fine was imposed by the Commission *de facto* because it found the undertaking’s explanations concerning the possible reasons for the breaking of the seal as not probable and reliable enough.

the legal basis for the evaluation of the breaking of official seals in Poland should be found in Article 106(2)(3)<sup>17</sup> of the Competition Act. Therefore, if it is established in the course of an inspection that seals previously affixed by UOKiK officials in the premises of the scrutinized undertaking have indeed been broken – such situation bares analogue consequences to the aforementioned provisions of both EU Regulations.

Accordingly, fines for the failure to cooperate within antitrust proceedings are determined on the basis of the turnover generated by the culprit and may reach a maximum of 1% of its yearly turnover. The methodology of that provision is analogue to that of fine imposition for competition law infringements, where the turnover limit is set at a much higher level of 10%.

However, Article 106(2) of the Polish Competition Act limits fines for procedural infractions by the maximum threshold of EUR 50.000.000. This provision seems to indicate *prima facie* that the size of the fines is not related to the level of turnover generated by the offender in the fiscal year previous to the year where the fine is imposed. UOKiK's decisional practice shows however that financial penalties imposed for the lack of cooperation remain connected to the offender's economic strength, hence their yearly turnover is also taken into consideration<sup>18</sup>. The imposition of such fines is generally directly preceded by a UOKiK request for detailed information regarding the scrutinized undertaking's financial results. As such, this is an analogue step to the conduct prior to the imposition of fines on the basis of Article 106(1) of the Competition Act.

### III. Initiation of proceedings

If in the course of an antitrust proceeding an undertaking suspected of an infringement of competition law<sup>19</sup> refuses to cooperate, the antitrust authority has generally two ways to handle this fact. The first option is to 'include it' in the final decision ending the antitrust proceedings, the second is to address it directly and independently from the final verdict. In the first case, the procedural violation would be treated as an aggravating circumstance influencing the level of the overall fine imposed for the competition law

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<sup>17</sup> Breaking of a seal would be thus considered, depending on the case, as an intentional or unintentional lack of cooperation in the course of an inspection.

<sup>18</sup> E.g. see pt 108 of the decision of the UOKiK President of 4 November 2010, DOK-9/2010 (*Polska Telefonia Cyfrowa*).

<sup>19</sup> Entities other than the suspects may be subject to a document request or inspection.



infringement<sup>20</sup>. In the second case, separate proceedings would have to be initiated in order to impose a fine for the failure to cooperate, independent to the proceedings in the course of which the procedural infraction occurred in the first place<sup>21</sup>. The initiation of formal proceedings regarding the imposition of a fine for non-cooperation would be generally justified (i) either by the violation being committed by a entity other than the one suspected of the infringement of competition law or (ii) the procedural violation committed by the ‘main suspect’ is so grave, that it would seriously jeopardizes the outcome of the primary case. The rationale for this evaluation is clear in the first situation, infraction committed by another party, because the initiation of separate proceedings is the only way to assess the procedural violation and fine it. The second situation requires however separate attention.

Without a doubt, the competence of antitrust authorities to impose multimillion fines for procedural violations is meant to have a preventive character. Undertakings should be discouraged from attempting to unlawfully influence the investigation by concealing certain facts and information or by misleading the officials. It is easy to imagine a situation for example, when certain documents are deliberately destroyed by company staff during an inspection, prior to which UOKiK officials had justified expectations of finding evidence of allegedly anti-competitive practices. At times, especially in cartel cases, it is very difficult to find hard proof for unlawful conduct. Therefore, the deletion from a hard-drive of a set of emails for instance may at times hinder or potentially even preclude the antitrust authority from building a case against the scrutinized undertaking. In such cases, the authority’s ability to prove that a certain document was destroyed in the course of an inspection is very likely to indicate that such undertaking was in fact engaged in illegal practices. Nevertheless, high probability is in itself not sufficient to justify the imposition of a fine for an infringement of competition law in the primary case. The antitrust authority must therefore initiate separate proceedings regarding the procedural violation. An undertaking should in no way benefit from the fact that the main proceedings were obstructed by it or its employees.

