



**CLARIFICATIONS CONCERNING THE ASSESSMENT BY
THE PRESIDENT OF UOKIK OF THE NOTIFIED
CONCENTRATIONS**

Contents

List of abbreviations	5
Introduction	6
I. Relevant market	7
1. General comments	7
2. Product market	9
2.1. Demand substitutability	9
Characteristics and purpose of the product	9
Price difference	12
Dissimilarity of consumers and their behaviours	13
Time availability	15
Costs of changing the product used	15
Differences in legal regulations	15
2.2. Supply substitutability	16
2.3. Asymmetrical nature of substitutability	17
3. Geographic market	18
Specifics of the product	18
Costs of transport	19
Regulatory barriers	20
Technical and cost barriers	21
Linguistic barriers and the barriers connected with the lack of experience in international trade	22
Varied consumer preferences	22
Actual trading flows	23
Organisation of business activity	24
The uniformity of relevant market parameters	24
Area where the consumers purchase goods	25
II. Impact of concentration on competition	26
1. Horizontal impact	26

1.1.	Non-coordinated effects	26
1.1.1.	Market shares	27
	Significance of market shares.....	27
	High market shares	28
1.1.2.	Factors concerning the shaping of market shares	29
	Change in market share	29
	Competitors' market shares	29
	Tendency of changes in market shares.....	30
	Fluctuations of market shares.....	31
1.1.3.	Factors connected with barriers of entering and competing on the market	31
	The power of the concentration participants and their competitors	31
	Closeness of competition.....	33
	Easiness of changing suppliers.....	34
	Complaints of the trading partners and previous infringements of competition law.....	34
	Administrative entry barriers.....	34
	Cost entry barriers	35
	Other entry barriers and behaviours of potential competitors	36
	Development stage of the market and its dynamics	37
	Observed market entries.....	38
	Planned exits from the market.....	38
	Changes in the nature of the competitive process	38
	Organisational specificity of the merging entities.....	39
	Specific functioning of the market	39
	Power of customers	39
	Situation in other geographic markets	40
1.2.	Coordinated effects.....	41
2.	Vertical impact	42
2.1.	Non-coordinated effects	42
	Change in the relationship supplier-recipient.....	42

Asymmetry between production and retail sales in a natural monopoly.....	43
Natural monopoly at both levels of trade	43
Factors connected with market power and their change as a result of concentration.....	43
The nature of the market and probable responses of competitors	44
Regulatory provisions.....	46
Fulfilling the regulatory or quasi-regulatory function on the market.....	46
2.2. Coordinated effects.....	46
3. Conglomerate effects.....	46
4. Contractual restrictions of competition accompanying the concentration	48

List of abbreviations

CADU – Consumer Articles of Daily Use

EEA – European Economic Area

FMCG – Fast Moving Consumer Goods

HHI – Herfindahl-Hirschman Index

HSD – hypermarkets, supermarkets, discount stores

NHI – National Health Institute

SSNIP – small but significant and non-transitory increase in price

EU – European Union

UOKiK – Office of Competition and Consumer Protection

ERO – Energy Regulatory Office

Introduction

Taking into consideration the current judgements in cases concerning material assessment of notified concentrations of undertakings, as well as facing the expectations of entrepreneurs, the President of the Office of Competition and Consumer Protection¹ adopts these *Clarifications concerning the assessment by the President of UOKiK of the notified concentrations* conducted on the basis of Articles 18, 19 and 20 of the Act of 16 February 2007 on competition and consumer protection².

These *Clarifications* present the approach of the President of the Office applied on assessing whether a notified concentration may result in a significant restriction of competition. *Clarifications* are based on the current administrative jurisprudence, constituting mostly its synthesis, with particular emphasis on the leading cases. These *Clarifications* constitute a supplement to the previously published *Clarifications on the criteria and procedure of notifying the intention of concentration to the President of UOKiK*.

The document presents the most important elements taken into consideration when assessing the subject matter of notifying the concentration. The description was divided into two sections: I – concerning defining the relevant market and II – regarding the assessment of the concentrations' impact on the market.

The prime objective of *Clarifications* is to increase the transparency of tasks performed by the President of the Office, armed with the simultaneous growth of legal certainty of undertakings, who will be able to assess the results and nature of the intended concentration in an easier and faster way. It should also contribute to increase the predictability of decisions issued by the President of the Office, which used to be a postulate raised by many entrepreneurs.

Due to the multiplicity of state of the facts as well as the constant evolution of forms, methods and conditions of conducting a business activity, it is neither possible nor reasonable to prepare an exhaustive document concerning the substantive assessment of concentration. As the *Clarifications* are based on the already resolved cases, it cannot be excluded that there will be new circumstances and factors in the future that will be taken into account by the President of the Office while assessing the reported transactions. It also means that increasing awareness of economic processes or experiences gained by foreign consumer protection authorities may prove it is necessary in a particular case to use other analyses than those presented in the *Clarifications*.

Clarifications neither constitute a source of commonly binding law nor establish any laws or obligations. They are not binding for other administrative bodies or courts. They constitute a summary of current judicial practice concerning the material assessment of the notified concentrations. Due to the aforementioned, the fact of publishing the *Clarifications* must be interpreted so, that in connection with pending cases, the President of the Office takes them into consideration, provided that the particular case does not reveal new circumstances that have an impact on the necessity to include them in the analysis.

Pursuant to Article 32, paragraph 4 of the Act on competition and consumer protection, these *Clarifications* are subject to publication in the Official Journal of the Office of Competition and Consumer Protection.

¹ Hereinafter referred to as “the President of the Office” or “the President of UOKiK”.

² Journal of Laws No. 50, item 331 as amended.

I. Relevant market

1. General comments

Definition of a relevant market constitutes – theoretically – the first stage of concentration assessment, under which it is decided which products and market entities are taken into consideration on the next stage of assessing the impact of the concentration on competition. In practice, the analysis conducted at both stages has a lot of common characteristics and is intended to obtain credible information on the economic relations between the participants of a transaction, their real or potential competitors and trading partners (not only suppliers, but also recipients), based on which it is possible to determine whether there is a high risk of significant reduction of competition as a result of the analysed concentration. Therefore, defining the relevant market is not the necessary condition to conduct the analysis of impact exercised by the concentration on the competition, but an integral element of such analysis, often conducted in parallel. The hypotheses concerning the relevant market and the impact of transaction on the market influence each other, because in its essence they concern the same issue – the nature of competition on the market.

Definition of the relevant market should simplify identification of all relevant sources of competitive pressure, which effectively hinder or prevent the participants of the concentration to behave irrespective of their competitors, in particular increasing prices of the products sold or worsening the offer in other ways. It facilitates the analytically clear identification of the possibly negative impact of concentration on competition

The scope and the intensity of the tests conducted in order to identify the relevant markets may differ significantly, depending on the previous judgements concerning particular markets³, the existence of credible data concerning particular activity, the diversity scale between the preliminary assessment of the competitive conditions of the undertakings notifying the intention of concentration and the antimonopoly authority⁴, as well as the existence or lack of the impact of concentration on competition for all the reasonable variants of the relevant market definition⁵.

DKK – 12/11 (Empik/Merlin, on-line sales of non-specialist books)

As regards the takeover by Empik of an on-line store Merlin.pl (<http://merlin.pl>), information and data delivered by the undertaking and their interpretation (the relevant markets defined by the entrepreneur) were the cause of concern as to their compliance with the state of the facts. These concerns were mainly connected with the fact that UOKiK earlier received complaints from undertakings, describing situations, which could indicate that this entity enjoys a very strong position on the market, at least within the book sales. Similar image arose from press publications and other collected items of information. However, the information presented in the notification significantly differed from the aforementioned. Moreover, the materials delivered by the parties, in particular the numerical data, were a serious cause for concern in terms of methodology, and therefore they were considered insufficient to perform a thorough assessment of the concentration. Having assured that the party does not have any other data that would be satisfactory for UOKiK and is not able to purchase them (institutions conducting market research did not have the data with the level of detail that was necessary to assess the considered concentration), a decision was made to verify and supplement the data and information through comprehensive market research.

As indicates the practice of antimonopoly authorities all over the world, the definition of a relevant market, both in terms of the products as well as geography, is, similar by nature, as it is often not possible to reflect all the forces affecting the behaviour of particular undertakings, including the level of such impact, which would require determining all real and potential competitors of the given entrepreneurs and the proximity of the competition between them. The judicature practice thus adopts that the goods that do not belong to the product market do not impose any competitive pressure on the participants of the concentration, while the area, where the

³ DKK – 46/07, DKK – 28/08 (steel goods markets).

⁴ DKK – 12/11 (on-line sales of non-specialist books), DKK – 64/10 (lease of sales-service space in large shopping malls).

⁵ DKK – 9/09 (instant soups).

competition is taking place, may often be determined as equalling the arbitrary administrative borders connected with the territorial division of the country and international borders. In most cases the aforementioned generalisations do not influence the assessment of the concentration, and any potential disruptions that may take place, can be corrected, taking them into consideration at the stage of assessing the impact of the concentration on competition, or by conducting such analysis for different variants of the relevant market.

2. Product market

Product market includes the products, which due to their purpose, price or features are recognized as substitutes by the buyers. The essential criterion of assessment is the demand substitutability; supply substitutability is also used as an auxiliary criterion. The assessment of the product market may be very problematic and requires a good knowledge of preferences of consumers, technical characteristics of the goods, regulatory environment and other factors that may have an impact on the incentives of the companies operating on the market. Certain framework for determining the substitutability between the products is established by the SSNIP test, which recognizes that a product belongs to the relevant market, when its price may be increased by 5-10% from the competitive level, without causing so much loss of customers (in particular by selecting other products) that the price increase would be uneconomic. In practice, the availability of information that would allow for precise analysis of consumer responses to such changes (provided that no other factors change), therefore it is rarely used directly in the decisions issued by the President of UOKiK⁶. In practice, probable consumer responses to changes in the product prices are tested by analysing the factors connected with its characteristics and the specifics of functioning on the market as those indicated below. It needs to be emphasized that the market analysis (both in terms of products and geography) has a comprehensive nature, therefore including a certain product in the relevant market is the result of a set of its features and other circumstances, which on their own do not have to be decisive.

2.1. Demand substitutability

Demand substitutability constitutes a consequence of the switching possibilities between various products being on the part of recipients. The scope of these possibilities indicates the competitive pressure that various products impose on each other.

Characteristics and purpose of the product

Characteristics and purpose of a given product may, in many cases, be a proof that the given product does not have any substitutes. A product may be a necessary resource for other goods, such as in case of milk⁷, or it may be a necessary fuel in some technologies⁸. The characteristics of the product may also distinguish it from others of similar purpose. Specific financial structure of the product⁹, differences in uses arising from physical-chemical characteristics¹⁰, a different technical characteristic that makes it impossible to use for certain purposes¹¹, as well as particular predispositions for certain purposes¹² can be indicated here. Books that serve different purposes (i.e. specialist, non-specialist, school textbooks) cannot be included in one product market¹³.

DKK – 28/07 (Kompania Węglowa/Haldex, hard coal production)

As regards concentration between the producer of a hard coal and a company processing the waste generated during mining, the antimonopoly authority clearly indicated that this product does not have any substitutes. The grounds for such conclusion was the fact that the majority of the recipients use coal as a product that does not have any equivalent, considering the technologies used (e.g. power plants and heat generation plants fuelled with coal, coke producers).

⁶ Usually, it comes down to asking questions to the surveyed partners of the merging companies, whether they would rather choose alternative products in case of a certain growth of prices (DKK – 131/10 [paper industrial bags]).

⁷ DKK – 73/2008 (milk purchase).

⁸ DKK – 28/07 (hard coal sales).

⁹ DKK – 18/2007 (debt trade).

¹⁰ DOK – 73/2007 (production of rubber), DOK – 46/07 (gas distribution).

¹¹ DKK – 67/09 (railway and tram junctions), DKK – 9/2011 (PET resins).

¹² DKK – 39/2011 (railway transport), DKK – 56/07 (forklift trucks with counterbalance).

¹³ DKK – 12/11 (on-line sales of non-specialist books)

DKK – 67/09 (Cogifer/Koltram, production of railway junctions)

As regards concentration between the producers of railway junctions, these products were divided into separate markets, with railway junctions separated from the tram junctions. The tram junctions differed from the railway junctions due to the turning radiuses applied, specifics of the construction as well as the limited terrain possibilities of laying them in the existing development zones (the necessity to design them for particular solutions).

DKK – 12/11 (Empik/Merlin, on-line sales of non-specialist books)

As regards the takeover by Empik of an on-line store Merlin.pl (<http://merlin.pl/>) it was determined that it cannot be recognized that the wholesale (or purchase) of all books constitutes one relevant market. It was decided that the following markets should be distinguished: non-specialist books market, textbook markets and a group of specialist books' markets. One of the reasons for adopting such definition of the relevant market was the functions directly served by the particular types of books, which is directly connected with the needs of the consumers they meet, which in turn translate into the behaviour of wholesale market participants, adapting to the preferences of consumers. Non-specialist books are a source of entertainment as well as are used for developing hobbies and satisfy the need for self-education. A consumer makes a decision about its purchase independently and is not obliged to it by almost anything. Purchase of specialist books from various disciplines (e.g. law, technology, medicine, etc.) is mostly determined by the need to acquire knowledge, which is later used in professional work. These books are also often purchased by undertakings for their employees, as work tools. In case of textbooks, purchasing particular titles is not even a consequence of a choice made by the consumer. The particular titles are imposed by the teaching curriculum and the decisions of the given educational institution. A book functions as an educational aid, which cannot be replaced by hardly any other product. Such differences in functions served by the particular types of books have a significant impact on the purchasing process as well as on the price of the book and its distribution methods.

On the other hand, formally separated products, such as various salty snacks, may be treated as belonging to one relevant market due to the similar characteristics (reasons for eating, place of purchase, circumstances of consumption, high calorific value, impulse shopping)¹⁴. Similar products that are not substitutes, but rather complementary products, often purchased together, may be included in one product market¹⁵.

DOK – 124/2006 (Lorenz Bahlsen/Pol snack, production of salty snacks)

In the case concerning the merger between the producers of salty snacks, the President of UOKiK decided that such products constitute one relevant market, as all of them satisfy the same customer needs and the price is not a key element that impacts the consumer choices. Various products comprising the whole market of salty snacks are easily replaceable, and the consumption time and consumer behaviour in the place of consumption are the same for all products in various segments. All snacks are usually consumed in the late afternoon or in the evening, usually while watching television, relaxing, during social meetings and while drinking.

It was also determined that the products comprising various segments on the salty snacks market have the following common features:

- salty snacks do not constitute the basic purchases (a product that one can live without),*
- reasons for their consumption are the hunger and the willingness to experience some pleasure,*
- the purchase place for all salty snacks is the same (small, large and average food stores, super and hypermarkets, clubs, cafés, pubs, petrol stations, cinemas, schools), just as the circumstances of consumptions are the same (watching television, social and family meetings, learning, reading, public events),*
- their common feature is high calorific value,*
- the factors that influence the purchase of all categories of salty snacks are the same – impulsive purchases, high impact of advertising, location on the shelf (placed together, they create a full offer of salty snacks).*

¹⁴ DOK – 124/2006 (salty snacks).

¹⁵ DKK – 66/08 (distribution of optical machines and devices), DKK – 56/07 (distribution of storage devices).

DKK – 66/08 (INVOPTIC/JZO, production of optical machines and devices)

When analysing the circumstances of the concentration that has an impact i.a. on the market of optical machines and devices, the antimonopoly authority decided that optical machines and devices, due to their purpose, may be divided into machines/devices used in optician's shops to cut and frame glass lenses and into machines/devices used by doctors – ophthalmologists to measure the required eyesight corrections. Therefore, within this general market of optical machines and devices, it was possible to distinguish two segments, i.e. machines/devices market for opticians and machines/devices market for ophthalmologists. Antimonopoly body recognized that the division of the market of optical machines/devices into two separate product markets was not necessary. One of the reasons of this decision was the fact that the division of optical machines/devices into two product markets was systematically less and less distinct, also due to the fact that the major group of the buyers, that is optical shops, more and more often employed doctors-ophthalmologists, therefore the opticians usually purchased both types of such machines/devices.

Certain products may also be characterised with a set of features (product mix width connected with the possibility to see the product and a convenient location¹⁶, or a large trading area connected with a significant number of well-selected shops and convenient location¹⁷), this is why the undertakings who offer them should be distinguished from their smaller competitors, despite the fact that, in theory, they offer the same service (as it is, respectively, in case of small shops and smaller shopping malls). Similar products may also satisfy a given need in a different way (e.g. seeing a film at the cinema and on DVD)¹⁸.

DKK – 76/2008 (Jeronimo Martins/Plus, retail sales of CADU at HSD).

