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## Polish Antitrust Experience with Hub-and-Spoke Conspiracies

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## Polish Antitrust Experience with Hub-and-Spoke Conspiracies

by

Antoni Bolecki\*

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### *Abstract*

A hub-and-spoke conspiracy involves an exchange of confidential information primarily concerning future prices. The exchange takes place generally between competing distributors via a common supplier but a reverse relationship is also possible. The essence of hub-and-spoke lies in the fact that there is no direct contact between competitors – the party guaranteeing the information flow is normally the common supplier (distributor in a reverse scenario). A hub-and-spoke conspiracy was first identified and specifically described by the British Office of Fair Trade in 2003. There are currently several pending investigations concerning hub-and-spoke practices in a number of EU Member States including Germany, France, Italy and the UK.

Three cases of that type have been so far assessed in the Polish antitrust practice: Polifarb Cieszyn Wrocław (2007), Tikurilla (2010) and Akzo Nobel (2010). The main objective of this article is the reconstruction of hub-and-spoke conduct in Poland. Commented will also be issues such as: the connection between hub-

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and-spoke practices and ‘classic’ retail price maintenance; standard of proof, and duration of the agreements.

### *Résumé*

La pratique de “hub-and-spoke” implique un échange d’information confidentielle, surtout celle concernant les prix envisagés. De façon générale, l’échange a lieu entre les distributeurs concurrents, au travers d’un fournisseur commun, mais une relation inverse est aussi possible. Le système de “hub-and-spoke” est fondé sur le fait qu’il n’y a pas de contact direct entre les concurrents – le flux d’information est garanti par le fournisseur commun (distributeur dans un scénario inverse). Trois cas de ce type ont été jugés dans la pratique antitrust polonaise: Polifarb Cieszyn Wrocław (2007), Tikurilla (2010) et Akzo Nobel (2010). Le but principal de cet article est de reconstruire la pratique de “hub-and-spoke” en Pologne. Autre questions, notamment la relation entre les pratiques de “hub-and-spoke” et les prix de revente imposés, le standard de la preuve et la durée des accords, seront commentées.

**Classifications and key words:** hub-and-spoke; AtoBtoC coordination; exchange of information; vertical restraints; RPM; horizontal effect; standard of proof; duration of an agreement; initiator.

## I. Definition of conduct known as ‘hub-and-spoke’

The Polish Act of 16 February 2007 on Competition and Consumer Protection (hereafter, Competition Act<sup>1</sup>) does not contain a definition of a hub-and-spoke conspiracy<sup>2</sup>. The Polish competition authority does not use this term either. Nonetheless, a careful study of its selected antitrust decisions makes it possible to reconstruct the features characterising this particular type of market conduct. In general, the economic events defined as hub-and-spoke that were assessed in Poland were similar to analogous practices put into question by the British, German and American antitrust authorities (see pt. 2 below).

Hub-and-spoke consists of the sharing of confidential trade information between the supplier and its retailers and, in simple terms, can assume two forms:

- The supplier acts as the ‘hub’ whereas retailers play the role of ‘spokes’.
- The supplier obtains confidential information from one of its retailers

<sup>1</sup> Journal of Laws 2007 No. 50, item 331, as amended.

<sup>2</sup> Hub-and-spoke is also referred to as ‘AtoBtoC’ coordination; see E.Giovanetti, D. Stallibrass, ‘Three Cases in Search of a Theory: Resale Price Maintenance in the UK’ (2009) 5(3) *European Competition Journal* 645.

concerning, most often, retail prices that the latter intends to introduce. Then the supplier forwards that information to other retailers who, at the same time, inform it of their own intended retail prices, which the supplier in turn forwards to other retailers. In this manner, retailers become aware of the retail prices that their competitors intend to introduce despite the fact that they have not actually been in direct contact with each other.

- The retailer acts as the ‘hub’ whereas its suppliers play the role of ‘spokes’. The flow of information pertains to sale prices that suppliers intend to introduce, and which are, from the retailer’s perspective, purchase prices. Suppliers can find out from their common retailer what price rises their competitors intend to introduce despite not having been in direct contact with each other. This type of reverse hub-and-spoke conduct has not yet been assessed by the Polish antitrust practice.

Research material that served as the basis for this paper consisted primarily of three separate decisions issued by the President of the Polish Office of Competition and Consumer Protection (in Polish: *Prezes Urzqd Ochrony Konkurencji i Konsumenta*; hereafter, UOKiK) concerning vertical price collusion entered into by DIY store chains and paint & varnish manufacturers:

- UOKiK President’s decision of 18 September 2006, DOK-107/06, in the Polifarb Cieszyn Wrocław case – the *PCW* decision<sup>3</sup>;
- UOKiK President’s decision of 24 May 2010, DOK-4/2010, in the *Tikkurila* case;
- UOKiK President’s decision of 31 December 2010, DOK-12/2010, in the *Akzo Nobel* case.

## II. Hub-and-spoke – legal decisions made in other jurisdictions

Hub-and-spoke is a relatively new phenomenon in antitrust case law also in Poland<sup>4</sup>. The first, highly publicised cases of that type occurred on the British market and concerned three decisions of the Office of Fair Trading (OFT) in

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<sup>3</sup> Decisions available at: [www.uokik.gov.pl](http://www.uokik.gov.pl). None are final and can thus be subject to amendments by the Court of Competition and Consumer Protection (SOKiK), Court of Appeals or Supreme Court. The *PCW* case has already been adjudicated by SOKiK and the Court of Appeals. The case was returned for a renewed assessment by SOKiK in August 2011. The judgments did not however directly deal with the hub-and-spoke conduct.

