

## Competence of Common Courts in Poland in Competition Matters

by

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### *Abstract*

The main aim of this article is to present current judicial practice, concerning hearing cases stemming from appeals of Polish Competition Authority decisions. The relevant court tends to review the cases only on merits, omitting to address procedural infringements, clearly stated by the parties in appeals. In author’s opinion this common practice does not have a legal leg to stand on. Author analyses relevant laws and precedents pointing out, that full review of the decision is Court’s duty, which could not be neglected. Furthermore, according to ECHR rulings procedural guaranties should be assured on high level, especially in matters, where quasi-criminal fines are concerned. As a legal practitioner Author perceives possible crippling effect on effectiveness, assuming that the Court would have to review all steps of the proceedings before Competition Authority. So in conclusion Author proposes a compromise solution asserting, that the Court should at least address all procedural infringement counts stated in appeal.

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## *Résumé*

Cet article vise essentiellement à présenter la pratique judiciaire actuelle pour ce qui est de connaître les affaires résultant d'un recours contre les décisions de l'autorité polonaise de concurrence. Le juge compétent pour ces affaires fait preuve d'une tendance à en connaître exclusivement le fond sans considérer les violations de procédure soulevées expressément dans les recours des parties. L'auteur est d'avis que cette pratique juridictionnelle est dépourvue de fondements juridiques. Il analyse les textes appropriés et l'acquis de la jurisprudence pour montrer qu'un contrôle complet de la décision est une obligation du juge, qui ne saurait être négligée. En plus de cela, conformément à la jurisprudence de la Cour européenne des droits de l'homme, un niveau élevé de garanties procédurales doit être assuré, notamment dans les affaires susceptibles de sanctions quasi-pénales. L'auteur, qui est un praticien, y voit le risque potentiel de compromettre l'efficacité de la procédure, en admettant que le juge soit amené à contrôler toutes les étapes de la procédure avant l'autorité de concurrence. Pour conclure, l'auteur propose une solution de compromis qui admettrait que le juge devrait au moins se prononcer sur les exceptions procédurales soulevées dans le recours.

**Classifications and key words:** antitrust proceedings; competition; judicial review; National Competition Authority; fines; due course of law; procedural safeguards; procedural infringements.

## **I. Introduction**

The issue of the extent of competence of common courts to hear appeals from decisions of the President of the Office of Competition and Consumer Protection (the Polish National Competition Authority, hereafter alternately the UOKiK President or Competition Authority) has been the subject of widespread debate since passage of the underlying legislation. Despite a number of modifications to the system of court review of the Competition Authority's rulings, solutions that would be commonly accepted as satisfactory have not yet been developed.

Much of the problem lies in the 'hybrid' character of competition proceedings in Poland. At the initial stage a matter is dealt with by a state administrative authority (UOKiK President), largely according to rules of the Code of Administrative Procedure (KPA). An appeal from the Competition Authority's decision, on the other hand, will be heard by a common court (although specially designated in the first instance) according to the rules of civil procedure. These two sets of procedural rules serve substantially different goals in Polish jurisprudence and are different in nature, making it

hard to fit them together to form a consistent whole. Part of the difficulty, too, undoubtedly lies in the fact that the system of common courts, which normally deals with cases between equal parties, has to be 'recast' to fit the role of a reviewing authority for administrative rulings.

This article sets out to propose solutions that would remove one of the fundamental flaws of this 'hybrid' procedure, which is a lack of review of competition proceedings for their compliance with procedural laws. This grows out of an established line of case law supporting what seems to be a mistaken view that the Competition and Consumer Protection Court (or, for that matter, a Court of Appeals or the Supreme Court) has no jurisdiction to hear claims of procedural violations occurring during the stage of administrative proceedings. In practical terms, this means that we are dealing with a state authority (UOKiK President) which may conduct its proceedings unduly (unlawfully) without any negative consequences. What is more, with no judicial review mechanism in place, it is difficult to eliminate the procedural errors as there is no authority to find them and then signal a need to change the *modus operandi*. For the reasons stated below, such a situation is intolerable. Hence, this article attempts to develop and propose certain modifications which could help to extend the competence of common courts to review and remedy procedural violations. Importantly, the proposals would not entail having to amend the current law.

