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Polish Antitrust Law in its Fight Against Cartels – Awaiting a Breakthrough

by

Rajmund Molski*

"We have to agree on prices [...] Polish law does not protect us and the legislator does not recognize that there is need to introduce minimum prices. We cannot protect ourselves because someone prosecutes us at once"[1].

"Attracting clients by offering lower remuneration represents a particularly glaring case of unfair competition"[2].

CONTENTS

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1 From the article entitled "Skazani na zmowę" ["Condemned to collude"] published in the business newspaper *Drogowskaz* after the owners of 24 driving schools in Bydgoszcz were fined for price fixing, as quoted in *Zmowy cenowe*, UOKiK, Warszawa 2009, p. 15.

2 A clause from the Notary's Public Code of Professional Ethics (*sic!*) declared by the Supreme Court as manifestly infringing the principles of the free market, non-ethical and non-compliant with the binding legal order; see judgment of 7 April 2004, III SK 28/04, UOKiK Official Journal 2004 No. 3, item 315; M. Król-Bogomilska, "Praktyka Krajowej Rady Notarialnej ograniczająca konkurencję" (2007) 4 *Glosa* 112–132.

Abstract

This paper presents the basic elements of the Polish anti-cartel regime and suggests what potential changes would be likely to improve it. Considered here are: the legal framework of anti-cartel enforcement in Poland as well as the performance of the Polish antitrust authority in its fight against cartels. Special attention is devoted to the substantive provisions of the cartel prohibition, investigatory powers of the antitrust authority, including the leniency programme, and the arsenal of sanctions available in cartels cases. The paper will show that Poland has sound anti-cartel laws and an antitrust authority determined to enforce them effectively. Notwithstanding its generally positive conclusions, the paper will conclude with some suggestions *de lege ferenda* which are likely to improve the Polish anti-cartel regime making its fight against cartels more dynamic.

Classifications and key words: cartels, cartel prohibition, investigatory powers, leniency programme, anti-cartel sanctions, anti-cartel enforcement.

I. Introduction

Cartel[3] agreements are a direct assault on the principles of competition and universally recognised as the most harmful form of anti-competitive conduct[4]. As stressed in the 1998 OECD Recommendation, cartels are "the most egregious violations of competition law". Today, the world's antitrust

[3] In this article, the term "cartel" means "hard core cartel", as defined in the 1998 OECD Recommendation Concerning Effective Action Against Hard Core Cartels, C(98)35/FINAL, OECD 1998 (hereafter, the 1998 OECD Recommendation), i.e. "an anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce".

[4] *Building Blocks for Effective Anti-Cartel Regimes*, Report prepared by the ICN Working Group on Cartels, ICN 4th Annual Conference, Bonn 6–8 June 2005, p. 1.

agencies are united in agreement that combating cartels, "the supreme evil of antitrust", should be their top enforcement priority[5].

Considering that the potential for anti-competitive harms associated with cartels is significantly higher in emerging economies than in developed countries[6], one could argue that Poland should implement an even stricter cartel policy than the EU or the US. Yet, rather than combating anti-competitive activities, the removal of their sources was the focus of the implementation of antitrust law and policy at the beginning of Poland's transition period, because that seemed the more pressing issues for an economy in transition. At that time, the Polish antitrust authority was mainly concerned with the development of competition rather than with its protection and so most of early enforcement concentrated on dominance, while restrictive agreements were of lower priority[7]. All the more so, since the antitrust authority was required by law until 2007 to formally review all received complaints, most of which concerned unilateral conduct.

Moreover, antitrust enforcement was initially rather lenient. Sanctioning of anti-competitive practices was not particularly restrictive, seeing as undertakings were still adapting to the new market conditions. Many companies were only just "learning" how to compete, hence the imposition of strict penalties was aimless. As the Polish economy had grown and matured and its market players got accustomed to competition and more familiar with antitrust rules, the time for a more vigorous antitrust law enforcement has come, especially with regard to most harmful violations. Indeed, there are reasons to believe that intensifying the fight against cartels is becoming one of the top priorities not only in declarations, but also in the enforcement practice of the President of the Office of Competition and Consumer Protection (UOKiK). It is true however, that the vast majority of antitrust proceedings in Poland still concerns abuse (see Table 1 in section III).

According to the Polish Competition Policy for 2008–2010[8], adopted by the Council of Ministers and confirmed in the announcement of the UOKiK President[9], one of its main objectives is to improve the effectiveness of the activities of the antitrust authority. Its effectiveness should improve, *inter alia*, in the context of finding, remedying and punishing of anti-competitive

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[5] *Building Blocks*..., p. 2, 5, 9.

[6] See M.M. Shed, "Formulating Antitrust Policy in Emerging Economies" (1997) 86 *Georgetown Law Journal* 470.

[7] M. Wise, "Review of Competition Law and Policy in Poland" (2003) 5 *OECD Journal of Competition Law and Policy* 91.

[8] *Polityka konkurencji na lata 2008–2010*, Warszawa 2008, p. 77–85

[9] See Competition Policy 2008-1010, UOKiK – Press release of 15 July 2008, available at http://www.uokik.gov.pl/en/press_office/press_releases/art121.html

practices, assuming that it is possible to fight them effectively on the basis of existing antitrust rules. That declaration may translate into more frequent inspections ("dawn raids") and stiffer penalties for antirust infringements, cartels in particular. Threatening undertakings violating antitrust law with higher fines, greater emphasis is also to be placed on the leniency programme.

The purpose of this article is to present and evaluate the basic elements of the Polish anti-cartel regime as well as to offer some suggestions *de lege ferenda* that would be likely to improve it. The article is based on the analysis of relevant Polish regulations, case law, enforcement data and doctrine, supplemented by comparative references to antitrust regimes of the EC and some other jurisdictions.

II. Legal framework of anti-cartel enforcement in Poland

1. Substantive provisions for cartel prohibition

The legal basis for anti-cartel enforcement in Poland lies in the Act of 16 February 2007 on Competition and Consumer Protection[10] (hereafter, the Competition Act) and a number of implementing regulations including, in particular, Regulation of the Council of Ministers of 26 January 2009 concerning the mode of proceeding in cases of undertakings' applications to the President of the UOKiK for immunity from or reduction of fines[11] (hereafter, the Leniency Regulation) and three regulations on the exemption from the prohibition of agreements restraining competition concerning: R&D agreements[12]; technology transfer agreements[13] and agreements between insurance companies[14] (the remaining two block exemptions relate to vertical agreements). Binding laws are supplemented by two important soft law Guidelines: 1) on setting fines for competition restricting practices[15] (hereafter,

[10] Journal of Laws No. 50, item 331, as amended.

[11] Journal of Laws No. 20, item 109.

[12] Journal of Laws of 2007 No. 30, item 1692.

[13] Journal of Laws of 2007 No. 137, item 963.

[14] Journal of Laws of 2007 No. 137, item 964. On block exemptions from the prohibition of anti-competitive agreements under the EC and Polish law see A. Jurkowska, T. Skoczny (eds.), *Wyłączenia grupowe spod zakazu porozumień ograniczających konkurencję we Wspólnocie Europejskiej i w Polsce*, Warszawa 2008.

[15] UOKiK Official Journal 2008 No. 4, item 33.

the Fining Guidelines), and 2) on the leniency programme[16] (hereafter, the Leniency Guidelines), applied from the beginning of 2009.