<sup>4</sup> However, compare George A. Hay, ‘Horizontal Agreements: Concept and Proof’ (2006) 51 *Antitrust Bulletin* 877, who as an example of a practice similar to hub-and-spoke cites the U.S. case dating back to the 1930s – *Interstate Circuit v. United States*, 306 U.S. 208 (1939).

the *Hasbro*<sup>5</sup>, *Replica Football Kit*<sup>6</sup> and *Double Glazing*<sup>7</sup> cases. Hub-and-spoke was also considered in the OFT's Tobacco case, but the latter investigation was ultimately discontinued with respect to prohibited information-sharing due to lacking evidence<sup>8</sup>. Another OFT proceeding, this time relating to dairy products, was also discontinued for the same reason<sup>9</sup>. Hub-and-spoke was referred to in the Bundeskartellamt's CIBA Vision case<sup>10</sup> and in the Federal Trade Commission's *Toys 'Я' Us* case<sup>11</sup>. It is also worth noting in this context two recent American court judgments, *PSKS, Inc v. Leegin Creative Leather Products Inc*<sup>12</sup>, and *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield*<sup>13</sup>. Despite the fact that the plaintiffs' claims that the defendants engaging in hub-and-spoke practices were not actually accepted, the Court of Appeals presented in its *Total Benefits Planning Agency v. Anthem Blue Cross and Blue Shield* judgment a useful description of hub-and-spoke practices: 'A hub and spoke conspiracy involves a hub, generally the dominant purchaser or supplier in the relevant market, and the spokes, made up of the distributors involved in the conspiracy. The rim of the wheel is the connecting agreements among the horizontal competitors (distributors) that form the spokes. Each of the three parts is integral in establishing a *per se* violation under the hub and spoke theory'<sup>14</sup>. Following this description, the District Court added in *PSKS v. Leegin* that: 'The critical issue for establishing a *per se* violation with the hub and

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<sup>5</sup> OFT decision no. CA98/8/2003 of 21 November 2003 concerning retail-price fixing between a manufacturer of toys (e.g. the game Monopoly) and his retailers Argos Ltd and Littlewoods Ltd. On 14 December 2004, the British Competition Appeal Tribunal issued a judgement essentially upholding the OFT decision. In turn, the Court of Appeal dismissed Hasbro's appeal by a judgement of 19 October 2006.

<sup>6</sup> OFT decision no. CA98/6/2003 of 1 August 2003 concerning retail-price fixing of replica football kits made by Umbro. By judgement of the British Competition Appeal Tribunal of 14 December 2004, the OFT decision was upheld in principle. In turn, by judgement of the Court of Appeal of 19 October 2006, a retailer's appeal was dismissed (in the appeal proceedings, the *Hasbro* and *Replica Football Kit* cases were examined jointly).

<sup>7</sup> OFT decision of 8 November 2004 in the *Double Glazing* case.

<sup>8</sup> OFT decision of 15 April 2010 in the *Tobacco* case.

<sup>9</sup> OFT communiqué of 30 April 2010, available on the OFT website.

<sup>10</sup> Bundeskartellamt decision of 25 September 2009 in case no. B3-123/08.

<sup>11</sup> FTC decision of 27 September 1997 in the *Toys 'Я' Us* case, available on the FTC website, pertaining to the exchange of information on intended market activities between U.S. game and toy makers through their common retailer.

<sup>12</sup> See *United States District Court For The Eastern District Of Texas Marshall Division*, Case No 2:03 CV 107 (TJW), available at [http://www.globalcompetitionreview.com/\\_files/\\_news/13218-leegin\\_final\\_decision.pdf](http://www.globalcompetitionreview.com/_files/_news/13218-leegin_final_decision.pdf)

<sup>13</sup> See United States Court of Appeals For The Sixth Circuit; Case No. 07-4115, available at: <http://www.Ca6.Uscourts.Gov/Opinions.Pdf/08a0453p-06.Pdf>

<sup>14</sup> *Ibidem*, p. 8.

spoke system is how the spokes are connected to each other<sup>15</sup>. Neither of the American courts found any such connections and thus they dismissed both cases.

A hub-and-spoke conspiracy was also the subject of antitrust proceedings in Slovenia in 2009. The Slovenian competition authority questioned there a practice whereby distributors forced certain suppliers to inform them when other distributors would increase their retail prices. A commitment decision was issued in this case<sup>16</sup>.

Two British cases, *Hasbro* and *Replica Football Kit*, are commonly quoted in antitrust literature. Many commentators agree that the main issue which arose in those cases was the awareness of the ‘hub’ and its ‘spokes’ of the information use<sup>17</sup>. The British Competition Appeal Tribunal presented a more restrictive opinion with respect to this subject than the OFT. This issue is well described in the British contribution to the 2010 OECD report where it is stated that: ‘It must be demonstrated to the required standard of proof that where a retailer (A) discloses to their supplier (B) their future pricing intentions, the circumstances of this disclosure are such that A may be taken to have intended that B will/would make use of that information to influence market conditions, or did in fact foresee this by passing that information on to other retailers (C). B must also be shown to have actually passed that information to C and that they disclosed this in circumstances where C may be taken to have known the circumstances in which the information was disclosed by A to B or that C in fact appreciated that the information was passed to it with A’s concurrence (i.e. to influence market conditions). It must also be demonstrated that C does, in fact, use the information in determining its own future pricing intentions. In these cases, the provision of, receipt of or passing on of information between competitors through an intermediary in circumstances where it can be taken for one to have intended to influence the market conduct of the other is anticompetitive’<sup>18</sup>.

Hub-and-spoke practices have recently caught the interest of other European competition authorities. Antitrust proceedings concerning this issue are currently underway in Italy (cosmetics and toiletries), France (cleaning products), and Germany (chocolate)<sup>19</sup>.

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<sup>15</sup> Ibidem, p. 12.

<sup>16</sup> See the decision of 7 May 2009, available at: <http://www.uvk.gov.si/fileadmin/uvk.gov.si/pageuploads/ijz072.pdf>

<sup>17</sup> See, for example, Bellamy & Child, *European Community Law of Competition*, Oxford 2008, p. 127; A. Jones, B. Sufrin, *EC Competition Law: Text, Cases, and Materials*, Oxford 2008, p. 180; A. Albors-Llorens, ‘Horizontal agreements and concerted practices in EC competition law: unlawful and legitimate contacts between competitors’ (2006) 51 *Antitrust Bulletin* 867–869;

<sup>18</sup> *Information Exchanges between Competitors under Competition Law*, OECD 2010, p. 286.

