

Maciej Bernatt

Powers of Inspection of the Polish Competition Authority. Question of Proportionality

Yearbook of Antitrust and Regulatory Studies 4 (5), 47-66

2011

Artykuł został opracowany do udostępnienia w internecie przez Muzeum Historii Polski w ramach prac podejmowanych na rzecz zapewnienia otwartego, powszechnego i trwałego dostępu do polskiego dorobku naukowego i kulturalnego. Artykuł jest umieszczony w kolekcji cyfrowej bazhum.muzhp.pl, gromadzącej zawartość polskich czasopism humanistycznych i społecznych.

Tekst jest udostępniony do wykorzystania w ramach dozwolonego użytku.

Powers of Inspection of the Polish Competition Authority. Question of Proportionality

by

Maciej Bernatt*

CONTENTS

- I. Introduction
- II. Limitations of rights and freedoms
- III. Proportionality safeguards in Polish competition proceedings
- IV. Distinction between a control and a search
- V. Prior notice of an inspection
- VI. Inspections during explanatory proceedings
- VII. Right of complaint and judicial control
 - 1. Objections under the Act on the Freedom of Economic Activity
 - 2. Prior judicial control
 - 3. Subsequent judicial control
- VIII. Conclusions

Abstract

The principle of proportionality applies to competition proceedings especially, when it comes to the exercise by the competition authority of its powers of inspection. Their use limits the economic freedom and right to privacy of the scrutinised undertakings in order to protect free competition. The use of inspection powers must thus be proportionate and remain the least onerous possible for the inspected companies. In consequence, legislation must provide procedural guarantees of proportionality of inspections.

This article analyses whether the powers of inspection bestowed upon the Polish competition authority are regulated in a way that guarantees the observance of

* Dr. Maciej Bernatt, lecturer at the Jean Monnet Chair on European Economic Law, Faculty of Management, University of Warsaw; ordinary member of the Centre for Antitrust and Regulatory Studies; assistant of justice in Polish Constitutional Court.

the principle of proportionality. The analysis focuses on the powers of control and search. Subsequently covered is also the issue of judicial control over the use of the powers of inspection by the competition authority. Proposals for changes in the practice of the competition authority as well as in the Polish legal framework are made in conclusion.

Résumé

Le principe de la proportionnalité s'applique quand il vient à l'exercice des puissances de l'inspection par l'autorité de concurrence. L'utilisation de ces puissances – limitant, au nom de la protection de la libre concurrence, la liberté économique et le droit des entreprises à l'intimité – doit être proportionnée et la moins onéreuse possible pour les entreprises inspectées. Par conséquent, dans le cadre juridique les garanties procédurales de la proportionnalité des inspections doivent être fournies. L'article analyse si les puissances des inspections de l'autorité de concurrence polonaise sont réglées d'une manière qui garantit le respect du principe de la proportionnalité.

Classifications and key words: competition proceedings; antitrust proceedings; dawn raids; inspection; right to privacy; right of defense; judicial control over the administrative proceedings; procedural fairness.

I. Introduction

Proportionality is an essential legal principle which states that interference by public authorities with the rights and freedoms of private entities is permissible only if it is in accordance with the law and is necessary in a democratic society for the protection of key interests such as public order or the rights and freedoms of others. For that reason, the use of public measures in order to attain objectives legitimately pursued by legislation should remain the least onerous possible for private entities. Actions of the State will be disproportional if the same aim can be achieved in a less intrusive way.

The principle of proportionality is useful when analysing competition proceedings. Competition authorities act for the protection of free competition on the market and ultimately, for consumer welfare¹. There is no doubt that these interests can be a reason for limitations being placed on the economic freedom of undertakings as well as their right to privacy. Competition authorities, including the Polish President of the Office of Competition and Consumers Protection (in Polish: *Prezes Urzędu Ochrony Konkurencji i Konsumentów*; hereafter, UOKiK President), have major powers of inspection.

¹ R. Whish, *Competition Law*, 6th ed., Lexis Nexis, London 2009, p. 1 and p. 19.

Their use, limiting the economic freedom and right to privacy of undertakings in the name of competition protection objectives, should be proportionate².

This article analyses if the powers of inspection granted to the UOKiK President by the Competition Act are formulated so as to guarantee the observance of the principle of proportionality. Problematic issues in this respect are discussed. Attention is drawn to the powers of control and searches covered by Articles 105a-105l of the Act of 16 July 2007 on Competition and Consumers Protection (the Competition Act)³. The article deals also with judicial control over the use of the powers of inspection by the competition authority. In conclusion, proposals for changes in the interpretation of the current legal framework are made. Suggested are also certain amendments of the Competition Act. Due to its limitations, the article does not deal with powers of inspection concerning private premises nor with inspections run by the UOKiK President under authorization of the European Commission.

II. Limitations of rights and freedoms

The principle of proportionality derives in the Polish legal system from Article 2, as a consequence of the democratic state of law clause, and Article 31(3) of the Constitution of 1997⁴. According to the latter rule, a limitation upon the exercise of constitutional rights and freedoms may be imposed only by statute, and only when necessary in a democratic State for the protection of its security or public order, to protect the environment, health or public morals, or the rights and freedoms of others. Such limitations shall not however violate the essence of specific rights and freedoms. Interference with the economic freedom and interests of companies [Article 64(1) of the Constitution] is thus allowed only if it meets the requirements of Article 31(3) of the Constitution. According to Article 22 of the Constitution, limitations upon the freedom of economic activity may be imposed only by means of a statute and only for important public reasons.

Inspections run by the UOKiK President interfere with the right to privacy of the scrutinised companies (right to respect its premises). Taken into consideration when assessing if an inspection is proportionate, must be the standards of Article 8 of the European Convention on Human Rights (ECHR)

² Compare in this respect 46/87 *Hoechst AG v Commission*, ECR [1989] 2859, para. 19. See also C-94/00 *Roquette Freres SA*, ECR [2002] I-9011, para. 80.