As regards the takeover of a competitor by the biggest discount network in Poland, an extensive analysis was performed, concerning the differences between the retail sales market of consumer articles of daily use (CADU) in hypermarkets, supermarkets and discount stores (HSD), and the sales market of smaller sales formats. As it was determined, the HSD market offers a wider range of products than traditional stores. In large-format stores one can buy a lot of various products – from groceries through chemicals, household appliances, clothing to consumer electronics. Moreover, within particular assortment groups, such as coffee or tea, consumers have a wider choice of products. Large-format stores offer both brand products and products under their own label.

In comparison, small-format stores have a limited assortment of products – usually dominated by groceries and, to a limited extent, chemicals. Smaller shops usually offer brand products.

Large-format stores are usually self-service stores, which let the buyers move around freely, look at the products on the shelves, consider the choice and compare them with other products. This possibility is not available in the majority of small shops, where the goods are handed over by the seller and in fact there is no opportunity to look at the products freely.

DKK – 64/10 (Unibail Rodamco/Simon Ivanhoe, renting sales-service area in large shopping malls).

As regards the concentration between the owners of the three biggest shopping centres in Warsaw, concerns were raised whether all shopping centres should be included in the relevant market or only some of them. Having conducted the market analysis, the President of the Office decided that as a competitors of shopping centres belonging to the concentration participants may only be recognised such shopping centres that do not differ significantly as regards the following parameters:

¹⁶ DKK – 76/2008 (retail sales of CADU at HSD).

¹⁷ DKK – 64/10 (renting sales-service area in large shopping malls).

¹⁸ DKK – 49/08 (showing films in megaplexes).

- size of the area of the whole shopping facility,
- size of the area of the shopping mall, after deduction of the hypermarket size,
- number of the lessees in the shopping mall,
- the so-called mix of lessees,
- location.

In the opinion of the antimonopoly authority, shopping malls with the biggest size, a large number of varied lessees (allowing for a wide range of shopping) and a convenient communication location (that allows convenient access also through public transport) constituted a separate category of facilities, with only a slight competition from the smaller facilities as regards attracting both consumers and the lessees. Other store formats were not recognised as competitors of shopping malls due to significant differences, which result in the fact that, as a rule, it was not possible to do shopping in such an extent and so easily, as in shopping malls; they also did not offer such varied possibilities of spending free time there.

DKK – 49/08 (Multikino/Silver Screen, display of films in megaplexes)

While analysing the substitutability between particular forms of watching films, the President of the Office recognized that there are no substitutes for watching films shown in the cinemas. This position was supported by the fact that the cinemas ensure a much larger format of the screen than any television sets or projectors, they also own professional sound systems. In such circumstances it would be expected that a consumer who is going to the cinema to see a film would expect other experiences (size of the screen, sound effects, etc.) than in case of films displayed with a different medium.

Price difference

Price differences in case of products with similar purpose may indicate that actually they serve different purposes or they differ significantly in terms of quality, which reduces their substitutability¹⁹. The same products (e.g. medical services) financed from other sources (e.g. private insurance and social insurance), as a result of which the former are recognized as payable, the latter as free, are determined as different product markets²⁰. Price differences in case of products, expenditures on which have an insignificant participation in the budgets of the entities purchasing them (and therefore their prices are perceived as nominally low by these entities) have a smaller significance than in case of products, the expenditures on which constitute a significant portion of the budget²¹.

DKK – 76/2008 (Jeronimo Martins/Plus, retail sales of CADU at HSD).

Information obtained during the proceedings indicated that the prices in the HSD facilities (hypermarkets, supermarkets, discount stores) are significantly lower than in smaller-format stores. In connection with the significant price sensibility of the Polish consumers confirmed by the market research it would indicate that large-format stores and smaller ones are complementary rather than substitutionary – shopping in large-format and smaller-format shops was performed in varied ways and for varied reasons – which was also confirmed by the data concerning the way of shopping in particular types of stores.

DKK – 60/08 (Beatrice Investments/Centrum Medyczne LIM, pay medical services)

The main reason for distinguishing pay medical services from medical services financed by NFZ (National Health Fund, pl. Narodowy Fundusz Zdrowia) was the fact that there is a large group of patients who use only medical services financed by NFZ because they cannot afford pay services. Also, it was taken into consideration that the public health centres could not charge any fees from patients for the services provided

¹⁹ RPZ – 38/2006 (display of films in megaplexes), DKK – 46/07 (structural sheets), DKK – 66/08 (mineral lenses), DKK – 39/09 (brick wall materials), DKK – 76/2008 (retail sales of CADU at HSD), DOK – 116/06 (sodium hypochlorite).

²⁰ DKK – 60/08 (payable medical services).

²¹ DOK – 124/2006 (salty snacks).

under NFZ contracts. Ultimately, a market of payable medical services (basic and clinic) rendered to individual patients, employers purchasing services for their employees and insurance companies offering medical insurance for both individual patients as well as their employers was distinguished.

DOK – 124/2006 (Lorenz Bahlsen/Polsnack, salty snacks)

One of the reasons that led the antimonopoly authority to adopt an extensive definition of the salty snacks market was the fact that the prices did not constitute a significant factor in selecting particular snacks, as they were nominally low. In case of products with a low nominal price, even a large relative difference may be of no high significance for the recipient, in particular if these products are not purchased often, so the expenditures do not constitute a significant portion of the budget of the purchasing entities. Absolute difference between the prices will never be of such significance to change the customer behaviour.

Dissimilarity of consumers and their behaviours

Characteristics of products or services may result in the situation that, in fact, their recipients will be different, and the service or product themselves will satisfy other needs. In particular, it may occur in the case of distribution markets, when the product market may vary depending on the scale of supplies²², and the suppliers delivering products at a smaller scale compete in other parameters than large suppliers (e.g. the extent of the assortment available and the pace of deliveries)²³. A varied scale of supplies may also be connected with using various technologies (e.g. delivering gases as a gas or as a liquid, in cylinders or through pipes)²⁴. Dissimilarity of recipients has an impact on distinguishing various stages of trading as separate markets²⁵, it may also differentiate the distribution channels, if they are used by recipients of a different profile (e.g. demographic profile)²⁶. Undertakings offering niche products within the given market will also have dissimilar recipients²⁷.

DOK – 46/07 (Air Products/BOC Gazy, gas distribution)

In this case it was assumed – in compliance with the judicature of the European Commission – that the tonnage deliveries, mass deliveries and deliveries in cylinders indicate separate relevant product markets. The division of the market of technical and specialist gases into tonnage, mass (cisterns) and cylinders was commonly accepted by undertakings acting on the market and was particularly connected with the volume of the recipient's demand. Moreover, on each distribution market, gases delivered in tonnage, mass (in cisterns) and in cylinders also differed in terms of price level, costs of transport and rental of containers, which justified the classification of particular markets of technical and specialist gases, divided according to the aforementioned distribution methods, as separate relevant product markets.

DKK – 79/08 (Torfarm/Promedic, selling medicinal products)

Separation of the pre-wholesale market as a separate market from wholesale of pharmaceuticals to pharmacies and hospitals was justified by a series of significant differences. In particular, the pre-wholesale and wholesale markets varied in the types of trading partners, the volume of transactions and the subject of the activity. On the pre-wholesale market, the trading partners of the undertakings (pre-wholesalers) were the manufacturers of medication and wholesalers, as it constituted an intermediate trading level between manufacturing and wholesale market.

DKK – 49/08 (Multikino/Silver Screen, display of films in megaplexes)

²² DOK – 46/07 (gas distribution).

²³ DKK – 28/08 (distribution of steel products through steel products' warehouses).

²⁴ DOK – 46/07 (gas distribution).

²⁵ DKK – 79/08 (selling medicinal products).

²⁶ DKK – 12/11 (on-line sales of non-specialist books and recordings)

²⁷ DKK – 49/08 (display of films in megaplexes).

Showing films in traditional cinemas with only one movie theatre was excluded from the definition of the product market. The President of the Office took it into consideration that the megaplexes (multiplexes) are modern cinema facilities, usually located in shopping malls or near them, offering a much more varied film offer (showing films varied in terms of type and age-rating at the same time, which makes it possible to organise a trip to the cinema for the whole family). Multiplexes have an additional offer in the form of the so-called snack bars, with snacks and drinks, as well as a café and a restaurant. In contrast, movie theatres are usually older, with less exhaustive fittings and a smaller film offer, where the new films are shown later than at multiplexes. However, the offer of traditional cinemas may be of a more ambitious, thus niche, nature.

Different behaviour of consumers with reference to similar products or services, even those very close to each other, may indicate a limited substitutability. In particular, it may be of significance in case of distribution channels for selected products. Dissimilarity of behaviours as regards the average size of shopping²⁸, frequency of shopping²⁹, or the significance attributed to the brand³⁰ were recognized as the factors that prove the separate nature of the researched product distribution channels as relevant markets.

DKK – 12/11 (Empik/Merlin, on-line sales of specialist books and recordings on traditional media carriers)

As regards the case of taking over the on-line store Merlin.pl (<http://merlin.pl/>) by Empik, one of the arguments that had an impact on separating the sales of specialist books and recordings on traditional media carriers on-line from traditional trade in these products, was the significant higher average value of one realized order/purchase in on-line sales than average traditional sales. It indicated the difference in behaviours of consumers using different retail distribution channels. It mostly arose from the fact that in on-line transactions the price of the product does not equal the cost of the book, as in traditional stores, as the consumers need to take into account the delivery costs, which in turn encouraged consumers to place larger orders, thus dividing the delivery costs into higher number of purchased items.

DKK – 76/2008 (Jeronimo Martins/Plus, retail sales of CADU at HSD).

Separating retail sales of CADU at HSD from those made in the so-called traditional shops, the antimonopoly authority considered more frequent visits of consumers in traditional stores than in a modern distribution channel. From the collected evidence it resulted that consumers visit traditional stores 15 times a month on average, while discount shops and supermarkets – 7 times a month, while hypermarkets – only 4 times a month. It indicated a variety of motives that guide consumers when they are doing shopping in HSD facilities on the one hand (consumers must often cover a significant distance to reach such shops, so shopping is done less frequently, but the value of the shopping is relatively high; consumers are attracted to this format of sales by i.a. lower, than in traditional shops, prices of products and their wider variety) and in traditional shops on the other hand (consumers do not have to cover large distances to reach them, so the shopping may be done more frequently, the value of shopping is relatively smaller compared with those done at HSD, prices are relatively high, so the shopping done there is often considered supplementary in comparison to the shopping done in HSD facilities).

DKK – 12/11 (Empik/Merlin, on-line sales of specialist books and recordings)

As regards the takeover of the on-line store Merlin.p (<http://merlin.p/>) by Empik, the antimonopoly body indicated the significance of the brand and the consumer trust to the seller as an element that greatly differentiates the traditional and on-line trade. In case of traditional trade, personal contact with the seller and the product encourages the consumer to purchase products, in particular such products concerned by the decision, even from unknown sellers. In this situation, there is no risk that is present at on-line transactions that the seller may not realize the order or that it may be non-compliant with the description. On-line consumers try to choose the store brands they know and trust, thus limiting the risk of failed transaction and obtaining a higher guarantee that the seller will ensure the possibility of a complaint or potential post-sale service. These dependencies make the price competition in on-line trading not always successful proportionally

²⁸ DKK – 12/11 (on-line sales of non-specialist books and recordings)

²⁹ DKK – 76/2008 (retail sales of ADU at HSD).

³⁰ DKK – 12/11 (on-line sales of non-specialist books and recordings)

to those present in the traditional channel. Even cheaper stores with a smaller renown (that is smaller consumer trust) offering identical goods, are less competitive than the well-known store brands.

Time availability

Products satisfying similar needs do not have to be available at the same time. In particular, it concerns products that are distributed through various channels in a sequence, such as films, which are first shown in the cinemas³¹.

DKK – 49/08 (Multikino/Silver Screen, display of films in megaplexes)

In the case of Multikino taking control over Silver Screen, the antimonopoly authority stated that i.a. due to the fact that the films are shown in the cinemas much earlier than on television or published on the most popular media carrier, that is DVDs, neither films shown on television nor those published on DVDs may be considered substitutes for films shown in the cinemas (they may not be included in one and the same product market). Consumers going to the cinema have a different film offer at their disposal than in the alternative media.

Costs of changing the product used

The necessity of incurring costs connected with moving to use a new product or supplier limits substitutability between such products³², as it makes it more difficult to use such alternative products in response to price change.

DKK – 131/10 (Mondi/Smurfit, industrial paper bags)

In the case concerning the takeover of Smurfit by Mondi, the antimonopoly body, assessing the substitutability issue between the industrial paper bags and industrial bags made of other materials, indicated that the packaging process is essential from the viewpoint of the recipients. Packing installations adapted to pack products into paper bags cannot be – without incurring significant costs – adapted to pack products into bags made of other materials. Using bags made of materials other than paper would require purchasing new or reconstructing the old installations, and therefore forcing the recipients of the bags to make a significant investment. In connection with the aforementioned, paper industrial bags were recognized as a separate product market.

Differences in legal regulations

Different legal regulations concerning the particular areas of activity may result in the fact that the sales of analogue products will take place on other conditions and in other competitive circumstances. Different regulations may limit the freedom of price behaviour towards certain target groups³³ (in particular by determining maximum prices only for some groups of recipients and not for others³⁴), differentiate regulatory barriers³⁵, be connected with additional, significant costs³⁶, as well as confirm the separate nature of particular areas of business activity, which are subject to separate tariff regulations³⁷.

DKK – 14/08 (Torfarm/Panaceum, delivery of medicinal products to pharmacies)

In the case concerning the takeover of Hurtownia Leków Panaceum by Torfarm, the antimonopoly authority, while separating the wholesale market of pharmaceuticals for pharmacies and wholesale market of pharmaceuticals for hospitals, took into consideration i.a. the fact that these markets are regulated by separate provisions. One of the consequences of separate legal regulations in these markets was the fact that some

³¹ DKK – 49/08 (display of films in megaplexes), the aforementioned circumstances may be considered from the viewpoint of a time market, yet to maintain the clarity of the analysis it is taken into account when considering the product market.

³² DKK – 131/10 (paper and plastic bags), DKK – 10/2011 (metal and plastic caps).

³³ DKK – 14/08 (delivery of medicinal products to pharmacies).

³⁴ DKK – 1/2011 (generating and marketing electric energy).

³⁵ DKK – 14/08 (delivery of medicinal products to pharmacies).

³⁶ DKK – 94/2011 (collecting hazardous waste).

³⁷ DKK – 7/09 (production and distribution of heat).

medicinal products had pre-determined maximum prices in the pharmacies, while in the hospital their prices depended on the policy of the producers, and further on – on the pharmaceutical wholesalers, as they were not included in the resolution on the price lists for medicinal products purchased by the closed treatment units. It means that in the pharmacies the recipient, that is the patient, could purchase some medication at the flat-rate price, while the hospitals purchased the same medication at the prices offered by the suppliers.

It was also considered that the trade on the hospital market was strictly regulated by the Act on public procurement, therefore it had a formal nature (the orders were preceded by tenders).

DKK – 1/2011 (PGE/Energa, retail sales of electric energy)

In the case concerning the concentration between the producers of electric energy, the antimonopoly body divided the market of retail sales of electric energy into the segment of G-group recipients (households) and other recipients. This decision was substantiated by the fact that the G-recipients were bound by the prices of electric energy approved by the President of ERO in the tariff, while there were no such regulations for other recipients. As a result, in the retail sales of electric energy segment for the G-recipients there was almost no competition, and the deliveries for these recipients were realized by the so-called appointed sellers. Such limitations were not the case for the other recipients of electric energy.

DKK – 94/2011 (SITA Polska/Przedsiębiorstwo Robót Sanitarno-Porządkowych, hazardous waste market)

As regards the case of takeover of Przedsiębiorstwo Robót Sanitarno-Porządkowych by SITA Polska, the antimonopoly authority, while indicating the relevant market for the activity comprising of collecting hazardous waste, took into consideration – apart from such factors as large dispersion and small number of disposal and storage locations for hazardous waste, depending on the particular type of waste - more strict technical requirements concerning the means and methods of transporting hazardous waste than in case of collecting and disposing normal waste (municipal waste), which had an impact on the number of entities offering such services, the nature of entities generating such waste (heavy industry, chemicals) as well as the high unit price per one kilogram of disposed waste compared with the prices for municipal waste.

DKK – 7/09 (ENERGA Elektrownie Ostrołęka/Ostrołęckie Przedsiębiorstwo Energetyki Ciepłej, generation and distribution of heat)

In the case concerning the takeover of Ostrołęckie Przedsiębiorstwo Energetyki Ciepłej by ENERGA Elektrownie Ostrołęka, the antimonopoly office indicated the separate nature of product markets on which these heat producers and heat distributors operate. This separation stemmed from various price tariffs (other for heat producers, other for distributors), approved by the President of ERO.

