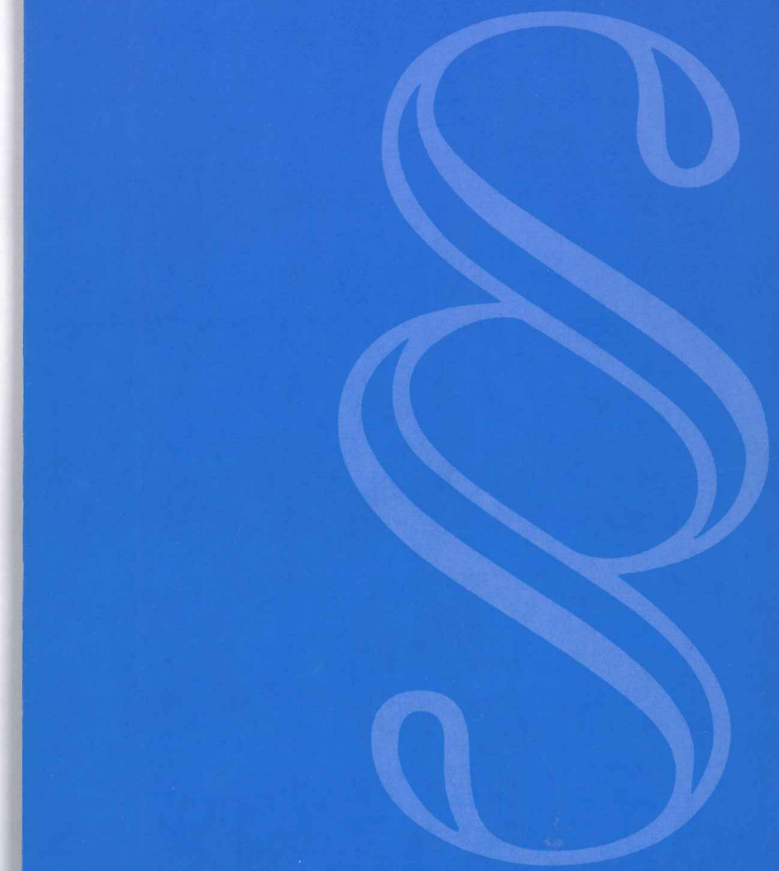

IUS ET ADMINISTRATIO • 2007 • z. 4 (16)

FACULTAS IURIDICA
Universitatis Ressoviensis

IUS ET ADMINISTRATIO

zeszyt 4 (16)

ISSN 1732-7318

FACULTAS IURIDICA
Universitatis Ressoviensis

IUS ET ADMINISTRATIO

Zeszyt 4, vol. 16

SELECTED ISSUES OF THE POLISH BUSINESS LAW

Rzeszów 2007

SELECTED ISSUES OF THE POLISH BUSINESS LAW

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ISSN 1732-7318

Wydawca / Published by
mitel
35-205 Rzeszów, ul. Warszawska 5/7, tel./fax 017 852-13-62

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UWAGI WSTĘPNE

Praca pt. *Selected Issues of the Polish Business Law* omawia wybrane problemy prawa gospodarczego i handlowego w Polsce.

Istnieje kilka celów, jakie skłoniły Redaktora wydania oraz Autorów poszczególnych rozdziałów do opracowania niniejszej książki.

W pierwszej kolejności na polskim rynku wydawniczym prawie zupełnie brak jest pozycji w języku angielskim omawiających aktualne akty prawa gospodarczego w Polsce. Jeśli już pojawiają się pozycje w tym języku, to mają one raczej charakter poradników stricte inwestycyjnych, w których przeważa wiedza ekonomiczna, natomiast aspekty prawne ujmowane są pobieżnie.

Drugim celem wydania tej publikacji jest rozwój współpracy z uczelniami z zagranicy. W ramach programu *Erasmus* wzrasta wymiana pracowników, a także studentów. To właśnie coraz liczniej odwiedzający Polskę studenci z zagranicy wielokrotnie zgłaszali brak prostych podręczników ukazujących prawo gospodarcze w Polsce. Podobne wnioski przedstawiają także inni goście z zagranicy (zwykle młodsi pracownicy naukowi).

Kolejną przesłankę stanowi wzrastająca potrzeba doskonalenia wśród kadry dydaktycznej praktycznej znajomości języków obcych. Podejmowanie się opracowania zagadnień będących tematem publikacji owocuje nie tylko konkretnym efektem w postaci materialnej, ale już sam proces tworzenia aktywizuje pracowników w zakresie dokształcania i ułatwia przyszłe badania porównawcze.

Redaktor wydania dostrzegając wyżej wymienione cele postanowił wypełnić tę lukę kompletując zespół autorów składających się z pracowników naukowych Wydziałów Prawa polskich uniwersytetów i szkół wyższych.

Ze względu na ograniczenia wydawnicze Redaktor i Autorzy niniejszej publikacji mają świadomość, że oddają do rąk czytelnika niezmiernie wąski przegląd instytucji tworzący jedynie zarys polskiego prawa gospodarczego.

Ponadto odmienne style analizy prezentowane przez poszczególnych Autorów powodują, że praca posiada zróżnicowane ujęcie badawcze i stopień szczegółowości przedstawionych zagadnień.

W związku z potrzebą ustawicznego rozszerzania opisu prawa gospodarczego w języku angielskim Redaktor wydania zaprasza zainteresowanych pracowników

naukowych do składania propozycji w zakresie samodzielnego opisania w tym języku niepodjętych w niniejszej książce obszarów szeroko rozumianego prawa gospodarczego i handlowego.

Wszelkie uwagi i propozycje prosimy składać na adres Zakładu Prawa Handlowego i Gospodarczego Wydziału Prawa UR.

Prezentowana publikacja obejmuje dwie części: pierwsza zawiera rozdziały poświęcone publicznoprawnym aspektom prawa gospodarczego, zaś druga w większym stopniu porusza problematykę należącą do prawa gospodarczego prywatnego.

Poniżej przedstawiony zostanie krótki opis poszczególnych rozdziałów (wg alfabetycznego indeksu autorów).

Anna Brzezińska-Rawa podjęła problematykę działalności gospodarczej samorządu terytorialnego, koncentrując uwagę na działalności z obrębie zadań użyteczności publicznej oraz poza tym, zakresem, a także na partnerstwie publiczno-prywatnym. W swoim drugim artykule Autorka prezentuje różne aspekty prawa telekomunikacyjnego, tj. zagadnienia zakresu ustawy Prawo telekomunikacyjne, uczestnicy rynku telekomunikacyjnego, itp.

Elżbieta Dąbek porusza zagadnienia małych i średnich przedsiębiorstw, z uwzględnieniem takich kwestii, jak mikrokredyt i źródła informacji dla inwestorów oraz możliwości ulepszenia tego obszaru prawa.

Małgorzata Ganczar omawia zagadnienia związane z handlem elektronicznym. Rozwój technologii informatycznych, jaki dokonuje się obecnie wywiera coraz większy wpływ na każdą dziedzinę ludzkiego życia, np. gospodarkę, administrację publiczną, zdrowie, edukację. Głównym założeniem rozdziału jest ukazanie prawnej regulacji umów elektronicznych, implementacji rozwiązań międzynarodowych i europejskich do prawa polskiego, oraz prezentacja polskich aktów prawnych odnoszących się do problematyki handlu elektronicznego.

Stanisław Głowiak jest autorem rozdziału poświęconego patologiom w działalności gospodarczej. Przybliża w szczególności problem związany z korupcją.

Krzysztof Lasiński-Sulecki podjął zagadnienia prawa celnego i prawa podatkowego, omawiając źródła tych gałęzi prawa oraz inne kwestie konieczne dla zrozumienia funkcjonowania ceł i podatków Polsce.

Janina Ciechanowicz-McLean i **Tomasz Bojar-Fijałkowski** zajęli się instytucją partnerstwa publiczno-prywatnego w Polsce omawiając zagadnienia objęte Ustawą z 28 lipca 2005 r. o partnerstwie publiczno-prywatnym. Wnikliwe analizy tam zawarte mogą być istotnym drogowskazem dla inwestorów, uwagi zaś służyć mogą legislatorom w poprawianiu tej ustawy.

Tomasz Miśko w swoich rozdziałach prezentuje problematykę związaną z podstawowymi zasadami rozpoczynania i prowadzenia działalności gospodarczej,

omawianiu regulacji ustawy o swobodzie działalności gospodarczej, następnie przybliża zagadnienia związane z udzielaniem pomocy publicznej w Polsce, jak również funkcjonowaniem specjalnych stref ekonomicznych.

Rozdziały autorstwa **Jana Olszewskiego** poświęcone są w znacznej mierze na prezentacji zagadnień związanych z ochroną mechanizmów rynkowych. W szczególności przybliżone zostały regulacje dotyczące publicznoprawnej ochrony konkurencji takie jak kontrola koncentracji przedsiębiorców, struktura organizacyjna organów ochrony konkurencji i konsumentów, jak również kwestie proceduralne związane z ich funkcjonowaniem i działaniem. Ostatecznie w oddzielnym rozdziale Jan Olszewski odnosi się również do zwalczania nieuczciwej konkurencji w Polsce. Autor skupia się także na problematyce arbitrażu, omawiając w szczególności tematykę programów aktywizacji sądownictwa polubownego.

Katarzyna Pokryszka rozważa sytuację prawną prawników zagranicznych świadczących pomoc prawną na terytorium Polski, zaś w drugim swoim artykule omawia instytucję mediacji jako alternatywnej metody rozwiązywania sporów.

Dominika Sagan jest autorem rozdziałów poświęconych spółce jawnej, która jest wzorcową spółką osobową na gruncie polskiego prawa. Fakt ten wynika, z tego że każda inna spółka osobowa zawiera odesłania do regulacji spółki jawnej.

Joanna Sieńczyło-Chlabicz podejmuje tematykę rozpowszechniania wizerunków osób publicznych przez media, którą osadza na gruncie Ustawy o prawie autorskim i prawach pokrewnych. Zauważa, że brak jest definicji osób publicznych, co może prowadzić do wątpliwości interpretacyjnych przy analizowaniu poszczególnych stanów faktycznych.

Małgorzata Szreniawska porusza tematykę znaków towarowych. W swoich rozważaniach dostrzega iż brak jest do tej pory definicji legalnej własności przemysłowej zarówno na gruncie prawa polskiego jak i regulacji międzynarodowych.

Piotr Szreniawski omawia zagadnienia koncesji i regulowanej działalności gospodarczej, której to poświęcone są odpowiednie zapisy ustawy o swobodzie działalności gospodarczej. Regulacje te znajdą zastosowanie zarówno do polskich jak i zagranicznych przedsiębiorców, którzy chcą rozpocząć wykonywanie działalności gospodarczej na terytorium Polski.

Z kolei **Roman Uliasz** zajmuje się problematyką reprezentacji przedsiębiorców, ze szczególnym uwzględnieniem prokury. Podejmuje również zagadnienia związane z organizacyjno-prawną formą prowadzenia działalności gospodarczej koncentrując się na spółkach osobowych i kapitałowych (naturą tych spółek, ich organizacją odpowiedzialnością, prowadzeniem spraw i reprezentacją).

Prof. UR dr hab. Jan Olszewski

INTRODUCTION

Polish Business Law is a comprehensive, yet manageable, text on the principles of the law of business in Poland. It explains the law of business clearly and logically, and highlights areas where there is a divergence of opinion.

The book is intended for everybody who has a special interest in commerce, business organisations as well as public instruments affecting business activity. In particular it is for law students and academic lawyers at universities and law schools. Even though this book focuses on Polish law, it may serve as a useful starting point for readers in other jurisdictions, especially foreign students taking business law course in Poland within the framework of Erasmus Programme. Apart from that, the book is intended for those who must use the law of business in an international environment, in particular for legal practitioners dealing with business law at an international level. In short, it is a useful and up-to-date guide to the Polish business law for practitioners, academics and students.

The book is composed of two parts: the first contains chapters which discuss various aspects of public business law (defined as the area of law which governs the relations between the State and business organisations), while the second one deals with matters belonging to the area of private business law (defined as the law concerning the relationships between business organisations). Both parts provide comprehensive coverage of the law relating to entrepreneurs, their registration, representation, sole traders, the law of business organisations (including partnerships and companies) as well as instruments aimed to facilitate carrying on a business such as state aid law and special economic zones. Additionally, such topics as public protection of competition and public procurement are dealt with. However, it must be stressed that the book is not intended to cover all aspects of the law of business in Poland.

This publication contains texts submitted by contributors from a number of academic centres throughout the country. Some of them discuss business law employing a typical textbook method, still others provide a more insightful view on the discussed topics which goes far beyond a fundamental approach. They are particularly addressed to those who seek wide and comprehensive analyses of a given subject.

The authors participating in the project include (in alphabetical order):

Anna Brzezińska-Rawa (*Business activities of the self-government*) who discusses the following issues: structure and activities of self-government, business activities within public utility tasks, business activities outside public utility tasks and public-private partnership. By the same author is *Telecommunications Law* which deals with various aspects of the Polish telecommunications law, namely: scope of the Telecommunications Law, purpose and role of the Telecommunications Law (goals), telecommunications administration, participants of the telecommunications market, performing of business telecommunications activities, regulation of telecommunications activities and confidentiality.

In her article **Elżbieta Dąbek** (*Small and Medium Enterprises as the way to achieve economic growth and employment*) discusses carrying on business by small and medium enterprises. It presents current EU financial instruments concerning SMEs access to finance. The issues of micro-credit, sources of information for investors and things that have to be improved are also dealt with. She also deals with the law of contract.

Małgorzata Ganczar discusses e-commerce law. Information technologies that develop intensively in the present day exert an immense influence on various fields of our lives, e.g. economy, public administration, health and education as well. The main goal of her article is to show the regulations of electronic contracts and legal framework for e-commerce, the implementation of international and European legislation of e-commerce into the law of Poland, the sources of Polish e-commerce law (Civil Code, Act on Electronic Signature, Act on rendering services electronically).

Stanisław Głowiak authored the chapter on pathologies in business, focusing on corruption in particular.

Krzysztof Lasiński-Sulecki authored *Customs Law* which concerns the following issues: sources of customs law in Poland, Poland as part of the customs territory of the community, customs tariff, origin of goods, valuation of goods, entry of goods into the customs territory, customs declaration, customs-approved treatment or use of goods, customs debt. By the same author is *Tax Law* which concerns the following issues: sources of tax law, tax authorities, corporate income tax, personal income tax, international tax conventions, goods and services tax, excise duties, local taxes, tax on civil law transactions.