³ Journal of Laws 2007 No. 50, item 337.

⁴ Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997 No. 78, item 483).

which guarantees the right to privacy. The ECHR is binding and directly applicable in Poland⁵. Consequently, all Polish public authorities including the UOKiK President are under the obligation to observe the ECHR.

The European Court of Human Rights (ECtHR) confirmed directly in the field of competition law procedure that Article 8 ECHR protects undertakings against arbitrary inspections by competition authorities. The ECtHR noted in *Société Colas Est and Others v France*⁶ that even if the scale of the steps taken by the French competition authority in order to prevent the disappearance or concealment of evidence of anti-competitive practices justified the interference with the applicant's right to respect its premises, law and practice had not afforded the inspected company adequate and effective safeguards against power abuse. The ECtHR pointed out that the French competition authority had extensive powers of inspection which gave it an exclusive competence to determine the expediency, number, length and scale of inspections. Moreover, inspections were carried out without a prior warrant from a judge and without a senior police officer being present. The ECtHR accepted at the same time however that the entitlement of State authorities to interfere with the rights protected by Article 8 if the ECHR may be more far-reaching where the business premises of a legal person are concerned⁷. It concluded nevertheless, having regard for the manner of the proceedings in the case in question, that impugned inspections cannot be regarded as strictly proportionate to the legitimate aims pursued⁸.

The principle of proportionality is also recognised by EU law as one of its general principles. Article 5(4) of the Treaty on European Union⁹ clearly specifies that under the principle of proportionality, the content and form of EU actions shall not exceed what is necessary to achieve the objectives of the Treaties. This stance is also confirmed by jurisprudence. In *C-133/92 Crispoltoni*, the European Court of Justice (ECJ) held that the principle of proportionality requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the EU law in question¹⁰. If a choice exists between several appropriate measures, the least onerous one must be used and the disadvantages caused must not be disproportionate to the aims

⁵ See Article 91(1) in conjunction with Article 9 of the Constitution.

⁶ Application no. 37971/97, judgment of 16 April 2002, see para. 48-49.

⁷ See also *Niemietz v Germany*, application no. 13710/88, judgment of 16 December 1992, para. 31.

⁸ See also other ECtHR judgments in which the proportionality of inspections was assessed – *Funke v France*, application no. 10828/84, judgment of 25 February 1993, para. 55-57; *Crémieux v France*, application no. 11471/85, judgment of 25 February 1993, para. 38-40; *Miallhe v France*, application no. 12661/87, judgment of 25 February 1993, para. 36-38.

⁹ OJ [2010] C 83/13.

¹⁰ *C-133/93 Crispoltoni v Fattoria Autonoma Tabacchi*, ECR [1994] I-4863, para. 40.

pursued¹¹. The ECJ held also that any intervention by public authorities in the sphere of anyone's private activities, be it a natural or legal person, must have a legal basis and be justified on the grounds laid down by the law¹². Consequently, protection against arbitrary or disproportionate intervention must be ensured by legislative means¹³.

EU courts identified procedural safeguards to be provided with respect to inspections run by the European competition authority – the Commission. It has been concluded that the Commission must, before starting an inspection, be able to specify its extent and goal¹⁴, especially by describing the facts that it wishes to establish through it¹⁵. Therefore, it should have prior to the inspection significant knowledge that a possible violation of EU competition law may have taken place¹⁶. Moreover, the inspected undertaking must be informed about the reasons for the inspection before it is started. Such information is crucial for the right of defence of those subject to an inspection. In addition, coercive measures used in its course should be neither arbitrary nor excessive having regard to the subject matter of the inspection¹⁷.

Taking all this into account it can be concluded that the economic freedom and the right to privacy of undertakings can indeed be legitimately limited as a result of an inspection run by competition authorities. However, such a limitation is permissible only if procedural safeguards are put in place and only if the goal of the inspection cannot be achieved with the use of less intrusive methods.

III. Proportionality safeguards in Polish competition proceedings

According to Polish competition law, the UOKiK President can run inspections in two ways: an ordinary inspection known as a control (Article 105a of the Competition Act, in Polish: *kontrola*, hereafter called a control) and; an inspection that includes a search of the premises and belongings of the undertaking (Article 105c of the Competition Act, in Polish: *kontrola*

¹¹ Ibidem.

¹² *Hoechst AG v Commission*, para. 19.

¹³ Ibidem.

¹⁴ Ibidem, para. 29 and T-23/09 *CNOP and CCG v Commission*, not yet reported, para. 34.

¹⁵ 136/79 *National Panasonic v Commission*, ECR [1980] 2033, para. 13, 21; see also H. Andersson, E. Legnerfält, 'Dawn Raids in sector inquiries – fishing expeditions in disguise' (2008) 29(8) *ECLR* 441.

¹⁶ Ibidem.

¹⁷ See Article 20(8) of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

z przeszukaniem; hereafter called a search). When it comes to a control, inspectors are entitled to study materials provided on their request by the employees of the scrutinised undertaking. During a search, inspectors are entitled to look actively for proofs of the alleged infringement without the cooperation of the employees of the inspected undertaking.

The Competition Act contains some provisions that safeguard the proportionality of inspections run by the UOKiK President. First, both ordinary controls and searches can be run only in the field of the proceedings to which they belong to [Article 105a(1) *in fine* of the Competition Act]. There must therefore be a direct link between the inspection (a control or a search) and the subject matter of the proceedings. This means that there ought to be a link between the alleged objections or objection already raised against the undertaking and the scope of the inspection¹⁸. In consequence, items to which inspectors had access to during a control or search should not be taken into consideration or seized (under Article 105g of the Competition Act) unless they are related to the subject matter of the actual proceedings¹⁹. A need to run an inspection shall be supported by evidence already in the possession of the UOKiK President before its commencement.