2.2. Supply substitutability

While the demand substitutability means the opportunity of the buyer to shift to buying other goods, the supply substitutability takes place when it is the undertaking that may easily shift to producing different goods. This factor should be taken into account when an undertaking that does not manufacture particular goods has the knowledge and producing capability that allow him to start producing it in short time and without incurring significant additional costs. Such potential producers (and products, from which it is easy to shift to producing other products) can be included in the relevant market, yet their impact on non-competitive behaviour of the market participants may also be analysed at the stage of assessing the impact of concentration on the market. The factors taken into account when assessing the existence and scale of supply substitutability include: similar production process³⁸, infrastructure and skills used on providing certain services³⁹ and materials used to produce the goods⁴⁰.

³⁸ DKK – 56/07 (storage equipment), DKK – 9/07 (sealing systems).

DKK – 56/07 (Toyota Industries/Emtor, storage equipment)

In this case, the antimonopoly authority recognized the market of storage equipment as one product market, even though it comprised of a wide range of various devices, such as riders, used to move around in confined spaces, powered by electricity, used to move large loads or pallets, manual walkies, powered by electricity, which are used to transport all types of goods and manual carts to transfer pallets, which are used for small loads transported over small distances. The segment of storage equipment could be therefore divided into further sub-groups due to the applications, size and other features. Each product served a different, very specific purpose. Inclusion of the equipment to one market was decided by the fact that these products constituted elements of a comprehensive system and they complemented each other. The companies that organise new storage houses require the whole assortment of the storage equipment or at least the basic equipment, therefore the customers in all assortment ranges were the same entities. It also concerns the delivery issue. Suppliers of storage equipment usually produced the whole or almost the whole product assortment at the same location. The main components, the production machines used and the whole basic production was the same for all types of storage equipment, and the differences were present only at the final installation stage, due to various additional components.

DKK – 98/08 (PESA/PREMA, repairing electric traction systems)

Assessing whether the market of repairing railway and tram locomotives and railway and tram wagons should be considered with a narrow or wide approach, the President of UOKiK recognised that this market is of “mixed” nature, that is on one hand it has specialized undertakings, running business activity within repairing a narrow assortment of railway wagons, and on the other hand, it has versatile entrepreneurs repairing a wider extent of the railway wagon assortment. From the surveys conducted during the procedure it followed that the narrow definition of the market (as a market for repairing certain types/sorts of wagons) is supported mostly by the entrepreneurs specialising in repairing one type of railway wagons. Undertakings offering a more extensive range of repairs of the railway wagons (with the relevant infrastructure and personnel) supported a wide definition of the market (as one market for repairing locomotives). It resulted from the fact that in their opinion, the infrastructure used to repair various types of wagons, as well as the scope and method of the repairs conducted, were similar.

DKK – 82/2011 (PPG Industries/Dyrup, production of paints and varnishes)

Assessing the product market of decorative layers (paints and varnishes) the President of UOKiK recognized that this market may be perceived jointly, or it may be separated into two product markets, that is the production and sales of paints and the production and sales of varnishes. The joint nature of the market was supported by the analysis of the supply substitutability. A lot of materials, that is resins, solvents, pigments and additives used to produce varnishes were similar to those used to produce paints, which indicated a high supply substitutability. As in either definition of the relevant market the reported transaction did not lead to a significant restriction of competition, this issue was left open.

2.3. Asymmetrical nature of substitutability

In case of some products, the substitutability may only take place one way, that is one product imposes a competitive pressure on another, but the reverse relation does not take place. With reference to demand substitutability it may be the case when one of the goods has additional attributes that the other one lacks. The buyers of the product with additional attributes may have a limited inclination to shift to consuming the “lesser” product. The buyers of the “lesser” product may shift to consuming the product with additional attributes without any problems. The “richer” product imposes competitive pressure on the “lesser” product, while the reverse relation does not take place. As an example we may indicate a bus station, which serves similar functions as a bus stop located in the same town, but it has additional attributes, which makes the entrepreneurs (long-distance coaches) using the station are not inclined to shift to using bus stops, while for the majority of undertakings using the bus stops, a bus station constitutes a good functional substitute of nearby bus stops. A similar situation

³⁹ DKK – 98/08 (repairing electric traction systems).

⁴⁰ DKK – 82/2011 (production of paints and varnishes).

takes place in the sales sector, where the larger stores (HSD) may impose pressure on the smaller ones, but the latter do not constitute a significant competition on the former.

A similar issue of asymmetry may take place in case of supply substitutability. For example, airlines operating only in charter flights, cannot easily enter the regular scheduled flights market on the same routes (e.g. due to the problems connected with obtaining access to the relevant infrastructure [the so-called slots]), whereas the airlines operating on scheduled flights may usually very easily offer charter flights.

3. Geographic market

Geographic market is determined in order to indicate the area, where the suppliers producing the goods that make up the product market are really competing. In accordance with the statutory definition, it is an area, where, due to the type and characteristics of the products, the existence of the market entry barriers, consumer preferences, significant differences in prices as well as transport costs, similar competing conditions take place. The undertakings operating within the same geographic area constitute, as viewed by their real or potential trading partners, a real alternative to themselves, which results in the fact that they cannot act independently, in particular they cannot increase prices or worsen the offer in any other way without the risk of losing trading partners.

The factors taken into consideration when determining the geographic market on the one hand refer to the barriers that may limit the flow of goods, but on the other hand – the real shaping of the aforementioned flows and real behaviours of the market participants, which may give essential guidelines referring to the existence and significance of the barriers to the trade in goods. In particular, the following factors shall be considered essential.

Specifics of the product

Some products, due to very fast loss of their characteristics during transport⁴¹, or with the passing of time from the production⁴², are by its nature sold within a limited area. It is similar in case of services that must be provided at high frequency and flexibility, as well as adapted to the specific requirements of local recipients⁴³.

DOK – 71/07 (CRH Deutschland/E. Schwenk, production and sales of ready-mix concrete)

As regards the concentration on the ready-mix concrete market, the antimonopoly authority, assessing the geographical aspect of the ready-mix concrete stated that i.a. due to the characteristics of ready-mix concrete (the possibility to commence the binding process, stratification, etc.), preventing the transport at larger distances, geographic markets for this product are, as a rule, local markets, covering the area determined by the radius of up to 50 km from the particular concrete manufacturing plants.

DOK – 116/06 (PCC/ZAK&ZAT, production and sales of sodium hypochlorite)

In this case the President of UOKiK decided that the market of introducing the sodium hypochlorite to the market is national, even though for a lot of chemicals, the relevant geographic market is a wider market, e.g. European market. One of the factors that had the influence on such decision was the limited stability of the sodium hypochlorite – up to 2 weeks, and in the summer – 7 days. It is a product that is very easily decomposed in the presence of mechanical and chemical pollutions as well as as a result of a heightened temperature. This factor significantly decreased the possibility of geographic expansion for sodium hypochlorite sales.

DKK – 54/08 (PZF Cefarm Lublin/GCF, wholesale of pharmaceuticals)

As regards the takeover of GCF by PZF Cefarm Lublin, the antimonopoly office recognized that the regional activity area of the pharmaceutical wholesalers often arises from i.a. the need of ensuring a high frequency of supplies (twice a day on average) and fast deliveries of pharmaceuticals to the client. Moreover, delivering pharmaceuticals is profitable only within a certain distance from the storage house. As the distributors of pharmaceuticals competed with each other as regards the deadlines and time for delivering the orders, in

⁴¹ RBG 1/2007 (heat generation), DOK – 71/07 (production and sales of ready-mix concrete).

⁴² DKK – 73/2008 (milk purchase), DOK – 116/06 (production of sodium hypochlorite).

⁴³ DKK – 54/08 (wholesale of pharmaceuticals).

order to ensure optimum conditions for delivering the goods to the client, they located their wholesalers and storage houses in such areas, where their operation is the most intense.

Costs of transport

The basic barrier limiting the possibility of the flow of goods is the cost of transport, which increases their final price. From the viewpoint of the geographic market, what is essential here is the cost of transport to goods value ratio. The value of the aforementioned indicator proving low share of transport costs in the product price varies in the decisions of the President of UOKiK, yet it usually remains below 10%. The profitability of the transport may yet depend on other factors, such as e.g. the size of margins. At the same costs of transport, transporting the goods of higher value compared with the size is profitable at larger distances than the goods of lower value. Therefore, when assessing the scope of a geographic market, the assessments of the market participants also apply, as to the radius it is profitable to transport particular goods⁴⁴, or the findings of other competition protection bodies in this respect⁴⁵. Due to this factor, some goods may only be sold, or services may be provided only locally⁴⁶, within the given country⁴⁷, Europe⁴⁸, or a larger area⁴⁹. The costs of transport may also concern services, to the provision of which it is necessary to deliver a product, on which the service will be performed⁵⁰.

DKK – 131/10 (Mondi/Smurfit, paper industrial bags)

As regards the paper industrial bags the antimonopoly authority decided that this market, in geographic aspect, should cover the radius of up to 1000 km as a rule from the production plant of the taken over company. From the information gathered from the market participants it followed that most often the transport of the paper bags takes place within the distance of the aforementioned radius. Due to the fact that some participants of this market indicated that it is profitable to transport the paper industrial bags at a larger distances, the antimonopoly body conducted alternative assessment of the impact of this concentration on the market, also on the area located within the radius of up to 1500 km from the facility of the taken over company.

DOK – 46/07 (Air Products/BOC Gazy, distribution of technical gases)

Assessing the markets in geographic aspect for particular technical gases and specialist gases, the President of UOKiK mainly used the judicature of the European Commission in this respect as guidance. It was justified by the fact that the European Commission conducted a detailed research of these markets within the period directly prior to notifying this concentration to the President of UOKiK.

RWA 43/2008 (SITA Polska/USKOM, storing municipal waste)

The local size of the geographic market (limited by the economic profitability of transport of up to 40-60 km) was indicated by the antimonopoly office i.a. in the case concerning collecting and disposing of municipal waste. Such definition of this market was substantiated by the fact that the specifics of the services comprising in disposing of municipal waste is strictly connected with the storage or utilisation services and with limited scope of providing such services (indicated by the profitability limits of the transport and the permits granted in particular communes).

DOK – 116/06 (PCC/Zakłady Azotowe w Tarnowie i w Kędzierzynie-Koźlu, sales of hydrochloric acid)

The national dimension of the geographic market was indicated by the antimonopoly authority i.a. in the case concerning the production and sales of hydrochloric acid. Such definition of the market was supported by significant cost of the transport against the price of hydrochloric acid, which made the sales of this product to

⁴⁴ DKK – 131/10 (paper industrial bags), DKK – 10/2011 (metal twist-off caps).

⁴⁵ DOK 46/07 (wholesale and retail sales of gases).

⁴⁶ DKK – 28/07 (limestone sales), RWA 43/2008 (storing municipal waste).

⁴⁷ DKK – 116/06 (selling hydrochloric acid).

⁴⁸ DKK – 9/07 (sealing car bodies).

⁴⁹ DOK – 103/06 (production of pharmaceutical foil and drink labels).

⁵⁰ RKT – 43/2008 (repairing, renovating and modernizing wheel goods).

other countries unprofitable. Lack of profitability was also confirmed by the data concerning – actually incidental – cases of exporting and importing this product.

DOK – 103/06 (Teich/ColorCap, production of pharmaceutical foil and drink labels)

The adoption of the fact that the markets of pharmaceutical foil and drink labels are global was supported i.a. by the fact that the products are sold in large series of small sizes and low weight. One transport may dispatch large batches of these products, so the transportation costs, even at very large distances (transcontinental) were relatively low, and therefore these costs did not constitute an economic barrier in trade of these products.

RKT – 43/2008 (NEWAG/ZNLE Gliwice, repairing, renovating and modernizing wheel goods)

When defining the market in terms of geography aspect for the activity comprising repairing, renovating and modernising wheel goods, the President of UOKiK decided that while there are no significant legal barriers for providing such services for international partners, but i.a. high costs of the transport of wheel goods to the service providers are decisive for the fact that the carriers usually select national service providers. This argument was decisive in determining this market as a national market.

Regulatory barriers

The existence of specific regulations within the given area may hinder the flow of goods by increasing the costs directly (if the regulations impose fees) or indirectly (imposing additional costs of meeting the regulatory requirements). The higher the costs and the more time is needed to overcome the regulatory barriers, the more they affect the definition of a geographic market. The regulations may constitute an absolute barrier of accessing the market, if the block particular suppliers (e.g. foreign suppliers) from accessing the whole or a part of the market⁵¹. The barriers increasing the cost of activity within the given area that are the most visible are the duty fees, which increase the price of the product within the territory of the country, as well as the contingents or limits, which directly limit the volume of import of a given product to a given country. Regulatory barriers may also take the form of the necessity to obtain relevant permits from the authorities for import or export of certain products⁵² (which, in case of a refusal, may make importing from a given area impossible), attestations or certificates for the products⁵³ (increasing the cost of starting the activity within the given area), as well as the differences in technical standards between particular areas, requiring modifications to the product, depending on the area it is to be sold on. On the other hand, the harmonization process of the regulatory requirements may contribute to increasing the scope of the geographic market⁵⁴.

The separation of the given area as a geographic market may be decided by the existence of a separate entity regulating the particular activity, with the authorizations to regulate the competitive conditions within the given area (e.g. commune (*gmina*) bodies⁵⁵, or sector regulator⁵⁶). Separate regulations in the health care systems in particular countries (concerning the registration of medication and refunding of medical services) are also indicated as a factor that decides on the separation of the national markets⁵⁷.

DOK – 116/06 (PCC/ZAT&ZAK, railway transport of goods)

A significant factor taken into consideration when determining a geographic scope of the market for railway transport of goods were the binding regulations. While Poland conducted a liberalisation of the railway transport market, in accordance with EU's directives, it was not complete. By the end of 2006 a transitory period was binding for the access to the Polish section of the Trans-European Railway Goods Networks – only 20% of this network's capacity could be used by foreign carriers to perform national transport; only

⁵¹ DOK – 116/06 (railway transport of goods).

⁵² DKK – 10/09 (processing battery scraps).

⁵³ DKK – 53/09 (pre-tensioned prestressed concrete cross-ties), DKK – 67/09 (railway junctions), DKK – 82/2011 (sales of paints and varnishes).

⁵⁴ DKK – 28/08 (selling steel products).

⁵⁵ DKK – 94/2011 (collecting waste).

⁵⁶ DKK – 23/10 (car loans).

⁵⁷ DOK – 44/07 (cough medication).

international transports could be performed without the transitory period. Due to the existence of the aforementioned provision, the competitive pressure from foreign companies was very low on the market of the railway transport of goods.

DKK – 10/09 (Orzel Bialy/Baterpol, processing battery scraps)

As regards the merger between the only collectors of battery scraps in Poland, defining the geographic market was particularly important from the viewpoint of determining the market power of the concentration participants and the result of such concentration. Market analysis showed that while there were no significant technical or cost obstacles for transporting used batteries to the neighbouring countries, such flow was interrupted by the practical application of the environment protection provisions. While they did not prohibit transporting battery scraps outside Poland, the regulator responsible for issuing such permits recognized that the aforementioned scraps should be utilised as close to the production location as possible, therefore the permits for transporting the scraps outside Poland have not been issued: in the past two years preceding this decision, no entity obtained a consent to transporting the battery scraps outside Poland. In connection with the aforementioned it was decided that the geographic market covers the territory of Poland.

DKK – 67/09 (Cogifer/Koltram, railway junctions)

In case of the concentration concerning the railway junctions markets, one of the important factors deciding on adopting the national nature of the geographic market was the necessity to obtain the permission to operate each type of junction in Poland from the Office of Rail Transportation. The permission procedures were complicated, time-consuming and laborious, technical documentation in the Polish language was not approved and the acceptance procedure – even at larger production series – concerned each and every single junction, which, in case of production held outside Poland's borders was connected with covering the costs of foreign travel for the acceptance committee. The aforementioned obstacles significantly hardened the competition for the entrepreneurs that did not operate in Poland directly.

DKK – 94/2011 (SITA Polska/Przedsiębiorstwo Robót Sanitarно-Porządkowych, waste collection)

In the case concerning the waste collection market it was adopted that even though transporting such waste is profitable within the 40-60 km radius from the base, geographic market is actually limited to the area of particular communes. This conclusion stemmed from the fact that the conditions, on which municipal waste collection services are provided, are determined by the bodies in the particular communes, granting permits for providing waste collection activity within their territory. Moreover, by virtue of the binding provisions, the commune council determines, in the form of a resolution, maximum fees paid by the real estate owners for the waste collection services. In such situation, competitive conditions may vary significantly from one commune to one commune, if they have a different policy as regards the permits and maximum fees.

Technical and cost barriers

The specific technical nature of the market may also limit the possibility of importing goods from outside the analysed territory. Such situation takes place in particular in case of goods that require relevant industrial infrastructure (e.g. connections between industrial systems), the lack or insufficient capacity of which can make importing to the given territory impossible⁵⁸ or limit its maximum volume significantly⁵⁹. The costs connected with erecting particular infrastructure may be so high that it may not be profitable for the competitors to enter the market, the activity in this area will be conducted by only one undertaking (natural monopolist), and the geographic market will be designated by the scope of his activity (determined by the scope of his infrastructure)⁶⁰.