None of the aforementioned laws or guidelines contains the term "cartel", as occasionally used by the doctrine and case law. Instead, Article 6 of the Competition Act speaks of "agreements restricting competition", while Article 4.5 contains a broad definition of "agreements". Similar to Article 81 EC, Article 6 of the Competition Act prohibits agreements the purpose or effect of which is to eliminate, restrict or cause any other infringement of competition in the relevant market.

Polish antitrust law, while establishing a general prohibition of agreements restricting competition, does not contain a general definition of such an agreement or practice although the Competition Act contains a list of practices infringing its Article 6 prohibition. The list is not exhaustive, nor does it expressly distinguish between horizontal and vertical agreements or practices. It covers all hard core violations of antitrust law, including cartels. Similar to EU case law, Polish courts clarified that to establish an infringement of the cartel prohibition (Article 6 of the Competition Act or Article 81 EC) the UOKiK President does not usually have to prove that an agreement had anti-competitive effects, where he/she has evidence that it had an anti-competitive "object"[17].

Article 7 and 8 of the Competition Act contain three important exemptions from the prohibition of anti-competitive agreements: (a) the *de minimis* exemption; (b) the rule of reason, and (c) block exemptions. The only exemption which might sometimes apply to cartels is the rule of reason. The *de minimis* test, pertaining to agreements of minor importance, excludes from its ambit all horizontal and vertical agreements containing hard core restrictions (price fixing, output restrictions, market allocation and bid rigging), irrespective of the market shares of their parties[18]. Similarly, none of the block exemptions currently in force exempts cartels – while creating a "safe harbour" for groups of agreements fulfilling the criteria of the rule of reason, each of them contains a list of "black clauses" – hard core restraints including cartel practices – disqualifying them from the benefit of the block exemption.

The Polish approach to the rule of reason is similar to that associated with Article 81 EC. Article 6 of the Competition Act contains no *per se* prohibitions

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[16] Accessible at http://www.uokik.gov.pl/en/press_office/press_releases/art147.html

[17] See e.g. judgment of the Court of Competition and Consumer Protection of 5 September 2005, XVII Ama 63/04, unpublished; judgment of the Court of Appeal in Warsaw of 4 December 2007, VI ACa 848/07, unpublished.

[18] See decision of the UOKiK President of 7 April 2008, DOK 1/2008, unpublished, and decision of the UOKiK President of 29 December 2006, DAR-15/2006, UOKiK Official Journal 2007 No. 1, item 5.

because all agreements are theoretically susceptible to exemption based on the rule of reason[19]. Nevertheless, both case law and most of Polish commentators are sceptical and unsympathetic to the legalisation of cartel practices under the rule of reason in the form of the so-called "crisis cartels"[20]. "Defensive cartels" on the other hand, constitute an example of an otherwise illegal cartel activity, which might be exempted on this basis[21].

The jurisdictional reach of the cartel prohibition is based on the pure "effects doctrine" (see Article 1(2) of the Competition Act)[22]. While no provision of Polish law explicitly exempts export cartels, such rule can be inferred, provided that they do not cause effects in Poland. If exposed to extraterritorial interventions of foreign antitrust authorities, participants of export cartels cannot seek protection in "blocking" or "claw-back" statutes, because Polish law, similar to EC law, does not contain such rules[23].

2. Investigatory powers

According to Articles 47-49 of the Competition Act, an investigation in a cartel case may be conducted in the form of explanatory proceedings or, if necessary, full antitrust proceedings, instituted on an *ex officio* basis. Explanatory proceedings may (and often do) precede the institution of a formal investigation. They allow the authority to initially determine whether an infringement took

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[19] See e.g. D. Miąsik, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 460; K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2008, p. 306–307; R. Wesseling, *The Modernisation of EC Antitrust Law*, Oxford 2000, p. 103.

[20] See e.g. decision of the UOKiK President of 18 September 2006, DOK-107/2006, UOKiK Official Journal No. 4, item 53; judgment of the Court of Competition and Consumer Protection of 10 September 2003, XVII Ama 136/02, (2004) 7–8 *Wokanda*, item 95; A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa*..., p. 406; D. Miąsik, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa*..., p. 460.

[21] See A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa*..., p. 431.

[22] See judgment of the Antimonopoly Court of 24 January 1991, XV Amr 19/90 (1992) 5 *Wokanda*, item 37; judgment of the Supreme Court of 10 May 2007, III SK 24/06, (2008) 9–10 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych* , item 152; R. Molski, "Eksterytorialne stosowanie prawa ochrony konkurencji" (2002) 3 *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 28–29; 28–29; D. Miąsik, T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa*.., p. 64–67; B. Fuchs, *Prawo kartelowe a prawo prywatne międzynarodowe*, Katowice 2006, p. 110–114.

[23] "Blocking" provisions were provided for in the second (actually first serious) Polish after-war Antimonopoly Act of 1990; see S. Gronowski, *Ustawa antymonopolowa. Komentarz*, Warszawa 1996, p. 373–376; T. Ławicki, *Ustawa o przeciwdziałalniu praktykom monopolistycznym. Komentarz*, Warszawa 1998, p. 128–130.

place that would justify the initiation of full proceedings against, for instance, cartel participants. Explanatory proceedings are not conducted against a particular undertaking – they have no parties. Only procedural infringements may be sanctioned in the course of explanatory proceedings. A violation of the cartel prohibition can be established and financial penalties imposed only after the conclusion of full antitrust proceedings.

The fight against cartels is a legally and practically demanding task, particularly because their members are by definition secretive[24]. Antitrust authorities, also in Poland, must therefore undertake great efforts to detect concealed cartels. In practice, of particular difficulty is the localisation and retrieval of evidence necessary to establish cartel participation. Inspired by the experiences of the Commission and the US Department of Justice, the UOKiK President applies two particular techniques of evidence detection in cartel cases. The first is a technique of stealth: surprise inspection of business premises – "dawn raids". The second technique is one of cunning – the offer of leniency[25]. Dawn raids rely upon an element of surprise exploiting an unavoidable level of human carelessness. Leniency relies upon an element of uncertainty exploiting the natural nervousness inherent to a cartel conspiracy. Both can trigger the information flow and "bust" a cartel[26].

Unannounced inspections are a key investigative tool in cartel cases in light of the seriousness and clandestine nature of cartel conduct, and the possibility that evidence could be altered, hidden or destroyed[27]. Dawn raids are especially useful when used in the course of explanatory proceedings[28]. Their legal basis lies in Articles 91 and 105a-105(l) of the Competition Act which supports a distinction being made between a routine inspection, based on the consent and cooperation of the inspected company, and a search. The latter can be performed in specific circumstances only, in particular, in cases of suspicion that an undertaking (or other entity) would be more likely to conceal or destroy the requested documents rather than present them, or

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[24] See *Building Blocks*..., p. 1.

[25] C. Harding, J. Joshua, *Regulationg Cartels in Europe: A Study of Legal Control of Corporate Delinquency*, Oxford 2003, p. 165.

[26] Ibidem.

[27] C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 868.

[28] Dawn raids are most often performed during this type of proceedings, yet before institution of antitrust proceedings, and such inspections are recognised as most effective, in terms of quality and quantity of evidence collected, see E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2002, p. 235; K. Kohutek [in:] K. Kohutek, M. Sieradzka, *Ustawa*..., p. 802; M. Swora, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa*..., p. 1533; C. Banasiński, E. Piontek (eds.), *Ustawa*…, p. 870.

in cases where an undertaking refuses to cooperate (e.g. denies access to evidence)[29].

