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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 *Socrates-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 młodszy pracownicy naukowcy).

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 w całości z pracowników Zakładu Prawa Handlowego i Gospodarczego Wydziału Prawa Uniwersytetu Rzeszowskiego.

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 szczegółowo-

ści przedstawionych zagadnień. Mając świadomość braków kolegium redakcyjne zobowiązuje się do ich poprawienia w II wydaniu niniejszej publikacji, które jest planowane w przyszłym roku.

Do zakończenia prac nad nową szerszą, i przede wszystkim wnikliwiej zweryfikowaną pozycją oczekujemy na wszelkie sugestie od czytelników.

Redaktor wydania zaprasza zainteresowanych pracowników naukowych do składania propozycji w zakresie samodzielnego opisanie w języku angielskim niepodjętych w niniejszej książce obszarów szeroko rozumianego prawa gospodarczego.

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

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 advantage of this book is that all of the main rules concerning carrying on a business are included in one manageable-size text.

It provides 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.

Some chapters in the book are preceded by a comparative introduction which aims to provide a better understanding of the topic. Also, it is meant to find the equivalents of the institutions of the Polish law presented in the book in the national jurisdictions of the readers.

Polish Business Law 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.

It is a useful and up-to-date guide to the Polish business law for practitioners, academics and students.

Chapter 1 comprehensively reviews and analyses the principles of undertaking and carrying on a business in Poland. It 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.

Chapter 2 extensively examines the rules of representation of entrepreneurs placing particular emphasis on a commercial power of attorney (*prokura*).

Chapters 3 and 4 deal with, generally speaking, business organisations, namely partnerships and companies. They cover a large range of issues, such as partnership and company nature, their formation, liability, representation and management.

In chapter 5 and 6 topics such as state aid and special economic zones are succinctly discussed.

Chapter 7 extensively covers the law of public protection of competition in Poland. In this chapter 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.

Chapter 8 is concerned with combating unfair competition in Poland.

Chapter 9 provides a brief coverage of public procurement system in Poland.

CHAPTER I

Undertaking and Carrying on a Business in Poland

1. GENERAL PROVISIONS

The principal legal act governing business activity in Poland is the **Economic Freedom Act of 2 July 2004**. It regulates undertaking, running and closing businesses in the territory of Poland, as well as tasks of the public administration in this respect.

The Economic Freedom Act came into force on 21 August 2004 to improve the business climate in Poland by removing many restraints and uncertainties that had burdened entrepreneurs.

The Act governs starting, conduct and termination of economic activity in the territory of the Republic of Poland and the tasks of public administration authorities in this respect.

Economic activity shall mean a professional profit-gaining activity in the fields of production, construction, commerce, services and in the prospecting for, exploration and extraction of minerals from deposits, as well as a professional activity carried on in an organised and uninterrupted manner.

The provisions of this Act shall not apply to agricultural production activity in the realm of crop farming and animal husbandry, horticulture, market gardening, forestry and inland-water fisheries, or to the renting by farmers of rooms, the sale of home meals and the provision in agricultural farms of other services in connection with the stay of tourists.

Definitions of terms used in the Act

Concession-granting authority – a public administration authority empowered under this Act to issue, refuse, modify or withdraw concessions.

Foreign person:

- a) natural person having their place of residence abroad, holding no Polish citizenship;
- b) legal person having its seat abroad;
- c) organisational entity which has no legal personality and is endowed with legal capacity, having its seat abroad;

Foreign entrepreneur – a foreign person pursuing economic activity abroad;

Branch – an isolated and organisationally independent part of economic activity carried on by an entrepreneur outside his seat or principal place of pursuit of the activity;

Regulated activity – an economic activity the pursuit of which requires the satisfaction of special conditions laid down in provisions of law.

2. THE DEFINITION OF ENTREPRENEUR UNDER THE POLISH LAW

Definition of the entrepreneur (Article 4 of the Economic Freedom Act):

- a natural person, legal person, and an organisational entity which is not a legal person and is endowed with legal capacity by force of a separate Act – carrying on economic activity in their own name;
- partners in a civil partnership to the extent of an economic activity conducted by them.

Definition of the entrepreneur (Article 43¹ of the Civil Code)

As provided for in Article 43¹ of the Civil Code, in connection with Article 33¹, any natural person, legal person and unincorporated organisational unit granted legal capacity by a statute, carrying out economic or professional activity on its own behalf, shall be an entrepreneur.

Micro-, Small and Medium-sized Entrepreneurs

Poland puts great importance on to the growth of micro-, small and medium-sized entrepreneurs for several reasons. SME's (Micro-, Small and Medium-sized Entrepreneurs) form the backbone of the market economy and, as in most other countries create a significant number of new jobs.

The State shall, while observing the principles of equality and competition, create advantageous conditions for the operation and development of micro-entrepreneurs, small, and medium-sized entrepreneurs, in particular by:

1. initiating such changes in the state of law as will encourage the development of micro-entrepreneurs, small and medium-sized entrepreneurs, including changes relating to access to credit and loan funds and credit suretyships;
2. supporting institutions which enable economic activity to be financed on advantageous terms within the framework of government programmes in progress;
3. ensuring equal conditions for economic activity in terms of public-law burdens;
4. facilitating access to information, training and counselling;
5. supporting institutions and organisations acting on entrepreneurs' behalf;

6. promoting co-operation of micro-entrepreneurs, small and medium-sized entrepreneurs with other Polish and foreign entrepreneurs.

The micro-entrepreneur shall mean an entrepreneur who in at least one of the two recent financial years:

1. had an average annual employment of less than 10; and
2. showed an annual net turnover from sales of goods, products and services and from financial operations of no more than a zloty equivalent of 2 million euro, or a balance-sheet assets total, as at the end of either of these two years, of no more than a zloty equivalent of 2 million euro.

The small entrepreneur shall mean an entrepreneur who in at least one of the two recent financial years:

1. had an average annual employment of less than 50 and
2. showed an annual net turnover from sales of goods, products and services and from financial operations of no more than a zloty equivalent of 10 million euro, or a balance-sheet assets total, as at the end of either of these two years, of no more than a zloty equivalent of 10 million euro.

The medium-sized entrepreneur shall mean an entrepreneur who in at least one of the two recent financial years:

1. had an average annual employment of less than 250 and
2. showed an annual net turnover from sales of goods, products and services and from financial operations of no more than a zloty equivalent of 50 million euro, or a balance-sheet assets total, as at the end of either of these two years, of no more than a zloty equivalent of 43 million euro.

3. RULES FOR UNDERTAKING AND PURSUIT OF ECONOMIC ACTIVITY

Forms of Business Entities

Polish regulations allow the following legal forms of businesses:

- enterprises run by a natural person; these are small businesses run by private individuals,
- civil partnerships and companies established under the regulations of the Polish Civil Code,
- commercial companies, established by natural or legal persons under the regulations of the Polish Code of Commercial Companies,
- co-operatives established by natural or legal persons,
- state-owned enterprises,
- *societas europea* (SE) and European Economic Interest Grouping (EEIG) can be set up in Poland as of 19 May 2005 (in accordance with EU Council regulations).

The Code of Commercial Companies of 15 September 2000 regulates two groups of companies:

- partnerships (registered partnership, limited partnership, professional partnership and limited joint-stock partnership),
- corporations (joint-stock company and limited liability company).

Societies, foundations, and trade unions may also carry out economic activity.

The entrepreneur may undertake an economic activity upon being entered in the register of entrepreneurs of the National Court Register or in the Economic Activity Records.

A company in organisation may undertake economic activity prior to being entered in the register of entrepreneurs.

3.1. National Court Register

The National Court Register consists of a register of economic operators, a register of associations, other social and professional organisations, foundations and public health care establishments, and a register of insolvent debtors. The register contains records of entities, which are statutorily required to be registered.

The National Court Register is a database composed of three separate registers:

- register of entrepreneurs,
- register of associations, other types of voluntary and professional organizations, foundations and public institutions of social service,
- bankruptcy register (regarding insolvent debtors).

The National Court Register was founded according to the Act adopted on 20th August 1997 on the National Court Register (Dziennik Ustaw 1997/No. 121, item 769, with further modifications).

The National Court Register is supposed to perform two fundamental functions:

- informational,
- legalizational.

Types of entities which may be entered in the register of entrepreneurs:

- natural persons engaged in business activity
- commercial partnerships and companies
- co-operative associations
- state enterprises
- units (research institutes)
- foreign enterprises
- mutual insurance companies

branches of foreign enterprises conducting business activity on the territory of Poland

- central offices of foreign insurance companies
- other types of legal entities, engaged in business activity, which are subject to registration in the register of associations, other types of voluntary and professional organizations, foundations and public institutions of social service

Types of entities which may be entered in the register of associations, other types of voluntary and professional organisations, foundations and public institutions of social service:

- foundations
- social- professional organizations of farmers
- different types of chambers (economy, handicrafts)
- guilds
- Polish Handicraft Association
- different types of associations
- different types of trade unions (of employers, individual farmers)
- professional self-governing units of some transactors
- health service transport
- public institutions of health service

Types of entities which may be entered in the bankruptcy register:

- natural persons engaged in business activity, if they have been declared insolvent or if the application for bankruptcy has been dismissed with legal validity, due to insufficient property (which would not cover the costs of insolvency proceedings), or the execution of a court judgement or administrative decision against the debtor has been discontinued due to the fact that the execution would not provide the sum exceeding the costs of the execution
- associates who bear financial responsibility with their whole property for company's obligations, except for silent partners in a limited partnership (spółka komandytowa) if it has been declared insolvent or if the motion for declaration of insolvency has been dismissed with legal validity due to insufficient property (which would not cover the costs of insolvency proceedings), or the execution of a court judgement or administrative decision against the debtor has been discontinued due to the fact that the execution would not provide the sum exceeding the costs of the execution
- debtors who have been obligated to disclose their assets in the course of the provisions of the Code of Civil Procedure regarding executive proceedings
- persons, who – by the court conducting proceedings in bankruptcy – have been deprived of the right to conduct business activity on their own account and to act as a representative or proxy to an entrepreneur, a member of a board of directors

and auditing committee in a public company, company limited by shares, or co-operative association.

Furthermore, the debtors who within 30 days from the date of a summons for payment have not paid their dues will be entered into the register of bankrupts- on application made by the creditor who is in possession of the executory document with a writ of execution drawn up against a natural person.

The registration

The registry applications are filed as official registry application forms (e.g. application on "altered registration", applications concerning data disclosure) along with the required court fee and fee for publishing in *Monitor Sądowy i Gospodarczy* (the official journal). Official registry applications are available in courts and communes, with reservation that communes provide the application forms for the registration of natural persons engaged in business activity and general partnerships.

Altogether 69 patterns of official registry application forms have been provided. They comprise any possible application for registration of all types of entities which are subject to registration.

Divisions of the National Court Registers have been constituted in 20 provincial courts.

The specification of provincial courts and the office addresses of the Divisions of the National Court Registers, together with a complete set of application forms are to be found on the web site of the Ministry of Justice www.ms.gov.pl.

3.2. Economic Activity Records

An entrepreneur who is a natural person may undertake economic activity upon being entered in economic activity records.

Economic activity records shall be kept by a local community (*gmina*) competent for the place of residence of the entrepreneur, as a commissioned task relating to government administration.

The place of residence shall be the locality in which the entrepreneur resides with the intention of staying permanently.

Application for an entry in the economic activity records shall be subject to a fee of 100 zlotys, and if an application concerns a modification to the entry the fee shall be 50 zlotys. The fees collected shall be income of the budget of the records-keeping local community. The council local community may introduce an exemption from the fees.

An entry in economic activity records shall be made by the *wójt, burmistrz* or *prezydent miasta*¹, hereinafter referred to as the "records-keeping authority".

¹ The above Polish names are equivalent to *voit*, mayor and president of the city.

An application for entry in the economic activity records shall contain:

- 1) designation of the entrepreneur and the entrepreneur's PESEL number, if any;
- 2) designation of the entrepreneur's place of residence and address, and where the entrepreneur permanently carries on economic activity in a place other than his place of residence – also the identification of this place and of the address of the principal establishment, branch;
- 3) identification of the object of economic activity pursued, in accordance with the Polish Classification of Activity (PKD);
- 4) indication of the economic activity commencement date.

The records-keeping authority shall ex officio serve upon the entrepreneur a certificate of entry in economic activity records, no later than 14 days from the date of application.

The records-keeping authority shall issue a decision refusing to make the entry where:

- 1) application concerns an economic activity that does not fall under the provisions of this Act;
- 2) application is flawed with formal defects which have not been removed within an appointed time limit, despite a summons to this effect;
- 3) valid injunction has been pronounced on the conduct by the entrepreneur of the economic activity identified in the application.

The entrepreneur shall notify the records-keeping authority of any such changes in the state of fact and legal status pertaining to the entrepreneur and the economic activity carried on by him.

A change of the entrepreneur's place of residence shall be entered by the records-keeping authority competent prior to the change. Having made the change in the entry, the previously competent records-keeping authority shall send a certificate of entry to the body competent for the entrepreneurs' new place of residence. The competent records-keeping authority shall ex officio enter the entrepreneur in the economic activity records kept.

An entry in the records of economic activity shall be struck off in the event of:

1. notification of cessation of economic activity;
2. entering in the register of entrepreneurs of a commercial partnership or company resulting from a transformation of a civil partnership, to the extent of activity entered in the register of entrepreneurs;
3. change of the entrepreneurs' place of residence.
4. if made by the records-keeping authority in violation of the law, or where evidence on the basis of which a state of fact relevant to the matter has been established should prove false.

A records-keeping authority may ex officio struck off an entry which contains data incompatible with the state of fact.

An entry shall be struck off the economic activity records under an administrative decision.

The records-keeping authority shall, within 14 days from the date on which the decision has become final, furnish information about the entrepreneur having been struck off the economic activity records to the statistical office and revenue office competent for the entrepreneur's most recent place of residence.

3.3. Starting a business in Poland

The table below shows the main indicators which are involved in starting business in Poland. They include:

- all procedures required to register a firm,
- average time spent during each procedure,
- official cost of each procedure, and
- the minimum capital required as a percentage of income per capita.

It also examines the procedures, time, and cost involved in launching a commercial or industrial firm with up to 50 employees and start-up capital of 10 times the economy's per-capita gross national income (GNI) as well as identifies the bureaucratic and legal hurdles an entrepreneur must overcome to incorporate and register a new firm.

Region or Economy	Procedures (number)	Duration (days)	Cost (% GNI per capita)	Min. Capital (% GNI per capita)
East Asia & Pacific	8.2	46.3	42.8	60.3
Europe & Central Asia	9.4	32.0	14.1	53.9
Latin America & Caribbean	10.2	73.3	48.1	18.1
Middle East & North Africa	10.3	40.9	74.5	744.5
OECD	6.2	16.6	5.3	36.1
South Asia	7.9	32.5	46.6	0.8
Sub-Saharan Africa	11.1	61.8	162.8	209.9
Poland	10	31	21.4	204.4

The table below summarizes the procedures and costs associated with setting up a business in Poland.

Nature of Procedure (2006)	Proc.	Duration (days)	US\$ Cost
1	2	3	4
Notarize company agreement	1	1	1,041.03
Obtain "REGON" number (statistical number)	2	1	0.00
Deposit paid-in capital at the bank	3	1	0.00

1	2	3	4
File Articles of Association registration date, registration number with the Tax Office; Obtain tax identification number (NIP)	4	24	44.19
Register for VAT	5	1*	0.00
Register in the Register of Entrepreneurs maintained by the National Court Register	6	14*	436.08
File amending application for "REGON" number with the Statistical Office	7	1	0.00
Register the company at The National Sanitary Inspection	8	1	0.00
Register the company at the local Social Insurance Office (ZUS) for social insurance payments	9	1	0.00
Register the company at The National Work Inspection	10	1	0.00
Totals:	10	31	\$1,521.31

Note:

Source: <http://www.doingbusiness.org>

4. BRANCHES AND AGENCIES OF FOREIGN ENTREPRENEURS

Foreign companies may open branch offices and representative offices in Poland pursuant to the provisions contained in the Law on Economic Freedom of 2 July 2004.

Branch Office

Foreign companies may establish branch offices in Poland, on the basis of reciprocity, subject to the provisions of international agreements ratified by Poland, in order to conduct business activity in Poland within the scope of their business objectives, exclusively.

Foreign persons (as defined by the aforementioned law) from EU and EFTA states – members of the European Economic Area – may establish branch offices in Poland in accordance with the principles applicable to domestic entrepreneurs.

Branch offices are obliged to use the name of the mother company in the language of the country where it is registered, along with the name of its legal form translated into Polish and the words *oddział w Polsce* (branch in Poland) added.

A foreign entity setting up its branch office is obliged to appoint a person at the branch who is authorised to represent this entity. A branch may commence its operations only after it has been registered with the National Court Register.

Branch offices are to maintain separate accounting books in Polish, pursuant to Polish accounting regulations. Another requirement stipulates that branch offices are required to notify the Polish Minister of Economic Affairs of:

- the commencement of liquidation of the foreign entity that has opened the branch in Poland,

- the loss by that foreign entity of the right to conduct business activity.

Liquidation of branch offices is carried out following the liquidation procedure for limited liability companies contained in the Code of Commercial Companies of 15 September 2000.

Representative Office

Foreign companies may establish representative offices in Poland solely in order to promote and advertise the company establishing the office. Establishment of a representative office requires registration in the Register of Representative Offices of Foreign Business Entities kept by the Minister of Economic Affairs. Registration is effected based on an application from the foreign company concerned.

The application, in Polish, should contain the following:

- name, place of registration, and legal form of the foreign company opening its representative office,
- scope of the business activity of the foreign company opening its representative office,
- name and address in Poland of a person in the representative office authorised to represent the foreign company,
- representative office's address in Poland.

The above-mentioned application should be accompanied by the documents listed below:

- deed of formation (articles of association, charter) of the foreign company, if applicable,
- copy of its entry in the Commercial Register or its equivalent, if applicable,
- statement of the foreign company on establishing its representative office in Poland,
- document certifying the foreign company's rights to the real estate wherein its representative office will carry out the activities.

The enclosures in a foreign language contained in this list should be accompanied by a certified translation into Polish.

Representative offices are obliged to use the name of the mother company in the language of the country where it is registered, along with the name of its legal form translated into Polish and the words *przedstawicielstwo w Polsce* (representative office in Poland) added.

Just like branch offices, representative offices are required to maintain separate accounting books in Polish, pursuant to Polish accounting regulations. Furthermore, representative offices are obliged to notify the Polish Minister of Economic Affairs of:

- the commencement or end of liquidation of the foreign entity that has opened a representative office in Poland,
- the loss by that foreign entity of the right to conduct business activity,
- the loss by that foreign entity of the right to dispose of its assets, as well as
- any change pertaining to the information contained in the application for registering of the representative office.

Liquidation of representative offices is conducted in accordance with the liquidation procedure for limited liability companies contained in the Code of Commercial Companies of 15 September 2000.

CHAPTER II

Representation of entrepreneurs

The question of representation in commercial relationships as well as before the court and other bodies is of crucial importance to the law of business. Improper representation may result in that a given contract may be considered null and void. Moreover, not complying with the rules of representation set forth under the procedural law may lead to some negative consequences specified in the Code of Civil Procedure.

A distinction is drawn between two kinds of representation, both of which are regulated in the Civil Code (hereinafter referred to as "CC"), namely: a power of attorney (*pełnomocnictwo*) and a commercial power of attorney (*prokura*). The table below illustrates the differences between the two kinds of representation.

	Power of attorney (<i>pełnomocnictwo</i>)	Commercial power of attorney (<i>prokura</i>)
Who may grant	Every subject of law, including persons who do not carry on a business	Only entrepreneurs who are subject to registration with the National Court Register
Who may be the representative	Every subject of law; including natural persons who enjoy limited contractual capacity	Only natural persons who enjoy full contractual capacity
The source by which the representative is empowered to act in the name of his	The principal specifies the acts which may be performed by his representative	The Civil Code directly specifies which activities may be performed by the holder of a commercial power of attorney
The form of granting	Basically, the Civil Code fails to impose any particular form applicable to all powers of attorney ²	Must be granted in writing, otherwise it shall be null and void
Representation during the liquidation procedure	This kind of representation may exist both before and after liquidation has been opened	Expires after the liquidation has been opened; a new commercial power of attorney may not be granted

Of the two forms of representation the commercial power of attorney (*prokura*) is typical of entrepreneurs, hence it will be discussed more extensively in this part

² However, the so called general power of attorney must be granted in writing, otherwise it shall be null and void. Additionally, if the power of attorney being granted is intended to empower to perform activities which require particular form and failure to use this form results in that a given act is null and void, the power of attorney must be granted in the same form.

of the book. As stated above, **only entrepreneurs who are subject to registration with the National Court Register may grant the commercial power of attorney.** This means that the following subjects may be represented by the holder of a commercial power of attorney: general partnerships, limited partnerships, professional partnerships, limited joint stock partnerships, limited liability companies, joint stock companies, state enterprises, cooperatives, charities (provided they carry on a business). The commercial power of attorney may be granted only to natural persons who enjoy full contractual capacity. The person who is empowered to act on behalf of an entrepreneur is named *prokurent*.

The commercial power of attorney must be granted **in writing**, otherwise it shall be null and void. Additionally, it must be **registered** with the National Court Register (NCR). The question arises whether the registration is a formal requirement needed for the validity of the power of attorney. It should be noted that no provision directly states that the *prokurent* is fully empowered only after he has been registered with the NCR. Consequently, it must be stressed that registration, though required under the law, is not a precondition for the validity of the commercial power of attorney.

As far as the scope of activities of the *prokurent* is concerned the Civil Code directly specifies which activities may be performed by him. Article 109¹ § 1 CC states that he **may perform the activities which are related to running the enterprise.** The following acts fall within the category:

- Activities performed before the court, namely: filing applications and acting before the court as representatives of an entrepreneur;
- Activities performed out of court, particularly concluding contracts in the name of an entrepreneur.

However, the holder of a commercial power of attorney may not sell the enterprise or any part of it nor real property owned by the enterprise, unless he has been granted a specific power of attorney.

There are **two kinds** of the commercial power of attorney:

- The one which has been granted to one person;
- The one which has been granted to more persons.

The latter may take the form of a **joint commercial power of attorney** (*prokura łączna*) and **separate power of attorney**. The joint power of attorney means that a given act may be performed only by all representatives, otherwise it is considered not effective. It may become effective after it has been confirmed by other representatives. In the case of the separate power of attorney the acts may be undertaken by all representatives individually and separately.

It must be stressed that the entrepreneur may not be represented by the *prokurent* in the case of **liquidation**. In the situation where the liquidation has been opened the *prokura* expires and a new commercial power of attorney may not be granted.

CHAPTER III

Partnerships

1. A COMPARATIVE OVERVIEW OF PARTNERSHIPS
IN EUROPEAN COUNTRIES

Discussing partnerships operating in Poland should be preceded by a short overview of various types of partnerships existing in other European countries. The partnerships in six European countries will be presented in the table below, followed by a short summary of partnership forms in Germany, France, Italy, United Kingdom (England) and Lithuania.