## II. Mission statement

Before embarking on my analysis, permit me to make a general remark, a kind of 'mission statement' for this text. The adversarial nature of appeals from Competition Authority's decisions necessarily creates antagonism between the parties involved, that is, the UOKiK President and the undertaking. Each of them is interested in 'winning the case' and obtaining a favourable judgement. One of the points of contention can, and often does, involve procedure. Accordingly, whether making their own argument in the case at hand or arguing in relation to the system as a whole, each party (i.e. the UOKiK President on the one hand, and the undertakings with their lawyers on the other) will tend to push hard for solutions that favour it at the expense of the other. Businesses try to place an ever greater burden on the Competition Authority and the courts which, if shouldered, would in fact cripple the effectiveness of competition enforcement proceedings. On the other hand, guided by the need to ensure an effective case disposition, the UOKiK President sometimes strives to make procedural restrictions as loose and flexible as possible (for example, in waiver of evidence rulings in administrative proceedings).

Such ‘conflicts of interest’ make everyone involved in the issue blind to the procedural specificity of competition matters which, as will be argued further below, are not “ordinary” court cases. One important thing that tends to get forgotten is that procedural safeguards are not in place only to protect the interests of undertakings ‘charged’ with competition infringements (although this undoubtedly is one of their major functions). A due process (e.g. in the area of evidence taking and assessment) will also limit the risk of erroneous decisions on the merits. Indeed, errors made by competition authorities, such as unreasonably banning activities which in fact are not anti-competitive, may have very serious consequences for the economy, including through a chilling effect (e.g. restricting innovation or artificially maintaining inefficient competitors). This is another major reason why the competition enforcement system must be strict not only in its application of substantive rules, but also in its observance of the rules of procedure. Thus, in terms of ‘mission’, this text strives to find solutions which, while ensuring the due protection of the procedural rights of businesses, will not paralyse the competition authority or the reviewing courts by imposing overly onerous tasks which are cumbersome to comply with.

### III. Specificity of competition proceedings

Before formulating any proposals, it is necessary to begin with a short discussion concerning the specificity of competition proceedings, as an understanding this issue will undoubtedly shed light on the search for compromise proposals. In considering the specificity of competition enforcement procedure, it is first of all clear that the task of competition courts at all levels differs substantially from responsibilities of a ‘typical’ common court, necessitating departure from a civil-proceedings-based way of thinking. In other words, judicial review proceedings in competition matters, even though conducted before common courts according to the Code of Civil Procedure on commercial matters<sup>1</sup>, are not ‘ordinary’ judicial proceedings,

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<sup>1</sup> Except that Chapter IVa KPC has been repealed, effective 3 May 2012, by the Act of 16 September 2011 on amendments to the Civil Procedure Code Act and certain other acts (Journal of Laws No. 233, item 1381). Pursuant to Art. 9(7) of the amending act, Articles 479<sup>1</sup>–479<sup>2</sup>, 479<sup>4</sup>, 479<sup>6</sup>, 479<sup>6a</sup>, 479<sup>8</sup>, 479<sup>9</sup>–479<sup>14b</sup>, 479<sup>16</sup>–479<sup>19a</sup> and 479<sup>22</sup> will continue to apply to appeals from decisions of regulatory authorities, including the UOKiK President, that were issued prior to the repeal date (that is on or before 2 May 2012).

just as matters heard by such courts are not ‘ordinary’ civil matters. They are civil matters in form but administrative matters in substance<sup>2</sup>.