RKT – 69/2007 (Energetyka Południe/EC Nowa, production and distribution of heat)

Analysing the geographic scope of the production and distribution of heat market, it was taken into

⁵⁸ RKT – 69/2007 (production and distribution of heat).

⁵⁹ DKK – 1/2011 (generating and marketing electric energy).

⁶⁰ DKK – 13/07 (distribution of heat), DKK – 32/07 (distribution of electric energy).

consideration that while there were connections between particular sections of heat network supplied from various heat sources and theoretically they could be used to deliver hot water from a different source, in fact such situation was improbable. In practice, the aforementioned connections were used only in emergencies, such as failures, while their regular use would require conducting relevant, expensive modernisation. Therefore it was recognized that the particular heat sources do not impose competitive pressure on each other, therefore each heat network supplied from the given heat market comprises a separate geographic market.

Linguistic barriers and the barriers connected with the lack of experience in international trade

Linguistic barriers and the barriers connected with the lack of experience in international trade may be of significance if the recipients of the products are small companies⁶¹. However, this factor is of only auxiliary nature, as in the situation of significant price differences between the countries, a natural phenomenon is the establishment of intermediaries that specialise in importing certain goods from abroad.

Varied consumer preferences

Varied consumer preferences within various areas make the substitutability of the same products within various areas different, resulting in the fact that the undertakings that wish to sell their goods at the areas exhibiting different preferences must either modify their product (and bear the costs it entails), invest in changing the consumer preferences (e.g. through an advertising campaign⁶²), or bear other costs (learning local preferences, training the employees⁶³), or they will not be able to find sufficient number of recipients. In particular, consumers within the given territory may prefer certain forms of the product⁶⁴, its national brands⁶⁵, or products using a certain language⁶⁶. Consumer preferences (e.g. arising from local traditions) may also have an impact on using certain technologies within certain areas⁶⁷.

DKK – 5/08 (Kompania Piwowarska/Browar Belgia, production of beer)

While indicating the entry barriers into the Polish beer market it was indicated that introducing a new brand into the market and maintaining its presence are associated with significant costs that must be paid permanently and maintained at a similar level. The significance of this factor was increased by the fact of low consumer awareness among beer consumers, often making shopping decisions based on the product brand. The aforementioned entry barriers make it difficult for new, less known and less financed players to enter the market and make the competitive pressure from the undertakings inactive within the given area very small.

DKK – 56/07 (Toyota Industries/Emtor, distribution of forklift trucks)

While determining the geographic market for forklift trucks distribution market as national it was recognized that the basis for providing such services constitutes knowing the clients and their requirements. Cross-border provision of a range of services connected with equipment used to transport materials, including leasing (governed by provisions specific for each country) and rental of forklift trucks with personnel would require significant investments and personnel training, which would significantly reduce the attractiveness of such organisation of activity.

DKK – 68/09 (Rieber Foods/FoodCare, production of gelatine and jelly desserts), DKK 9/2009 (Agros Nova/Kotlin, production of jams)

In the cases concerning the concentrations between the producers of (i.a.) gelatine desserts and jams, the specifics of consumer preferences within the Polish market was considered. In case of groceries assessed in the

⁶¹ DKK – 66/08 (distribution of mineral and organic lenses).

⁶² DKK – 5/08 (production of beer).

⁶³ DKK – 56/07 (distribution of forklift trucks).

⁶⁴ DKK – 68/09 (production of gelatine desserts).

⁶⁵ DKK – 9/09 (production of jams).

⁶⁶ DKK – 12/11 (on-line sales of books and music recordings).

⁶⁷ DKK – 39/09 (brick wall materials).

first of the aforementioned issues, it was determined that the Polish market was dominated by traditional products, easy to process and requiring a significant workload to prepare, compared with the Western Europe markets, dominated by the processed products, requiring minimum effort during preparation, such as single portion blancmange or ready to eat jellies. The second decision on the national scope of the geographic market was due to the preferences of the consumers, who have grown attached to the national brands: as it was determined, the share of brands other than national ones on the Polish market was insignificant.

The specifics of consumer preferences in the aforementioned causes resulted in the fact that the producers had to offer specific products within the territory of Poland – both in terms of the form and image – which in turn limited, for cost and organisational reasons, the possibility to apply uniform competitive strategies within the area larger than the territory of Poland.

DKK – 39/09 (Grupa Ożarów/Grupa Silikaty, brick wall materials)

Product and geographic market for brick wall materials was determined extensively (as covering a range of various materials and the territory of Poland), yet while analysing its scope, the fact that there are local preferences as to the construction technologies used had to be taken into account, and these preferences (usually due to local traditions) constituted a significant choice factor. In a situation where the residents of particular territories (e.g. voivodeships or regions) prefer one type of construction materials over another (e.g. hollow bricks against bricks or the opposite), particular construction technologies, even though they could be used interchangeably within some scope, they will not be substitutes in practice. As the considered concentration did not lead to any restriction of competition both at the national and at the regional level, local differences in consumer preferences did not have any impact on a narrower definition of the geographic market.

Actual trading flows

Significant information concerning the area, where the undertakings exercise real competitive pressure on the concentration participants, is delivered by the actual trading flows. If there is a significant trade exchange (export and import) between the given areas within a given product, it may be adopted that they create one geographic market⁶⁸, as the goods manufactured within one area find a significant number of buyers within the other area. High level of export may give rise to such a conclusion⁶⁹. In turn, small import to the given country, along with small export, indicates only a national nature of the market⁷⁰.

When assessing the relevant market scope, the analysis may also concern the flows within the activity of undertakings producing certain products in various countries. If a significant portion of the production sold within the territory of the given countries (in particular these countries where the production infrastructure is located) comes from factories located in other countries, it may be recognized that any potential barriers for goods flow are not high, and the geographic market extends beyond one country⁷¹.

DKK – 46/07 (Mittal Steel/Florprofile, steel goods).

DKK – 28/07 (Kompania Węglowa/Haldex, hard coal sales)

DKK – 5/08 (Kompania Piwowarska/Browar Belgia, production of beer)

While assessing the scope of the geographic market of galvanized coated steel products it was considered – according to the European Commission – that the market of such products is characterised by significant trading flows at the level of the European Economic Area – import usually constitutes over 40% consumption of such products in each EEA country. In case of hard coal, significant export share to the EU countries and export share outside EU in the sales general was emphasised (about 21% in 2005 and 17% in 2006), which allows for the assumption that the market has wider than national scope. In turn, when analysing the beer market, minor import level to Poland was emphasised (less than 1% total sales) and still very low level of export (approx. 3.5%), whose growth may mainly be explained by the growing number of emigrants from Poland, which lets us state that the growth in consumption of the Polish beer abroad was not caused by

⁶⁸ DKK – 46/07 (steel goods).

⁶⁹ DKK – 28/07 (hard coal sales), DOK – 32/07 (production of small turbo-propelled airplanes).

⁷⁰ DKK – 5/08 (production of beer).

⁷¹ DKK – 10/2011 (metal twist-off caps).

lowering the entry barriers to foreign markets but by an external incentive, in the form of the presence of a higher number of persons with their preferences shaped in Poland. The aforementioned circumstances led us to conclude that the market is national, which was also confirmed by other facts connected with its operation.

Organisation of business activity

The organisation of business activity by the undertakings itself often contains important guidelines as to the scope of the geographic market. The uniformity of the offered price and promotion conditions⁷², or the marketing activity within the given area⁷³ may indicate that the relevant market covers at least the whole such area. Similar conclusions may be justified by the presence of other factors leading to unification of the sales conditions within the given area, such as high density of logistics infrastructure that allows providing services to the local customers efficiently⁷⁴, a small number of central warehouses, from which the EEA consumers are serviced⁷⁵ (indicating a small significance of the costs of transport), or the significant presence of large, international recipients on the market, doing their shopping in a centralized manner, on similar conditions, regardless of the destined location of the goods⁷⁶. In turn, organisation of activity separate for particular areas (e.g. separate representations for particular countries⁷⁷) may indicate a narrower scope of the geographic market.

DKK – 54/08 (PZF Cefarm Lublin/GCF, wholesale of pharmaceuticals)

A range of factors connected with organising wholesalers of pharmaceuticals indicated the national scope of this market. The concentration participants centralized their activity within sales and marketing, having one centre of tele-sales and telemarketing operating within Poland and creating uniform Poland-wide loyalty schemes for pharmacies. Also, the discount policy was made uniform across the country, the logistics network that is in constant development (in particular increasing the density of reloading storehouses) made it easier to adapt deliveries to the local needs, regardless of the distance from the storehouse. Such organisation of activity indicated a far-reaching and growing standardisation of market behaviours within the country, supporting the notion that the relevant geographic market is Poland. In the end, due to the simultaneous presence of factors supporting the notion of a regional nature of competition, it was surveyed both at the regional (voivodeships) and national level.

The uniformity of relevant market parameters

The area with uniform competitive conditions should not be characterized with significant differences in prices, product availability or market share. Circumstances proving the certain scope of the geographic market include: lack of geographic variety in terms of the offer⁷⁸, possibilities of providing services (both within the country and locally)⁷⁹, or prices⁸⁰ (determined based on one reference item, such as listing on goods exchanges⁸¹). On the other hand, the differentiation of the market shares within particular voivodeships may indicate the regional, not national market scope⁸², while significant differences in the number of customers serviced by the suppliers acting at two neighbouring cities emphasize the hypothesis on the separate nature of geographic markets covering these cities⁸³.

DKK – 106/10 (Stroer Polska/News Outdoor Poland, rental of flat external advertising carriers)

When considering the concentration between two providers of services comprising of rental of flat external advertising carriers there were doubts as to the geographic scope of the market. Its local nature could be

⁷² DKK – 54/08 (wholesale of pharmaceuticals).

⁷³ As above

⁷⁴ DKK – 14/08 (wholesale of pharmaceuticals).

⁷⁵ DKK – 5/07 (selling floppy disks).

⁷⁶ DOK – 73/2007 (production of rubbers).

⁷⁷ DKK – 56/07 (distribution of forklift trucks).

⁷⁸ DKK – 93/09 (retail data transmission), DKK – 49/08 (distribution of cinema films), DKK – 53/08 (mobile telephony).

⁷⁹ DKK – 106/10 (rental of flat external advertising carriers).

⁸⁰ DKK – 29/07 (prefabrication of construction reinforcements).

⁸¹ DOK – 73/2007 (production of rubber).

⁸² DKK – 14/08 (wholesale of pharmaceuticals to pharmacies).

⁸³ DKK – 49/08 (showing films in megaplexes).

justified by the fact that, as a rule, advertising carriers subjected to the analysis are not mobile, so the advertising placed on each of them usually reaches different people. However, the information collected during the proceedings let us clearly state that this market is national. This conclusion stemmed from the fact that the largest undertakings operating on the market had, as a rule, carriers within the whole country, without concentrating them in particular cities or voivodeships: the number of carriers was usually distributed proportionally between the cities, depending on their size. Moreover, the prices were determined mostly based on the size and quality of the carriers, not on their location within the given area. The aforementioned circumstances proved that in practice, competition between the market participants was of national nature. It could happen that the advertising campaigns were realized only at a local market, but it was rather a consequence of the objectives for the given campaign, not the lack of possibility to conduct it in another local market.

Area where the consumers purchase goods

In case of a range of markets (in particular these where the services are provided in a certain place, to which the customers much go to use such services), an essential factor deciding on the competitive pressure exercised on each other by the particular suppliers is the freedom of movement of their customers, who, due to the costs and time of reaching the location of service provision, in practice use only some suppliers, perceiving only those suppliers that are close enough geographically as close alternatives. In the case of such markets, their geographic scope is indicated based on the distance from the place of providing certain services. It is usually a 20 or 30-minute car ride⁸⁴, but in case of more expensive or less often purchased services or products, the distance may be larger⁸⁵. In some cases, the geographic market may be the given town⁸⁶.

The basis for formulating conclusions as to the scope of geographic markets of such features may also constitute the analysis of origin (domicile) of the customers purchasing the given product or using the services in the given location. On the one hand they may indicate the area the majority of customers in the given location comes from⁸⁷, on the other hand it may show that some locations of service provision, as a rule, provide their services to customers from other areas⁸⁸. For such an analysis the spatial distribution of such service provision points is essential: the existence of a cluster in the centre of a given city may result in the fact that through such a centre, the points located at the outskirts may compete with each other, creating a wider geographic market⁸⁹.

DKK – 49/08 (Multikino/Silver Screen, display of films in megaplexes)

⁸⁴ DKK – 76/2008 (HSD), DKK – 49/08 (display of films in megaplexes), DKK – 64/10 (renting sales-service space in large shopping malls).

⁸⁵ RWR 16/2007 (retail sales of home appliances and consumer electronics).

⁸⁶ DOK – 85/2007 (retail sales of fuels), RBG 4/2007 (HSD).

⁸⁷ DKK – 128/2011 (wholesale of FMCG).

⁸⁸ DKK – 49/08 (showing films in megaplexes).

⁸⁹ As above

A multi-aspect analysis of consumer flows and their impact on the scope of the relevant market was conducted in the case concerning the concentration of two megaplex networks. A significant issue, from the viewpoint of the transaction assessment, was the answer to the question whether the megaplexes within Trójmiasto may be considered one relevant market, or whether there are two separate markets, covering Gdańsk and Gdynia respectively. Adoption of the latter alternative was decided by a range of factors.

In particular, the area of impact of the megaplexes belonging to the concentration participants (defined as an area that allowed to commute to the cinema within 30 minutes) overlapped mainly in Sopot. It made the megaplexes in particular cities influenced each other to a limited extent, and price changes by a megaplex in Gdańsk would not result in significant loss of customers to or from a megaplex in Gdynia. Sopot, located within the influence zone of both megaplexes, has relatively few residents, which reduced the incentives to lower the prices in order to attract additional customers even more. Such shape of impact zones of particular megaplexes arose from the specific location of the Trójmiasto agglomeration, stretched along the sea coast, with easy to distinguish areas, connected with the centres of Gdańsk and Gdynia.

Secondly, the megaplex in Gdynia was characterised by a much higher “attendance” (given in the number of viewers per one seat in the cinema in a year) than Gdańsk's cinemas (the “attendance” indicator was similar in this group). It proved that the megaplexes in Gdańsk do not constitute a significant competition for the megaplexes in Gdynia, exercising competitive pressure on each other.

What is more, the structure of the loyalty programmes' participants in the megaplexes showed that loyalty programmes participants of a cinema in Gdynia were mainly from Gdynia, with Gdańsk's citizens in definite minority. Similarly, the situation was analogous for a cinema in Gdańsk, with its loyalty programme's participants dominated by Gdańsk's residents, where it was possible to identify their domicile, while Gdynia's citizens were in minority.

The subject of the analysis also covered the Warsaw market. In this case, the aforementioned factors indicated that it is not reasonable to divide the market geographically (e.g. into districts). The presence of a distinct city centre, with a high concentration of cinema theatres, through which the competition included the cinemas at larger distances, as well as similar “attendance” level gave grounds for the conclusion that Warsaw constitutes one geographic market.

II. Impact of concentration on competition

1. Horizontal impact

1.1. Non-coordinated effects

More detailed analysis of the risk of the non-coordinated effects is conducted when the concentration exercises a horizontal impact, that is the participation of the parties in any market they act, jointly exceeds 20%. Horizontal effects come down to eliminating the competitive pressure the concentration participants exercise on each other, which leads to reinforcing the position of a merged entity towards the trading partners and competitors, therefore it is possible to raise the prices (worsen the quality, etc.).

The analysis is conducted on the basis of the historic data, but its objective is to assess the situation in the future. Therefore, the future changes as regards the technological⁹⁰ and legal⁹¹ environment of the market the concentration concerns are taken into account. To make such future changes influence the final assessment, there must be a sufficient level of certainty that they will occur, which may in particular be indicated by reflecting the changes in market trends, or, in case of legal changes, irrevocable nature of their coming into force (conclusion of the legislative process).

DKK – 101/11 (UPC/Aster, access services to pay television)

⁹⁰ DKK – 101/11 (access services to pay television).

⁹¹ DKK – 94/2011 (collecting waste).

From the information gathered during the proceedings it followed that the competitive pressure exercised on the concentration participants by the digital platforms, while present, it is limited, which arises mainly from technological differences. The advantage of cable operators over the digital platforms within the areas with dense population comprised of the benefits connected with simultaneous provision of a few services, such as access to television, broadband Internet and fixed phone line. It allowed to create attractive packets at low costs of rendering additional services. Such strategy could not be realized by digital platforms. Preferences of consumers, who use packet services more and more frequently, increased the competitive advantage of the cable television networks.

Technological trends indicated that it is possible to reduce this competitive advantage through e.g. the introduction of mobile Internet comparable to the attractiveness of the fixed Internet connection, yet even though the LTE wireless Internet was introduced into the market, at the time of this decision, there was no proof that the aforementioned fact will change the competitive situation in a significant way.