Table 1

Poland	Germany	France	Italy	United Kingdom (England)	Lithuania
<i>Spółka cywilna</i> (civil partnership)	<i>BGB – Gesellschaft</i> (regulated under the German Civil Code)		<i>Società semplice</i> (Article 2251 of the Italian Civil Code)	Partnerships (regulated in the Partnerships Act of 1890)	
<i>Spółka jawna</i> (general commercial partnership, disclosed partnership)	<i>Offene Handelsgesellschaft</i> (general partnership)		<i>Società in nome collettivo</i> (Article 2291 of the Italian Civil Code)		<i>Tikroji ūkinė bendrija</i> (general partnership)
<i>Spółka partnerska</i> (professional partnership)	<i>Partnerschaft gesellschaft</i> (non-trading partnership)	<i>La société civile</i> , partnership for non-commercial purposes (Art. 1845 of the French Civil Code)			
<i>Spółka komandytowa</i> (limited partnership)	<i>Kommanditgesellschaft</i>		<i>Società in accomandita semplice</i> (Article 2313 of the Italian Civil Code)	Limited partnerships (Limited Partnerships Act of 1907)	<i>Komanditinė ūkinė bendrija</i> (limited partnership)
<i>Spółka komandytowo-akcyjna</i> (limited joint – stock partnership)	<i>Stille Gesellschaft</i> (dormant partnership)	<i>La société en participation</i> , undisclosed partnership (Article 1871 of the French Civil Code)		Limited liability partnerships (Limited Liability Partnerships Act of 2000)	

Germany

A characteristic feature of German partnerships is that they enjoy limited legal personality: they may sue and be sued but they are not owners of the partnership property. Actually there is no such category as partnership property as the owners of the assets contributed by the partners are the partners themselves in joint ownership.

France

In France partnerships are regulated in the Civil Code. There exists the Commercial Code but it does not regulate the matter of business organisations.

A partnership (*la société*) must be established by at least 2 persons (Article 1832 of the French Civil Code). Its duration may not exceed ninety-nine years (Article 1838 of the French Civil Code). A characteristic feature of French partnerships is that – except for undisclosed partnerships – **they enjoy legal personality from their registration**. Until registration the relations between members are governed by the partnership agreement and by the general principles of law which apply to contracts and obligations (Art. 1842 of the French Civil Code). Persons who have acted on behalf of the partnership in the making before registration are liable for the obligations arising from the acts so performed, jointly and severally where the firm is a merchant, jointly in the other cases (Article 1843 of the French Civil Code).

There are two types of partnerships under the French law:

***La société civile* (a partnership for non-commercial purposes)** is regulated in Articles 1845–1870 of the French Civil Code. As far as the management of the partnership is concerned Article 1846 provides that it shall be managed by one or several persons, partners or not, appointed either by the articles of partnership, or by a special act, or by a resolution of the partners. The liability for debts and obligation is based on the rule of liability of all partners, however, their liability is not unlimited and is dependent on the value of the partners' shares in the capital of the partnership. Under Article 1857 with regard to third parties, partners are liable indefinitely for debts of the partnership in proportion to their share in the capital of the partnership on the date when falling due or on the day of cessation of payments. A partner who has contributed only his industry is liable like the one whose contribution in the capital is the smallest (Article 1857 of the French Civil Code). It should be noted that the liability of the partners is subsidiary (secondary) in relation to the liability of the partnership itself. Creditors may sue a partner for payment of the debts of the partnership only after suing first and vainly the juridical person (Article 1858 of the French Civil Code).

***La société en participation* (undisclosed partnership)** regulated in Articles 1871–1872 of the French Civil Code.

Partners may agree that the partnership will not be registered. The partnership is then called “undisclosed partnership”. It is not a juridical person and is not subject to registration. With regard to third parties, each partner remains owner of

the property which he placed at the disposal of the partnership. Shall be deemed undivided between the partners the property acquired by investment or re-investment of undivided funds during the partnership and that which was undivided before being placed at the disposal of the partnership. It shall be likewise for that which the partners have agreed to place in undivided ownership. It may furthermore be agreed that one of the partners is, with regard to the others, owner of all or part of the property which he acquires with a view to the carrying out of the objects of the partnership. Each partner contracts in his own name and is alone bound with regard to third parties. However, where the undisclosed partners act as partners to third parties' knowledge, each one of them is bound with regard to the latter for the obligations arising from acts performed in that capacity by one of the others, jointly and severally where the partnership is a merchant, jointly, in the other cases.

Italy

As regards the nature of the contract of partnership Article 2247 of the Italian Civil Code provides that under the contract of partnership (*il contratto di società*) two or more persons transfer (*conferiscono*) the goods or services in order to carry on a business (*per l'esercizio di una attività economica*) in common (*in comune*).

It should be noted that Italian partnerships must be organized only in one of the forms prescribed under the law (Article 2249 of the Italian Civil Code).

There are three types of partnerships under the Italian law:

Società semplice (simple partnership):

The contract need not to be made in the special form except the case where it is required because of the nature of the contributions made to the partnership property (Article 2251 of the Italian Civil Code). This means that if one of the partners contributes real property the contract of partnership should be notarized since such a form is required to transfer the real property (the nature of making contributions is that items being contributed are transferred onto the partnership property).

Partners who acted in the name of the partnership are liable for the debts and obligations jointly and severally (*personalmente e solidalmente*). Other partners are also liable except the case where otherwise specified in the contract (Article 2267 of the Italian Civil Code).

Società in nome collettivo (partnerships in the collective name) are regulated in Article 2291 of the Italian Civil Code. All partners are liable (*solidalmente e illimitamente*). Any provision to the contrary shall be null and void. The law specifies the elements which must be included in the contract. Must be registered. If the partners fail to register it the law concerning *società semplice* shall apply.

Società in accomandita semplice (Articles 2313–2324 of the Italian Civil Code). The nature of this partnership is that there are two categories of partners: *soci accomandatari* whose liability for obligations is unlimited and *soci accomandanti* whose liability is limited to the value of the contributions they have made.

United Kingdom (England)

Partnerships in the UK are regulated in the Partnership Act of 1890, Limited Partnerships Act of 1907 and Limited Liability Partnerships Act of 2000.

General partnerships regulated in the Partnership Act of 1890 do not enjoy legal personality, though in some cases they are treated under the law as if they were separate subjects of law. What should be noted about general partnerships is that there is only one group of partners who are liable for debts and obligation arising during the activity. General partnerships are not subject to registration.

A limited partnership, regulated in Limited Partnerships Act of 1907 as well as in the provisions of the Act of 1890, consists of one or more persons called general partners who are liable for all the debts and obligations of the firm and one or more persons called limited partners who contribute a sum of money or property. Limited partners are not liable for the debts and obligations beyond the amount contributed.

Limited liability partnerships regulated in the Limited Liability Partnerships Act of 2000 are a new form of legal entity. A limited liability partnership is a body corporate (with legal personality separate from that of its members) which is formed by being incorporated. For a limited liability partnership to be incorporated:

1. **two or more persons** associated for carrying on a lawful business with a view to profit must have subscribed their names to an incorporation document,
2. there must have been **delivered to the registrar either the incorporation document** or a copy authenticated in a manner approved by him, and
3. there must have been so delivered a **statement** in a form approved by the registrar, made by either a solicitor engaged in the formation of the limited liability partnership or anyone who subscribed his name to the incorporation document, that the requirement imposed by paragraph 1 has been complied with.

Lithuania

The most important among other types of business enterprise are partnerships which are regulated by a relatively new version of Law on Partnerships³. The law defines partnership as a private legal person with unlimited liability, founded by partnership agreement. The distinction is drawn between:

- general partnership (lt. *Tikroji ūkinė bendrija*) where all partners are fully liable and take part in management of partnership on one hand and
- limited partnership (lt. *Komanditinė ūkinė bendrija*) on the other hand, where some partners have limited liability and does not participate in the management of partnership.

³ The first version of the law dated 16 October 1990 held that partnership has no legal personality. Currently in force – Partnerships law 6 November, 2003 Nr. IX-1804, Valstybės žinios, 2003, Nr. 112-4990.

2. PARTNERSHIPS UNDER THE POLISH LAW IN GENERAL

Partnerships in Poland fall in **two categories: civil partnerships** regulated by the provisions of the Civil Code of 1964 and **commercial partnerships** regulated by the Code of Commercial Companies and Partnerships. The latter can take various forms, i.e.:

- registered partnerships,
- professional partnerships,
- limited partnerships and
- limited joint-stock partnerships.

Despite the fact that the name “registered partnership” is used only in the first case, one should bear in mind that all other partnerships are subject to registration with the National Court Register (under the Act on the National Court Register).

All commercial partnerships regulated under the Code have one thing in common – **they are not separate legal persons but they are treated by the law as if they enjoyed separate legal personality**. This means that they can sue and be sued, they are fully liable for their debts.

Both civil and commercial partnerships operating in Poland are illustrated in the table below (table 2).

Table 2

Name of a partnership	Where it is regulated	Requirements which must be complied with to set up a partnership	Liability for debts and obligations
Civil partnership (<i>spółka cywilna</i>)	Civil Code	Contract in any form prescribed under the law	All partners, jointly and severally; the partnership itself is not liable
General partnership (<i>spółka jawna</i>)	Code of Commercial Companies and Partnerships	Contract in writing and registration with the National Court Register	All partners, jointly and severally with the partnership itself
Limited partnership (<i>spółka komandytowa</i>)	As above	Contract in the form of a deed and registration with the National Court Register	All partners, jointly and severally with the partnership itself
Professional partnership (<i>spółka partnerska</i>)	As above	Contract in the form of a deed and registration with the National Court Register	All partners, jointly and severally with the partnership itself
Limited joint-stock partnership (<i>spółka komandytowo-akcyjna</i>)	As above	Contract in the form of a deed and registration with the National Court Register	All partners, jointly and severally with the partnership itself

3. CIVIL PARTNERSHIP (*SPÓŁKA CYWILNA*)

Nature

Civil partnership (Articles 860–875 Polish Civil Code; all statutory reference in this chapter will be to this Code unless otherwise stated) is **not a separate legal person** under the law. It arises under the contract of partnership (see below) and it is treated as such both in the civil law doctrine and the judicature. This means that the civil partnership may not be regarded as an organisation – it is **solely a relationship which subsists between the partners**. By making the contract no separate legal entity is created. The **consequences** are that:

- the partnership may not be liable for its debts,
- there is no property which could be considered as the property of the partnership itself (all the contributions made by the partners are the subject of the co-ownership of all partners),
- the partnership may not sue and may not be sued,
- the partnership may not be the subject of rights and obligations,
- it may not enter arrangement with its creditors,
- it may not be declared bankrupt.

Civil partnerships may be set up solely with a view of carrying on a business – unlike companies which can have non – commercial and charitable aims.

Formation

There are **no formalities** for the creation of this partnership. Although the partners may draw up a formal deed of partnership or written contract, the partnership may be created by oral agreement or by implication. The only condition for the formation of a civil partnership is entering into the contract. The law on freedom of business activity of 2004 provides that partners in a civil partnership are considered as sole traders (individual entrepreneurs) and requires that they should be registered with the local register of business activity (Article 4. 2). It should be noted that **such registration is not a precondition for the partnership existence**. If the partners fail to register themselves as sole traders the partnership made between them does arise.

Persons capable of being partners are natural persons (it is disputable if minors, i.e. persons with limited contractual capacity may enter the partnership agreement), legal persons (e.g. limited liability companies and joint – stock companies) and legal entities without legal personality (commercial partnerships).

Entering into the contract of partnership undergoes the same provisions which refer to making all other agreements under the civil law. This means that both law relating to age and contractual capacity shall apply. Under the Polish law the

contractual capacity generally depends on age but can also be limited in the case of a mental disease though a special court order should be passed⁴.

As far as the **form of the partnership agreement** is concerned pursuant to Article 860 Civil Code the civil partnership agreement shall be made **in writing**. However, the above provision fails to specify the results of making the contract in a different form. In this case we should apply general rules referring to this question. Art 70 Civil Code provides that if a particular article does not provide what the result of making a contract without the prescribed form is, the result is that this contract is valid. The question arises why according to the law the contract should be made in writing but on the other hand there is no negative effect and the contract is still valid. The answer that though there is no sanction as regards the validity of the contract the parties will have some difficulties in proving that the contract was really made.

It was mentioned before that the contract of partnership should be made in writing but making a contract orally bears no effect for its validity. However, this statement is only partly true. One should also bear in mind that **the form of the contract depends on the kind of contributions made by the partners**. If contributions made by all partners include items except for land the contract should be made in writing but if land is contributed the contract should be made in the form of a notarial deed.

Under Article 158 Civil Code contracts including transfer of land shall be made in the form of a notarial deed. Making contributions is in fact transferring this land onto the partnership. Thus, both contracts should be made in this form. Making contributions through transferring land is part of the contract of partnership. The question arises if not complying with the necessary form of the contract affects the entire contract or only part of it. We might ask if the entire contract is not valid

⁴ The following rules shall apply when entering into the contract of civil partnership. They must be applied to other partnership agreements as well.

- a. If a contract creates certain obligations for one of the parties and the party is under 18 but over 13 a consent of a parent or a tutor is necessary. The same applies to the contract of partnership: a minor (over 13 under 18) is entitled to make a valid contract only after the consent of one of the parents or a tutor has been given. For all other contracts made in relation to the partnership a new consent has to be given – though a minor can formally be one of the partners, acting as a partner will be rather awkward and difficult; every time a minor acting as a partner would like to make a contract on the partnership behalf he will need to ask his parent or tutor for consent.
- b. There are however cases where a person under 18 can make a legally binding agreement without the consent of the parent: a woman under 18 who is already married (in some cases a girl after reaching 16 can be married by the consent of the family court and the main reason for the court's consent is the girl's pregnancy) may enter a valid contract.
- c. If a girl was married at the age of 16 the result of which is that she is fully capable of making all contracts, she does not lose her capacity even if she divorced before reaching 18.

or only part of it where a partner agreed to contribute land without the prescribed form.

The conclusions should be the following: if land is substantial for the partnership's activity its transfer to the partnership property without the prescribed form makes the entire contract null and void. On the contrary, if land is not the only contribution made by the partner and it is not substantial for the partnership activity the contract of partnership is valid but the provision under which one of the partners transfers real property as his contribution, is invalid.

Though there is a general rule that partnerships are subject to **registration** with the National Court Register this **does not apply to civil partnerships regulated in the Civil Code**. Such a partnership exists as long as a legally binding agreement has been made. Entering into such an agreement is the only requirement necessary for the creation of civil partnership.

Making contributions is sometimes necessary for founding a partnership though it applies only to partnerships regulated in the Code of Commercial Companies and Partnerships. To establish a civil partnership there is **no obligation** for the partners to contribute anything.

Liability

The liability in the civil partnership is **borne by all partners jointly and severally** (which is the consequence of the partnership nature). This means that a creditor may sue all of the partners, some of them or one of them, dependent on his own decision. In the case where a partner satisfies the creditor's claim, the remaining debtors shall be relieved from liability. However, unlike under the Code of Commercial Partnerships and Companies, **the partnership itself may not be sued** (which results from that the civil partnership is not a separate legal entity).

Management and representation

Managing the partnership remains the fundamental right and duty of all partners, subject to agreement to the contrary. This means that the partners may state that some of them shall be excluded from the decision – making process in the partnership. In the case where no such exclusion has been made **the decision as to the partnership affairs belongs to:**

- **one partner** as far as the activities which fall within the ordinary course of business are concerned,
- **all partners who must agree to the act by their resolution** as far as the act which is out of the ordinary course of business is concerned.

This means that decisions on selling the company produce may be usually made by one partner whereas the decisions on selling real property belonging to all partners under co-ownership conditions shall require the resolution of other partners. It should be stressed that there is no universal catalogue of activities which fall within ordinary course of business or those which are beyond the partnership ordinary affairs. **The question whether an activity may be undertaken by one or**

all partners by resolution should be answered dependent on the circumstances of the case.

If the partnership agreement failed to specify the **rules of representation**, the rules of the Civil Code would apply. This means that:

- Where the intended contract concerns the ordinary course of business, it may be **made by one partner**;
- Where the intended contract is out of the ordinary course of business (usually sale of real property), it should be **made by all partners**.

As is seen from the above, **rules of representation in a civil partnership are dependent on the rules of management**. It needs emphasizing that **lack of the resolution of all partners** in the situation where such a resolution was required because of the nature of an act to be undertaken (as it belonged to the acts which are beyond the partnership ordinary affairs) **may have no effect for the validity of the contract made by a partner with the third parties if making such a contract is consistent with the rules of representation specified in the partnership agreement**. For example, one of the partners sold real property owned by all partners. As mentioned above, such a decision should be made by all partners by resolution. Despite making the decision by one partner (without asking others for permission), the sale might be valid and fully effective to the third parties if the contract of the partnership stated that the partnership may be represented by one partner.

4. REGISTERED PARTNERSHIP (*SPÓŁKA JAWNA*)

Regulation of registered partnership in Poland

It is regulated mostly in Section I of Title II (Articles 22–85) of Code of Commercial Partnerships and Companies. The section is called “Registered partnership”.

The following provisions shall apply to registered partnerships:

- general provisions of the Code of Commercial Partnerships and Companies (Article 1–7)
- general provisions on partnerships (Article 8–9)
- provisions of the Code of Commercial Partnerships and Companies as far as mergers with the participation of partnerships are concerned (Article 491–494, 517–527)
- provisions of the Code of Commercial Partnerships and Companies about transformations of partnerships (Article 551–576, 581–584)
- provisions of the Civil Code about the business name of an entrepreneur and the commercial power of attorney (*prokura*) (Article 34²–43¹⁰, 109¹–109⁹)
- provisions of the National Court Register Act of 1997.

In the case where certain issues concerning this partnership have not been regulated by the provisions of the Code of Commercial Partnerships and Companies, provisions of the Civil Code shall apply.

The definition of registered partnership

The definition of registered partnership is provided in Article 22 § 1 CCPC.

Under this provision a registered partnership shall be a partnership which conducts an enterprise under its own business name and is not any other commercial partnership or company.

A registered partnership, as well as professional partnerships, limited partnerships and limited joint-stock partnerships falls within a general category of commercial partnerships. These partnerships, however, are significantly different from the companies which include a limited liability company and a joint-stock company.

The registered partnership can be easily regarded as a model partnership as it is mostly based on the personal substratum which partners constitute. The aim of the registered partnership is running an enterprise. The term “enterprise” represents a type of business activity run on one’s own behalf, with a view to profit and in an organised and constant way.

Business name

Registered partnerships act under their own business. Its purpose is set forth by all partners in a deed of partnership.

The business name of a registered partnership shall contain (Article 24 § 1 CCPC):

- the surnames or business names (names) of all partners,
- or the surname (s) or business name (s) of one or several partners,
- designation “*spółka jawna*” [“registered partnership”]

Examples:

- a) if partners are: Anna Kowalska and Zofia Nowak the business name of the partnership may be as follows:
 - „Kowalska and Nowak sp.j.”
 - „Kowalska and Nowak *spółka jawna*”
 - „Anna Kowalska and Zofia Nowak *spółka jawna*”
 - „Anna Kowalska and partner sp.j.”
- b) if partners are: sp. z o.o. “MIS” and Anna Kowalska the business name of the partnership may be as follows:
 - „MIS sp. z o.o. and Anna Kowalska, sp.j.”
 - „Anna Kowalska and sp. z o.o. MIS, sp.j.”

Indication of a surname or a business name of the partners and specifying the kind of a partnership are elements necessary to register it.

Additionally the business name may contain other elements.

Example:

- if partners are Anna Kowalska and Adam Kowalski (married couple) –
- “Restaurant “Oasis” marriage Kowalscy, sp.j.”

Formation of registered partnerships

Deed

Registered partnerships arise upon registration (Article 25¹ § 1 CCPC).

The deed of a registered partnership may be concluded by:

- natural persons (e.g. marriage couple)
- legal persons (e.g. companies)
- imperfect legal persons (e.g. registered partnerships)

The deed of a registered partnership shall be made in writing under the pain of nullity (Article 23 § 1 CCPC).

The deed of a registered partnership shall include in particular:

- 1) the business name and the registered office of the partnership,
- 2) specification of contributions made by each partner and their values,
- 3) the objects of the partnership's activity,
- 4) lifetime of the partnership if definite.

Entering into the register

A registered partnership shall come into existence upon being entered into the register (Article 25¹ § 1 CCPC).

An application for registration of a registered partnership by a registration court shall include (Article 26 § 1 CCPC):

- the business name, registered office and address of the partnership,
- the objects of the partnership,
- surnames and forenames or business names of the partners and their delivery addresses,
- surnames and forenames of the persons who have the right to represent the partnership and the manner of representation.

The following documents shall be attached to the application for registration:

- the deed of partnership (Article 9 § 3 law on the National Court Register),
- the specimen signatures of persons entitled to represent the partnership made before the court or certified by a notary public (Article 26 § 3 CCPC).

Each partner shall have the right and duty to file the application for registration.

Relationships with Third Parties

Representation of the partnership

To the following persons are entitled to represent the partnership:

- partners,
- attorneys if they are appointed (first of all signing clerks)

As results from Article 29 § 1 CCPC every partner has the right to represent the registered partnership.

A partner's right to represent the partnership shall apply to all its court and out-of-court acts (Article 29 § 2 CCPC). However, a partnership deed may provide that a partner is deprived of the right to represent the partnership or that he is only authorized to represent it jointly with another partner or a holder of a commercial power of attorney (*prokurent*). A partner may be deprived of the right to represent the partnership only for important reasons by virtue of a final court decision. (Article 30 CCPC).

Responsibility of the partners for obligations of the partnership

Every partner shall be liable for obligations of the partnership with all his assets. This responsibility is:

- unlimited, joint and several (Article 22 § 2 CCPC) – every partner shall be liable for obligations of the partnership, without limits, with all his assets jointly and severally with the remaining partners and with the partnership,
- subsidiary (Article 31 CCPC) – a creditor of a partnership may carry out an execution from a partner's assets where execution from the partnership assets proves ineffective (subsidiary responsibility of the partner does not concern obligations which had existed before the partnership registration).

A person joining the partnership shall be liable for its obligations that arose before the day of his joining.

Contractual provisions in violation of the provisions of Articles 31 to 33 CCPC are not effective to third parties.

Internal Relationship in the Partnership

Conduct of the partnership affairs

Managing the partnership affairs is regulated in Articles 39 to 47 CCPC. Under the above provisions every partner has the right to manage the affairs of the partnership. He may, without a prior resolution of other partners, conduct affairs within the scope of ordinary partnership's activities. However, if before dealing with this affair at least one of the remaining partners objects to conducting such an affair, a prior resolution of partners shall be required. In affairs outside the scope of ordinary activities of a partnership the consent of all partners shall be required.

including the partners excluded from conducting the affairs of the partnership. A partner having the right to conduct affairs of the partnership may perform, without a resolution of other partners, an urgent act, the non-performance of which might bring serious damage to the partnership.

A partner may be deprived of the right to conduct the affairs of the partnership under the deed of partnership, or by resolution of partners. Under the provisions of CCPC conducting the affairs of the partnership may be entrusted to one or several partners under the deed of partnership or at a later date under the decision of the partners.

Partnership assets

Partnership assets shall be any property contributed to or acquired by the partnership during its existence (Article 28 CCPC).

Contributions into registered partnership assets shall be in the form of:

- Movable and immovable property,
- Money,
- Rendering work and other services
- Transferring onto the partnership or instituting the rights to exploitation of rights on estates immaterial
- Institute onto partnership contribution in form institute right to exploitation or collect profits from things or rights

Principles of participating by the partners in profits and the loss

The capital share of a partner shall correspond to the value of the contribution actually made. The partner shall neither be entitled nor obliged to increase the agreed contribution (Article 50 CCPC).

Every partner shall have right to equal share in profits and shall participate in losses in the same proportion regardless of the kind and value of contributions. In the event of doubts, the partner's share in profits determined in the partnership deed shall also apply to his share in losses. A partnership deed may release a partner from participation in losses (Article 51 CCPC).

A partner may demand division and payment of the whole profit at the end of each financial year. If partner's capital share was reduced as a result of loss incurred by the partnership, the profit shall be first of all allocated for supplementation of partner's share (Article 52 CCPC).

