OFFICE OF COMPETITION AND CONSUMER PROTECTION

REPORT ON ACTIVITIES IN 2004

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Introduction

The President of the Office of Competition and Consumer Protection is a unit of the central governmental administration responsible for competition and consumer protection issues, who performs its tasks with the help of the Office of Competition and Consumer Protection.

The tasks of the President of the Office, which were initially limited to the control of competition restricting practices and of mergers between undertakings, are extended every year. They remain within the scope of the competition law and closely therewith related consumer protection and cover broader and broader areas of regulation. At present the scope of activities of the President of the OCCP includes among other things the control of anticompetitive practices and mergers, as well as monitoring state aid for undertakings at the national level.

Within the scope of consumer protection, apart from implementing national policy in this area (consisting *inter alia* in the preparation of acts and cooperation with organizations and authorities dealing with consumer protection), the President of the OCCP was also entrusted with tasks concerning practices infringing collective consumer interests, combating unfair competition, abusive clauses, the protection of the Polish language, as well as product safety. The President of the OCCP also supervises the activities of the Trade Inspection. The competence of the President of the OCCP has also been extended to include tasks related to market surveillance.

Together with Poland's accession to the European Union, i.e. since 1 May 2004, which coincided with the entering into force of the Community Regulation 1/2003 reforming the competition protection system in the EU and of the closely related amendment to the Act on competition and consumer protection, the President of the OCCP was entrusted with a number of new obligations.

The President of the OCCP has become a part of the European Competition Network (ECN), which consists of the European Commission and competition authorities of Member States. For the Polish competition authority this means, first of all, the obligation to directly apply Article 81 and 82 of the Treaty establishing the European Community (EC), in the case when a practice restricting competition may affect trade between Member States.

The tasks entrusted to the President of the OCCP aim at guaranteeing healthy competition allowing undertakings to act and develop in optimal market conditions, and at ensuring the consumers' right to choose products of appropriate quality, ensuring their safety and ensuring that undertakings respect their rights.

General information

Organizational structure of the OCCP

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Organizational structure of the OCCP

The President of the OCCP is an organ of central administration supervised by the Prime Minister. The President of the OCCP is appointed by the President of the Council of Ministers for a five year tenure, and the candidate for this position is chosen through a contest from among people of exceptional theoretical knowledge and experience relating to market economy and competition and consumer protection. The President of the OCCP performs his tasks with the help of the Office of Competition and Consumer Protection.

In the year 2004 the Office's management consisted of the following: Mr Cezary Banasiński, Ph.D. – President of the Office and Mrs Elżbieta Ostrowska, Ph.D. (until August 2004), Mr Jarosław Maćkowiak, Ph.D. (since August 2004), and Mrs Ewa Kubis, Ph.D. until February 2005, Mr Jarosław Król (from March 2005) – Office's Vice-Presidents.

The President of the OCCP acts on the basis of the Act of 15 December 2000 on competition and consumer protection and other acts specifying his competencies. The organizational structure of the Office is specified in the Statute granted by the Prime Minister in Regulation No. 142 of 31 December 2001.

The Office of Competition and Consumer Protection consists of the headquarters and 9 branch offices:

- OCCP Branch Office in Bydgoszcz – its scope of activities covers Kujawsko-Pomorskie and Warmińsko-Mazurskie voivodships,
- OCCP Branch Office in Gdańsk – Pomorskie and Zachodniopomorskie voivodships,
- OCCP Branch Office in Katowice – Śląskie and Opolskie voivodships,
- OCCP Branch Office in Kraków – Małopolskie and Podkarpackie voivodships,
- OCCP Branch Office in Lublin – Lubelskie and Podlaskie voivodships,
- OCCP Branch Office in Łódź – Łódzkie and Świętokrzyskie voivodships,
- OCCP Branch Office in Poznań – Wielkopolskie voivodship,
- OCCP Branch Office in Wroclaw – Dolnośląskie and Lubuskie voivodships
- OCCP Branch Office in Warsaw – Mazowieckie voivodship.

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

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

The following breakdowns show the employment in the Office in the year 2004, taking into account professional structure and personnel shifts.

Statistics

Employment in the OCCP

	No. of persons	No. full-time positions
- 1 January 2004	**259**	**252**
- 31 December 2004	**274**	**264**
- annual average	**259**	**251**

Age and profession structure of the OCCP employees as of 31 December 2004

Age	Lawyers	Economists	Other professions	Total	% of the total number of employees
Up to 30	99	8	27	134	48,6
30-40	43	14	15	72	26,3
40-55	14	16	18	48	17,5
More than 55	3	9	8	20	7,3

Personnel shifts in 2004

	No. of persons	No. of full-time positions
- employed	**60**	**55.8**
- employment terminated	**38**	**37.3**

Changes in the employment status

Year 2004	Total number of employees in OCCP	Growth in %	Overall employment in Trade Inspectorate	Growth in %	Overall employment in OCCP Assistance Property	Growth in %	Total section 53	Growth in %
	99	8	99	8	99	8	99	8

The annual budget of the OCCP according to the budgetary act for the year 2004

- income **PLN 895,000.000**
- expenses **PLN 31,440.000**

  including:
  - Office of Competition and Consumer Protection **PLN 21,108.000**
  - Trade Inspection Chief Inspectorate **PLN 8,132.000**
  - subventions for financing national tasks within the scope of consumer protection to be performed by associations. **PLN 2,200.000**

General characteristics of the tasks of the President of the OCCP

The first legal regulation concerning competition protection was the Act of 28 January 1987 on counteracting monopolistic practices in national economy (Journal of Laws No. 3, Item 18.) In the year 1996 the Office's scope of competence was extended to include the capability to create and implement consumer protection policy, the Department of Consumer Policy was established for the purpose of fulfilling new obligations, the name of the Office was changed into the Office of Competition and Consumer Protection, and the Trade Inspection was subordinated to the President of the OCCP. Since 1998 the name of the Act has been "Act on counteracting monopolistic practices and protection of consumer interests." Entrusting the President of the OCCP with the function within the scope of consumer protection policy resulted from the necessity to ensure consistent implementation of the competition and consumer protection policy. At this time many regulations concerning consumer rights have been adopted, *inter alia* the Act on combating unfair competition (which granted the President of the OCCP competence to address the court in cases where undertakings commit acts of unfair competition), the Consumer Credit Act, the Trade Inspection Act.

After 10 years of the Act on counteracting monopolistic practices and protection of consumer interests being in force, the need to prepare a new act, which would regulate the competition issues in the Polish market in a comprehensive and, at the same time, consistent and effective manner emerged. The act included a number of new solutions developed as a result of analysing the experiences of the Office and the European Union case-law in the field of antitrust law.

On 15 December 2000 the Parliament (Sejm) adopted the Act on competition and consumer protection (Journal of Laws No. 122, Item 1319). As far as substantive regulations are concerned, the Act on competition and consumer protection was based on the premises of the Act on counteracting monopolistic practices and it included the prohibition to abuse a dominant position, the prohibition of agreements restricting competition, and also the obligation to report merger transactions which may affect the market and negatively influence the processes occurring in the market.