To illustrate, during a routine inspection, inspectors are only entitled to request documents rather than actually search for them. Typical dawn raids (without a search) can be carried out on the UOKiK President's authorisation (without a court order). Inspectors are entitled, *inter alia*, to: 1) enter the premises and means of transportation belonging to the inspected undertaking, 2) demand access to files, books and all kinds of documents or data carriers related to the subject of the inspection, 3) make notes and require oral explanations. Upon a special ruling of the UOKiK President, inspectors are also allowed to seize, for up to 7 days, any objects that may represent evidence in the case.

A search in the course of an inspection may be performed only with the permission of the Court of Competition and Consumer Protection issued upon a request of the UOKiK President. The court warrant cannot be challenged. A search may also be conducted separately from an inspection. More generally, it may take place prior to antitrust proceedings (a search on *ad hoc* basis), in the event of a justifiable suspicion of a serious breach of antitrust rules (no doubt cartels can be qualified as such an infringement) and, in particular, whenever the obliteration of evidence may occur (not an unusual scenario in cartel cases). While the scope of an inspection is limited to business premises or company property, a search may also cover private residences or cars, if there are justifiable grounds to assume that they might hold relevant evidence. A search of non-business premises can be carried out only by the police, accompanied by an authorised employee of the UOKiK and/or other authorised persons (e.g. individuals having special knowlegde).

Pursuant to Article 50 of the Competition Act, undertakings are obliged to provide "all necessary information and documents" upon request of the UOKiK President. This is a widely used mandatory version of a request letter (Article 18(2) of Regulation No 1/2003[30]). During cartel investigations, the UOKiK President may summon witnesses or even experts in cases requiring special information. Generally, the UOKiK President has at his/her disposal investigative powers comparable to those conferred on the Commission under Regulation No 1/2003.

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[29] See judgement of the Supreme Court of 7 May 2004, III SK 34/04, UOKiK Official Journal 2004 No. 4, item 330; judgement of the Court of Competition and Consumer Protection of 11 August 2003, XVII Ama 123/02, UOKiK Official Journal 2004 No. 1, item 281; D. Swora, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa*..., p. 1546, 1548, 1552; C. Banasiński, E. Piontek (eds.), *Ustawa*…, p. 765, 838, 873; E. Modzelewska-Wąchal, *Ustawa*..., p. 228.

[30] Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1, as amended.

It seems fair to say that under the Competition Act (see various Articles in Title VI, Chapter 1 and 2) due process and key rights of defence are generally ensured in cartel investigations. However, due to the vagueness of the law and lack of case law concerning the applicability of legal professional privilege rules to cartel cases, this issue (especially relevant to searches) remains controversial. Although there are both legal and rational arguments supporting the position that limited legal privilege should be respected at least in relation to certain documents (e.g. legal opinions of external lawyers)[31], some authors are of the opinion that this concept is not recognized in Poland[32]. However, at least in one case reported to date in the literature UOKiK's inspectors applied similar standard, confirmed afterwards by the Court of Competition and Consumer Protection[33].

3. Armoury of sanctions

Under the Competition Act, all sanctions for violating the cartel prohibition are of administrative or civil nature. Two categories of sanctions are available: monetary and non-monetary ones both of which are corporate in nature. Individuals (natural persons) cannot be sanctioned for cartel offences unless they can be qualified as an "undertaking" (e.g. liberal professions). They can be fined however for procedural infringements in the course of a cartel investigation.

3.1. Administrative sanctions

An order to terminate all cartel activities represents the most straightforward legal instrument in the repertoire of sanctions available to the UOKiK President. If the authority declares that a practice is restricting competition, it may order an undertaking charged with cartel conduct (violating Article 6 of the Competition Act or Article 81 EC) to refrain from it. An order to terminate cartel practices cannot require anything further from its addressee than to desist from that conduct (it is not possible to require positive action such as the implementation of an "antitrust compliance programme")[34].

[31] See B. Turno, "Zagadnienie tajemnicy adwokackiej na gruncie prawa konkurencji", [in:] C. Banasiński, M. Kępiński, B. Popowska, T. Rabska (eds.), *Aktualne problemy polskiego i europejskiego prawa ochrony konkurencji*, UOKiK, Warszawa 2006, p. 184–189.

[32] See e.g. M. Sendrowicz, M. Szwaj, *Prawo konkurencji. Podstawowe pojęcia*, UOKiK, Warszawa 2007, p. 15.

[33] See order of the Court of Competition and Consumer Protection of 4 April 2007, XVII Ama 8/06, unpublished, as quoted in C. Banasiński, E. Piontek (eds.), *Ustawa*..., p. 878–879.

[34] See judgment of the Court of Appeal in Warsaw of 22 June 2007, VI ACa 8/07, unpublished; A. Jurkowska [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa*..., p. 725–726; C. Banasiński, E. Piontek (eds.), *Ustawa*..., p. 298.

The imposition of administrative fines, coupled with the leniency programme, constitutes the most efficient weapon in the Polish anti-cartel arsenal. According to Article 106 of the Competition Act, the UOKiK President may impose – on an undertaking involved in a cartel – a financial penalty (fine) of up to 10% of its revenue in the accounting year prior to the year of the penalty. In order to protect the integrity and effectiveness of cartel investigations, separate fines may be imposed on undertakings as well as executives, employees and other individuals related to them, if they fail to meet various procedural obligations (eg. falsify, conceal or destroy documents or information) seeking to obstruct efforts of antitrust enforcers[35]. These fines can amount to the maximum of 50 million EURO (for an undertaking) or fifty-fold the average salary[36] (for an individual). The liable undertakings or individuals may face these sanctions even if they were not aware of the antitrust violation. However, financial penalties imposed on employees, former or current, can be compensated by the undertaking.

Subject to certain limits, the UOKiK President enjoys notable discretion when imposing fines for cartel infringements although he/she remains bound by the statutory maximum imposed for this violation. When setting the amount of the fine, the duration, gravity and circumstances of the infringement as well as past antitrust violations are to be taken into account first of all (Article 111 of the Competition Act). However, these general statutory criteria are rather vague and not comprehensive. Additional clarification can be found in case law which instructs the UOKiK President to consider in this context also issues such as: fault (whether the infringement was intentional or negligent)[37]; extent to which the infringement harmed the public interest[38]; economic potential of the fined undertaking[39] and financial benefits obtained from the infringement[40].

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[35] These penalties are consistent with broad consensus that obstruction of cartel investigations is a roadblock to successful anti-cartel enforcement and that punishment for impeding a cartel investigation should be on par with punishment for the original infringement; see *Obstruction of Justice in Cartel Investigations*, Report to the ICN Annual Conference, Cape Town, May 2006, p. 2.

[36] I.e. an average monthly salary within the enterprise sector in the last month of the quarter preceding the day of issuance of a decision by the UOKiK President, published by the President of the Central Statistical Office (see Article 4.16 of the Competition Act).

[37] See judgment of the Antimonopoly Court of 9 April 1997, XVII Ama 3/97, unpublished; judgment of the Court of Competition and Consumer Protection of 24 May 2006, XVII Ama 17/05, UOKiK Official Journal 2006 No. 3, item 48.