A partner shall have the right to demand every year the payment of interest in the amount of 5 per cent of his capital share, even if the partnership incurs a loss.

Dissolution of Partnership

Reasons for dissolution of the partnership

The partnership shall be dissolved upon striking off the register (Article 84 §2 CCPC).

The following shall result in the dissolution of the partnership (Article 58 CCPC):

- reasons envisaged in the partnership deed,
- unanimous resolution of all partners,
- declaration of bankruptcy of the partnership,
- death of a partner or declaration of his bankruptcy,
- termination of the partnership deed by a partner or partner's creditor,
- valid court judgment: every partner may, for valid reasons, demand the dissolution of partnership by court (Article 63 §1 CCPC), any contrary provisions of the deed shall be null and void (Article 63 §3 CCPC).

If the partnership was set up for a definite period of time, every partner may terminate the deed of partnership by a six months' notice before the end of a financial year. The deed of partnership may shorten or lengthen the above period of time. Termination shall be made in the form of a written declaration which shall be submitted to the remaining partners or the partner authorized to represent the partnership (Article 61 §3 CCPC).

Continuation of Partnership Activity Despite the Reasons for Dissolution

Continuation of the partnership activity with the same partners

In spite of the fact that there exist reasons for the partnership dissolution provided in the deed of partnership (Article 58 §1 CCPC), the partnership shall be regarded as prolonged for an indefinite period of time if, in spite of the occurrence of grounds for dissolution provided for in the deed, it continues its activity with the consent of all partners (Article 59 CCPC).

Continuation of the partnership activity with new partners

In spite of the reasons for the dissolution of the partnership it shall continue its activity in the following situations:

- if the heirs of a deceased partner join the partnership,
- if the partnership continues its activity in spite of death or declaration of bankruptcy of the partner and in spite of termination of the partnership deed by a partner or his creditor (Article 64 §1 CCPC),
- if court decides to exclude partner from partnership (Article 63 §2 CCPC).

Liquidation

If there exists a reason for the dissolution of the partnership, shall carry liquidation partnership, in other way partners adjusted other manner end of activity partnership. Ending the partnership activity in the way other than liquidation is possible if it is provided so in the deed of partnership and in an agreement made after the reasons for the dissolution of the partnership had occurred.

If a reason for the partnership dissolution occurred and the other way of ending the activity by the partnership had not been specified, the liquidation procedure must be carried out (Article 67 § 1 CCPC).

Every liquidator shall have the right and duty to notify the registration court about opening liquidation (Article 74 § 1 CCPC).

Liquidation shall be conducted under the partnership's business name with an additional designation "in liquidation" (Article 74 § 4 CCPC). The partnership in liquidation is governed by the provisions about internal and external relations in this partnership, unless the provisions of Chapter V on liquidation state otherwise or unless otherwise results from the purpose of liquidation.

All partners shall be liquidators. Partners may appoint only some of them to be liquidators, as well as other persons. The resolution shall be unanimous unless the partnership deed provides otherwise (Article 70 § 1 CCPC). A liquidator may be removed from office only by a unanimous resolution of partners (Article 72 CCPC).

The registration court may, for valid reasons, upon application of a partner or another person having a legal interest, appoint only some partners, as well as other persons to be liquidators (Article 71 § 1 CCPC). For valid reasons, the registration court may remove a liquidator from office upon application of a partner or a person having a legal interest. Only court may remove a liquidator who was appointed by the court (Article 73 § 1 and 2 CCPC).

After opening the liquidation, liquidators shall have the duty to the following actions: (Article 77 § 1 CCPC):

- ending the current interests of the partnership,
- collecting receivable debts,
- fulfill obligations,
- liquidate assets of the partnership,
- remaining assets of the partnership shall be divided among the partners (Article 82 CCPC).

Liquidators shall have the right to conduct affairs of the partnership and to represent it. Limitation of their competence shall not be effective against third parties (Article 78 § 1 CCPC).

Opening liquidation shall result in expiration of a commercial power of attorney (*prokura*). During the period of liquidation, a commercial power of attorney (*prokura*) shall not be granted (Article 79 CCPC).

Liquidators appointed by the court shall obey unanimous resolution adopted by partners and by persons having legal interest, who caused them to be appointed (Article 77 § 2 CCPC).

If there are several liquidators, they shall be authorized to represent the partnership jointly unless the partners or the court which appointed the liquidators decided otherwise. The matters in which a resolution of liquidators is required shall be decided by a majority of votes unless the partners or the court which appointed the liquidators decided otherwise. (Article 75, 76 CCPC)

Liquidators shall report the end of liquidation and file an application for removing the partnership from the register. In the case of the dissolution of the partnership without liquidation, the partners shall be under a duty to file the application (Article 84 § 1 CCPC).

A partnership shall be dissolved upon removal from the register (Article 84 § 2 CCPC).

The books and documents of a dissolved partnership shall be deposited with a partner or a third party to keep for a period of at least five years. If the partner or third party dissents, the registration court shall appoint the custodian (Article 84 § 3 CCPC).

Partners and persons having a legal interest shall have the right to inspect the books and documents (Article 84 § 4 CCPC).

5. LIMITED PARTNERSHIP (*SPÓŁKA KOMANDYTOWA*)

Nature

The Code of Commercial Companies and Partnerships of 2000 introduced to the Polish legal system a new form of legal entity to be known as a limited partnership (*spółka komandytowa*). A limited partnership does not enjoy legal personality, however, as in the case of a registered partnership (*spółka jawna*), it is treated under the law as a separate legal entity. The limited partnership starts to exist as such on the date of its registration. Before the registration it may be considered merely as a contract made between the partners, not a separate subject of law.

The provisions concerning limited partnerships are contained in Title II Section III (Articles 102–124 of the Code), however, the regulation under this section is **not complete**. One should bear in mind that to study the nature of a limited partnership it is necessary to master the provisions of the Code on registered partnerships (pursuant to Article 103 in the cases not regulated in Section III on limited partnerships, it shall be governed by the provisions on registered partnerships, unless the law provides otherwise).

A specific nature of a limited partnership is reflected in the fact that there are **two categories of partners**: at least one partner (a limited partner, *komandyta*-

riusz) whose liability for debts and obligations is limited to the amount set forth in the deed of partnership and entered in the court register and at least one partner (a general partner, *komplementariusz*) whose liability for debts and obligations is unlimited. The other particular feature of a limited partnership is that the legal position of a limited partner is restricted to a large extent if compared to the position of a general partner. It implies that he may not manage the partnership affairs nor represent it (there are, however, exceptions).

Formation

The formal requirements which must be complied with to set up the limited partnership are:

- entering into a contract of partnership and
- registering it with the National Court Register.

It should be noted that, unlike in the case of a general partnership (*spółka jawna*), the contract must be notarized. If the partners fail to make the contract in the form of a deed it is null and void, an additional consequence being that the partnership may not exist as a subject of law.

As regards the registration, it must be noted that the moment of registration is equal to the beginning of the partnership existence under the law.

Liability

As mentioned above, the liability of the partners is **differentiated** and is based on the rule of limited liability of at least one partner and unlimited liability of at least one partner. The liability of a limited partner is restricted to the amount set forth in the deed of partnership and entered in the court register. It is worth mentioning that limiting the liability of one of the partners should not in practice lead to the situation where he is completely relieved from liability.

All partners are **liable jointly and severally** together with the partnership for the partnership obligations which means that a creditor may sue any of the partners and/or the partnership. In the case where a partner or the partnership satisfies the creditor's claim, the remaining debtors shall be relieved from liability.

However, the liability of the partners is **subsidiary** in relation to the liability borne by the partnership. This means that the creditor may apply for execution to be carried out against partners' personal property only after the execution against the partnership property has been returned unsatisfied. It must be stressed that the above rule is without prejudice to the right of a creditor to sue any of the partners before the execution against the partnership property has been returned unsatisfied. However, even if his action against the partners is successful, he will have no possibility to satisfy his claims from partners' personal property. The basics of the liability in limited partnerships is illustrated in the table below.

Who is liable	Limitations on liability (if applicable)
Partnership	Liability without limitations
General partner (<i>komplementariusz</i>)	Liability without limitations
Limited partner (<i>komandytariusz</i>)	Liability with limitations up to the value set forth in the deed of partnership and entered in the court register

Representation and management

The right to represent and manage the partnership affairs is basically vested in general partners. Limited partners may not represent the partnership unless they are granted an ordinary power of attorney or a commercial power of attorney (*prokura*). As far as the right to manage the partnership is concerned, a limited partner may not exercise this right unless the contract of partnership provides otherwise.

6. PROFESSIONAL PARTNERSHIP (*SPÓŁKA PARTNERSKA*)

Nature

A characteristic feature of this partnership is that:

- all partners must be **natural persons** (the partnership may not be set up by legal persons nor other legal entities such as commercial partnerships);
- all partners must be **authorized by law to render a professional service**.

The law enumerates the professional services which may be rendered within the framework of the professional partnership. These include: advocates, pharmacists, architects, building engineers, certified auditors, insurance brokers, tax advisors, accountants, medicine doctors, dentists, veterinary doctors, notaries, nurses, midwives, legal advisors, patent attorneys, property experts and sworn translators.

Formation

Setting up the professional partnership requires:

- entering into a contract which must be made in the form of a deed (otherwise it shall be null and void) and
- registration with the National Court Register.

Liability

Since the professional partnership is a legal entity (though not a legal person) it may be made liable for its own debts. Additionally, the personal character of the partnership implies that the liability for the partnership debts is also borne by the partners. However, the law modifies these rules to a large extent and assumes the rule that **the partner may not be made liable for the debts and obligations which arose in connection with rendering a professional service by another partner**. Article 95 of the Code provides that a partner shall not be liable for partnership obligations arising in connection with the practicing of a freelance

profession within the partnership by the remaining partners or for obligations of the partnership resulting from actions or omissions of persons employed by the partnership under an employment contract or on a different ground, if those persons reported to another partner in rendering their services within the partnership. This means that, e.g., a partner may not be made liable for obligations which arose due to a wrongful surgical operation performed by other partners if such an operation gave rise to claims for damages on the part of a patient.

Representation and management

The rules of representation and management are similar to those which are applied to registered partnerships (*spółka jawna*), except for the fact that the **partners may agree that a board of directors be appointed**. In such a case the directors will exercise the right to represent and manage the partnership according to the same rules which apply to directors in a limited liability company (see below).

7. LIMITED JOINT – STOCK PARTNERSHIP (*SPÓŁKA KOMANDYTOWO-AKCYJNA*)

Introduced to the Polish legal system in 2000, limited joint – stock partnerships remain quite rare business organisations in comparison with other forms of partnerships. It is a combination of limited partnerships and joint – stock partnerships. Consequently, the liability of the partners reflects the liability of an unlimited partner in a limited partnership and the liability of a shareholder in a joint – stock partnership: at least **one partner remains fully liable** for the debts of the partnership and at least **one partner is not liable for the partnership debts at all**.

The dualistic nature of this partnership is reflected in that:

- the relations between unlimited partners inter se as well as their relation with the shareholders and the third parties are governed by the Code provisions on registered partnerships,
- other matters are governed by the provisions of the Code on joint – stock companies, in particular the provisions on shares, contributions made by the shareholders, share capital, general shareholders meeting and supervisory board.

CHAPTER IV

Companies

1. A COMPARATIVE OVERVIEW OF COMPANIES THROUGHOUT THE WORLD

To provide a better understanding of Polish companies their foreign equivalents are presented in table below and a brief description of the company types in various countries follows.

Poland	Germany	Italy	Spain	United Kingdom	Japan
<i>Spółka z ograniczoną odpowiedzialnością</i> (limited liability company)	<i>Gesellschaft mit beschränkter Haftung</i> (GmbH), limited liability company	<i>società a responsabilità limitata</i> art. 2462 CC – 2474 CC	<i>sociedad limitada</i> (S.L.)	Private company	<i>Yūgen Gaisha</i> (closed corporation)
<i>Spółka akcyjna</i> (joint – stock company)	<i>Aktiengesellschaft</i> (AG), stock company	<i>società per azioni</i>	<i>sociedad anónima</i> (S.A.)	Public company	<i>Gaisha Kabushiki</i> (public corporation)
No equivalent among the companies, however, see the chapter on the Polish limited partnership	<i>Kommanditgesellschaft auf Aktien</i> , company limited by shares	<i>società in accomandita per azioni</i> art. 2452 CC – 2461 CC	-	No equivalent among the companies, however, see the chapter on the English limited partnership	-

Germany

German companies like in other countries enjoy legal personality which means that the company is the owner of the assets contributed by the shareholders. The document setting forth the basic rules on which the company is organized is called *Satzung*. The German law recognizes the following companies:

***Gesellschaft mit beschränkter Haftung* (GmbH)**, limited liability company. This form of a company is predominant in Germany: in 2000 there were more than 1 million limited companies, whereas the number of stock companies was around 10500 and the number of *Kommanditgesellschaft auf Aktien* was just 100⁵.

⁵ Assman H. D., Lange B., Sethe R., *The Law of Business Associations* (in:) *Introduction to German Law*, 2nd Edition, Kluwer Law International 2005, p. 143.

The limited liability company is regulated under the *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* of 1893, as amended on 9 December 2004. The company may be formed by one or more persons who are not personally liable for the obligation of the company. The setting up process is less formalistic than in the case of *Aktiengesellschaft* (stock company). There are two bodies of the company that are considered mandatory under the law, namely the shareholders' meeting and directors. The shares are transferable and inheritable. There is a requirement of a share capital which must amount to at least 25 000 EURO which is likely to be lowered on 1 January 2006 to 10 000 EURO⁶.

Aktiengesellschaft (AG), stock company. This type of a company is regulated under the Stock Company Act of 1965 (*Aktiengesetz*). It is a corporation with a fixed capital divided into transferable shares. Shareholders are not personally liable for the company's obligations. The company becomes a legal entity upon registration in the commercial register. To register the company the following requirements must be met⁷:

- 1) The memorandum of association must be signed by at least one founder in a notarized form,
- 2) The founders have to subscribe for all shares,
- 3) The founders must elect the first auditors and the supervisory board,
- 4) The founders deliver a written incorporation report,
- 5) An application for registration is made.

Kommanditgesellschaft auf Aktien, company limited by shares. This company is a combination of a limited partnership (*Kommanditgesellschaft*) and a stock corporation (*Aktiengesellschaft*). There are two groups of members: general partners (*Komplementäre*) and the shareholders (*Kommanditaktionäre*). General partners carry on the company's affairs and are personally liable for the obligations of the company. Shareholders are not liable for the obligations⁸.

Italy

There are three types of companies under the Italian law: *società a responsabilità limitata* (limited liability company), *società per azioni* (stock corporation) and *società in accomandita per azioni* (limited stock corporation). As seen from the above table, Italy recognizes the same types of companies as Germany. The characteristic feature is that *società in accomandita per azioni*, though its equivalents may be set up under the Polish or Spanish law, fall within the category of companies rather than partnerships (as is the case in Poland).

⁶ Assman H.D., Lange B., Sethe R., *The Law of Business...*, p. 158–159.

⁷ Assman H.D., Lange B., Sethe R., *The Law of Business...*, p. 147.

⁸ Assman H.D., Lange B., Sethe R., *The Law of Business...*, p. 157.

Spain

Sociedad limitada (S.L.). Regulations concerning this company are included in the law of 23 March 1995 on limited liability companies⁹. The above mentioned regulations are amended by the Law of 1 April 2003 on Limited Liability Company Nueva Empresa¹⁰. About 95 per cent of all companies set up in Spain fall within the first category.

The share capital of limited companies is divided into shares (*participaciones sociales*). The shares are not freely transferable as the law provides for some limitations in this respect. The restrictions are applicable to both types of companies (Articles 29–34 LSL). Restrictions applicable solely to LSLNE are included in Article 136 LSL which provides that shares in this company may be transferred only to natural persons. This restriction results from the fact that members of the company Nueva Empresa may be solely natural persons. If the shares are transferred to legal persons, they must retransfer them to natural persons within 3 months. In the case where that duty is not satisfied the company Nueva Empresa shall be governed by the law applicable to limited companies of the basic type.

Sociedad anónima (S.A.). The companies of this type constitute only 3 per cent of all companies in Spain. Regulations concerning Spanish stock corporations are included in the law on stock companies (*Ley de Sociedades Anónimas*)¹¹. The share capital of the company is divided into shares (*acciones*), a consequence of this fact being that a share is seen as a part of the share capital (*la accion como parte del capital* – Article 47 LSA). A share is also seen as a bundle of rights of a shareholder (*la accion como conjunto de derechos, derechos del accionista* – Article 48 LSE).

United Kingdom

The distinction is drawn between:

A company limited by shares. The liability of a member to contribute to the company's assets is limited to the amount, if any, unpaid on his shares. The vast majority of registered companies are companies limited by shares. Such companies must have a share capital.

A company limited by guarantee. The liability of a member is limited to the amount which he has undertaken to contribute in the event of its being wound up.

⁹ Ley 2/1995, de 23 de marzo, de Sociedades de Responsabilidad Limitada, hereinafter referred to as LSL. The law is available on the website http://noticias.juridicas.com/base_datos/Privado/l2-1995.html#a26.

¹⁰ Ley 7/2003, de 1 de abril, de la Sociedad Limitada Nueva Empresa, hereinafter referred to as LSLNE. The law is available on the website www.circe.es.

¹¹ Real Decreto Legislativo 1564/1989, de 22 de diciembre, por el que se aprueba el texto refundido de la Ley de Sociedades Anónimas (LSA); full text available on the website: http://noticias.juridicas.com/base_datos/Privado/rdleg1564-1989.html#c4. The is hereinafter referred to as LSA.

Companies limited by guarantee may not have a share capital if they were formed after 22 December 1980.

An unlimited company. The liability of a member is unlimited. Unlimited companies may or may not have a share capital.

Another classification of companies is into public and private companies.

A public company is a limited company with share capital which has a memorandum stating that it is a public company and which has been registered or re-registered as such. The vast majority of registered companies are private companies. A public company cannot commence business unless it has actually allotted shares up to the authorized minimum and has received at least one quarter of that amount. The minimum number of members and directors for a public company is two.

There are three requirements for the registration of a company as a public company:

- Its memorandum and its name must state that it is a public company. Its name must end with the words “public limited company” (frequently abbreviated to “plc”). A private company the word “Limited” or Ltd” at the end of its name;
- The memorandum must be in the special form;
- The company must have an authorized capital figure (the amount of shares it may issue to the public) of at least the authorized minimum.

Private companies. A company which is not a public company is a **private company**. Private companies are not required either to restrict the transferability of their shares or to limit the number of members involved, although most private companies do have such restrictions and are small in size. They **cannot apply to be quoted on the stock exchange and it is a criminal offence for a private company to make an offer of its shares to the public. The minimum number of members in private companies is one** (a single member company). The same applies to the number of directors. It needs **no minimum capital** either for registration or the commencement of business.

Japan

Yūgen Gaisha (closed corporation). There are restrictions on the number of shareholders and the transfer of shares. A characteristic of the closed corporation is that it can have no more than 50 shareholders. Shares are freely transferable among existing shareholders but to transfer the shares to a person from the outside of the company the approval of the shareholders’ meeting is required. If such a transfer is not approved the shareholders must designate another person to whom the shares may be transferred¹².

¹² Yanagida Y., *Law and Investment in Japan, Cases and Materials*, Second Edition, Harvard University Press, 2000, p. 304.

Gaisha Kabushiki (public corporation). Transfer of shares is basically not restricted which means that the shares are freely transferable to non shareholders. Shareholders are liable only to the extent of their capital contributions. Shares are freely transferable unless the articles of incorporation provide that transfer of shares requires the approval of the board of directors¹³.

2. NATURE OF COMPANIES UNDER THE POLISH LAW

The nature of companies may be described by making a brief reference to partnerships. Differences and similarities of commercial partnerships and companies under the Polish law are illustrated in table below.

Differences and Similarities Concerning	Commercial Partnerships	Companies
1	2	3
Legal personality	They do not enjoy legal personality, however they are treated as legal persons	They enjoy legal personality
Requirements with respect to the name	The name of a partner must be used in the name of a partnership	The name a company bears does not need to be related to the names of shareholders
Number of persons setting up	At least two	At least one
Formalities which must be complied with to set up	Relatively few formalities	More formalities, including contributions to the share capital and appointment of directors
Rules of representing	All partners are entitled to represent*	Members of the company (shareholders) are not entitled to represent, except the case where they are appointed as the members of the board of directors. As a rule the directors have the right to represent
Rules of administration	All partners are entitled to manage the partnership’s affairs*	Members of the company (shareholders) are not entitled to represent, except the case where they are appointed as the members of the board of directors. As a rule the directors have the right to administer

¹³ Yanagida Y., *Law and Investment ...*, p. 303.

1	2	3
Transfer of shares	Allowed only in the case where the partners agreed to the transfer in the contract of partnership (such a provision must be included in the contract of partnership); additionally all partners must agree to the transfer on the date of the transfer. These restrictions are based on the idea that the partnership should basically exist between the same partners who concluded the contract of partnership	Transfer of shares is a rule, not an exception
Liability for debts and obligations	Partners and the partnership itself is liable since it is treated as if it enjoyed legal personality	Only a company is liable. Members of the company may be held liable in the situations where they are members of the management board (Article 299 CCC)
Right to control	The right is vested in the partners	There may be special bodies the function of which is controlling the company affairs. However, in the case of a limited liability company shareholders have this right unless they are deprived of it in the situations where a supervisory board or a revision committee has been established in that company
Influence on the decisions making process	As a rule, the scope of rights the partners enjoy is not dependent on the value of contributions they have made. The value of contributions is not reflected in the number of votes each partner may cast	The more contributions a partner has made the more votes he is entitled to cast. Consequently, the shareholder whose contributions were of higher value will have more influence on the decisions making process
Death of a partner or shareholder	A partner's death basically results in the dissolution of a partnership	Despite the death of a shareholder the company exists. The shares of the deceased shareholder are inherited by his testamentary or statutory heirs

* There are exception in the case of a limited partnership

3. COMPANIES IN ORGANISATION (IN THE PROCESS OF SETTING UP)

Before the company registration some persons may make contracts on its behalf. The question arises if such contracts are binding on the company. The answer is dependant on the nature of a company which is in the process of setting up (has not been yet registered). The above problem has been regulated in various ways, e.g. in Britain contracts made before the company registration are not binding on the company when it is formed. It is due to the fact that before registration the company lacks capacity to make the contract and it is not possible to contract on behalf of a principal who is not in existence. A company cannot, after registration, enforce a contract made in its name before registration, or sue for damages for breach of such a contract.

As opposed to the regulation in Britain, Poland follows the rule that companies before registration do enjoy capacity to contract. Though they are not legal persons, **they are treated under the law as if they enjoyed legal personality.** The consequence is that **the company before registration may be a party to a contract, may be an owner of the assets contributed by the shareholders, may sue and may be sued.**

The above has most important consequences for the liability for the obligations of the company which arose before its registration. Since the company has a capacity to contract and is the owner of its property, **such a company is considered by the law as a person liable for its obligations.** Other persons liable for the company obligations which arose before its registration are **persons who dealt with the third parties in the name of the company** (such as directors if they had been appointed or a representative appointed by the resolution of the shareholders meeting) and **shareholders.** The latter may be liable for the company obligations only if they failed to make full contributions to which they were obliged under the contract. If they made contributions in part, they are liable for the company obligations only to the value of the contributions which has not been made. Summarizing, both the company and persons dealing in its name are liable up to the total value of the obligation, whilst the shareholders liability is limited.