The scope of competence of the competition authority was broadened on the basis of the Act of 30 June 2000 on conditions of admissibility and monitoring of state aid for undertakings (Journal of Laws No. 60, Item 704, as amended), under which the President of the OCCP was responsible for controlling state aid granted in Poland as far as its compliance with the Act and international agreements, of which the Republic of Poland is a party, is concerned. On 31 May 2004 the Act of 30 April 2004 on proceedings in matters relating to state aid (Journal of Laws No. 123, Item 1291) came into force. This Act regulates the manner of proceedings in matters related to state aid at a national level. Under this Act, the President of the Office issues opinions on aid schemes and individual aid before their formal notification to the European Commission. In his opinion the President of the Office presents his position on *inter alia* the compliance of the proposed aid measures with the common market, and in the case of non-compliance, proposes specific solutions aimed at eliminating the non-compliance.

The competence of the President of the OCCP have been also extended by the Act of 22 January 2000 (currently the Act of 12 December 2003) on general product safety, which specified the requirements regarding product safety, the principles and manner of counteracting infringement of these requirements, as well as authorities performing the surveillance of the safety of products placed on the market. Under this Act the President of the OCCP is granted authority powers in relation to undertakings, including among other things the right to ban placing a product not

compliant with safety requirements on the market or to order to withdraw a product from the market or to destroy a product.

As of 1 July 2000 the President of the OCCP has been also granted the right to institute actions for recognizing clauses of a standard format of contract as abusive before the Court of Competition and Consumer Protection (on the basis of Article 479^{36} – 479^{45} of Civil Proceedings Act).

The amendments to the scope of competence of the President of the OCCP have been taken into account in the provisions of the Act on competition and consumer protection, specifying the general scope of the competence of the President of the Office.

- Exercising control over the undertakings' compliance with the provisions of the Act on competition and consumer protection, including issuance, in the cases stipulated in the Act, of decisions in matters of counteracting competition restricting practices, mergers or separations of undertakings,
- Elaboration and giving opinions on acts concerning – competition restricting practices, development of competition or conditions for its emergence, as well as protection of consumer interests,
- Conducting studies on the concentration level in the economy and in the market behaviour of undertakings,
- Protection of consumer interests, by means of addressing undertakings and associations thereof on matters relating to the protection of the rights and interests of consumers, cooperation with the territorial self-government authorities and with national and international social organizations and other institutions, which statutory tasks include the protection of consumer interests, elaborating and editing publications and educational programmes promoting awareness of consumer rights, addressing specialized units and relevant bodies of the State supervision for undertaking control of observance of consumer rights and initiating checks on products and services to be performed by consumer organizations,
- Elaboration of draft government programmes for the development of the competition and of draft government consumer protection policy,
- Monitoring the state aid granted to undertakings pursuant to separate provisions, including assessment of the efficiency and effectiveness of the state aid granted to undertakings, as well as of the effects of granted aid in the field of competition,
- Cooperation with foreign and international organizations and authorities within the scope of competition and consumer protection and the enforcement of the international commitments of the Republic of Poland within the scope of cooperation and exchange of the information in the field of competition protection and state aid granted to undertakings,
- Undertaking any actions ensuing from the provisions on combating unfair competition,
- Surveillance of the safety of products intended for consumer use within the scope of the provisions on the general product safety.

As of 15 December 2002, as a result of the amendment to the Act on competition and consumer protection, the President of the OCCP was granted competence to conduct proceedings and issue decisions in cases of practices infringing collective consumer interests.

In 2003 the tasks of the President of the OCCP were extended to include the surveillance of products placed on the market, performed on the basis of the Conformity Assessment System Act

of 30 August 2002 (Journal of Laws No. 166, Item 1360 as amended), some additional competence was also granted to the President of the OCCP within the scope of managing the Liquid Fuels Quality Monitoring and Controlling System on the basis of the provisions of the Act of 10 January 2003 on quality monitoring and controlling system for liquid fuels.

The Act on competition and consumer protection, in force since 1 May 2004, adapted the Polish competition law to the new system of EU protection, specified in Regulation 1/2003, as far as the procedural scope is concerned. Additional responsibilities were imposed on the Polish competition authority (see more in the section discussing the Reform of the European Competition Law).

Apart from the aforementioned competence, the President of the OCCP performs a number of other tasks provided for in separate acts, namely:

- **Broadcasting Act of 29 December 1992** – the right to request the broadcaster of an advertisement which has features of an act of unfair competition to disclose data allowing for identification of the person who ordered a programme or advertisement and to demand the free of charge delivery of the recording of the programme or advertisement within 7 days from the date of the request;
- **Polish Language Act of 7 October 1999** – controlling the fulfilment of obligations ensuing form the Polish Language Act by undertakings;
- **Trade Inspection Act of 15 December 2000**– confirming Trade Inspection's periodical plans for nationwide inspections;
- **Act of 16 July 2004 – Telecommunications Law** – the President of the URTiP (Office of Telecommunications and Post Regulation) in consultation with the President of the OCCP issues *inter alia* decisions regarding designation of an undertaking or undertakings of significant market power on the relevant market or imposing regulatory obligations specified in the act, as well as decisions regarding designation of an undertaking of significant market power on radio or television broadcasting markets. Moreover, the President of the URTiP after seeking opinion of the President of the OCCP, changes the frequency reservations in the course of tender proceedings;
- **Act of 30 April 1993 on national investment funds and their privatisation** (Article 25) – approving the provision of management services for two or more funds by a company and for being a shareholder of a fund, for which it provides management services;
- **Conformity Assessment System Act of 30 August 2002** – the President of the OCCP is one of the bodies forming the system of supervising products placed on the market;
- **Act of 23 January 2004 on quality monitoring and controlling system for liquid fuels and liquid biofuels** – the President of the OCCP manages the system of monitoring and controlling the quality of liquid fuels and biofuels;
- **Act of 28 March 2003 on railway transport** – issuing opinions regarding the issuance of permits by the President of the Office for Railway Transport within the scope of railway transports;
- **Act of 30 October 2002** – Bankruptcy and Rehabilitation Law - submitting a motion to institute proceedings in matters of ruling the ban to conduct economic activity, in cases specified in the Act;
- **Act of 30 October 2002 on state aid for undertakings of particular significance for the labour market** – issuing an opinion (within 28 days) regarding the restructuring plan submitted by the President of the Industrial Development Agency Management Board;
- **Act of 28 February 2003 on the liability of collective entities for acts prohibited under**

penalty – submitting a motion to institute proceedings in cases where the ground for the liability of a collective entity is an act of unfair competition, as well as providing legal assistance within this scope;

- **Act of 30 August 2002 on restructuring of certain public receivables from undertakings** – issuing opinion regarding the proposed decisions to cease restructuring submitted to the President of the OCCP by the restructuring authority (within 14 days from the date of receiving the project);
- **Act of 3 July 2002 - Aviation Law** – in cases indicating the infringement of the Act of 15 December 2000 on competition and consumer protection, the President of the Civil Aviation Office may refer the case to the President of the OCCP. If a decision to withdraw a tariff or to withhold the application of a tariff was made, the decision of the President of the Civil Aviation Office stays in force until the President of the OCCP decides about the case;
- **Act of 5 July 2002 on protection of certain services provided by electronic means based on, or consisting of, conditional access** – to present a motion to prosecute offences consisting in the use, production and placing prohibited devices on the market;
- **Act of 17 November 1964 - Civil proceedings code** – instituting actions in cases regarding recognising clauses of contract formats as abusive.

New rights and obligations of the President of the OCCP

General Information

Antitrust proceedings instituted under Article 81 and 82 of the EC Treaty

General Information

Since Poland's accession to the European Union, the President of the Office of Competition and Consumer Protection, as the national competition authority, has become a member of the ECN. This results in specific obligations and rights of the President of the OCCP.