<sup>19</sup> After P. Whelan, ‘Trading negotiations between retailers and suppliers: a fertile ground for anti-competitive horizontal information exchange?’ (2009) 5(3) *European Competition Journal*

### III. Detailed reconstruction of hub-and-spoke practices in Polish cases – *PCW (2006)*, *Tikkurila (2010)* and *Akzo Nobel (2010)*

The three aforementioned cases were assessed by the UOKiK President between 2005 and 2010 as separate proceedings with no formal links between them. Nonetheless, their joint assessment is justified by the nature of the practices identified therein and similarity of the circumstances of their application. The issue at hand was an agreement concluded between paint and varnish suppliers on the one hand, and Polish Do-It-Yourself store chains ('DIY') on the other. The scrutinised practices were in effect from 2003 to 2006 and were meant to fix retail prices of paints and varnishes made by PCW, Tikkurila<sup>20</sup> and Akzo Nobel<sup>21</sup>.

From the perspective of the scrutinised manufacturers, those arrangements were vertical, that is, they did not involve any direct or indirect contact between the competing suppliers themselves. From the point of view of the retailers however, the contested practices bore the features of vertical agreements with a horizontal effect<sup>22</sup>. In other words, no direct contact between individual retailers was identified and yet they were aware, as a result of the practice in question, of the intended/current pricing activities of their competitors. Indeed, pertinent information was being provided by individual suppliers. Horizontal effects of this practice were achieved in particular thanks to the information exchange on retail prices applied by individual DIY store chains between the latter and the paint and varnish manufacturers.

Each of the Polish cases had a similar history. As the Polish DIY market grew between 2000 and 2003, price wars between competing DIY chains were waged increasingly often. They caused a steady drop in retail prices of paints and varnishes made by the aforementioned suppliers. At the same time

824. See also H. Wollmann, 'Category Management, Private Labels und Informationsaustausch zwischen Wettbewerbern' (2011) 1 *Ecolex – Fachzeitschrift Für Wirtschaftsrecht* 51. The author does not present any Austrian hub & spoke cases but points to the fact that category management agreements may facilitate hub-and-spoke conduct if the same category manager is dealing with many competing retailers and has access to their confidential data.

<sup>20</sup> In the period covered by the *Tikkurila* decision, the scrutinised paint and varnish maker was TBD S.A. That company was taken over in 2007 by the Finnish concern Tikkurila. See pt. 11 of the UOKiK decision in the *Tikkurila* case.

<sup>21</sup> In the period covered by the *Akzo Nobel* decision, the relevant scrutinised paint and varnish maker was Nobiles Sp. z o.o. That company was taken over in 2007 by the international concern Akzo Nobel, the latter was taken over by the ICI Group in 2008. Since the reorganisation of the ICI Group in 2009, ICI operates in Poland under the name Akzo Nobel Decorative Paints sp. z o.o. See p. 7 of the decision in the *Akzo Nobel* case.

<sup>22</sup> See p. 41 of the *PCW* decision, pt. 342 of the *Tikkurila* decision and pp. 94–95 of the *Akzo Nobel* decision.

however, the purchasing power of DIY retailers was growing in comparison to the so-called traditional market. As a result, paint and varnish manufacturers found it increasingly difficult to convince DIY chains to accept successive price rises even though they were indispensable due to growing prices of raw materials. The issue at stake here was whether the growing production costs were to be borne by the supplier or, whether they would be shifted onto retailers and, consequently, onto end users. Price wars between DIY store chains ultimately resulted in a reduction of their profit margins and thus, their will to accept successive price increases waned. Sometime during 2003, individual suppliers began persuading their retailers to comply with recommended retail prices which were usually higher than the shelf prices charged at that time. The initial scope of the retail price setting arrangements was limited. They were restricted to negotiations with the market leader only, covered a very narrow range of products and their nature was infrequent and ad hoc<sup>23</sup>.

The scrutinised parties disagreed as to who had initiated the anticompetitive practices in the first place. Tikkurila and Akzo Nobel claimed that they had been forced into price fixing and information exchange by one of the DIY chains. Retailers accused in turn the two manufacturers of having initiated the contested practices<sup>24</sup>. In both cases, the scrutinised supplier and one of the retailers filed for leniency. According to Polish competition law however, the undertaking which has initiated the prohibited practice cannot expect a full penalty waiver. This is why both suppliers were attempting to prove that the restrictive practice had been initiated by one of the DIY chains, while the latter argued that it had in fact been initiated by the suppliers. Ultimately, the UOKIK President shared the position of the retailers and decided that the restrictive arrangements had been initiated by the suppliers as it was them who stood guard over the cohesion of the retail-price fixing and information exchange system. It was also them who took active measures to stabilise market prices, set retail-price levels and then endeavoured to persuade particular retailers to apply them<sup>25</sup>.

The pace of the restrictive practices undertaken by the scrutinised suppliers and their retailers accelerated from early 2005 onwards due to the determined actions taken by Polifarb Cieszyn Wrocław. At that time, PCW introduced a 'price stabilizing system'. Its purpose was to ensure that DIY store chains

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<sup>23</sup> In the *Tikkurila* and *Akzo Nobel* cases. In the *PCW* case, the agreement started to be executed in an organised manner in 2005 – see, for example, p. 40 of the *PCW* decision which describes its history.

<sup>24</sup> See pp. 76–80 of the *Akzo Nobel* decision and pts. 143, 196 and 203 of the *Tikkurila* decision.

<sup>25</sup> See pp. 96–99 of the *Akzo Nobel* decision and pt. 32 of the *Tikkurila* decision.



maintain the retail prices of its 10 best-selling products at a level not lower than that recommended by the manufacturer. Any failure to comply with those prices would cause a PCW intervention into the purchasing department of the given chain and ‘taking corrective measures meant to persuade the store chain to return to the suggested prices, e.g. halting supplies’. In return for the introduction of the recommended prices, retailers received a so-called ‘stabilizing rebate’. If any of the stores that form part of a given DIY chain charged prices different than those indicated by the supplier, the entire chain would lose the stabilizing rebate or be faced with a supply refusal from PCW. Polifarb Cieszyn Wrocław instructed its retailers that ‘stores that maintain PCW suggested prices as their retail prices will be receiving an additional stabilizing rebate in their invoice as a bonus for price compliance. If a given store does not comply with the prices suggested by PCW, all supplies of all products will be stopped and the stabilizing rebate will be put on hold until prices are brought back to the suggested level’<sup>26</sup>.