As regards the liability of the registered company for the obligations which arose before its registration, Article 12 CCPC provides that **on the date of registration the company becomes the subject of all rights and obligations of the company which has not been registered** (company in organisation). This means that a creditor to whom the company owed debts before registration may now sue the registered company. Additionally, he may sue persons who dealt in the name of the company before registration as well as shareholders (provided that the preconditions of their liability are met, see above). The liability of those persons expires in relation to the registered company on the date of ratification of their act

by the shareholders meeting (in limited companies, see: Article 161 § 3 CCPC) or general meeting (in joint – stock companies, see: Article 323 CCPC). Obviously, their liability does not expire in relation to the third parties (creditors).

It should be stressed that **the company in organisation may be an entrepreneur under the Polish law**. This will have various consequences e.g. the company before registration should be sued before the court of commerce (*sąd gospodarczy*) and not an ordinary civil court. The questions might arise, however, if a dispute arising between the members of such a company is subject to the proceedings before the court of commerce. The fact that a company is not registered with the National Court Register does not imply that it may not be treated as an entrepreneur. Article 4.1 of the Law on Freedom of Business Activity provides that entities without legal personality which under the law are granted legal capacity are entrepreneurs. As mentioned above not registered companies do enjoy legal capacity though are not formally legal persons. The consequence is that they must be treated as entrepreneurs if only they carry on a business. Having said this, it must be clear that companies before registration must be treated as entrepreneurs under the Code of Civil Procedure: Article 479² § 1 specifies that subjects which are entrepreneurs pursuant to the provisions on business activity are treated as entrepreneurs under the Code of Civil Procedure.

The company in organisation, though it is similar to registered companies in some respects, **shows several differences if compared to the companies after registration**. Firstly, such a company may not grant a commercial power of attorney (*prokura*) since it is not subject to registration. Secondly, the shares in such a company are not transferable (Article 16 CCPC).

4. LIMITED LIABILITY COMPANY

Limited liability company in general

The limited liability company regulated in Articles 151–300 CCC enjoys the following characteristics:

- **As a separate legal person is liable for its debts and obligations whereas members of the company may not be made liable**. It should be noted that “limited liability” should not be referred to the liability of the company (as the name “limited liability company” might suggest). The company is liable for all its debts and obligations without any limitations with its entire property. What is limited is the economical liability of the company members. They make certain contributions of a given economical value and they may be certain that economical risk they undertake is limited to that value. It means that in the case of economical failure of the company business the risk of the company members is that of losing what they have contributed to the company property. Hence, the

word “limited” is a misnomer as the company’s liability for its own debts is not limited, but it is the members of the company who are not liable for its debts. One should bear in mind that the company members are not legally liable for the company debts. They may not be sued for the company debts and obligations (however, there are exceptions).

- **The position of a company member**, perceived as a bundle of his rights and obligations, is made **dependent on the value of contributions** made by a given shareholder.
- The **contributions** must be made by all shareholders. Their total value forms the so called **share capital** (*kapitał zakładowy*) which is the basis of the company liability towards its creditors.
- Unlike in the case of a joint – stock company, the shares may not take the form of listed securities.

Setting up a limited liability company

Every limited company must be based on the **agreement** made between the persons setting up the company. This agreement is called *umowa spółki*. It includes the data which are usually contained in a memorandum of association¹⁴ and articles of association¹⁵ in the case of British companies. Because of the fact that *umowa spółki* is equivalent both to a memorandum and articles none of this phrases will be used separately in relation to the contract made between the founders of the company as it might blur its meaning and nature. Instead, the word contract will be used to reflect best the nature of the company fundamental act. The contract must be **concluded before a notary public**. Not complying with this requirement results in that the contract is null and void. The provisions of the contract may be altered in certain specified cases. Article 157 § 1 CCC provides that **the contract must include:**

1. The name of the company,
2. The registered office of the company,
3. The objects of the company,
4. The amount of share capital and statement if the share are divisible,
5. The statement of the company directors that all contributions have been made by the shareholders,

1. The general rule is that **any name** may be selected. However, a company may not be registered by a name which is prohibited. Further, the last word of the company name must be the word “*spółka z ograniczoną odpowiedzialnością*” or “*spółka z o.o.*” (an abbreviated form). Additionally, a name which is the same as a name appearing in the National Court Register is prohibited.

¹⁴ In general memorandum regulates the company’s external affairs.

¹⁵ The articles regulate the company’s internal affairs.

2. The company must have a **registered office** to which communications and notices may be addressed. The registered office must be in the territory of the Republic of Poland. The reason for requiring a company to have a specific registered office is that it is necessary to know where the communications and notices may be addressed and where the documents can be served on it. It is required that every company should mention its registered office and registered number and the address of its registered office, in legible characters on all its business letters and order forms. A company may change its address. The new address takes effect on the entry of that address on the register.

3. **The objects** of the company. Any contract which is outside the scope of the objects clause is valid. The Polish approach to this question differs a lot from the British *ultra vires* doctrine¹⁶.

4. At least **50 000 PLN must be collected** in cash or in kind contributions (personal or real property, transferable rights, including claims, securities, patents, trademarks).

5. The **false statement** may lead to directors **liability** on the ground of Article 291 CCC.

The setting up process is illustrated in table below.

Stage	Particular feature
Entering into a contract	The contract must be made in the form of a deed; on this date the company starts to be a subject of law though it does not formally enjoy legal personality
Contributions	The contributions must cover the whole share capital; these may be money contribution or in – kind contributions
Appointment of the company bodies	The board of directors must be appointed in each company irrespective of the amount of the share capital; in the case where the share capital exceeds 500 000 PLN and the number of shareholders is more than 25 a supervisory body must be established
Registration	Application for registration must be made within 6 months after entering into the contract; on the date of registration the company starts to exist as a separate legal person

The company bodies

In each limited liability company the only body which must be appointed is a **board of directors**. The other company body which exists *ipso iure* is a shareholders meeting. In some cases there is the duty to appoint another company body, i.e. supervisory board or a revision committee. Such a duty arises when the number of company shareholders exceeds 25 and the value of the share capital is more than 500,000 PLN.

¹⁶ According to it anything done which is outside the scope of the objects clause included in the memorandum of association was *ultra vires* and void. The reforms of 1989 effectively abolished the *ultra vires* rule as far as the third parties are concerned.

The power to appoint the directors is vested in the shareholders meeting unless the company agreement provides otherwise. This means that the shareholders may agree that the right to appoint members of the board may be exercised by a supervisory board.

Only natural persons who enjoy full contractual capacity may be appointed director (Article 18 § 1 CCC). Thus, as a rule, the possibility to perform this function is made dependent on age since contractual capacity is generally based on that a given person has reached the age of 18. On the other hand, there are no limitation while appointing as directors persons who, e.g. have reached the age of 70. Additionally, a person who was disqualified by the court may not be appointed director.

As regards **the powers** of the directors the law specifies that:

- The directors shall **manage the company**, and
- The directors shall **represent the company**, i.e. enter into agreements with the third parties as well as represent the company before the court and other institutions. **If the board is composed of at least two member the company must be represented by at least two members or one member acting with the holder of a commercial power of attorney (*prokurent*)**. This means that the contract entered into in the name of the company must be signed by at least two directors, otherwise it shall not be effective. If the contract is made by only one director, the other may approve the contract by giving his consent at a later date. **The above rules of representation may be changed in the company agreement**, i.e. the shareholders may provide that the company may be represented by one director, even if the board is composed of more than one member. It must be stressed that some contracts to be made by the directors require the **approval of the shareholders meeting** (Article 228 CCC and 17 § 1 CCC).

As to the shareholders meeting, there are two kinds of it: **annual meeting and extraordinary meeting**. The meetings may be **convened** by directors. In the case where the directors failed to call the meeting, it may be called by the supervisory board or revision committee. Additionally, under the company agreement other persons may be granted the right to call the meeting. In some cases, the shareholders may be entitled to call the meeting, after they have been authorized to do so by the court.

The meeting must be convened by **registered mail at least two weeks before the date of the meeting**. It also may be called by **email but only in the case where** the shareholder agreed in writing to receive the notice in such a form. If the above requirements are not complied with the resolution of the meeting may be contested under Article 252 CCC.

Rights and duties of shareholders

A share may be defined as **a part of the share capital** and in such a meaning it is measured by a sum of money, namely, the nominal amount of the share. Speaking more clearly, the share capital, the minimal value of which is to be 50,000 PLN, is divided into shares. The nominal value of each share is 50 PLN.

Secondly, a share may be defined as **a bundle of rights and obligations** arising from it.

Shares in a limited liability company may not take the form of securities.

The rights of the shareholders include:

- The right to dividend,
- The right to participate in the company assets in the case of its liquidation,
- The right to receive new shares in the situation where the share capital has been rise,
- The right to participate in the shareholders meeting.
- The right to vote,
- The right to contest the shareholders resolution.

It should be stressed that the above list is not complete and is solely intended to give a rough idea of what the shareholders rights are.

The basic duty of the company member is to cover his share. Other duties may include the duty to make additional payments to the share capital.

Classes of shares

A company is not bound to issue all its shares with the same rights but may confer different rights on different classes of shares. Such classes may be described as:

- ordinary shares (*udziały zwykłe*) and
- preference shares (*udziały uprzywilejowane*).

Preference shares are entitled to **some priority over the other shares** in the company. They usually carry a right to preference in payment of dividend, the right to preference in the repayment of capital in winding up and the right to more votes.

In limited liability company there is no distinction between registered shares and bearer shares (such distinction is drawn in joint – stock companies).

Transfer of shares

The basic feature of shares is that they are transferable, though the transferability of shares may be much more restricted than in joint – stock companies. There is a distinction between a transfer of shares and a transmission of shares. A transfer is by the act of the company member, whilst a transmission occurs by operation of law on the death of a member. Under Article 180 CCPC transfer of shares must be effected **in writing with the signatures of the parties** (the seller and the buyer) **certified by a notary public**. Not complying with this requirement results in that the transfer is null and void.

Secondly, the company (i.e. directors) must be notified of the transfer. Thirdly, directors are under the duty to prepare a new list of the company members and present it with the registration court. It must be emphasized that the two conditions are not required for the validity of the transfer. **The buyer becomes a member of the company on the date of concluding the sales contract.** Either notifying the company and presenting a new list of shareholders are not preconditions for the effectiveness of the transfer in relation to third parties. This is not true if we consider the effectiveness in relation to the company. Article 187 § 1 CCCP provides that the transfer shall not be effective to the company unless the company has been notified of the transfer. The practical meaning of this provision is that although before notifying the company of the transfer the buyer will be formally a new company member he will have difficulties in proving his legal status to the company and, e.g., in participating in voting.

Liability in a limited company

As mentioned above, the **company as a separate legal person is liable for its debts and obligations whereas members of the company may not be made liable**. Basically, other persons may not be held liable, either. This refers to the directors of the company as well as members of other company bodies. In some cases, the law specifies the conditions under which persons other than the company may be held liable for its debts and obligations. They are, however, the exceptions to the general rule.

The liability in a limited company is illustrated in table below. Only the liability under Article 291 and 299 CCC is the liability towards the creditors for the company debts. Other cases include the liability to the company for the damage incurred by it.

Subject liable	Type of liability	Conditions for liability	The rule on which the liability is based	Exclusions of liability	Significant feature
1	2	3	4	5	6
Directors (Article 291 CCC)	Liability for the obligations of the company to its creditors	Statement made by the directors that all shareholder made their contributions; deliberation or negligence on the part of directors	Guilt	If deliberation or negligence on the part of directors is not proved by the creditor the directors will be relieved from liability; Lapse of time	The liability exists for three years from the date of the company registration or rising of the share capital registration
Directors (Article 299 CCC)	Liability for the obligations of the company to its creditors	Proving that the execution against the company has been returned unsatisfied	Presumption of guilt	Proving that the petition for bankruptcy has been filed timely, or that a director is not	Presumably most common ground for directors liability

1	2	3	4	5	6
				responsible for not presenting that petition, or that despite the above failure to present the petition, there occurred no damage on the part of a creditor	
Persons involved in the setting up process (Article 292 CCC)	Liability for the damage made to the company	Acting contrary to the rules of law while setting up the company; guilt	Guilt	Creditors are unable to prove that directors acted contrary to the law	
Members of the managing and supervisory bodies as well as liquidators (Article 293 CCC)	Liability for the damage made to the company	Acting or omission to act contrary to the law or the company agreement	Presumption of guilt	Lack of guilt	Liability limited to a certain group of persons listed in Article 293 CCC

One of the most crucial exceptions from the general rule that the liability in a limited company is basically borne by the company itself is provided for in Article 299 of the Code which specifies **the conditions under which the company directors may be made liable for the company debts and obligations.**

One of the principal aims of the regulation providing for directors liability for wrongful trading is to encourage them to present a petition for bankruptcy when all reasonable expectation of saving the company has gone.

Article 299 Code of Commercial Companies provides that **only directors** of the company may be made liable for its debts. Due to the fact that the above article is an exception to the rule that only the company as a separate legal person may be held liable for its debts it cannot be interpreted widely. Thus the liability for the company's debts provided for in Article 299 cannot be extended to other persons not mentioned in that article. Consequently, it is clear that members of the supervisory board, liquidators as well as representatives cannot be held liable under that article. Obviously, the liability does not extend to the shareholders of the company.

It does not mean, however, that the shareholders who have been nominated as the company's directors are relieved from liability. Although Article 151 Paragraph 4 Code of Commercial Companies provides that the shareholders shall not be liable

for the debts of the company it does not exclude the application of Article 299 in respect of the shareholders who are the directors of the company¹⁷.

This means that **persons other than directors, such as the representatives of directors, the representatives of the shareholders as well as other persons which, irrespective of the ground on which they acted on behalf of the directors, may not be held liable.** Furthermore, persons who carried out the directors duties but were not formally appointed as directors are not liable under that article.

In determining whether a director may be held liable under Article 299 Code of Commercial Companies, the court must take into consideration a director's removal from office as well as his resignation. As a general point, however, resignation or removal from office by resolution in general meeting not disclosed in the National Court Register does not automatically lead to relieving such a person from liability though that person should be given a chance to be relieved from liability if he shows his lack of responsibility in relation to not presenting the petition for bankruptcy.

The grounds for liability

The grounds for directors liability are contained in Article 299 Code of Commercial Companies which provides that *'If execution against the company is returned unsatisfied directors shall be made liable for the company's debts'*. Having said this, it appears to be clear that the only thing the creditor has to prove is **ineffectiveness of the execution against the company** (*bezskuteczność egzekucji*).

Though there is only one ground for directors liability which is clearly expressed in the above article, i.e. "ineffectiveness of execution", many authors argue that in fact there is also another, namely "the existence of a debt against the company". This statement is widely accepted by the courts. In several judgments they held that the creditor proving "ineffectiveness of execution" against the company under Article 299 Code of Commercial Companies may not sue the director if he is not in a position to present a "writ of execution" against the company.

Ineffectiveness of execution, according to the interpretation of this term that is largely accepted by the courts, **means the situation where it is doubtful whether the debts may be recovered from the company's property.** In other words, this term implies the situation where it is obvious in the circumstances of the case that the company has no property which could be used for the satisfaction of the creditor's debts.

The consequence of the above statement is that the creditor suing the directors on the grounds specified in Article 299 Code of Commercial Companies is **not**

¹⁷ The Judgment of the Supreme Court of 14 February 2003, IV KKN 1779/00, OSNC 5/2004, item 76.

obliged to prove that he has made use of all possible ways of recovering his debts. The creditor may be relieved from the obligation to institute his own formal proceedings aimed at the recovery of his debts in the situation where impossibility of effective recovery of the debts by means of that proceedings is obvious in the circumstances of the case. What is necessary is that **the creditor must be able to prove that the ways of recovering his debts which are provided for in the Code of Civil Procedure would fail to lead to the satisfaction of his debt.**

Obviously, undisputable way of proving that execution is likely to be returned unsatisfied is instituting the proceedings by the creditor under the provisions of the Code of Civil Procedure or Act on the Executive Proceedings in Administration.

Other proofs include:

- A court's decision to dismiss the petition for bankruptcy on the ground that the debtor's property is not sufficient to satisfy the costs of the proceedings: Article 13¹ and 13² Bankruptcy and Rehabilitation Law;
- a court's decision to discontinue the bankruptcy proceedings on the ground that the debtor's property is not sufficient to satisfy the costs of the proceedings: Article 361 point 1 Bankruptcy and Rehabilitation Law;
- proving that execution against the company under the Code of Civil Procedure or under the Law of Executive Proceedings in Administration initiated on the application of a person seeking to satisfy his debts from the directors or on the application of any other person in relation to the entire property of the company was ineffective;
- not revealing the company's property under Article 913 Code of Civil Procedure before or after the execution was initiated on the application of a person seeking to satisfy his debts from the directors or on the application of any other person;
- a balance sheet of the company proving that the assets of the company are not sufficient to satisfy the debts which fall due to the person seeking the satisfaction from the directors;
- all other proofs showing that in the given circumstances it is not likely to satisfy one's debts from the remaining property of the company¹⁸.

Furthermore, in order to prove ineffectiveness of execution it is enough to prove that the only property of the company is a real property which was mortgaged beyond its value¹⁹.

¹⁸ Judgments of the Supreme Court of 9 June 1937, I C 1927/36, OSN 1938, nr 4, item 184 and of 14 February 2003, IV CKN 1779/00. The statements expressed in those judgments in relation to proofs which may be found satisfactory to show ineffectiveness of execution were accepted in the recent judgment of the Supreme Court of 14 February 2003, IV CKN 1779/00, OSNC 2004, nr 5, item 76.

¹⁹ The judgment of the Supreme Court of 9 June 1937, I C 1927/36, OSN 4/1938, item 184.

Grounds for relieving a director from liability

1. Presenting a petition for bankruptcy or a petition for opening arrangement proceedings

This may lead to relieving a director from liability if the court is satisfied that the relevant petition was presented in accordance with the rules set out in Article 21 Bankruptcy and Rehabilitation Law.

2. Lack of responsibility for not presenting the petition

Some authors argue that a director may be relieved from liability if, due to the division of powers in the articles of association, he was not in a position to exercise control over the company affairs as he did not have contact with documents of the company which could enable him to estimate its financial condition. Others claim that as a rule the division of responsibilities between directors cannot lead to discharging them from the duty to possess information on substantial problems of the company. Arguably, the information on the financial condition of the company falls within this category. Thus the mere fact that a director has not been involved in the management of the company's financial affairs due to organizational agreements between directors may not discharge him from responsibility.

A good example of the circumstances which lead to the relief of a director from liability is the impossibility of carrying out his duties due to a long-lasting disease or a long stay abroad. In such circumstances it may occur that a director had no possibility of learning that the grounds for bankruptcy existed. However, no rule of general application can be formulated in this respect. It may be the case that despite his disease or stay abroad a director had access to the documents of the company or knew about its condition from other sources which means that he knew that the grounds for bankruptcy occurred. This will automatically lead to depriving a director of his chance to claim that he cannot be made responsible for delaying the petition for bankruptcy.

3. Lack of damage on the part of a creditor

Among the circumstances relieving a director from liability set out in Article 299 Para 1 is proof that despite a director failed to present a petition for bankruptcy or for opening arrangement proceedings a creditor did not suffer damage. This includes situations where a director is in a position to prove that the creditor would be equally harmed even though the petition was presented timely.

The liability under Article 299 of the Code is illustrated in the table below.

Who is liable?	Only directors Persons who may NOT be made liable: – members of the supervisory board, – liquidators, – representatives, – the shareholders of the company, – the representatives of directors, – the representatives of the shareholders, – other persons who acted on behalf of the directors, – persons who carried out the directors duties but were not formally appointed as directors.
Grounds for liability	Ineffectiveness of the execution against the company
Grounds for relieving from liability	– Presenting a petition for bankruptcy or a petition for opening arrangement proceedings, – Lack of responsibility for not presenting the petition, – Lack of damage on the part of a creditor.

Directors disqualification

At present the provisions relating to directors disqualification are contained in Section 10 of Bankruptcy and Rehabilitation Law²⁰ which came into force on 1 October 2003 and superseded the provisions set out in the Bankruptcy and Arrangement Law which had hitherto governed this area.

There are various **grounds under which a director may be disqualified**. Article 373¹ Bankruptcy Law provides that the court may make a disqualification order in relation to a person who:

1. failed to present a petition for bankruptcy within two weeks after the grounds for bankruptcy appeared if he had a duty to do so or,
2. having a legal obligation to do so, after the bankruptcy has been declared, failed to give over or reveal the property, company's books, correspondence and other documents of the debtor, or
3. after the bankruptcy has been declared hid, destroyed or charged the assets which belonged to the company's property after the bankruptcy has been declared or,
4. being a bankrupt debtor, he failed to perform other duties imposed on him under the law or by a judgment of the court or the judgment of the judge or impeded the proceedings in other ways.

One of the conditions on which the order may be made is the director's responsibility (*wina członka zarządu*). The present regulation is more advantageous for him as it is the applicant whose task is to prove that the director was responsible for his acts specified in Article 373¹ Bankruptcy and Rehabilitation Law. The former regulation was based on the presumption of responsibility, i.e. the

²⁰ Act of 28 February 2003, Official Journal 2003, no: 60, item 535 with further modifications.

defendant might be relieved from liability if he was in a position to prove his lack of responsibility: Article 17² § 1 Bankruptcy and Arrangement Law.

Article 373¹ Bankruptcy Law provides that a person may be **disqualified from carrying on business as a sole trader, being a member of a supervisory board, a representative or a proxy in a commercial company or partnership, state enterprise, cooperative, charity or association.**

Moreover, the consequence of making a disqualification order is that the person in relation to which it has been made **may not be registered with the National Court Register as a director** or any other person specified in Article 373¹ Bankruptcy and Rehabilitation Law.

Unlike under the former act governing this area, the present law provides that the only possibility to **initiate the proceedings is on the application** of a person entitled under Article 376¹ Bankruptcy and Rehabilitation Law, namely a creditor, a trustee in bankruptcy, a receiver, an administrator and the President of the Office for Competition and Consumer Protection as well as the President of the Securities and Exchange Commission. **The proceedings aimed at disqualifying a director may not be initiated *ex officio*.**

5. JOINT – STOCK COMPANY

Joint stock company in general

Describing the nature of a joint – stock company requires pointing out to some differences between limited liability company and joint – stock company (illustrated in table below).

	Differences concerning	Limited liability company	Joint – stock company
1	2	3	4
1.	Covering the share capital	In order to register the company all contributions must be made to cover the whole share capital	The company may be registered even if the share capital has not been covered to the full extent
2.	Minimum share capital	The share capital amounting to 50 000* PLN must be collected	The share capital amounting to 500 000** PLN must be collected
3.	Form of the shares	The rights arising from the shares may not take the form of listed securities	The rights arising from the shares take the form of securities, some of which may be listed on the stock exchange
4.	Classes of the shares	The shares are always assigned to the shareholder	The shares may be both registered shares and bearer shares
5.	Excluding of the company member	A shareholder may be excluded only under the court's order (Article 266)	A shareholder may be excluded by resolution of the shareholders meeting (squeeze out – Article 418)

1	2	3	4
6.	Mandatory bodies	As a rule, only the board of directors must be appointed in the company	The bodies which must be appointed are: management board and supervisory board
7.	The control of the company	As a rule, the shareholder has the right to control the company	The shareholder has only the right to be informed of the company affairs

* Around 13 000 EURO (according to the exchange rates on 20 September 2006).

** Around 130 000 EURO (according to the exchange rates on 20 September 2006).

Setting up a joint – stock company

The setting up process of joint – stock companies is much more complicated if compared to limited liability companies. Generally, similar steps should be followed to obtain registration. The exception is that, the share capital to be collected in order to set up the joint – stock company amounts to 500 000 PLN. However, the company may be registered even if the total value has not been reached (it may be covered in part).