Note also that judicial proceedings on appeal from the decisions of the Competition Authority serve a radically different purpose; essentially, their goal is to resolve whether the conduct at issue is or is not anti-competitive. This leads to a conclusion that since all the UOKiK President’s decisions are to be made in the public interest<sup>3</sup>, so too should the court rulings be guided by the public good. There is no reason why competition court rulings should be made on a different basis than the Competition Authority’s decisions. After all, they have the same content and pertain to the same subject-matter. In other words, when construing Article 479<sup>31a</sup> of the Code of Civil Procedure (KPC) which lays out the duties of the court, regard must be had also to Article 1(1) of the Competition and Consumer Protection Act (hereafter, Competition Act)<sup>4</sup>, which reads as follows: ‘This Act sets out the framework for the development and protection of competition and the terms upon which the interests of businesses and consumers shall be protected in the public interest’ (emphasis added). As the Supreme Court held in its judgment of 5 June 2008,<sup>5</sup> ‘[the phrase] ‘in the public interest’ means that **competition is protected in the interests of the state**, notwithstanding any activities of individuals and notwithstanding their interests’. Thus the interests of *the state*, including the interests of all parties to commercial transactions, must be taken into account by courts in their judgments. It follows naturally that a matter adjudged in the public interest may not be dealt with in the same way as an ‘ordinary’ court case between private parties.

These public interest considerations are also important given that the case law of the Competition Authority and common courts serves a special role. The Competition Act is very laconic. Take for example Article 9(2)(1), which prohibits the ‘imposition of overly excessive prices’. This is a very vague term designating an action with very negative social consequences, and conduct which can lead to extremely severe penalties. It is thus imperative that the case law of both the Competition Authority and the common courts hearing appeals from its decisions add precision to and/or construe the specific provisions of competition law. It is not until we have the precedence of case law that we

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<sup>2</sup> Cf. M. Sieradzka, ‘Sądowa weryfikacja decyzji i postanowień wydanych przez Prezesa Urzędu Ochrony Konkurencji i Konsumentów (part I)’ (2007) 10 *Rejent* 105–106.

<sup>3</sup> See also: D. Miąsik, T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i Konsumentów. Komentarz*, Warszawa 2009, pp. 45–55; E. Stawicki, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i Konsumentów. Komentarz*, Warszawa 2011, pp. 32–38.

<sup>4</sup> Act of 16 February 2007 on Competition and Consumers Protection (Journal of Laws No. 50, item 331, as amended).

<sup>5</sup> Case no. III SK 40/07 (2009) 19–20 *OSNP* 272.

can begin to determine when a price becomes ‘overly excessive’. This is not a typical role for courts in a system based on statutory law, such as the Polish one. Consequently, the common courts are saddled with considerably greater responsibility when hearing appeals from the UOKiK President’s decisions.

There is one other aspect that makes competition enforcement proceedings special in procedural terms. The European Court of Human Rights (ECHR) has held that penalties for anti-competitive practices should be imposed according to a procedure which guarantees that the rights of the undertakings under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, Convention) will be retained<sup>6</sup>. Polish courts (including notably the Supreme Court) have also made a point of noting that, to the extent a business which is a party to the proceedings is to be fined, the rules of judicial review of agency rulings (e.g. those of the UOKiK President) should be similar to those applicable to a court dealing with a criminal case<sup>7</sup>. The Supreme Court ruled along the same lines in relation to the proceedings of the UOKiK President (see the judgement of 21 April 2011)<sup>8</sup>.

Accordingly, proceedings in cases of alleged anti-competitive practices should offer the highest possible protections for the entity ‘charged’ with engaging in such practices. As a consequence, both the proceedings of the Competition Authority and the subsequent judicial proceedings must ensure core standards of procedural justice<sup>9</sup>, including the right to a fair trial under Article 6 of the Convention<sup>10</sup>. This right to a fair trial comprises, among others, the right to defend oneself, which contains concomitant rights such

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<sup>6</sup> For more on this topic, see M. Bernatt, ‘Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku’ (2012) 1 *Państwo i Prawo* 55–58; M. Bernatt, ‘Gwarancje proceduralne w sprawach z zakresu ochrony konkurencji i regulacji, mających charakter karny w świetle EKPCz – glosa do wyroku SN z dnia 14.04.2010’ (2011) 6 *Europejski Przegląd Sądowy* 43.