[38] See judgment of the Supreme Court of 27 June 2000, I CKN 793/98, unpublished.

[39] See judgment of the Antimonopoly Court of 14 November 2001, XVII Ama 111/00, UOKiK Official Journal 2002 No. 1, item 46; judgment of the Supreme Court of 24 April 1996, I CRN 49/96, (1996) 9 *OSNCP* 1996, item 124.

[40] See judgment of the Supreme Court of 24 April 1996, I CRN 49/96, (1996) 9 *OSNCP*, item 124.

Further clarifications are available in the soft law rules contained in the Polish Fining Guidelines. While not legally binding, the UOKiK President declared that she will follow them which effectively means that the authority imposed a limit on the exercise of its own discretion. The UOKiK President must therefore observe the Fining Guidelines, otherwise it could be found to be in breach of general principles of law such as equal treatment or the protection of legitimate expectations. In practice, the act not only promotes transparency in respect to the methodology of setting fines but also ensures impartiality. It allows businesses to make a preliminary estimation of the fine which they may face should they breach antitrust law, including the cartel prohibition. However, as the Court of First Instance stated with respect to the EC Fining Guidelines, an observation that can be related to their Polish counterpart, "[t]he objective of the Guidelines is [...] transparency and impartiality, and not the foreseeability of the level of the fines"[41]. The Fining Guidelines may contribute to the development of the Polish leniency scheme because they help potential applicants to estimate the gain associated with whistleblowing. No doubt, the UOKiK President also hopes that increased transparency will make his/her decisions less vulnerable to challenges in courts.

According to the Fining Guidelines, the UOKiK President takes into account the harmfulness and duration of the infringement as well as relevant mitigating and aggravating factors. In line with the Competition Act, the Fining Guidelines refers the fine to the revenue in the year prior to the year of the imposition of the fine (up to the statutory limit of 10% revenue). As a result, the Polish fining system differs therefore from the method used by the Commission, who bases fines upon the value of the sales of the goods/services related to the infringement in the relevant geographic area within the EEA (sales of the last business year of the participation in the infringement)[42].

Under the Fining Guidelines cartels are qualified as a very serious violation, which translates into the highest level of the basic amount of fine (above 1% but not more than 3% of revenue). Mitigating and aggravating circumstances, listed non-exhaustively in the Fining Guidelines, may increase or decrease the amount of the fine for cartel infringement. The list of mitigating circumstances comprises e.g.: passive role in the infringement, acting under

[41] Judgment of the Court of First Instance of 15 March 2006 in Case T-15/02 *BASF v Commission (Vitamins)*, [2006] ECR II-497, para. 250; see also W. P. J. Wils, "The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis" (2007) 30 *World Competition* 207-208 (arguing that a degree of discretion in fining policy has to be retained, all the more so because attempts to achieve full foreseeability would inevitably lead to under-deterrence in some instances or disproportionately high fines in other instances).

[42] See Point 1 of the Fining Guidelines and Points 12, 13 and 17 of the Guidelines on the method of setting fines imposed pursuant to Article 23(a) of Regulation No. 1/2003, OJ [2006] C 210/2.

coercion, abandonment of the anti-competitive practice before institution of the antitrust proceedings. Aggravating factors are, for instance: performing as the leader or initiator of the infringement, using coercion, recidivism. The application of the Fining Guidelines is likely to result in a significant increase in the level of fines imposed on cartelists, which may be close to or even reach the statutory limit.

3.2. Criminal sanctions

According to Polish antitrust law, cartel behaviour does not constitute a criminal offence – the Competition Act does not provide criminal sanctions for violating the cartel prohibition. However, under Article 305 of the Act of 6 June 1997 – the Penal Code[43], bid rigging in a public tender is a crime that is subject to an imprisonment period of up to three years. In addition, under Article 286 of the Penal Code, bid rigging in a private tender could potentially be qualified as fraud[44] although, to the best of the author's knowledge, this supposition has not been confirmed in case law[45]. If collusive conduct constitutes a criminal violation, the UOKiK President conducts his/her proceedings against corporate cartel participants. Independently, the public prosecutor conducts his/her criminal proceedings against individuals. Immunity (full or partial) granted to a corporate informant has no bearing on the individual's possible criminal liability. For instance, the Penal Code (Articles 39^2 and 41) provides that a person may be prohibited from holding a specific position, performing a specific profession or conducting a specific economic activity as penalty for bid rigging.

The fact that only one category of cartels was criminalized in Poland suggests that the legislator[46] considers cartels affecting public institutions to be the most reprehensible, and thus deserving of much stiffer sanctions. On the other hand, lack of criminal sanctions for other types of cartels may be perceived as a symptom of a generally hesitant attitude in Poland (more generally, Europe) to actively prosecute and severely punish "white collar" crimes.

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[43] Journal of Laws 1997 No. 88, item 553, as amended.

[44] See e.g. A. Wróbel, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna*. *Komentarz*, Vol. III, Kraków 2006, p. 846, 848.

[45] Interestingly, German courts have upheld the application of the general offence of fraud under German law to deal with a case of bid rigging; see T. Lampert, S. Götting, "Opening Shot for Criminalisation of German Competition Law?" (2003) 24 *European Competition Law Review* 30–31.

[46] Also in Austria and Germany.

3.3. Civil sanctions

Polish antitrust law provides for only one direct civil sanction for cartel practices. According to Article 6(2) of the Competition Act, agreements identified as cartels are ex lege null and void. The sanction of nullity is presumed to be absolute with erga omnes effect – every entity (including cartel participant) may refer to it[47]. It has to be noted that the sanction of nullity affects only agreements and decisions, which constitute legal (juridical) acts. Concerted practices (having by nature no underlying legal instrument that can be said to be null and void) are therefore not covered by this sanction[48]. Still, the sanction of nullity generally lacks bearing in the context of cartels seeing as members of a naked cartel would not normally consider trying to enforce it in a court[49]. Thus, nullity is not a deterrent to those that should be deterred.

The Competition Act does not contain a direct legal basis for private enforcement of the cartel prohibition. Such legal basis can be found in the provisions of the Act of 23 April 1964 – the Civil Code[50]. Compensation in cartel cases may be pecuniary or non-pecuniary. Pecuniary compensation, which has the most deterrent potential of all civil sanctions in cartel cases, can comprise: 1) "typical" damages, granted pursuant to general rules, and 2) *restitutio in integrum*. It is very difficult to assess the manner in which Polish courts might calculate damages in cartel cases since there are no specific provisions (or even non-binding guidelines) or case law on that subject. Accordingly to the basic rules of Polish civil law, compensation in such cases will likely cover all losses incurred (out-of-pocket losses or *damnum emergens*), benefits that could have been obtained (lost profits or *lucrum cessans*) and due interest[51]. For instance, the calculation of damage in a price-fixing cartel would be based on the difference between fixed and market prices. Still, assessing damages can be difficult.

Polish civil law contains no statutory rules on the concept of "passing on defence" and the closely linked issue of "indirect purchasers" even though they could be potentially employed pursuant to general rules on awarding damages. A defendant is entitled to invoke various arguments to demonstrate that the plaintiff has not incurred losses due to the contested practice. Thus, in proceedings brought by direct purchasers (e.g. wholesalers of cartelised

[47] See decision of the UOKiK President of 30 April 2007, DOK-53/07, unpublished.