Setting up of the joint – stock company requires:

- Entering into a contract
- Making contributions
- Appointment of the company bodies (board of directors and supervisory board)
- Registration

The company bodies

The joint – stock company is a more advanced form of corporation (if compared to a limited liability company). Consequently, the system of corporate bodies may be slightly different: in every joint – stock company a supervisory board must be appointed. The basic differences and similarities in the organisational structure of both types of companies is illustrated in the table below.

Body	Limited liability company	Joint – stock company
1	2	3
Board of directors	Manages the company affairs and represents it	Manages the company affairs and represents it
Supervisory board (<i>rada nadzorcza</i>)	<ol style="list-style-type: none"> 1. Must be established only in the situation prescribed under the law. 2. Performs constant supervision of the company business (Article 219). 3. Under the contract the board may possess additional powers including the right to suspend the directors (Article 220). 	<ol style="list-style-type: none"> 1. Must be established in each company. 2. Performs constant supervision of the company business. 3. The board has the right to suspend the directors. 4. May delegate its members to perform the function of a director.

1	2	3
Revision committee (<i>komisja rewizyjna</i>)	Assesses the reports submitted by the board of directors as well as the financial reports. The scope of the committee responsibilities may be extended in the case where a supervisory board has not been established (Article 221).	May not be established in a joint – stock company
Shareholders meeting	Making resolutions	Making resolutions

Rights and duties of shareholders

The rights of the shareholders include:

- The right to dividend,
- The right to participate in the company assets in the case of its liquidation,
- The right to receive new shares in the situation where the share capital has been rise,
- The right to participate in the shareholders meeting.
- The right to vote,
- The right to contest the shareholders resolution.

It should be stressed that the above list is not complete and is solely intended to give a rough idea of what the shareholders rights are.

Transfer and other forms of shares disposal in a joint – stock company

Classes of shares	Transfer (particularly selling the shares)	Pledge	Usufruct
1	2	3	4
Registered shares	The shareholder must state in writing that he transfers the shares and pass the possession of the shares onto the buyer	The contract must be made in which the shareholder (debtor) charges his shares as a security e.g. for a bank loan and the possession of the shares must be passed onto the creditor (e.g. bank)	The contract must be made where the date on which the contract was made must be authenticated by a notary public and the possession of the shares must be passed onto the usufructuary
Bearer shares	The contract must be made (no specific form is prescribed) and the possession of the stock document must be passed onto the buyer	The contract must be made where the date on which the contract was made must be authenticated by a notary public and passing the possession of the shares. This is not necessary in the case of the pledge which arises by registration; in this case	As above

1	2	3	4
		the contract must be made in writing and the registration with the National Register of Pledges must be made; no transfer of possession is required	
Shares listed on the stock exchange	The contract must be made (no specific form is prescribed) and the transfer must be registered with the securities account of the seller and the buyer	The contract must be made and the company must be notified of charging the shares (in the case of the pledge regulated in the Civil Code); alternatively, in the case of the pledge which arises by registration the registration with the National Register of Pledges must be made	The contract

Liability in a joint – stock company

As the joint stock company enjoys legal personality it is liable for its debts with its entire property. The shareholders may not be made liable for the debts of the company.

CHAPTER V

Polish state aid law

1. PREFACE

State aid is a form of state intervention used to promote a certain economic activity. It implies that certain economic sectors or activities are treated more favourably than others. Thus distorts competition because it discriminates companies that receive assistance and others that do not. As a result, it presents a threat to the running of the internal market. The competition policy in the European Union, State aid control included, is a key component of the enlargement process. Before the accession, candidate country must demonstrate the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.

Before the fall of the Iron Curtain, all Central and Eastern European countries (CEECs) had state economies with industries being heavily subsidised by the state. With the start of the enlargement process, the EU wanted to make sure that the candidate countries' governments would not attract foreign investment by granting all kinds of state aid. The bilateral Europe Agreements with the candidate countries already included provisions to adjust national legislation on state aid to EU norms.

An important issue is the dichotomy between 'existing state aid' and 'new aid'. Annex IV of the Accession Treaty differentiates clearly between those two. Existing aid is admissible but the Commission can suggest appropriate measures for its future amendment.

Another main challenge for the new member states was the establishment of a centralised surveillance authority to supervise state aid systems.

The negotiations on competition policy (including state aid provisions) were closed with Estonia, Latvia, Lithuania and Slovenia in late 2001. These four countries did not request any transitional arrangements. With the other six candidate countries (Cyprus, Czech Republic, Hungary, Malta, Poland and Slovakia) negotiations ended in 2002 with some transitional arrangements, especially as regards fiscal aid schemes to attract foreign investment and measures to restructure the ailing steel industries of these countries.

Poland entered the EU as one of a number of new Member States in 2004. Entry into the EU implies increased competitive pressures for Polish industry created by the single market and EU competition law. EU legislation on state aid is applicable and directly effective in Poland.

2. STATE AID CONTROL IN EUROPEAN UNION

The EU's regime for controlling state aid is a central pillar of the 'acquis'. It complements the Union's antitrust and merger control regimes. Its main aim is to prevent member states from protecting or promoting companies to the detriment of competitors within the EU. The term state aid encompasses all forms of assistance provided by the state (or its organs) to particular businesses or industries.

While the EC Treaty itself does not define state aid, it does stipulate that state aid is incompatible with the internal market. Aid can take the form of state grants, interest relief, tax relief, state guarantees or holdings, as well as the provision by the state of goods and services on preferential terms. State aid is prohibited if it affects trade and thereby distorts competition. The exemptions – which include regional development aid, aid to 'sensitive' sectors and also certain 'horizontal' aid measures – are spelled out in the Treaty. Through a rigorous system of ex ante control, the Commission must clear all forms of state aid.

3. LEGAL ASPECT OF SUBSIDIES AND STATE AID IN POLISH STATE AID LAW

- Article 87 of the Treaty Establishing the European Community applies to favours granted to undertakings or production of goods. Four conditions of prohibited state aid: (i) it distorts competition, (ii) it has financial character (ECJ), (iii) it is granted by public authorities, (iv) it adversely affects trade between EU Member States.
- Act of 20 March 2002 on Financial Support for Investments,
- Law of October 20, 1994 on Special Economic Zones,
- Act of 30 October 2002 on State Aid for Undertakings with Special Significance for the Labour Market
- Act of 30 April 2004 on the Procedures in the Matters of State Aid,
- Regulation of the Council of Ministers of 11 August 2004 on the detailed method for calculating the levels of state aid granted in different forms (i.e., financial forms of aid)

4. MAIN DEFINITIONS IN STATE AID LAW

Aid – any measure fulfilling all the criteria laid down in Article 92 (1) of the Treaty.

Existing aid:

- (i) all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;
- (ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;
- (iii) aid which is deemed to have been authorised pursuant to Article 4 (6) of this Regulation or prior to this Regulation but in accordance with this procedure;
- (iv) aid which is deemed to be existing aid pursuant to Article 15;
- (v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation.

New aid – all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

Aid scheme – any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount.

Individual aid – aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme.

Unlawful aid – new aid put into effect in contravention of Article 93 (3) of the Treaty;

Interested party – shall mean any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.

The day of aid provision – the day when an entity seeking public aid gained the right to receive such aid, and when tax relief aid is granted on the basis of a normative act, without a decision required:

- a) the day when – based on separate regulations – the deadline passes to submit declaration or another document describing the value of aid, with the reservation of letter b),
- b) the day on which – as per separate regulations – the deadline passes to submit the annual tax return – in case of granting aid in the form of income tax relief,

c) the day of actual provision of financial benefit – in case if submitting a declaration or another document defining the value of aid is not obligatory.

Aid granting authority – it stands for a public administration body or another entity authorized to grant public aid, including a public entrepreneur.

Amount of aid – it stands for the value of public aid expressed in a monetary amount or for intensity of public aid expressed as a relation of the value of public aid to costs qualified to be covered by public aid.

A public entrepreneur – it stands for each business entity conducting business operations, which is influenced in a decisive, direct or indirect way by a public authority. i.e. in particular:

- a) a state-owned enterprise, a company held in trust by the State Treasury or by a local government unit,
- b) a joint stock company or a limited liability company, for which the State Treasury or a local government unit or entrepreneurs mentioned in letter a) are entrepreneurs equivalent to dominating entity, in the sense of regulations on competition and consumer protection.

Notification – it stands for submitting to the Commission a draft of aid scheme, draft of individual aid or draft of individual aid for restructuring, as per Article 88 of the Treaty of European Communities, together with information necessary for assessing compliance of the public aid with the common market.

Aid beneficiary – it stands for an entity that conducts business operations, irrespective of its organisational and legal form or the way of financing, which received public aid.

5. NOTIFICATION PROCEDURE

An opinion of the President of the Office is required for:

- draft of aid schemes and draft of individual aid, including those that provide for granting aid as part of block exemptions, as well as individual aid for restructuring,
- important change of drafts (which means in particular changing the amount of aid, its form, objective or granting conditions) prior to notification, and in case of aid provided as part of block exemptions – prior to the time when it starts to be granted.

The opinion of the President of the Office contains in particular:

- 1) the statement on whether the draft provides for granting public aid;
- 2) the statement regarding compliance of public aid with the common market;
- 3) proposed amendments presented in order to assure compliance of draft provisions with the common market;
- 4) the statement regarding the obligation of draft notification.

The entity the application of for opinion is respectively:

- 1) for a draft aid scheme – the public administration body that prepares such a draft;
- 2) for individual aid – the authority granting such aid;
- 3) for individual aid for restructuring – the undertaking applying for aid.

Attached to the application for opinion is the draft aid scheme or a draft act which is to be the basis for individual aid, in particular – a draft decision or agreement, as well as information necessary for issuing an opinion, in particular those regarding recipients of planned aid, its objective, form, amount and duration.

In case of a draft of individual aid for restructuring, attached to the application is information above, the restructuring plan and opinions of the aid granting authority (authorities) regarding probability of granting such aid on the terms as described in the plan.

Issue of the Opinion

The President of the Office issues the opinion within 60 days, and in the case of a draft of aid scheme – within 21 days of receiving the application together with the attached information and documents.

The President of the Office, prior to issuing the opinion, may request the public administration body preparing the draft aid scheme, and in case of individual aid and individual aid for restructuring – the authority granting the aid, the undertaking applying for aid or to other interested parties, to provide additional clarification and information in a specified time.

If entities or authorities fail to present additional clarification and information within the specified period, the President of the Office issues the opinion based on available information.

Notification of a draft of aid scheme requires acceptance of the Council of Ministers.

The Council of Ministers takes a resolution regarding notification after taking cognizance of the opinion of the President of the Office.

The Council of Ministers, together with the draft of Law constituting an aid scheme, informs the Marshal of the Sejm about the notification.

In case if the President of the Office issues an opinion stating that the draft aid scheme providing for aid as part of block exemptions is noncompliant with the common market, and the entity preparing the draft had not applied for notification, the President of the Office submits his opinion to the Council of Ministers.

In case of a draft of individual aid or draft of individual aid for restructuring, the President of the Office submits his opinion without undue delay to the entity the application of for the opinion and to the authority granting aids.

Within 14 days of receiving the opinion regarding non-compliance with the common market of an individual aid or of an individual aid for restructuring, the

entity the application of for the opinion may apply to the President of the Office to notify such a project, with the exception.

Exception

In the case where the opinion of the President of the Office on non-compliance with the common market refers to an individual aid or to individual aid for restructuring, the authority or authorities granting the aid may amend the opinion, notifying the President of the Office and the entity the application of for the President's opinion within 14 days of receiving the opinion.

The President of the Office does not notify a project:

- 1) of individual aid or individual aid for restructuring – if the deadline (14 days) passes without effect,
- 2) of individual aid for restructuring – in case if it is stated in the amended opinion that aid cannot be provided.

The President of the Office, through the Permanent Representative of the Republic of Poland at the European Union in Brussels, makes or completes the notification regarding:

- 1) an aid scheme – immediately after the Council of Ministers takes a resolution regarding notification;
- 2) individual aid or individual aid for restructuring – immediately after an opinion is issued on the compliance of aid with the common market, or after application for notification.

6. PROCEEDING BEFORE THE COMMISSION

For procedure at the Commission the proper authority is the President of the Office.

In relating to the proceeding before the Commission, public administration authority preparing draft aid schemes, authority granting aids that developed individual aid, undertaking applying for aids or other appropriate bodies present the President of the Office – within an defined time – with information necessary for developing responses to Commission questions, explanations, remarks or positions.

The President of the Office consults with the entities mentioned above the content of responses, explanations, remarks or positions – developed by him based on presented information – for immediate submission to the Commission through the Permanent Representative of the Republic of Poland at the European Union in Brussels.

In case of the Commission taking decisions or issuing a recommendation the President of the Office informs the appropriate entity immediately, submitting a copy of the decision at the same time.

Upon receiving a copy of the Commission decision that obliges to stop providing the aid, the authority granting aid immediately stops the provision.

Upon receiving a copy of the Commission decision, that obliges to return the aid, the authority granting aid immediately takes appropriate decision in this respect.

Prior to the Commission taking decisions, notification may be withdrawn in case of:

- 1) an aid scheme – at a request of a public administration body developing such a draft, upon acceptance of the Council of Ministers;
- 2) individual aid – at a request of an authority granting aid;
- 3) individual aid for restructuring – at a request of an undertaking applying for aid or provider.

The President of the Office informs the Commission immediately on withdrawing a notification decision through the Permanent Representation of the Republic of Poland at the European Union in Brussels.

7. AID RECOVERY GRANTED IN NON-COMPLIANCE WITH THE COMMON MARKET AND OF MISUSED AID

An aid beneficiary is obliged to return the amount, representing equivalent of public aid as to which the Commission decided on obligatory recovery, unless, due to an appeal, implementation of such a Commission decision is suspended. The duty to return aid also comprises interest.

Until the aid beneficiary performs his duty no public aid may be granted to the beneficiary.

8. PROCEDURE AT THE COURT OF JUSTICE

The President of the Office is the body appropriate for:

- representing the Republic of Poland in procedures related to public aid at the Court of Justice and at the Court of First Instance, where the Republic of Poland is a party;
- making appeals – upon acceptance of the Council of Ministers – against Commission decisions to the Court of Justice and the Court of First Instance, in matters related to public aid;

- appealing against Commission decisions – at request and on behalf of local administration bodies – to the Court of Justice and the Court of First Instance, in matters related to public aid;
- submitting – upon acceptance of the Council of Ministers – cases related to public aid to the Court of Justice on behalf of the Republic of Poland, and to participate in procedures in this respect at the Court of Justice and the Court of First Instance.

The President of the Office immediately announces in a public IT network the following information regarding procedures at which the Republic of Poland is a party:

- 1) On making an appeal against a Commission decision in matters related to public aid;
- 2) On submitting a case related to public aid to the Court of Justice;
- 3) On decisions of the Court of Justice or the Court of First Instance in public aid cases.

9. MONITORING OF PUBLIC AID

Definition of monitoring of public aid

Monitoring of public aid comprises collecting, processing and transfer of information regarding public aid granted, in particular about its types, forms and amounts.

The authority monitoring public aid is the President of the Office.

Duties of the authority granting aid

Authority granting aid are obliged to prepare reports on provided public aid and to submit them to the President of the Office. Such reports will in particular include information on aid beneficiaries, as well as types, forms, amounts and appropriation of the aid.

In case if an aid beneficiary received aid based on a legal act, those obliged to prepare and submit reports as mentioned in point 1 above are the entities that obtained declarations or other documents specifying reduction amounts from aid beneficiaries.

Duties of an entity seeking aid

- An entity seeking de minimis aid is obliged to present all proofs of de minimis aid received within the period of 3 years before the current application – to the aid provider, together with the application;
- An entity seeking a kind of aid different from de minimis aid is obliged to present the authority granting aid with an application for aid together with information on the public aid received, containing in particular the data on its legal basis, form and appropriation.

10. AUDIT OF AN AID BENEFICIARY

In case if the Commission makes an audit the President of the Office is entitled to present remarks to the Commission regarding the audit and any reservations as to the choice of experts. During the audit of the aid beneficiary, persons authorised by the President of the Office may be present.

If the aid beneficiary obstructs an audit, the President of the Office may use the help of duly authorised government audit functionaries, or the Police station appropriate for the location of the aid beneficiary.

11. FINANCIAL PENALTIES

The amount of financial penalties

The amount is established considering in particular the extent and circumstances of the violation of law.

The due payment day

The financial penalty should be paid within 14 days of the effective date of the decision by the President of the Office. In case if the financial penalty is paid in delay, statutory interest is charged. Compulsory collection of financial penalty is done as per provisions on collection procedures in administration. Financial resources from the penalties represent income of the State Budget.

Appeals against decisions of the President of the Office on imposing financial penalties

Decisions of the President of the Office on imposing financial penalties may be appealed against to the Competition and Consumer Protection Court within 14 days of the date when the decision is received.

Procedure for appeals against decisions of the President of the Office is conducted according to provisions of the Law of November 17th, 1964 – Code of civil procedure (Law Journal No 43, item 296 with later amendments⁴)) regarding procedure in business cases.

In case of an appeal against the decision, the President of the Office submits it immediately together with the case files to the competition and consumer protection court.

12. ORGANIZATION OF CONTROL STATE AID IN POLAND

Department of State Aid Monitoring

The Department of State Aid Monitoring consists of two units: Regional and Horizontal Aid Unit and Sectoral Aid, and Reporting Unit. The Department performs its tasks on the basis of Act of 30 April 2004 on proceedings in matters relating to state aid. Due to Poland's accession to the European Union passing a new act was necessary, and as a result the rules of the proceeding in matters relating to state aid have been amended.

Taking into account the fact that the European Commission is the authority monitoring state aid in the Member States, it was also necessary to modify procedural provisions within the scope of state aid.

The Department of State Aid Monitoring evaluates the compliance of projects of aid scheme and individual aid (granted on the basis of a decision or contracts) with the Common Market, as well as it expresses its position in relation to the obligation to notify these projects to the European Commission.

Taking into consideration the fact that the President of the OCCP represents Poland in cases relating to state aid, which take place before the European Commission, the Court of Justice and the Court of First Instance, the Department's task is to prepare and collect all documents and information required by these institutions.

The Department is responsible for state aid monitoring. It prepares an annual report on state aid including the results of monitoring, such as: the amount, form and use of state aid and the evaluation of its effects within the scope of competition on the basis of reports presented by authorities granting state aid.

13. OCCP'S COMPETENCE IN THE FIELD OF STATE AID

The competence of the President of the OCCP in the field of State aid

Aid granted to an undertaking constitutes State aid as defined in the Treaty establishing the European Community (EC Treaty) if the following conditions are met:

- it is granted by the State or from the State's funds,
- it is granted on more attractive terms than market terms,
- it is selective in nature (it privileges a selected undertaking or undertakings or production of specific goods),
- it threatens or distorts competition and affects trade between EU Member States.

If any of the aforementioned conditions is not met, we do not deal with State aid as defined in Article 87 par. 1 of the EC Treaty.

The European Commission is the sole competent authority to determine compliance of granted aid with the Community law. Any type of aid granted to undertakings by central and local government agencies on the basis of individual applications or aid schemes is to be notified to the EC. Until the Commission's approval the aid may not be granted. De minimis aid – i.e. support of up to EURO 100 thousand granted to an undertaking within three consecutive years and aid granted on the basis of group exemptions – is an exception.

Whereas the President of the Office of Competition and Consumer Protection is obliged to monitor State aid granted to undertakings. The OCCP prepares annual reports concerning State aid granted to undertakings.

Special Economic Zones in Poland

1. GENERAL ISSUES

Special economic zones (SEZs) have been adopted by many countries as a popular means to stimulate regional development. Although a large number of SEZs are already in operation around the globe (approximately 850), it is likely that a growing number of SEZs will continue to appear.

Among postcommunist countries, Poland comparatively late joined in process of organization SEZs.

Poland's special economic zones were introduced by a separate piece of legislation agreed upon already in 1994 (Law of October 20, 1994 on Special Economic Zones). This act is the most important area of creating grounds for regional initiatives.

The Law defines principles and way of the establishment of special economic zones in the area of the Republic of Poland, the management of such zones and special principles and conditions for business activity run in the area of such zones.

According to the law regulations, 17 SEZs were established as separated parts of Poland's territory, where economic activity can be started.

Currently there are 14 SEZs (including one Technology Park), each of which is composed of several sub-zones, thus giving a prospective investor a choice of several possible locations.

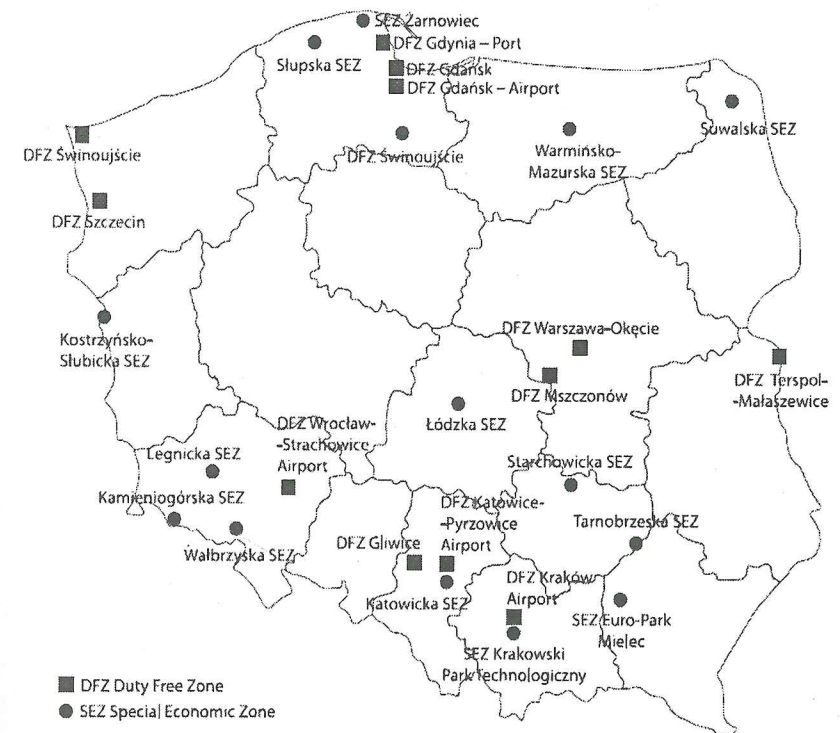
The table below presents general information on the Special Economic Zones.

	Zone	Operating until	Total area in hectares	Valid permits	Permits issued in 2004	Companies operating	Actual investments (PLN million)	Employment
1	2	3	4	5	6	7	8	9
1.	Kamiennogórska SSE	2017	250.89	24	6	13	318.8	1,932
2.	Katowicka SSE	2016	1,077.24	106	7	66	6,631.9	17,374
3.	Kostrzyńsko-Słubicka SSE	2017	462.56	50	8	16	784.3	1,753
4.	Krakowska SSE	2017	122.35	18	2	8	395.4	1,307

1	2	3	4	5	6	7	8	9
5.	Legnicka SSE	2017	441.93	39	6	20	2,346.5	5,688
6.	Łódzka SSE	2017	337.6	47	14	25	1,191.7	3,061
7.	Mielecka SSE	2015	739.23	71	10	58	2,240.5	11,588
8.	Pomorska SSE	2017	348.37	47	2	23	1,126.5	8,210
9.	Słupska SSE	2017	167.89	21	4	14	108.1	973
10.	Starachowicka SSE	2017	351.48	39	9	28	292.0	2,290
11.	Suwalska SSE	2017	331	67	2	52	399.9	3,235
12.	Tarnobrzaska SSE	2017	828.8	70	19	57	708.3	7,769
13.	Wałbrzyska SSE	2017	492.61	41	8	30	3,263.3	10,786
14.	Warmińsko-Mazurska SSE	2017	372.1	39	1	19	120.0	1,604
Total				679	98	429	19,927.2	77,570

Source: Ministry of Economic Affairs and Labour, 2005

Special Economic Zones are located in the south of Poland (5), on the Baltic coast (5) and close to the German border (4).