If the antitrust authority decided to assess the violation of the obligation to cooperate in its decision regarding the main infringement, failure to cooperate could potentially have an impact on both of those violations. According to the Commission and UOKiK Guidelines, an obstruction of antitrust proceedings can be treated as an aggravating factor that makes it possible to increase the

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<sup>20</sup> Assuming the undertaking is found guilty and fined – the direct legal basis for a fine increase would be Art. 111 of the Competition Act, Art. 23(3) of Regulation 1/2003 and 14(3) of Regulation 139/2004.

<sup>21</sup> On the independent character of both of the proceedings *vide* K. Kohutek, ‘Komentarz do art. 161 ustawy o ochronie konkurencji i konsumentów’, point 1, SIP LEX el/2008.

overall level of fine imposed for the competition law infringement. However, non-cooperation is in such cases directly connected with the main infringement which the undertaking is accused of. If, by appealing the antitrust decision for instance, the undertaking managed to prove that there was insufficient evidence of the main infringement, then the court would have to annul the decision in its entirety. In consequence, the procedural infraction, even if clear and proven beyond all doubt, would remain unpunished.

On the other hand, if the antitrust authority managed in the same situation to gather enough evidence to impose a fine for the primary infringement, the deliberate destruction or concealment of evidence should be treated as an aggravating factor enabling the authority to further increase the overall fine, rather than assessing the obstruction in a separate decision. Such approach should be justified by reasons of procedural economy – the initiation of separate proceedings generally prolongs the main investigation because the authority must engage its resources in two separate cases that are formally independent from each other. Thus, where the undertaking fails to distort the course of the main proceedings, there is no justifiable reason to open separate proceedings addressing its procedural infractions since they would delay the imposition of the ‘main’ fine for the infringement of competition law.

Nevertheless, considered should also be arguments that could lead to an opposite conclusion. To illustrate, the maximum level of fines for competition law infringements should in no event exceed 10 % of the offender’s yearly turnover<sup>22</sup>. It is possible that the imposition of a maximum fine is justified by the scale, character and duration of the restrictive practice alone. In such cases, procedural non-cooperation could no longer act as an aggravating circumstance for a further fine increase. But does this mean that the culprit actually benefited from this situation? After all, it still received the highest possible fine.

It should be born in mind that the proceedings regarding non-cooperation and the main antitrust investigation are closely related even if they are formally independent from each other. Also connected should therefore be the level of the fine which may be imposed on the same undertaking for its procedural violations and substantive infringements. The fine cap was set out by both the Polish and EU legislator intentionally. Stressing that the level of all fines should remain in adequate proportion to the economic strength of the culprit<sup>23</sup>, it was nevertheless decided that exceeding a certain maximum level would be unreasonable. Irrespective of the number of aggravating factors which could be applied in a given case, no antitrust fine should thus go above the cap.

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<sup>22</sup> Art. 106(1) of the Competition Act, Art. 23(2) Regulation 1/2003 and Art. 14(2) Regulation 139/2004 respectively.

<sup>23</sup> E.g. see the judgment of the Polish Supreme Court of 27 June 2000, I CKN 793/98.

Penalizing an undertaking already receiving a maximum fine for an antitrust infringement with yet another fine for a procedural violation, only because this is possible due to the formal separation of the two proceedings, would be considered excessive and contradict the general rules of the Competition Act and EU Regulations.

#### **IV. Hereto fines imposed by the UOKiK President and the Commission**

In general, fines for the failure to cooperate within antitrust proceedings are imposed rather rarely<sup>24</sup>. Nonetheless, the frequency and situations where they have indeed been used by the Commission and the UOKiK President vary significantly. Their respective decisional practice should thus be addressed separately.