[48] See T. Skoczny, W. Szpringer, *Zakaz porozumień ograniczających konkurencję*, Warszawa 1996, p. 45; P. Podrecki, *Porozumienia monopolistyczne i ich cywilnoprawne skutki*, Kraków 2000, p. 189–190; A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa*..., p. 432.

[49] See A. Jones, B. Sufrin, *EC Competition Law: Text, Cases, and Materials*, Oxford 2007, p. 125.

[50] Journal of Laws 1964 No. 16, item 93, as amended.

[51] A. Jurkowska, "Antitrust Private Enforcement – Case of Poland" (2008) 1 *YARS* 67, 69.

goods), the defendant could escape liability by showing that they escaped loss because the overcharge was passed on to downstream buyers. Similarly, there are no formal legal obstacles for indirect purchasers (such as end-distributors or end-customers) to bring anti-cartel actions before the court, provided that they were impaired by the infringement – they must be able to show the chain of adequate causation. However, in the absence of relevant case law, it is very difficult to predict the effectiveness of actions brought about by indirect purchasers, as well as of the "passing on defence".

Damages awarded in cartel cases cannot exceed the amount of loss incurred – compensation cannot enrich the injured party. Punitive (exemplary) damages or damages multiplied (such as American treble damages) are not available because, in principle, they are not recognised by Polish law. The lack of economic incentives to pursue competition based damages claims (damages are only compensatory in nature) and the time-consuming and costly nature of court proceedings (excessively high court fees) discourage injured parties from pursuing their rights in Poland.

A private anti-cartel case can be initiated following a final decision of the UOKiK President or before the authority's ruling – the closure of antitrust proceedings is not a requirement for filing a civil claim. However, in "follow on" actions, the administrative decision affirming an infringement is binding for the civil court – it has a prejudicial character – constituting proof of the infringement. In "stand alone" cases, where no final decision of the UOKiK President exists declaring that a breach of antitrust law took place, the court is free to decide for the sake of the plaintiff[52].

At the moment, Polish civil procedure does not recognise collective claims or class actions[53]. However, the Polish Sejm on 5 November 2009 passed legislation introducing the institution of "group proceedings" (collective redress). The bill, sent to the Senat, provides an opportunity for a group of at least 10 entities to file a single action, if factual circumstances justifying the demand are common to them. While members of the group would need to consent to an action being taken in their name (opt-in model), contingency fee arrangements, where lawyers are paid out of the awarded damages, are to be allowed – up to 20% of the award (currently deontological rules are against such arrangements). The bill will take effect six months after it is signed into law. Once in force, the new act is likely to strengthen the position of indirect

[52] See judgment of the Supreme Court of 2 March 2006, I CSK 83/05, unpublished; judgment of the Supreme Court of 4 March 2008, IV CSK 441/07, unpublished; resolution of the Supreme Court of 23 July 2008, III CZP 52/08, (2009) 7–8 *Orzecznictwo Sądów Polskich*, item 86; A. Jurkowska, "Antitrust...", p. 72–73.

[53] Some forms of collective redress can be identified in the Act of 17 November 1964 – the Code of Civil Procedure (Journal of Laws 1964 No. 43, item 296, as amended).

purchasers (notably consumers) in private cartel enforcement in Poland and, consequently, improve its effectiveness[54]. Especially in cases where the value of individual claims is low and when more complex hearing of evidence is required. Consumers will have incentive to file a group action as the costs of proceedings (2% of the value of a claim compared to 5% in individual suits) will be incurred by all members of the group proportionally, while at present each aggrieved person has to file a claim, pay a court fee, appoint and pay for a legal representative individually.

Not unlike most other European countries, private enforcement is still greatly underdeveloped in Poland, lagging far behind its public counterpart. Although the Polish legal system does not create a barrier for private actions concerning cartels and additional efforts are being made in legislature and case law to facilitate private pillar of antitrust enforcement, private antitrust enforcement is still far from established.

4. Leniency programme

4.1. Background

In line with current trends, Polish anti-cartel enforcement is no longer only based on sanctions but embraces also an increasingly pragmatic dialogue that weakens the structure of cartel arrangements. The leniency programme (hereafter, Polish Leniency) – a kind of "fair's fair" contract between the UOKiK President and cartel participants – has become a crucial tool in the fight against cartels. Nevertheless, its effectiveness is still less then satisfactory particularly compared to its EU counterpart, not to mention the US. Its lacking can be attributed primarily to the legal structure of the scheme that offered, at least until recently, a rather anaemic "carrot" for prospective confessors and no real "stick" for those involved in cartel activities.

Polish Leniency was introduced in 2004. It is governed by Articles 109 and 110 of the Competition Act together with the Polish Leniency Regulation and Leniency Guidelines. The Polish scheme largely reflects the EC Leniency Programme[55] (hereafter, EC Leniency) and conforms to the ECN Model

[54] A. Jurkowska, "Antitrust...", p. 67, 69; see also *Private Remedies*, DAF/COMP(2006)34, OECD 2006, p. 16–17 (arguing that class actions or other forms of actions that allow the aggregation of a large number of small claims for damages can be a useful form of deterrence in particular with respect to hard core cartels).

[55] See Commission notice on immunity from fines and reduction of fines in cartel cases, OJ [2006] C 298/17.

Leniency Programme[56] (hereafter, Model Leniency). It is based upon the conviction that it is in the public interest to grant favourable treatment to undertakings involved in cartel activities provided they help the antitrust authority in the detection and prosecution of cartels. Polish Leniency is based on two basic principles: the sooner an informant approaches the UOKiK, the higher the reward (a waiver or a fine reduction) which, in turn, depends on the value and timeliness of the evidence supplied.

4.2. Scope of programme

In line with EC Leniency, the Polish scheme applies to undertakings only seeing as under Polish antitrust law only companies can be penalised for the infringement of the cartel prohibition. Hence, leniency granted to an undertaking does not cause any direct consequences to its employees. In particular, it does not prevent the UOKiK President from imposing an administrative fine upon an applicant's representative for lack of cooperation in the course of an investigation. Moreover, Polish Leniency does not preclude criminal enforcement where, according to the Polish Penal Code, individuals, such as managers or employees of the undertaking, are criminally liable for bid rigging or fraud. Indeed, in cases of collusion in public procurement, the UOKiK President must refer the proceedings against individuals to the public prosecutor's office. In consequence, one should not hold one's breath waiting for leniency applications from companies involved in bid rigging[57].

As opposed to the majority of other leniency schemes, including the EC programme and the ECN Model Leniency, Polish Leniency is not limited to classic cartels only (secret horizontal agreements among competitors). Instead, it applies to all agreements prohibited by Article 6 of the Competition Act or Article 81 EC that are not exempted, including vertical agreements without hard core restrictions[58]. However, similar to virtually all its counterparts, Polish Leniency does not apply to unilateral anti-competitive conduct. Finally, contrary to the US Corporate Leniency Policy[59] and similar to EC Leniency, Polish Leniency does not protect from civil law consequences associated with the participation in a cartel but also does not contain any conditions on restitutions being made, where possible, to injured parties as a condition of leniency.

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[56] Accessible at http://ec.europa.eu/competition/ecn/model_leniency_en.pdf

[57] R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsiki (eds.), *Ustawa*.., p. 1668.