The UOKIK President established that PCW had played the role of a ‘mediator’ who would ‘appease disputes’, explain price differences, and inform retailers about how quickly would the prices of their competitors return to the agreed level. The manufacturer would notify retailers of all price changes of their competitors (most often increases), no matter how small, so as to prevent price changes by other trading partners<sup>27</sup>. By taking structured and wide-ranging measures to persuade DIY store chains to participate in the price stabilizing system, PCW was able to bring about a stabilization of its retail prices within as little as one week<sup>28</sup>.

PCW activities were watched by other paint and varnish suppliers – Akzo Nobel and Tikkurila. When it became clear that the uncompromising implementation of PCW’s price stabilizing system was bringing about measurable results, they also began to take more decisive steps in order to level out the retail prices of their own products<sup>29</sup>.

The Polish competition authority was not able to prove in any of the discussed cases that the scrutinised suppliers had ever been in direct or indirect contact with each other. Neither was there any evidence of direct contact between the DIY chains. On the other hand however, the UOKIK President managed to prove indirect horizontal contacts between the scrutinised retailers through their common suppliers. This factor was of utmost importance to those involved in the prohibited practice as it could result in a substantial increase of the antitrust fine they ultimately faced.

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<sup>26</sup> See p. 22 of the *PCW* decision.

<sup>27</sup> See p. 25 of the *PCW* decision.

<sup>28</sup> See p. 24 of the *PCW* decision.

<sup>29</sup> See pt. 153 of the *Tikkurila* decision.

The Polish competition authority classified the aforementioned agreements as the most serious type of competition law infringement. The UOKIK President's decision in the *Tikkurila* case states that '(...) the nature of the agreement in question was, in fact, horizontal – a cartel of retailers supervised and kept stable by the supplier. Therefore, despite having formally classified the infringement as a vertical agreement, i.e. concluded by entities operating at different levels of the trade chain (supplier-retailer), in reality it had a horizontal effect – the introduction or the intent to introduce minimum retail prices by DIY stores, dependant on analogous conduct by other market participants (i.e. other retailers). The result of such activities was a complete elimination of competition at the level of retail sales of *Tikkurila* products, hence, in the horizontal dimension'<sup>30</sup>.

Moving onto the discussion of the individual aspects associated with information exchange between paint and varnish suppliers and DIY store chains in the *PCW*, *Tikkurila* and *Akzo Nobel* cases, a distinction needs to be made however between different types of information exchange.

## Types of information exchanged

### *a. Information on current paint and varnish shelf prices*

The compliance by all major DIY chains participating in the agreement with the prices set by the suppliers was the key to the success of the price stabilization program. A deviation by one of the retailers generally caused an immediate reaction from other DIY store chains – the latter would either lower or threaten to lower their retail price so as to remain competitive with each other. Information concerning the competitors' retail prices was thus of primary importance to the participating DIY chains. As the UOKIK President established in the *Tikkurila* decision, '(...) measures taken by [DIY store chains] depended on the supplier "tidying up" the market, i.e. introducing full transparency of prices applied by other store chains. (...) Participants in the agreement reacted "violently" to promotion campaigns organized by other points-of-sale and to other cases of 'retail price dumping'<sup>31</sup>. All DIY chains permanently monitored the retail prices of their competition<sup>32</sup>. The UOKIK President stated in the *PCW* decision: 'the objective of monitoring prices applied by the competition in the case at hand was to check whether everyone was applying fixed prices. When a store chain applied prices lower

<sup>30</sup> See pt. 372 of the *Tikkurila* decision.

<sup>31</sup> See pt. 303 of the *Tikkurila* decision.

<sup>32</sup> See pt. 28 of the *Tikkurila* decision, p. 104 of the *Akzo Nobel* decision and p. 21 of the *PCW* decision.

than agreed, other chains would inform Polifarb Cieszyn Wrocław thereof and the supplier would then “discipline” the head office of that chain, whereas the head office would subsequently intervene at the store level<sup>33</sup>.

Retail prices applied by individual stores were known and access to them was not a problem, in theory at least. In practice however, retailers would sometimes come across some difficulties in this area, which the supplier would help solve by providing appropriate pricing information. This issue requires a few words of explanation.

Two publicly accessible sources of information exist about retail prices charged by specific DIY chains. The first is promotional flyers, their usefulness is limited however because a flyer only refers to a very narrow range of items of a given type. The second source of information on current retail prices is found on store shelves. The usefulness of this source is also limited because the shelf price setting system by individual stores is in most cases decentralized. The head office of a given DIY chain establishes a system price which serves as a guide for all its stores. However, individual store managers are free to decide to lower or increase the system price (this freedom does not generally extend to best-selling products, i.e. products advertised nationally with a specific retail price)<sup>34</sup>. For example therefore, the fact that one of the DIY chains knew the retail price charged for Jedyńka Biała paint in 10 litre containers at a competing store in Gdańsk did not mean that it knew the retail price of the same product in the same competing chain’s store in the neighbouring city of Gdynia. Indeed, each individual store could charge a different price. In 2005, the scrutinised DIY store chains owned more than 100 stores. Checking shelf prices in all or most of those stores was theoretically possible but individual retailers found it troublesome as it required a lot of work, time and resources. As a result, DIY chains would often monitor their competitors’ prices in a hap-hazard manner only and thus rely on the supplier’s assistance in getting comprehensive information about the retail prices applied by competing stores nationwide<sup>35</sup>.

In this respect, the supplier held a trump card in the form of a team of sales agents whose duties included regular visits to all retail stores for the purpose of order collecting, taking care of product displays, conducting marketing campaigns, etc. At the same time, they had the opportunity to note down shelf prices applied in particular outlets. A sales agent could also contact an employee of a given chain and ask for information about the level of specific retail prices. Such contact was a natural occurrence between trading partners. The decisions issued by the UOKIK President in the three aforementioned cases

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<sup>33</sup> See p. 49 of the *PCW* decision.

<sup>34</sup> See pp. 13 and 76 of the *Akzo Nobel* decision and pts. 1 and 138 of the *Tikkurila* decision.

<sup>35</sup> See pts. 56, 139 and 150 of the *Tikkurila* decision.

indicate that such contact, and the accompanying exchange of information, was frequent. There was however no contacts between the employees of competing DIY chains<sup>36</sup>. Nevertheless, the arrangements made between the parties generally concerned centrally determined system, retail prices. It was indeed obvious that the price established by the head office served as a clear guide for particular stores as to what level of retail price was expected by the head office and, consequently, what profit margin were to be generated on the sales of particular products.