<sup>7</sup> See, e.g., judgement of the Supreme Court of 14 April 2010, III SK 1/10; Lex no. 579549; judgement of the Supreme Court of 1 June 2010, III SK 5/10, LEX no. 622205; judgement of the Supreme Court of 21 September 2010, III SK 8/10, Lex nr 646358; judgement of the Supreme Court of 21 October 2010, III SK 7/10, Lex no. 686801; judgement of the Supreme Court of 10 November 2010, III SK 27/08, Lex no. 677766. See also M. Bernatt, ‘Gwarancje proceduralne w sprawach...’, pp. 40–45. Importantly, the Convention requirements extend to that stage of administrative proceedings which can be treated as a mandatory preliminary (pre-trial) procedure.

<sup>8</sup> III SK 45/10, Lex no. 901645; Cf. Z. Kmiecik, ‘Koncepcja zintegrowanego systemu odwoławczego w sprawach administracyjnych’ (2010) 1 *Państwo i Prawo* 29; M. Bernatt, ‘Gwarancje proceduralne w sprawach...’, pp. 42–44.

<sup>9</sup> The relevance of procedural justice is emphasised by the Constitutional Court in its judgment of 16 January 2006, SK 30/05 (2006) 1 *Orzecznictwo Trybunału Konstytucyjnego-A* item 2.

<sup>10</sup> For more, see M. Bernatt, ‘Prawo do rzetelnego procesu...’, pp. 50–63.

as the right to be heard, the right to an oral hearing (access to hearing), the right to have sufficient time and opportunity to prepare for one's defence, and the right to receive information about the essence of and reasons for the claims made against the business concerned<sup>11</sup>. Such fundamental rights, which may be inferred from Article 6 of the Convention to comprise the notion of 'procedural justice', are also reflected in the Polish Constitution [Article 2: democratic state rule of law; Article 7: rule of law; Article 42(2): right to defence], the Code of Administrative Procedure (Article 6: rule of law, Article 7: objective truth principle; Article 8: principle of trust in public authority; Article 9: principle of disclosure to parties; Article 10: principle of active involvement of parties in proceedings), and even in the Competition Act (Article 74: principle that the decision concluding the case must be based only on those infringement claims which the party had an opportunity to address).

Certainly, such rights cannot be asserted if the procedures followed at the administrative stage (which is actually a 'pre-trial' stage; see more on this below) are not subject to judicial review.

#### IV. Current views on the role of competition courts

The discussion above demonstrates that, owing to the specificity of the cases they deal with, neither the Competition and Consumer Protection Court (hereafter, SOKiK) nor the higher-level courts should be treated as 'ordinary' common courts when reviewing competition cases. Before setting out to answer the consequences that accompany this conclusion, it is worthwhile to briefly outline the current interpretation of the rules governing appeals from the decisions of the UOKiK President.

As has been said, competition enforcement is a 'hybrid' system procedurally<sup>12</sup>. The first-instance proceedings are conducted before an administrative agency (UOKiK President) pursuant to, primarily, the Code of Administrative Procedure (but also partly under the Code of Civil Procedure and the Code of Criminal Procedure). But the appellate proceedings are conducted before a common court (the SOKiK) solely under the Code of Civil Procedure.

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<sup>11</sup> M. Bernatt, 'Prawo do rzetelnego procesu...', p. 62. See also M. Bernatt: *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011.

<sup>12</sup> For the notion of hybrid procedure, see Z. Kmiecik, 'Postępowanie w sprawach ochrony konkurencji a koncepcja procedury hybrydowej' (2002) 4 *Państwo i Prawo* 31-47.