Janina Ciechanowicz-McLean and **Tomasz Bojar-Fijałkowski** deal with *The regulation of public – private partnership in Poland*. The authors discuss the areas covered by "Public – Private Partnership Act" of July 28th 2005. The act regulates principles and procedures of cooperation between public entity and private partner in public – private partnership frameworks (Article 1 of the act). The act presents the definition of public – private partnership as cooperation between public entity and private partner in order to implement particular public social need, based on the public – private agreement and performed according to rule of proper act.

Tomasz Miśko comprehensively reviews and analyses the principles of undertaking and carrying on a business in Poland. His chapter covers such topics as general provisions of the Law on Business Activity, starting business activity, concessions and regulated business activity, inspection of entrepreneurs, as well as branches and agencies of foreign entrepreneurs. He also deals with state aid.

Chapters authored by **Jan Olszewski** extensively cover the law of public protection of competition in Poland and combating unfair competition in Poland. Issues of concentration of entrepreneurs, structure of competition and consumer protection (including the President of the Office for Competition and Consumer Protection for Council for Good Economic Practices and Consumer Ombudsman) as well as some procedural questions are dealt with. Also the provisions on special economic zones are succinctly discussed. Professor Olszewski also deals with the functioning of arbitration courts. Development of such courts may give rise to an enhanced business activity within transborder areas. The author generally characterizes activation programme for arbitration courts and discusses some other issues concerning arbitration (the problem of a multitude of arbitration agreements, types of Arbitration Courts, etc.).

Katarzyna Pokryszka in her article *Legal Status of the Foreign Lawyers in Poland* notices that the principal Polish legal act that regulates the right to take up and pursue legal professions by foreigners in Poland is the Act of 5 July 2002 on Providing Legal Assistance by Foreign Lawyers in the Republic of Poland (hereinafter referred to as "the Act on Foreign Lawyers" or "the Act"). Although the Act was adopted first of all in order to implement the European Community directives concerning lawyers, it includes also provisions referring to the situation of lawyers coming from outside the European Union who are not encompassed by the EC regulations. The Act came into force on 10 February 2003, except for the provisions on lawyers from the European Union (art. 13–17, art. 21–41), which entered into force on the date of Poland's accession to the EU. Katarzyna Pokryszka in her next article (*Mediation as a method of alternative dispute resolution in Polish civil proceedings*) observes that mediation as an alternative method of resolving disputes in civil and commercial proceedings became a part of the Polish legal system on the basis of the amendments to the Civil Proceedings Code adopted on 28 July 2005. Mediation is regulated under the provisions of art. 183(1)–183(15) of the CPC which came into force on 10 December 2005.

Dominika Sagan is the author of the chapter concerning registered partnerships as the basic form of commercial partnerships in Poland. The importance of this form of a business organisation results from that the provisions concerning registered partnerships must be applied in relation to other types of partnerships, namely professional partnerships, limited partnerships and limited joint-stock partnerships.

Joanna Sieńczyło-Chlabicz in *Distribution Of Public Figures' Image By Media deals with the Polish Act on Copyright Law and Neighbouring Rights*, which

regulates image distribution and protection, does not contain its normative definition. Similarly, Polish Civil Code, listing image among other examples of personal interests, does not define this notion either. Therefore, doctrine and jurisdiction are obliged to create this definition. Representatives of doctrine present various definitions that contain many common elements. They will be presented together with each approach. It can be stated that the process of covering still new elements by the term image in order to provide them legal protection is successively proceeding. This phenomenon is noticeable not only in Polish doctrine and jurisdiction, but also in court jurisdiction and doctrine of numerous European countries, for instance in Germany, France.

Małgorzata Szreniawska in *Trademarks – general rules* notices that industrial property does not have a legal definition yet. The term "property" can be defined on the basis of civil law, where it is described as the widest right of using goods. Yet, this description is not enough to determine the meaning of the term "industrial property". The lack of a legal definition of industrial property is evident both in the Polish legal system, as well as in international agreements. The basic act of law, which creates the basis for understanding today's law of industrial property is the Paris Convention for the Protection of Industrial Property of March 20, 1883.

Piotr Szreniawski deals with *Concessions and Regulated Economic Activity*. He notices that the undertaking, pursuance and termination of economic activity in Poland is regulated by the Freedom Of Economic Activity Act of 2 July 2004. The regulation applies both to Polish and foreign persons as entrepreneurs. Entrepreneurs who undertake economic activities may be required to obtain concession, a permit, a licence, an approval, to make a notification as well as to make an entry in the Regulated Activity Register. Polish regulations do not define the term "concession". Public business law doctrine defines a concession as an administrative act by which the state may authorise a legal or a physical person to conduct a business activity, where such authorization is required by law.

Finally, **Roman Uliasz** examines the rules of representation of entrepreneurs placing particular emphasis on a commercial power of attorney (*prokura*). He also deals with business organisations, namely partnerships and companies. His chapters cover a large range of issues, such as partnership and company nature, their formation, liability, representation and management.

Professor Jan Olszewski

PART I
PUBLIC BUSINESS LAW

CHAPTER V

J. Olszewski

Public protection of competition in Poland

1. BRIEF HISTORY OF COMPETITION IN POLAND

In Poland after WW II there was a socialistic economy with central planning system and high level of monopolization, which could significantly limit the success of the economic transformation. In this situation in 1988 the Polish Government started promoting competition and counteracting the anti-market behaviours. In January 1988 the first Polish socialistic centrally-planned economy antimonopoly law[65] came into force.

With the abandonment of a centrally-planed economy and when Polish Government took the conversion to a market economy in 1989, the socialist antimonopoly law lost its entire reason for being.

- The two years' period following its passing revealed many faults in the antimonopoly law.
- But that same period provided considerable experience owning to which a new law might arise.

After political breakthrough in 1989 the Polish Government made the second antimonopoly law. It was Act on counteracting monopolistic practices. This act was passed on 24 February 1990[66]. It constituted an important element of the market reform programme.

The goals of the second antimonopoly act in 1990 were:

- to take into account the changes that had occurred in the economy
- to assure better development of competition
- to protect business from the monopolizing practices of others
- to protect the interests of consumers.

Counteracting the anti-competitive agreements and abuse of the dominant position on the market as well as control of concentration of entrepreneurs were set as the main tasks of the Office. These competences were repeatedly increased. A significant change took place in 1996, when after the reform of the central

[65] Act O przeciwdziałaniu praktykom monopolistycznym w gospodarce narodowej Dz 1987 No 3 p 27.

[66] Act O przeciwdziałaniu praktykom monopolistycznym Dz 1995 No 80 p 405.

administration, the AO received its present name – the Office of Competition and Consumer Protection – OCCP (*Urząd Ochrony Konkurencji i Konsumentów – UOKiK*). The extent of its activities was simultaneously extended to include the protection of consumer interest. At the same time the Chief Inspector of the Commercial Inspection was assigned to the President of the Office.

After 10 years of the Act on counteracting monopolistic practices and protection of consumer interests being in force, the need to prepare a new act, which would regulate the competition issues in the Polish market in a comprehensive and, at the same time, consistent and effective manner emerged.

Third public competition act was prepared in 15 December 2000[67]. The Act of 15 December 2000 on competition and consumer protection (entered into force on April 2001) defined principles of functioning of the entire system of competition and consumer protection, in which the President of the OCCP takes the central position. One of the most important changes was implementation of specific terms of office and the obligation of appointment through competition.

In 2002 the OCCP made an effort to create a market supervision system for products under community directives and a fuel quality monitoring system.

For the OCCP, Poland's accession to the European Union as of 1 May 2004 signified most of all the end of the process of harmonization of the Polish antimonopoly law with the EU regulations. Since the accession, the Office operates within the scope of the European Competition Network (ECN)

Fourth public competition act was prepared on 16 February 2007[68] (entered into force in April 2007 and this Act has the same name as act of 15 December 2000, so the name Act on Competition and Consumer Protection number two will be used in the next parts of the text (the CCP Act II).

2. GENERAL PROVISIONS (ARTICLE 1–3)

Act of 16.02.2007 on competition and consumer protection[69] (hereinafter referred to as CCP Act II) is one of the basic regulations in Polish public law.

The CCP Act II determines conditions for the development and protection of competition as well as the rules on protection of interests of entrepreneurs and consumers, undertaken in the public interest. The CCP Act II regulates the rules:

[67] Act of 15 December 2000 on competition and consumer protection Dz U Nr 122 poz 1319.

[68] Act of 15 February 2007 on competition and consumer protection Dz U No 50 p 331.

[69] Journal of Laws No 03.86.804; 2003-10-01, amend. Dz.U.03.60.535 art. 534; 2003-10-15, amend. Dz.U.03.170.1652, art. 6; 2004-05-01, amend. Dz.U.04.93.891, art. 1; amend. Dz. U.04.96.950, art. 43.

1) of counteracting competition restricting practices and practices violating collective consumer interests,
2) as well as anticompetitive concentrations of entrepreneurs and associations of thereof, where such practices or concentrations cause or may cause effects in the territory of the Republic of Poland,
3) defines the authorities competent in competition and consumer protection issues.

The Act provides some exceptions. The first exception is that the Act is without prejudice to the rights vested under the provisions concerning protection of intellectual and industrial property rights, in particular provisions on the protection of inventions, decorative and industrial patterns, topography of integrated circuits, trade marks, geographic designations, copyright and neighbouring rights.

The Act shall apply to the agreements concluded between entrepreneurs:
1) in particular licensing agreements, as well as to other practices of exercising rights (referred before);
2) concerning information undisclosed to the general public, related to:
   a) technical and technological information,
   b) rules of organisation and management

– in relation to which steps were taken in order to prevent their disclosure, where such agreements result in the unjustified limitation of freedom of business activity of the parties, or in significant restriction of competition on the market (Article 2).

Article 3 contains unconditional exemption. It states that the provisions of the Act shall not apply to impediments to competition admitted by virtue of separate legal acts.

3. MAIN DEFINITIONS IN COMPETITION LAW (ARTICLE 4)

There are a few new interesting definitions (made for the purpose of OCCP Act II) especially:
1) "undertaking" shall have the same meaning as under the provisions on freedom of business activity, as well as:
   a) natural and legal person as well as organisational units without a legal personality, to which the legislation grants legal capacity, organising or rendering services of public utility nature, and which are not business activity within the meaning of the provisions on freedom of business activity,
   b) natural person exercising a profession on its own behalf and account or performing activity in the frame of exercising such a profession,

   c) natural person having control, within the meaning of Subparagraph 4, over at least one undertaking, even if not conducting business activity within the meaning of the provisions on freedom of business activity, provided that this person is undertaking further activities subject to control of concentrations, referred to in Article 13;
   d) associations of undertakings within the meaning specified in Subparagraph 2 – for the purposes of the provisions on competition restricting practices and practices violating collective consumer interests;
2) "associations of undertakings" shall mean chambers, associations and other organisations associating undertakings referred to in Subparagraph 1, as well as associations of such organisations;
3) "dominant undertaking" shall mean an undertaking having control, within the meaning of Subparagraph 4, over another undertaking;
4) "taking over control" shall mean any form of direct or indirect acquisition of rights by the undertaking, which, individually or jointly, taking into account all legal or factual circumstances, allow for exerting a decisive influence upon another undertaking or other undertakings; in particular, such powers are created by:
   a) holding directly or indirectly a majority of votes in the shareholders' meeting or general meeting of shareholders, also in the capacity of a pledgee or user, or in the management board of another undertaking (dependent undertaking) also under agreements with other persons,
   b) the right to appoint or remove from office a majority of members of the management board or supervisory board of another undertaking (dependent undertaking), also under agreements with other persons,
   c) members of its management board or supervisory board constitute more than half of the members of another undertaking's (dependent undertaking's) management board.
   d) holding directly or indirectly, a majority of votes in the dependent partnership or in the general meeting of the dependent cooperative, also under agreements with other persons,
   e) ownership of entirety or part of the property of another undertaking (dependent undertaking),
   f) an agreement which stipulates the management of another undertaking (dependent undertaking) or transfer of profit by such undertaking;
5) "agreements" shall mean:
   a) agreements concluded between undertakings, between associations thereof and between undertakings and their associations, or certain provisions of such agreements,
   b) concerted practices undertaken in any form by two or more undertakings or associations thereof,

c) resolutions or other acts of associations of undertakings or their statutory organs;

6) "distribution agreements" shall mean agreements concluded between undertakings acting at different levels of the economic process aimed at purchase of products for further resale;
7) "goods" shall mean items as well as all forms of energy, securities and other property rights, services as well as construction works;
8) "prices" shall mean prices, also charges in the nature of prices, trade margins, commissions and mark-ups;
9) "relevant market" shall mean a market of goods, which by reason of their intended use, price and characteristics, including quality, are regarded by the buyers as substitutes, and are offered in the area in which, by reason of their nature and characteristics, the existence of market access barriers, consumer preferences, significant differences in prices and transport costs, the conditions of competition are sufficiently homogeneous;
10) "dominant position" shall mean a position of the undertaking which allows it to prevent the efficient competition within a relevant market thus enabling it to act in a significant degree independently of competitors, contracting parties and consumers; it is assumed that the undertaking holds a dominant position if its market share exceeds 40%;
11) "competitors" shall mean undertakings which at the same time release or may release for free circulation, purchase or may purchase goods in the relevant market;
12) "consumer" shall mean 'a consumer' as defined by the provisions of the Act of 23 April 1964 – the Civil Code (Journal of Laws, No. 16, item 93, as amended)[70];
13) "consumer organisations" shall mean, independent of undertakings and of associations thereof social organisations, the statutory tasks of which include the protection of consumer interests; consumer organisations may run business activities, according to general rules, provided that the income from the activity serves solely to finance the execution of the organisations' statutory tasks;
14) "capital group" shall mean all undertakings, which act under the direct or indirect supervision of one undertaking, including the undertaking;
15) "revenue" shall mean revenue attained in the tax year preceding the day of instituting the proceedings by virtue of the present Act, within the meaning of income tax provisions binding the undertaking;
16) "average salary" shall mean an average monthly salary within the enterprise sector in the last month of the quarter preceding the day of issuance of a decision by the President of the Office of Competition and Consumer Protection, published by the President of the Central Statistical Office pursuant to separate provisions;
17) "business secret" shall mean 'business secret' as defined in Article 11, Paragraph 4 of the Act of 16 April 1993, on combating unfair competition (Journal of Laws of 2003 No. 153, item 1503, of 2004, as amended)[71];
18) "President of the Office" shall mean the President of the Office of Competition and Consumer Protection;
19) "EC Treaty" shall mean the Treaty establishing the European Community (Official Journal EC C 325 of 24.12.2002);
20) "Regulation No. 1/2003/EC" shall mean Council Regulation No. 1/2003/EC, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (Official Journal EU L 1 of 4.01.2003, p. 1; Official Journal EU Polish special edition, chapter 08, volume 02, p. 205);
21) "Regulation No. 139/2004/EC" shall mean Council Regulation No. 139/2004/EC, of 20 January 2004, on the control of concentrations between undertakings (Official Journal EU L 024 of 29.01.2004, p.1; Official Journal EU Polish special edition, chapter 08, volume 03, p. 40);
22) "Regulation No. 2006/2004/EC" shall mean European Parliament and Council Regulation No. 2006/2004/EC, of 27 October 2004, on cooperation between national authorities responsible for the enforcement of consumer protection laws ("Regulation on consumer protection cooperation") (Official Journal EU L 364 of 9.12.2004).