Having obtained information on competitors' retail prices, a given DIY chain would behave in one of the following ways:

- It would raise its retail price if the DIY chain saw that it was charging less than, or equal, to the price of its competitors. Such raise could also take place if a given retailer had information that competing DIY chains were intending to increase their price<sup>37</sup>;
- It would lower its retail price if the DIY chain saw that it charged more than its competitors. If the level of prices which the supplier promised would be maintained by other retailers actually changed, a decision to cut the retail price was often combined with a request to the supplier to grant the given retailer a so-called 'margin-loss rebate'. The retailer in question would argue that it accepted a particular purchase price because the supplier had promised to maintain market prices at a set level. Since the supplier did not keep its word, the retailer was forced to lower its own retail prices, which resulted in a loss of that retailer's expected profit margin. The supplier should thus compensate for that loss<sup>38</sup>;
- It would not lower its retail price, even though the DIY chain saw that its competitors charged less, but request at the same time from the supplier an additional rebate in return for maintaining the set retail price<sup>39</sup>. There were times in addition when DIY chains would request compensation for the price difference. The latter situation occurred with respect to those retailers that guaranteed their customers the lowest price on the market. If a customer found the same product for less somewhere else, he could request the store where he had originally bought the product to reimburse him for the price difference. The chain would pay that difference and then sometimes request an equivalent return from the supplier (often with success)<sup>40</sup>.

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<sup>36</sup> See p. 22 of the *Akzo Nobel* decision and pt. 83 of the *Tikkurila* decision.

<sup>37</sup> See pp. 27 and 50 of the *PCW* decision and pp. 18 and 20 of the *Akzo Nobel* decision.

<sup>38</sup> See pp. 18 and 79 of the *Akzo Nobel* decision and pt. 30 of the *Tikkurila* decision.

<sup>39</sup> See pt. 63 of the *Tikkurila* decision.

<sup>40</sup> See pt. 222 of the *Tikkurila* decision.

- It would not change its retail price as that was apt to start a price war but instead, the DIY chain would add a free gift to the products sold in its stores such as a paint roller or extra litre of paint, etc.<sup>41</sup>

***b. Information on intended retail prices***

Another type of data conveyed by retailers to the supplier and then by the supplier to competing retailers was information on retail prices that the various DIY chains intended to introduce in the future. That information came in two types:

- Price information associated with the joint production of advertising material

The analyzed body of material confirms the existence of a frequent practice of joint marketing campaigns organised by the supplier and its retailers. As a rule, those campaigns consist of press and billboard advertising whereby the advertisements would, for example, refer to a DIY chain but also to a specific paint that could be purchased therein. The paint was sold at the retail price shown in the advertisement. The campaign would be commissioned by the given DIY chain but the manufacturer would usually participate in its costs. Consequently, it was natural for the supplier to want to see the draft of the advertisement before it was finalized, seeing as it co-financed its production.

It goes without saying that the supplier had the right in such situations to make sure that its product was properly portrayed and described, that its photograph was of good quality, that its trademarks were properly used, etc. Nonetheless, when sending the draft for a supplier's approval, retailers would often disclose at the same time that product's intended retail price<sup>42</sup>. If the price shown on the draft was lower than the price recommended by the supplier, the latter would try to persuade the DIY chain to raise it, for example by threatening to withdraw the co-financing of the campaign<sup>43</sup>. Suppliers would transmit information obtained in this way to other retailers, thus curtailing the uncertainty with respect to competitive measures taken by retailers. This action would also reduce the risk of price wars.

- Information on intended retail prices obtained in a different way

Suppliers would obtain information from retailers on their intended retail prices in the course of standard conversations or e-mail contacts. Suppliers would also inform DIY chains of expected non-compliance

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<sup>41</sup> See p. 26 of the *PCW* decision.

<sup>42</sup> See pts. 26, 79, 83 and 95 of the *Tikkurila* decision and pp. 67-68 of the *Akzo Nobel* decision.

<sup>43</sup> See pp. 67-68 of the *Akzo Nobel* decision.

with the recommended price by a given chain, explaining at the same time that it was not the fault of that supplier<sup>44</sup>.

*c. Other types of information*

Other types of information about retailers' activities that were transmitted to competing retailers included the reasons behind price changes in particular chains/stores. A retailer would be less inclined to lower its own price to match that of its competitor if it knew beforehand that the latter has lowered its prices to clear excess stock, due to an error or automatic price rounding by its computer system or even, if the competing store was conducting a small scale promotion to respond to the situation on a local market<sup>45</sup>. The DIY chain would thus be aware of the fact that the competitor lowered its prices only temporarily and that the price would soon return to 'normal'. As a result, not lowering its own price would not cause any loss of competitiveness with respect to the retailer who had lowered its price for the above reasons.

On the other hand however, there was no evidence of suppliers sharing information of any other type, such as retailers' know-how, investment plans, intention to open new stores, volume of sales of specific products, volume of returned products, commercial terms such as rebate levels, purchase targets, payment terms, payment arrears, etc. Still, it is hard to tell whether that meant that there really was no such information exchange between the scrutinised parties or whether the UOKiK President simply did not question such exchange.

#### **IV. Hub-and-spoke – independent practice or element of another practice?**

Two questions come to mind when examining the nature of hub-and-spoke conspiracies:

1. Can such practice be seen as an independent agreement / concerted practice? If not, is it an element of a different agreement? In other words, is a hub-and-spoke practice meant to bring another agreement into being or facilitate its smooth operation?
2. What is the importance of treating a hub-and-spoke conspiracy as an independent competition restricting practice?

Considering the first issue, foreign antitrust authorities have usually classified hub-and-spoke practices as an element of a wider agreement meant

<sup>44</sup> See pp. 18 and 20 of the *Akzo Nobel* decision.

<sup>45</sup> See p. 19 of the *Tikkurila* decision.

to fix retail prices in a vertical configuration. Only in the American *Toys 'R' Us* case can it be said that the FTO treated the hub-and-spoke conspiracy as an independent practice seeing as its sentencing part specifically prohibited suppliers from exchanging any future information pertaining to sales of their products through their common retailers. Hub-and-spoke practices were treated in all other foreign cases more like an element of a wider agreement than a separate practice.