The most important obligations are:

- performing proper allocation of cases submitted to the authority,
- informing the European Commission about instituting proceedings on the basis of Article 81 or 82 of the EC Treaty,
- consulting decisions issued on the basis of the aforementioned provisions with the Commission,
- conducting investigative activities – on request and on behalf of national competition authorities of other Member States,
- conducting inspections of undertakings or their associations upon request of the Commission.

The President of the OCCP has been obliged to perform the following tasks of informative nature:

- submitting summaries of cases to the Commission prior to issuing a decision, as well as copies of most important documents prepared in the course of proceedings,
- submitting to the Commission upon its request all documents relating to cases handled on the basis of Article 81 and 82 of the EC Treaty,
- upon request of the Commission, providing and transmitting information necessary for the fulfilment of obligations resulting from the Regulation,
- exchange of information with other EU Member States,
- participation in the works of the Advisory Committee on Restrictive Practices and Dominant Positions.

As an ECN member the President of the OCCP has the following rights:

- to receive and handle cases which according to the principles of proper allocation are within the competence of the Polish competition authority,
- to suspend or discontinue proceedings held by the Office under Article 81 or 82 of the EC Treaty, or the right to refuse to institute proceedings if competition authorities of another Member State are simultaneously handling the case in relation to the same agreement or practice,
- to obtain information from the Commission and national competition authorities of other Member States for the needs of proceedings held by the Office on the basis of Community law, as well as copies of most important documents collected in relation to the proceedings held (decisions issued) by the Commission,
- to obtain all necessary documents relating to the actual and legal circumstances, including confidential information from the Commission and national competition authorities of other Member States, in connection with proceedings held by the Office under Community law, and then to use these documents as evidence,
- President of the OCCP may, on behalf of the Office, request national competition authorities of other Member States to carry out investigative actions necessary for the needs of proceedings being held,
- to address national courts to provide access to necessary documents relating to the proceedings held under the Community law,
- to represent the Commission upon its authorisation when addressing national courts with motions regarding the subject matter of proceedings held before these courts under the

provisions of Community law and to independently address national courts with such motions,
- to consult with the Commission all cases related to the application of the Community law.

Antitrust proceedings instituted under Article 81 and 82 of the EC Treaty

In 2004 the Office of Competition and Consumer Protection held two antitrust proceedings instituted under Article 81 and 82 of the EC Treaty, where it simultaneously applied Polish and Community law.

The first proceedings were instituted upon request of the Polish Organization of Commerce and Distribution in connection with the suspicion of infringement of Article 5 (1) (1) of the Act of 15 December 2000 on competition and consumer protection and Article 81 (1) of EC Treaty in connection with suspicion that agreements concluded by the majority of Polish banks being issuers of Visa and Mastercard payment cards may affect trade between Member States. In the course of the proceedings it was found that the aim of the concluded agreement is to jointly establish the rates of interchange fee charged for transactions with Visa and Europay/Eurocard/Mastercard cards in the market of services related to the settlement of consumers' liabilities to acceptors for the payment for goods and services purchased with payment cards on the territory of the Republic of Poland.

The proceedings are currently in progress.

The second antitrust proceeding was instituted *ex officio* in relation to the suspicion of infringement of Article 8 (2) (5) of the Act of 15 December 2000 on competition and consumer protection and Article 82 of the EC Treaty by Telekomunikacja Polska S.A., through preventing telecommunication undertakings conducting economic activity on the territory of the Republic of Poland from transferring IP traffic of appropriate quality by means of foreign transit. In order to provide their users with access to the whole global Internet network, individual operators must either connect to operators of similar size on the basis of traffic exchange free of charge (peering), or purchase links from larger operators (transit.) In the course of the proceedings it was found among other things that TP S.A. is not applying the peering policy in relation to Polish operators, and thereby, it forces them to buy a very expensive transit link. Moreover, the Polish operator applies purposeful discriminatory restriction of the network traffic. It consists in not allowing data coming from servers located within the network of Polish telecommunication operators to be transferred to end users connected with the TP S.A. network in the case when the operator accesses the TP S.A. network via networks located abroad. Thus, those operators have to resign from the cheaper foreign transit from abroad and use the much more expensive TP S.A. transit. The OCCP has also found that the actions of Telekomunikacja Polska S.A. may affect trade between Member States, since it forces Polish operators to resign from services offered by foreign entities. According to the Office, it is an anticompetitive practice aimed at foreign operators offering lower and more affordable prices. Telekomunikacja Polska takes customers away from foreign operators not through more competitive prices or contract terms, but through actually forcing those customers to conclude a contract with TP S.A.

The proceedings are currently in progress.

Legislative works

Intradepartmental legislative works

Issuing opinions on draft normative acts

Intradepartmental legislative works

According to the Act on competition and consumer protection, the President of the OCCP is obliged to elaborate and submit government acts concerning restrictive practices, development of competition or conditions for its emergence, as well as protection of consumer interests and state aid. The acts prepared by the President of the OCCP are consulted with all departments, and then (after being examined by the Legal Commission at the Government Legislative Centre) submitted for acceptance to the Committee of the Council of Ministers or the European Committee of the Council of Ministers and the Council of Ministers.

In 2004 within the scope of the Office of Competition and Consumer Protection the drafts of the following normative acts were prepared:

Act amending the Act on competition and consumer protection and amending certain other acts
(Amendment to the Act was published in Journal of Laws No. 93, Item 891 on 16 April 2004)

The amendment of the Act of 15 December 2000 on competition and consumer protection first of all aimed at adapting the Polish competition law to the new European competition protection system defined in Regulation No. 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty establishing European Community (hereinafter referred to as: Regulation 1/2003), binding in all Member States since 1 May 2004.

Regulation 1/2003 did not require implementation into the Polish legal order (it is binding directly on the territory of all Member States), nevertheless it was necessary to establish procedures enabling the Polish competition authority to undertake appropriate actions and facilitating the cooperation with the European Commission and other Member States.

Since Poland's accession to the European Union, i.e. from 1 May 2004, the Polish competition authority has been granted competence to hold independently – on the basis of national procedural provisions – proceedings in cases concerning the infringement of Article 81 and 82 of the Treaty (unless the European Commission takes over the case). Therefore, it was purposeful to amend the Polish competition act in such a manner as to ensure efficient proceedings at the Community level and efficient cooperation with the European Commission and authorities of Member States and the avoidance of legal doubts related to the simultaneous application of the Community law and the Polish law.

According to the Act, the President of the OCCP is the central government administration authority exercising tasks superimposed by the EC Treaty and Regulation 1/2003, meaning that it may impose a penalty provided for in national provisions on an entrepreneur who infringes Article 81 of EC Treaty. The President of the OCCP as the Polish competition authority has become a part of the European Competition Network, participates in the close antitrust cooperation between the competition offices of Member States and the European Commission.