The value of EURO referred to in the provisions of the Act shall be converted into Polish Zloty, according to the average rate of foreign currencies published by the National Bank of Poland on the last day of the calendar year preceding the year in which the intention of concentration is notified or a financial penalty imposed.

[70] Amendments to the aforementioned Act are published in the Journal of Laws of 1971, No. 27, item 252; of 1976, No. 19, item 122; of 1982, No. 11, item 81, No. 19, item 147 and No. 30, item 210; of 1984 No. 45, item 242; of 1985 No. 22, item 99; of 1989, No. 3, item 11; of 1990, No. 34, item 198; No. 55, item 321 and No. 79, item 464; of 1991, No. 107, item 464 and No. 115, item 496; of 1993, No. 17, item 78; of 1994, No. 27, item 96, No. 85, item 388, and No. 105, item 509; of 1995, No. 83, item 417; of 1996, No. 114, item 542, No. 139, item 646 and No. 149, item 703; of 1997, No. 43, item 272, No. 115, item 741, No. 117, item 751 and No. 157, item 1040; of 1998, No. 106, item 668, and No. 117, item 758; of 1999, No. 52, item 532; of 2000, No. 22, item 271, No. 74, items 855 and 857, No. 88, item 983 and No. 114, item 1191; of 2001, No. 11, item 91, No. 71, item 733, No. 130, item 1450 and No. 145, item 1638; of 2002 No. 113, item 984, and No. 141, item 1176; of 2003, No. 49, item 408, No. 60, item 535, No. 64, item 592 and No. 124, item 1151; of 2004, No. 91, item 870, No. 96, item 959, No. 162, item 1692, No. 172, item 1804 and No. 281, item 2783; of 2005, No. 48, item 462, No. 157, item 1316 and No. 172, item 1438; and of 2006, No. 133, item 935 and No. 164, item 1166.

[71] No. 96, item 959, No. 162, item 1693 and No. 172, item 1804, and of 2005 No. 10, item 68

4. PROHIBITION OF COMPETITION RESTRICTING PRACTICES (ARTICLE 5–11)

4.1. Prohibition of competition restricting agreements

Prohibitions of competition restricting agreements are from art. 6 to art. 6 OCCP Act. The agreements which have as their object or effect elimination, restriction or any other infringement of competition on the relevant market shall be prohibited, in particular those consisting in:

1) fixing, directly or indirectly, prices and other conditions of purchase or sales of products,
2) limiting or controlling production or supply as well as technical development or investments,
3) sharing markets of supply or purchase,
4) application in similar transactions with third parties onerous or not homogenous contract terms, thus creating for these parties diversified conditions of competition,
5) making conclusion of an agreement subject to acceptance or fulfilment by the other party of another performance, having neither substantial nor customary relation with the subject of the agreement,
6) limiting access to the market or eliminating from the market entrepreneurs which are not party to the agreement,
7) collusion between entrepreneurs entering a tender, or by those entrepreneurs and the entrepreneur being the tender organiser, of the terms and conditions of bids to be proposed, particularly as regards the scope of works and the price.

The agreements referred to in section 1 shall be in their entirety or in the respective part null and void, with the reservation of Articles 7 and 8.

In this part of restrictions are two individual exemptions: the prohibition of agreements referred to in Article 7 shall not apply to:

1) competitors whose combined market share in the calendar year preceding the conclusion of the agreement does not exceed 5%;
2) undertakings which are not competitors, if the market share of any of them in the calendar year preceding the conclusion of the agreement does not exceed 10%.

4.2. Group excemption

The basic regulation for group excemption is Article 8. It provides that the Council of Ministers may, by way of a regulation, exempt from the prohibition

stipulated in Article 6, agreements which contribute to improvement of the production, distribution of products or to technical or economic progress and ensure to the buyer or user fair share of benefits resulting thereof, and which:

1) do not impose upon the entrepreneurs concerned restrictions which are not indispensable to the achievement of these objectives;
2) do not afford these entrepreneurs the possibility to eliminate competition on the relevant market in respect of a substantial part of the products in question.

In the regulation referred to in section 1, the Council of Ministers shall define:

1) conditions which are to be satisfied for the agreement to be considered exempted from the prohibition;
2) clauses the existence of which in the agreement constitutes the infringement of Article 6;
3) period during which the exemption shall apply.

At present, there are a few groups of excemptions under the Polish law. They are introduced by: **Draft Regulation of the Council of Ministers amending the Regulation on exempting certain vertical agreements in the motor vehicle sector from the prohibition of agreements restricting competition**.

This Regulation constitutes the realization of the delegation contained in Article 8 of the Act on competition and consumer protection II. It exempts some agreements concluded between car suppliers and distributors from the general prohibition to conclude anticompetitive practices. Furthermore, it unambiguously identifies strictly prohibited agreements, particularly those harmful to competition. The aim of the Regulation is to establish appropriate conditions for the development of competition on the distribution market of motor vehicles, spare parts and maintenance services, and in a result, to provide consumers with better purchase terms.

This Regulation has been amended by means of exempting agreements regarding motorcycles from its scope, as the motorcycle market is not a broad market and the agreements concluded on this market are not of such a great significance to consumers as to cover them with a special regulation.

4.3. Prohibition of abuse of a dominant position (Article 9)

In Poland, like in UE law, the second kind of restricting practices is abuse of a dominant position. The abuse of a dominant position on the relevant market by one or more entrepreneurs shall be prohibited.

The abuse of a dominant position may, in particular consist in:

1) direct or indirect imposition of unfair prices, including predatory prices or prices glaringly low, significantly delayed payment terms or other conditions of purchase or sale of products,

2) limiting production, supply or technical development to the detriment of contractors or consumers,
3) application in similar transactions with third parties onerous or not homogenous contract terms, thus creating for these parties diversified conditions of competition,
4) making conclusion of the agreement subject to acceptance or fulfilment by the other party of another performance having neither substantial nor customary relation with the subject of agreement,
5) counteracting formation of conditions necessary for emergence or development of the competition,
6) imposition by the entrepreneur of onerous contract conditions, yielding to this entrepreneur unjustified profits,
7) division of market according to territorial, product, or entity-related criteria.

Legal actions which constitute abuse of a dominant position shall be in their entirety or in the respective part null and void.

5. CONCENTRATION OF UNDERTAKINGS

5.1. Control of concentration (Articles 13–23 OCCP Act II)

One of the main tasks of the President of the OCCP is the control of mergers between undertakings. The aim of this control is to counteract excessive consolidation of undertakings and the achievement of a dominant position on the market causing a significant restriction of competition. The antitrust authority's control within this scope is indispensable, as a very strong market position of one undertakings may impede conducting competitive activities by other undertakings in relation to the incumbent, and may also lead to the elimination of other undertakings from the market or impeding their access to the market - to the detriment of competition and consumer interests.

In which situations the President of the Office starts control of concentrations?

I. President of the Office starts notification if:
   1) the combined worldwide turnover of undertakings participating in the concentration in the financial year preceding the year of the notification exceeds the equivalent of EUR 1 000 000 000, or
   2) the combined turnover of undertakings participating in the concentration in the territory of the Republic of Poland in the financial year preceding the year of the notification exceeds the equivalent of EUR 50 000 000.

II. This obligation concerns the intention of:
   1) a merger of two or more independent undertakings;
   2) taking over – by way of acquisition or entering into a possession of stocks, other securities, shares or in any other way obtaining direct or indirect control over one or more undertakings by one or more undertakings;
   3) creation by undertakings of one joint undertaking;
   4) acquisition by the undertaking, of a part of another undertaking's property (the entirety or part of the undertaking), if the turnover achieved by the property in any of the two financial years preceding the notification exceeded in the territory of the Republic of Poland, the equivalent of EUR 10 000 000 (art. 13).

5.2. Concept of control in the UE merger regulations

The concept of control in the UE Merger Control Regulation is much wider because for the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

a) ownership or the right to use all or part of the assets of an undertaking;
b) rights or contracts which confer decisive influence on the composition, voting or decision of the organs of an undertaking.

According to the Commission's case law, an assessment of whether or not decisive influence exists looks in particular at whether influence (or at least a right of veto) can be exercised in relation to the following:

- decisions on the appointment of the management of the target undertaking (whether members of the board or executive directors);
- decisions on the adoption of the target undertaking's financial plans;
- decisions on the adoption of the target undertaking's business plans;
- decisions concerning the target undertaking's investments;
- decisions concerning the target undertaking's choice of technology;
- decisions concerning the target undertaking's product developments[72].

5.3. The case where the notification is not necessary

1. The turnover of the undertaking over which the control is to be taken in accordance with Article 13, Paragraph 2, Subparagraph 2, did not exceed in the

[72] M. Broberg, *The Concept of Control in the Merger Control Regulation*, E.C.I.R. 2004, issue 12, p. 741–742.

territory of the Republic of Poland in any of the two financial years preceding the notification, the equivalent of EUR 10 000 000.

2. The financial institution, the normal activities of which include investing in stocks and shares of other undertakings, for its own account or for the account of others, acquires or takes over, on a temporary basis, stocks and shares with a view to reselling them provided that such resale takes place within one year from the date of the acquisition or taking over, and that:
   a) this institution does not exercise the rights arising from these stocks or shares, except from the right to dividend, or
   b) exercises these rights solely in order to prepare the resale of the entirety or part of the undertaking, its assets, or these stocks and shares.
3. The undertaking acquires or takes over, on a temporary basis, stocks and shares with a view to securing debts, provided that such undertaking does not exercise the rights arising from these stocks or shares, except from the right to sell.
4. The concentration arises as an effect of insolvency proceedings, excluding the cases where the control is to be taken over by a competitor or a participant of the capital group to which the competitors of the to-be-taken undertaking belong.
5. The concentration applies to undertakings participating in the same capital group.

5.4. Decisions in cases of concentration

President of OCCP may make a few decisions. **The first is a consent to perform a concentration**, which shall not result in restrictions to competition in the market, in particular, by emergence or strengthening of dominant position in the market.

Conditional consent

Second decision have some conditions. The President of the Office shall, by way of a decision, issue a consent for concentration when, upon fulfilment of conditions by entrepreneurs intending to effect the concentration, the competition in the market will not be significantly restricted, in particular by emergence or strengthening of dominant position.

The President of the Office may impose upon the entrepreneur or entrepreneurs intending to perform the concentration an obligation, or accept their obligation, in particular:

1) to divest the entirety or a part of the property of one or more entrepreneurs,
2) to divest control over an entrepreneur or entrepreneurs, in particular by divesting a set of stocks or shares, or to dismiss one or several entrepreneurs from the position in the management/ or supervisory board,
3) to grant competitor an exclusive licence

– determining in the decision referred to in section 1 the time limit for meeting the requirements.

Third kind of decision is a prohibiting decision. The President of the Office shall, by way of a decision, prohibit that a concentration be effected, if it shall result in significant restriction of the competition in the market, in particular by emergence or strengthening of dominant position.

Fourth kind of decision is a justifiable decision. The President of the Office shall, by way of a decision, issue a consent to perform a concentration resulting from which competition in the market will be significantly restricted, in particular by emergence or strengthening of dominant position, in any case that desistance from banning concentration is justifiable, and in particular:

1) the concentration is expected to contribute to economic development or technological progress;
2) it may exert a positive impact on the national economy.

The fifth decision is the decision cancelling former decisions. The President of the Office may cancel the decisions (referred to in Article 18, Article 19, paragraph 1 and Article 20, paragraph 2) if they **were based on unreliable information** for which entrepreneurs participating in the concentration were responsible or where entrepreneurs did not comply with conditions (referred to in Article 19, paragraph 2 and 3). In the case of withdrawal of the decision the President of the Office shall pronounce on the merit of the case.

Where, in the cases referred above, the concentration is already performed and restitution of the competition on the market is otherwise impossible, the President of the Office may, by way of a decision, defining time limits for its implementation under conditions defined in the decision, order in particular:

1) separation of the merged undertaking under conditions defined in the decision;
2) divestiture of the entirety or a part of the entrepreneur's property;
3) divestiture of stocks or shares ensuring the control over the entrepreneur or entrepreneurs or dissolution of the company over which the entrepreneurs have joint control;
4) removal from office a member of a managing or controlling body of the entrepreneurs participating in the concentration.

The decision referred to in paragraph 2 cannot be issued after the lapse of 5 years since the day the concentration was performed.

All positive decisions (referred to in Article 17, Article 18, clause 1, or in Article 19, clause 2) shall expire if within two (2) years of their issuance date, the concentration has not been effected. In some situations the President of the Office may, upon request of an entrepreneur participating in a concentration, prolongate the above period, by way of a decision.

The President of the Office, upon request of a financial institution, may extend, by way of a decision, the time limit referred to in Article 14, Subparagraph 2, if the

institution proves that resale of stocks or shares was not possible or economically justified before the lapse of one year from the date of their acquisition (art. 23).

6. ORGANISATION OF COMPETITION AND CONSUMER PROTECTION

6.1. The President of the Office (art. 29–36)

The President of the Office shall be the central government administration organ competent in the protection of competition and consumers. The Prime Minister shall supervise activities of the President of the Office.

The President of the Office is:

1. an authority exercising tasks imposed upon the authorities of the Member States of the European Union, pursuant to Articles 84 and 85 of the EC Treaty. In particular, the President of the Office shall be the competent competition authority within the meaning of Article 35 of Regulation No. 1/2003/EC.
2. a single liaison office within the meaning of the provisions of Regulation No. 2006/2004/EC and, in the scope of his statutory competences, shall be the competent authority referred to in Article 4 (1) of Regulation No. 2006/2004/EC.