##### **1. Decisions of the UOKiK President**

Although fines for procedural infractions within antitrust proceeding have been used rather regularly by the UOKiK President, their vast majority was not overly excessive. Out of approximately sixty of such fines imposed between 2003 and 2010, only eleven reached the level of PLN 50,000 (app. EUR. 12,500). However, five of the latter were imposed in 2010 alone<sup>25</sup>. Although their frequency has not greatly changed, a tendency to increase their severity can clearly be observed. Almost all of the procedural violations subject to a fine concerned situations, where the scrutinized undertaking either failed to provide the UOKiK President with the requested data or provided information which was false or misleading. By contrast, only a few of the decisions concerned the lack of cooperation. Nevertheless, it was that very non-cooperation in the course of a UOKiK inspection that has generated the highest fines imposed so far for procedural infractions in Poland.

For a long time however fines for the failure to cooperate in the course of an inspection did not differ greatly from those imposed by the UOKiK President for other procedural infractions. To illustrate, the Polish mobile operator PTK Centertel was fined PLN 16,730 (app EUR 4,100)<sup>26</sup>, Międzynarodowa

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<sup>24</sup> Decisions imposing fines for non-cooperation amounted to only 1.7% of all UOKiK decisions issued in 2010.

<sup>25</sup> Information from the UOKiK website ([www.uokik.gov.pl](http://www.uokik.gov.pl)).

<sup>26</sup> Decision of the UOKiK President of 19 September 2002, DD-79/2002.

Korporacja Gospodarcza InCO – PLN 23,585 (app. EUR 5,900)<sup>27</sup>, and Unia Rozwoju i Wspierania Finansowego Sp. z o.o. – PLN 50,160 (app. EUR 12,500)<sup>28</sup>. All three companies were penalized for refusing to provide UOKiK officials with documents requested during an inspection. Non-cooperation during inspections and during the remaining part of the proceedings was therefore treated similarly as far as the level of fines is concerned. The highest fine imposed by UOKiK until 2007 for a procedural infraction reached a mere PLN 101,975 (EUR 25,000). It was imposed on Visa International Service Association for its refusal to provide the requested data<sup>29</sup>.

However, by decision of 19 April 2007, the UOKiK President imposed a fine of PLN 2,000,000 (EUR 522,030) on Grupa Ożarów<sup>30</sup> for its attempt to conceal and change the content of crucial documents during a UOKiK inspection. The inspection was conducted in the course of an antitrust investigation regarding a price cartel on the Polish cement production market. The cartel proceedings ended with a decision whereby six cartel participants were fined a total of PLN 411,586,477 (app. EUR 102,900,000)<sup>31</sup>. The UOKiK President referred in the final decision to a series of aggravating factors concerning Grupa Ożarów, which eventually resulted in the imposition of a fine at the maximum level of 10% of the company's yearly turnover<sup>32</sup>. Even though none of these circumstances concerned non-cooperation, it should be emphasized that Grupa Ożarów was in fact fined twice: for its infringement of competition law as well as for the lack of procedural cooperation<sup>33</sup>.

The PLN 2,000,000 fine imposed on Grupa Ożarów in 2007 reflected a definite shift in the approach of the UOKiK President to the level of fines for non-cooperation within antitrust proceedings. Still, all other decisions imposing such fines between 2007 and 2010 were significantly lower<sup>34</sup> and concerned infractions in the provision of information. On 4 November 2010, the UOKiK President imposed however a fine of PLN 123,246,000 (EUR 30,000,000) on the mobile phone operator Polska Telefonia Cyfrowa<sup>35</sup> for its failure to cooperate

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<sup>27</sup> Decision of the UOKiK President of 22 March 2004, RPZ-7/2004.

<sup>28</sup> Decision of the UOKiK President of 8 December 2004, RŁO-13/2004.

<sup>29</sup> Decision of the UOKiK President of 8 May 2006, DAR-430-01/05/EK.

<sup>30</sup> Decision of the UOKiK President of 19 April 2007, DOK-48/07.

<sup>31</sup> Decision of the UOKiK President of 8 December 2009, DOK-7/09. The aforementioned fines are the highest ever imposed in a single case in history of the existence of the Polish antitrust authority.

<sup>32</sup> The precise amount of the fine was not made public.

<sup>33</sup> See in this scope pt III herein.