The factors that were taken into account by the President of UOKiK when assessing the impact of the said concentrations on competition are presented below. It needs to be emphasised that they do not have a uniform and predetermined weight – it may change, depending on the market context. Final determination of a significant negative impact (non-coordinated) of a given concentration on the market takes place when the circumstances ensue which indicate that the concentration participants may act independently of their competitors, at the simultaneous absence of or insufficient weight of the factors that would prevent such a result.

1.1.1. Market shares

Significance of market shares

The recognition of the counter-competitive impact of the concentration requires, as a rule, a high share in the relevant market. In the decision-making practice of the President of UOKiK, such a threshold that creates the assumption of a dominant position is the 40% market share, below which – apart from one exception⁹² – there has been no incident of significant restriction of competition as a result of concentration with horizontal impact. It does not mean that the lower market share excludes the possibility of incurring a significant restriction of competition and makes the market research groundless, yet, as a rule, determining such a reduction at market share lower than 40% would require the presence of particular circumstances, which cause the market share does not reflect fully the threats to competition arising from the given transaction. It may in particular occur:

- In the case of significant variety of products, which causes that some products are better substitutes for themselves than others, therefore the loss of the competitive pressure connected with them would have more significant effects on the freedom of market behaviours of the merging entities, including the possibility of raising prices⁹³;
- In the case of the possibility to apply varied prices/trading conditions to various groups of consumers, in particular higher prices from trading partners, from which the given entity is an unavoidable partner⁹⁴;
- In the event an entity that is essential for the competitive process leaves the market, thus creating a significant barrier for the undertakings acting on the market (e.g. a particularly innovative entity, an aggressive competitor or an entity owning advanced technology).

DKK – 12/11 (Empik/Merlin, purchase of non-specialist books)

The participation of the concentration participants in the national retail market of on-line sales of books remained below the share level, which is associated with the assumption of enjoying a dominant position in the Act on protection of competition, that is 40%. However, the antimonopoly body also took into account – stating that the concentration would lead to a significant restriction of competition – i.e. such factors that this

⁹² DKK – 12/11 (purchase of non-specialist books, on-line sales of non-specialist books; it needs to be emphasised that the counter-competitive effects of the transaction were of comprehensive nature and were not limited to its impact on one market only).

⁹³ As above

⁹⁴ As above

transaction concerned the purchase of a leader of the national on-line sales of non-specialist books by an entity taking the second place, the fact that the biggest competitor of the concentration participants, that is KDC, had a much lower market share than the share of the concentration participants, while the share of other market participants was marginal, and the factor that Empik and Merlin were closest competitors (they offered products that were the closest substitutes).

With reference to the last of the aforementioned factors, the antimonopoly authority recognized that not all on-line book stores will exercise significant competitive pressure on the merging entities. Some of the entities operating on the market of on-line sales of books, sells such books that NFI Empik or Merlin offer occasionally or not at all. It was similar in case of publishing houses conducting on-line sales. Moreover, the antimonopoly body considered the fact that Empik and Merlin owned particularly recognizable brands and they offer a wide assortment of books and other products, such as music recordings, computer games or films, which allows their clients for a comprehensive shopping. For consumers who mostly use the trust to the brand, image of the store and comfort of shopping, Merlin and NFI Empik constituted close substitutes. From the research at the disposal of the antimonopoly body it also followed that Empik is the main alternative for Merlin's clients.

On the market with a varied assortment of products, that is some pairs of products are perceived as closer substitutes than others, concentration between close competitors may lead to a significant restriction of competition, even if as a result the market share threshold (also including further substitutes) that would indicate obtaining of a dominant position, is not exceeded. It is the consequence of the fact that particular products included in the relevant market impose varied competitive pressure: if the price of a certain product grows, the majority of consumers that resign from purchasing it will move their demand to the closest substitutes, and it will be them that will be the main source of the competitive pressure preventing the producer (seller) of the given product from increasing the prices.

High market shares

A very high market share of the newly established entity, in connection with high growth of this share (analogously: high HHI in connection with its high growth) may largely decide on negative assessment of the impact of the concentration on the market. In principle, if only one entity remains on the market, it decides on the existence of a significant restriction of competition⁹⁵. Also, shares exceeding 70% are recognized as having allegedly anticompetitive effects on the market⁹⁶.

Market share exceeding 50% constitutes a strong prerequisite for determining the negative impact of the transaction on competition⁹⁷; recognizing the merger as not impeding the competition at such level of concentration requires, as a rule, the existence of circumstances that despite the high market share the newly established entity would not be able to, after the transaction is finalized, act independently from the competitors and partners.

DKK – 10/09 (Orzel Biały/Baterpol, processing battery scraps)

Participants of this concentration are the only entities that were active on the market of purchasing used batteries. As a result of the concentration, there would emerge an entity with no competitors on the market of purchasing used batteries in Poland, consequently it would enjoy a monopoly position (sole recipient) on this market. In this case it was obvious that the considered transaction would lead to elimination of competition from the market, as the efficient competition, as a rule, requires the existence of at least two undertakings on the market.

DKK – 67/09 (Cogifer/Koltram, railway junctions)

As a result of the concentration, out of three major undertakings (with similar market shares and similar market power), acting on this market, there would be only two left, while the shares of the merged Cogifer and Koltram would be over twice the size of the share of the only significant competitor, i.e KZN Bieżanów. The difference in the volume of market shares of participants to the concentration, and their competitor constituted

⁹⁵ DKK – 10/09 (processing battery scraps).

⁹⁶ DKK – 67/09 (railway junctions)

⁹⁷ DKK – 101/11 (access services to pay television), DKK – 64/10 (renting sales-service spaces in large shopping malls).

one of the factors, which were decisive in stating that the concentration would lead to a significant restriction of competition.

1.1.2. Factors concerning the shaping of market shares

The changes of the market shares of the concentration participants and their competitors in time may allow us to form a series of hypotheses concerning the way the market functions as well as the tendency of the possible market power of the concentration participants to grow or fall.

Change in market share

Change in market share usually indicates how large the impact of the given concentration on the market will be. As a rule, small – usually up to 2-3 percentage points, as well as the changes of 4 percentage points were treated as insignificant – changes in market share as a result of the concentration, leading to small growth of HHI (below 150), are treated as circumstances indicating, on a small scale, potential negative results of the transaction, whereas they do not exclude researching other circumstances connected with the concentration.

DKK – 94/2011 (SITA Polska/Przedsiębiorstwo Robót Sanitaro-Porządkowych, waste collection)

Small growth of the market share was not recognized as the basis for recognizing that the concentration comprising in the takeover of PRSP by SITA would lead to a significant restriction of competition on the local market of waste collection. The antimonopoly authority recognized that the market share of the concentration participants in the considered waste collection markets, despite being high, is mostly due to their current, individual position on the particular markets, and the takeover of the competitor with a small market share will not reinforce it significantly.

Competitors' market shares

The existence of counter-balance on the side of strong competitors constitutes a strong premise to recognize that the concentration would not lead to the restriction of competition. If there is a competitor on the market, with a similar or even larger market share than the newly established entity, it practically decides on the fact that there are no essential negative unilateral impacts of the transaction⁹⁸. On the other hand, taking over the second in line undertaking by the market leader, who is also its closest competitor, also in terms of positioning of the product, may lead to a significant impediment to competition⁹⁹.

RKT – 43/2008 (NEWAG/ZNLE Gliwice, repairing, electric locomotives)

Assessing the impact of concentration consisting in the takeover of ZNLE by NEWAG on the national market for repairing electric locomotives, the antimonopoly authority decided that having performed the transaction, NEWAG will face a strong competition, in particular from ZNTK Oleśnica. This undertaking possessed the market share that could imply its dominant position on this market. In such situation the antimonopoly body recognized that it is not possible for the concentration to lead to a significant restriction of competition on the same market as a result of non-coordinated effects.

DKK – 64/10 (Unibail Rodamco/Simon Ivanhoe, renting sales-service space in large shopping malls).

Unibail Rodamco used to be the biggest participant on the market for renting sales-service space in large shopping malls located within the Warsaw agglomeration. The transaction concerned the purchase of the second in size market participant. Another factor that was taken into account when assessing this transaction

⁹⁸ RKT – 43/2008 (repairing electric locomotives).

⁹⁹ DKK – 64/10 (renting sales-service space in large shopping malls).

was the circumstance that as a result of this transaction, three biggest and most attractive shopping malls in Warsaw, direct competitors (due to the size, location and prestige), would be controlled by one entity.

Market share below 40% in connection with the existence of strong competitors is, in principle, treated as having no negative effects on concentration. Strong competitors are understood as undertakings with market share over 10%¹⁰⁰, yet this share is relative to the market share of the newly established entity: the higher is the latter, then the higher the share of the competitors must be, so that they could be considered a significant competitive counter-balance. It is also important that they were numerous enough – one competitor with a significant market share, regardless of the advantage over the concentration participants, is treated as weaker counter-balance than a few entities with such market share.

Tendency of changes in market shares

The tendency of changes in market shares both for the concentration participants as well as their competitors may have a significant impact on the assessment of the transaction. If the market shares of the concentration participants fall and the shares of their competitors grow, in particular the largest ones, then it indicates limited activity potential, regardless of the competitors on the side of the concentration participants and allows for a milder assessment¹⁰¹. In turn, the growing market share of the parties to the transaction (which does not have to be the consequence of the growth in market share of all concentration parties¹⁰²) may constitute the basis for stating that the reduction of competition is probable. The higher market share, the lower significance of the fall, and the higher – of the growth. If the market share of the concentration participants exceeds 50% significantly, even its downward tendency may not give the basis for recognizing the lack of threat for competition, in particular if as a result a significant growth of concentration takes place, and the merging parties are closest competitors¹⁰³.

DKK – 52/2008 (Richter Gedeon/Polpharma, anti-inflammatory diarrhoeal medication)

A strong downward tendency of market shares of the products belonging to the acquiring entity was a significant factor taken into account when assessing the impact of this concentration. Significant drop of the share was a result of introduction of new products by the competitors. In the situation when the products manufactured by competitors gain market share very quickly at the cost of the concentration participants' goods, it may be expected that the latter will not obtain a significant market power as a result of the concentration.

DKK – 12/11 (Empik/Merlin, sales of specialist books and recordings on traditional media carriers)

Share of one participant of the aforementioned markets in the period analysed by the Office fell, while the share of the other one grew. As a consequence, the joint market share of the concentration participants remained high, much higher than the market share of their competitors. What is more, it indicated that the drop of the market shares of one concentration participant is taking place at the cost of the other one, confirming the thesis on the closeness of competition between the concentration participants.

DKK – 101/11 (UPC/Aster, access services to pay television)

As regards the takeover of Aster by UPC, despite the downward trend of the market share of the concentration participants on the market of providing access services to pay television in Warsaw and Kraków, the antimonopoly authority decided that this concentration will result in a significant restriction of competition. The total market share of the concentration participants still remained high (over 50%), the loss of the market share was not significant, but the growth of the share as a result of the concentration was significant.

¹⁰⁰ DOK – 68/07 (distribution of steel products), DOK – 19/07 (product of electric energy from renewable resources).

¹⁰¹ DKK – 52/2008 (anthelmintic).

¹⁰² DKK – 12/11 (sales of specialist books and recordings on traditional media carriers).

¹⁰³ DKK – 101/11 (access services to pay television).

Fluctuations of market shares

High variability of the market share may indicate the effective competition in a given sector. Based on the aforementioned it may be concluded that the consumers are not forced to choose particular suppliers, whereas the advantage obtained by the market participants over their competitors is not permanent. In particular, significant fluctuations of market shares take place when selecting the suppliers through high-value tenders, organised rarely, which may result in the fact that high market share in the given period is not the adequate indicator of market power¹⁰⁴.

DKK – 98/08 (PESA/PREMA, repairing electric traction sets)

As regards the takeover of ZNTK Mińsk Mazowiecki by PESA, the main recipient of the services in repairing electric traction sets and personal wagons was the company PKP Przewozy Regionalne, enjoying a significant purchasing power. Moreover, selling these services on these markets took place mainly based on the agreements concluded as a result of tender bids of high value, which had an impact on impermanence of market shares owned by the entities acting on these markets. The supplier winning the tender for operating a very large customer, such as e.g. PKP Przewozy Regionalne, sort of automatically obtained a high market share. The fact that the indicated markets experienced significant fluctuation of shares belonging to their participants was demonstrated by the market data collected during the proceedings. In the context of such specific nature of the market, the market share should not be the main criterion taken into account when assessing market power of the given undertaking. The antimonopoly authority decided to include the potential of other entities that may provide the services of repairing such type of railway fleet.

1.1.3. Factors connected with barriers of entering and competing on the market

The possibility of obtaining market power – measured i.a. by the market share – depends on the lack of strong competitors, limited possibility of entering the market for new competitors (usually undertakings operating on neighbouring markets, that is geographically separate product markets, or markets separate in terms of products, but requiring similar skills¹⁰⁵), as well as the predicted response of the partners. High entry barriers to the market result in the fact that new entries will not constitute significant threat to potential market power obtained as a result of the concentration. In turn, in case of limited entry barriers, the possibility of new entries to the market may be a significant factor limiting the ability to potential price-rising by participants to the concentration.

DKK – 98/08 (PESA/PREMA, repairing electric traction sets and repairing personal wagons)

While assessing the concentration, the antimonopoly authority considered the fact that the undertakings conducting activity in repairing a certain type/sort of railway wagons could easily change their profile to be able to repair other type/sort of wagons. Expanding the activity would be connected with bearing some costs connected e.g. with training the personnel or equipping the workshop. However, these costs did not constitute a barrier preventing the given undertaking running the activity in one segment of repairing the railway fleet from entering to another segment of repairing the railway fleet. The aforementioned is confirmed by the cases of such expansion of activity that took place in the past.

For example, PESA mainly performed repairs of electric locomotives, and then did not realize such repairs due to the lack of orders, even though the company repaired diesel locomotives, electric traction sets and track buses with electric and combustion drive.

The power of concentration participants and their competitors

Although the basic indicator of economic potential of the competitors are their market shares, what is taken into account also includes the power of (international) capital groups they belong to¹⁰⁶, access (or lack thereof) to

¹⁰⁴ DKK – 98/08 (repairing wagons).

¹⁰⁵ DKK – 98/08 (repairing electric traction sets and repairing personal wagons).

¹⁰⁶ DKK – 71/07 (selling ready-mix concrete).

resources on beneficial conditions¹⁰⁷, vertical integration (within the capital group), in particular in case of problems with availability or resources¹⁰⁸, significant production power¹⁰⁹, combined with limitations in this respect on the side of the merging entities¹¹⁰. The power of the competitors may be limited by the complementary nature of the products belonging to the relevant market (if it covers a packet of products, usually or often sold together). If a given product, necessary for submitting a comprehensive offer in the tender, is not manufactured by the competitors, they become dependent on the entity established as a result of the concentration, which limits the competitive pressure they may impose on it¹¹¹.

DOK – 71/07 (CRH/E.Schwenk, selling ready-mix concrete)

When considering the concentration, the President of UOKiK considered that the advantage of the concentration participants would not only result from the market share they have, but also from the fact of belonging to a capital group, which supplied the manufacturers of ready-mix concrete with resources for its production. CRH group used to be a significant supplier of cement and aggregates used in producing ready-mix concrete. The concentration participants would have unlimited access to the aforementioned resources for producing concrete. Out of the CRH's competitors, only Dyckerhoff Polska Sp. z o.o. owned its own cement production, and KRUSZGEO S.A. delivered aggregates to the market. None of the other competitors had their own sources of the aforementioned resources. This argument was vital, in particular in connection with the fact that within the period, during which the transaction assessment was conducted, there was a large demand for construction materials and problems in purchasing them.

DOK – 46/07 (Air Products Iberica/BOC Gazy, gas distribution)

As regards the impact of the concentration on the market of delivering hydrogen, it was indicated that no supplier of technical gases has its own source of this gas in Poland. All suppliers of hydrogen in cylinders in Poland had access to local hydrogen sources located at three producers of fertilizers and one producer of chemicals. Therefore the concentration did not have the potential to limit the possibility of obtaining this product by the competitors.

In the considered case it was also important that the acquiring entity did not have sufficient production capacity in Poland, which would allow for increasing the production capacity of the merged companies. Therefore the increased market share did not translate directly on the growth of the market power of the concentration participants and did not cause an increase in competitive advantage over the other market participants.

DKK – 5/08 (Kompania Piwowarska/Browar Belgia, production of beer)

The antimonopoly authority assessed the effects of the concentration also in the context of changes in production capacity. Production capacity of Belgia Brewery, at the level of 1 mln hl, remained largely unused at the time of concentration. Therefore the share of Belgia Brewery, considering their production capacity, was higher than it would seem from the sales of beer. However, it had to be considered that the share gained by Kompania Piwowarska was not significantly higher than the share of its closest competitor, Żywiec Group. Moreover, the importance of the fact was recognized that Kompania Piwowarska planned to increase its production capacity significantly within the next two years. Therefore, regardless of the fact whether Belgia Brewery would be acquired by Kompania Piwowarska or not, it would not significantly affect the growth of production capacity of this undertaking.