Also the Polish *PCW*, *Tikkurila* and *Akzo Nobel* decisions leave no doubt that the UOKiK President did not treat hub-and-spoke practices as an independent agreement. This finding is confirmed by the unequivocal wording of the sentencing part to those decisions which state that the parties were engaged in only one prohibited practice – a competition restricting agreement consisting of retail price fixing of their paints and varnishes. Indeed, a different approach could have been applied seeing as in the *Polish Cement Cartel* case<sup>46</sup>, the UOKiK President did in fact divide the scrutinised information exchange according to its aim into two separate agreements: a) an independent agreement and b) an element of another wider agreement.

Considering the existence of this type of division, the question arises whether there are in actuality any material differences in separating independent hub-and-spoke practices from those seen only as part of more extensive multilateral agreements. Theoretical issues notwithstanding, such differences should be seen as of minor importance. This question can however impact four areas: evidence, antitrust statute of limitations, right of the party to mount a proper defence (awareness of charges) and the penalty level. Owing to the fact that the Polish competition authority may achieve the same intended objective by classifying hub-and-spoke as either an independent or derivative practice, this issue is important only in theoretical terms and will thus not be discussed further in this paper.

It is quite simple in actual fact to decide when should hub-and-spoke be treated as an independent agreement and when as part of another practice. Where the main economic function of the agreement (concerted practice) lays in the hub-and-spoke conspiracy itself, the latter should be treated as an independent agreement (an agreement in itself). If, in turn, the main object of a given market conduct is to fix prices directly in a 'classical' way and the hub-and-spoke practice merely underpins this primary object as an additional tool to facilitate it, then it should be treated as part of that wider agreement. The circumstances of the three Polish cases show very clearly that they were an example of the latter. The aforementioned division criteria can be found

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<sup>46</sup> Decision of the UOKiK President of 8 December 2009, DOK-7/2009, concerning a pricing collusion between Polish cement suppliers.

also the *Polish Cement Cartel* decision as well as in point 56 of the European Commission's Horizontal Guidelines of 2011.

## V. 'Hub' as the initiator of the agreement

The issue of who had initiated the retail price fixing agreement played an important role in the *Tikkurila* and *Akzo Nobel* cases because both of these manufacturers, as well as retailers, applied for leniency. The importance of this issue results from the fact that leniency applies in Poland, as opposed to most other European jurisdictions, to vertical agreements also. However, an entity that files a leniency application but is recognized as the initiator of the restrictive practice cannot expect a full waiver. It is thus essential for the UOKiK President to establish who the 'initiator' of the contested agreement is.

In the *Akzo Nobel* and *Tikkurila* decisions, the Polish competition authority adopted a broad interpretation of the notion 'initiator'<sup>47</sup>. The UOKiK President associated this status not only with the undertaking that had started the practice by persuading others to join it but first and foremost, with the entity that was actively implementing, organizing and supervising the practice (i.e. acting as the leader of the practice). The UOKiK President stressed the role of the 'hub', played in both cases by paint suppliers, for proving who the initiator of both practices was. It is worth quoting here the relevant part of the decision in the *Tikkurila* case: 'The role played by Tikkurila also involved pacifying 'trouble spots' mainly by transmitting to the parties information on the date the given store would return to applying prices fixed by other stores and compensating for the lost margin as well as informing the parties of the pricing policy pursued by other market participants (i.e. giving them retail prices that competing stores were intended to introduce). Market stability and transparency were meant to prevent price wars between DIY store chains'<sup>48</sup>.

The Polish competition authority expressed the following view in the *Akzo Nobel* case: 'Akzo Nobel was transmitting to its retailers information on price changes intended by their competitors. As shown by the collected evidence, the company was not doing that at the request of the chains but rather to convince them that the given participant in the agreement would indeed comply with the arrangements. Such assurances would give the supplier more certainty as far as the compliance with the arrangements by those participating in the agreement'<sup>49</sup>.

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<sup>47</sup> See pp. 96–100 of the *Akzo Nobel* decision and pts. 305-310 of the *Tikkurila* decision.

<sup>48</sup> See pt. 308 of the *Tikkurila* decision.

<sup>49</sup> See pp. 98-99 of the *Akzo Nobel* decision.



## VI. Standard of proof

The Polish competition authority applies in its decisions the presumption of an anticompetitive aim (object) of price arrangements. As a result, the requirements to conduct a detailed economic analysis, in order to demonstrate the restrictive consequences of agreements containing such arrangements, are notably ‘softened’. Literature suggests however that lowering of evidence standards should not be tantamount to completely neglecting the economic context of the given agreement, particularly when it comes to vertical relations<sup>50</sup>.

What characterised the *PCW*, *Tikkurila* and *Akzo Nobel* decisions was the very high standard of proof of the UOKiK President’s findings (except on the issue of the duration of the prohibited agreement). The adopted standard of proof resulted however more from the nature and circumstances of these cases, as well as from the evidence collected in each of them, than from any formal legal requirements in that respect. Polish legislation makes it possible to prove a restrictive practice also on the basis of indirect evidence, on the basis of regulations referring to factual presumptions<sup>51</sup>. Moreover, the Polish competition authority is of the opinion that it can fully apply European case law with regard to the standard of proof in antitrust proceedings<sup>52</sup>.

In all three of the Polish cases, evidence was primarily found in an abundant number of e-mails exchanged between the personnel of the paint and varnish manufacturers and the employees of the DIY chains. Those individuals, most probably unaware of the fact that vertical pricing agreements are prohibited by the Polish Competition Act, described the details of the contested arrangements in their messages<sup>53</sup>. Part of that correspondence was seized by UOKiK officials during dawn raids performed in the premises of the scrutinised companies; the remaining was filed in relation to leniency applications.

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<sup>50</sup> A. Jurkowska [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 380.

<sup>51</sup> See the judgement of the Antimonopoly Court of 21 December 1994, XVII Amr 47/94. Concerning factual presumptions in Polish law, see also: K. Piasecki, *System dowodów i postępowanie dowodowe w sprawach cywilnych*, Warszawa 2010, pp. 92–97.