<sup>34</sup> The highest fine in that period of time equaled PLN 150,000 (EUR 41,867), it was imposed by the UOKiK President on Zakład Energetyczny Warszawa – Teren by decision of 12 December 2008, RWA-58/2008.

<sup>35</sup> Decision of the UOKiK President of 4 November 2010, DOK-9/2010.

in the course of an inspection conducted in its premises in connection with a suspected<sup>36</sup> cartel agreement on the Polish mobile television market. The obstruction was said to have consisted of a delay in the start of the dawn raid and preventing UOKiK officials from accessing certain premises. A fine of a very similar amount of PLN 130,689,900 (EUR 33,000,000)<sup>37</sup> was subsequently imposed on Polkomtel, another alleged participant of the same cartel for its obstruction of the inspection carried out simultaneously to that of Polska Telefonia Cyfrowa. Aside from delaying the start of the dawn raid, Polkomtel was accused of refusing to provide UOKiK officials with certain documents and a hard-drive disk from one of its computers. As the main antitrust proceedings have not yet been closed, reference to the potential fines is at this point impossible. It should be emphasized however that the fines for non-cooperation already imposed on both operators are the highest individual fines in the decisional practice of the UOKiK President so far. Having said that, both of the decisions were appealed by the mobile operators and thus their modification by the court cannot be excluded since the appeal proceedings are still pending.

## 2. Decisions of the Commission

When faced with the lack of procedural cooperation, the Commission has so far rarely exercised its competences to penalize such infractions in a separate decision. Indeed, stumbling against an undertaking's unwillingness to produce the requested documents or cooperate in any other ways, the Commission was most likely to address such issues in its final antitrust decisions<sup>38</sup>. Formally, the legal basis for the imposition of fines for procedural infractions within antitrust proceeding was for a long time found in Article 15.1 Council Regulation No 17/62 implementing Articles 81 and 82(4) of the Treaty ('Regulation 17/62')<sup>39</sup>, the legal predecessor of Regulation 1/2003. Regulation No 17/62 capped the maximum fine for procedural violations at the level of 5,000 ECU (later EUR) making past fines seem rather symbolic from today's point of view. For example, in the decision of 14 October 1994, the Commission imposed the equivalent of ECU 5,000 on Akzo Chemicals BV<sup>40</sup> for providing false

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<sup>36</sup> The main proceedings have not yet been completed.

<sup>37</sup> Decision of the UOKiK President of 24 February 2011, DOK-1/2001.

<sup>38</sup> I.e. as aggravating circumstances such as e.g. in the *Industrial Bags* case (Decision of 30 November 2005, case ref. COMP/38354) or the *Bitumen* case (Decision of 13 September 2006, case ref. COMP/F/38.456) where the fines for the primary infringement of competition law were raised by an additional 10%.

<sup>39</sup> OJ [1962] pp. 204–262, as last amended by Regulation No. 1216/1999, OJ [1999] L 148/5.

<sup>40</sup> Commission Decision 94/735/EC of 14 October 1994 (*Akzo Chemicals BV*).

information about the existence of its offices in certain cities, and for denying Commission representatives entry to its managements' offices. This decision can now be treated more as a curiosity than a basis for an evaluation of the level of Commission fines for procedural infractions or the infringement itself<sup>41</sup>. It is certainly not a coincidence that in the last years of the validity of Regulation 17/62, the Commission preferred to address non-cooperation in its final decisions<sup>42</sup>. By doing so, it could go around the fine cap imposed by its Article 15(1) and *de facto* increase the severity of the financial penalties imposed for infractions committed in the course of antitrust proceedings.