6.2. Activities of the President of the Office

The scope of the activities of the President of the Office shall include:

1. exercising control over the observance by undertakings of the provisions of the present Act;
2. issuing decisions in the matters of counteracting competition restricting practices, concentrations of undertakings, violations of collective consumer rights, as well as other decisions stipulated in the Act;
3. conducting studies on the concentration level in the economy and on the market behaviour of undertakings;
4. preparing the draft government programmes for the development of competition and the draft government consumer protection policy;
5. co-operating with foreign and international consumer and competition protection authorities and organisations;
6. performing tasks and exercising competences of a competition protection authority of the European Union Member State, as determined in Regulation No. 1/2003/EC and Regulation No. 139/2004/EC,

7. performing tasks and exercising competences of the competent authority and of the single liaison office of the European Union Member State, as determined in Regulation No. 2006/2004/EC;
8. preparing and submitting to the Council of Ministers, draft legal acts concerning competition restricting practices;
9. submitting to the Council of Ministers, periodical reports on the implementation of the government programmes for competition development and consumer policy;
10. co-operating with the territorial self-government authorities in the scope resulting from the government consumer policy;
11. initiating checks on products and services to be performed by consumer organisations;
12. preparing and editing publications and educational programmes promoting awareness of competition and consumer protection;
13. addressing undertakings on matters relating to the protection of the rights and interests of consumers;
14. fulfilling the international obligations of the Republic of Poland in the scope of co-operation and exchange of information in the field of consumer and competition protection and state aid;
15. collecting and disseminating judgements pronounced in the cases in the field of competition and consumer protection, in particular placing the decisions issued by the President of the Office on the Office's website;
16. co-operating with the Head of the National Crime Information Centre in the scope essential for the fulfilment of his statutory tasks;
17. performing other tasks defined by the present Act or by separate acts.

6.3. Official Journal of the Office

The President of the Office issues the Official Journal of the Office for Competition and Consumer Protection.

The decisions and resolutions of the President of the Office, as well as judgements of the District Court in Warsaw – the Court for Competition and Consumer Protection, hereinafter referred to as "Court for competition and consumer protection" and judgement of the court of Appeal in appeal cases concerning the judgements of the Court of Appeal and at least the Supreme Court in cases of cassation of the judgements of the Court for competition and consumer protection, or their sentences with the omission of information constituting business secrecy of the undertaking and of other secrecy protected under separate provisions, may be in their entirety or part published in the Official Journal of the Office for Competition and Consumer Protection.

In the Official Journal of the Office for Competition and Consumer Protection shall be also published information, communications, notices, explanations and interpretations having significant importance for the application of the provisions encompassed by the scope of the activities of the President of the Office.

6.4. Branch Offices

The Office shall be composed of the Head Office in Warszawa and of the Office branch offices in Bydgoszcz, Gdańsk, Katowice, Kraków, Lublin, Łódź, Poznań, Warszawa and Wrocław. The branch office shall be managed by their directors.

The Prime Minister shall determine, by way of a regulation, territorial and material jurisdiction of the branch offices in the scope of the activities of the President of the Office, taking into consideration character and number of cases arising on the relevant territory.

In addition to the matters within their jurisdiction the branch offices may deal with other cases entrusted by the President of the Office.

6.5. Organization units in headquarters

The Office's headquarters consist of the following organizational units:

- President's Secretariat,
- Department of Legal Affairs and European Jurisprudence,
- Department of Competition Protection,
- Department of Market Analyses,
- Department of State Aid Monitoring,
- Department of Consumer Policy,
- Department of Market Surveillance,
- Department of International Relations and Communication,
- Department of Foreign Assistance, Budget and Administration,
- Independent Confidential Information Specialist,
- Independent Internal Auditor.

6.6. Market research and analyses conducted by OCCP

Research of competition on the Polish market is carried out by both the OCCP headquarters, and its branch offices. In 2003 in the Department of Market Analyses and one department of jurisprudence – the Department of Competition Protection dealt with competition research in the Headquarters.

There are two basic objectives of competition research carried out by the OCCP, which determine their course, selection of used research tools and the amount and range of obtained information. These objectives are:

a) collecting evidence for conducted proceedings,
b) collecting information regarding concentration and competition processes, which enable getting acquainted with the method of functioning of individual markets and possible distortion of competition or threats of them coming to being[73].

The second type of research here called also "market analyses", namely research not directly connected with antitrust proceeding, have a more extensive nature. This is research enabling to get to know the degree of market concentration and the market position of individual undertakings, and moreover to identify forces shaping competition in the studied sector; as well as competitive behaviours of key undertakings. Materials, collection of which was mainly dictated by a cognitive objective, create much more extensive possibilities, as far as further analysis and the latter use of its results is concerned.

The research realized within the framework of proceedings is conducted by units handling a given case. A broader research, than only for the purpose of the proceeding, is allocated because of their geographic reach. The research concerning markets of a local nature is realized by branch offices.

More Extensive Research is monitoring in sectors and on markets located on the objective and geographic area of operations of the departments of jurisprudence ranch offices, and on market analyses carried out by the Department of Market Analyses[74].

Table 5.1

Market research conducted by Branch Offices of the OCCP in 2004

No.	Branch Office	Total number of research	Nationwide research	Local research	Completed research	On-going research
1	Warszawa	6	1	5	2	4
2	Bydgoszcz	4	0	4	4	0
3	Kraków	4	2	2	4	0
4	Gdańsk	14	3	11	11	3
5	Katowice	7	4	3	3	1
6	Lublin	8	0	8	8	0
7	Wrocław	5	0	5	4	1
8	Łódź	12	2	10	10	2
9	Poznań	7	2	5	6	1
Total		**67**	**14**	**53**	**52**	**12**

[73] Report on activities – Office of Competition and Consumer Protection, Warszawa 2004, p. 102.
[74] Op. cit.

In 2004 the subject of interest of branch offices of the OCCP was mainly these sectors of economy, in which irregularities pointed out by consumers and undertakings most frequently emerge. Most research was conducted in relation to institution of a proceeding in a given case[75]. Market research conducted by the Department of Market Analyses has a broader nature than this type of activities undertaken by other units of the OCCP.

In 2004 the Department of Market Analyses conducted analyses of fourteen markets, all of a nationwide reach. The following markets were subject to the analyses: vouchers market, fire resistant materials market, air-carriers market, artificial fertilizers market, liquid gas market, metallurgic products market, freelance professions market, Press distribution market, soft fruits purchasing market, market of insurances for travel agencies, bank credits for individual customers market, bank accounts market, cellular telephony market, market of wholesale trade of liquid fuels in Poland and the oil market in Poland[76].

6.7. Council for good economic practices

Council for Good Economic Practices shall be established, as an opinion-making and advisory body to the President of the Office.

6.7.1. Main Tasks of Council

The tasks of the Council shall include, in particular:

1) presentation of proposals and opinions concerning amendments to the provisions regarding protection of competition and consumers;
2) preparation of studies concerning the state-of-play as to protection of competition and consumers in individual sectors of the economy;
3) promoting out-of-court consumer dispute resolution procedures, in particular conciliation and mediation;
4) expressing opinions concerning good economic practices.

6.7.2. Members of the Council

The Council for Good Economic Practices shall be composed of fifteen (15) members, as appointed from amongst:

1) individuals representing consumer organisations and milieus – a total of five (5) members;
2) individuals representing entrepreneurial organisations and milieus – a total of five (5) members;

[75] Op. cit. p. 103.

[76] Op. cit.

3) individuals being distinguished by their knowledge, expertise and experience as regards protection of competition and consumers – a total of five (5) members.

Members of the Council for Good Economic Practices shall be appointed and dismissed by the President of the Office.

The works of the Council shall be managed by the President of the Office.

The procedure of works of the Council shall be determined by the Rules-and-Regulations determined by the President of the Office.

Administrative and financial assistance to the Council shall be provided by the Office.

Members of the Council are entitled to reimbursement of travel and other public transport expenses within the territory of Poland, as determined in the provisions of Article 77^5, Para. 2, of the Act dated 26th June 1974, titled The Polish Labour Code (JL of 1998, No. 21, item 94, as amended thereafter)[77].

6.8. Trade Inspections (Article 35–36)

1. The Trade Inspection shall be subordinated to the President of the Office.
2. The President of the Office shall sanction the policy of the Trade Inspection and its plans of inspections of national dimensions submitted by the Chief Inspector of the Trade Inspection.
3. The President of the Office may order the Trade Inspection to proceed with the inspection or to perform other tasks included in the scope of his activities.
4. The President of the Office shall perform periodical assessments of the activities of the Trade Inspection based on the reports submitted by this Inspection and shall deliver the conclusions of such assessments to the Chief Inspector of the Trade Inspection.
5. The President of the Office may make public information concerning results of the control of The Trade Inspection, excluding information constituting a business secret as well as any other secret protected under separate provisions.

[77] Amendments to the said Act as published in JL: of 1998, No. 106, item 668 and No. 113, item 717; of 1999, No. 99, item 1152; of 2000, No. 19, item 239, No. 43, item 489, No. 107, item 1127, and No. 120, item 1268; of 2001, No. 11, item 84, No. 28, item 301, No. 52, item 538, No. 99, item 1075, No. 111, item 1194, No. 123, item 1354, No. 128, item 1405, and No. 154, item 1805; of 2002, No. 74, item 676, No. 135, item 1146, No. 196, item 1660, No. 199, item 1673, and No. 200, item 1679; and, of 2003, No. 166, item 1608, and No. 213, item 2081.

6.9. Consumer Ombudsmen

In Poland many consumers ombudsmen constitute the only way of appeal against dishonest practices applied by entrepreneurs in complaint processing. They are able to solve many disputes in an amicable way and gladly attempt to do so, for a dispute is much more expensive and not necessarily successful.

There are poviats where ombudsmen receive legal and organisational support, but in many other poviats, where the role of an ombudsman is not understood at all, the ombudsmen become no support from poviat authorities – neither legal, organisational nor office support[78].

6.9.1. Appointing Consumer Ombudsman as District (municipal) Consumer Advocate

The tasks of the district (*powiat*) self-government in the field of the protection of consumer rights shall be performed by the district (municipal) consumer advocate, hereinafter referred to as "Consumer Ombudsman".

The districts may, by way of an agreement, create one common post of the Consumer Ombudsman.

The Consumer Ombudsman shall be appointed by the district council or town council in towns with district status, hereinafter referred to as "the council".

The Consumer Ombudsman shall be appointed from among persons with university education, in particular in law or economy and with minimum five years of professional experience. The Consumer Ombudsman shall be subordinated directly to the council and report to the council.The organisational status of the Consumer Ombudsman shall be determined by the district statute or regulations.

The Consumer Ombudsman shall be employed in the district county (*starostwo*). All functions in the scope of labour law in relation to the Consumer Ombudsman shall be performed by the governor of a county (*starosta*). The working and payment conditions of the Consumer Ombudsman shall be determined by the council.

The rules on the remuneration of the consumer advocate shall be governed by the provisions on self-government employees.

In *poviats* populated by over 100 thousand inhabitants and in towns with *poviat* rights, the Consumer Ombudsman may perform his tasks with the help of an individual office.

[78] K. Staszyńska, *Synergy of consumer and competition policies in the view of entrepreneurs and consumer association in Urząd Ochrony Konkurencji i Konsumentów – Polityka ochrony konsumentów i polityka konkurencji – razem czy osobno? Consumer Protection and Competition Policy working together?*, Warszawa 2006, p. 115

6.9.2. Main tasks of the Consumer Ombudsman

The tasks of the Consumer Ombudsman shall, in particular include the following:

1) providing free of charge consumer advice and legal information in the scope of protection of consumer interests,
2) bringing forward motions for proclaiming and amending local regulations in the scope of consumer protection,
3) addressing entrepreneurs in cases pertaining protection of consumer rights and interests,
4) co-operation with the territorially competent branch office, with bodies of Trade Inspection and with consumer organisations,
5) performance of other tasks prescribed by the present Act and by separate provisions.

Consumer Ombudsman may in particular bring an action on consumers' behalf and, with their consent, join lawsuits in cases pertaining protection of consumer interests.

In the cases concerning misdemeanours to the detriment of consumers, the Consumer Ombudsman is acting as a public prosecutor in the meaning of provisions of the Misdemeanour Code.

6.9.3. Consumer Ombudsman report

The Consumer Ombudsman shall submit to the council for approval annual activity report by 31 May of the following year.

The Consumer Ombudsman shall remit the report approved by the council referred to in section 1 to the territorially competent branch of the Office.

The Consumer Ombudsman shall be obligated to continually present to the branch offices the relevant conclusions and inform about problems concerning consumer protection which require taking measures on the government administration level.

6.10. The National Council of Consumer Ombudsmen

The National Council of Consumer Ombudsmen, hereinafter referred to as "the Council" shall be established as a body assisting the President of the Office.

The Council shall be a standing opinion-giving and advisory body of the President of the Office to the extent of matters relating to the protection of consumer rights at the level of powiat (district) selfgovernment.

6.10.1. Main tasks

The tasks of the Council shall include, in particular:

1) submitting proposals on directions of legislative changes in provision pertaining to the protection of consumer rights;

2) giving opinion on matters of draft legal instruments or directions of the government's consumer policy;
3) giving opinion on such other matters falling within the scope of protection of consumers as the President of the Office may refer to the Council
4) conveying information concerning protection of consumers to the extent as indicated by the President of the Office.

The Council shall comprise nine Consumer Ombudsmen, one from each area of local competence of the branch offices of the Office for Protection of Competition and Consumers.

The Office shall provide administrative support for the Council.

The Office shall refund to the members of the Council the costs of commuting to meetings of the Council in accordance with provisions on dues to which an employee is entitled in connection with domestic business travel.

The work practices of the Council shall be laid down in Rules and Regulations established by the President of the Office.

Communication between structures which protect competition and those which protect consumers is easier within one institution, and the use of experience gained in the course of competition and consumer protection policy implementation for shaping law, is natural.

However, in the opinion of both respondent circles, in particular in the opinion of consumer organisation representatives, the Office for Competition and Consumer Protection (OCCP) has certain drawbacks. According to consumer ombudsmen and consumer organisation representatives, the OCCP is not authorised to influence activities of other central bodies which are responsible for the execution of consumer and entrepreneur rights (e.g. Ministry of Health, Ministry of Agriculture) and does not have statutory prerogatives to deal with individual consumer interests[79].

6.11. Consumer Organizations

6.11.1. Main tasks

The consumer organisations shall represent consumer interests in relation to the public and self-government administration bodies and may participate in the implementation of the government consumer policy.

The organisations referred to in section 1 are, in particular, entitled to:
1) expressing opinion on the draft legal acts and other documents concerning rights and interests of consumers,

[79] K. Staszyńska, op. cit.

2) elaborating and disseminating consumer educational programmes,
3) performing tests of products and services and publishing their results,
4) editing periodicals, research studies, folders and leaflets,
5) providing free-of-charge consumer advisory services and assistance in handling consumer claims, unless the Statute of the organisation provides for pursuance of such activities against payment,
6) participating in works on standardisation,
7) implementing government tasks in the field of consumer protection, commissioned to them by the government and self-government administration bodies,
8) applying for allocation of public funds for the implementation of tasks referred to in item 7.