[58] For favourably comments on the wide scope of the Polish Leniency see S. Sołtysiński, "Z doświadczeń programu *leniency* w Brukseli i w Warszawie" [in:] C. Banasiński (ed.), *Prawo konkurencji – stan obecny i przewidywane kierunki zmian*, UOKiK, Warszawa 2006, p. 41.

[59] Accessible at http://www.usdoj.gov/atr/public/guidelines/0091.htm

The Polish legal system, similarly to the EU and most EU countries, does not contain a "leniency plus" policy, which allows an undertaking under investigation for one cartel, to potentially gain substantial leniency as to that cartel if it uncovers another cartel. There is also no "penalty plus" policy, where undertakings risk harsh sanctions if they fail to expose a second cartel, of which they knew, if that other cartel is discovered and prosecuted.

4.3. Full immunity

Under the "first-come first-served" principle, full immunity from fines is available to the undertaking which, on its own initiative[60], is the first to submit to the UOKiK President: 1) information which allows the launch of antitrust proceedings into the confessed violation; or 2) evidence which allows the issuance of a decision concerning an infringement, provided that the applicant: (a) has withdrawn from the anti-competitive agreement not later than on the date of its application; (b) was not the initiator of the agreement and did not induce others to participate in the agreement as well as; (c) fully cooperates with the authority during the proceedings.

4.4. Fine reduction

Applicants that do not qualify for full immunity may benefit from a reduction of the fine (partial immunity). A fine reduction is possible if: 1) the evidence provided substantially contributes to the issuance of a decision finding an infringement, and 2) participation in the anti-competitive agreement was ceased at the latest by the time the application was submitted. Although the Competition Act does not explicitly impose an obligation to fully cooperate with the UOKiK President for those qualifying for partial immunity, such an obligation should also apply to them[61].

According to Article 109(3)(4) of the Competition Act, the statutory maximum level of a fine (10% of the undertaking's revenue in the last financial year) is progressively reduced to 5%, 7% and 8% of the undertaking's revenue, depending on the „place in line" for a fine reduction. In case of undertakings that gained no revenue in the last year (e.g. associations of undertakings), the maximum statutory fine (two hundred-fold the average salary[62]) is reduced

[60] Polish Leniency does not allow for the „affirmative leniency", that is the possibility of the UOKiK President approaching potential leniency applicant.

[61] See R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa*..., p. 1677 and decision of the UOKiK President of 7 April 2007, DOK 1/08, unpublished (applying in practice such an obligation to the applicant for a reduction of a fine).

[62] See footnote 37.

to fifty-fold, seventy-fold and eighty-fold the average salary, respectively. The least 8%, or eighty-fold the average salary reduction, can be awarded to an unlimited number of undertakings that fulfil the criteria. Contrary to common standards therefore, fine reductions set in the Competition Act are relative to the maximum fine available by law, rather than to the amount of the fine, which would normally be imposed. As a result, the level of the potential reward associated with the leniency scheme was difficult to predict on the basis of the Competition Act only. This unpredictability was a significant contributor to the low attractiveness of Polish Leniency and, in consequence, its unsatisfactory effectiveness. Not surprisingly, it was often criticised[63]. The new Leniency Guidelines (see Point 31 and footnote 6) seems to remedy this weakness.

Fine reductions on the basis of Polish Leniency are considered differently in the Competition Act and the Leniency Guidelines. Unlike the Competition Act, the Leniency Guidelines refer the level of reduction (maximum 50%, 30% and 20% for the second, the third and subsequent applicants, respectively) to the amount of the fine that would be imposed in accordance with the Guidelines if the leniency applications were not submitted. Admittedly, even though the Leniency Guidelines are only an instrument of *soft law*, the UOKiK President cannot freely depart from them[64]. They cannot regulate the subject matters contrary to provisions of the Competition Act and the Leniency Regulation, nor be implemented in such a manner. As a result, the level of reduction applied in a given case cannot in any way exceed the statutory limits. It remains to be seen whether this combination of different statutory provisions and soft law rules concerning fine reduction will improve the effectiveness of Polish Leniency. Leaving aside the question of its effectiveness, such non-coherent combination seems to be far from a model of legal transparency and certainty.

4.5. Procedure

An application for leniency can be submitted before or during proceedings conducted by the UOKiK President. The new Leniency Regulation that entered into force in February 2009 provides details concerning the required elements of a standard leniency application. The new procedural rules are designed to bring the Polish programme closer to the ECN Model Leniency. The adoption of the Polish Leniency Regulation complements the first ever domestic Leniency Guidelines, which constitute an "instruction manual" addressed to

[63] See e.g. A. Stefanowicz-Barańska, "The importance of being lenient", (2005) 2 *International Business Voice* 38; R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa*..., p. 1678.

[64] See earlier comments on the legal status of the Fining Guidelines.

businesses helping them understand the institution of leniency and informing potential confessors of their duties and rights under the programme.

The leniency application may be submitted in writing or orally (the latter form may, in particular, be used during an inspection). The standard leniency application must meet all the prerequisites for granting full or partial immunity. Besides a normal application, the Leniency Regulation makes it also possible to submit a somewhat incomplete application, which enables the applicant to take "a position in the queue" – "marker". If an agreement affects the territory of at least four EU Member States including Poland, an undertaking submitting a leniency application to the Commission may also, at the same time, file a simplified, summary application for total immunity with the UOKiK President. Such a submission allows the applicant to "save itself a place in the queue", in the event that the Commission takes no action but the UOKiK President decides to pursue the case.

Besides the leniency scheme, Polish antitrust law does not contain any other formal settlement or plea bargaining procedures applicable in cartel cases. By comparison, under a novel settlement procedure in cartel cases introduced by the EC in 2008, undertakings may choose to acknowledge their involvement in a cartel and their liability for it, in exchange for a reduction of fines by 10%. In contrast to the cooperation within the leniency programme, this procedure is not aimed at collecting evidence, but is a device for simplifying cartel procedures[65]. The so-called "commitment decisions" that impose an obligation to exercise commitments undertaken voluntarily by an undertaking with the aim of bringing an illegal practice to an end without imposing a penalty (see Article 12 of the Competition Act) are not, in principle, relevant to cartel conduct. Decisions of this type are not appropriate in cases of serious, clear-cut infringements, since in such cases, the main enforcement objectives should be deterrence and public censure, through the finding of the infringement and the imposition of penalties[66].

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[65] See Commission Regulation (EC) No. 622/2008 of 30 June 2008 amending Regulation (EC) No. 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ [2008] L 171/3; Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases, OJ [2008] C 167/1; M. L. Tierno Centella, "The New Settlement Procedure in Selected Cartel Cases" (2008) 3 *EC Competition Policy Newsletter* 30–35.

[66] W. P. J. Wils, "The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles" (2008) 31 *World Competition* 325. The UOKiK President's commitment decision practice reveals that at least in some cases she is inclined to accept commitments even in cases of hard core restrictions, such as e.g. vertical price fixing – see decision of 4 July 2008, DOK-3/2008, unpublished (however, in the justification of this decision reservation was made about the exceptional nature of the case, as well as declaration was expressed that in case of hard core restrictions the UOKiK President is, in principle, far from taking decisions under Article 12).

III. Enforcement performance

Since the UOKiK President does not provide comprehensive data on anti-cartel enforcement in Poland, it is difficult to fully evaluate the authority's performance in this area. Nevertheless, some observations can be made based on the available information.