Taking the aforementioned into account, a representative analysis of the Commission's position as regards fines for non-cooperation within antitrust proceedings should be made on the basis of current EU Regulations. The latter cap the maximum amount of fines to be imposed in such cases at a much higher level of 1% of the company's yearly turnover. It was however only once that the Commission exercised its authority in this context under the new provisions. In the famous decision of 30 January 2008, a fine of EUR 38.000.000 was imposed on E.ON Energie AG<sup>43</sup> for the braking of a Commission seal placed in the course of an inspection in E.ON's premises. Even though the fine itself is of a clearly significant amount, the Commission emphasized that it was well below the theoretical maximum<sup>44</sup>. The financial penalty was moderated because it was the first time that a seal had ever been broken by a company subject to an inspection and the first time in which a fine was imposed under Article 23(1) Regulation 1/2003. The violation was however qualified as serious due to the fact that the broken seal was intended to secure a room in which all documents previously collected by the inspectors were stored (i.e. highly sensitive data). As these documents were not yet catalogued, the Commission was unable to ascertain whether, and if so which documents were actually removed by E.ON. In the course of the proceedings, the company denied having broken the seal listing a number of factors which could have caused the seal to break (the use of an aggressive cleaning product, the age of the seal and a high level of humidity<sup>45</sup>). The decision was however upheld in full by the General Court in its judgment of 15 December 2010<sup>46</sup>.

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<sup>41</sup> Nevertheless, cases existed where EU fines for non-cooperation did not reach the maximum level e.g. Commission Decision of 7 October 1992, case ref. IV/33.791 (*CSM*) imposing a fine of ECU 3.000 on CSM for its refusal to provide Commission officials with certain requested documents.

<sup>42</sup> E.g. *Industrial Bags* and *Bitumen* cases.

<sup>43</sup> Commission decision of 30 September 2008, case ref COMP/B-1/39.326 (*E.ON Energie*).

<sup>44</sup> The fine reached only 14% of the maximum possible level.

<sup>45</sup> Commission seals are made of plastic film, if removed, they do not tear, but show irreversible 'VOID' signs on their surface.

<sup>46</sup> Judgment of the General Court T-141/08 *E.ON Energie*, not yet reported.

Although the *E.ON.* decision is the only example of the Commission imposing a fine on the basis of Article 23.1 Regulation 1/2003, several other such cases are currently pending. Proceedings were opened in 2008 against Sanofi-Aventis<sup>47</sup> for an alleged obstruction of an inspection. The procedural violation took the form of an initial refusal to let the officials examine and copy relevant documents until the French authorities produced a national search warrant. Three other companies were targeted in 2010 – proceedings are currently pending against the Energetický a průmyslový holding and J&T Investment Advisors<sup>48</sup>, Suarez Environment<sup>49</sup> and Laboratoires Servier and Servier SAS<sup>50</sup>.

Increased activity of the Commission as regards procedural cooperation (lack thereof) within antitrust proceedings is thus certainly visible. More decisions of that type are to be expected shortly.

## V. Fine graduation

The latest fines imposed by both the UOKiK President and the Commission signalize the disappearance of the trend to treat procedural violations committed in the course of antitrust proceedings less severely than substantive infringements of competition law itself. The same or a similar level of fines as those imposed on Polska Telefonia Cyfrowa, Polkomtel and even *E.ON. Energie* could have easily been observed in final infringement decisions. Unfortunately however, neither of these decisions unambiguously defines or clarifies what factors were taken into account by the authorities when setting the amount of these fines. There are furthermore no UOKiK or Commission guidelines that directly consider the issue of fine graduation in procedural cases and it is thus necessary to turn to other sources in order to establish what factors should be taken into consideration here. First of all, the level of fines for non-cooperation within antitrust proceedings should remain in line with general principals of fine graduation<sup>51</sup> similarly to any other antitrust fine. Both

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<sup>47</sup> See Press release of 2 June 2008, MEMO/08/357.

<sup>48</sup> Suspected non-cooperation with Commission officials during inspections and non-disclosure of all documents relevant to the investigation, see press release of 28 May 2010, IP/10/627.

<sup>49</sup> Suspected of breaking a seal in the course of the inspection, see press release of 4 June 2010, IP/10/691.

<sup>50</sup> Suspected of providing misleading and incorrect information, see press release of 26 July 2010, IP/10/1009.