The list of persons who may perform an inspection of an entrepreneur in a manner provided for in the Act has been extended. At present representatives of the Commission may participate in the inspection in a situation where the OCCP carries out an inspection of an entrepreneur ordered by the

European Commission, conducting proceedings in a case of infringement of Article 81 and 82 of the Treaty. The amendment to this provision also makes the purely national proceedings more efficient, thanks to the participation of persons who are neither the OCCP's nor Trade Inspection's employees, but who may contribute to increasing the efficiency of inspections (e.g. IT specialists). Furthermore, the President of the OCCP on the basis of Article 61a has been granted the right to carry out an inspection (a search) of an entrepreneur, dwelling, means of transportation etc. upon the European Commission's request in a situation where the Commission is holding its own proceedings on the basis of Community provisions and has encountered resistance of undertakings or other persons from which it requested documents, information and other evidence. Since in such a situation the Commission has no right to use coercive measures – national authorities shall carry out proper actions upon the order of the Commission on the basis of internal provisions. This provision allows the President of the OCCP also to carry out inspection (without instituting a proceeding) in other cases upon the request of the European Commission or competition authorities of other Member States, submitted on the basis of the provisions of the Council Regulation.

Since 1 May 2004, in the event any justified suspicion of a serious infringement of the provisions of the Act occurs in the case of any urgent matter, particularly whenever obliteration of evidence may occur, the possibility to obtain the permission of the Court of Competition and Consumer Protection for carrying out a search at any moment in the course of the conducted proceedings has been introduced. At present it allows to carry out a search using the element of surprise, which is extremely important in the case of proceedings concerning restrictive practices (especially cartels) – in such cases the promptness of the actions of the Office is very important, and is often decisive for collecting evidence against an entrepreneur (the entrepreneur who does not expect a search has no time and no opportunity to hide or destroy evidence, which may be the case in course of a standard inspection.) In order to guarantee the rights of undertakings the restriction has been introduced that a search based on such a permission may only be performed once within a month from its issuance.

It was also necessary to introduce an appropriate procedure in the event proceedings concerning the same case are instituted (or even concluded) by a Member State or the Commission. In the light of Community provisions it is possible that proceedings concerning a given case are held simultaneously in several Member States, however, if the European Commission takes over a case, this precludes any Member State from deciding in this case – these principles must have been reflected in the Act on competition and consumer protection.

A provision being analogous to the provision included in the Council Regulation allowed the President of the OCCP to accept undertakings' commitment to discontinue such infringements or to take certain actions to prevent those infringements (Article 11a) – in the event the use of anticompetitive practices by undertakings has been rendered plausible. The aim of introducing this provision was to achieve better effectiveness of the Office's activities – its basic goal is to protect the consumers and not to punish the undertakings. The President of the OCCP may also accept undertakings' commitment (at the same time retracting from further holding the proceedings and from issuing a decision stating the use of a practice and from imposing a penalty) in the event this would be advantageous to competition (i.e. immediate discontinuance of the use of a practice brings more benefits for the competition than concluding the proceedings and imposing a penalty on the entrepreneur). A similar possibility has been also introduced in relation to proceedings concerning practices infringing collective consumer interests.

The President of the OCCP has also gained the right to apply the so - called interim measures in the course of proceedings in the event the conduct of an entrepreneur poses, in the opinion of the OCCP, a serious and hard-to-remove threat to competition. In such exceptional situations – the President of the OCCP may temporarily (for a period not longer than until a decision regarding the case is issued) order the entrepreneur to discontinue the use of a given practice. In this way it is possible to avoid very serious competition infringements, which may have irreversible effects on the market.

Extremely important for the Polish competition authority was the introduction of a leniency programme, modelled on the so called *leniency system* functioning under the Community law, to the Polish legal order under Article 103a of the Act and Regulation of the Council of Ministers of 18 May 2004 on the proceedings with leniency application (Journal of Laws z 2004 r., No. 130, Item 1380) issued on the basis of this provision. The aim of this system is to facilitate the detection of cartels, i.e. anticompetitive agreements of significant importance to competition concluded by undertakings. From the point of view of competition these are the most dangerous practices and most difficult to detect, they may lead to a significant restriction or even complete elimination of competition on the market. Therefore, the detection and elimination of such practices is particularly important, even for the price of refraining from imposing penalties on some undertakings partaking in such practices (in such a case the elimination of a cartel is of greater value than punishing all cartel participants).

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

On one hand Article 101 provides increasing the penalties for the infringement of the provisions of the Act up to EUR 50 million. However, on the other hand Article 103a and Article 103b of the Act introduce a system of mitigating penalties imposed on cartel participants who voluntarily retract from using the forbidden agreement and inform the President of the OCCP thereof. The penalty in the previously binding amount appeared not to be severe enough in the case of serious infringements of the provisions of the Act committed by undertakings of significant economic potential, and thereby it often does not fulfill its deterring function. It should be also added that penalties are no longer imposed for not informing about an intention of concentration (undertakings are at present punished for performing a merger without the acceptance of the President of the OCCP, and not for the lack of notification alone).

A considerable number of amendments introduced to the Act on competition and consumer protection in the year 2004 resulted from over three years of experiences from its application. This refers to tightening of some of the provisions of the Act, among other things extending the list of forbidden restrictive practices to include bid-rigging between the tender organizer and tender

participants. Also the scope of application of the so - called de minimis principle, according to which agreements concluded by undertakings of small market power are deemed harmless to competition, and thus are permitted in the light of the Act, has been limited in relation to agreements particularly dangerous from the point of view of competition protection (such as price fixing, market allocation, bid-rigging), which from their nature – regardless the market power of the participants – lead to a significant restriction of competition.

Significant amendments were also introduced within the scope of control of mergers of undertakings. This resulted from the need to simplify the notification principles, and at the same time to keep the possibility of effective monitoring of merger performed in the market. The most important change within this scope is the transition from the so - called "dominant position test" to the so - called "significant restriction of competition test." This means that when examining a notification about intention of concentration, the President of the OCCP examines whether the planned merger shall not lead to a significant restriction of competition in the market, which my be manifested through, among other things, the emergence or strengthening of a dominant position in the market. Prior to the provisions amending the Act on competition and consumer protection entering into force, first of all the latter circumstance was examined (emergence or strengthening of a dominant position) and only the occurrence of this circumstance could lead to the prohibition of an anticompetitive merger.

Furthermore, the currently binding provisions of the Act no longer provide for a low market share criterion (up to 20%) as a premise for the exemption from the obligation to notify the intention of concentration. This criterion has been questioned by the undertakings themselves – it imposed on them an obligation to precisely specify their market share for the needs of determining the notification obligation, and the lack of notification resulting from miscalculated market share could lead to a financial penalty being imposed. Also OECD presented objections in relation to this condition (deleting it from the Act was recommended). Also Community provisions do not include any analogous criterion. Moreover, the possibility to apply the exemption from the obligation to notify about intention of concentration due to a low turnover achieved by the acquired entrepreneur in a situation where as a result of the merger the acquiring entrepreneur shall strengthen (or achieve) a dominant position in the market was also excluded. Eliminating the exemption within this scope was necessary, since it allows for eliminating cases (which are quite often, especially on local markets) when undertakings achieve a dominant position in the market through e.g. acquisition of a number of undertakings acting in the same industry and having littlie economic power.

It was also necessary to shorten the "expiry date" of a decision allowing for performing a merger to 2 years. As this is a period within which generally no very important changes occur in the market, the implementation of the decision within this time limit does not cause negative effects for competition. The previously (i.e. prior to 1 May 2004) binding time limit of 3 years was too long from the point of view of competition protection and could have caused the planned merger, not threatening competition at the moment of issuing the decision, to *de facto* lead to its infringement, if the merger was performed after a relatively long time (after 2 years). In such a situation the President of the OCCP had no effective tools with which he would be able to prevent this merger being effected. Under the provisions currently in force it was admissible (the decision about the consent being in force). This amendment means *de facto* that in principle the consent is valid for 2 years, however, it is possible to extend the consent for a consecutive year, if this shall not cause negative effects for competition.