In effect, an appeal from a decision of the UOKiK President is considered the doctrinal counterpart of a statement of claim under general civil procedure. The formal requirements for such appeals, as laid down in Article 479<sup>28</sup>(3) KPC are similar to the requirements of a statement of claim under Article 187 KPC<sup>13</sup>. In fact, an appeal from a decision of the UOKiK President is a special kind of pleading that commences civil proceedings<sup>14</sup>. As stated earlier, cases pending on this kind of appeal are civil matters formally and in the broad sense<sup>15</sup>, yet they remain administrative matters in terms of substantive law.

Both legal scholars and the courts firmly adhere to the view that the SOKiK is not a formal appellate court, but rather a court of first instance<sup>16</sup>. In effect, the filing of an appeal properly commences a legal dispute between the parties (the undertaking<sup>17</sup> affected by the Competition Authority's decision) and the Competition Authority. The conclusion of administrative proceedings and issuance of a decision is merely 'a precondition for the matter to become cognizable by common courts'. There is thus no doubt that, although the judicial proceedings are triggered by an appeal from UOKiK President's decision, they cannot be treated as a typical appellate process in administrative review cases. According to the Supreme Administrative Court, proceedings before the UOKiK President are in essence a 'pre-trial' court stage<sup>18</sup>.

Various legal authorities, including the courts, also claim that the proceedings at the judicial stage are adversarial in nature<sup>19</sup>, as the court

<sup>13</sup> J. Gudowski, [in:] T. Ereciński, J. Gudowski, M. Jędrzejowska, *Komentarz do Kodeksu postępowania cywilnego. Część pierwsza. Postępowanie rozpoznawcze*, vol. I, 3rd ed., Warszawa 2001, p. 959.

<sup>14</sup> See also: Ł. Błaszczak, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1351.

<sup>15</sup> This was made clear by the Constitutional Court in its statement of grounds for its judgment of 12 June 2002, P 13/01, Journal of Laws No. 84 item 764; (2002) 4a/42 *Orzecznictwo Trybunału Konstytucyjnego ZU 6*.

<sup>16</sup> Constitutional Court judgment of 31 January 2005, SK 27/03, Journal of Laws No. 22 item 185; (2005) 1a/8 *Orzecznictwo Trybunału Konstytucyjnego ZU 6*.

<sup>17</sup> Within the meaning of Article 4(1) of the Competition Act/

<sup>18</sup> Supreme Administrative Court's order of 11 February 2009, II GSK 749/08, Lex no. 551408.

<sup>19</sup> Judgment of the Supreme Court of 19 August 2009, III SK 5/09 (2011) 9–10 *OSNP* 144; judgment of the Supreme Court of 29 May 1991, III CRN 120/91 (1992) 5 *OSNC* 87. Cf. M. Sieradzka, 'Sądowa weryfikacja decyzji...', p. 107.

It should be noted in passing that the assumption itself is highly controversial. Above all, the claim that we are dealing here with two equal parties is not true to reality. The dispute is in fact between an administrative agency and a business. In course of its competition proceedings, the former has a huge advantage over the latter, having a whole range of measures available to it within its power and authority [e.g. the power under Art. 50(1) of the Competition Act to demand submission of all necessary information and documents].



must comprehensively investigate all relevant circumstances of the case and, importantly, have regard to distribution of the burden of proof and the parties' duties as to evidence (Article 232 KPC)<sup>20</sup>. Hence, the UOKiK President is required to submit evidence to prove an infringement of the Competition Act and support the agency's treatment of the conduct concerned. The undertaking may (and usually does) offer evidence to prove that no infringement occurred and/or that UOKiK President applied the law erroneously. Evidence offered during these 'quasi-appellate' proceedings need not be the same as that collected in course of the administrative proceedings, because the only limits set by the appeal are those within which the matter is to be adjudicated<sup>21</sup>.