DKK – 67/09 (Cogifer/Koltram, railway junctions)

In the course of proceedings the President of UOKiK stated that the basic forms of concluding agreements for various types of railway junctions were tenders. Usually these tenders were comprehensive in nature and

¹⁰⁷ DOK – 46/07 (gas distribution).

¹⁰⁸ DOK – 71/07 (selling ready-mix concrete).

¹⁰⁹ DKK – 5/08 (production of beer).

¹¹⁰ DOK – 46/07 (gas distribution).

¹¹¹ DKK – 67/09 (railway junctions)

concerned many types of railway junctions. This way of organising tenders could put some undertakings in a favourable position. Due to the fact and considering the incomplete assortment of railway junctions of KZN Biezanów (competitor of the concentration participants), this entity concluded cooperation agreements with Koltram. The tender bid conducted in 2009 for PKP PLK proves the significance of these contracts for KZN Biezanów. The tender was divided into 7 tasks, and certificates for various types of junctions were required for each task separately. Due to the fact that neither KZN Biezanów nor VAE Polska (another competitor of the concentration participants) had all the necessary permits, they could not join all the tasks for this tender on their own. KZN Biezanów, having a cooperation agreement with Koltram, submitted a bid together with this entity. The President of UOKiK decided that there would be a high risk that, having implemented the concentration, the cooperation would not continue or would be conducted within limited scope, which would prevent or hinder the participation of KZN Biezanów in annual tenders organised by PKP PLK. In fact, after implementing the concentration the advantage of Cogifer and Koltram over KZN Biezanów could grow even more than it would only seem from comparing the market shares of both undertakings.

Closeness of competition

The closer competitors the concentration participants are, the higher probability there is that the transaction will result in a significant restriction of competition. Undertakings are considered close competitors if, for a major group of recipients, they constitute direct alternatives. Merger of close competitors results in the fact that the strong competitive pressure they used to impose on each other disappears, which makes it possible to raise prices, because the products or services offered by the remaining suppliers are assessed by the customers as less attractive than the products or services of the concentration participants. The closeness of the competition may result from similar positioning of the products¹¹², similar character of the products offered by the given undertakings¹¹³, varying from the analogous products, technological differences that have impact on availability and development of potential of the products¹¹⁴, or the geographic location within the local market¹¹⁵. The aforementioned factor is essential in particular in case of concentrations concerning varied products, where the products included in the relevant market impose varied competitive pressure: even though all of them are substitutes to some extent, some pairs of products are better substitutes than others¹¹⁶.

DKK – 101/11 (UPC/Aster, access services to pay television)

Examining the competition on the market for access to pay television, the President of UOKiK noticed significant technical differences between digital platforms and cable networks. The first ones had a significant advantage over the others in the areas with lower population density, where the construction of cable infrastructure would not be profitable. In turn, within the strongly urbanized areas, in principle, the dominant position belonged to the cable networks, as they made use of the effect of scale, while placement of antennas that allowed receiving the signal of digital platforms was often subject to limitations from the housing cooperatives. It was reflected in the consumer research conducted by one of the concentration participants, whose conclusion was that the consumers from Kraków and Warsaw perceived other cable television networks as closer substitutes of the given network than digital platforms. Also, internal documents of the concentration participants indicated that they recognized other cable networks as closer competition. As a consequence it was determined that the digital platforms should be included in the relevant market, but when assessing the concentration it was taken into consideration that the competitive pressure imposed on the cable networks was of limited nature.

DKK – 54/08 (retail sales of pharmaceuticals)

When assessing the concentration between the networks of pharmacies, the President of UOKiK noticed the spatial aspects of competition between particular pharmacies. Even though the concentration participants had high market share on one of the local markets (i.e. the area of the city), the analysis of spatial distribution of pharmacies showed that it did not translate into gaining significant market power. Pharmacies belonging to

¹¹² DKK – 12/11 (sales of specialist books and recordings on traditional media carriers), DKK 9/09 (production of jams).

¹¹³ DKK – 64/10 (renting sales space in shopping malls).

¹¹⁴ DKK – 101/11 (access services to pay television).

¹¹⁵ DKK – 54/08 (retail sales of pharmaceuticals).

¹¹⁶ DKK – 12/11 (sales of specialist books and recordings on traditional media carriers).

the concentration participants were located at the outskirts of the city, and between them there were pharmacies of their competitors. It resulted in the fact that the pharmacies controlled by the concentration participants were not closest competitors to each other, while the competitive pressure was exercised on them by some pharmacies located in neighbouring towns, which were not included in the geographic relevant market.

Easiness of changing suppliers

The easier it is to change suppliers, the harder it is for the latter to gain market power, as they must take into account the loss of customers if they offer conditions that differ even slightly from the offer of their competitors'. In general, changing the supplier is easy, if it is possible within a relatively short period of time (depending on the specific nature of the industry) and if it is not connected with the necessity to bear significant costs (terminating the current contract and finding a new trading partner offering the product on beneficial conditions). Lack of major obstacles for changing the supplier may be indicated by: functioning of the market based on short-term agreements¹¹⁷, lack of exclusivity agreements¹¹⁸, or simultaneous use of multiple supply sources¹¹⁹. The last case may also lead to certain loss of market share by the merging undertakings, as the consumers using exclusively or mainly services or products of the concentration participants, wishing to avoid dependence, may direct some of their demand to other suppliers¹²⁰.

In turn, the role of the participants to concentration as a particularly important distribution channel¹²¹ and exclusive production of the given assortment¹²² were treated as circumstances substantiating the statement that concentration may lead to a significant restriction of competition.

DOK – 46/07 (Air Products/BOC Gazy, gas distribution)

An important factor taken into account when assessing the concentration on the gas market was the fact that the supply agreements between the producers of hydrogen and gas companies were not exclusive and were concluded for short periods of time, usually for one year. The prices were negotiated each time on prolonging the agreements. In turn, access to hydrogen sources was the same for all gas companies.

DKK – 66/08 (IVOPTIC/JZO, organic lenses)

In this case the President of UOKiK stated that while the position of both undertakings will be stronger than any of their major competitors after the concentration, it would not mean that they will be able to act independently of their competitors or customers, and therefore to prevent effective competition. A characteristic feature of this market was the fact that the recipients, that is optician's workshops, used many supply sources simultaneously. For this reason, the buyers of organic lenses (opticians) had unlimited access to multiple alternative supply sources. Moreover, in Poland in particular, the market of organic lenses' distribution was still a developing market, without any significant barriers for expansion or entries of new entities, both sales representatives of lenses' manufacturers as well as independent distributors /importers.

Complaints of the trading partners and previous infringements of competition law

The confirmed infringements of competition law, as well as the complains of the partners of the merging undertakings may constitute the basis to suspect that the competition on the market concerned by the concentration is not fully effective and could worsen further as a result of the considered transaction. If the previous irregularities were not connected with determining that any of the parties to the transaction had a dominant position, this factor is treated as auxiliary.

Administrative entry barriers

¹¹⁷ DOK – 46/07 (gas distribution).

¹¹⁸ As above

¹¹⁹ DKK – 66/08 (organic lenses).

¹²⁰ DKK – 131/10 (sales of paper industrial bags), DKK – 10/2011 (metal caps for containers for foods and drinks).

¹²¹ DKK – 12/11 (sales of specialist books and recordings on traditional media carriers).

¹²² DKK – 67/09 (railway junctions)

The necessity to obtain relevant permits or certificates in order to conduct activity on the market is making it more difficult to enter the market for new suppliers and to compete with the companies already active in the trade. The decisions of administrative bodies that in practice prevent consumers from using the services of suppliers other than national suppliers may result in the fact that only the competition between them will be taken into account when assessing concentration¹²³. The requirement to obtain technical certificates may also significantly slow down the undertakings from the neighbouring product or geographic market in entering the relevant market and may also significantly decrease the competitive pressure exercised by them¹²⁴. In turn, the expiry of patent protection of medication increases the probability of new entries in response to the attempt of raising their prices¹²⁵.

DKK – 10/09 (Orzel Bialy/Baterpol, processing battery scraps)

DKK – 67/09 (Cogifer/Koltram, railway junctions)

In the case concerning the concentration between the only recipient of battery scraps in Poland, the issue that was fundamental for assessing the entry barriers (and for determining the scope of geographic market) was the possibility of transporting the battery scraps outside Poland. Even though it was technically possible and cost-profitable, the market regulator did not issue permits for transporting battery scraps outside Poland, in accordance with a restrictive interpretation of the provisions on environment protection, according to which hazardous waste should be utilised as close to the generation site as possible. Lack of possibility of using foreign recipients of battery scraps resulted in the fact that the national manufacturers could only deposit it at Polish recipients. Therefore when assessing the impact of the transaction on the competition, only the rivalry between two Polish recipients of battery scraps was taken into account. As their merger would lead to buyer's monopoly (the transaction participants acted on the demand side of the relevant market) of the Polish market, the concentration was prohibited.

By the same principle, in the case concerning the concentration on the market for railway junctions, the essential issue for assessing the geographic market and the impact of the transaction on competition was the restriction connected with the possibility of functioning foreign producers on the Polish market that do not produce the junctions in Poland.

DKK – 52/2008 (Richter Gedeon/Polpharma, anthelmintic)

DKK 23/2012 (Polpharma/Polfa Warszawa, antiaggregation drugs, fluoroquinolones, sulfonamides)

Among the relatively numerous factors essential for the situation on the anthelmintic drugs market, the lack of patent protection was indicated in the case of all three medicines available on this market. Lack of the most important market entry barrier for the pharmaceutical market, in connection with low level of other entry barriers, significantly reduced the possibility of raising the prices after the concentration. Such an attempt could lead to a new competitor entering the market.

Even a total lack of patent protection does not mean that the concentration cannot lead to a significant restriction of competition. In the case concerning the takeover of Polfa Warszawa by Polpharma, the negative impact of the concentration was determined with reference to a wide range of products not covered by patent protection. It stemmed from very high market shares, which, as very mature markets (with stable or dropping demand), had insignificant potential to attract new competitors.

Cost entry barriers

Entering the market may be connected with the necessity to construct the relevant infrastructure (e.g. plants), or incurring expenditures for establishing a brand or a distribution system. If such operation is very expensive compared with the expected revenues from the activity on the market, entering the market may be unlikely, as

¹²³ DKK – 10/09 (processing battery scraps).

¹²⁴ DKK – 67/09 (railway junctions), DKK – 10/09 (processing battery scraps).

¹²⁵ DKK – 52/2008 (anthelmintic).

seeing the potential problems with covering the incurred costs, the undertakings will not be motivated to new entries¹²⁶. This phenomenon will be stronger the higher the entry costs will be¹²⁷, in particular those that cannot be retrieved when leaving the market (the so-called sunk costs), and unused production capacities on the market, due to the limited profitability of entering the market with the significant advantage of production capacities over the demand¹²⁸. In turn, small costs connected with entering the market (e.g. costs of purchasing the required production materials¹²⁹, having a recognizable brand and the presence in the distribution system with similar products) indicate the lower possibility of establishing and maintaining market power.

DKK – 68/09 (Rieber Foods/FoodCare, production of jelly)

DKK – 10/09 (Orzel Bialy/Baterpol, processing battery scraps)

The issues connected with cost entry barriers played an important role in case of two cases resolved by the President of UOKiK. The first one, concerning a series of markets of processed foods, such as blancmange, jellies or whipped cream powder, an important factor that limited the possibility of entering the market was the necessity to construct the relevant production infrastructure, estimated at about PLN 100 million.

In the other case, concerning processing of battery scraps, the entry costs were also significant. Entry to the market within only the first stage of processing battery scraps, the result of which is the production of lead paste, not the lead itself, required the construction of the so-called breaker for about PLN 20 million and expenditures of about PLN 2-3 million for a smaller installation to process the scraps. Expanding the infrastructure by the installation to remove sulphur from the paste would be connected with the expenditures at the level of PLN 2-20 million, depending on the size and capacity of the installation. Constructing steelworks of the parameters similar to the steelworks operated by the party taking over would constitute an expenditure of about PLN 50 million, whereas additional expansion with a refinery would require additional PLN 30 million.

Expensive entry was even more unlikely in the context of significant advantage as regards the capacity of the concentration participants over the supply of battery scraps. Such market is not very attractive to new undertakings due to the fact that there is no additional demand for the services provided by its participants that may be satisfied, while further growth of capacity on the market, where the supply already surpasses the need, may lead to even less beneficial shape of the prices on the market for the recipients of the battery scraps, due to the significant growth in competition between them. Probability that any entrepreneur would be willing to bear so high, difficult to retrieve costs in order to enter the market with such features is very low. Also, this was the reason why it was recognized that the entering of new competitors to this market is unlikely and new entries will not reduce the market power obtained as a result of the transaction by its participants.

Other entry barriers and behaviours of potential competitors

Among other factors that may limit the probability of new entities entering the market, the following were indicated in the judicature: linguistic barriers as regards using shopping stores in a foreign language¹³⁰, as well as access to a significant distribution channel¹³¹. The probability of entering the market was also assessed based on real behaviour of potential competitors (indicated by the transaction participants); the lack of potential competitive pressure was recognized as the behaviour of potential competitors consisting in producing exclusively or almost exclusively for their own needs¹³².

DKK – 12/11 (Empik/Merlin, on-line sales of books, on-line sales of music recordings)

As regards the case of the concentration on the on-line retail sales of music recordings on traditional carriers and non-specialist books, significant factors limiting the possibility of entering the Polish market were:

¹²⁶ DKK – 68/09 (production of gelatine desserts and blancmange).

¹²⁷ DKK – 68/09 (production of jelly).

¹²⁸ DKK – 10/09 (processing battery scraps).

¹²⁹ DKK – 37/08 (on-line directories).

¹³⁰ DKK – 12/11 (on-line sales of books, on-line sales of music recordings).

¹³¹ As above

¹³² DOK – 71/07 (sales ready-mix concrete).

linguistic barriers and access to an essential distribution channel, that is customer individual receipt at the Empik stores. In the case of selling music recordings on traditional carriers it was noticed that it is possible to purchase them also in foreign on-line stores, yet such potential competitive pressure was recognized as insignificant and affecting only a limited group of consumers, due to the necessity to overcome a linguistic barrier in order to use stores other than Polish ones. In turn, in the case of retail sales of non-specialist books, the source of significant competitive advantage of the entity that would be established as a result of the transaction was recognized as the Empik stores network in the largest cities, allowing the recipients convenient collection of the ordered books. This collection option was very popular, as proven by its large share in the general on-line sales of books by this entrepreneur. Undertakings without the access to such a distribution channel would meet significant restrictions in competition with the entity established as a result of the merger. In turn, replicating a network of stores that would allow for customer collection in similarly convenient locations as Empik's stores would be unprofitable for an on-line seller, while out of the entities functioning on the traditional market none of the them owned a chain store that could compete with the Empik's network in terms of size and attractive location.

DOK – 71/07 (CRH/E. Schwenk, sales of ready-mix concrete)

When assessing the effects of competition between retail sellers of ready-mix concrete on one of the local markets, the President of UOKiK examined the activity of the undertakings indicated by the concentration participants as new market participants. The analysis showed that the indicated entities act in the construction industry and the concrete they produce is used mainly or exclusively for their own needs – to operate the conducted investments or to produce construction prefabricates. The aforementioned justified the notion of limited competitive pressure such potential competitors could exercise on the concentration participants.

Development stage of the market and its dynamics

The development stage of the market may, in many cases, be connected with its competitiveness. Regarding the markets at an early development stage we usually witness their fast growth, new market entries, development of new business models, we also face experiments within the products, which hampers the maintenance of a strong market position and makes it easier to attack it. Such market profile decreases the possibility of recognizing a restriction of competition as a result of a given concentration¹³³. On the other hand, the declining stage of the market, where, usually due to the technological changes or changes in consumer preferences, its significance falls and the rate of growth is getting smaller or even goes into negative numbers, may be recognized as the factor limiting the legitimacy of the existence of significant restriction of competition¹³⁴. As a rule, the declining stage of the market decreases the attractiveness of new entries, and therefore limits the competitive pressure exercised on the entities active on such market.

Market variability, arising from technological and cultural changes¹³⁵, is recognized as a factor limiting the occurrence of significant restriction of competition.

RWR 16/2007 (Neonet/Mars, retail sales of home appliances and consumer electronics)

In the case concerning the merger between two retail sales networks of home appliances and consumer electronics, one of the significant factors supporting the lack of significant restriction of competition was the fact that wholesale and retail home appliances and consumer electronics markets were still at the development stage, which was indicated i.a. by new entries to the market by new brands of sales networks and the growing sales of home appliances and consumer electronics in Poland.