The Council of Good Economic Practices has been established as an opinion-making and advisory body to the President of the OCCP. The need to establish a body which would monitor the application of competition law on a constant basis and initiate actions aiming at efficient protection of consumers and undertakings from disadvantageous market phenomena resulted from the experiences of the OCCP.

Act amending the Act of 2 March 2000 on protection of certain consumer rights and liability for a damage caused by a dangerous product
(Amendment to the Act was published on 25 August 2004 in Journal of Laws No. 116, Item 1204).

The amendment to the Act of 2 March 2000 on protection of certain consumer rights and liability for a damage caused by a dangerous product resulted from the need to implement the Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/ECi into the Polish legislation.

The objective scope of the amendment included contracts for distance provision of financial services, *inter alia* bank services, consumer credit contracts, insurance services, investment fund participation contracts. It should be emphasized that this is not a complete list, since the Act names only basic financial services defined in particular acts.

The currently binding provisions of the Act ensure better consumer protection in relation to distance provision of financial services, i.e. via the Internet or per telephone. Due to the complex nature and the risk related to distance provision of financial services, the protection of consumer interests is particularly required in this case. This protection is first of all related to the right to information, including not only precise specification of the consumer's contracting party, but also the features of the contract – its nature and the terms of: concluding, realization, execution and possible vindication of claims.

Furthermore, extremely important from the point of view of the protection of consumer rights was ensuring the right to renounce the contract. The time limit for renouncing a contract for distance provision of financial services is 14 days from concluding the contract (or confirming information), and in the case of contracts for insurance services – 30 days (the 30-day time limit applies to individual insurance policies.) The provisions specify in detail the method of calculating the time limit for renouncing a contract. The situations in which the entrepreneur may request the payment of the price, even if the consumer has exercised the right to renounce the contract, as well as situations where the right to renounce the contract does not bind, have been specified. This refers to contracts executed completely on the consumer's request, contracts for services in case of which the price for the provision depends only on the price shifts in the financial market, insurance contracts regarding travel and luggage, as well as other contracts concluded for a period shorter than 30 days.

The amendment to the Act imposed on undertakings obligations of informative nature by means of introducing a list of elements the consumer shall be informed about at the moment of submitting the offer to conclude a contract at the very latest. The scope of information includes among other things details on the entrepreneur and its representative, on the operator of distance communication means, characteristics and price of a service, the right to renounce the contract, information related to submitting complaints and renouncing the contract. Furthermore,

undertakings are also obliged to indicate the law being the basis of the relations between the entrepreneur and consumer prior to concluding a contract, as well as governing law for concluding and executing the contract.

Act on proceedings in matters relating to state aid
(The act was published on 30 April 2004 in Journal of Laws No. 123, Item 1291)

Since the day of Poland's accession to the European Union, aid granted to undertakings is subject to evaluation with respect to the compliance with the principles of the common market. At present the European Commission is the authority supervising the granting of state aid to undertakings in Poland. Therefore, as early as in the year 2003, the OCCP initiated strenuous works on the act aimed at regulating the aforementioned issues.

In May 2004 the Act of 27 July 2002 on conditions of admissibility and monitoring state aid for undertakings (Journal of Laws No. 141, Item 1177 as amended) was replaced with the Act of 30 April 2004 on proceedings in matters relating to state aid.

Due to the fact that after the accession the intention to grant state aid to undertakings is subject to notification to the European Commission in the form of a draft aid scheme or ad hoc aid (individual aid), the new act includes *inter alia* provisions specifying the manner of cooperation between entities granting aid, developing aid schemes, beneficiaries of aid and other interested parties and the President of the OCCP and the European Commission. The purpose of introducing new regulations was to ensure efficient and effective execution of the obligations resulting from the Council Regulation No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

The amendments covered also issues related to the monitoring of state aid granted to undertakings in Poland, as provisions imposing reporting obligations on entities granting aid and beneficiaries of aid have been introduced, consisting in periodic notification to the President of the OCCP about cases of granting state aid. Informative obligations were also imposed on the President of the OCCP. At present the President of the Office is obliged to notify the European Commission about granting aid in Poland. Also provisions regulating the issues of recovery of unlawful or misused aid were introduced in the new act.

8 Regulations specifying in detail the main reporting obligations of the entities granting state aid, its beneficiaries, as well as information submitted to the President of the OCCP for issuing an opinion on the planned state aid and notifying this aid to the European Commission, have been issued on the basis of the Act of 30 April 2004 on the proceedings in matters relating to state aid:

- *Regulation of the Council of Ministers of 26 October 2004 on information submitted to the President of the Office of Competition and Consumer Protection for the purpose of issuing an opinion on planned state aid* (Journal of Laws No. 246, Item 2467),
- *Regulation of the Council of Ministers of 1 September 2004 on establishing regional aid map* (Journal of Laws No. 200, Item 2050),
- *Regulation of the Council of Ministers of 11 August 2004 on information regarding state aid received other than de minimis aid* (Journal of Laws No. 191, Item 1960),
- *Regulation of the Council of Ministers of 11 August 2004 on de minimis aid certificates* (Journal of Laws No. 187, Item 1930),

- *Regulation of the Council of Ministers of 11 August 2004 on reports regarding the use of state aid and the category of entities obliged to specify accounting principles in relation to activities financed from public resources* (Journal of Laws No. 192, Item 1964),
- *Regulation of the Council of Ministers of 11August 2004 on reports of beneficiaries of state aid* (Journal of Laws No. 194, Item 1984),
- *Regulation of the Council of Ministers of 11 August 2004 on reports on granted state aid and reports on overdue liabilities of undertakings resulting from payments for the benefit of public finances sector* (Journal of Laws No. 196, Item 2014),
- *Regulation of the Council of Ministers of 11 August 2004 on the detailed method of calculating the value of state aid granted in various forms* (Journal of Laws No. 194, Item 1983).

Act amending the Trade Inspection Act

The experiences generated in the course of over 3 years of implementation of the provisions regarding product control included in the Trade Inspection Act, the need to fully adapt its organization, competence and operating tools to the European Union effectiveness requirements, as well as the need to adapt the control procedures to the solutions included in the Act on freedom of economic activity, all this indicated the need to amend and supplement especially those provisions which refer to the Trade Inspection's competence, operating tools, rules of proceedings and some regulations regarding its organization.

The proposed amendments aim mainly at ensuring the effectiveness of inspections carried out by the Trade Inspection and they take into account the wholeness of the Trade Inspection's tasks, most of which having been regulated so far in many separate acts, making the scope of competence illegible.

In December 2004 the Act was in the phase of interdepartmental consultations.

Draft Regulation of the Council of Ministers on the manner of proceedings in the case undertakings apply to the President of the Office of Competition and Consumer Protection for the renouncement or reduction of a financial penalty
(The regulation was published on 18 May 2004 in Journal of Laws 130, Item 1380)

Articles 103a and103b of the Act on competition and consumer protection introduce a system of mitigating penalties for participants of prohibited agreements (cartels) who have voluntarily withdrawn from the use of the forbidden agreement and informed President of the OCCP thereof. The aim of this system is to increase the detection of cartels, which are the most dangerous competition restrictions and lead, among other things, to price increase and deterioration of the quality of goods and services to the detriment to other undertakings and consumers.