In the context of our topic, which is the issue of court competence, it is important to note a popular view that judicial review should only extend to the merits of the case, and not include a review of the procedural compliance during the administrative stage. In expounding this approach, the courts typically invoke the Supreme Court's judgment of 13 May 2004<sup>22</sup>, wherein it was held that 'judicial proceedings are not aimed at reviewing the administrative procedure but at adjudicating on the merits of the matter involving a dispute which arose between the parties to the UOKiK President's decision'. Some case law suggests that claims of procedural errors by the Competition Authority in the administrative proceedings should not be affirmed by the reviewing courts unless the undertaking concerned demonstrates that the errors affected the decision on the merits. Importantly, the burden of proof in such cases is on the undertaking affected, a considerable challenge indeed. According to this reasoning, judicial review covers only the outcome of proceedings (administrative decision) and extends solely to the merits.

## V. Key problems with the current approach

There is much to be argued against the above construction of the lines of authority. What it means is that we have a state administration authority that is free to make procedural errors in its administrative proceedings because there is in fact no higher-level authority or court with the power of review over this area of its activity. And even if the undertaking does formally raise such errors in its appeal, its claims will not be affirmed; moreover, they will not even be

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<sup>20</sup> For more, see: T. Kwieciński, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa...*, pp. 835–837.

<sup>21</sup> Judgement of SOKiK of 14 September 2006, XVII Ama 71/05 (UOKiK Official Journal 2006 No. 4, item 61), Lex no. 222125.

<sup>22</sup> III SK 44/04 (2005) 9 *OSNP* 36.

heard (the court will just omit them). In the context of our earlier discussion about the criminal or quasi-criminal aspect of competition enforcement proceedings, such an approach is highly controversial to say the least. It is manifestly at odds with Article 42 of the Constitution (right to defence) and Article 45 of the Constitution (right to court, i.e. to have one's case heard by a competent court). In fact, this controversial treatment substantially limits the right to defence (formal defences alleging procedural violations will not be heard) and impairs the right to court (the right to have one's case heard by a competent court), since there is no court competent to deal with procedural defences<sup>23</sup>.

Another direct consequence of this approach is that there are no mechanisms in place to correct the UOKiK President's unlawful acts. If such acts develop into a practice (e.g. in relation to evidence) which, albeit unlawful, is not unlawful enough to consider it capable of affecting the final decisions on their merits, then the practice can continue despite its unlawfulness because no court will ever address it. If this reasoning were pushed to absurdity, one could even argue that the UOKiK President is free to disregard and disapply any law on procedure (e.g. he could stop informing the parties that the proceedings will end after the statutory deadline, or stop giving evidence rulings or other required rulings) and will not face any legal responsibility unless the incriminated undertaking is able to prove that such formal deficiency affected the merits of the final decision. This cannot be reconciled with the fundamental principles of state rule through law.

## VI. In search of a “third way”

Ironically, this controversial line of authority stems from what appears to be a mistaken construal of the underlying Supreme Court judgment dated 13 May 2004, where the court stated that ‘in cases on appeal from UOKiK President's decisions, the Competition and Consumer Protection Court may not limit its efforts to **only** reviewing whether the underlying administrative proceedings were conducted correctly’ (emphasis added). The judges clearly held that the SOKiK has two jobs: to review the administrative stage for legal compliance and (without stopping at that) to rule on the merits. It was not the intention of the Supreme Court to rule that the SOKiK may refrain from reviewing procedural compliance. Given the purpose of judicial proceedings, which is to hear and resolve issues, the court is responsible for a full evaluation of the

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<sup>23</sup> Cf. Ł. Błaszczak, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, pp. 1346–1347.

decision submitted for review and of the administrative agency's processes and procedures with regard to the requirements of legality, legitimacy and purposefulness of agency decisions<sup>24</sup>.