As can be seen from Table 1, the number of cases concerning horizontal agreements significantly declined in 2008, contrary to the number of vertical cases, and remains vastly lower than unilateral conduct. In the reviewed period a great number of vertical agreement cases referred to minimum resale price maintenance (RPM), particularly in the construction sector. Most cartel cases related to the activities of trade associations (architects, driving school owners, notaries, pharmacists, tax advisers and taxi drivers) and undertakings active in the communal sector. Curiously at first sight, but typically for an inexperienced economy, some blatantly collusive arrangements were undertaken quite overtly by: inserting minimum price clauses in the resolutions of trade associations (e.g. the National Council of Notaries[67]), publishing price lists for tax advisory services in a business magazine (e.g. the associations of tax advisers) or even announcing a price fixing scheme during a press conference (e.g. billboard advertising companies). It seems that the Polish businesses world still lacks proper antitrust law awareness, or more generally, competition culture in Poland is still weak.

Unfortunately, relatively few proceedings relating to bid-rigging were carried out in Poland so far and no extraterritorial investigations concerning

Table 1. Antitrust proceedings carried out by the UOKiK President in respect of anti-competitive practices*

Year	Horizontal agreements cases reviewed**	Vertical agreements cases reviewed	Unilateral conduct cases reviewed
2004	32	27	295
2005	34	26	260
2006	27	30	293
2007	26	21	201
2008	14	30	152

* Source: UOKiK annual reports
** UOKiK does not specify how many of those cases concerned cartels

[67] See footnote 2 above and accompanying text.

cartel activities occurring outside Polish jurisdiction that had an effect on Poland. The latter observation can be confronted with comments arguing that Poland has found it difficult to address an international market-division problem. It appears, according to M. Wise, that firms bidding in privatisation proceedings in different countries of Central-East Europe are declining to compete against each other. The result is lower bids for the privatised firms and no competition through trade from the privatised companies in the neighbouring countries[68]. This assertion sounds worrying, particularly in the context of massive privatisation programme that the Polish government is going to undertake[69].

The start of the leniency programme in Poland has been sluggish, as illustrated by Table 2, though the number of leniency applications increased noticeably in the last two years. However, the majority (10) of the 16 applications submitted until 2009 related to vertical agreements (RPM) rather than classic (secret) cartels. So far, there have been only two successful applications (in RPM cases), both of which lead to a reduction of fines.

Table 2. Leniency applications submitted to the UOKiK President

Year	2004	2005	2006	2007	2008
No of applications	1	2	2	6	5

An analysis of the UOKiK President's fining policy shows a general tendency to impose higher fines than in the past. This in itself is consistent with the thesis that a policy of imposing strong sanctions for cartel conduct as well as obstruction of cartel investigations is an indispensable part of a successful anti-cartel regime[70]. To illustrate, the highest ever fine of 2 million PLN was imposed in 2007 on Cementownia Ozarów allegedly involved in a price-fixing and market-partitioning cartel of 11 cement producers. The fine was imposed for the non-disclosure of documents and attempts to mislead the authority during a dawn raid. The scale of this raid, the largest in the history of the UOKiK (simultaneous searches in 13 locations all over Poland by about 150 investigators including policemen and highly qualified criminology technicians), illustrates the investigatory potential of the Polish antitrust authority.

[68] M. Wise, "Review...", p. 116.

[69] See "Privatization plan for the years 2008-2011", available at: http://www.msp.gov.pl/portal/en/6/554/Privatization_plan_for_the_years_20082011.html

[70] See *Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation*, OECD 2005, p. 39; *Obstruction of Justice…*, p. 2.

Table 3. Total fines imposed and collected by the UOKiK President*

Year	Total fines imposed (mln PLN)	Total fines collected (mln PLN)
2004	174.2	2.1
2005	38.0	2.0
2006	339.0	10.2
2007	171.0	15.2
2008	95.4	35.8
Total	817.6	65.3

* Average fine collection efficiency: cir. 8%

The figures in Table 3 show the effectiveness of fine collection, which clearly remains far from satisfactory, though some progress in the total amount of fines collected per year is present.

Unlike public enforcement that seems to be working in a moderately successful manner, private enforcement of the cartel prohibition is totally underdeveloped. To the best of the author's knowledge, no such cases were lodged before Polish courts as yet.

Finally, it is worth noting that the overall performance of the UOKiK is now being assessed within the well regarded annual surveys undertaken by the *Global Competition Review* journal (hereafter, GCR)[71]. In the 2009 edition of GCR's Rating Enforcement of the world's leading competition authorities, the Polish antitrust authority shared the 30–35 position with 5 other agencies, ranked at 2.5 stars[72]. According to the Rating's experts, its performance improved last year.

IV. Recommendations

Substantive anti-cartel laws in Poland conform to familiar European models. At least where powers and enforcement tools are concerned, the UOKiK President seems to be well equipped to apply them effectively. Even if there are places where the fight against cartels is more efficient, anti-cartel

[71] Available at http://www.globalcompetitionreview.com

[72] Ranks are based on a star rating of 1 to 5,5 being outstanding. A low ranking does not mean an authority is dreadful. Indeed, an appearance in Rating Enforcement is itself an achievement.

enforcement in Poland is steadily getting more successful. Nonetheless, some improvements deserve consideration.

The institutional status of the UOKiK President should be strengthened. While his/her decisional independence is not under dispute, it is not clearly guaranteed by the authority's institutional design because the appointment procedure, effective 24 March 2009, does not specify the term of office nor provide an exhaustive list of dismissal causes. Indeed, the UOKiK President can be dismissed by the Prime Minister at any time for any reasons. Therefore, in order to preserve the integrity of antitrust law enforcement, a tenure of the UOKiK President should be restored and secured against arbitrary removals. *Prima facie* this argument is hardly relevant to the subject of this article. However, the lesson of history is that large and powerful cartels can have strong political influence with the governments, therefore, antitrust authority should be free of such influence to the extent possible[73]. Further, it would be advisable to consider the establishment, within the antitrust authority, of a special unit for combating cartels. As part of the UOKiK, it could support the other (sectorial) units in uncovering cartels by offering specialised personnel and material resources. In particular, the cartel unit could assist in the preparation, conduct and result analysis of inspections and searches in cartel proceedings. It could be also the main contact for all those considering application for leniency. Additionally, this unit would be responsible for anti-cartel cooperation with foreign antitrust authorities. An increasing number of antitrust agencies have set up dedicated cartel branches with very positive results[74].

As regards Polish Leniency, its scope should be limited to cartels only (including horizontal joint boycotts as defined in the Point 13 of the Explanatory Notes to the Model Leniency). Alternatively, in line with the Swiss scheme, the programme could comprise vertical agreements but only those that contain hard core restrictions (minimum fixing prices or allocating markets). Other types of vertical or horizontal agreements restraining competition are generally less harmful and difficult to detect or investigate, and therefore do not justify being dealt with under a leniency programme[75]. Cooperation with the antitrust

[73] See D.J. Gerber, *Law and Competition in Twentieth Century Europe. Protecting Prometheus*, Oxford 2001, p. 254–255, 286–287.