6.11.2. Obliged consulting

The government and self-government administration bodies shall be obliged to consult consumer organisations on the issues concerning the directions of activities aimed at the protection of consumer interests.

7. PROCEEDINGS BEFORE THE PRESIDENT OF THE OFFICE

7.1. General Provisions (Article 47–105)

The proceedings before the President of the Office shall be conducted as:
1) explanatory proceedings,
2) antimonopoly proceedings
3) proceedings in cases of practices violating consumer interests.

7.1.1. Explanatory Investigation

The explanatory investigation may precede instituting the antimonopoly investigation or proceedings on the matter of practices infringing collective consumer interests.

The President of the Office may institute, on an ex officio basis, and by way of a decision, explanatory proceedings, if the circumstances indicate a possibility that the provisions of the Act have been infringed, as to matters relative to a determined branch of economy, or as to matters regarding protection of consumer interests, and in any other cases as provided for by the Act.

The explanatory proceedings may in particular be aiming at:
1) initially determining whether an infringement of the provisions of this Act has occurred, such as may justify the institution of antimonopoly proceedings, including whether the case is of an antimonopoly nature,

2) initially determining whether an infringement of the provisions of this Act has occurred, such as may justify the institution of proceedings regarding the use of practices infringing the collective interests of consumers,
3) study of the market, inclusive of determination of the structure and degree of concentration thereof,
4) initially determining whether an obligation exists to notify an intended concentration,
5) determining whether an instance of infringement has occurred of any consumer interest being protected by the law, such as may justify the undertaking of actions determined in the relevant separate Acts or Laws.

The explanatory proceedings shall be concluded by way of a decision [*resp.* ruling]. Any explanatory proceedings should not last in excess of thirty (30) days, and as regards particularly complex issues, not longer than sixty (60) days of institution thereof.

7.1.2. Antimonopoly Investigation

The antimonopoly proceedings in the cases of competition restricting practices, control of concentrations, or matters of practices infringing collective consumer interests shall be instituted upon a motion or *ex officio*.

7.1.3. Main obligations in procedure

Entrepreneur or association of entrepreneurs shall be obligated to provide any and all necessary pieces of information and documents upon demand of the President of the Office.

The request referred to in section 1 should include:
1) indication of the scope of such information and the relevant time period,
2) indication of the object of the request,
3) time limit for providing information,
4) instruction about sanctions for non-delivery information or for providing false or misleading information.

7.1.4. "Amicus curiae" (Article 50 section 3)

Everyone shall be entitled to submit, in a written form, on his or her own initiative or upon request of the President of the Office, explanations concerning the essential circumstances of a given case.

7.1.5. Documents in proceedings (Article 51–53)

Only the original document or its copy certified by public administration body, notary, attorney at law, legal adviser or authorised employee of the entrepreneur may serve as the documentary evidence in the proceedings before the President of the Office.

The evidence in the proceedings before the President of the Office shall constitute the document drawn up in the Polish language, with the reservation of section 3.

Where such document has been drawn up in a foreign language also the translation into Polish of this document or of its part intended to serve as the evidence in the proceedings should be submitted, certified by a sworn translator.

The party adducing witness evidence is obligated to precisely indicate facts subject to confirmation by the testimony of individual witnesses and to indicate the data to allow proper summons of the witnesses.

The President of the Office, when summoning a witness, shall indicate in his summons name, surname and domicile of the summoned, place and date of giving the explanation, parties and subject of the case as well as provisions on penal sanctions for false testimony.

The testimony of a witness, after its entry to the protocol, shall be read before a witness and, depending on circumstances, completed or verified based on his/her comments.

The protocol of the hearings of a witness shall be signed by the witness and by the employee of the Office carrying on the hearings.

7.1.6. Experts (Article 54–59)

In cases requiring special information, the President of the Office having heard proposals of the parties concerning number of experts and their choice, may summon one or more experts in order to seek their opinion (the expert may be also a legal person specialised in the relevant field).

Until the termination of the activities of an expert each party may request him/her to be excluded from the proceedings for the same reasons as may be invoke to exclude the employee of the Office. The party lodging a request to exclude an expert after the works have been initiated has an obligation to give an appearance of verisimilitude that the reason justifying the exclusion arose thereafter or was unknown to the party beforehand.

The President of the Office may order to present to an expert the case records and the subject of inspection. The provisions of Article 63, sections 1 and 3 shall apply respectively.

The opinion of an expert should contain its justification. The experts may submit their joint opinion.

The President of the Office shall accord to an expert the remuneration in accordance with the provisions on costs of expert's evidence in court proceedings. The President of the Office may impose upon a party the obligation to pay an advance on account of the expert's expenses.

The President of the Office may address a scientific or scientific-research institute to issue an opinion. In its opinion this institute shall indicate person or persons who carried the research and issued the opinion.

7.1.7. Hearing (Article 60)

During the proceedings the President of the Office may hold hearings.

The hearing shall be in open court, with the exception of such hearing or its part in course of which information subject to business secrecy or other secrecy protected by virtue of separate provisions are being examined.

The President of the Office may summon for the hearing and examine parties, witnesses as well as ask for expert opinion (in the case of hearing in camera the provisions of Articles 153, 154 and 479^{10} of the Code of civil proceedings shall apply respectively).

7.1.8. Regional court (Article 61)

The President of the Office may address territorially competent regional court to examine witnesses and obtain an expert opinion, where it is supported by the character of the evidence or consideration of significant inconvenience or significant costs of obtaining the evidence. When addressing the court for providing evidence, the President of the Office shall issue a decision which shall define:

1) the court which is to provide evidence,
2) means of evidence,
3) facts to be found out.

7.1.9. Inspectors (Article 62)

During the proceedings before the President of the Office the authorised employee of the Office or of the Trade Inspection, hereinafter referred to as "inspector", may perform the inspection of each entrepreneur or association thereof, hereinafter referred to as "controlled", in the scope encompassed by these proceedings.

The President of the Office may authorise any of the following for participation in an inspection:

1) an employee of the competition authority of a Member State of the European Union – in a case referred to in Article 22 of Regulation 1/2003/EC,
2) any individuals having special knowledge – if for the sake of carrying out an inspection any such piece of knowledge is necessary.

Any authorisation for carrying out an inspection should comprise:

1) designation of the inspection authority
2) indication of the relevant legal basis,
3) date and location of issue,
4) first name, surname, and title/post of the inspector as well as the number of his or her professional identity card, and in case authorisation for participation in an inspection concerns any of individuals referred to in clause 1a – the respective first names and surnames of those persons, and:

   a) the number of passport or any other document confirming the individual's identity – in case of individuals referred to in clause 1a, item 1; or,
   b) the (personal) identity card number – in case of individuals referred to in clause 1a, item 2;
5) a marking of the entity to be inspected,
6) determination of the object and scope of inspection,
7) determination of the inspection start date and the expected end date,
8) signature of the authorisation granting individual, also quoting the title or post (scope of duties) being held by the same,
9) instruction regarding the rights and obligations of the entity being inspected.

1. Everybody may submit to the President of the Office a written notification concerning a suspicion that competition restricting practices have been applied, together with a justification[80].
2. The notification referred to in Paragraph 1 may include in particular:
   a) indication of the undertaking which is accused of applying competition restricting practices;
   b) description of the actual state being the basis of the notification;
   c) indication of the provision of the Act or the EC Treaty, the infringement of which is objected against by the notification submitter;
   d) making the infringement of the provisions of the Act or the EC Treaty plausible;
   e) identification data of the notification submitter.
3. Any documents that may constitute the evidence of infringing the provisions of the Act shall be attached to the notification.
4. The President of the Office shall provide the notification submitter, within the time period specified in Articles 35 to 37 of the Act of 14 June 1960 – the Code of Administrative Procedure, with information in writing about the way of considering the notification together with its justification.

[80] Before in antimonopoly proceedings in cases of competition restricting practices was another. Because the motion for instituting the antimonopoly investigation related to suspicion of the infringement of the provisions of the Act may be lodged by:

1) entrepreneur or association of entrepreneurs, which prove their legal interest,
2) territorial self-government body,
3) organ of State inspection,
4) Consumer Ombudsman,
5) Consumer organizations.

8. ANTIMONOPOLY PROCEEDINGS IN THE CASES OF CONCENTRATION (ARTICLE 94–99)

Every person who notifies the intention of concentration shall be a party to the proceedings[81].

The intention of concentration shall be notified by:

1) merging undertakings jointly;
2) an undertaking taking over the control;
3) jointly all undertakings participating in creation of a joint undertaking;
4) an undertaking acquiring part of another undertaking's property.

In the case where a concentration is implemented by a dominant undertaking by intermediary of at least two dependent undertakings, the notification of intention of concentration shall be submitted by a dominant undertaking.

For the requests for instituting the antimonopoly proceedings in concentration cases the undertakings shall pay fees. If the request has been submitted but no fee has been paid, the President of the Office shall summon the applicant to pay the fee within 7 days with the instruction that if the fee is not paid, the request will not be considered (art. 94 p. 1–4).

§ 8.1. Proceedings in cases of practices violating collective consumer interests (Article 100–105)

1. Every person may submit a notification in writing to the President of the Office about a suspicion of applying practices of violating collective consumer interests.
2. The notification referred to in Paragraph 1 may be also submitted by a foreign organisation entered in the list, published in the Official Journal of the European Communities, of organisations entitled in the European Union Member States to file a request for instituting proceedings, where the object of its activity warrants

[81] Before were six kinds of person who have to notifies the intention of concentration:
1) merging entrepreneurs jointly;
2) entrepreneur taking over the control;
3) jointly alt entrepreneurs participating in creation of a joint entrepreneur;
4) entrepreneur taking over or acquiring stocks or shares;
5) entrepreneur in whose managing or controlling body the person already performing function of the member of managing or controlling body of another entrepreneur is assuming the function;
6) respectively financial institution or entrepreneur who acquired stocks or shares in order to secure liabilities.

its submitting a notification concerning an infringement resulting from unlawful omissions or such acts performed in the Republic of Poland, which jeopardise collective consumer interests in the Member State where the organisation is seated.

The party to the proceedings shall be every person against whom the proceedings on the application of practises violating collective consumer interests are instituted.

The President of the Office shall issue a resolution about the instituted proceedings on the application of practises violating collective consumer interests and he shall notify the parties of this fact.

A settlement may be made in proceedings in cases of practices violating collective consumer interests where the nature of the case warrants this and the settlement is not intended to circumvent the law or is not contrary to public interest or a legitimate consumer interest.

The President of the Office may rule that the decision be immediately enforceable in whole or in part where an important consumer interest so warrants.

The proceedings in cases of practices violating collective consumer interests shall be concluded no later than within two months, and in particularly complicated cases no later than within three months from the date of their institution. The provisions of Articles 35 to 38 of the Act of 14 June 1960 – the Code of Administrative Procedure, shall apply accordingly.

No proceedings in cases of practices infringing collective consumer interests shall be instituted where a year has elapsed from the end of the year in which such practices were discontinued.

9. LENIENCY SYSTEM IN POLAND

Leniency is the programme of mitigating penalties for cartel members who start cooperating with the antimonopoly office. It was first applied in the United States in order to eliminate from the market all unlawful agreements limiting competition – which consist in e.g. setting prices which are greater than in market conditions. The leniency programme, for a dozen years or so, has been applied by the European Commission, and was implemented to the Polish legislation two years ago.

Extremely important for the Polish competition authority was the introduction of a leniency programme, modelled on the so call *leniency system* functioning under the Community law, to the Polish legal order under Article 109[82]. **The aim of this**

[82] The President of the Office shall refrain from imposing a penalty entrepreneur have jointly fulfilled the following conditions:
1) he has been the first, amongst the participants of the agreement, to:

system is to facilitate the detection of cartels, i.e. anticompetitive agreements of significant importance to competition concluded by undertakings. From the point of view of competition these are the most dangerous practices and most difficult to detect, they may lead to a significant restriction or even complete elimination of competition on the market. Therefore, the detection and elimination of such practices is particularly important, even for the price of refraining from imposing penalties on some undertakings partaking in such practices (in such a case the elimination of a cartel is of greater value than punishing alt cartel participants).

Under the principles of this system it is possible to refrain from imposing a financial penalty on an entrepreneur partaking in a cartel who has been the first to voluntarily, upon his own initiative, provide the competition authority with significant evidence for the existence of a forbidden agreement and who is at the same time fully cooperating with the authority in the course of the proceedings. Other undertakings partaking in the agreement who provide the authority holding the proceedings with evidence relating to the case and are cooperating with it may count on significant penalty mitigation. The leniency programme is thus advantageous to both competition and undertakings, which in this manner - provided they retract from the participation in an anticompetitive cartel and provide the President of the OCCP with evidence – may avoid severe punishment.

On one hand Article 101 provides increasing the penalties for the infringement of the provisions of the Act up to EUR 50 million. However, on the other hand Article 103a and Article 103b of the Act introduce a system of mitigating penalties imposed on cartel participants who voluntarily retract from using the forbidden agreement and inform the President of the OCCP thereof[83].

a) provide the President of the Office with information concerning the existence of such a forbidden agreement, as may suffice for instituting antimonopoly proceedings, or,
b) present to the President of the Office, upon his own initiative, a proof rendering it possible to issue a decision referred to in Article 9 or 10,
– providing that the President of the Office Bid not have at that time any information or pieces of evidence proving sufficient for instituting antimonopoly proceedings or issuing a decision referred to in Article 9 or 10;

2) he is fully co-operating with the President of the Office in the course of the proceedings, providing him with any and alt proofs or pieces of evidence that he may have at his disposal, or the ones he may have at his disposal, and promptly giving any and alt pieces of information relating to the case, upon his own initiative or upon demand of the President of the Office,
3) he has ceased participating in the agreement not later than as of the day in which he notified the President of the existence of an agreement or presented evidence referred to in item 1, subparagraph b),
4) he was not the initiator of the agreement, and has not induced any other entrepreneurs to partaking in the agreement.

[83] Office of Competition and Consumer Protection – Report on activities in 2004, p. 24.

CHAPTER VI

K. Lasiński-Sulecki

Tax law

1. SOURCES OF TAX LAW

Polish tax law has been extensively regulated in various legal acts ranging from the Constitution of the Republic of Poland of April 2, 1997[84], being the supreme law.

The Constitution refers to legislative aspects of creating tax law. Although, under Article 123(1) of the Constitution, the Council of Ministers may classify a bill adopted by itself as urgent, the Council is not allowed to do so with regard to tax bills. Thus, tax bills must be subject to the usual legislative procedure. This provision is to assure that the tax bills are given attention and careful consideration during the legislative process.