<sup>52</sup> See. pt 430 of the decision of 8 December 2009, DOK-7/09.

<sup>53</sup> In a survey conducted by the Polish Competition Authority in June 2009, Polish undertakings were asked whether price fixing was legal. A mere 53% of them replied that it was not. On the positive side, competition law awareness, although still very low, is systematically rising in Poland. In 2006, only 46% of the respondents were able to answer the same question correctly. *Examining knowledge of competition law and rules on granting state aid among Polish undertakings*, Office of Competition and Consumer Protection, Warszawa 2009, pp. 60–63. See also: ‘Firmy nie chcą na siebie donosić’ *Dziennik Gazeta Prawna* of 23 August 2011.

Indeed, leniency submissions were the second source of relevant information which, together with the content of the aforementioned e-mails, created a cohesive, logical and reliable whole of evidentiary material in support of the antitrust decision. In consequence, it is possible to conclude that most of the findings of the UOKiK President in the discussed cases have the character of findings ‘beyond reasonable doubt’ (note however the reservations in pt. 7 below). As a result, the most interesting issue of the British hub-and-spoke practice did not materialise in Poland at all as the UOKiK President had no doubts about the parties’ joint awareness of the anticompetitive aim of the information exchange in question.

Such strong standard of proof was possible thanks to the character of the evidence collected by UOKiK. Truthfully, most antitrust proceedings concerning vertical price-fixing conducted so far by the Polish competition authority have seen a similar methodology of evidence collection. Usually, evidence is essentially limited to written distribution agreements containing clauses referring to minimum resale prices, parties’ written explanations and additional documentation, mainly in the form of piecemeal correspondence between the parties<sup>54</sup>. There does not seem to exist a Polish vertical price-fixing case where evidence was sourced from economic experts nor from witness testimonials. The main reason for such phenomenon is likely the aforementioned unawareness of Polish undertakings with regard to the restraints laced upon them by competition law. This means in practice that company employees often create documentary evidence which can be later used by the UOKiK President against their employers. Advanced and in-depth evidence collection proceedings, including expert witnesses and testimonies, are thus not necessary in most cases.

## VII. Duration

The UOKiK President expressed in the *Tikkurila* decision the opinion that a vertical retail price fixing agreement (supported by the hub-and-spoke practice) lasts as long as the retailer applies the price set with its supplier<sup>55</sup>. The same opinion was expressed in the *ICI* case<sup>56</sup>, which could not refer to

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<sup>54</sup> See A. Bolecki, ‘Current Developments in Poland’ (2009) 5(3) *European Competition Journal* 911–915, where the author analyses six decisions of the UOKiK President, concerning vertical price-fixing, i.e. decision of 3 August 2009, RWR–18/2009; decision of 31 December 2008, RKT–109/2008; decision of 31 December 2008, RKT–88/2008; decision of 31 December 2008, RKT–107/2008; decision of 30 December 2008, RKT–50/2008; decision of 19 December 2008, RKT–88/2008.

<sup>55</sup> See pt. 316 of the *Tikkurila* decision.

<sup>56</sup> See p. 31 of the decision of 7 April 2008, DOK–1/08.

hub-and-spoke because it involved only two undertakings (retail price fixing by one paint supplier and one DIY store chain) and is thus not analyzed in detail in this paper. Nonetheless, the *ICI* case concerned the same antitrust issues as the *PCW*, *Tikkurila* and *Akzo Nobel* decisions (with the exception of the hub-and-spoke practice). The Polish competition authority decided in the *ICI* case that the fact that the given paint's retail price fixed in September 2005 was still used in April 2008 (the issue date of the antitrust decision) meant that the retail price fixing agreement was still in operation in 2008 and continued to have an anticompetitive effect until then.

If the UOKIK President's line of argumentation expressed in the *Tikkurilla* and *ICI* decisions was consistently pursued and applied by analogy to hub-and-spoke practices, the following conclusion would emerge:

Assuming that the supplier receives information from Retailer A that the latter will apply as of 1 January 2012 a new retail price agreed upon with the supplier; Retailer A counts on the supplier conveying this information to Retailer B. The supplier deliberately conveys that information to Retailer B and the latter, knowing the origin of that information, deliberately accepts it and as of 1 January 2012 applies the same price as Retailer A. Retailer B shapes its own price on the basis of the information previously obtained from the common supplier; Retailer B maintains the retail price until December 2014.

If the approach of the Polish competition authority was consistently applied to the above example, the conclusion would be reached that the anticompetitive agreement lasted and had an effect all the way until December 2014.

How significant is the UOKIK approach with respect to the duration of the restrictive agreement presented in the above example? Its impact is enormous in practical terms. Indeed, the duration of an anticompetitive practice is very important in relation to issues such as a) antitrust statute of limitations, b) the position of a leniency applicant, and c) the level of fines.

- Antitrust statute of limitations – according to Article 93 of the Competition Act, proceedings in matters of competition restricting practices are not instituted if at least one year has lapsed since the end of the year in which those practices were discontinued.
- Leniency applicant's position – according to Article 109.1.3 of the Competition Act, a full waiver of the penalty may be expected only by a leniency applicant who has ceased to participate in the given prohibited agreement at the latest on the date of notifying the UOKIK President of the agreement's existence.
- Penalty level – according to pt. 3 of the UOKIK Guidelines on the Determination of the Level of Fines for Applying Competition Restricting Practices issued in December 2008, long-term infringements are those that last in excess of one year. In the case of long-term infringements, the

level of the base used in calculating the antitrust fine can be increased by 200%.<sup>57</sup>

Deciding how long a restrictive vertical agreement has actually been in operation is fundamental to the outcome of antitrust cases. The approach of the UOKIK President is clearly very convenient from the perspective of prosecuting competition law infringements. It makes it possible to postpone the moment when the statute of limitations comes into effect. It also makes it possible to impose higher fines. However, is it compliant with the principles of the economic approach? It certainly does not seem so.

The approach adopted by the UOKIK President concerning the duration of vertical retail price fixing agreements is worth noting due to its dangerous automatism, which might not consider details of individual case. When preparing its decisions, the Polish competition authority did not conduct any economic or even quasi economic analysis of how long, account being taken of specific market conditions, a particular retail price remains the same as the one originally fixed between the parties.