Another procedural safeguard set out in the Competition Act is the obligation for the inspectors to deliver an authorisation issued by the UOKiK President, which specifies the extent of the given control, to the representatives of the undertaking subject to that control. According to Article 105a(1) of the Competition Act, an authorisation to carry out a control must contain: designation of the inspection authority; indication of the relevant legal basis; date and location of issue of the authorisation; inspectors' data; designation of the entity to be inspected; determination of the object and scope of the inspection; determination of the inspection starting and expected end date; signature of the authorisation granting individual; instructions on the rights and obligations of the entity being inspected. With respect to a search, handed in must be an equivalent court order permitting it to start.

Any undertaking can become subject to an inspection under the Competition Act²⁰. Grounds for the limitation of the freedom of economic activity are stronger however with respect to those suspected, even informally during explanatory proceedings, to have infringed competition rules. Inspections should thus concern alleged offenders first rather than those not believed to have breached competition law. Only if proofs of the infringement cannot be

¹⁸ In this respect compare T-39/90 *SEP v Commission*, ECR [1991] II-1497, para. 29.

¹⁹ M. Swora, [in:] *Ustawa o ochronie konkurencji i konsumentów, Komentarz*, T. Skoczny, A. Jurkowska, D. Miąsik (eds), Warszawa 2009, Art. 105b, No. 12.

²⁰ C. Banasiński, E. Piontek (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 841.

found at the premises of the alleged offender can an inspection be carried out at the premises of non-suspects (for example their competitors or distributors).

IV. The distinction between a control and a search

The fact that the Competition Act distinguished between a control and a search makes Polish solutions different to EU law where inspections run under Article 20 of Regulation 1/2003 include, automatically, the power of search²¹.

This distinction creates practical problems in Poland since procedural safeguards circumscribing the powers of the UOKiK President are more limited with respect to controls (ordinary inspections) than they are with respect to searches. The authority does not need judicial consent to carry out a control, unlike to start a search. Moreover, a control is merely based on a written authorisation handed in to the representatives of the inspected undertaking by the inspectors – UOKiK employees. The authorisation issued by the UOKiK President does not take the form of an order²² in the sense of Article 123 of the Code of Administrative Procedure (in Polish: *Kodeks Postępowania Administracyjnego*; hereafter, KPA)²³. The inspected undertaking is thus deprived of the right to contest before a court the legality and proportionality of such an informal decision authorising the control of its premises. This situation takes place despite the fact that companies are obliged to cooperate with the UOKiK inspectors during a control and cannot deny them access to premises. Entry denial or lack of cooperation can in fact cause the imposition of a fine of up to 50 000 000 Euro [Article 106(2)(3) of the Competition Act]²⁴. By contrast, a decision concerning an inspection

²¹ ECJ held in *Hoechst AG v Commission*, para. 27, that the right of the Commission to enter any premises, land and means of transport of undertakings would serve no useful purpose if the Commission's officials could do no more than ask for documents or files which they could precisely identify in advance. On the contrary, in the opinion of the ECJ, such right implies the power to search for various items of information which are not already known or fully identified; without such power, it would be impossible for the Commission to obtain the information necessary to carry out the investigation if the undertakings concerned refused to cooperate or adopted an obstructive attitude.

²² See the opinion of R. Janusz in this respect, 'Dostosowywanie prawa polskiego do prawa wspólnotowego w zakresie instytucji, procedur i sankcji antymonopolowych', [in:] P. Saganek, T. Skoczny (eds), *Wybrane problemy i obszary dostosowania prawa polskiego do prawa Unii*, Warszawa 1999, p. 292.

²³ Act of 14 June 1960 – Code of Administrative Procedure (Journal of Laws 1960 No. 30, item 168, as amended).

²⁴ A fine was recently imposed on undertakings in the UOKiK President's decision of 4 November 2010, DOK-9/2010 and the decision of 24 February 2011, DOK-1/2011. See M. Kozak,

issued under Article 20(4) Regulation 1/2003 – a decision that the undertaking must submit to – can be appealed to EU courts by the inspected undertaking²⁵.

Despite the procedural distinction between controls and searches, the difference in the way they are run in practice may turn out rather minor. The Competition Act fails to define either of the two forms of inspections. Jurisprudence has pointed out that a search takes place when the inspectors run it independently from the representatives of the company concerned, without their cooperation and help²⁶. During a search, inspectors are entitled to look actively for proofs of the alleged infringement rather than only, as is the case with respect to a control, to study the material provided by the employees of the scrutinised undertaking. However, since controls can be performed even without the presence in the premises of the company representative²⁷, procedural safeguards do not exist to stop a control from becoming a search. This very problem has become the basis for a dispute between a specific undertaking that was subject to a control and the UOKiK President. The company in question refused to cooperate with the inspectors (computer files were not made available to them) claiming that the officials were conducting a search, rather than a control. A fine was thus imposed upon that undertaking by the UOKiK President, later to be upheld by the courts²⁸.

A search is more intrusive than a control with respect to an undertaking's freedom of economic activity and right to privacy. It should thus be used in exceptional cases only when the UOKiK President is unable to obtain sought after documents or when the undertaking in question fails to cooperate with the inspectors²⁹. A search may only be performed if there is a high probability that the documents the competition authority wishes to get hold of cannot be

'Simple procedural infraction or a serious obstruction of antitrust proceedings, are fines in the region of 30-million EURO justified? Case comment to the decisions of the President of the Office for Competition and Consumer Protection of 4 November 2010 *Polska Telefonii Cyfrowa Sp. z o.o.* (DOK-9/2010) and of 24 February 2011 *Polkomtel SA* (DOK-1/2011)' (2011) 4(5) *YARS*.

²⁵ See also *Hoechst AG v Commission*, para. 26. A complaint to EU courts does not suspend the inspection.