Source: Polish Information and Foreign Investment Agency (PAIiIZ)

Definition of Special Economic Zone

A Special Economic Zone (SEZ) is an administratively separate part of Polish territory, in which a more favourable business climate is created. However, the zones are neither extraterritorial, nor fenced, nor isolated in any physical way. A SEZ offers preferential tax conditions, as well as special premises on which entrepreneurs may conduct business activities without being subject to the payment of income taxes.

The zone may be established to accelerate economic development of a part of the territory of the State, especially by means of:

- development of specific fields of the business activity,
- development of new technical and technological solutions and their application in the national economy,
- development of export,
- increase of competitiveness of products and services offered,
- use of the existing industrial assets and economic infrastructure,
- establishment of new workplaces,
- use of unutilised natural resources observing ecological balance principles.

2. ESTABLISHMENT OF SPECIAL ECONOMIC ZONE

The Council of Minister at a request of the Minister relevant to the issues of economy approved by the Minister relevant to the regional development establishes a zone by its ordinance.

The Minister relevant to the issues of economy shall present a request upon obtaining an opinion by the province governor and a permit of the communal council (s) relevant to the zone location.

The Minister relevant to the issues of economy completes a request with assumptions of the zone development plan including especially an analysis of expected social and economic consequences of the zone establishment.

The ordinance on a zone establishment shall define:

- 1) name, area and borders of the zone,
- 2) objects of a business activity to which the permit shall not be issued;
- 3) zone manager (administrator),
- 4) period which the zone is established for,
- 5) the volume of public support granted to businesses active in the zone, following the permit,
- 6) the conditions of public support granted to businesses active in the zone, following the permit, having in mind assurance in accordance with European Union rules of public aid,
- 7) detailed conditions for approving the expenditure for the investment in the zone as well as their minimum amount,
- 8) the cost of investment projects accounted for when calculating the size of public aid funds for entrepreneurs who obtained permits after December 31st, 2000 and for entrepreneurs specified in art. 5 point 2 of the Act of October 2nd. 2003 on amending the Act on Special Economic Zones and Selected Legal Acts. (Journal of Law No 188, item. 1840),

The rule

The zone may be established, only on land plots belonging to the manager, State Treasury or district(s), municipality unions or on land plots subject to the manager's perpetual usufruct.

Exceptions

- ☐ The zone may be also established if the sales of the manager's right to land plots mentioned above results from a binding agreement envisaging the establishment of the zone as the only purchase condition.
- ☐ In cases justified by important economic reasons, a part of the zone may cover land plots belonging to:
 - the State Treasury, whose perpetual user is a person different than the manager – at a permit of the perpetual user;
 - persons different than the State Treasury, district (municipal union) and the manager at the owner's permit.

9) the matter of discounting costs of investment projects and the size of public aid funds as on the day of obtaining a permit.

The Government, specifying the maximum allowed volume of public support in particular zones, takes into account the following criteria:

- the unemployment ratio in the zone influence region,
- GNP level per capita in the region where the zone is located,
- the level of the region's problems pertaining to the necessity of former industrial zones restructuring, structural recession and social degradation.

3. MERGING, CANCELLING OF ZONES AND MODIFYING THEIR AREA

The Council of Ministers, aiming to provide the best functional environment for the zones may, upon request of a Minister in charge of economy consulted with a Minister in charge of regional development, by way of an ordinance, annul a zone before the period for which it was established, it may change the area of a zone or combine zones, provided that the total area of all zones cannot exceed 12 K. ha.

Cancelling a zone

Cancelling a zone cannot be announced in the period when at least one permit issued for running business activity in the area of the given zone, entitling to take advantage of public support remains valid.

The prohibition mentioned above does not apply if the region, where an entrepreneur carries business activities on the basis of the permit, is included into another zone, with maintaining the entrepreneur's rights to tax relieves, on the conditions used so for.

Decreasing the zone's territory

Decreasing the zone's territory cannot apply to properties where the business activities are carried, on the basis of the permit issued for running business activity in the area of the given zone, entitling to take advantage of public support, unless the entrepreneur carrying business operations on the basis of such permit agrees to do so.

4. ZONE MANAGEMENT

The manager may be only a joint stock company or a limited liability company in relation to which the State Treasury or the provincial self-government has got

the majority of votes which may be cast at the general meeting of shareholders or the meeting of partners, and is authorised to appoint and dismiss the majority of members of the manager's management and supervisory board.

The composition of the supervisory board:

- No more than five persons shall be appointed to the supervisory board of the company being the manager, in relation to which the State Treasury or the provincial self-government has got the majority of votes which may be cast at the general meeting of shareholders or the meeting of partners, including:
 - one representative of each of the following: the Minister relevant to the issues of economy, President of the Competition and Consumers Protection Office and the province governor – as the representatives of the State Treasury,
 - no more than two representatives of local government units, who hold the largest share in the basic capital of the said company.
- No more than five persons shall be appointed to the supervisory board of the company being the manager, in relation to which the province self-government has got the majority of votes which may be cast at the general meeting of shareholders or the meeting of partners, including:
 - two representatives of the province self-government,
 - a representative of the Minister relevant to the issues of economy,
 - no more than two representatives of local government units, exclusive of the province self-government, who hold the largest share in the basic capital of the said company.

Tasks of the manager

Tasks of the manager cover the management, in accordance with the zone development plan, zone general conditions and legal regulations, of actions aiming at the development of a business activity conducted within the zone, including especially:

- 1) enabling entrepreneurs running their business in the zone on the grounds of an agreement to use and take advantage of assets located within the zone that belong to the manager or in case of which the manager is a dependant holder,
- 2) managing devices of economic and technical infrastructure and other properties belonging to the manager or in case of which the manager is a dependant holder in a way allowing other entities to run their business activity in the zone,
- 3) providing services to the entrepreneurs running their business in the zone on the grounds of an agreement and establishing conditions for provision of services by third parties,
- 4) taking up activities promoting the business activity in the zone.

Zone general conditions

The way of zone management by the manager shall be defined in the zone general conditions.

Which shall be issued by the manager. The issue and any amendments to the zone general conditions shall be approved by the Minister relevant to the issues of economy.

The manager shall deliver the zone general conditions to entrepreneurs running their business in the zone the moment the agreements are concluded, and publish them.

Zone board

The entrepreneurs running their business activity in the zone may establish a zone board which may present opinions and motions on issues related to the activity in the zone and zone development.

The organisation and way of the zone board operation shall be defined in the by-law adopted by the board.

5. PERMIT TO RUN BUSINESS ACTIVITY IN THE ZONE ENTITLING TO RECEIVE PUBLIC SUPPORT

The basis for taking advantage of public support, provided on the grounds of the Law, is the permit for running business activity in the area of the given zone, entitling to take advantage of public support.

The permit specifies the object of business activity and the term referring in particular to:

- employing a defined number of persons by the entrepreneur running business activity in the zone area for a specific period of time,
- the entrepreneur's making investments in the zone area, the value of which exceeds a certain amount.

The permit may be granted if:

- in the zone, there are conditions to run a business activity which is to be carried out by the entrepreneur applying for the permit, and, especially, the scope of the planned activity is compliant with the zone development plan mentioned in article 9, and the zone manager has got free areas, structures or premises which are indispensable for the entrepreneur applying for the permit to run his business activity,
- commencing business operations within the zone is supported by the degree of the intended activity's input into objectives specified in the zone development plan.

The Minister relevant to the issues of economy defines, withdraws and amends the permits.

The Minister also requests the zone manager's opinion before issuing a decision on defining, withdrawing or amending the permit.

The entrepreneurs who will receive the permit shall be selected in the course of bid proceeding or negotiations carried out on the grounds of a public invitation.

Expiration of the permit

The permit shall expire with the expiration of the zone existence period.

Withdrawing and limiting of the permit

The permit may be withdrawn or its scope or object of the activity define therein may be limited if the entrepreneur:

- stopped running the business activity for which he has obtained permit in the zone, or
- materially violated conditions defined in the permit, or
- did not remove defects observed in the course of the audit within a term indicated in a relevant request by the Minister relevant to the issues of economy.

6. PRIVILEGES

Companies that decide to invest in the SEZ's enjoy various privileges:

- Income tax exemption;
- **Relief in real estate tax (depending on a decision of the local authorities)**
The relief is of general nature (for a group of entrepreneurs meeting certain preconditions). Reliefs are granted by the local authorities, at the commune level, by the Commune Council.
- **Relief in tax on means of transport (depending on a decision of the local authorities)**
The relief is of general nature (for a group of entrepreneurs meeting certain preconditions). Reliefs are granted by local authorities, at the commune level, by the Commune Council;
- **Customs duty reliefs**
The Polish customs law offers numerous incentives for entrepreneurs, such as:
 - Customs duty exemptions;
 - Economic customs procedures;
 - Operations in duty free areas;
 - Facilitated payments;

- Exemption from the obligation to place security for customs duty and tax liabilities.
- **Non-tax incentives relating to employment of new employees**
There are various types of instruments (such as reimbursement of expenditures borne or in the form of a loan) aimed at supporting the hire of new employees;
- **Non-tax incentives related to investment procedures in the SEZs**
These include in particular:
 - Full preparation of the plot of land for a given investment project;
 - Preferential price for the plot of land;
 - The accelerated procedure for issuing a permit to purchase real estate (within 1 month);
 - Free-of-charge assistance in handling various formalities, actions and obligations.

CHAPTER VII

Public protection of competition in Poland

1. BRIEF HISTORY OF COMPETITION IN POLAND

In Poland after World War II there was 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 came into force.

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

The two years' period following its passing revealed many faults in the law.

But the same period provided considerable experience owing to which a new law might arise.

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

The goals of the second antimonopoly act of 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 administration, the Antimonopoly Office 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 interests. 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, there emerged 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.

Third public competition act was passed on 15 December 2000. 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 took 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).

2. GENERAL PROVISIONS (ARTICLE 1-3)

Act of 15 December 2000 on competition and consumer protection²¹ (hereinafter referred to as CCP Act) is one of the basic regulations in the Polish public law.

The CCP Act 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 regulates rules:

- 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 exemptions. The first exemption is that the Act is without prejudice to the rights vested on the basis of the provisions concerning protection of

²¹ Journal of Laws No 03.86.804

2003-10-01 amend. Dz.U.03.60.535 Article 534

2003-10-15 amend. Dz.U.03.170.1652 Article 6

2004-05-01 amend. Dz.U.04.93.891 Article 1

amend. Dz.U.04.96.950 Article 43

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 concluded between entrepreneurs:

- 1) agreements, in particular licensing agreements, as well as to other practices of exercising rights (referred before);
- 2) agreements 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 exemptions. It states that the provisions of the Act shall not apply to:

- 1) restrictions of competition exempted by virtue of separate legal acts,
- 2) collective labour agreements.

3. MAIN DEFINITIONS IN COMPETITION LAW (ARTICLE 4)

There are a few interesting definitions (made for the purpose of OCCP Act), especially:

“**entrepreneur**” – shall have the same meaning as under the provisions of the Act of 19 November 1999 – Law on business activity (J. L. of 1999, No 101, item 1178 and of 2000, No 86, item 958, and No 114, item 1193, of 2001, No 49, item 509, No 67, item 679, No 102, item 1115, and No 147, item 1643, and of 2002, No 1, item 2, No 115, item 995, and No 130, item 1112), as well as:

- a) natural and legal person as well as organisational unit without legal personality, organising or rendering services of public utility nature, which are not business activity in the meaning of provisions on business activity,
- b) natural person exercising a profession on his own behalf and account or performing activity in the frame of exercising such profession,
- c) natural person being in a possession of stocks or shares ensuring at least 25% of votes in organs of at least one entrepreneur or having control, in the meaning of item 13, over at least one entrepreneur, even if not conducting business activity in the meaning of provisions on business activity, provided that this person is undertaking further activities subject to control of concentrations, referred to in Article 12;

“**associations of entrepreneurs**” shall mean chambers, associations and other organisations associating entrepreneurs referred to under item 1 as well as associations thereof;

"**dominant entrepreneur**" shall mean the entrepreneur that:

- a) disposes, directly or indirectly, of the majority of votes at the assembly of shareholders or at the general assembly, also as a pledgee or usufructuary, or in the managing organ of the other (dependent) entrepreneur, also on the basis of agreements concluded with other persons, or
- b) is empowered to appoint or remove from office the majority of members of the management or of the supervisory board of another entrepreneur (dependent) also on the basis of agreements concluded with other persons, or
- c) members of its management board or supervisory board constitute more than one half of members of the management board of another entrepreneur (subsidiary entrepreneur), or
- d) disposes directly or indirectly of the majority of votes in a dependent partnership or at the general assembly of a dependent co-operative, also on the basis of agreements concluded with other persons, or
- e) has a decisive impact on the activities of another (dependent) entrepreneur, in particular pursuant to agreement stipulating managing another (dependent) entrepreneur or transferring him the profits;

"**agreements**" shall mean:

- a) agreements concluded between entrepreneurs, between associations thereof and between entrepreneurs and their associations, or certain provisions of such agreements,
- b) concerted practices undertaken in any form by two or more entrepreneurs or associations thereof,
- c) resolutions or other acts of the associations of entrepreneurs or their statutory organs;

"**distribution agreements**" shall mean agreements concluded between entrepreneurs acting at the different levels of the economic process aimed at purchasing the products for further resale;

"**products**" shall mean goods as well as all forms of energy, securities and other property rights, services as well as construction works;

"**prices**" shall mean prices including also charges possessing the nature of prices, profit margins, commissions and mark-ups;

"**relevant market**" shall mean market of products, 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, existence of market access barriers, consumer preferences, significant differences in prices and transport costs, the conditions of competition are sufficiently homogeneous;

"**dominant position**" shall mean the position of the entrepreneur which allows him to prevent the efficient competition on the relevant market thus enabling him to act in a significant degree independently from competitors, contracting parties and consumers; it is assumed that entrepreneur holds a dominant position where his market share exceeds 40%;

"**competitors**" shall mean entrepreneurs which at the same time release or may release for free circulation, purchase or may purchase products on the relevant market;

"**consumer**" shall be understood to mean 'a consumer' as defined by the provisions of the Act, dated 23 April 1964 the Polish Civil Code (Journal of Laws No. 16, item 93, as amended thereafter);

"**consumer organisations**" the term shall be understood to mean social organisations, independent of entrepreneurs and of associations thereof, which statutory tasks include the protection of consumer interests; the consumer organisations may run business activities, according to general rules, provided the benefits serve solely to finance the execution of the organisations' statutory tasks;

"**taking over control**" any form of direct or indirect acquisition of powers which, individually or jointly, taking into account all legal or factual circumstances, enable to exercise decisive influence upon a given entrepreneur or entrepreneurs; in particular, such powers are created by:

- a) ownership of entirety or part of the property of the entrepreneur,
- b) rights or agreements according decisive influence upon composition, voting or decisions of the entrepreneur's organs;

"**capital group**" shall be understood to mean all entrepreneurs, who act under the direct or indirect supervision of one entrepreneur, including the entrepreneur;

(an enterprise's) "**business secret**" shall be understood to mean 'business secret' as defined by Article 11, clause 4 of the Act, dated 16 April 1993, on combating unfair competition (JL of 2003, No. 153, item 1503).

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

4.1. Prohibition of competition restricting agreements

Prohibitions of competition restricting agreements are included in Articles 5-7 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, without prejudice to Articles 6 and 7 (Article 5).

In this part of restrictions there are two individual exemptions: the prohibition of agreements referred to in Article 5 shall not apply to:

- 1) agreements concluded between competitors which combined market share in the year preceding calendar year in which such an agreement is concluded does not exceed 5%,
- 2) agreements concluded between entrepreneurs acting at different levels of the economic process which combined market share in the year preceding calendar year in which such an agreement is concluded does not exceed 10% (Article 6).

4.2. Group Exemption

The basic regulation for group exemptions is Article 7. It provides that the Council of Ministers may, by way of a regulation, exempt from the prohibition stipulated in Article 5, 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 is not considered as the infringement Article 5;
- 3) clauses the existence of which constitutes the infringement of Article 5;
- 4) period during which the exemption shall apply.

At present, there are a few group exemptions 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 (The regulation was published on 1 February 2004 in the Journal of Laws No. 14, Item 116).

This Regulation constitutes the realization of the delegation contained in Article 7 of the Act on competition and consumer protection. 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 as a result, to provide consumers with better purchase terms.

This Regulation has been amended in such a way that the agreements concerning motorcycles have been exempted 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.

The amendment entered into force on 1 May 2004 (thus adapting the provisions of the Polish Regulation to the relevant Community Commission Regulation No. 1400/2002 of 31 July 2002 on the application of Article 81 (3) of the EC Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector).

Draft Regulation of the Council of Ministers on Exempting certain vertical agreements from the prohibition of agreements restricting competition. (The regulation was published on 21 April 2004 in the Journal of Laws No. 95, Item 951).

The aim of the amendment to the Regulation, being in force since the day of Poland's accession to the European Union, was to ensure comprehensive coherence of the provisions relating to the exemption of vertical agreements from the prohibition of agreements restricting competition. Due to the fact that on the basis of Article 7 of the Act on competition and consumer protection the Regulation of the Council of Ministers of 28 January 2003 on exempting certain vertical agreements in the motor vehicle sector from the prohibition of agreements restricting competition was issued, the regulation included in § 4 (2) of the Regulation on exempting certain vertical agreements from the prohibition of agreements restricting competition was unnecessary and therefore repealed.

4.3. Prohibition of abuse of a dominant position (Article 8)

In Poland, like in the UE law, the second kind of restricting practices are the abuse of a dominant position. The abuse of a dominant position on the relevant market by one or more entrepreneurs is 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) creating for consumers onerous conditions of redress,
- 8) 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 ENTREPRENEURS

5.1. Control of concentration (Articles 12–23 OCCP Act)

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 entrepreneur 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.

The intention of concentration is subject to the notification to the President of the Office in the case where combined turnover of the entrepreneurs participating in the concentration in the marketing year preceding the year of the notification exceeds 50 million EURO.

The obligation of notification concerns the intention of a few kind mergers between undertakings. Mergers between undertakings may be performed in various forms – the Act on competition and consumer protection names as basic types the following: a merger of undertakings, taking over by an entrepreneur of direct or indirect control over another entrepreneur or creation of one joint entrepreneur. In the light of the provisions of the Act also taking over or acquisition of a block of stocks or shares, giving at least 25% of votes at the general meeting or shareholders meeting, as well as personal mergers are treated as mergers²².

Only those mergers which exert or may exert influence in the territory of the Republic of Poland are subject to the initial control of the President of the OCCP. Their performance is thus subject to prior obtaining the consent of the President of the Office.

5.2. Concept of control in the UE Merger Regulations

The concept of control in the UE Merger Control Regulation is 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.

²² In Article 12 there are six obligations of the notification about the intention of:

- 1) merger of two or more independent entrepreneurs,
 - 2) taking over – by way of acquisition or entering into a possession of stocks, other securities, shares, of the entirety or a part of the property or in any other way obtaining direct or indirect control over one or several entrepreneurs,
 - 3) creation by entrepreneurs of one joint entrepreneur.
- The obligation to notify the intention of concentration referred to in section 1 shall also apply to:
- 1) taking over or acquisition of stocks or shares of another entrepreneur resulting in achieving at least 25% of votes at a general assembly or assembly of shareholders,
 - 2) assuming by the same person the function of a member of the managing or controlling body of the competing entrepreneurs,
 - 3) initiating to exercise the rights arising from stocks or shares taken over or acquired without prior notification in accordance with Article 13, items 3 and 4.

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 the 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 developments²³.

5.3. The cases where the notification is not necessary

The obligation to notify the intention of concentration shall not apply where:

- 1) the turnover of the entrepreneur:
 - a) over which the control is to be taken in accordance to Article 12, section 2, item 2,
 - b) whose stocks or shares are to be taken over or acquired as defined in Article 12, section 3, item 1,
 - c) whose rights to stocks or shares are to be exercised in accordance with Article 12, section 3, item 3
- did not exceed, in the territory of the Republic of Poland, during any of two marketing years preceding the notification the equivalent of 10 million EURO;
- 2) (repealed);
- 3) the financial institution, the normal activities of which include investing in stocks and shares of other entrepreneurs, for its own account or for the account of others, acquires on a temporary basis stocks and shares with a view to reselling them provided that such resale takes place within one year of the date of acquisition 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 a part of the entrepreneurs, its property, or these stocks and shares;
- 4) the entrepreneur acquires on a temporary basis stocks and shares with a view to securing debts, provided that such entrepreneur does not exercise the rights arising from these stocks or shares, except from the right to sell;

²³ M. Broberg – The Concept of Control in the Merger Control Regulation _ E.C.I.R. 2004 issue 12 p. 741–742.

- 5) arising as an effect of insolvency proceedings, except from the operations 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 entrepreneur belong;
- 6) concentration of the entrepreneurs participating in the same capital group.

5.4. Decisions in cases of concentration

The President of the OCCP has the right to make a few decisions. The first is giving a consent to carry out 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

The second decision may be made under 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.

The third 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.

The four decision is justifiable decision. The President of the Office shall, by way of a decision, give a consent to perform a concentration the result of it being that 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 because:

- 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 17, Article 18, section 1 and Article 19, section 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 18, section 2 and 3). In the case of cancellation of the decision the President of the Office shall decide again 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 limit for its implementation under conditions defined in the decision, order in particular:

- 1) separation of the merged entrepreneur 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) removing from office the member of a managing or controlling body of the entrepreneurs participating in the concentration.

The decision referred to in section 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.

5.5. Supervision Registry Court

The Registry court, acting pursuant to the separate provisions, shall make entry into the register where:

- 1) the President of the Office shall, by way of a decision, give permission to perform the concentration;
- 2) the entrepreneur proves that the intention of concentration is not subject to notification (Article 23 OCCP Act).

6. ORGANISATION OF COMPETITION AND CONSUMER PROTECTION

6.1. The President of the Office (Article 24–29)

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 an authority exercising tasks superimposed upon the authorities of the Member States of the European Union, pursuant to Articles 84 and 85 of the Treaty establishing the European Community (OJ C 325, 24.12.2002), hereinafter referred to as the 'CE Treaty'. In particular, the President of the Office shall be the competent competition protection authority, as stipulated in Article 35 of Regulation 1/2003/EC.

6.1.1. Contest Selected

The Prime Minister shall appoint, for the period of 5 years, the President of the Office, selected by way of a contest, from among the persons with university education, in particular in the field of law, economy or business administration, distinguished by their theoretical knowledge and practical experience in the scope of market economy and competition and consumer protection.

The Prime Minister shall define, by way of a regulation, mode and procedures for organising the competition referred to in section 2. The Prime Minister shall define composition of the selection board and exigencies towards members thereof, having in mind the necessity to ensure impartiality of the election of the President.

6.1.2. Selection Board

The member of the selection board may not be a person who within the last three years was performing function in the organs of the entrepreneur being in possession of a dominant position or was representing his interest, or a person not giving a guarantee of impartiality in performance of the function in public interest.

6.1.3. Case of dismissing president

The President of the Office may be dismissed by the Prime Minister before the term of office in the case of:

- 1) being employed, with the exception of employment as professor at the university or in scientific institution;
- 2) undertaking business activity in a capacity of entrepreneur or assuming function of a member of managing or controlling body of the entrepreneur;

The Prime Minister shall appoint and dismiss Vice-Presidents of the Office, upon a motion of the President of the Office.