DKK – 106/10 (Stroer Polska/News Outdoor Poland, rental of external advertising carriers)

In the decision concerning the concentration on the lease market of external advertising carriers it was emphasised that widely understood advertising market to which the relevant market concerned belongs to, is a market with relative high variability, arising from the ongoing technological and cultural changes. On the one

¹³³ RWR 16/2007 (retail sales of home appliances and consumer electronics).

¹³⁴ DKK – 37/08 (printed directories), DKK – 5/07 (distribution of floppy disks), DKK – 66/08 (distribution of mineral lenses).

¹³⁵ DKK – 106/10 (rental of external advertising carriers).

hand, these conditions support the establishment of new products or competitors within the particular markets that make up the sector, as well as they increase the probability of changes modifying the relative attractiveness of particular advertising channels, which, despite not being direct substitutes, may still exercise some competitive pressure on each other. In this situation, the possibility of efficient impediment of competition by the relevant market participants, both as a result of unilateral as well as coordinated behaviours, is further limited, which constituted another factor justifying the notion about the lack of negative impact on the competition exercised by the considered concentration.

Observed market entries

Lack of new entries to the market may indicate the presence of significant barriers in this area and may increase the probability of significant restriction of competition as a result of the transaction¹³⁶. In turn, the emergence (and maintaining) new entities on the market may indicate that entering the market is not associated with excessive difficulties and imposes real pressure on the entities active on the market (particularly when it entails a rapid fall in market share of the merging entities¹³⁷). In particular, it may indicate that the market is at the development stage¹³⁸.

Planned exits from the market

The fact that a product of one of the transaction participants is to be withdrawn from the market was also taken into account when assessing a transaction¹³⁹, as circumstances indicating the drop in market share and in economic power of the merging entities in the near future. This argument was only of auxiliary nature.

Changes in the nature of the competitive process

The specificity of the competitive process depends on many factors, such as the nature of the product, consumer preferences, production technology or the market “rules of the game”, most often arising from the binding provisions of law. In particular, changes in the latter may be of key significance for the nature of competition in the industry – e.g. by increasing the tender power of consumers, increasing the costs of functioning in the sector, as well as expanding the scope of geographic markets¹⁴⁰ – and therefore impact the assessments of the results of the considered concentration.

DKK – 94/2011 (SITA Polska/Przedsiębiorstwo Robót Sanitarno-Porządkowych, municipal waste collection)

The issue connected with changes in market organisation for waste collection was of significance for assessing the concentration between providers of these services. Legal changes resulted in the fact that the current model, comprising in concluding individual agreements between the waste collectors and trading partners (real estate owners), was replaced with market competition, under which the commune, having authority over the municipal waste generated within its territory, selected an entity providing the services to all of its residents in a tender procedure (or, in case of larger communes, their respective parts). After the introduction of the aforementioned changes there would be only one partner within the given area, commune, which would significantly affect the competition on the market. As it was assumed in the decision, it was meant to lead to reduce the entry barriers to the area of the given communes, and along with the growth in significance of regional or local factors (such as know-how and national equipment and personal resources, which may be located according to the results of the tenders within a wider area) may lead to expanding the area, where the undertakings active in waste collection will compete. This in turn would result in reducing the number of entities running such activity, due to the fact of bearing higher costs, in connection with the requirements of communes in respect of their activity - the tender holders. In particular, it might have been expected that the undertakings without sufficient potential to participate in a high number of tender procedures simultaneously may be eliminated from the market. As a result, the assessment of the impact of the concentration was supplemented by the analysis of competitive conditions on the voivodeship market, i.e. territory, which may

¹³⁶ DKK – 9/09 (production of jams), DOK – 116/06 (production of sodium hypochlorite).

¹³⁷ DKK – 52/2008 (anti-inflammatory diarrhoeal medication).

¹³⁸ RWR 16/2007 (retail sales of home appliances and consumer electronics).

¹³⁹ DKK – 52/2008 (antiarrhythmic agents).

¹⁴⁰ DKK – 94/2011 (waste collecting).

constitute a relevant market after the legal changes enter into force.

Organisational specificity of the merging entities

In the case concerning producers' cooperatives, it is taken into account that the suppliers of the products purchased by the cooperative are also its members. It significantly limits the incentive of the cooperative to worsen the conditions on which the purchase of the products is taking place, even if as a result of the concentration the market power of such entity would increase¹⁴¹.

Specific functioning of the market

Functioning of some markets may significantly differ from the activity methods of the majority of the markets, comprising a reference point for assessing the impact of concentration on competition. For example, on some markets, reducing the number of entities on the market may bring some benefits, or it may result in losses for the customers that are lower than it could have been expected on “normal” markets. For example, reducing the number of energy exchanges may result in the increasing liquidity of the market, as then, one place would gather more sale and purchase offers, which increases the probability of concluding a transaction that is beneficial for both parties¹⁴². In turn, in case of printed directories, smaller number of service providers decreases the necessity to advertise in many publications¹⁴³. Also, rationing products through prescriptions was also indicated as a factor hindering the use of potential market power on the specific market, which results in the fact that influencing the demand on the product is hindered.

Such arguments are of auxiliary nature and are not decisive for the final assessment of the transaction.

Power of consumers

The fact that the customers of the merging entities enjoy the levelling purchase power, decreases the risk of occurring a significant restriction of competition. In particular, it would take place when the consumers are large and have specialist knowledge, and the concentration of their shares is relatively high¹⁴⁴, while the product purchases are made globally in a centralized process¹⁴⁵, or if they may manufacture certain products on their own¹⁴⁶. The potential probability of increasing the tender power of the trading partners (granted by the legal provisions) towards the concentration participants by associating (creating producers' groups) is also taken into account¹⁴⁷. The dispersed recipients are not recognized as a significant counter-balance¹⁴⁸, even if they perform orders for the benefit of a very strong entity, which may be perceived as the final recipient of certain products¹⁴⁹.

Very strong consumers may not always impact the final assessment of concentration. In one of the cases, even the existence of the monopsony recipient did not lead to the conclusion on the lack of significant restriction of competition in case of a concentration that led to obtaining about 50% of the market share by the supplier on some relevant markets¹⁵⁰.

DKK – 9/07 (Cooper/Metzeler, car body sealing systems)

¹⁴¹ RŁO 58/08, RLU 10/2008 (milk purchase).

¹⁴² DKK – 1/2012 (services facilitating wholesale trade in electric energy).

¹⁴³ DKK – 37/08 (printed directories).

¹⁴⁴ DKK – 9/07 (car body sealing systems), DKK – 12/11 (purchasing music recordings on traditional carriers).

¹⁴⁵ DOK – 73/2007 (production of rubber).

¹⁴⁶ As above

¹⁴⁷ RLU – 10/2008 (milk purchase).

¹⁴⁸ DOK – 71/07 (selling ready-mix concrete).

¹⁴⁹ DKK – 67/09 (railway junctions)

¹⁵⁰ DKK – 70/11 (dialyses).

DKK – 12/11 (Empik/Merlin, purchase of music recordings on traditional media carriers)

In the cases concerning the concentration on the market for car body sealing systems and purchasing music recordings on traditional media carriers, the final conclusion on the lack of negative impact on competition was supported by the existence of strong customers. In case of the former case, customers were car producers, that is an insignificant number of undertakings with a very high tender power. Usually they purchased high numbers of sealing systems under tender procedures, which increased the competition between the suppliers and limited their activity possibilities regardless of their trading partners. In turn, in the case of music recordings, concentration participants had high market share together, as customers of music recordings on traditional carriers, yet their suppliers were mainly four music labels, experienced market participants with a very high market share.

DOK – 73/2007 (Dwory/Kaucuk, production of india rubber)

When assessing the concentration between ESBR india rubber (emulsion-styrene-butadiene) producers it was noted that 70% of such india rubbers were purchased by car tires producers, mostly concerns with global scope, with centralized purchases, therefore they were able to negotiate prices and delivery conditions that were beneficial for them. Due to their significant share in purchasing ESBR india rubbers, these recipients enjoyed a significant tender power towards the india rubber producers, also conducting the diversification policy as regards ESBR india rubber supplies, making it easier to change a supplier. An additional factor that was taken into account was the fact that the biggest tire-making concerns had their own installations for producing india rubbers, which covered their demand on such products partially (e.g. Michelin, Goodyear) or, as it was in the case of Bridgestone, were shareholders of companies manufacturing india rubbers, which made them even more independent from india rubber producers and hindered the latter from obtaining and using the market power.

DKK – 67/09 (Cogifer/Koltram, railway junctions)

Concentration participants on the railway junctions market faced a specific situation from its consumers. Final recipient was mainly the infrastructure administrator (PKP PLK) determining the demand scope for the junctions and realizing all its purchases through tender procedures. However, the already mentioned final recipient purchased only a small portion of the junctions directly (in accordance with the data of PKP PLK, it was 10.6% in 2007 and 0.7% in 2008 in case of ready-made junctions). The remaining part was realized in the price negotiations made by the contractors performing track works for PKP PLK. In the years preceding the notification of concentration, participants of the tenders for these works were 55 Polish or foreign undertakings (including consortia). Such significant dispersion on the demand on this market led the President of UOKiK to the conclusion on the lack of tender power among the recipients.

Situation on other geographic markets

Development of the situation on other geographic markets may indicate the specific nature of competition on a given product market. In particular, information concerning the market structure in other countries¹⁵¹, or the impact of concentration within the other territory on the prices there¹⁵², may be considered.

DKK – 37/08 (EDSA/Ditel, printed directories)**DKK – 131/10 (Mondi/Smurfit, industrial paper bags)**

In the case concerning the concentration between the manufacturers of printed directories, one of the factors taken into consideration when assessing the concentration was the confirmed observation from a row of European countries as to the tendency of a dominant undertaking existing on this market, which could be explained by efficiency reasons – smaller number of directories on the market reduces the costs for the advertisers (who do not have to publish their ads in multiple directories) and increases the convenience of using them, as the users do not have to possess a large number of the directories.

In turn, in the decision concerning the concentration between the producers of paper industrial bags, one of the

¹⁵¹ DKK – 37/08 (printed directories).

¹⁵² DKK – 131/10 (industrial paper bags).

arguments was the fact that a concentration on the same product market, which led to very high market share in Hungary, did not result in the increase of prices of industrial bags within this territory compared with the price of imported bags. It confirmed the real nature of transboundary competitive pressure and indicated a wide scope of the geographic market.

1.2. Coordinated effects

Coordinated effects of concentration may appear on oligopolistic markets, whose specifics makes their participants refrain from effective competition and are able to maintain such situation without communicating. In order to maintain oligopolistic coordination, three conditions must be met:

- the market should be transparent enough, so that it would be possible for its participants to achieve (assumed) coordination as to the common strategy, maximizing the benefits to the market participants,
- there should be a reliable penalty scheme, which allows for disciplining the undertakings that deviate from the coordinated strategy and for ensuring the profitability of complying with such strategy,
- maintaining the strategy should not be threatened by the responses of current and future competitors, as well as consumers.

In judicature practice of the President of UOKiK the coordinated effects are analysed based on the aforementioned framework. Among the factors hindering the determination of a common strategy, the following were listed: asymmetry of market shares¹⁵³, lack of clarity in prices for competitors (due to the discount rates applied)¹⁵⁴, as well as asymmetry in financing (some medicines on the relevant market were refunded, while the others were not)¹⁵⁵.

Using this dependence from the concentration participants, with whom he had to keep business relationships in order to obtain full assortment of products, which allowed him to take part at least in some tenders¹⁵⁶, was recognized as a tool for disciplining the competitor. Refusal to sell some products to the competitor by the concentration participants would significantly reduce his competing potential.

In turn, the possible responses of consumers, in the form of migrating to a similar product market (from printed to on-line directories) were indicated as the circumstances limiting the possibility of maintaining over-competitive prices by the participants of the concentration, as a result of which there would emerge a duopoly on the market¹⁵⁷. The same decision also indicated the pro-competitive structure of impulses that arises from homogenic nature of the product and the lack of limits to production capacities, in connection with mainly the price-based nature of the competition.

¹⁵³ DKK – 52/2008 (anthelmintic).

¹⁵⁴ DKK – 37/08 (printed directories).

¹⁵⁵ DKK – 52/2008 (anthelmintic).

¹⁵⁶ DKK – 67/09 (railway junctions)

¹⁵⁷ DKK – 37/08 (on-line directories).

2. Vertical impact

Vertical concentrations take place between undertakings operating on different levels of trade, therefore the entities are, at least potentially, suppliers and recipients for each other. Negative impact of concentration in vertical setting may take place, in principle, in three cases; two concern unilateral conduct, resulting in limiting access to the market or foreclosure, and one connected with coordinating market behaviour. First, concentration between the undertakings functioning at neighbouring levels of trade may, due to the strong position at the higher level of trade, create the possibility and impulses among its participants to limit the access to goods manufactured at a higher level for the competitors at the lower level of trade or increasing their product prices, as a result of which it would mean the growth of costs of the aforementioned competitors and decreasing the pressure the lower level profits may impose on the participants to concentration. Second, analogous situation may take place with reference to the lower level of trade: market power at the lower level of trade may give the merging participants the possibility and the impulses to limit the access to large enough base of consumers for their competitors at the higher level of trade, thus decreasing the rivals' capability and impulses to compete, and may even result in them exiting the market.

Vertical concentration may also lead to changes, which will result in coordinating market behaviours easier in a horizontal setting, in connection with making it easier to determine a strategy that is most beneficial to all market participants, monitoring deviations from it, effective deterring from such deviations or limiting the potential behaviours unfavourable for the stability of coordinated behaviours, activities of other undertakings.

2.1. Non-coordinated effects

In the judicature practice of the President of UOKiK, vertical effects were rarely the grounds for stating that the transaction may lead to a significant restriction of effective competition on the market, while the majority of cases that concluded in this way concerns the connections in the electricity-energy sector and is connected with its specific functioning. The factors considered when assessing vertical impact of the concentration were presented below.

Change in the relationship supplier-recipient

Concentration between undertakings operating at neighbouring levels of trade does not have to result in significant changes on the market, even if it is connected with a market share exceeding 30%. In particular, it will take place when a concentration participant is the exclusive recipient or supplier for the remaining participants. It regards the case of exclusive distributors, taken over by their current suppliers¹⁵⁸ or transforming joint control into exclusive control, with no impact on the current trading relations¹⁵⁹. The aforementioned circumstances could be of significance if the acquiring entity, while not being the exclusive supplier of the party taken over, it satisfies the majority of its demand¹⁶⁰. A slight scope of the changes in supplier-recipient relation does not exclude the presence of negative vertical impact, even though it reduces its probability. In particular, it is hardly appropriate to speak about cutting off the competitors from the given distributor, as they did not use to have access to him before the concentration¹⁶¹.

DKK – 56/07 (Toyota/EMTOR, distribution of forklift trucks with counter-balance)

In the case of taking over the distributor of the equipment for transporting materials it was taken into account that it will not have any impact on changes in the supplier-recipient relation between these entities. The acquired entity, while being independent from the acquiring party, distributed only the products of the latter, therefore concentration did not reduce access to any of the markets for the competitors.

¹⁵⁸ DKK – 56/07 (distribution of forklift trucks with counter-balance).

¹⁵⁹ DKK – 46/07 (steel galvanized goods).

¹⁶⁰ DKK – 28/08 (steel galvanized goods), DKK – 128/2011 (wholesale of FMCG).

¹⁶¹ DKK – 53/08 (distribution of mobile telephony services).

Asymmetry between production and retail sales in a natural monopoly

In the case of a series of concentrations in the electricity-energy sector, the determined significant negative impact on competition resulted from the specific functioning of this industry. In particular, the concentrations that lead to a significant reduction of asymmetry inside the given capital group between the electric energy generation volume and its sales volume, were recognized as unfavourable for the competition due to the fact that such development of the situation would lead to limiting the amount of electric energy sold outside the capital group, that is on the wholesale market¹⁶². In such case, liquidity, and as a result – effectiveness of this market is reduced.

The barriers for accessing the market for other producers and distributors of electric energy are also increased. The major market entities, with a balanced production and distribution structure, have limited impulses both in terms of purchasing and selling energy outside the capital group. Also, the recipients connected to the distribution networks belonging to the companies covered by vertical consolidation may be imposed as the suppliers of only the entities from the capital group. In particular, such a result would be more discernible in the conditions of limited efficiency of the provisions granting the recipients the right to select their supplier¹⁶³.

Natural monopoly at both levels of trade

In the case of a natural monopoly on both levels of trade, it is then usually adopted that the transaction will not have negative impacts, as there are no potential competitors, which could be removed from the market as a result or forced to less intensive competition¹⁶⁴.