²⁶ Judgment of the Supreme Court of 7 May 2004, III SK 34/04, UOKiK Official Journal 2004 No. 4, item 330; the judgment of the Court of Competition and Consumer Protection of 11 August 2003, XVII Ama 123/02.

²⁷ Article 80(2)(3) of the Act of 2 July 2004 on the Freedom of Economic Activity (Journal of Laws No. 173, item 1807, as amended) provides in the case of competition proceedings an exception from general rules which state that the presence during a control of the representative of the undertaking is obligatory.

²⁸ Judgment of the Supreme Court of 7 May 2004, III SK 34/04. See also the judgement of the Court of Competition and Consumer Protection of 11 August 2003, XVII Ama 123/02.

²⁹ E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2002, p. 228; M. Swora, [in:] Skoczny, Jurkowska, Miąsik (eds), *Ustawa...*, Art. 105c,

obtained in a different, less intrusive manner (especially by way of a simple information request under Article 50 of the Competition Act)³⁰ or when there is suspicion that the undertaking will hide, destroy or alter them unless a search is carried out³¹. As the provisions of the Code of Criminal Procedure³² are applicable *per analogiam* to searches run by the UOKiK President³³, for a search to be started, a high probability must exist that proofs of the alleged infringement will be found in the given premises (Article 219 § 1 of the Code of Criminal Procedure)³⁴.

V. Prior notice of an inspection

Another issue that poses questions about proportionality in Polish competition proceedings is whether it is true that only unexpected can be deemed effective. Under the standards of EU law, an unannounced inspection is considered to be proportionate if it is justified in the given case³⁵. Competition authorities must be able to search for various items of information which are not already known to them or fully identified³⁶. Polish courts also accept that control can be run without prior notice³⁷.

In the light of the principle of proportionality, an unannounced control should be seen as an exception rather than the rule. Unfortunately, the Polish Act on the Freedom of Economic Activity³⁸ provides in this respect that, specifically in the case of competition proceedings, undertakings are not given notice of a planned control [Article 79(2)(4)]. This provision constitutes therefore an exception from the general rule of the prior announcement of

No 2; B. Turno, 'Komentarz do Art. 105c', [in:] A. Stawicki, E. Stawicki E. (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2011, p. 1071.

³⁰ Por. B. Turno, 'Komentarz....', [in:] A. Stawicki, E. Stawicki E. (eds), *Ustawa...*, p. 1071; K. Różewicz-Ładoń, *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję*, Warszawa 2011, p. 275.

³¹ C. Banasiński, E. Piontek (eds), *Ustawa...*, pp. 868-869.

³² Act of 6 June 1997 – Code of Criminal Procedure (Journal of Laws 1997 No. 89, item 555, as amended).

³³ See Article 105c(4) of the Competition Act.

³⁴ E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji...*, p. 228; M. Swora, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), *Ustawa...*, Art. 105c, No 9.

³⁵ *National Panasonic v Commission*, para. 30.

³⁶ *Hoechst AG v Commission*, para. 27.

³⁷ Judgment of the Antimonopoly Court of 16 December 1998, XVII Ama 62/98, (2000) 4 *Wokanda*.

³⁸ Act of 2 July 2004 on the Freedom of Economic Activity (Journal of Laws No 173, item 1807, as amended).

controls [Article 79(1)]. The existence of a general statutory rule excluding prior notice in competition law proceedings is excessive. It is likely that a forewarning may in many situations undermine the possibility of finding proofs of the competition law infringement. Unlike searches however, controls are based on cooperation between the undertaking and inspectors. They therefore tend to focus on the physical examination of facts already known to the authority. Indeed, a control can also concern those not suspected of a violation. At least in such cases, controls should be carried out only if the undertaking in question has been duly informed about it. The UOKiK President should decide on the issue of prior notification on a case by case basis – statutory provisions should thus not generally preclude the competition authority from issuing a forewarning of an inspection.

VI. Inspections during explanatory proceedings

Proceedings before the UOKiK President can take the form of explanatory or full competition proceedings (officially called antimonopoly proceedings in the Polish Competition Act). Under Article 48(1) of the Competition Act, the UOKiK President can institute explanatory proceedings if circumstances indicate that it is likely that the provisions of the Competition Act had been infringed³⁹. Article 48(2) of the Competition Act states that explanatory proceedings may, in particular⁴⁰, aim at (1) initially determining whether an infringement took place of the provisions of the Competition Act which would justify the institution of antimonopoly proceedings⁴¹; (2) a study of the market, including the determination of the structure and degree of concentration thereof; (3) initially determining whether an obligation exists to submit a notification of an intended concentration. There are no parties to explanatory proceedings – objections against undertakings are not yet raised at this stage. Companies are not informed about the start of explanatory proceedings even if the actions of the UOKiK President undertaken therein

³⁹ Other reasons are: need to examine a given branch of economy, or as to matters regarding the protection of consumer interests, and in any other cases as provided for by the Competition Act.

⁴⁰ The list of grounds for establishing explanatory proceedings is not exhaustive.

⁴¹ In the field of consumer law explanatory proceedings can also aim at (1) initially determining whether there was an infringement of the provisions of the Competition Act, such as may justify the institution of proceedings regarding the use of practices violating the collective interests of consumers and (2) determining whether a violation of any consumer interests being protected by the law occurred.

refer to them⁴². It is common for undertakings to not know officially about the existence of explanatory proceedings until an inspection is carried out despite the fact that they can lead to competition law charges. The question arises in this context whether inspections (controls or searches) can take place during explanatory proceedings. An affirmative answer derives from the wording of Article 105a(1) of the Competition Act (a control) and Article 105c(1) of the Competition Act (a search)⁴³ which provide that an inspection can be carried out during any kind of proceedings before the UOKiK President including explanatory ones.