This conclusion finds support in the Code of Civil Procedure, too. According to Art. 479<sup>31a</sup> KPC, the Competition and Consumer Protection Court may (1) dismiss the appeal if there is no basis for affirming it, (2) reject the appeal on formal grounds, or (3) affirm the appeal. In this last instance, the court has two options. It may either amend the decision in whole or in part, or **reverse it**. The SOKiK's power to reverse a decision by the UOKiK President can be seen in the context of Article 386 KPC<sup>25</sup>. True, Article 386 governs the appellate procedure. But if one assumes that the proceedings in front of the UOKiK President are in the nature of a pre-trial stage, the SOKiK, as the court of first instance, will also operate as a court of 'higher instance' of sorts. According to Article 386(2) KPC: 'If it finds the proceedings invalid, the appellate court shall reverse the appealed judgment, discontinue the proceedings to the extent invalid and remand the case for reconsideration by the trial court'. And according to Article 386(3) KPC: 'If the statement of claim is liable to be rejected or there are grounds for discontinuation of proceedings, the appellate court shall reverse the judgment and reject the statement of claim or discontinue the proceedings'. Finally, under Article 386(4) KPC: 'Except as specified in § 2 and § 3, the appellate court may reverse the appealed judgment and remand the case for reconsideration only if the trial court failed to hear the case on its merits or if the judgement cannot be given without carrying out the entire evidentiary procedure'. In my opinion, the SOKiK could do the same in relation to decisions of the UOKiK President, with the 'judgment' provisions applied by analogy to the UOKiK President's decision and the 'statement of claim' provisions so applied to the appeal.

Therefore, when read in conjunction with Article 386 KPC, Article 479<sup>31a</sup>(3) KPC does not allow the reviewing court to 'relieve' itself of the duty to evaluate the administrative proceedings for procedural compliance, because such a waiver would constitute a dereliction of duty by ignoring a competence expressly conferred on that court.

The conclusion above becomes obvious if it is kept in mind that the expansion of the SOKiK's powers to include reversal of decisions rendered by the UOKiK President follows from the Constitutional Court's ruling of 31 January 2005<sup>26</sup>. In that case, the Constitutional Court held that 'The right expressed in

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<sup>24</sup> Judgment of the Supreme Court of 20 September 2005, III SZP 2/05 (2006) 19–20 *OSNP* 2006 312.

<sup>25</sup> T. Kwieciński, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa...*, p. 830.

<sup>26</sup> SK 27/03, *Journal of Laws* 2005 No. 22, item 185; (2005) 1A/8 *Orzecznictwo Trybunału Konstytucyjnego* ZU 6.

Article 45(1) of the Constitution should operate to create a substantive and real opportunity to seek protection in a particular case, and not just a formal availability of judicial proceedings. Upon verification for compliance with such requirements, the challenged regulation appears contrary to constitutional requirements as it deprives the party of an opportunity to start a procedure that would ensure full judicial review of the merits of the agency decision. That outcome cannot be sufficiently justified by the above-mentioned fact that proceedings conducted before a public administration authority and then before a court are ‘hybrid’ in nature. Indeed, the constitutional right to court includes, without limitation, the right to a due judicial process that shall guarantee a fair hearing of the case on its merits so as to subsequently enable a just verdict’ (emphasis added).

Finally, the view that the SOKiK’s role also includes reviewing antitrust proceedings for formal compliance is shared by a number of legal scholars. Note, for example, A. Turliński<sup>27</sup>, who argues that ‘(...) when an appeal from UOKiK President’s decision is duly filed, the administrative matter will as of that moment be pending as a civil matter according to Code of Civil Procedure. And it is clear that all procedural steps duly made in course of the administrative proceedings will remain in force’. Further, ‘(...) SOKiK’s reversals should be dispensed with prudence and used especially in the event of a gross violation of rules of administrative procedure, a failure to hear the matter on its merits, or material defects in the agency decision itself’ (emphasis added).

If a case on appeal from a decision by the Competition Authority was a ‘classic’ civil matter which is only heard on its merits, then the trial court would give a ruling on the merits (i.e. it would rule that X engaged in some anti-competitive practice and would issue a cease and desist order). Yet, the rulings given by SOKiK are completely different: the court merely dismisses or rejects the appeal (thus sustaining the underlying decision) or amends or reverses the decision. Having such adjudicative powers, the SOKiK clearly fulfils the function and role of a court of appellate jurisdiction (this approach is accepted among legal scholars)<sup>28</sup>.