The Regulation was issued on the basis of the Act on competition and consumer protection and aimed at introducing necessary procedures applied in the case of submitting, accepting and examining applications related to mitigation of penalties for the participation in cartels. The lack of such procedures might have discouraged undertakings from revealing existing cartels, since an entrepreneur interested in penalty mitigation, and thus revealing the existence of a cartel, would be certainly interested in the formal consequences of addressing the President of the OCCP with information regarding the existence of a cartel.

The provisions of the Polish Regulation reflect the procedural principles applied in the Commission notice of 14 February 2002 on the non-imposition or reduction of fines in cartel cases (OJ No. 45, 19 February 2002, p. 3), taking into account the differences resulting from the Polish system of administrative and antitrust proceedings.

Draft Regulation of the Council of Ministers amending the Regulation on exempting certain vertical agreements in the motor vehicle sector from the prohibition of agreements restricting competition
(The regulation was published on 1 February 2004 in the Journal of Laws No. 14, Item 116)

This Regulation constitutes the realization of the delegation contained in Article 7 of the Act on competition and consumer protection. It exempts some agreements concluded between car suppliers and distributors from the general prohibition to conclude anticompetitive practices. Furthermore, it unambiguously identifies strictly prohibited agreements, particularly those harmful to competition. The aim of the Regulation is to establish appropriate conditions for the development of competition on the distribution market of motor vehicles, spare parts and maintenance services, and in a result, to provide consumers with better purchase terms.

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

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

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

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

Draft Regulation of the Council of Ministers on additional requirements concerning the safety and labelling of products, which pose a threat to consumers because they appear to be other than their purpose
(The regulation was published on 6 April 2004 in the Journal of Laws No. 71, Item 644)

The issuance of the Regulation of the Council of Ministers on additional requirements concerning

the safety and labelling of products, which pose a threat to consumers because they appear to be other than their purpose constituted the realization of delegation included in the Act of 12 December 2003 on general product safety.

The provisions of this Regulation have transposed Directive 87/357/EEC of 25 June 1987 on the approximation of the laws of the Member States concerning products which, appearing to be other than they are, endanger the health or safety of consumers into the Polish legal system.

The Regulation indicates features, which safe imitations shall possess. Thanks to the features named in the Regulation the products may not be confused by the consumers, especially by children, with foodstuffs. Therefore a label shall be placed on each imitation, including understandable and easily legible information on what this imitation really is.

Draft Regulation of the Council of Ministers on implementing measures provided for by the provisions on general product safety in relation to products containing phthalates, which pose a serious threat
(The regulation was published on 6 April 2004 in the Journal of Laws No. 73, Item 656)

The issuance of the Regulation of the Council of Minister on implementing measures provided for by the provisions on general product safety in relation to products containing phthalates, which pose a serious threat constituted the realization of the delegation included in the Act of 12 December 2003 on general product safety.

This Regulation was a transposition of the provisions of the European Commission Decision of 7 December 1999 (OJ EC L 315, 9 December 1999, p. 46). Its adoption to the Polish legal order made placing products containing phthalates in amounts exceeding the level specified in the Regulation on the market impossible and withdrawing such products already placed on the market possible. This allows for a more complete protection of life and health of consumers, especially children, who may come into contact with these products.

Draft Regulation of the Council of Ministers on the manner of keeping the national information system on dangerous products
(The regulation was published on 14 April 2004 in the Journal of Laws No. 87, Item 815)

The issuance of the Regulation of the Council of Minister on the manner of keeping the national information system on dangerous constituted the realization of the delegation included in the Act of 12 December 2003 on general product safety.

The Regulation specifies the manner of keeping the national information system on dangerous products and is one of the normative acts implementing the provisions of Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety into the national legal order.

The solutions adopted in the Regulation facilitate consumer access to the resources of the national information system on dangerous products and promote the knowledge about products which are not compliant with safety standards.

Draft Regulation of the Council of Ministers on the detailed manner of keeping the register of dangerous products
(The regulation was published on 14 April 2004 in the Journal of Laws No. 87, Item 814)

The issuance of the Regulation of the Council of Minister on the detailed manner of keeping the register of dangerous products constituted the realization of the delegation included in the Act of 12 December 2003 on general product safety.

This Regulation implements provisions of the Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety into the national legal order.

The register is available to the public on the web site of the Office and at the premises of OCCP, where it is being kept. It contributes to ensuring the safety of consumers and is an important source of information for authorities dealing with product safety. Moreover, it facilitates the implementation of the monitoring tasks over general product safety, allowing for the evaluation of proceedings being held.

Draft Regulation of the Council of Ministers on the safety and labelling of textile products
(The regulation was published on 6 April 2004 in the Journal of Laws No. 81, Item 743)

The issuance of the Regulation of the Council of Ministers on the safety and labelling of textile products constituted the realization of the delegation included in the Act of 12 December 2003 on general product safety.

This Regulation implements the provisions of Directives 96/74/EC and 97/37/EC on textile names and Directives 73/44/EEC and 96/73/EC on methods for quantitative analysis of binary and tertiary textile fibre mixtures to the national legal order.

This Regulation specifies in detail the labelling of textile products.

In December 2004 the OCCP submitted the draft Regulation of the Council of Ministers amending the Regulation of the Council of Ministers on the safety and labelling of textile products for interdepartmental consultation. The proposed amendments consist in extending the list of textile products.

Draft Regulation of the Council of Ministers on the register of products not compliant with essential requirements
(The regulation was published on 14 April 2004 in the Journal of Laws No. 87, Item 811)

The issuance of the Regulation of the Council of Ministers on the register of products not compliant with essential requirements constituted the realization of the delegation included in the Conformity Assessment System Act of 30 August 2002. The main purpose for establishing the register of products not compliant with essential requirements was to inform undertakings, consumers and specialized authorities about products placed on the market which do not comply with essential requirements, the threats their pose and the measures applied in relation to those products. The information included in the register is publicly available.

Draft Regulation of the Council of Ministers on information flow regarding the control system for products placed on the market
(The regulation was published on 14 April 2004 in the Journal of Laws No. 87, Item 812)

The issuance of the Regulation of the Council of Ministers on information flow regarding the control system for products placed on the market constituted the realization of the delegation included in the Conformity Assessment System Act of 30 August 2002.

The Regulation specifies the flow of information regarding the control of products placed on the market between the President of the OCCP, specialized authorities and customs authorities.

Effective information flow allows for the coordination of entities forming the system, and this shall lead to the increase of detection of products not compliant with essential requirements. Moreover, the time limit necessary to withdraw such products from the market on the entire territory of the country has been shortened.

Issuing opinions on draft normative acts

In the year 2004 the Office of Competition and Consumer Protection issued opinions, in the phase of interdepartmental consultations and at the stage of further works of the Council of Ministers (Committee of the Council of Ministers, European Committee of the Council of Ministers and the Council of Ministers, Preparatory Team of the Committee for European Integration, Council of Ministers) on **3480** governmental acts and government's positions on Parliamentary acts. While giving opinions on the aforementioned documents first of all the following issues have been taken into consideration: the effect of the proposed acts on the competition on the market, their consequences for the protection of consumer interests, as well as their compliance with the principles for granting aid to undertakings, specified in the regulations regarding state aid.