Still, the interpretation of any legal act cannot be limited to a literal meaning of its provisions. Article 105a and 105c of the Competition Act read in conjunction with Article 48 should be interpreted in the light of the principle of proportionality. The use of inspections must thus be excluded in certain kinds of explanatory proceedings. Generally speaking, a control and a search can be carried out only when the explanatory proceedings may lead to a decision being taken by the UOKiK President whether it is likely that a competition law violation had occurred⁴⁴. It is unfounded to consider that the authority is entitled to carry out an inspection when the premise of Article 48(1) of the Competition Act is not met, in other words, when the UOKiK President has no knowledge about circumstances suggesting that Competition Act had been infringed. The competence of the competition authority to carry out an inspection (both controls and searches) must be excluded in particular with respect to explanatory proceedings meant to conduct a market study, including the determination of the structure and degree of concentration thereof and initially determining whether an obligation exists to submit a notification of an intended concentration. Performing an inspection in such cases would have the character of a 'fishing expedition'⁴⁵ – an inspection that has no factual and legal basis suggesting that competition rules could have been infringed.

Concerns arise in this context because controls are carried out primarily during explanatory proceedings⁴⁶ when undertakings have very limited powers to oppose unfounded controls. Out of the 26 controls that took place in the first half of 2011, 25 occurred during explanatory proceedings, the respective

⁴² Such situation was assessed critically by A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), *Ustawa...*, art. 48, No 10.

⁴³ A search (if accepted by the court) makes an integral part of a control.

⁴⁴ Such a conclusion justifies opening of competition law proceedings by raising objections against particular undertakings.

⁴⁵ H. Andersson, E. Legnerfalt, *Dawn Raids in Sector Inquiries...*, pp. 439–440; A. Jones, B. Sufirin, *EC Competition Law*, Oxford University Press, 2004, p. 1061.

⁴⁶ Some scholars suggest that this is a correct situation – see C. Banasiński, E. Piontek (eds), *Ustawa...*, p. 840 and K. Różewicz-Ładoń, *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów...*, p. 213.

numbers were 23 out of the total of 28 in 2010, 23 out of 29 in 2009 and; 23 out of 36 in 2008⁴⁷. It is true that controls can often be effective only if carried out without a forewarning. They must therefore take place before official objections are raised – at the stage of explanatory proceedings. However, the presumption for controls to be carried out during explanatory proceedings has no legal basis. Respect for proportionality (the use of the least intrusive methods possible to establish facts) suggests caution in their use⁴⁸. A control is an instrument that significantly interferes with the freedom of economic activity of the inspected undertaking also because the UOKiK President has the power to seize items that may constitute evidence in the case [Article 105g(1) of the Competition Act].

When it comes to searches, their use during explanatory proceedings should be even more restrained and primarily concern possible hard-core infringements of competition law. The Competition Court should decide on authorising a search on a case by case basis rather than by a formal qualification of given proceedings as dealing with cartels. The assessment whether a search is needed must take into account the fact that it is permissible during explanatory proceedings only if a justifiable suspicion exists of a breach of the Competition Act, particularly if it is feared that evidence might be obliterated (see Article 105c(2) of the Competition Act). As a rule therefore, a search should be performed during full competition proceedings rather than in their explanatory phase. Statistics of the last two year paint a different picture however. Between January and June 2011, the UOKiK President carried out 6 searches all of which occurred during explanatory proceedings; 5 searches took place in 2010 and again, all of them occurred during explanatory proceedings. The situation was slightly different in earlier years: 2 out of the 5 searches carried out in 2009 took place in explanatory proceedings as did 2 out of the 3 searches performed in 2008⁴⁹.

The UOKiK President is entitled to carry out a search during explanatory proceedings only in situations described in Article 48(2)(1) of the Competition Act – explanatory proceedings aiming at an initial determination whether an infringement of the Competition Act took place which may justify the institution of full competition law proceedings. The authority cannot carry out a search in explanatory proceedings described in Article 48(2)(2-5) of

⁴⁷ The situation was different in 2007 where only 8 out of the total of 30 controls were carried out during explanatory proceedings. This data were obtained from UOKiK in effect of the notion for disclosure of public information.

⁴⁸ R. Janusz, *Dostosowywanie prawa polskiego...*, p. 294.

⁴⁹ No searches were carried out in 2007.

the Competition Act⁵⁰. The performance of a search is excluded therefore in explanatory proceedings meant to conduct a market study including the establishment of its competitive structure⁵¹. It can be added that the UOKiK President does not have, at such an early stage of the investigation, justifiable suspicions of a serious infringement of the Competition Act. It is also correct to state that conducting a search in concentration proceedings would be contrary to the character of these proceedings⁵². For that reason, the provisions of the Competition Act should be interpreted in the light of the principle of proportionality and thus exclude the use of searches during explanatory proceedings unless the UOKiK President has prior knowledge of competition restricting practices.

VII. Right of complaint and judicial control

Procedural safeguards circumscribing the UOKiK President's inspection powers consist of: (1) the right to lodge an objection under the Act on the Freedom of Economic Activity; (2) prior judicial control with respect to searches and; (3) subsequent judicial control of final decisions issued by the competition authority where it is possible to rise procedural objections about the way in which the administrative proceedings were conducted.

1. Objections under the Act on the Freedom of Economic Activity

The Act on the Freedom of Economic Activity of 2004 states that an undertaking may lodge an objection against the way public administrative bodies exercise their inspection rights. Filing such an objection suspends the inspection. The administrative body carrying it out has three days to decide whether the objections are justified. If the administrative order concerning the objections is negative for the company, in other words, if the control is to be continued, the undertaking in question can file a complaint to an administrative court.

⁵⁰ This is also an opinion of B. Turno, 'Komentarz...', [in:] A. Stawicki, E. Stawicki E. (eds), *Ustawa...*, p. 1073.

⁵¹ See different opinion, [in:] C. Banasiński, E. Piontek (eds), *Ustawa...*, pp. 869-870.