<sup>51</sup> As stated by the Polish Court of Competition and Consumer Protection (in Polish: *Sąd Ochrony Konkurencji i Konsumenta*; hereafter, SOKiK) in its judgment of 17 February 1999,

EU Regulations as well as the Competition Act contain specific provisions that indicate precisely which factors should be taken in consideration when setting the level of fines (i.e. the nature, gravity and duration of the infringement<sup>52</sup>). These factors are widely analyzed in both case law and doctrine<sup>53</sup>. Despite the fact that most of these discussions relate to fines for competition law infringements, rather than procedural non-cooperation, their conclusions should be taken into consideration in this context also.

First, since the given failure to cooperate takes place within given antitrust proceedings, the obstruction may by its nature influence the course and result of the main case. Therefore, the setting of fines for procedural infractions must take into consideration if they have influenced, and if so, to what a degree, the outcome of the primary proceedings. Antitrust authorities request information or documents from an undertaking in order to realize their statutory mission of finding and preventing competition law infringements<sup>54</sup>. By analogy, the objective of an inspection of the premises of a scrutinized undertaking is to verify the legality of its actions – to gather as much evidence as possible confirming the infringement of competition law or proving that no such violation took place<sup>55</sup>. If that objective has not been distorted by the procedural offence, the fine for non-cooperation should be fixed at a noticeable yet not excessive level<sup>56</sup>. In other words, when setting the fine, the authority should analyse what were the potential consequences of the obstruction and what ‘benefits’ occurred as its result<sup>57</sup>. The gain to the scrutinized undertaking should be analyzed by taking into consideration its market power and influence on the market (established by its turnover)<sup>58</sup>. As stated by the Court of First

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fines should also be in accordance with the axiological objectives of the Competition Act which aims to develop market competition (XVII Ama 78/98).

<sup>52</sup> Art. 111 Competition Act, Art. 23(3) Regulation 1/2003 and Art. 14(3) Regulation 139/2004 respectively whereby the latter, for unexplained reasons, refers only to the ‘gravity and duration’.

<sup>53</sup> See e.g. M. Król-Bogomilska, *Kary pieniężne w prawie antymonopolowym*, Warszawa 2001, pp. 135–151; M. Król-Bogomilska, ‘Kary pieniężne w polskim prawie antymonopolowym na tle europejskiego prawa antymonopolowego’ (1998) 7 *Państwo i Prawo*; M. Sachajko, ‘Administracyjna kara pieniężna jako element systemu sankcjonowania naruszeń wspólnotowych oraz polskich zakazów praktyk ograniczających konkurencję’ [in:] C. Banasiński, M. Kępiński, B. Popowska, T. Rabska (eds), *Aktualne problemy polskiego i europejskiego prawa ochrony konkurencji*, Warszawa 2006, p. 193 and positions indicated therein.

<sup>54</sup> Decision of the UOKiK President of 20 July 2010, RPZ-14/2010, p. 10.

<sup>55</sup> Decision of the UOKiK President of 4 November 2010, DOK-9/2010, p. 12, pt. 44.

<sup>56</sup> As for the form in which such fine should be imposed, i.e. as an independent fine or as an element of the ‘main’ substantive fine.

<sup>57</sup> Judgment of SOKiK of 24 May 2006, XVII Ama 17/05.

<sup>58</sup> See M. Sachajko, *Administracyjna kara pieniężna...*, p. 195



Instance<sup>59</sup>, in assessing the gravity of an infringement regard must be had to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case<sup>60</sup>. Therefore, considered should also be the subject matter of the main proceedings where the failure to cooperate took place. For instance, if it occurred during a cartel investigation, it would be reasonable to expect a higher fine than if it occurred in the course of a notification procedure for concentrations.

Duration should also be assessed when possible in cases concerning non-cooperation despite it being *prima facie* linked to the antitrust infringement instead. What may potentially have a decisive influence on the effectiveness of a procedural obstruction is, in particular, the time during which an undertaking refused to submit to a dawn raid and delayed officials from entering its premises<sup>61</sup>. Obviously, it is the surprising character of the dawn raid which should make it impossible for the undertaking to conceal or alter any documents, plan the content of statements etc. Nevertheless, the aforementioned does not mean that, a dawn raid has to start immediately<sup>62</sup> upon the officials' arrival in the company premises. The undertaking must at least have the opportunity to review the authorization documents before consenting to the inspection, let the doorman contact its manager, in-house lawyer or the company's external counsel etc. The time needed for a dawn raid to start has to be analyzed taking into consideration the size and character of the company – it should be short enough however to avoid delaying tactics<sup>63</sup>.