Opining of the draft projects by the President of the OCCP is of a great significance due to the fact of counteracting competition restrictions through an *ex ante* control. The OCCP presented *inter alia* comments to the following drafts:

Act on professions of public trust

The act on professions of public trust was submitted to the President of the OCCP. According to the author of the act (the Minister of Economy and Labour) this act shall comprehensively regulate the issues concerning the professions of public trust, mentioned in Article 17 of the Constitution of the Republic of Poland. So far there has been no such act.

The act provided for obliging the President of the OCCP to institute antitrust proceedings upon request of a supervisory body of a professional self-government, which would be comprehensively non-compliant with the solutions adopted in the Act on competition and consumer protection. The Act provides for the President of the OCCP acting on request, however, the list of entities authorised does not include the aforementioned supervisory bodies. According to the act, notifying the President of the OCCP by the supervisory body about irregularities in the functioning

of a given professional corporation found in the course of carrying out supervision by this body and which could affect competition, shall have binding character for the President of the OCCP in relation to instituting antitrust proceedings.

When presenting comments to the act, the President of the OCCP stated that by proposing such legal solutions the author of the act has restricted the competence of the President of the OCCP, who in an unjustified manner has been deprived of the statutory entitlement consisting in the ability to institute explanatory proceedings under the Act on competition and consumer protection.

Obliging the President of the OCCP to institute proceedings under the Act on competition and consumer protection as a result of receiving a notification from a supervisory body or a national professional self-government authority, and in particular the attempt to casuistically specify the type of such proceedings, may lead to the collision of the provisions of the acts.

The act provides also for the President of the OCCP instituting proceedings concerning practices infringing collective consumer interests as a result of a notification about a resolution of a professional self-government body imposing on persons being members of the professional self-government an obligation to apply only maximum rates or in any other way restricting the ability to apply lower rates of fees for the services rendered. Presenting comments to the act, the President of the OCCP emphasized that in such a case antitrust proceedings concerning practices restricting competition are instituted, instead of proceedings concerning practices infringing collective consumer interests.

Act on large-area commercial objects

The President of the OCCP also issued an opinion on the Deputies' act on large-area commercial objects. In numerous comments presented in relation to this act the President of the OCCP has, among other things, emphasized that the regulation developed by Deputies limits in an unjustified manner the freedom of economic activity in relation to the establishment of new commercial objects, and thus restricts competition. These doubts are of a constitutional nature and relate to Article 20 of the Constitution of the Republic of Poland, stating that the basis of the economic system of the Republic of Poland is a social market economy, based on the freedom of economic activity. The introduction of the obligation to obtain a permit to establish a large-area commercial object would – according to the President of the OCCP – imply rationing of this sphere of economic activity and would lead to creation of a market access barrier.

The act on large-area commercial objects submitted for opinion provided for numerous barriers of administrative nature impeding operations within the scope of running such commercial objects. Moreover, the President of the OCCP indicated that this act may also infringe the Community principle of the freedom to establish undertakings mentioned in the Treaty establishing the European Community. As a large number of the owners of large-area commercial objects operating on the Polish market are foreign entities, administrative barriers put up by Polish public authorities might be considered a restriction of the aforementioned principle.

The objections raised in relation to the act have been included in the Government's position on this act prepared by the Minister of Economy and Labour, which in conclusion states that the Governments opts against continuing legislation works on the act on large-area commercial objects.

Provisions introducing the Act on public-private partnership

Doubts of the OCCP were raised by a solution included in the proposed regulation, according to which airport management on principles specified in the Act on public-private partnership does not exclude the private partner's ability to apply for co-financing of an object of general interest from the resources of the Civil Aviation Office. The OCCP has indicated the necessity to explain whether the purpose of this construction is to allow to obtain additional resources not provided for in the agreement, and if so, what additional costs may be covered by the resources of Civil Aviation Office, taking into consideration the fact that the remuneration for the provision of services imposed on a private partner by public authorities would have been taken into account in the partnership agreement.

Furthermore, according to the OCCP, the profit generated as a result of the task's implementation and due to the private partner, the principles of estimating such a profit and the mechanism ensuring that its amount shall not be exceeded shall be specified.

The OCCP also noted that when determining the financing level and schedule for a task implemented in the form of a private-public partnership from public resources and when estimating the remuneration due to the private partner, the public interest shall be secured.

Moreover, according to the President of the OCCP the status of the Private-Public Partnership Centre shall be explained, and namely whether the activity conducted by the Center shall be considered economic activity (as according to the act, the Centre may collect fees for its activities, and at the same time it may be granted subsidies from the State budget and the budget of the self-government unit). The remarks of the President of the OCCP have been taken into account.

Draft Regulations of the Minister of Infrastructure on: homologation of motor vehicles with two or three wheels, certain motor vehicles with four wheels and mopeds, homologation of motor vehicles and trailers, homologation of farm tractors and trailers

The objections of the President of the Office of Competition and Consumer Protection were raised by the concept of a closed list of entities authorized to perform homologation tests, which would cause the establishment of a legal barrier for entering the market of homologation services for other undertakings and would lead to sharing this market according to entity-related criteria.

According to the draft Regulations, the list of entities authorised to perform homologation tests shall be specified in annexes to the Regulations, which in advance specify the number of entities authorised to conduct the aforementioned activity.

The OCCP objected to limiting the number of entities authorised to conduct the aforementioned activity as unjustified and in consequence leading to unnatural shaping of the concerned market structure, by eliminating possible competition on the part of other entities able to provide services of this kind.

Therefore, in order to keep the competitive structure of this market, the President of the OCCP has suggested to specify the content of § 11 of the concerned Regulations in a manner allowing for extending the circle of entities authorised to perform homologation tests and to control production conformity, as well as withdrawing from specifying the so called authorised entities in separate annexes to the Regulations.

Implementation of the Act on competition and consumer protection in relation to practices restricting competition and mergers

General information

Statistics

Agreements restricting competition

Abuse of a dominant position

Control of mergers between undertakings

Court case-law in antitrust cases

Financial penalties

General information

The proceedings before the President of the OCCP may be conducted as explanatory proceedings or as antitrust proceedings. Under the Act on competition and consumer protection explanatory proceedings may precede the institution of antitrust proceedings.

Since 1 May 2004 it is also possible to conduct explanatory proceedings in some cases concerning mergers (e.g. in order to find whether extending the time limit in which the consent for performing a merger is valid shall not cause negative effects in the field of competition) As a result of this amendment there is no time limit for concluding explanatory proceedings in the case of proceedings aiming at study of the market, as they are not typical administrative proceedings – there are no parties here, and no specific cases are decided upon. In order for such type of research to be reliable and give the actual picture of the structure and degree of concentration of the market it has to last relatively long – generally it is not possible to complete it within the time limits specified in the Code of administrative procedure.

Therefore, if the circumstances indicate the possibility that the provisions of the aforementioned Act have been infringed, as to matters relating to a specific branch of economy, as to matters relating to consumer protection and in other cases provided for by the Act – The President of the OCCP may institute explanatory proceedings *ex officio* by way of a decision.

Antitrust proceedings in cases of practices restricting competition and in cases of mergers are instituted on motion or *ex officio*. A motion to institute antitrust proceedings in relation to a suspicion of the infringement of the provisions of the Act may be submitted by: an entrepreneur or an association of undertakings which prove their legal interest a self-government authority, a state control authority, a consumer ombudsman and a consumer organization.