⁵² B. Turno, 'Komentarz...', [in:] A. Stawicki, E. Stawicki E. (eds), *Ustawa...*, p. 1073. The concentration proceedings shall be deemed civil and not criminal in a light of the Article 6 of the ECHR.

The application of the Act on the Freedom of Economic Activity is very limited with respect to competition proceedings. Companies may lodge objections on the basis of Article 84c(1) of this Act claiming that a violation occurred of its Article 79a(1) and 79a (3)-(9)⁵³. Those subject to an inspection may thus complain only on irregularities when it comes to the authorisation to carry out a control within competition proceedings. Undertakings may, in particular, lodge an objection that the extent of the control being carried out is actually broader than that set out in its authorisation.

A company being controlled, Polkomtel S.A., has tried at one point, albeit unsuccessfully, to use the above institution to complain also on the lack of impartiality of the inspectors and disproportional character of actions taken in the framework of the inspection with respect to the object of the explanatory proceedings. The undertaking claimed moreover that the contested control was run by UOKiK employee without an appropriate authorization. Polkomtel alleged in this respect that the inspection was carried out on the basis of an authorization issued prior to the initiation of the investigation, and that the scope of the control was broader than the object of the proceedings. The company noted additionally that the control was carried out outside its normal working hours. Polkomtel's objections were dismissed by the UOKiK President as well as the Competition Court⁵⁴.

2. Prior judicial control

In competition proceedings, prior judicial control over the UOKiK President's powers of inspections is limited to searches only [Article 105c(1) of the Competition Act] because a control [Article 105a(1) of the Competition Act] is carried out on the basis of a written authorisation issued by the authority itself. Companies subject to controls can thus question them only in cases prescribed in the Act on the Freedom of Economic Activity or complain

⁵³ Under the general rules of the Act on the Freedom of Economic Activity, objections may refer to the violations of Article 79(1) and 79 (3)-(7), Article 80(1), Article 82(1) and Article 83(1). These provisions, due to the existence of a clear statutory exemption in this respect, are not applicable in the case of proceedings before the UOKiK President. See also B. Turno, 'Komentarz...', [in:] A. Stawicki, E. Stawicki E. (eds), *Ustawa...*, p. 1156.

⁵⁴ See the order of the Court of Competition and Consumer Protection of 22 December 2009, XVII Amz 54/09/A, described in the decision of the UOKiK President of 24 February 2011, DOK-1/2011, p. 12. The Court of Competition and Consumer Protection (not an Administrative Court) is competent to deal with complaints on orders of the UOKiK President issued as a result of objections raised under the Act on the Freedom of Economic Activity, see judgment of the Regional Administrative Court in Warsaw of 5 March 2010, III SA/Wa 1496/09. See also K. Rózewicz-Ładoń, *Postępowanie przed Prezesem Urzędu...*, pp. 261-262.

to the Competition Court if the UOKiK President imposes on them a fine for their lack of cooperation during a control.

Article 105a(1) and 1051(3) of the Competition Act fails to set out however the extent of judicial control over searches carried out by the UOKiK President. It provides only that the Competition Court has 48 hours for issuing an order authorising a search upon the authority's request. Lacking legal provisions together with problems in distinguishing between a search and a control make procedural guarantees unclear in this context. It has been pointed out in the jurisprudence of the Polish Constitutional Court that those legal provisions which result in a limitation of rights and freedoms must be characterized by their non-ambiguity and precision as required by Article 2 of the Polish Constitution⁵⁵. The more far-reaching the limitation in question is, the stronger the procedural guarantees shall be to protect them⁵⁶.

The premises for consenting to a search should be interpreted in a strict manner. The Competition Court must decide first whether a reasonable basis exists to believe that possible proofs can be found in the premises the authority wishes to search (*per analogiam* Article 219 § 1 of the Code of Criminal Procedure)⁵⁷. Proportionality requirements must be taken into account next to decide if it is highly likely that the documents, or other items the UOKiK President wishes to get hold of, cannot be obtained in a different, less intrusive manner (such as a control) or if is suspected that the scrutinised undertaking will hide, destroy or alter them. When dealing with a request to consent to an exceptional search in explanatory proceedings, the Court has to decide also whether a justifiable suspicion exists that the Competition Act had actually been violated. It should assess in particular if past misconduct of the undertaking the premises of which the authority wishes to search suggests that there is an objective risk that evidence will be obliterated⁵⁸.

⁵⁵ Judgments of the Constitutional Court: of 22 May 2002, K 6/02, (2002) 3/A OTK ZU sec. 33 and of 11 January 2000, K 7/99, (2000) 1 OTK ZU sec. 2. See also judgment of ECHR of 16 February 2000 in case *Amann v Switzerland*, 27798/95, para. 56.

⁵⁶ L. Garlicki, 'Komentarz do art. 31 ust. 3 Konstytucji', [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. III, Warszawa 2003.; K. Wojtyczek, 'Zasada proporcjonalności', [in:] B. Banaszak, A. Preisner (ed.), *Prawa i wolności obywatelskie w Konstytucji RP*, Warszawa 2002, p. 667. The judgments of the Constitutional Court: of 12 January 1999 r., P 2/98, (1999) 1 OTK ZU sec. 2 and of 22 September 2005, Kp 1/05, (2005) 8/A OTK ZU, sec. 93.

⁵⁷ The UOKiK President should show in the request concrete informations he/she believes can be established by way of a search in given premises, see M. Swora, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), *Ustawa....*, Art. 105c, No 9.

⁵⁸ M. Swora, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), *Ustawa....*, Art. 105c, No 14.