When fixing the level of a fine, antitrust authorities are of course also bound by general principles of EU law such as proportionality or observance of fundamental rights<sup>64</sup> as well as general rules of administrative law<sup>65</sup>. The sanction cannot be disproportionate to the offence. The less disruptive the behavior, the less severe the sanction should be. It should be stressed that fines can be imposed under both EU Regulations and the Competition Act

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<sup>59</sup> Currently the 'General Court of the EU'.

<sup>60</sup> Judgment of the Court of First Instance of 5 April 2006, T-279/02 *Degussa*, ECR [2006] II-897, also judgment of the European Court of Justice (currently Court of Justice of the EU) of 10 May 2007 C-328/05 P *SGL Carbon*, ECR [2007] I-3921, para. 43.

<sup>61</sup> Duration of the infringement was addressed in particular in the decision of the UOKiK President concerning Polska Telefonía Komórkowa (DOK-9/2010), see para. 98.

<sup>62</sup> Undertaking are obliged to submit to an inspection without delay rather than immediately.

<sup>63</sup> Similarly P. Berghé, A. Dawes, 'Little pig, little pig let me come in': an evaluation of the European Commission's powers of inspection in competition cases' (2009) 30(9) *ECLR* 8.

<sup>64</sup> See judgment of the General Court of the European Union in the *E.ON. Energie* case, para. 274, similarly M. Sachajko, 'Administracyjna kara pieniężna...', p. 199.

<sup>65</sup> Compare M. Wincenciak, *Sankcje w prawie administracyjnym i procedura ich wymierzania*, Warszawa 2008, p. 97.

irrespective of the fact whether the procedural violation was intentional or not (i.e. committed by negligence). Case law and doctrine emphasize however that the scale of the fine should above all reflect the level of guilt associated with the infringement<sup>66</sup>.

It should be noted finally that Polish case law and doctrine suggest that the level of fines in antitrust cases should depend on the level of the threat to the public interest associated with the violation (i.e. how possible is the occurrence of negative effects for competition and consumers<sup>67</sup>). However, the form in which the public interest is threatened or violated by a competition law infringement (e.g. by cartels) and a failure to cooperate within antitrust proceedings seems slightly different because competition is not distorted directly in the latter case. It may also occur nevertheless that an inadequate level of fine (too mild) would make undertakings ponder what would be more beneficial to them – a fine for non-cooperation or a fine for an infringement of competition law. Such situation is of course unacceptable.

## VI. Conclusions

Fines for the failure to cooperate within antitrust proceedings are a powerful tool available to antitrust authorities in their fight against those that infringe competition law. This is true particularly because potentially severe fines for procedural violations can be imposed on the offender irrespective of the course of the main case and actual antitrust violation. Nevertheless, by no means should they be treated as a substitute for addressing the primary infringement. Fines for non-cooperation should have a preventive character without violating the right of defense and fair treatment of the scrutinized undertakings. Recent case law suggests that fines for the lack of cooperation are increasing, especially in the case of obstructions in the course of an inspection where the emotions of both the inspectors and the inspected play frequently a role. If antitrust authorities do meet with a failure to cooperate, high fines should not be imposed automatically simply because no incriminating material was found. Each case should be analyzed separately, taking into consideration all of the relevant factors both mitigating and aggravating. At the same time however, they should be considered in the light of the antitrust proceedings where they occurred in the first place.

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<sup>66</sup> See M. Król-Bogomilska, *Kary pieniężne w prawie...*, p. 90 and 93.

<sup>67</sup> Judgment of the Court of Competition and Consumer Protection of 24 May 2006, XVII Ama 17/05; M. Król-Bogomilska, *Kary pieniężne w prawie...* p. 91, see also judgment of the Polish Constitutional Tribunal of 5 May 2009, P 64/07.

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