RKT – 68/2007 (Energetyka Południe/Przedsiębiorstwo Energetyki Ciepłej in Dąbrowa Górnicza, generation and distribution of heat)

DKK – 13/07 (Energetyka Południe/Przedsiębiorstwo Energetyki Ciepłej in Katowice, generation and distribution of heat)

Situation where the concentration participants are natural monopolies at neighbouring levels of trade was seen in a series of concentrations concerning the heat sector. Usually, their participant is a monopolist producer of heat, who delivers it to the owner of industrial infrastructure, who – due to the lack of reasoning behind the expensive replication of such infrastructure – does not face any competitors. Even if heat to the given distribution network is delivered from various sources, the specific nature of the construction prevents them from mutual competition: a section of the network where the heat carrier delivered by one supplier is usually unavailable for other suppliers, operating within another area, and also under no competition. In such circumstances there is no risk that the competitors of the concentration participants (that is the heat producer and his distributor) will experience a limited access to the market, as no entity competes with them in practice on such markets.

Factors connected with market power and their change as a result of concentration

The analysis within this scope is similar to the one conducted in the case of horizontal effects (it may happen that references are made to the analysis of horizontal effects of the transaction¹⁶⁵). The circumstances reducing the probability of negative vertical effects include:

- the fact that the participant(s) operating at the given level of trade is(are) minor recipient/supplier; it results in the fact that after implementing the concentration, the newly established entity will not have enough capacity nor impulses to block the competitors from accessing particular levels of trade¹⁶⁶;
- slight changes in market shares of the concentration participants, which may indicate the lack of significant change in capabilities and impulses to impact the situation of the competitors; this fact may

¹⁶² It needs to be noted that the electric energy generated may be used not only on the retail sales market, but also on the balancing market; this fact may have an impact on the assessment of asymmetry between production and sales volumes (see DOK – 19/07).

¹⁶³ DOK – 163/06 (production and distribution of electric energy).

¹⁶⁴ RKT – 68/2007, DKK – 13/07 (production and distribution of heat).

¹⁶⁵ DKK – 128/2011 (wholesale of FMCG).

¹⁶⁶ DKK – 28/07 (selling aggregates), DKK – 14/09 (retail distribution of mobile telephony services).

be of significance in particular in case of concentrations, where an entity present at both levels of trade takes over an entity active on one of them¹⁶⁷; if the concentration is mainly vertical, thus comes down to obtaining significant growth of market share at the given level of trade by the entity active mainly at the neighbouring level, the aforementioned argument will have limited value;

- facing competition from strong rivals, resulting in the fact that the competitors at the neighbouring level of trade have alternative supply or sale sources¹⁶⁸; the very availability of alternative supply sources is treated as a factor limiting the possibility of incurring negative vertical effects¹⁶⁹.

In turn, taking over the biggest recipient on the market by the biggest supplier, with the most extensive assortment and the existence of dependant recipients, was recognized as the basis for concluding that the transaction will lead to negative vertical effects¹⁷⁰.

DKK – 28/07 (Kompania Węglowa/Haldex, sales of aggregates)

The concentration took place between the significant producer of aggregates on the market (Kompania Węglowa, which generated a high amount of mining waste, with some of it used as aggregate or in other uses) and the waste collector (Haldex), who managed them afterwards. One of the reasons for recognizing that this concentration will not lead to negative vertical results was insignificant position of Haldex as waste collector: in the years 2005 and 2006 the waste managed by this recipient constituted about 4% and 6% of all mining waste in Śląskie voivodeship respectively, and between 7 and 10% of the mining waste provided by Kompania Węglowa for recycling.

DKK – 105/2010 (Kompania Węglowa /Huta Łabędy, mining casings and accessories)

Participants of this concentration were: Huta Łabędy, leader on the market of mining casings (with 40-60% market share, depending on the type of assortment) and Kompania Węglowa – the biggest recipient of the aforementioned casings and accessories (with purchase share of about 40-50%, depending on the assortment). Huta's competitors as regards delivering mining casings and accessories were, in case of mining casings: Arcelor Mittal Polska, with the share at the level of 35% and smaller entities, while in case of mining accessories – Huta's competitors mainly comprised of a range of smaller entities. Huta offered the most extensive and comprehensive assortment of casings and accessories; there were significant recipients on the market, such as one of the mines, which could not make use of the offer provided by the suppliers other than Huta due to the technical specifics of the activity. Huta was also the only producer of some mining accessories.

The President of UOKiK recognized that the concentration brings a significant risk of negative vertical effects. After implementing the concentration, it would be probable that Huta would focus on providing services to Kompania, with the simultaneous neglecting of other partners or raising prices of the products offered to them. In this way it would be possible to increase their cost and hinder the activity competitive to Kompania. Having the above in mind, the concentration was given a conditional consent.

The nature of the market and probable responses of competitors

The specific character of the market may cause that some negative effects of the concentrations will be more or less probable, it will also have an impact on the possible responses of competitors limiting or reinforcing the aforementioned results. In the judicature of the President of UOKiK concerning the vertical concentrations the following factors concerning the specific nature of the market were indicated:

- entry barriers: the market protected by entry barriers is difficult for new entrants, which may reduce the probability that the potential future competitors' responses will level out the negative vertical effects of the concentration; the high entry barriers may be proved by: lack of new entries to the market, necessity

¹⁶⁷ DKK – 54/08 (retail sales of medicinals), RPZ 7/2006 (wholesale distribution of alcohol beverages).

¹⁶⁸ DKK – 56/07 (distribution of forklift trucks with counter-balance), DOK – 46/07 (distribution of technical gases), DKK – 28/08 (distribution of steel goods through warehouses), DKK – 53/09 (production of pre-tensioned prestressed concrete cross-ties), DOK – 90/2006 (chemicals).

¹⁶⁹ DKK – 66/08 (distribution of mineral and organic lenses).

¹⁷⁰ DKK – 105/2010 (mining casings).

to have large financial resources (due to common delays in payment)¹⁷¹, necessity to have relevant history of purchases¹⁷²; analysis of entry barriers within the aforementioned scope is not much different from the one that is conducted in the case of horizontal concentrations;

- dynamics of the market development: if the market is a developing market and new entries¹⁷³ or technological changes¹⁷⁴, may be expected, then it may also be expected that the potential market power, which could be used to limit competition at the neighbouring level of trade, may decrease; in turn, the stability of market shares with the simultaneous lack of significant technological changes indicates low possibility of changes on the market¹⁷⁵; factors decreasing the probability of negative effects of the concentration included: declining nature of the market¹⁷⁶, which on the one hand limits the probability of new entries, but on the other hand may result in the efforts intended to dominate the market through anticompetitive behaviours being little profitable;
- technological specific nature of the market, combined with the tendencies in the surroundings: arguments concerning the concentration on the waste storage market indicates a dropping stream of waste as a result of tendencies to change their utilization technologies (plans of constructing incinerators); in such conditions, hampering access to the waste disposal (in order to restrict competition on the market for collecting waste from the residents) is considered unlikely, as it would lead to limiting the profits gained from the disposal, necessary to cover its fixed costs¹⁷⁷; in turn, in case of one of the chemicals it was considered that it is a by-product, therefore limiting its supply for strategic reasons (in order to increase the costs of competitors at the lower level of trade) would not seem rational¹⁷⁸.

DKK – 105/2010 (Kompania Węglowa /Huta Łabędy, mining casings and accessories)

The circumstance reinforcing the previously described possible counter-competitive effects of the concentration were the high market entry barriers, limiting the potential competitive pressure that could be imposed on the entity established as a result of the concentration. The costs connected with commencing and conducting activity comprising of producing casings and mining accessories were very high, due to the fact that it was necessary to invest in machine park and to maintain large reserves. Introduction of casings and accessories to the market required obtaining relevant safety certificates.

Moreover, concluding contracts for deliveries to mining industry was connected with the common risk in the mining industry, that is the delays in payment from the mines for the delivered products. The aforementioned preferred large undertakings, for which it is easier to maintain financial liquidity in the context of frequent delays in payments from the mines. Entry to the market was also hindered by restrictive requirements as to the experience in the given activity (the necessity to present recommendations and documenting the history of deliveries with a given value), which were difficult to meet for new entities.

DKK – 53/09 (Trakcja Polska/Kolbet, pre-tensioned prestressed concrete cross-ties)

When assessing the impact of concentration on competition, the antimonopoly body noticed the fact that in the years after the transactions dynamic development of cross-ties was expected, due to the need of modernizing the railway infrastructure in Poland. The predicted development of the market for pre-tensioned prestressed concrete cross-ties could, in the opinion of the President of UOKiK, result in increasing the production by both the concentration participant as well as by his competitors. Moreover, it could also lead to implementation of new production technologies already in use in other regions of the world, e.g. the so-called mobile pre-tensioned prestressed concrete cross-ties manufacturing plants at the construction sites of the modernised or

¹⁷¹ As above

¹⁷² As above

¹⁷³ RBG 4/2007 (retail sales of CADU).

¹⁷⁴ DKK – 53/09 (pre-tensioned prestressed concrete cross-ties), DKK – 94/08 (mobile television).

¹⁷⁵ DKK – 105/2010 (mining casings).

¹⁷⁶ DOK – 44/07 (active agent for cough medication).

¹⁷⁷ RWA 36/2006, RWA 43/2008 (collection and storage of waste).

¹⁷⁸ DOK – 90/2006 (hydrochloric acid).

newly constructed railway lines.

Regulatory provisions

The existence of regulatory provisions restricting the anticompetitive behaviours is often listed as one of the factors reducing the probability of negative effects of concentration. In particular, the aforementioned limits may impose tariffs confirmed by the regulator¹⁷⁹ and the terms and conditions issued by the regulator concerning providing certain services, directly prohibiting discrimination of the recipients¹⁸⁰.

DKK – 94/08 (P4/Polkomtel/PTC/PTK, mobile television)

When analysing concentration comprising in the establishment of a joint undertaking by the four main participants of the mobile telephony market, who would take part in the contest announced by the President of the Office of Electronic Communications, and in case of winning – they would provide the wholesale audio-visual services (mobile television), the antimonopoly authority considered the conditions of the aforementioned contest. One of the obligations the entity winning the contest would have to accept, was the wholesale offering of services using the reserved frequencies to undertakings within the telecommunications sector, on equal, transparent and non-discriminatory conditions, by offering equal conditions in similar circumstances, as well as by offering services and making information available on the conditions not worse than used within their own company, or in relations with dependent entities, based on uniform offer for telecommunications companies. The conditions, on which the newly established entity could offer his services, significantly hindered the possibility of undertaking activities intended to make it difficult for the competitors to enter the market.

Fulfilling the regulatory or quasi-regulatory function on the market

In case of some markets, it may be necessary for a regulator/organizer to exist, as it determines the rules for the functioning on the market. Serving such a particular function by a concentration participant may increase the probability of negative vertical effects¹⁸¹, as it allows him to discriminate his competitors.

DKK – 163/06 (Polska Grupa Energetyczna, managing the transmission system)

One of the factors taken into account when assessing the concentration, as a result of which Polska Grupa Energetyczna came to be, was the fact that the newly established entity, despite acting in producing, distributing and trading in energy was also – at least temporarily, until the planned changes in the provisions of law come into force – to serve as the operator of the transmission system, which would allow it to discriminate other market competitors in selling the transmission services and purchasing systemic services.

2.2. Coordinated effects

Coordinated effects, which were to be the result of vertical concentration, have not been to date the subject of analysis by the President of UOKiK. Their assessment would come down to analysing the factors taken into account in the case of coordinated effects arising from horizontal concentration, i.e. market transparency which facilitates determining common strategy and monitoring for any deviations from it, the existence of penal system, ensuring that the deviations are not profitable, as well as the responses of current and future competitors, which could endanger the stability of the realized strategy.

3. Conglomerate effects

Conglomerate effects concern such aspects of concentration, where their participants are neither competitors, nor they are bound by supplier-recipient relations. In most cases, high market shares in the given markets will not allow for transferring such power to the markets that are not connected vertically, but there may be situations,

¹⁷⁹ DKK – 7/09 (production, distribution and sales of heat).

¹⁸⁰ DKK – 94/08 (mobile television).

¹⁸¹ DKK – 163/06 (managing the transmission system).

where connections other than vertical connections between the markets would enable the transfer of market power. In particular, it might occur in case of products having common recipients: they are complementary goods or for various reasons are generally purchased by the same group of customers. In such situation it is possible to limit the access to the market or to exclude competitors from the market through cross-merchandising or packet merchandising, or other exclusion practices, even though the fact whether the entity established as a result of the concentration will have the possibilities and impulses to exclude the competitors depends on multiple factors. Conglomerate concentrations may also result in coordinated effects, making it easier to maintain over-competitive prices on the market. To assess them, the same analytic framework shall be used as in the case of coordinated effects incurred as a result of horizontal and conglomerate mergers.

The reason of the statement that the strong market position on some markets will not be transferred to other markets where the concentration participants function, most often raised in the judicature of the President of UOKiK is – direct or implicated¹⁸² – the fact that the products sold on particular relevant markets for the concentration do not have common recipients.

Among the other factors taken into account when assessing the possible conglomerate effects, the following must be listed:

- lack of packet merchandising of the given products on the market¹⁸³;
- high competitiveness of the markets, which eventually will become the subject of anticompetitive practices¹⁸⁴;
- lack of close complementarity between the products that the supplier has strong position in¹⁸⁵;
- the possibility to replace the packet merchandising strategy by the competitors of the merging undertakings (in cooperation with the suppliers of the other product)¹⁸⁶;
- disproportions in the size of the consumer base between the binding and bound products, resulting in the fact that even its maximum use could not lead to foreclosing the market¹⁸⁷.

DKK – 126/11 (Spartan/Polkomtel, retail sales of pay television services provided through digital platforms and retail sales of mobile telephony services)

A more extensive analysis of the possible conglomerate effects of the concentration took place in the case of taking over of a significant mobile telephony operator (Polkomtel) by an entity belonging to a capital group, within which the biggest Polish satellite television platform operator operated (Cyfrowy Polsat). The reservations reported in connection with the transactions concerned inter alia the possibilities of restricting competition on the market of mobile telephony, through using the popularity of the television platform of the capital group. In the opinion of the President of UOKiK these reservations were not justified for a series of reasons.

First, there is no such close complementarity between the pay television services and mobile telephony services, which limited the attractiveness of packets of such services for a wide group of consumers. Second, if the packets covering the access to television and mobile telephony would turn out to be particularly popular, Polkomtel's competitors, that is other mobile operators, could obtain the possibility of creating packets by concluding relevant agreements with the competitors of Cyfrowy Polsat. In this context it was noticed that the sales of pay television provided through the satellite platform already was offered by TP S.A. group, which owned another large mobile operator (Centertel).

Third, the number of subscribers of Cyfrowy Polsat using the services of pay television was significantly smaller than the size of mobile telephony market, and the subscribers' numbers of its largest participants, such as PTC and Centertel (about 13 and 14 millions respectively), or even P4 (about 5 millions); in such situation, even maximum use of the potential of this consumer base by Cyfrowy Polsat would not foreclose the mobile

¹⁸² DKK – 67/09 (railway and tram junctions).

¹⁸³ DKK – 67/09 (railway and tram junctions).

¹⁸⁴ DKK – 29/2010 (pharmaceuticals).

¹⁸⁵ DKK – 126/11 (retail sales of pay television services provided through digital platforms and retail sales of mobile telephony services).

¹⁸⁶ As above

¹⁸⁷ As above

telephony market to its other participants.

While the distribution channels at the disposal of Cyfrowy Polsat could be used by Polkomtel to sell the services provided by this entity, however, when assessing such connections, the share of Cyfrowy Polsat on the market of providing access to radio and television channels through satellite digital platforms would not reflect its position, which would be much weaker in reality, due to the existence of other sales channels that may be used by both Polkomtel and its competitors.

4. Contractual restrictions of competition accompanying the concentration

The practice of economic trading shows that the market changes resulting from concentrations may be accompanied by additional contractual provisions, which may restrict the competition. Such situations may take place e.g. when the seller receives the prohibition to conduct activity competitive against the activity of the sold entity or its organized part, or by concluding agreements obligating to exclusive purchases or sales with reference to the seller. Apart from those most frequent anticompetitive contractual provisions accompanying concentrations, other contractual clauses may be present that have similar effects. It needs to be emphasized that such contractual provisions accompanying the concentration are not the subject of inspection or assessment during the antimonopoly proceedings as regards the intention of concentration of undertakings. Therefore the consent of the President of the Office to implement the concentration does not extend to the anticompetitive contractual clauses accompanying the concentration. The judicature practice of the antimonopoly body concludes that during the concentration procedure, the President of the Office may inform the undertaking that the contractual provisions accompanying the concentration raise doubts as to their conformity with the provisions of the competition law on the ban on anticompetitive behaviours of undertakings, and therefore, if the entrepreneur refuses to change them, it may result in the necessity to commence an antimonopoly procedure in order to assess whether the anticompetitive arrangement between the undertakings took place. It means that, in principle, the President of UOKiK does not make the consent to the submitted concentration dependant on the previous amendment of additional contractual provisions accompanying the concentration.