Article 105c(3) of the Competition Act⁵⁹ constitutes a negative exception from the perspective of the constitutional requirement of a two-instance judicial process [Article 78 and Article 176(1) of the Polish Constitution]. It specifies that the decision of the Competition Court concerning a search cannot be appealed. This happens despite the fact that searches interfere significantly with the rights and freedoms of private entities (especially their right to privacy). It would be possible to amend the Competition Act so as to compromise procedural effectiveness with adequate procedural standards by introducing two-instance judicial proceedings and giving the inspected undertakings the right to appeal the court order authorising a search at the moment of its commencement (such appeal would not have to suspend a search). Similar solutions exist in the Polish Code of Criminal Procedure (Article 236).

Judicial control over the powers of inspections of the UOKiK President cannot be illusory. Statistics put this issue into doubt however since the Competition Court has in practice authorised all searches requested by the UOKiK President in the last three and a half years (3 in 2008, 5 in 2009, 5 in 2010 and 6 in the first half of 2011).

3. Subsequent judicial control

According to the jurisprudence of the ECtHR, decisions taken by administrative bodies which do not satisfy the requirements of Article 6(1) ECHR must be subject to subsequent control by a 'judicial body that has full jurisdiction' over questions of facts and law⁶⁰. Full jurisdiction means that courts must be entitled and actually examine all relevant facts of the case⁶¹ as well as to have the power to quash the appealed administrative decision⁶²

⁵⁹ See also M. Swora, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), *Ustawa.....*, Art. 105c, No 16.

⁶⁰ Generally see *Albert and Le Compte v Belgium*, application no. 7299/75, 7496/76, judgment of 10 February 1983, para. 29; *Gautrin and others v France*, application no. 21257/93, judgment of 20 May 1998, para. 57; *Frankowicz v Poland*, application no. 53025/99, judgment of 16 December 2008, para. 60. Specifically for judicial control over administrative bodies see: *Bendenoun v France*, application no. 12547/86, judgment of 24 February 2004, para. 46; *Umlauf v Austria*, application no. 15527/89, judgment of 23 October 1995, para. 37–39; *Schmautzer v Austria*, application no. 15523/89, judgment of 23 October 1995, para. 34; *Janosevic v Sweden*, application no. 34619/97, judgment of 21 May 2003, para. 81. See also L. Drabek, 'A Fair Hearing Before EC Institutions' (2001) 4 *European Review of Private Law* 561; K. Lenaerts, J. Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) (34) *CMLR* 561-562.

⁶¹ *Schmautzer v Austria*, para. 35.

⁶² *Ibidem*, para. 36; *Janosevic v Sweden*, para. 81.

in all its aspects (facts and law). When it comes to the assessment of their legality, the ECtHR expects the judiciary not to be limited to an assessment whether the impugned decision is in line with substantive law⁶³. Courts shall also be empowered to set aside an administrative decision in its entirety or part, if it is established that procedural requirements of fairness were not met in the proceedings which led to its adoption⁶⁴. The observance of the principle of proportionality by the UOKiK President should thus be assessed by the Competition Court during appeal proceedings where UOKiK infringement decisions are being controlled⁶⁵. This is an indispensable safeguard as inspections are crucial for finding proofs of competition law violations.

Article 77(6) of the Act on the Freedom of Economic Activity states in this respect that evidence obtained in violation of legal norms on inspections cannot be considered as proof in any administrative proceedings regarding the inspected undertaking, provided the violation influenced the results of that inspection. EU jurisprudence follows the same line specifying that the illegality of a Commission decision authorizing an inspection (as well as its disproportional character) prevents it from using, for the purposes of competition law infringement proceedings, any documents or evidence which it might have obtained in the course of that investigation⁶⁶. If that is not the case, the final decision on the infringement might be annulled by EU Courts in so far as it was based on such evidence⁶⁷.

The Polish Competition Court should exercise effective control over the way in which evidence is collected during inspections (both controls and searches). If an infringement of procedural rules is established concerning evidence, such as a violation of the principle of proportionality in the course of an inspection, the Court should disregard such evidence. In cases where the remaining evidence is insufficient to prove a competition law infringement, the Court should change the UOKiK decision by not establishing an infringement in line with the jurisprudence of the Polish Supreme Court⁶⁸. The Competition

⁶³ See *Potocka and others v Poland*, application no. 33776/96, judgment of 4 October 2001, para. 55, 58; *Sigma Radio Television Ltd v Cyprus*, application no. 32181/04, 35122/05, judgment 21 July 2011, para. 153–154.

⁶⁴ *Ibidem*.

⁶⁵ With respect to Polish rules governing judicial control over procedural infractions in competition proceedings see M. Bernatt, ‘The control of Polish courts over the infringements of procedural rules by the national competition authority. Case comment to the judgement of the Supreme Court of 19 August 2009 – Marquard Media Polska (No. III SK 5/09)’ (2010) 3(3) *YARS* 300–305.

⁶⁶ C-94/00 *Roquette Freres*, para. 49; H. Andersson, E. Legnerfalt, *Dawn Raids in Sector Inquiries...*, p. 444.

⁶⁷ *Ibidem*.

⁶⁸ The Supreme Court of 19 August 2009, III SK 5/09, LEX, No. 548862.

Court is also entitled to quash a decision of the UOKiK President if it establishes that the undertaking in question was deprived of, as a consequence of an inspection, the opportunity to defend itself during the proceedings, that is, if a violation took place of a requirement indispensable for their validity⁶⁹.

VIII. Conclusions

Several problems were identified in this article concerning the observance of the principle of proportionality when it comes to inspections carried out by the Polish competition authority.

The first deals with the lack of clarity in the distinction between two inspection powers granted to the UOKiK President – a control and a search. It must be accepted that whenever the authority plans to actively look for proofs of a competition law breach independently from the representatives of the undertaking concerned, it should carry out a search (after obtaining judicial authorisation to do so) rather than an ordinary control. Otherwise the inspected undertakings will have a reasonable right to question before the Competition Court the legality of such control.