There are two constitutional provisions which set certain standards for tax laws enacted. Under Article 84 of the Constitution everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by statute. This provision indicates that in the Polish legal system duties can be imposed on persons exclusively by statutes. Under Article 217 of the Constitution the imposition of taxes, as well as other public imposts, the specification of those subject to taxation, the object of the tax and the rates of taxation, as well as the principles for granting tax relief and remissions, along with categories of taxpayers exempt from taxation, shall be by means of statute. Therefore, the crucial elements of any tax must be determined by statute. Certain technical details may be determined by regulations.

Another constitutional provision refers to the problem of local taxes. Under Article 168 units of local government (*jednostki samorządu terytorialnego*) shall have the right to set the level of local taxes and charges to the extent established by statute. It must be emphasized at this point that Poland is a party to the European Charter of Local Self-Government[85]. Under its Article 9(1), local authorities shall be entitled, within national economic policy, to adequate financial resources of

[84] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Journal of Laws 1997, No. 78, item 483, as amended.

[85] Journal of Laws 1994, No. 124, item 607.

CHAPTER VII

K. Pokryszka, J. Olszewski

Alternative dispute resolution

1. MEDIATION AS A METHOD OF ALTERNATIVE DISPUTE RESOLUTION IN POLISH CIVIL PROCEEDINGS

1.1. Introduction

Mediation is one of the most popular methods of alternative dispute resolution (ADR). ADR is the term usually used to describe a variety of techniques for resolving civil disputes without the necessity of taking part in conventional court litigation. Mediation is a proceeding in which a mediator, who is an independent third party, assists the parties to the dispute to achieve a mutually acceptable resolution of the conflict. The mediator has no decision-making powers and cannot force the parties to reach a settlement[272].

Mediation as an alternative method of resolving disputes in civil and commercial proceedings became a part of the Polish legal system on the basis of the amendments to the Civil Proceedings Code[273] adopted on 28 July 2005. Mediation is regulated under the provisions of art. 183 (1) – 183 (15) of the CPC which came into force on 10 December 2005[274].

1.2. General rules of the mediation proceedings

As an out-of-court method of resolving legal disputes, mediation is based on particular rules that determine the characteristic features of these proceedings. According to Article 183 (1) of the CPC, mediation is voluntary. The proceeding is conducted under a mediation agreement concluded between the parties to the

[272] A Dictionary of Law, Fifth Edition, edited by Elizabeth A. Martin, Oxford University Press 2003, p. 24 and 311.

[273] The Civil Proceedings Code of 17.11.1964 (Dz.U. Nr 43, poz. 269 z zm.), hereinafter referred to as the CPC.

[274] Mediation in the Polish civil proceedings is also described in the „Polish Law Review", Fall 2005, p. 11–13, http://www.millercanfield.com/services/practice/PolishLawReviewFall2005.pdf.

dispute or under a court decision to submit the case to the mediation. The mediation contract also may be entered into upon the consent of one party when the other party has filed a motion to start mediation in accordance with Article 183 (6) of the CPC.

In contrast to traditional civil litigation, a mediation proceeding is not an open trial. The mediator is obliged to keep all the facts he found out in connection with the conduct of the mediation secret, unless the parties exempt him from this duty. An essential consequence of the rule that a mediation is a proceeding in closed sessions is that parties are prohibited from invoking any settlement proposals, proposals for mutual concessions or other statements made in the mediation proceedings during any subsequent court or arbitration proceedings (Article 183 (4) of the CPC).

The last important principle of the mediation refers to the mediator and his attitude to the parties to the dispute. According to Article 183 (3) of the CPC, a mediator should be impartial when conducting the mediation proceedings.

1.3. A Mediator

The provisions of the Polish Civil Proceedings Code relating to mediators are very general and they do not stipulate any particular requirements regarding the education or professional qualifications of mediators, which may seem to be controversial especially in case of commercial disputes[275].

Under the provisions of Article 183 (2) of the CPC, a mediator must be a natural person who has the full legal capacity to perform acts in law and who enjoys all public rights. It is not permissible to appoint a professional judge as a mediator, however this exclusion is not applicable to retired judges. Social and professional organizations are entitled to manage lists of permanent mediators and to set up mediation centers. A mediator may be registered on the list of permanent mediators only when his consent is expressed in writing. Information on the lists of permanent mediators centers should be passed on to the chairman of the district court.

A permanent mediator may refuse to conduct a mediation proceeding only for significant reasons, and he is obliged to immediately inform the parties about the reasons for his refusal and, if the mediation has been ordered under the decision of the court, the court should also be informed.

[275] R. Morek, *ADR w sprawach gospodarczych*, Warszawa 2004, p. 142–143.

1.4. Mediation proceedings and a settlement concluded before a mediator

When mediation is initiated upon a application filed by one of the parties, the proceeding is opened at the moment of delivery of the motion to the mediator. The motion should be attached with the evidence that the other party received its transcript (Article 183 (6) of the CPC). The court is also authorized to issue a decision with an order to conduct mediation. Such a decision may be issued only once during the proceedings and in principle only until the first hearing is closed. After that time the court may issue a decision ordering mediation only upon the request of the parties unanimously applying for mediation. The decision of the court with an order to start mediation does not infringe the general principle according to which mediation is voluntary since mediation shall not be conducted if at least one of the parties – within a week from the delivery or the announcement of the court's decision – refuses to give his consent to take part in a mediation. Mediation is not applicable in writ of payment proceedings or in simplified proceedings (Article 183 (8) of the CPC).

In the decision ordering mediation the court appoints the mediator, however the parties may choose another person (Article 183 (9) of the CPC). The court also indicates the term of mediation that can be no longer than one month, unless the parties applied jointly for a longer term. This term may also be extended by the court during the mediation. The court orders a trial after the expiry of the term of mediation if the parties have not managed to reach a settlement or before the expiry of this term when at least one of the parties refuses to mediate (Article 183 (10) of the CPC).

If the mediation was successful and the parties concluded a settlement, the mediator is obliged to draw up minutes of the mediation and to deliver them to the court. The settlement should be included in the minutes or attached to it.

The court starts the proceedings in order to approve the settlement upon the request of the party. The court will refuse to approve the settlement concluded before the mediator, in whole or in part, if the settlement is contrary to the law or to the principles of community life or its objective is to circumvent the law, or if it is incomprehensible or includes contradictions (Article 183 (14) of the CPC).

A settlement reached before the mediator has the same legal status as a settlement concluded before the court (Article 183 (15) of the CPC).

2. MAIN PROBLEMS IN ARBITRATION ACTIVITY IN POLAND

2.1. Introduction

In all west Europe and USA all arbitration proceedings have a lot of benefits in commercial cases. Here are the most important ones:

1) Independent, stable regulation contained in the New York Convention on 1958.
2) Lower costs of proceedings.
3) Increase in the number of business entities.
4) Ethical benefits – suitable resolution of conflicts, which encourages further cooperation.
5) The pressure on the speed of proceedings exerted by judges.

One must first identify the obstacles and then efficiently overcome them.

Identifying problems only seems to be a simple task; in fact, it requires thorough examination, especially if the results are to ensure the development of precise solutions.

As I learned from the interviews carried out with the entrepreneurs from the south Poland, one of the factors discouraging them from settling disputes in an amicable way is ignorance of this institutions.

So the role of this article is to describe the special activator programme, where is basic information about arbitration and mediation.

The aim of the Special Programme would be the popularization of the institutions followed by assistance in using it. The programme would consist of three stages. The first stage is training and presenting the institution's legal basis followed by demonstrating the procedure of arbitration agreements. The second stage would include practical case analyses by showing activities in a "step by step" way, that is, what one is supposed to do to initiate action by an already existing arbitration court whenever a conflict between the parties exists. In both stages it would be advisable to clarify the procedural complexities and costs connected with the proceedings led before a court of law and to compare them with the significantly faster and cheaper arbitration court. The training sessions carried out in both stages should conclude with practical conferences which would constitute the third part of the programme. During the conferences judges and practitioners would present their comments resulting from the research into the functioning of arbitration courts.

2.2. Examples of research topics recommended for inclusion in training plans

The training programme should include a couple of theoretical and practical topics. The choice of topics has been set based on problems presented during an international conference organized by Economic and Trade Law Unit at the Department of Law, Rzeszów University on 22–23 September 2006 in Rzeszów. The list given below is only suggestive. The choice of problems emerged from the author's current experience. However, it should be remembered that changing a legal and political environment will require a dynamic reaction from arbitration courts. Therefore, new topics will continue to appear.

2.2.1. Mediation, conciliation and arbitration court

Due to the amendment of the Code of Civil Procedure, which was enacted by the Sejm on 28 July 2005, we should first discuss new institutions. Then the connection of mediation and conciliation with the procedure of arbitration agreement will follow.

A lecture should also include a review of cases which show successful (and unsuccessful) mediations. Similarly, mediation settlements of the more important arbitration courts will be clarified.

A review of various Polish mediation regulations should take place here (for example, consumer, banking, electronic media, Internet domain regulations etc.) and it should be followed by a survey of transborder regulations. It is advisable to show mediation as an institution which should precede the appropriate proceedings in arbitration court. Then, the aspect of creating mediation incentives should follow.

2.2.2. The notion of arbitration and arbitration agreements

Despite the fact that there are numerous definitions of arbitration, the problem lies in determining clear boundaries of this institution. Therefore, it would be advisable to do research in this field by means of reviewing the literature, which would be concluded with the assessment of current definitions.

The next research stage is determining when the given arbitration agreement is complete and sufficient and when it is not. It is recommended to examine the legal effects of arbitration agreement and to consider which factors are necessary for an agreement to be made, and which are not necessary or not sufficient.

2.2.3. The notion of pending agreement

Arbitration agreement is sometimes regarded as "pending" as it is applicable only when a conflict arises on the grounds of the basic agreement. If a conflict does not exist, the arbitration agreement is not carried out[276]. However, within the doctrine of arbitration law it is considered that an arbitration court is competent not only when a conflict arises, but also in order to explain the contents and aims of agreements which contain such regulations.

It would be suitable to refer here to mediation, conciliation and other agreements, the character of which is typical for ADR (Alternative Dispute Resolution).

[276] T. Szurski, *Podstawowe aspekty arbitrażowego rozstrzygania sporów (Basic Aspects of Settling of Conflicts by Arbitration)*, PUG 1999, No 3, p. 7.

2.2.4. The problem of a multitude of arbitration agreements

An arbitration agreement can be created in at least two ways. The first one is based on forming an agreement concerning resolving conflicts from the determined legal relationship in arbitration court. This agreement can be formed even after other agreements have been made. Therefore, it will comprise one or more agreements. Its main advantage is broad regulation of the whole range of aspects.

The second way is called an "arbitration clause", which is placed in the main agreement. The weakness of this type of agreement is its generality.

The research problem here should concern the obligation aspect, which is connected with the structure and contents of the agreement. Another thing that is essential here is noticing the claim rights, which should result from the appropriate phrases (which are sometimes direct or in the form of scattered clauses but leading to the same goal).

2.2.5. Looking for practical regulations in arbitration clauses

Popularizing knowledge about arbitration courts, apart from outlining the basic knowledge about their activity, should lead to looking for practical solutions in the existing courts. Analysis of arbitration regulations and clauses (from domestic and foreign agreements) is almost non-existent in Polish literature. This lack of analysis is the consequence of the factors discussed above and, above all, of the very small number of such courts. A recent superficial review of regulations yields similar results. An example of a practical regulation is the obligation of the parties to appoint reserve arbitrators, in addition to the principal and decisive ones and it is important that these appointments take place at the same time[277]. Provision for reserve arbitrators is by all means practical so that an obstacle preventing the decisive arbitrator from acting will not affect the proceedings[278]. Apart from individual cases it will be useful to collect such experiences from literature[279].

[277] A regulation of this type is included in the Regulation of the Arbitration Court of the Krajowa Izba Gospodarcza (Domestic Economic Chamber) in Warsaw.

[278] T. Szurski, *Podstawowe aspekty...*, *op. cit.*, p. 11.

[279] Recent literature has referred to other interesting regulations, for example, concerning the appointment of arbitrators. T. Szurski writes that: "On the whole, the lists of arbitrators do not have binding character for the sides, although regulations of rare arbitration institutions give this kind of character to their lists. One can also find arbitration regulations according to which only the arbitrator-chairperson of the arbitration court and the only arbitrator must be chosen exclusively from the list of arbitrators of the given arbitration institution, but »the arbitrators of the sides« can be appointed

2.2.6. Types of Arbitration Courts

The most basic division of arbitration courts results directly from the Civil Code. It distinguishes between permanent courts and ad hoc courts (appointed just for one case). The role of both courts should basically be identical for the case settled.

However, finding essential differences which determine the further process will be a problem here. One possible difference from the practical perspective, for example, is the quickness of the proceedings. From the theoretical perspective certain legal notions will act differently in the two institutions.

2.2.7. Legal form in Polish agreements, the agreements of transborder countries and in international law

One thing that is extremely essential in arbitration clauses is providing the legal form which would be consistent with legal requirements. It should be noted here that in international relations, a much wider catalogue of forms is acceptable[280], for example, letters and telegrams, telexes and recently e-mails.

As far as the form is concerned, it will therefore be advisable to determine the boundaries of the legal form in Polish law and the law of transborder countries. For practical reasons it will be useful to introduce the catalogue of forms from the system of common law, as well as the new guidelines which result from the changes in UNCITRAL[281].

2.2.8. Practical attempts at establishing the proper form in international law

In the majority of countries there is a legal obligation to sign an arbitration agreement. However, there are new tendencies in the model law UNICITRAL, which is basically about electronic means of communication.

There is also a problem of signatures made by the parties, since the New York Convention does not openly require such signatures. Hence it is recommended that an interpretation of the New York Convention be presented in that particular respect. The presentation will proceed through an analysis of several contractual models.

regardless of the list. However, there are also such arbitration institutions, which do not have any lists, giving the sides full freedom in choosing the arbitrators. An example is, first of all, the International Arbitration Court at the International Chamber of Commerce in Paris. However, this court maintains a special procedure for approving arbitrators by the Court on the basis of forms received from the potential candidates, which contain the most important personal data and information concerning their qualifications, arbitration experience and relationship with the sides."

[280] www.prawo.lex.pl arbitraz.xml downloaded on 27 April 2005.

[281] A. Szumański, *Kierunki zmian ustawodawstwa w międzynarodowym arbitrażu handlowym (The Directions of Changes in the UNCITRAL Legislation in International Trade Arbitration)*, PPH, January 2007, p. 51–58.