[74] See *Building*..., p. 30–34

[75] See R. Molski [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa*..., p. 1669–1670; W. P. J. Wils, *The Optimal Enforcement of EC Antitrust Law* 2002, the Hague 2002, p. 54. One should keep in mind that leniency programmes does not serve altruistic purposes. Providing lenient treatment to participants of anti-competitive agreements that are easy to detect and punish can even stimulate cartel activities and hence be counter-productive.

authority concerning this type of restrictive agreements could benefit from a fine reduction under the Fining Guidelines.

Furthermore, in line with the latest version of EC Leniency, the Competition Act should explicitly impose an obligation of continuous cooperation on all applicants for leniency including applicants for a fine reduction. Another amendment, inspired by EC Leniency, should require the applicant to continue its involvement in the alleged cartel following the application, if in the UOKiK President's view, it is reasonably necessary to protect the effectiveness of cartel proceedings (the extent of any continued participation by the applicant would always need to be agreed with this authority). It seems also that it would be more practical if leniency applicants could use a standard (non-obligatory) application form, prepared by the UOKiK (such as offered within e.g. Austrian, Danish and Swiss leniency programmes).

There is currently no urgent need or pressure to find ways to resolve cartel cases more quickly because the effectiveness of Polish Leniency is only moderately successful and the UOKiK does not seem to be overloaded with cartel cases. Thus, cartel settlements are not at the forefront of discussions in Polish antitrust forums. Nevertheless, it would be worthwhile to consider introducing negotiated cartel settlements. As an enforcement tool complimenting the leniency scheme, negotiated cartel settlements can greatly benefit all parties involved (creating a "win-win" situation for antitrust authorities and cartel members) ultimately benefiting consumers through increased anti-cartel enforcement[76]. Speaking for the adoption of such procedure is the fact that negotiated settlements tend to be, where available, the procedure of choice for resolving cartel cases without conducting a full investigation or trial[77].

In order to avoid controversies concerning the applicability of legal privilege in cartel investigations, it would be advisable to regulate this issue comprehensively in the Competition Act and preferably in line with the relevant EC case law[78].

Overwhelming research and studies point out that criminal sanctions are the ultimate weapon (*ultimum remedium*) against cartels[79]. However, no signs of an intention to expand criminal sanctions for cartels can be found

[76] On benefits of cartel settlements see *Cartel Settlements*, Report to the ICN Annual Conference, Kyoto April 2008; *Bargaining/Settlement of Cartel Cases*, DAF/COMP(2007)38, OECD 2008.

[77] See *Plea Bargaining/Settlement of Cartel Cases*..., p. 9.

[78] See judgment of the ECJ of 18 May 1982 in Case 155/79 *Australian Mining & Smelting Europe Limited (AM&S) v Commission* [1982] ECR 1575; judgment of the CFI of 17 September 2007 in Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* [2007] ECR II-03523.

[79] See in particular P. Whelan, "A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law" (2007) 4 *Competition Law Review* 7-40; W. P. J. Wils, "Is Criminalization of EU Competition Law the Answer?" (2005) 28 *World Competition* 117–159.

in Poland even in light of the outside trend to criminalise cartel conduct[80]. There is compelling rationale for moving toward a system that provides for a combination of corporate and individual criminal sanctions in all cartel cases, provided there is adequate certainty and protection of the rights of individuals. Reliance on corporate sanctions alone cannot ensure adequate deterrence, an issue that has to be addressed in a comprehensive way. Properly implemented individual criminal sanctions (with custodial sentences), can represent the difference between viewing cartels on a cost/benefit basis as areasonable risk-taking exercise, and serious deterrence that prevents unlawful cartel arrangements. Besides deterring cartel conduct, criminal sanctions against individuals can be a useful tool during a cartel investigation itself, potentially increasing the effectiveness of the leniency programme[81].

However, the experiences of some countries show that expanding criminal sanctions upon all cartel cases would not necessarily improve enforcement of the cartel prohibition as such. Indeed, banning cartel activity, even on pain of criminal sanctions, is only symbolic if the ban is not relentlessly and comprehensively enforced. If the introduction of criminal (custodial) sanctions to punish individuals for all types of cartel conduct is not likely to take place in Poland (at least in the near future), the introduction of personal anti-cartel sanctions of an administrative nature (fines and disqualification orders) could prove the second best option.

Effective private enforcement, especially in the form of actions for damages, is clearly needed as an essential counterpart for public enforcement of the cartel prohibition. Permitting indirect purchaser suits, notably in the form of group (class) action, is a must because otherwise, as one commentator aptly observed, antitrust enforcement in the name of consumer welfare becomes "a cruel parody"[82]. Still, the role of the UOKiK President will continue to be of critical importance for detecting and punishing (*ergo* deterring) cartels. His/her compulsory investigative and sanctioning powers will likely remain the key to the discovery, proof and punishment of cartels. Private damage actions should be perceived as a superior instrument for the pursuit of corrective justice through compensation, complementing therefore, rather than replacing or jeopardising, public enforcement[83].

[80] Australia, the Czech Republic, Estonia, Ireland and the United Kingdom are examples of jurisdictions that recently introduced criminal sanctioning of individuals involved in all categories of cartel conduct.

[81] More on arguments for introducing individual sanctions in cartel cases see *Cartels: Sanctions against Individuals*, DAF/COMP(2004)39, OECD 2005.

[82] S. W. Waller, "Towards a Constructive Public-Private Partnership to Enforce Competition Law" (2006) 29 *World Competition* 381.

[83] This approach seems be compatible with the Commission's *White paper on Damages actions for breach of the EC antitrust rules*, COM(2008)165 of 2 April 2008; see also W. P. J. Wils,

Bearing in mind that collusive tendering poses especially grave threats in transition economy, where public purchasing accounts for a substantial part of national economic activity and public projects, such as transportation infrastructure development[84] (accentuated by the fact that Poland co-hosts the European Football Championship in 2012), it would be advisable to strengthen the cooperation of the UOKiK with procurement officials in an effort to fight bid rigging more effectively. In particular, the construction industry, recognized as a "critical component of every OECD economy"[85] should be one of the priorities in the UOKiK enforcement activities.

Finally, the fact must be stressed that one of the biggest problem of the Polish anti-cartel enforcement regime is the ineffectiveness of its sanctioning system[86]. The long gap between the imposition and the collection of fines lowers the effectiveness of sanctions both in terms of nullifying the gains from the violation and preventing future infringements. Still, the problem of the lagging fine collection can be attributed mostly to the inefficiency of the Polish judicial system as a whole seeing as the lengthy appeals process makes it possible to postpone payments even in cases of very serious violations such as cartels[87]. To remedy this problem, the entire procedural system should be reformed.

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[84] W.E. Kovacic, "Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement" (2001) 77 *Chicago-Kent Law Review* 294. In 2008 public procurement in Poland accounted for 8,6 % of GDP; see Sprawozdanie z funkcjonowania systemu zamówień publicznych w 2008 roku [Report on functioning of public procurement in 2008], Urząd Zamówień Publicznych, Warszawa 2009, p. 20, available at http://www.uzp.gov.pl

[85] *Competition in the Construction Industry*, DAF/COMP(2008)36, OECD 2008, p. 17 (also noting that "the construction industry has acquired a certain degree of notoriety. It is well-known that the [construction] sector has been plagued by cartel activity for decades").

[86] See Table 3 above.

[87] W. Dorabialski, "Can competition protection in Poland become more effective?" (2008) 1 *Baltic Rim Economies* 29.

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