6.1.4. Scope of the activities of the President

The President of the Office shall perform his tasks supported by the Office for Competition and Consumer Protection, hereinafter referred to as "the Office".

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

- 1) exercising control over the observance by entrepreneurs of the provisions of the present Act,
- 2) issuance, in the cases stipulated in the Act, of decisions in the matters of counteracting competition restricting practices, concentrations or separations of entrepreneurs, infringements of collective consumer rights, as well as decisions concerning financial penalties,
- 3) conducting studies on the concentration level in the economy and on the market behaviour of entrepreneurs,
- 4) elaboration of the draft government programmes for the development of the competition and of the draft government consumer protection policy,
- 5) monitoring the state aid granted to the entrepreneurs pursuant to separate acts and provisions,
- 6) assessment of the efficiency and effectiveness of the state aid granted to the entrepreneurs as well as of the effects of granted aid in the field of competition,
- 6a) co-operation with other authorities or bodies whose scope of operation includes protection of competition and consumers,
- 7) co-operation with foreign and international organisations and authorities in the scope of competition protection,
- 7a) exercise of tasks and competencies of a competition protection authority of a Member State of the European Union, as determined in Regulation 1/2003/EC, and Regulation 139/2004/EC,
- 8) elaboration and submission to the Council of Ministers of the draft legal acts concerning competition restricting practices, development of competition or conditions for its emergence as well as protection of consumer interests,
- 9) giving an opinion on draft legal acts concerning competition restricting practices, development of competition or conditions for its emergence as well as protection of consumer interests,
- 10) submitting to the Council of Ministers periodical reports on the enforcement of the government programmes for competition development and consumer policy,
- 11) addressing entrepreneurs and associations thereof on matters relating to the protection of the rights and interests of consumers,
- 12) undertaking of any actions ensuing from the provisions regarding the combating of unfair competition and provisions regarding illicit contractual provisions,

- 13) addressing specialised units and relevant bodies of the State supervision for undertaking control of observance of consumer rights,
- 14) surveillance over the safety of products intended for consumer use in the scope of the provisions on the general product safety,
- 14a)⁽²⁾ monitoring the system of controlling products introduced on the market, in relation to their compliance with essential requirements, accordingly to the Act dated 30 August 2002, on conformity assessment system (J. L. No 166, item 1360, and of 2003, No 80, item 718, No 130, item 1188, No 170, item 1652),
- 15) co-operation with the territorial self-government authorities and with national and international social organisations and other institutions which statutory tasks include the protection of consumer interests,
- 16) giving assistance to the self-government authorities at the level of a province (*województwo*) and district (*powiat*) and to organisations the statutory tasks of which include protection of consumer interests, in the scope of the government consumer policy,
- 17) initiating checks on products and services to be performed by consumer organisations,
- 18) elaborating and editing publications and educational programmes promoting awareness of consumer rights,
- 19) enforcement of the international obligations of the Republic of Poland in the scope of co-operation and exchange of the information in the field of competition protection and state aid granted to the entrepreneurs,
- 20) collecting and disseminating judgements pronounced in the cases in the field of competition and consumer protection,
- 21) performance of other tasks defined by the present Act or by separate acts.
- 22) President of the Office for Competition and Consumer Protection cooperates with the Head of the National Criminal Information Centre within the scope essential for the fulfilment of statutory tasks.

6.1.5. Official Journal of the Office

The President of the Office shall issue 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 of the Supreme Court in cases of cassation of the judgements of the Court for competition and consumer protection, or their sentences, may be in their entirety or part published in the Official Journal of the Office for Competition and Consumer Protection (however, the information constituting business secrecy of the undertaking and other secrecy protected under separate provisions may not be published).

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.

6.1.6. 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 in 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.

6.1.7. Organisation units in headquarters

The Office's headquarters consist of the following organizational units (as of 31 December 2004):

- 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.

6.1.8. Market research and analyses conducted by OCCP

Research of competition on the Polish market is carried out both by 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 being²⁴.

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 Analyses²⁵.

6.1.9. 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

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 case²⁶.

²⁴ Report on activities – Office of Competition and Consumer Protection, p. 102.

²⁵ Op. cit.

²⁶ Op. cit. p. 103

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 loans for individual customers market, bank accounts market, cellular telephony market, market of wholesale trade of liquid fuels in Poland and the oil market in Poland²⁷.

6.2. 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.

6.2.1. 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.

6.2.2. 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;
- 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.

²⁷ Op. cit.

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 77⁵, Para. 2, of the Act dated 26th June 1974, titled The Polish Labour Code (JL of 1998, No. 21, item 94, as amended thereafter²⁸).

6.3. Trade Inspections (Article 30–31)

The Trade Inspection shall be subordinated to the President of the Office.

The President of the Office shall sanction the policy of the Trade Inspection and the draft plans of inspections of national dimensions submitted by the Chief Inspector of the Trade Inspection.

The President of the Office may order the Trade Inspection to proceed with the inspection or to exercise other tasks included in the scope of his activities.

The President shall perform periodical assessments of the activities of the Trade Inspection based on the reports submitted by this Inspection and shall address the conclusions of such assessments to the Chief Inspector of the Trade Inspection.

The President of the Office may make public information concerning results of the control of the Trade Inspection as well as information about activities undertaken by virtue of the provisions of Article 26, items 11 and 12, excluding information constituting secrecy of the undertaking as well as of other secrecy protected under separate provisions.

6.4. Territorial self-government and consumer organisations (Article 32–38)

6.4.1. Main tasks

The tasks in the field of the protection of consumer interests in the scope determined by the Act and by separate provisions shall be performed also by the territorial self-government as well as by consumer organisations and other institutions, which statutory tasks include the protection of consumer interests.

²⁸ 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.

The task of the territorial self-government in the field of consumer protection shall consist in promoting consumer education, in particular by way of introducing elements of consumer awareness into educational programmes in the public schools.

6.4.2. 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.

6.4.3. 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.

6.4.4. Consumer 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 at the government administration level.

6.5. The National Council of Consumer Ombudsmen (Article 38a)

6.5.1. Body assisting

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.

6.5.2. 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

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 under 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.

6.6. Consumer Organizations (Article 39–41)

6.6.1. 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,
- 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.

6.6.2. Obligated 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 42–83)

The proceedings before the President of the Office shall be conducted as:

- 1) explanatory investigation,
- 2) antimonopoly investigation or proceedings on matters of practices infringing collective 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 relating 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 investigation 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 the procedure

Entrepreneurs or associations 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, instruction about sanctions for non-delivery information or for providing false or misleading information.

7.1.4. "Amicus curiae" (Article 45a)

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

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, without prejudice to section 3.

Where such a 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 the summons the name, surname and domicile of the summoned, place and the date of giving the explanation, parties and subject matter of the case as well as the provisions on penal sanctions for false testimony.

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

The minutes 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 49–54)

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 serve to exclude the employee of the Office. The party lodging a request to exclude an expert after the works have been initiated has the duty 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 grant 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 out the research and issued the opinion.

7.1.7. Hearing

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 the 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 479¹⁰ of the Code of civil proceedings shall apply respectively).

7.1.8. Regional court (Article 56)

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 57)

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) indication of the relevant legal basis,
- 2) date and location of issue,
- 3) first name, surname, and title/post of the inspector as well as the number of his or her professional identity card, and in the case where 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 the case of individuals referred to in clause 1a, item 1; or,
 - b) the (personal) identity card number – in the case of individuals referred to in clause 1a, item 2;
- 4) a marking of the entity to be inspected,
- 5) determination of the object and scope of inspection,
- 6) determination of the inspection starting date and the expected ending date,
- 7) signature of the authorisation granting individual, also quoting the title or post (scope of duties) being held by the same,
- 8) instruction regarding the rights and obligations of the entity being inspected.

7.2. Antimonopoly proceedings in the cases of competition restricting practices

The motion for instituting the antimonopoly investigation related to suspicion of the infringement of the provisions of the Act may be lodged by:

- 1) an 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.

7.3. Proceedings in the cases of concentration (Article 94)

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

The intention of concentration shall be notified by:

- 1) merging entrepreneurs jointly;
- 2) the entrepreneur taking over the control;
- 3) jointly all entrepreneurs participating in creation of a joint entrepreneur;
- 4) the 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.

In the case where a concentration is performed by a dominant entrepreneur by intermediary of at least two dependent entrepreneurs, the notification of intention of concentration shall be filed by a dominant entrepreneur.

The antimonopoly proceedings in concentration cases should be terminated not later than within 2 months since their institution. In the event that the entrepreneur has presented the terms and conditions determined in Article 18, clause 2, the (final) date referred to in clause 1 shall be extended by additional fourteen (14) days. The time limits as established in clauses 1 and 2, do not include the time period of waiting for notification from other participants of the concentration, and the time periods necessary to complete information, as referred to in Article 96, clause 1, item 2, or to respond to the measures proposed by the President of the Office, referred to in Article 18, clause 2, as well as the time period of waiting until the fee is paid, as referred to in Article 77, clause 2.

7.4. Proceeding on matters of practices infringing collective consumer interests

An application for the institution of proceedings on the matter of a practice infringing collective consumer interests may be filed by:

- 1) Civil Rights Ombudsman,
- 2) Insurance Ombudsman,
- 3) Consumer Ombudsman,
- 4) Consumer organisation.

The application may also be filed 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 an application for the institution of proceedings, where the object of its activity warrants its filing an application for the institution of proceedings on the matter of an infringement resulting from unlawful failure or such acts performed in Poland, which jeopardise collective consumer interests in the Member State where the organisation is seated.

8. 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 103a²⁹ of the Act and Regulation of the Council of Ministers of 18 May 2004 on the proceedings leniency application (Journal of Laws z 2004 r., No. 130, Item 1380) issued on the basis of this provision. The aim of this 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

²⁹ 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:
 - 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 did 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 all 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 all 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.

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 introduced a system of mitigating penalties imposed on cartel participants who voluntarily retract from using the forbidden agreement and inform the President of the OCCP thereof³⁰.

³⁰ Office of Competition and Consumer Protection – Report on activities in 2004, p. 24.

Combating unfair competition in Poland

1. INTRODUCTION

In this part, the Act on combating unfair competition ACUC³¹ as well as other regulations on unfair competition in Poland are dealt with. It should be stressed that only the most common cases are examined or those which may be useful for entrepreneurs in practice.

The presentation embraces five subjects. Firstly, common definitions will be explained, such as entrepreneurs and unfair competition, secondly, civil acts of unfair competition will be discussed. Thirdly, unfair advertising will be dealt with. Analyses of unfair advertising embraces a few acts. First of all the Act on combating unfair competition and acts regulating advertising on the radio, TV and others media will be presented. In the fourth part there is some information on civil liability. The fifth part reviews criminal acts of unfair competition from ACUC and penal provisions will be presented.

2. GENERAL PROVISIONS (AREA OF PREVENTIONS, 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 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.

³¹ Act of 16. April 1993. on combating unfair competition, Journal of Laws No 03.153.1503
2003.11.28 amend. J.L. No 02.197.1661
2004.05.01 amend. J.L. No 04.96.959

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 the 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 in the Act. 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 competition act is regulated in Article 6. The main problem regulated in this article is similar indication of two undertakings in relation to the identity with another undertaking which earlier. Where designation of the undertaking with the name of the entrepreneur may mislead customers 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)

In the act there are three groups of unfair designation of products. The first two protect geographic indication. Labeling products or services with 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.

The second regulation provides much stricter protection because 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.

Third unfair designation prohibits such 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 above shall be the act of unfair competition, unless the use of such packing is justified by technical reasons.

3.3. Company secrets (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 on 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 organizational 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. Induce workers and customers (article 12 ACUC)

To induce person rendering to the entrepreneur her work, based on 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 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 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 in section 1 above shall be in particular on 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 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 (dumping),
- 2) the enticement of third parties to refuse to sell to other entrepreneurs or to purchase goods or services from other entrepreneurs (boycott),
- 3) materially justified differences in the treatment of some customers (discrimination),
- 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 entrepreneur³².

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.

³² 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.)

The organisation 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 catalog 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,
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 emphasizes 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. 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.
- 2) advertising appealing to emotions of customers by provoking fear, exploiting superstitions or credulity of children,
- 3) statement encouraging the purchase of products or services, creating the impression of a neutral information (hidden advertisement). A hidden advertisement is 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 a 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 considered to be an act of unfair competition, however it is prohibited according to the Radio and television law.
- 4) 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. Comparative advertising

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

At present, in Poland there are a few ads 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 alcohol³³

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 advertising³⁴

Accordingly with 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.

³³ Prepared on the basis of papers from K. Czyżewska – Advertising. Invest in Poland.

³⁴ Op. cit.

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 medicines³⁵

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 not require and 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). The next example of unfair drug advertising, are 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"³⁶.

4.3.4. Advertising of games of chance³⁷

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

³⁵ Op. cit.

³⁶ Office for Competition and Consumer Protection (OCCP) – report advertising and consumer, Warsaw 2004, p. 64.

³⁷ K. Czyżewska – op. cit.

prohibition does not concern advertising or information in places performing gaming or betting activities.

4.3.5. Television and radio advertising³⁸

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 a 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 children³⁹

In general in Poland there are not special regulations which forbid advertising addressed to children; however the legislator has forbidden a specific interference into their psyche. Advertising in which children participate and the one addressed to children is admissible. Such advertising is liable to the regulations to be found in the following legal provisions:

- 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:

³⁸ K. Czyżewska – op. cit.

³⁹ OCCP Report – op. cit, p. 65

- 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 and 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 entrepreneur may request?

Where the act of unfair competition is committed, the entrepreneur whose interest is threatened or infringed may request:

- 1) relinquishment of 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 a motion 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 person may apply with the claims above items 1–3 and 6:

- a national or regional organisation 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 complaint

In the case of the obviously groundless complaint concerning unfair competition, the court, upon a motion 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 in section 1 above have suffered a damage, may request its repairing pursuant to general rules.

5.4. Civil liability after intervene OCCP President

In a few situations it is better to start civil action before a court of law against the unfair advertiser if the President of OCCP positively finishes administrative procedure on protecting collective interest.

In order to protect individual consumers, it has become necessary to introduce an abstractive control of advertisements with respect to their compliance with the regulations. In the case where a breach of regulations is found, the organs entitled to act, intervene to protest the collective interest of all citizens, potential customers. It is not required here to find the appearance of a concrete damage caused by unfair advertising (e.g. the conclusion under its influence of a contract being disadvantageous to the consumer), the threat alone of misleading and inducing to a purchase is sufficient.

The entities authorized to intervene in these cases are: the President of the Office for Competition and Consumer Protection, a district (municipal) consumer advocate and consumer organizations. Any consumer, who feels that a given advertisement infringes his rights, may report thereto. These organs may order the enterprise to:

- 1) abandon the unauthorized activities,
- 2) remove their results,
- 3) lodge a statement in due form and content,
- 4) pay vindictive damages to a specific social purpose connected with the support of Polish culture and protection of national heritage – if the act was caused by

fault – that is when at working out the advertising campaign the advertiser's objective was to mislead the recipients.

In the case where the possibilities to amicably settle the case are lacking, these organs may lay a civil action before a common court of law against the unfair advertiser. Where an actual damage appears, the consumer is entitled to claim for indemnity under the general rules of the Civil Code⁴⁰.

6. CRIMINAL UNFAIR ACTS AND PENAL PROVISIONS (ARTICLE 23–27 ACUC)

Every person, who contrary to their obligation towards the entrepreneur discloses to another person or uses in her own economic activity information which is a business secrecy, shall be liable to the fine, probation or imprisonment up to 2 years, provided it is to the significant detriment of the entrepreneur.

The same sanctions shall apply to the person, who having acquired illegally the business secrecy, discloses it to another person or uses in her own economic activity.

In Article 24. ACUC are penal provisions for every person, who by way of technical means of reproduction shall copy external image of a product or releases such product for free circulation creating the possibility to mislead customers as to the producer or product identity, thus significantly damaging the entrepreneur, shall be liable to the fine, custody or imprisonment up to 2 years.

In Article 24a. ACUC are penal provisions for whoever organizes a system of pyramid sales or manages such a system is subject to imprisonment for between 6 months and 8 years.

In Article 25.1. whoever marks, or contrary to the obligation, does not mark goods or services which misleads the customer either as to their origin, quantity, quality, content, method of production, application, capabilities of use, repair or maintenance or other significant features of the products or services or does not make a notification of the risk associated with their use and exposes the customer to damage, is subject to the penalty of arrest or a fine.

The same penalty is applicable to anyone who performs an act of unfair competition in terms of advertising, promotional lottery or sale (as described in Article 17a).

In Article 26.1. ACUC are penal provisions for person who is disseminating false or misleading information on the enterprise, in particular about persons managing undertaking, manufactured products, provided services, or charged prices, or economic or legal status of the undertaking in order to bring detriment to the entrepreneur, shall be liable to the custody or fine.

⁴⁰ OCP Report – op. cit., p. 66.

The same sanction shall apply to the person who, in order to yield benefits for herself, her undertaking or third parties, disseminates false or misleading information about her undertaking or entrepreneur, in particular about persons managing the undertaking, manufactured products, provided services or charged prices, or about economic or legal status of the entrepreneur or undertaking.

The prosecution of the offences specified in the present Act shall be instituted upon a motion of the injured party, and in the case of misdemeanors – upon a request of the injured.

Public Procurement

1. GENERAL REMARKS

The Act of 29 January 2004 – Public Procurement Law (Journal of Laws No. 19, item 177 with later amendments) entered into force on 2 March 2004. Article 1 of this Act specifies the rules and procedures for awarding public contracts, legal protection measures, checking of the award of public contracts and competent authorities with respect to matters regulated in the Act.

The Act of 7 July 2006 concerning the amendments to the Act – the Public Procurement Law and to the Act on Liability for Violating the Public Finance Discipline of entered into force on 25th May (Journal of Laws No. 79, item 551). The amendment to the Public Procurement Law was long awaited. Its main aim was to adjust the Polish law to the new EC directives:

- Directive 2004/18/EC of the European Parliament and the Council of 31st March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Official Journal of the European Union L. 134). It is the so called classical directive,
- Directive 2004/17/EC of the European Parliament and of the Council of 31st March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (Official Journal of Law L. 134). It is the so called sector directive.

The necessity of implementation of the above mentioned directives results in the following changes:

- time limits for submission of requests and tenders,
- principles applicable to informing the contracting authorities and economic operators,
- the way of publication of specifications of the essential terms of the contract.

Moreover, the legislator took advantage of the ability conferred upon him in the directives to introduce some new institutions:

- competitive dialogue,
- electronic auction,
- dynamic purchasing system.

Numerous changes were also introduced into the existing legal system that is not covered by the directives.

2. STATUTORY DEFINITIONS

Definitions of the terms referred to in the Act are included in Article 2 of the aforementioned Act. These are:

- price
- supplies
- dynamic purchasing system
- head of the contracting entity
- public works concession
- most advantageous tender
- tender for lot
- variant
- public works
- public funds
- framework agreement
- economic operator
- contracting entity
- public contracts

Some of these definitions have already been used in some other legal regulations (e.g. price). Some of the terms were defined by specific regulations for the use of procurement law.

3. SUBJECTIVE SCOPE OF THE ACT

Article 3 enumerates the entities that by virtue of law are to apply the Public Procurement Law. The entities mentioned in points 1–3a are obliged to apply the provisions of the Act to any kinds of public contracts awarded by themselves (exceptions are included in Article 4). Whereas entities mentioned in points 4–7 apply the provisions of the Act insofar as the public contract awarded complies with the requirements as set forth in the Act, such as the purpose of the awarding a public contract or the way of financing.

4. EXCLUSIONS FROM THE SCOPE

Article 4 excludes the application of the Act for some kinds of public contracts. However these contracts still remain public contracts.

The catalogue included in Article 4 refers to the so called subjective exclusions, i.e. exclusions on the basis of the object of the contract, not the entity which awards the contract.

5. PRINCIPLES OF AWARDING CONTRACTS

The principles of awarding public contracts are defined in the chapter 2, section I. These norms are fundamental for the public procurement system and the further provisions of the Act build upon them. Any violation of any of the principles defined in Article 7–10 results in far-reaching consequences, including the invalidity of the contract referring to a public contract.

The principles are as follows:

- 1) the principle of fair competitiveness
- 2) the principle of equal treatment of the economic operators
- 3) the principle of impartiality and objectivism
- 4) the principle of awarding the contracts in compliance with the provisions of the Act
- 5) the principle saying that public procurement procedure is open to the public
- 6) the principle of written form
- 7) the principle of using Polish language
- 8) the principle of primacy of tendering procedure

Ad. 1

The principle implies the obligation of the contracting entity to prepare and conduct the procurement procedure, so as not to distort fair competitiveness. This principle is expressed in the following articles:

- Article 17 which implies exclusion from the exercising any activities in the procedure of any persons whose impartiality may be questioned,
- Article 24, item 1 referring to exclusion from the procurement procedure of economic operators, when their reliability may be questioned,
- Article 89, item 1, point 3 which sets forth that any tender submitted is deemed to be rejected when it is an act of unfair competition,
- Article 90 item 3 which sets forth rejecting any tender of an economic operator if it is abnormally low when compared to the object of the contract.

Ad. 2

In accordance with this principle contractors are to be treated equally by a contracting authority. None of them can be discriminated or treated better than others. Following this principle contractors are to receive from a contracting entity any information referred to in the provisions of the Act under the same conditions and at the same time. Evaluation of the tenders and evaluation of the fulfillment of requirements to participate in the procurement procedure are to be conducted under the same criteria and requirements in reference to every economic operator.

Ad. 3

This principle refers to the persons exercising activities connected with preparation and conduct of public procurement procedures. Impartiality implies lack of favoring and discriminating against any economic contractor seeking an invitation to perform the contract. Objectivism implies the necessity of exercising activities by these persons in compliance with the regulations and thorough knowledge in the field of formal and subject matter issues connected with awarding contract.

Ad. 4

This legal norm sets forth that contracts are awarded solely to the economic operator chosen according to the provisions of the Act – a contract may be awarded solely in compliance with the procedures set forth in the Act.

Ad. 5

The principle of procurement procedure being open to the public is regulated in Article 8 item 1 of the Act and is further specified in the following articles:

- Article 86, item 2 which sets forth that opening of tenders is open to the public
- Article 96, item 3 according to which the records of the procurement proceedings together with the annexes attached thereto are open to the public.

This principle is also realized after the procurement procedure has been terminated – Art 139, item 3: the contract for procurement, which is concluded after the public procurement procedure is conducted, is open to the public.

According to item 2 the contracting authority may restrict the access to the information connected with the procurement procedure solely in cases referred to in the Act. These are listed in the following articles:

- Article 38, item 2 which forbids disclosure of information, when the economic operator referred to the contracting authority to have the technical specifications explained
- Article 38, item 3 forbids disclosure of the information pertaining to the profile of the economic operators who submitted to the contracting entity questions for explanation of the content of specification

- Article 58, item 3 and Article 60d, item 7 referring to the confidentiality of negotiations and dialogue
- Article 79, item 3 and Article 91c, item 3 which forbid disclosure of the information enabling identification of the economic operators within the framework of auction or electronic auction respectively
- Article 96, item 3 which sets forth that the annexes attached to the record of procurement procedure are not rendered accessible until the most advantageous tender is chosen or the procurement procedure are invalidated.

Ad. 6

In accordance with this principle the procurement procedure is conducted in a written form.

Ad. 7

It is a rule that procurement procedure is conducted in Polish. However, according to item 3 in justified cases the contracting entity may agree to submit certain documents in another language that is commonly used in international trade or in the language of the country where the contract is awarded.