2.2.9. Recognizing the court which is competent to determine the validity of the arbitration agreement

In the doctrine there is a widespread view that the arbitration clause is autonomous in nature. Its autonomy lies in the fact that it is assessed regardless of whether the agreement itself is valid. Such a condition makes it possible for arbitration courts to assess the validity of the arbitration clause as well as the main agreement. The above-mentioned premises give a solid foundation to determine whether the court is competent or not in each of the contentious issues[282].

2.2.10. Selected foreign procedure

It is worthwhile to touch upon, and even analyze in greater detail, special procedures used in the countries that have significant arbitration experience. It especially applies to the rich literature of the United States of America. There is one factor worth mentioning, the so-called equity principle. It stipulates that a ruling can be made without reference to the material law of either party. In practice arbitrators make decisions based on their knowledge, experience, trading traditions etc. Such rulings ultimately might not be in accordance with material law, and therefore rulings cannot be questioned on the basis of material law. It should also be stressed that application of the equity principle has certain limitations – in particular, public order.

In the transborder practice it is much harder to find reference to general clauses. Thus the research should be preceded by determining the scope of meaning of the phrase: "public order".

2.2.11. The functions of an arbitrator

It is still difficult to determine what the function of an arbitrator is in the arbitration agreement (basically it is also not fully defined in the relevant literature). This is due to the fact that apart from the juridical function the arbitrator also carries out the action resulting from the arbitration agreement. In the actions performed by the arbitrator both functions manifest themselves equally. It would be advisable to investigate which functions exist (and to what extent) in the legal system of the countries under investigation.

2.2.12. Foreign arbitration courts – overview, description and specification

In international relations the argument for expanding arbitration courts (both in terms of development of that type of court, and the issues resolved by them) would be their universality. In fact, only in developing and former socialist countries are they still in the process of creation. As stressed by the relevant literature and practice in Western Europe, and especially in the USA, these courts accept the majority of

[282] This ruling may be appealed right after its announcement as well as later, in the application for repeal of the ruling issued by the arbitration court.

contentious issues resulting from international agreements and play a significant role in internal, administrative cases. This undervaluing of arbitration courts, or even unfamiliarity with them, is not really the result of economic backwardness, but rather the result of the isolation of Poland and other Central European countries from the market economy during communism. Thus learning about selected, usually more efficient, courts in Western Europe and the USA should decrease the number of organizational barriers, as well as increase motivation to create laws for existing institutions.

2.2.13. The problem of the application of New York Convention regulations and domestic regulations

For the entrepreneurs who know only the basic regulations of their trade, the need to use foreign or international law may discourage them from signing long-term contracts with foreign clients.

As research shows, entrepreneurs are afraid of:

- the necessity to employ a local lawyer who obviously is not personally interested in quick finalization of the process;
- the necessity to translate the whole documentation connected with the trial into the official language of the national court;
- multi-instance character and precisianism of legal proceedings, and thus the risk of prolonging its time by one of the interested parties;
- very often, a limited familiarity with the issues of international economic relations as well as lack of knowledge of foreign languages by the national judges, who are as a rule overwhelmed by their domestic cases.

All these factors mean that legal proceedings can be very long and costly, including in Poland. We cannot totally exclude the possibility of prejudice in favour of the side which comes from the country whose court is ruling. Moreover, the court proceedings are public, which puts the parties at risk of revealing confidential information connected to their activity, which especially in relations of an administrative nature is not beneficial for them[283].

One of the main problems, which can appear during international conflicts, is the diverse regulation in the activity of arbitration courts. Despite the fact they are common, whenever there are no detailed regulations as far as the method of the arbitration court is concerned, it will be necessary to apply the law of the country, which has been identified as the one in which the conflict will be settled.

[283] T. Szurski, *The basic aspects of arbitrary resolution of conflicts*, The Overview of Economic Legislation 1999, No 3, p. 4.

2.2.14. The sentence in arbitration courts (an application to revoke the sentence)

The issue of pronouncing the sentence in an arbitration court is rich in formal questions, which have to be explained. The situation is especially complex in transborder legal cases[284].

One of the leading issues is the time of pronouncing the sentence. In fact, it depends on the decisions written in regulations. Sometimes a problem arises when the time limit is too short for complex cases. However, the time can be prolonged as the deadlines are usually administrative[285]. Therefore, lengthening the time does not entail legal effects. But real problems arise when an application to revoke the sentence is filed.

The practical rule is checking the sentences of arbitration courts in a formal respect by a body of the arbitration institution.

2.3. Conclusions

In the United States, ethical codes require that the lawyers inform clients about the possibility of resolving the conflict by means of alternative institutions in every case. It is not only a question of information, but each lawyer is supposed to encourage the use of mediation by arbitration courts[286] etc. This attitude has meant that federal courts are the last resort in settling conflicts, while alternative institutions are being developed and modified.

Assessing the judges with respect to the quickness of settling conflicts is of significance not only for the budget of the country. Quickness also prevents cases from landing in trial courts. In order to increase the number of settlements (or suit withdrawals), rewards are encouraged and alternative methods are supported. In almost all economically developed countries judges prompt the clients to choose mediation or arbitration courts (or they even sometimes oblige them to do so)[287].

The strongest economy in the world, the economy of the United States, proves that arbitration courts and mediation influence the state of economy. Despite the increase in the number of entrepreneurs federal courts do not examine more civil cases. According to the literature, only 2% of cases end with a court ruling. All the others are settled by means of so-called alternative methods[288].

[284] Read more about it in J. Olszewski, *Uwagi o sądownictwie polubownym (arbitrażowym) na Ukrainie (Comments on arbitrary judiciary in Ukraine)*, [in:] *Sądy Polubowne i mediacja (Arbitration Courts and Mediation)*, C. H. Beck, Warsaw, 2008.

[285] Regulation can contain a different rule.

[286] Ł. Rozdeiczer, *Negocjacje w cieniu sądów (Negotiations in the shadow of the courts)*, Rzeczpospolita, No 157, 7 July 2005, p. C-5.

[287] This example from the USA is given by Ł. Rozdeiczer, *Negocjacje w cieniu...*, *op. cit.*, p. C-5.

[288] Ł. Rozdeiczer, *Negocjacje w cieniu...*, *op. cit.*, p. C-5.

CHAPTER VIII

J. Olszewski

Combating unfair competition in Poland

1. INTRODUCTION

In this part Act on combating unfair competition (ACUC) and other regulations concerning unfair competition in Poland will be discussed.

The presentation embraces five subjects. Firstly, a few words will be dedicated to general provisions e.g. definitions of the following terms: entrepreneurs, unfair competition, secondly civil acts of unfair competition will be enumerated. Thirdly, unfair advertising will be dealt with. Analyses of unfair advertising will embrace a few acts. First of all Act on combating unfair competition and acts regulating advertising in radio, TV and others media will be discussed. In the fourth part civil liability will be touched upon. The fifth part will concern criminal acts of unfair competition from ACUC and penal provisions will be presented.

2. GENERAL PROVISIONS (AREA OF PREVENTIONS, MEANS ENTREPRENEURS AND UNFAIR COMPETITION)

The Act of combating unfair competition governs the prevention and combating unfair competition in the economic activity, in particular in industrial and agricultural production, in construction works, trade and services – in the interest of general public, entrepreneurs and customers, in particular consumers.

The entrepreneurs, for the purpose of the present Act, shall mean natural and legal persons and organisational units without the legal personality, which by performing, even casually, paid or professional activity participate in the economic activity.

The act of unfair competition shall be the activity contrary to the law or good practices which threatens or infringes the interest of another entrepreneur or customer.

The acts of unfair competition shall be in particular: misleading designation of a company, false or deceitful indication of the geographical origin of products

or services, misleading indication of products or services, infringement of the business secrecy, inducing to dissolve or to not execute the agreement, imitating products, slandering or dishonest praise, impeding access to the market and unfair or prohibited advertising and organizing a system of pyramid selling.

The rights resulting from the provisions of the Act shall apply to the foreign natural and legal persons by virtue of the international agreements binding the Republic of Poland or by reciprocity.

3. CIVIL ACTS OF UNFAIR COMPETITION

3.1. Unfair designation of the undertaking (Article 5–8 ACUC)

There are three kinds of unfair designation of undertaking. The designation of the undertaking in a way which may mislead customers in relation to its identity, due to the use of trade mark, name, emblem, letter abbreviation or another characteristic symbol already lawfully used to indicate another undertaking, shall be the act of unfair competition.

The second unfair designation is covered by Article 6. The main problem governed by this provision is similar indication of two undertakings. Where designation of the undertaking with the name of the entrepreneur may mislead customers in relation to the identity with another undertaking which earlier used similar indication, this entrepreneur should take measures aimed at elimination of the risk to misguide third parties.

Upon request of the interested party the court shall order the entrepreneur who later started to use such designation to take appropriate preventive measures, consisting in particular in introducing changes to the designation of the undertaking, restricting territorial scope of its use or its use in the determined way.

Where as a result of liquidation, division or transformation of an undertaking the question arises which of entrepreneurs is entitled to use the designation of the liquidated, divided or transformed undertaking, such designation should be defined as to prevent misleading third parties.

In the case of a dispute, the court, upon request of the interested entrepreneur, shall define the designation of the undertaking, taking into account interests of the parties and other circumstances of the case.

3.2. Unfair designation of products (Article 8–10 ACUC)

There are three groups of unfair designation indicated in the Act. The first two protect geographic indication. Labeling products or services with a false or deceitful geographic indication, directly or indirectly indicating country, region or locality of their origin, or the use of such indication in the commercial activity, advertising, business letters, invoices or other documents, shall be the act of unfair competition.

In the second provision the protection goes even further. According to it where the product or service is protected in the place of its origin and its specific features or properties are connected with originating from a given region or locality, the false or deceitful use of such geographical regional indications shall be the act of unfair competition, even if the words "kind", "type", "method" are added.

The third provision prohibits such an indication of products or services or its lack, which may mislead customers in relation to the origin, quantity, quality, components, manufacturing process, usefulness, possible application, repair, maintenance and another significant features of products or services as well as concealing the risks connected with their use, shall be the act of unfair competition.

Releasing for free circulation products in the packing which may cause effects referred to above shall be the act of unfair competition, unless the use of such packing is justified by technical reasons.

3.3. Company confidentiality (Article 11 ACUC)

A factor of unfair competition is the transfer, disclosure or use of third party information, which is company confidential or their receipt from an unauthorized person, if it threatens or violates the interests of the entrepreneur.

The provisions referred above shall also apply to the person who has been rendering work based an employment contract or another legal relation, for the period of three years from its expiration, unless the contract stipulates otherwise or there is no longer secrecy.

The provisions referred above shall not apply to the person who, *bona fide*, by way of a legal operation against payment, acquired the information constituting a business secrecy. The court may oblige the acquirer to the appropriate remuneration for its use, nevertheless for a period not longer than duration of secrecy.

Company confidentiality is understood to include the entrepreneur's technical, technological organisational or other information having commercial value, which is not disclosed to the public to which the entrepreneur has taken the necessary steps to maintain confidentiality.

3.4. Inducing workers and customers (Article 12 ACUC)

To induce a person rendering to the entrepreneur his/her work, based on an employment contract or another legal relation, to neglect performing or to perform inadequately her employee's or another contractual obligations in order to yield benefits to oneself or third parties or to the detriment of the entrepreneur, shall be the act of unfair competition.

To induce customers of the entrepreneur or another persons to dissolve a concluded contract, or to neglect performing, or to inadequately perform an agreement in order to yield benefits to oneself or third parties, or to the detriment of the entrepreneur, shall be the act of unfair competition.

The provisions referred to above do not apply to the actions of labour unions, taken in conformity with the provisions on the settlement of collective disputes.

3.5. Imitating a finished product (Article 13 ACUC)

Imitating a finished product by way of technical means of reproduction, to copy an external image of such product where it may mislead customers as to the identity of the producer or product, shall be the act of unfair competition.

Imitating functional features of a product, in particular its make, structure and form ensuring its usefulness shall not be deemed the act of unfair competition. Where the imitation of functional features of a finished product requires including its characteristic form, which may mislead customers as to the producer or product identity, the imitator is under an obligation to adequately mark the product.

3.6. Disseminating untrue or misleading information (Article 14 ACUC)

Disseminating untrue or misleading information on oneself or another entrepreneur or undertaking in order to yield benefits or bring detriment shall be the act of unfair competition. The untrue or misleading information referred to above shall in particular concern the following:

1) persons managing the undertaking,
2) manufactured products or provided services,
3) charged prices,
4) economic or legal status.

The use of the following shall be also considered as dissemination of the information referred to above:

1) unlawful or inaccurate titles, university degrees or another information on professional skills of the employees,

2) false certificates,
3) unreliable results of research,
4) unreliable information on distinctions or indications of products or services.

3.7. Introduction of difficulties to access the market (Article 15 ACUC)

An act of unfair competition is the introduction of difficulties for other entrepreneurs to access the market through:
1) the sale of goods or services below their purchase cost in order to eliminate other entrepreneurs,
2) the enticement of third parties to refuse to sell to other entrepreneurs or to purchase goods or services from other entrepreneurs,
3) materially justified differences in the treatment of some customers,
4) collection of charges other than commercial margins for accepting goods for sale,
5) acts having the purpose of enforcing on customers the need to choose a specific trading partner or imposing conditions enabling third parties to enforce the purchase of goods or services from a defined entrepreneur[289].

3.8. Corruption as unfair competition (Article 15a ACUC)

The act of unfair competition consisting in corruption of the natural person performing public function shall be behaviour of the natural person defined in Article 229 of the Penal Code:
1) being entrepreneur,
2) acting on behalf of the entrepreneur within the powers to represent him or to make decisions on his behalf or to exercise control over him,
3) acting on behalf of the entrepreneur upon a consent of the person referred to in item 2.

[289] The act described in item 5, may be based in particular on:
1) the restriction in a significant manner or the exclusion of the possibility of the customer making purchases from another entrepreneur,
2) the creation of a situation causing the direct or indirect imposition on customers of the need to make purchases from a given entrepreneur by third parties with whom the given entrepreneur has a commercial relationship,
3) the issue and offering of coupons for implementation, which are subject to exchange for goods or services from one entrepreneur or a group of entrepreneurs who have a commercial relationship under the circumstances indicated above.

3.9. Conditional access (Article 15b.1 ACUC)

The creation, import, distribution, sales, rental or passing over for use through another legal title, as well as possession of non-permissible devices as understood by the laws on the protection of some services provided electronically supported by or based on conditional access is an act of unfair competition for monetary gain.

Additionally, the installation, servicing or replacement of non-permissible devices for monetary gain, as well as the use of the broadcasting of commercial information to promote these devices or the services related to them is also an act of unfair competition.