The economic approach should be applied in order to perform a fair assessment of whether a vertically fixed retail price remains in fact the same price after it has been applied for an extended period of time. Such assessment is closely tied to the evaluation of the effects of the agreement, and this does not refer to the effect in the form of the introduction of a shelf price in the agreed amount, which is simple to examine. The problem is more complex and requires an analysis of how long can those effects be felt on the relevant market. It is accepted in both Polish and EU literature that an analysis of the effects of an antitrust practice requires the application of the economic approach and the consideration of the entire complexity of the economic environment in which the scrutinised practice took place<sup>58</sup>.

UOKIK abandoned that approach in favour of one that is purely formalistic and automatic. Meanwhile, account should be taken of factors such as inflation, purchase price changes, currency exchange fluctuations, demand and supply changes, the introduction of new products including substitutes, changing market structures and the competitive environment, etc. Only an economic analysis covering all of these variables would make it possible to assess whether a retail price fixed in 2005 and still applied, for example in 2008, continues to remain the very same price as before or if it is perhaps lower, and if so, since when. If it is decided that as of a certain moment in time

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<sup>57</sup> Available at [http://uokik.gov.pl/wyjasnienia\\_w\\_sprawie\\_kar3.php](http://uokik.gov.pl/wyjasnienia_w_sprawie_kar3.php).

<sup>58</sup> See Bellamy & Child, *European Community law of competition, sixth edition*, Oxford 2008, p. 166; K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów, Komentarz*, Warszawa 2008, p. 256, and D. Miąsik, *Reguła rozsądku w prawie antymonopolowym. Studium prawnoporównawcze*, LEX El. pt. 4.3.

the original price has in fact dropped (for example, because of a substantial rise of inflation), it would mean that both the restrictive agreement as well as its effects have ceased to exist. From an economic perspective, the retailer is now charging a lower price than the one originally fixed if the nominal value of that price has not changed over a considerable period of time. A retail price that has not risen, despite inflation or growing costs for instance, means that it has in fact been reduced. As a result, there can be no talk of the continuing existence of the anticompetitive agreement or of the agreement continuing to trigger an anticompetitive effect.

The presumption of the anticompetitive nature of price fixing arrangements lowers the requirement to conduct a detailed economic analysis of the contested practice in order to demonstrate the restrictive effect of a contract containing anticompetitive provisions. Nonetheless, the views of A. Jurkowska should be fully supported here whereby lowering the standard of proof in such cases should not equal to the complete abandoning of the economic context of the case. Doing so would be contrary to contemporary axiology of competition law expressed in the economic approach. In addition, the cited author correctly indicates that restricting the assessment of an agreement to its formal elements only is more justified in horizontal cases than it is in vertical relations<sup>59</sup>.

Foreign antitrust decisions concerning hub-and-spoke conspiracies did not deal with the issue of their ‘duration’. Duration does not seem to have been considered in vertical relations in EU case law either. Attention should however be drawn to three European judgements in the *CBS Grammofoon*<sup>60</sup>, *Binon*<sup>61</sup> and *Petrofina*<sup>62</sup> cases all of which express, in principle, the following view: ‘With regard to agreements which are no longer in force, it is sufficient, for article 85 to be applicable, that they continue to produce their effects after they have formally ceased to be in force’<sup>63</sup>. Nonetheless, the essence of these three cases differed significantly from hub-and-spoke conduct and retail price maintenance practices. In the *CBS Grammofoon* and *Binon* cases, the presented view did not refer to price fixing at all. Although it did so in the *Petrofina* case, the latter differed significantly from the Polish cases as it concerned direct horizontal price fixing and the set prices were charged only two months after the last meeting of the competitors.

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<sup>59</sup> A. Jurkowska [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), *Ustawa...*, p. 380.

<sup>60</sup> 86/75 *CBS Grammofoon*, ECR [1976] 871, para. 27.

<sup>61</sup> 243/83 *Binon*, ECR [1985] 2015, para. 17.

<sup>62</sup> T-2/89 *Petrofina*, ECR [1991] II-1087, para. 126 and 138.

<sup>63</sup> As stated in para. 17 of the *Binon* judgment.

## VIII. Conclusions

Polish antitrust practice has dealt with three major hub-and-spoke cases. All concerned sales of paints and varnishes in Polish DIY store chains. It is possible in summary to distinguish the following characteristic features of hub-and-spoke practices in Poland:

- In all cases, the role of the ‘hub’ was played by the supplier, whereas retailers (DIY store chains) acted as ‘spokes’. No direct contacts between suppliers were identified.
- The supplier would obtain information from its retailers referring not only to retail prices they intended to introduce but also to current prices. If the latter were too low, the supplier would also obtain information referring to the reasons ‘justifying’ such state of affairs. The supplier would transmit that information to other DIY chains. The information exchange served as an incentive for retailers to increase their retail prices or to refrain from lowering them.
- Hub-and-spoke conspiracies were not recognized by the UOKiK President as an independent restrictive practice. Instead, the transmission of information on prices applied by other retailers was recognized as an element of vertical retail-price fixing. The existence of the hub-and-spoke practice was the very reason why the Polish Competition Authority decided that the vertical practice caused a horizontal effect. As a result, the UOKiK President substantially increased the level of the fines imposed.
- The fact that the supplier played the role of the ‘hub’ was recognized as one of the factors proving that it had indeed been the initiator of the agreement involving vertical retail-price fixing with a horizontal effect. The notion of the ‘initiator’ was understood more as an ‘instigator’ than the undertaking that actually started the practice. This prevented the treatment of the supplier as a ‘fully-fledged’ leniency applicant.
- The standard of proof was very high in all of the aforementioned cases. This was due to the abundance of evidence found in the hundreds of e-mails found by UOKiK that contained details of the anticompetitive arrangements at hand as well as the explanations provided by leniency applicants.
- The interpretation of the ‘duration’ of the contested practice was definitely incorrect. Without having conducted any economic analysis, the UOKiK President automatically recognized that the agreement was still in operation and continued causing anticompetitive effects. Its duration was said to extend for as long as one of the retailers was still applying the retail price initially fixed in violation of the Competition

Act, even if nearly three years have passed since the price setting actually occurred. The Polish Competition Authority would have done better by applying the economic approach rather than exercising formalistic automatism.

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