Finally, the present issue should not be discussed without referring to the new language of the closing provisions of Article 479<sup>31a</sup> KPC, which were amended in 2011<sup>29</sup>. The amendment gives the SOKiK an opportunity to rule on

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<sup>27</sup> Cf. A. Turliński, ‘Miejsce Sądu Ochrony Konkurencji i Konsumentów w systemie organów ochrony prawnej’, [in:] C. Banasiński (ed.), *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej*, Warszawa 2005, pp. 63–65.

<sup>28</sup> Cf. P. Telenga, [in:] A. Jakubecki (ed.), *Kodeks postępowania cywilnego. Praktyczny komentarz*, Zakamycze 2005, p. 722, stating that ‘its [SOKiK’s] determinations are characteristic of an appellate court’.

<sup>29</sup> Journal of Laws No. 34, item 173.

whether or not a decision was issued without a legal basis or in gross violation of the law. In this way, the lawmakers clearly assigned to the SOKiK a duty to verify whether or not the appealed decision was issued 'in gross violation of the law'. Since the amended regulation does not limit such verification to substantive law, it is reasonable to conclude that the phrase 'in gross violation' includes both violations involving the merits of a case as well as those which relate solely to the procedure. A violation can be deemed gross if, according to Code of Administrative Procedure, it would result in trial *de novo* or a finding that the agency decision was invalid. But the legislature does not seem to have restricted the scope of the verification to only those errors which necessitated the reversal or amendment of the decision. No such restriction can be inferred from the KPC regulation in question.

Equally, it seems that where the SOKiK wishes to uphold the UOKiK President's decision and state that the agency did not breach its duties under the regulation concerned, the court could and should hold that the UOKiK President did not commit a gross violation of the law in any respect and that, therefore, there are no grounds for reversing (or partially or wholly amending) the appealed decision. Otherwise we would be facing a rather odd situation whereby the scope of court's review would differ according to how the court resolves the case. This would be absurd because only an in-depth investigation can allow the court to determine if the Competition Authority's decision should be upheld, reversed, or amended.

## VII. Proposals for change

So, what should judicial review be like in competition enforcement cases? Theoretically, two solutions are conceivable:

- First, the SOKiK (and the higher-level courts) can be held responsible for making procedural compliance reviews by themselves. In other words, the court(s) must check if a procedural violation has occurred, whether or not the party makes such a claim. Although this outcome would be highly desirable, this postulate is probably too far-reaching to fall within the 'mission statement' of this article. Having the court discharge such extensive duties might engender paralysis.
- So it seems we should rather consider the court to be under a duty to make a procedural compliance review only to the extent the issue is raised by the appealing party, provided the court may always omit claims that are manifestly unfounded (for example, claims which the case law clearly treats as liable to dismissal for being without legal basis). When

resolving a matter, the court would determine if the error raised has indeed occurred and whether it affected the merits of the decision. If the error was ‘neutral’ as regards the merits of the case, the decision would be upheld (absent any other successful challenges). Formal errors would not in and of themselves provide a sufficient basis for reversal. One advantage of this solution is that the UOKiK President would also receive guidance as to whether his action or inaction violated rules of procedure, and the court’s ruling would have a corrective function. If the error was found to have affected the outcome, it would be left for the court to decide whether or not the error can be corrected in course of its judicial proceedings. If so, the court would proceed to rule on the merits. In the event additional proceedings were required, the Competition Authority’s decision would be reversed and remanded back to the Competition Authority so that it could correct its error.

The solution proposed above offers a reasonable compromise between the need to ensure procedural efficiency in competition appeals and the need to ensure that the Competition Authority complies with the applicable rules of procedure, particularly where fundamental rights are involved. Such a conclusion is justified both in the context of the procedural characteristics of competition enforcement cases as well as in the context of the new duties of the SOKiK following the recent statutory amendment to the KPC.

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