3.10. Promotional lotteries as an act of unfair competition (Article 17b.1 ACUC)

Acts in the scope of promotional lotteries are unfair competition if the offer is formulated in such a way – regardless of the result of the lottery or the knowledge of the consumer – that winning is certain if the customer places an order for the goods or services or pays the bidder any amount in advance.

An act described above, is specifically the formulation of an offer in a document issued to the consumer by name, having the features of an official letter.

3.11. Pyramid sales (Article 17c.1 ACUC)

The organization of a system of pyramid sales based on proposing the purchase of goods or services by making the purchasers the promise that they will obtain material benefits in exchange for enticing other people to make the sale transaction, in order that they obtain the same benefits as a result of enticing further people to participate in the system is an act of unfair competition.

The organization of the system of sales described above is not an act of unfair competition if the following conditions are satisfied:
1) the material benefits obtained from the participation in the sales system are obtained from the funds obtained from the sale of goods and services at a prices which may not flagrantly exceed the real market value of these goods and services,
2) the person who withdraws from participating in the sales system has the right to sell back all of the products, information and educational materials, product samples or presentation kits that are capable of being resold to the organizer of the system for at least 90% of the price at which they were purchased within 6 months preceding the date of notifying the organizer of the resignation from the sales system.

3.12. Discount stores and quantities brands property (Article 17d ACUC)

The introduction by discount stores of products with brands which are the property of the owner of the network or his subsidiary companies in quantities exceeding 20% of the value of their turnover is an act of unfair competition.

4. UNFAIR ADVERTISING (ARTICLE 16–17 ACUC)

4.1. General catalogue and analysis

In the field of advertising the act of unfair competition shall be, in particular, the following:

1) advertising contrary to provisions of the law, good practices or offending human dignity,
2) advertising misleading the customer, thus susceptible to influence his/her decision to purchase a product or service. Misleading advertising is an act of unfair competition **if it may influence a customer's decision concerning the purchase of a product or service**. It should be noted that even a communication, **which is objectively true, may be misleading if it causes a false opinion of a recipient on a product's or service's characteristics**. This refers e.g. to an advertisement, which emphasises ordinary, normal attributes of a given product – an advertisement's recipients may, on this basis, conclude that other products of that sort do not possess a given attribute. Nevertheless, certain exaggeration is allowed in advertising.
3) advertising appealing to emotions of customers by provoking fear, exploiting superstitions or credulity of children,
4) statement encouraging the purchase of products or services, creating the impression of a neutral information (hidden advertisement). A hidden advertisement is the one that encourages consumers to purchase products or services in such a way that the target recipient considers it to be a neutral, objective presentation of those products or services. A hidden advertisement may be conducted in the form of:
   - Editorial advertisement or "advertorial", which is included in the content of an radio or TV programme, or press article in such a way that the listener or reader **does not distinguish between advertising and rest of communication**;
   - Product placement – **showing advertised products/services** in films, television series and also e.g. in photos printed in newspapers, in such a way that a viewer or reader remembers a product/service;
   - Advertising via expert opinions or scientific publications – advertising hidden in outwardly neutral publication of a scientific nature.

   Subliminal advertising is not an considered to be an act of unfair competition, however it is prohibited according to the Radio and television law.
5) advertising significantly interfering with privacy, in particular arduous pressing customers in public places, sending on customer's expense unsolicited products or abusing use of technical means of communication.

An advertisement violating the privacy of its recipients, in particular by **besieging clients in public places**, sending unsolicited products to clients at their cost or abusing technical means of communication such as faxes or emails constitutes an act of unfair competition.

4.2. Misleading advertising

When assessing the misleading advertising all its elements should be taken into account, in particular those related to quantity, quality, components, way of manufacturing, usefulness, possible use, repair or maintenance of the advertised products, as well as customer's behaviour.

The advertising enabling to identify, directly or indirectly, the competitor or products or services offered by the competitor, hereinafter referred to as "comparative advertising", shall be the act of unfair competition where it is contrary to good practices. The comparative advertising shall not be contrary to good practices provided that jointly fulfils the following prerequisites:

1) it is not misleading advertising,
2) in a fair and verifiable way compares products or services meeting the same needs or intended for the same purpose,
3) objectively compares one or several material, characteristic, verifiable and typical features of these products and services, including price,
4) it does not lead to confusion on the market place between the advertiser and his competitor nor between their products or services, trade marks, trade names or other distinguishing marks,
5) it does not discredit products, services, activities, trade marks, trade names, products, services, activities or circumstances of a competitor,
6) in relation to products with geographical regional designation, it relates always to products with the same designation,
7) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of the competitor or of the geographical regional designation of competing products,
8) it does not present product or service as imitation or replica of product or service bearing the protected trade mark or another distinguishing designation.

The comparative advertising connected with a special offer should, depending on its terms, clearly and unequivocally indicate the date on which the offer expires or to contain information that the offer is valid till the stock of products is exhausted or till cessation of rendering services and, where the special offer is not binding yet, it should also indicate the date since which the special price or other specific terms of the offer shall be binding.

The act of unfair competition, in a meaning above shall be committed also by the advertising agency or another entrepreneur who elaborated the advertisement.

4.3. Unfair advertising in other Polish acts

Now in Poland there are a few types of acts which prohibit unfair advertising, especially advertisements of unsafe products or services are **subject to special legal regulation**.

In particular, **it refers to the following** categories of advertising:

4.3.1. Advertising of alcohol

According to the Act on **combating alcoholism** advertising of alcoholic drinks is prohibited in Poland, except for advertising of beer, which is allowed, provided that it is not:

- Addressed to minors
- Performed on the basis of creating associations with sexual attractiveness, leisure, body fitness, science, professional activities, job or life success, health
- Conducted in television, radio, cinema or theatre between 6 a.m. and 8 p.m., except for advertising performed by an organizer of a sport event during that event
- On video tapes or other data carriers
- In youth or children's press
- On front pages of daily newspapers or magazines
- On posters or billboards, unless 20% of advertising space is used for information about the detrimental effects of using alcohol/prohibition of selling alcohol to minors
- With minors.

The aforementioned restrictions do not refer to advertising conducted inside warehouses, separated places selling alcoholic beverages, so for example advertising vodka is permitted inside a pub, warehouse of alcoholic beverages or a separated area within a retail store.

4.3.2. Tobacco advertising

Accordingly to the Act on protection of health against effects of using tobacco and tobacco products, advertising or promoting of cigarettes and other products or devices/symbols connected with usage of tobacco shall be prohibited.

In particular, this prohibition refers to advertising of cigarettes:

- In television, radio, cinemas, health treatment units, schools and educational units, sport and leisure centers and other public places;
- In the press;
- On posters or billboards;
- In electronic media.

4.3.3. Advertising of medicines[290]

According to the Pharmaceutical Law, advertising of medicines is subject to special restrictions. The following restrictions should be mentioned:

- Advertising of medicines delivered only upon a prescription may be addressed only to professionals, i.e. doctors, pharmacists, veterinary surgeons
- Advertising of medicines may not be addressed to children
- Advertisement of medicines, which is addressed to the public, may not show persons having public functions or physicians or pharmacists presenting medicines
- Advertising of medicines may not be misleading
- Advertisement of medicines, when addressed to the public, must contain the wording: "Before use read the leaflet included in the package, or consult a doctor or pharmacist".

In the case of pharmaceuticals advertisements, those are not authorized, which do not contain all information required by regulations – above all concerning undesirable effects, counter indications concerning the application. Advertising should not engender a delusive conviction, that a drug is completely safe and its using does dot require any precautions. They also should not suggest that taking the drug would provide immediate relief from pain caused by the sickness, without the need to consult a doctor (especially the producers of analgesics and vitamin preparations excel in this). Another example of unfair drug advertising, is the promotion articles appearing in the press, which give the reader an impression of unbiased, scientific information, often illustrated with a picture of a person wearing a smock and signed "Dr. Jan Kowalski, pediatrician" etc. or even signed by genuine doctors, but not containing the annotation "announcement", "advertisement" or "sponsored article"[291].

[290] More information about advertising K. Czyżewska, *Advertising Invest in Poland*, Electronic Official Pages, Agencja Inwestycji.

[291] Office for Competition and Consumer Protection (OCCP) – report advertising and consumer, Warsaw 2004, p. 64.

4.3.4. Advertising of games of chance

According to provisions of the Act on games and mutual betting, it is prohibited to advertise in Poland: video lotteries, cylindrical games, card games, mutual betting, machine games or machine games with low-value prizes. However, this prohibition does not concern advertising or information in places performing gaming or betting activities.

4.3.5. Television and radio advertising

The Radio and Television Act contains several restrictions concerning advertising. These refer to both a form and means of advertisement, and to the advertising of certain products or services. The latter restrictions are in line with the other legal acts (alcohol, tobacco etc). Among restrictions of the first type are:

- **The requirement that advertisements** do not last for **more than 15% of a daily airtime and for more than 12 minutes within an hour**;
- Prohibition of advertising during a feature-length film **more frequently than once every 45 minutes of the film's** duration;
- Prohibition of interrupting programmes other than movies or sport events more frequently than once every 20 minutes (in radio – once every 10 minutes);
- **Prohibition of interrupting** (for the purpose of advertising) of certain auditions, e.g. information programmes or auditions for children;
- Prohibition of **using the voice or appearance** of persons, **who presented information programmes or programmes for children** not earlier than three months before the date of broadcasting the advertisement;
- Prohibition of advertising that directly incites children to purchase products or services or to force their parents/other persons to purchase advertised products or services;
- Prohibition of advertising which plays on children trust in their parents, teachers or other persons;
- Prohibition of advertising in dangerous situations;
- Prohibition hidden advertising;
- Prohibition of advertising which violates human dignity, is discriminatory, including that which endangers the physical, psychological or moral development of minors.

4.3.6. Advertising addressed towards children[292]

In general in Poland thre are no special regulations which forbid conducting advertising addressed to children. Advertising in which children participate and the one addressed to children is admissible. Such advertising is subject to the regulations to be found in the following legal provisions:

[292] OCCP Report 2004, op. cit., p. 65.

- the Act on the National Broadcasting Council (NBC) i.e. Journal of Laws of 2001 No. 101 Item 1114 as amended) – Article 16b Paragraph 2 stipulates, that it is forbidden to broadcast the following advertisements:
  1) directly urging the minors to purchase products and services
  2) encouraging the minors to put pressure on parents or other persons aimed at inducing them to buy the products and services being advertised
  3) taking advantage of the minors' confidence that they have in parents, teachers and other persons
  4) working in a hidden way on the subconscious mind (subliminal advertising).

  Furthermore, radio and TV advertising may not, pursuant to Article 16b Paragraph 3 (4) and (5):
  1) threaten the physical, mental or moral development of the minors
  2) favor the behaviors posing threat to health, safety or environmental protection.
- Regulation of the NBC on the way of conducting advertising activity and telesales in the radio programmes an on television and the detailed rules for restrictions in the scope of interrupting feature films and television programmes for the purpose of broadcasting an advertisement or telesales (Journal of Laws No. 65 Item 784) in § 6 stipulates, that:
  – it is forbidden to use in advertising the voice or image of persons, which have conducted the broadcasts for children in a radio or television programme within the period of less than 3 month prior to the broadcast of the advertisement.
- the Act on protection of health against the effects of using tobacco and tobacco products (Journal of Laws of 1996 No. 10 Item 55 as amended), which in Article 8 forbids to advertise and promote the tobacco products, tobacco accessories (lighters, ashtrays, pipes etc.) and of the products that imitate such articles, and products and symbols connected with the use of tobacco, especially on television, in the radio, cinemas, health-care establishments, schools and educational agencies, in the press for children and youth, within sports and recreational areas and in other public places.
- the Act on the bringing up in sobriety and counteracting alcoholism (i.e. Journal of Laws 2002 No. 147, Item 1231 as amended), which in Article 131 forbids the advertising and promotion in the territory of the country of liquors, except for beer, whose advertising and promotion is authorized, provided that it is not addressed to the minors. The beer promotion and advertising may not be conducted:
  1) on television, in the radio, in any cinema, theatre from 6.00 a.m. to 11.00 p.m.
  2) on video cassettes and other supports
  3) in the press for the youth and children

4) on the cover pages of journals and periodicals
5) on pillars, boards and other fixed or movable surfaces used for advertising
6) using the minors

- Regulation of the Minister of health and social welfare on the rules and form of conducting advertising and supplying information about pharmaceuticals and medical materials ("Monitor Polski" Official Journal of 15.03.1994), which in § 4 stipulates, that pharmaceuticals and medical materials advertising addressed to children is inadmissible.
- the Act on counteracting unfair competition (Journal of Laws No. 47 Item 211, as amended), which as an act of unfair competition treat the pointless advertising appealing to customers' feelings, through evocation of fear, use of superstitions or children's gullibility.

Gullibility means simplicity, susceptibility to persuasion resulting from limitation, lack of experience or knowledge.

5. CIVIL LIABILITY (ARTICLE 18–22 ACUC)

5.1. What an entrepreneur may request?

Where the act of unfair competition is committed, the entrepreneur whose interest is threatened or infringed may request:
1) not to perform prohibited practices,
2) removing effects of prohibited practices,
3) making one or repeated statement of appropriate content and form,
4) repairing the damage, pursuant to general rules;
5) handing over unjustified benefits, pursuant to general rules,
6) adjudication of an adequate amount of money to the determined social goal connected with support for the Polish culture or related to the protection of national heritage – where the act of unfair competition has been deliberate.

The court, upon request of the entitled party, may also adjudge on products, their packing, advertising materials and another items directly connected with commitment of the act of unfair competition. In particular, the court may order their destruction or include them on account of the indemnity.

The burden of proof of the veracity of marking or information placed on products or their packing or of statements contained in the advertising shall fall upon the person accused of the act of unfair competition connected with misleading.

The following persons may make relevant claims specified under items 1–3 and 6:

- a national or regional organization whose statutory objective is to protect the interests of entrepreneurs,
- the President of the Office for Competition and Consumers Protection, if the act of unfair competition threatens or violates consumer interests.

The above provision does not apply to the acts of unfair competition described in Article 5–7, 11, 14 and 15a.

5.2. Lapse of time

The requests pertaining the acts of unfair competition shall expire with the lapse of three years. The course of the expiry shall be initiated separately for each infringement. The provision of Article 442 of the Code of Civil Proceedings shall apply, respectively.

5.3. Obviously groundless complain

In the case of the obviously groundless complaint concerning unfair competition, the court, upon request of the defendant, may order the plaintiff to make one or repeated statement of the determined content and form.

The defendant, who as a result of the complaint referred to above have suffered a damage, may request its repairing pursuant to general rules.