Ad. 8

The basic procedures applied for awarding public contracts are unrestricted or restricted tender. The other procedures for awarding contracts may be applied solely in the circumstances expressly provided for in the Act. These are negotiations with publication, competitive dialogue, negotiation without publication, single-source procurement, request for quotation and electronic auction.

6. PUBLICATION

Provisions of the Chapter 3, Section I regulate the principles concerning the publication of a contract notice by the President of the Procurement Office and the Office of Official Publications in EU (Article 11), the way of transmission of contract notices to these administrative authorities (Article 12) and in specified circumstances they impose on the contracting authority the obligation to publicize the preliminary contract notice on the contracts or framework agreements planned in the forthcoming 12 months (Article 13).

7. PROCUREMENT PROCEDURE

Contracting authority and economic operators

The provisions of the Civil Code are to be applied to the activities exercised by the contracting authority and economic operators within the public procurement procedure insofar no regulations are set forth in the Act.

The parties to the proceedings (contracting entity and economic operator) are equal to each other. In line with the provisions of Article 15 preparation and conduct of the procurement procedure is the right of the contracting entity. However, the contracting authority can delegate exercising of these activities to its own organizational unit or a third party (Article 15, item 2) which will act as plenipotentiaries of the contracting entity (Article 15, item 3).

In order to achieve more advantageous conditions to perform a public contract and in a view of accelerating the public procurement procedure through its common organization the legislator provided for the institution of the so called common contracts.

Under Article 16 a group of contracting entities will be able to delegate to one of the contracting entities chosen from among themselves the right to conduct the relevant procedure and award the contract on their behalf and in their name. This solution shall apply insofar there is a demand for the same object of a contract on the part of a few contracting authorities.

Article 17 sets forth provisions referring to the persons who exercise certain activities in the procurement procedure on behalf of the contracting entity and are subject to exclusion. The group of persons acting on behalf of the contracting entity is very wide and is not limited to its employees. This is any person who regardless of the nature of his/her relations with the contracting entity exercises activities in the procurement procedure. Hence the exclusion applies to employees, experts and any other persons to whom the circumstances covered by the aforementioned article apply.

It is a rule that the head of the contracting institution, i.e. the person or administrative authority, which according to the regulations in force, statute or agreement is entitled to manage the contracting institution, excluding the plenipotentiaries established by the contracting entity, is liable for the preparation and conduct of the procurement procedure. If the value of the contract does not exceed EUR 60000, given in PLN, the head of the contracting entity may appoint "Procurement Committee".

Preparation of the proceedings

Precise and accurate description of the object of the contract guarantees that the contracting entity performs the public contract in line with the provisions it has made.

The awarding entity shall describe the object of contract using technical and qualitative characteristics complying with the Polish Standards transposing European harmonized standards or with the standards of the European Economic Area member states transposing those standards.

The value of the contract shall be determined on the basis of the total estimated remuneration of the economic operator, excluding the tax on goods and services, determined by the awarding entity with due diligence.

The basis for calculating the value of a contract for recurring services or supplies shall be the total value of contracts of the same type:

1. awarded over the previous 12 months or in the previous budget year, taking into account the quantitative changes of the purchased services or supplies and the average annual index of consumer prices (ICP) of products and services forecasted for a given year, or
2. which the awarding entity intends to award within 12 months following the first delivery of such services or supplies.

Where the contract is awarded:

- 1) for the indefinite period of time, the contract value shall be the value determined taking into account of a 48-month time period of the contract performance;
- 2) for a definite period of time:
 - a) not exceeding 12 months – the contract value shall be the value determined taking into account the time of its duration;
 - b) exceeding 12 months – the contract value shall be the value determined taking into account the time of its duration, and in case of contracts for supplies acquired on the basis of rent, lease or leasing, along with a final value of the object of the public procurement contract.

The Act specifies the dates when the value of the contract is to be established. For supplies or services the value is established not earlier than 3 months before the procurement procedure commences.

Procurement procedures – definitions

Unlimited tender

Unlimited tender is regulated in Articles 39–46 of the Act. According to the definition set forth in Article 39 the unlimited tender is the only procurement procedure, whereby all interested economic operators can submit tenders in reply

to the publication of notices. In line with the provisions of the Article 10, item 1 this is, apart from the limited tender, the primary procedure for awarding contracts. It implies that it can be used in any circumstances without the necessity to meet additional requirements.

Limited tender

Under Article 47–53 limited tender is a procurement procedure, whereby in reply to the publication of notices the requests to be let into the tender are submitted by economic operators and the tenders may be submitted by the economic operators invited to submit tenders (Article 47).

Negotiations with notice

The negotiated procedure commences with the publication of notice on public contract. In reply to this the economic operators submit requests to let them into the relevant procedure. Following this the contracting entity invites the economic operators who already in the procedure to submit the preliminary requests. The economic contractors, whose preliminary tenders are not to be rejected are invited to negotiations. After these finish the contracting authority invites the economic operators to submit tenders. The most economically advantageous tender is chosen from these. Negotiations with notice are specified in Article 54–60.

Competitive dialogue

Competitive dialogue is new procurement procedure which was introduced by the amendments to the Public Procurement Law. The provisions of Articles 60a–60e regulating the conduct of this type of procurement procedure are based on Article 29 of the Classical Directive.

According to the definition included in Article 60a competitive dialogue procedure commences with publication of notice, in reply to which the economic operators submit their requests to be let into the relevant procedure. Following this the contracting entity invites to the dialogue all economic operators, who meet the requirements of participation in the procedure. The information achieved in the dialogue enables the contracting entity to prepare the specifications and dispatch them to the economic operators together with the invitation to submit tenders. The most advantageous tender is chosen from among those submitted.

Negotiations without notice

Negotiations without notice are regulated in Articles 61–65.

This is a type of procurement procedure, whereby the contracting authority negotiates the terms and conditions of the contract with the economic operators that he chooses and then he invites them to submit tenders. Together with the tenders the economic operators submit the documents confirming the fulfillment of the requirements to enter the relevant procedure. The most advantageous tender is chosen from among those submitted.

Single-source procurement

Single-source procurement – regulated in Articles 66–68.

This is a type of procurement procedure, whereby the contracting authority awards the contract after negotiations with just one economic operator.

Request for quotation

Request for quotation is regulated in Articles 69–73.

This is a type of procurement procedure which is very simple both for the contracting entity and for the economic operators. In this procurement procedure the contracting entity addresses a request or quotation to the chosen economic operators and invites them to submit tenders. From among the tenders submitted the most advantageous one is chosen, i.e. the one which offers the lowest price.

Electronic auction

Electronic auction – regulated in Articles 74–81.

This is a special type of procurement procedure which consists in submitting through electronic means tenders which are more advantageous to the contracting entity and are evaluated not by the contracting entity but they are automatically classified against the price criterion. Submission of tenders for lot and variants by economic operators is not possible.

8. PROCUREMENT CONTRACT

The regulations included in section IV of the Act on procurement contracts are special against the respective regulations of the Civil Code and as such have priority. As a rule these regulations are absolute (*ius cogens*), which implies that they cannot be excluded by any provisions of the procurement contract concluded between the economic operators who jointly seek the award of contract.

A procurement contract shall, under the pain of nullity, require a written form, unless separate provisions provide for a special form.

Under Article 145, item 1 the contracting entity may recede from the procurement contract, provided the following prerequisites occur:

- change in the circumstances compared with the moment when procurement concluded
- the change is essential
- as the result of this change the fulfillment of this procurement contract does not lie in the public interest
- this change was not foreseeable at the time when the procurement contract was concluded.

Article 146, item 1 sets forth six prerequisites resulting in invalidation of the agreement referring to procurement contract. This is a closed catalogue, hence

other than those infringements of the procurement regulations that are expressly mentioned in the Article does not result in invalidity of the procurement contract.

The awarding entity may request the economic operator to provide security on due performance of the contract.

Security shall serve to cover claims in respect of non-performance or improper performance of a contract. If an economic operator is at the same time a guarantor, this security shall also serve to cover claims in respect of quality guarantee.

9. PUBLIC PROCUREMENT OFFICE (PPO)

The central authority of the state administration is the President of the Office. The Prime Minister exercises supervision over the President of the Office. The Procurement Council is the advisory and consultative body of the PPO President. Its members are appointed by the Prime Minister. The President of the Office manages and supervises the work of PPO with the help of the Vice-presidents, General Director, Directors of Departments and Directors of Administrative Units of the same rank.

10. LEGAL REMEDIES

To ensure transparency in the procurement procedure, the interests of the participants of the procurement procedure, in particular the interests of economic operators often engaging economic and human potential to achieve a given contract the Act foresees a system of legal remedies. The catalogue of the legal remedies includes: protest, appeal and complaint lodged at the court.

The entities who are entitled to lodge legal remedies are: economic operators, participants of the competition, other persons, organizations uniting economic contractor and contracting entity.

Prerequisites for lodging legal remedies

- infringement on the regulations of the Act by the contracting entity (acting or abandonment)
- suffering damage or the possibility of it, whereby the damage concerns the legal status referring to achieving public contract
- or the possibility of it on the part of the entities entitled to lodge legal protection measures
- casual connection between the infringement on the regulations of the Act done by the contracting authority and the circumstances referred to in point 2.

Protest

A written protest may be lodged to the awarding entity against the contents of the notice, actions performed by the awarding entity in the course of procedure and in the event of a failure by the awarding entity to act as it is bound to perform under this Act.

Protest shall be lodged within 7 days from the date on which the economic operator may have become or actually became aware of the circumstances constituting the basis thereof. The protest shall be deemed as lodged when delivered to the awarding entity in a manner allowing it to become familiarised with its contents.

The protest shall be rejected when lodged:

- after the prescribed time
- by unauthorized entities

Elements of the protest:

- identifying of the relevant activity or abandonment by the contracting entity
- concise presentation of the objections raised
- identifying the factual and legal circumstances that justify lodging the protest
- pointing to the demand for specified action against the contracting entity

The protest is finally resolved:

- 1) where no appeal is possible – with the resolution of a protest by the awarding entity or the deadline for its resolution;
- 2) where no appeal has been lodged – upon the expiration of the final date for the lodging of appeals;
- 3) In case of lodging the appeal:
 - a) on the day, on which the decision ending the appeal procedure or the decision of the arbitration panel is issued or
 - b) on the day, on which the judgment or a decision ending the procedure in the case is issued by the district court referred to in Article 195 paragraph 1, or upon the expiry of the final date for lodging petitions as referred to in Article 195 paragraph 2 if the contract value for works is equal to or exceeds the PLN equivalent of EUR 20 000 000 and for supplies and services, of EUR 10 000 000.

The awarding entity dispatches the resolution along with justification and the cautions on the manner and time limit for lodging the appeal to the economic operator, who lodged the protest and the economic operators who joined the procedure as a result of protest being lodged, and if the protest refers to the content of the contract notice or the provisions of specification of essential terms of contract under open tendering, also places on the website where the specification is available.

Appeal

Appeal is the next type of legal remedies. It can be used against any decision taken in reference to the protest (procedure in which the value of the contract object is below EUR 60 000 are excluded from this).

The appeal is lodged to the President of PPO within 5 days from the dispatch of the resolution of protest or the expiry of the deadline for the examination of protest, at the same time dispatching the copy to the awarding entity. The appeal delivered at the Polish post office shall be regarded as submitted to the President of the PPO.

The copy of the appeal is also dispatched to all the participants of the procedure as a result of protest being lodged, however not later than 2 days from its receipt, summoning them to participate in an appeal procedure.

The appeal shall be examined by a panel of three arbitrators appointed by the President of the PPO from the list. The President of the PPO shall appoint arbitrators by public computer drawing. The chairman of the arbitration panel shall be drawn from persons with education in law.

The arbitration panel examines the appeal within 15 days from the day on which the appeal was dispatched to the President of PPO. The President of PPO may order a combined examination by the arbitration panel of all the appeals, which were lodged in the course of the same contract award procedure or refer to the same actions of the awarding entity.

The chairman of the arbitration panel shall close the hearing if in his opinion the case has been sufficiently clarified. The arbitration panel bases its judgement on the state of affairs determined in the course of the procedure. The chairman of the arbitration panel shall reopen a session or a hearing if new circumstances material to the resolution of the appeal have been disclosed thereafter.

Petition to the court

The petition to the court may be lodged against the judgement or the final decision of the arbitration panel ending the appeal procedure.

Petitions shall be lodged to the regional court competent for the seat or place of residence of the awarding entity.

Petitions are lodged through the President of the PPO within 7 days of the delivery of the arbitration panel decision, sending at the same time its copy to the opposing party of the petition.

The petition should satisfy the requirements provided for a pleading and should contain the indication of the decision complained against, description of charges with a brief substantiation, adduced evidence, as well as a request to change the decision in whole or in part.

The court shall examine the case forthwith, however not later than within 1 month from the date of its receipt by the court.

APPENDIX 1 FUNDAMENTAL BUSINESS REGULATIONS

REGULATION	Published in Journal of Laws (Dz. U.)
1	2
Accounting Law of 29 September 1994	Dz. U. No. 76, item 694 of 2002
Acquisition of Real Estate by Foreigners Law of 24 March 1920	Dz. U. No. 167, item 1758 of 2004 – uniform text
Administration of Foreign Trade in Goods Law of 16 April 2004	Dz. U. No. 97, item 963 of 2004
Banking Law of 29 August 1997	Dz. U. No. 72, item 665 of 2002 – uniform text
Civil Code of 23 April 1964	Dz. U. No. 16, item 93 of 1964
Code of Commercial Companies of 15 September 2000	Dz. U. No. 94, item 1037 of 2000
Commercialisation and Privatisation of State Enterprises Law of 30 August 1996	Dz. U. No. 171, item 1397 of 2002 – uniform text
Competition and Consumer Protection Law of 15 December 2000	Dz. U. No. 122, item 1319 of 2000
Construction Law of 7 July 1994	Dz. U. No. 89, item 414 of 1994
Copyright and Related Rights Law of 4 February 1994	Dz. U. No. 24, item 83 of 1994
Corporate Insolvency and Recovery Law of 28 February 2003	Dz. U. No. 60, item 535 of 2003
Customs Law of 19 March 2004	Dz. U. No. 68, item 622 of 2004
Economic Freedom Law of 2 July 2004	Dz. U. No. 173, item 1807 of 2004
Financial Assistance for Investments Law of 20 March 2002	Dz. U. No. 41, item 363 of 2002
Financial Restructuring of Banks and Enterprises Law of 3 February 1993	Dz. U. No. 18, item 82 of 1993
Foreign Exchange Law of 27 July 2002	Dz. U. No. 141, item 1178 of 2002
Formation of the Agricultural System Law of 11 April 2003	Dz. U. No. 64, item 592 of 2003
Industrial Property Law of 30 June 2000	Dz. U. No. 49, item 508 of 2001

1	2
Insurance	Dz. U. No. 124, item 1151 of 2003
Law of 22 May 2003	
Labour Code	Dz. U. No. 21, item 94 of 1998 – uniform text
of 26 June 1974	
National Investment Funds and their Privatisation	Dz. U. No. 44, item 202 of 1993
Law of 30 April 1993	
Promotion of Employment and Labour Market Institutions	Dz. U. No. 99, item 1001 of 2004
Law of 20 April 2004	
Public Aid Procedure	Dz. U. No. 123, item 1291 of 2004
Law of 30 April 2004	
Public Procurement	Dz. U. No. 19, item 177 of 2004
Law of 29 January 2004	
Refinancing the Interest on Fixed Interest Rate Export Credits	Dz. U. No. 73, item 762 of 2001
Law of 8 June 2001	
Spatial Zoning	Dz. U. No. 80, item 717 of 2003
Law of 27 March 2003	
Special Economic Zones	Dz. U. No. 123, item 600 of 1994
Law of 20 October 1994	
State Enterprises	Dz. U. No. 112, item 981 of 2002 – uniform text
Law of 25 September 1981	
Suppressing Unfair Competition	Dz. U. No. 47, item 211 of 1993
Law of 16 April 1993	
Tax Laws	
Act on Income Tax on Legal Persons	Dz. U. of 2000 No. 54, item 654, as amended
Act on Value Added Tax	Dz. U. of 2004 No. 54, item 535
Act on Excise Duty	Dz. U. of 2004 No. 29, item 257, as amended
Act on Income Tax on Legal Persons	Dz.U. of 2000 No. 54, item 654, as amended
Act on Income Tax on Natural Persons	Dz.U. of 2000 No. 14 item 176, as amended
Act on Lump-sum Income Tax	Dz.U. of 1998 No. 144 item 930, as amended
on Some Income Derived by Natural Persons	Dz.U. of 1993 No. 94 item 431, as amended
Act on Agricultural Tax	Dz.U. of 1991 No. 9 item 31, as amended
Local taxes	
Act on Local Taxes and Charges	

APPENDIX 2

STARTING A BUSINESS IN POLAND

STANDARDIZED COMPANY

Legal Form: Limited liability company

Minimum Capital Requirement: 50,000

City: Warsaw

Registration Requirements:

Procedure 1.	Notarize company agreement
Time to complete:	1 day
Cost to complete:	PLN 1,010 notary fee + 0.5% over PLN 60,000 + 22% on top of notary's fee (VAT) + 0.5% of share capital (civil law transaction tax)
Comment:	Maximum notary cost cannot exceed six times the average monthly wage (i.e. 2,289.57 PLN x 6 = 13,737,42 PLN) plus VAT and civil transaction tax This agreement could be standard if the company has only one shareholder (or a shareholder with definite majority of votes at the Shareholders' Meeting), no need to be written by a lawyer. It must be then notarized. For setting up whole company (tax, social insurance, etc. included), a lawyer would normally ask for PLN 5000 up to PLN 25,000.
Procedure 2.	Obtain "REGON" number (statistical number)
Time to complete:	1 day
Cost to complete:	no charge
Comment:	It takes half an hour if there is no queue. REGON – Rejestr urzędowy podmiotów Gospodarki Narodowej – Official Register of Entities of National Economy) is obtained at local statistical office (US – Urząd Statystyczny). The Regon number should be obtained prior to registration of the Company in the National Court Register within 14 days as from the date of the notarial deed.
Procedure 3.	Deposit paid-in capital at the bank
Time to complete:	1 day
Cost to complete:	no charge
Comment:	To open a bank account a limited liability company has to provide the bank with the Founding Deed and a REGON certificate.
Procedure 4.	File Articles of Association registration date, registration number with the Tax Office; Obtain tax identification number (NIP)
Time to complete:	24 days
Cost to complete:	no charge
Comment:	In order to obtain tax identification number (NIP), the Company must provide the following documents: notarial deed on setting up thereof, company's excerpt from the register, confirmation of assignment of "REGON" (statistical number), list of all agreements for bank account, agreement for office rental (or another document confirming legal title to the office/building where the company's activity shall be conducted), book-keeping agreement (if concluded). Some tax offices may request additional documentation (depending on the tax office).

Once the Company obtains a confirmation of its registration with the Tax Office it may benefit from VAT deductions and issue invoices for its contractors. Therefore it is strongly advised that the Company be registered with the Tax Office as soon as possible.

The number is usually issued within a month.

Procedure 5*.	Register for VAT
Time to complete:	1 day (simultaneous with procedure 4)
Cost to complete:	PLN 152
Comment:	The Company is required to register for the purposes of VAT by the date of conducting for the first time the business activity covered by VAT. The registration should be submitted with the Tax Office as referred to in Procedure 4. The Company is required to provide information concerning: its business name and legal form, "REGON" (statistical number), date of commencement of its business activity, address of its registered office. If the Company is planning to conduct foreign trade activities within territory of European Union in the future, it would also be obliged to register as a VAT EU taxpayer. The Company should submit an application for registration as the VAT EU taxpayer before commencing its foreign trade activity within European Union. However, it should be noted that prior to registration as the VAT EU taxpayer, the Company should be registered as a regular VAT taxpayer.

Procedure 6*.	Register in the Register of Entrepreneurs maintained by the National Court Register
Time to complete:	14 days (simultaneous with procedure 4)
Cost to complete:	PLN 1,500 (PLN 1000, registration fee + PLN 500 publication cost)
Comment:	Documents required for registration: (i) Articles of Association of the Company, (ii) representation of all Management Board members that the contributions towards the share capital have been made by all shareholders in full, (iii) shareholders' list, (iv) notarized specimens signature of all Management Board members (v) document confirming appointment of the members of corporate bodies (i.e. Management Board and supervisory body, if any). At the Court the company obtains number and date of registration. The announcement on the company's registration is published in "Monitor Sadowy i Gospodarczy" court gazette. The text of announcement is prepared and forwarded for publication ex officio by the court. On 14 November 2003 (with effect as of 1 January 2004) an amendment of Law on Economic Activity and some other laws was adopted by the Polish Parliament. In particular, the company may file together with its application to register the company at the State Court Register (Court of Registration) (i) an application to be registered in the register of economic entities (REGON) maintained by the State Statistical Office and (ii) application to receive a tax identification number (NIP) given by tax authorities. The court of registration is ex officio obliged to send the REGON application to the relevant State Statistical Office and NIP application to the tax office indicated by the applicant immediately and not later than 3 days after the entry to the court register has been made.

However, it is still advised for all companies to have their REGON and NIP applications filed separately as such bundled filing proves more time-consuming and, in practice, the Company may not carry on its activity prior to the registration in National Court Register and further obtaining of REGON and NIP number. In addition the court decides when subject documents are to be sent to the relevant authorities, which in some instances may result in unexpected extensions of the whole registration procedure. As a result, most companies choose to file the REGON and NIP applications directly.

New time limits have been introduced – the judge is required to issue a decision within 14 days; in case any hindrance from registration occurs the judge is obliged to issue a decisions within 7 days from the date such hindrance has been removed; in case the examination of the application requires an open hearing this has to be done not later than within a month. However, the time limit is not strictly binding.

On 21 August 2004, the Economic Freedom Act came into force. The Act foresees electronic registration, as well as the establishment of a "one-stop shop". It will allow entrepreneurs to apply for the NIP and REGON, and register with Social Insurance Office (ZUS) at one office. These systems are planned to be in place by early 2007.

Procedure 7.	File amending application for "REGON" number with the Statistical Office
Time to complete:	1 day
Cost to complete:	no charge
Comment:	Once the company is registered with the National Court Register, it is required to file with the Statistical Office an "amending application" to update the company data (delete "in organization" next to the company name). Obtaining REGON number and NIP (tax) number before registration at court is not obligatory.
Procedure 8.	Register the company at The National Sanitary Inspection
Time to complete:	1 day
Cost to complete:	no charge
Comment:	"Państwowa Inspekcja Sanitarna" (National Sanitary Inspection) will be informed within 30 days of the commencement of business.
Procedure 9.	Register the company at the local Social Insurance Office (ZUS) for social insurance payments
Time to complete:	1 day
Cost to complete:	no charge
Comment:	All social insurance and similar registrations are performed in ZUS (Zakład Ubezpieczeń Społecznych). Company has 7 days to register after hiring the first worker. Along with application, the Company should, inter alia, attach NIP number and REGON number decisions. Although it is not required by law to have NIP number at the time of registration for ZUS, in practice the software system used in ZUS does not accept entries without NIP number.

Procedure 10.	Register the company at The National Work Inspection
Time to complete:	1 day
Cost to complete:	no charge
Comment:	"Państwowa Inspekcja Pracy" (National Work Inspection) will be informed within 30 days of the commencement of business (the State Labor Inspectorate takes the "commencement of business" to mean the date on which the first employee was hired), the company must inform the relevant labor inspector in writing of the location, type and scope of business.

Note: Procedures sometimes take place simultaneously. Instances of this are marked with an asterisk (*).

Source: <http://www.doingbusiness.org>