Second, unannounced inspections should be an exception rather than the rule. There is a need to abolish the general exception provided by the Act on the Freedom of Economic Activity which states that undertakings are not notified about planned inspections in competition law proceedings. Prior knowledge can often undermine the possibility of finding proofs of a competition law infringement. This, however, the competition authority should decide on a case by case basis. The existence of a general statutory exception in this regard brings about the risks that the inspected company's right of defence will be disproportionately limited at least in some cases.

Third, the sake of the principle of proportionality requires a reasonable use of controls and an exceptional use of searches in explanatory proceedings. The UOKiK President is not entitled to carry out an inspection (controls and searches) during explanatory proceedings when the premise of Article 48(1) of the Competition Act is not met, that is, without a suspected breach of the Competition Act. The competences of the UOKiK President in this respect must be excluded in particular with respect to explanatory proceedings aimed at conducting a market study. Such inspections would amount to a

⁶⁹ The Supreme Court in the judgment of 29 April 2009, III SK 8/09, suggested that a violation of requirements indispensable for the validity of proceedings can be the ground for the revocation of a UOKiK decision. With respect to the consequences of improper inspections see also: C. Banasiński, E. Piontek (eds), *Ustawa...*, pp. 919–920.

‘fishing expedition’ – an inspection that has no factual and legal basis. The Competition Court must exercise caution especially when dealing with authorization requests for a search at the stage of explanatory proceedings. An approval should be granted only if the UOKiK President has managed to show a justifiable suspicion of a serious infringement of the Competition Act and when a reasonable basis exists to believe that possible proofs of anticompetitive behaviour can be found in the premises the authority wants to search. It must be also borne in mind that a search during explanatory proceedings is permissible only if they are aimed at an initial determination whether an infringement of the provisions of the Competition Act took place.

Finally, judicial control over the UOKiK President’s powers of inspection should be more intensive. The grounds for raising objections under the Act on the Freedom of Economic Activity could be broader and refer directly to the question of proportionality of inspections. When it comes to prior control of searches, the Competition Court must check in detail – on a case by case basis – whether carrying out a search is indispensable for finding proofs of the competition law violation and whether less intrusive investigative measures would not be sufficient. The Court must pay special attention to requests for authorising a search in the course of explanatory proceedings. There is also a need for an amendment of the Competition Act so as to introduce a two-instance judicial procedure applicable to search requests submitted by the UOKiK President. The right of the inspected undertaking to appeal an order of the Competition Court authorizing a search would be better at guaranteeing the proportionality of searches. Such an appeal, if not suspensory for a search, would not undermine the effectiveness of the investigation. Moreover, the Competition Court must consider procedural infractions when controlling final infringement decisions issued by the UOKiK President. Thus, the way the evidence was collected by the authority must be scrutinised by the judiciary. If a violation of procedural rules is established concerning the inspection, or indeed a direct violation of the principle of proportionality, the Competition Court should disregard such evidence.

The aforementioned problems can be largely solved by changing the enforcement practice of the UOKiK President and the approach of the Competition Court as well as an alteration of the interpretation of existing legal provisions. However, it would be wise for the UOKiK President to use works under the mandate of the *Competition Policy 2011-2013* program⁷⁰ not only to increase the effectiveness of the authority’s investigative powers but also to propose new legal solutions for guaranteeing the observance of

⁷⁰ *Polityka konkurencji na lata 2011–2013*, Urząd Ochrony Konkurencji i Konsumentów [Competition policy in 2011–2013, Office of Competition and Consumer Protection]; available only in Polish at <http://www.uokik.gov.pl/download.php?plik=10111>, pp. 73–74.

the principle of proportionality in the course of inspections carried out in competition law proceedings.

Literature

- Andersson H., Legnerfält E., 'Dawn Raids in sector inquiries – fishing expeditions in disguise' (2008) 29(8) *ECLR*.
- Banasiński C., Piontek E. (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, [Act on Competition and Consumers Protection. Commentary], Warszawa 2009.
- Bernatt M., 'The control of Polish courts over the infringements of procedural rules by the national competition authority. Case comment to the judgement of the Supreme Court of 19 August 2009 – Marquard Media Polska (No. III SK 5/09)' (2010) 3(3) *YARS*.
- Garlicki L. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. III [Constitution of the Republic of Poland. Commentary, vol. III], Warszawa 2003.
- Janusz R., 'Dostosowywanie prawa polskiego do prawa wspólnotowego w zakresie instytucji, procedur i sankcji antymonopolowych' [Adjustement of Polish law to EC law in respect with antitrust institutions, procedures and sanctions'] [in:] P. Saganek, T. Skoczny (eds), *Wybrane problemy i obszary dostosowania prawa polskiego do prawa Unii Europejskiej* [Selected problems and areas of adjustement of Polish law to EU law], Warszawa 1999.
- Jones A., Sufrin B., *EC Competition Law*, Oxford University Press, 2004.
- Lenaerts K., J. Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) 34 *CMLR*.
- Modzelewska-Wąchal E., *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [Act on Competition and Consumers Protection. Commentary], Warszawa 2002.
- Różiewicz-Ładoń K., *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję*, [Proceedings before the President of the Office of Competition and Consumers Protection in respect with the practices restricting competition], Warszawa 2011.
- Skoczny T., Jurkowska A., Miąsik D. (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [Act on Competition and Consumers Protection. Commentary], Warszawa 2009.
- Stawicki A., Stawicki E. (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [Act on Competition and Consumers Protection. Commentary], Warszawa 2011.
- Whish R., *Competition Law*, 6th ed., Lexis Nexis, London 2009.
- Wojtyczek K., 'Zasada proporcjonalności' [Principle of proportionality], [in:] B. Banaszak, A. Preisner (eds), *Prawa i wolności obywatelskie w Konstytucji RP* [Civil rights and freedoms in the Constitution of the Republic of Poland], Warszawa 2002.