Statistics

Proceedings in cases of practices restricting competition

In the year 2004 **354** antitrust proceedings in cases of practices restricting competition were being held and **152** decisions were issued in these cases by the Office of Competition and Consumer Protection (Headquarters and Branch Offices) The statistics look as follows:

Proceedings being held:

1. Total number of antitrust proceedings being held in cases of practices restricting competition in the year 2004 – 354
Including:

- proceedings concluded in 2004 – 201
- proceedings not concluded in 2004 – 153

2. The number of antitrust proceedings being held in cases of horizontal agreements in the year 2004 – 32

Including:
- proceedings concluded in 2004 – 16
- proceedings not concluded in 2004 – 16

3. The number of antitrust proceedings being held in cases of horizontal agreements in the year 2004 – 27
Including:
- proceedings concluded in 2004 – 14
- proceedings not concluded in 2004 – 13

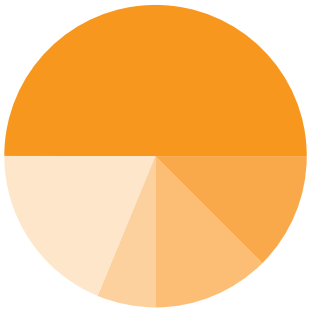
4. The number of antitrust proceedings in cases of abuses of a dominant position – 295
Including:
- proceedings concluded in 2004 – 171
- proceedings not concluded in 2004 – 124

5. Total number of explanatory proceedings held in the year 2004 – 559
Including:
- proceedings concluded in 2004 – 394

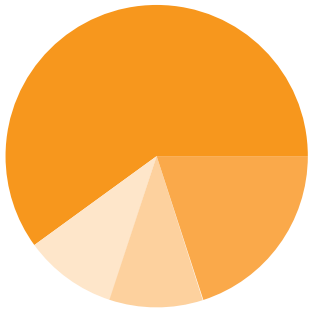
including proceedings concluded with the institution of antitrust proceedings – 81
- proceedings not concluded in 2004 – 84

Decisions issued:

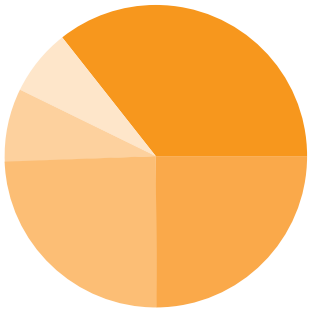
The number of decisions concerning horizontal agreements issued in the year 2004
16



The number of decisions concerning vertical agreements issued in the year 2004
10



The number of decisions concerning the abuse of dominant position issued in the year 2004
126



decisions finding the use of practices
decisions not finding the use of practices
decisions refusing to institute proceedings
decisions on the discontinuance of proceedings
finding cessation of the use of practices

Cases concerning the control of mergers

Total number of cases:

1. Number of cases in the year 2004 – **256**
2. Number of cases which were carried forward from the year 2003 to 2004 – **38**

3. Number of cases concluded in the year 2004 – **218**
   Including:
   - permission for mergering – **175**
   - conditional permission for mergering – **1**
   - prohibition of mergering – **2** (on the basis of Article 20 of the Act on Competition and Consumer Protection)
   - discontinuance of proceedings – **10**
   - return of the application – **19**
   - other decision – **12**
4. To be concluded in the year 2005 – **38**.

Industry specification of the cases concerning the control of mergers;

Most of the examined cases referred to:
- food industry – approx. **13**
- trade – approx. **23**
- chemical and cosmetic industries – approx. **15**
- fuel, gas and energy industry – approx. **15**
- media market (press, cable TV) – approx. **18**
- construction – approx. **9**
- mining – approx. **6**
- motor industry – **5**
- telecommunications – **5**.

Other cases referred to the following industries: arms industry, production of household appliances, production of gates and bars, metal industry, paper industry, packaging industry, pump industry, tobacco industry, timber industry, electronic industry and services: municipal, transport, office space rental, real estate trading, construction, courier mail, games of chance and mutual wagering, maintenance services, cargo handling in ports.

Agreements restricting competition

The general clause prohibiting any agreements restricting competition is included in Article 5 (1) of the Act on competition and consumer protection of 15 December 2000. According to this clause, agreements which have as their object or effect elimination, restriction of any other infringement of competition on the relevant market shall be prohibited. As a consequence, the prohibition to conclude agreements restricting competition has a relative character. This means that not all agreements are prohibited, but only those among them which limit the economic freedom of entities operating on a given market. Article 5 of the Act on competition and consumer protection includes an exemplary list of agreements restricting competition.

Since 1 May 2004 the prohibition to conclude anticompetitive agreements was extended to include cases where the terms of bids are agreed between the tender organizer and tender participants.

The Act on competition and consumer protection provides, however, for two types of exemptions from the statutory prohibition of agreements, i.e.: statutory exemptions and block exemptions.

Agreements concluded by undertakings, where market share does not exceed the amounts specified in Article 6 of the Act have been exempted from the statutory prohibition of agreements. They are the so called agreements of minor importance, which are treated as allowed. Even though they may restrict competition, taking the small market power of the parties of such an agreement into account, one may assume they are so insignificant that they do not limit the independence and possibilities of choice of other market participants and do not impede market mechanisms.

This does not, however, apply to agreements consisting among other things in fixing prices, limiting or controlling production and sales, market sharing, as well as bid rigging. Such clauses are extremely dangerous from the point of view of competition protection, even if they are concluded by undertakings not having a significant market power.

The second group of exemptions, i.e. the so called block exemptions from the prohibition to conclude agreements restricting competition, is implemented by way of Regulations of the Council of Ministers. They refer to specific types of agreements, which fulfil the conditions modelled on Article 81 (3) of the EC Treaty, i.e. agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress, allow consumers a fair share of the resulting benefit and do not impose restrictions on interested undertakings, and at the same time are indispensable to the attainment of these objectives. Due to the method of their implementation (*ex ante*) these exemptions shall give the undertakings surety in relation to what extent their actions are legal, and to what extent they infringe antitrust provisions.

In the event the President of the Office of Competition and Consumer Protection finds that anticompetitive agreement has been concluded by undertakings, the President of the Office shall issue a decision pronouncing the practice as restricting competition and order to cease its use. If the market behaviour of the undertakings no longer infringes the bans specified in Article 5, within the scope not exempted under Articles 6 and 7, the President of the Office issues a decision pronouncing the practice as restricting competition and finding the cessation of its use.

It shall be emphasised that since 1 May 2004 the President of the OCCP may – in the event that during proceedings the use of anticompetitive practices by undertakings has been rendered plausible – accept the undertakings' obligation to refrain from such infringements or to undertake specified actions in order to prevent those infringements. This allows for achieving higher effectiveness of the Office's actions – its basic task being to protect competition and not to punish undertakings. The President of the OCCP may accept the undertakings obligation (at the same time refraining from holding further proceedings and from issuing a decision finding the use of a practice and imposing a penalty), if this would be of advantage to the competition, as immediate cessation of the use of a practice shall bring more advantages for the competition than concluding the proceedings and imposing a penalty on the entrepreneur. The introduction of this measure is first of all advantageous to undertakings, as it provides them with an opportunity to withdraw from the use of a prohibited practice without being imposed with a penalty. This ensures equal situation of undertakings being parties in proceedings held by the President of the OCCP with undertakings against which proceedings are being held before the European Committee.

The most important rulings concerning agreements restricting competition on the basis of examples of proceedings held by the President of the Office of Competition and Consumer Protection in the year 2004:

Case regarding the conclusion of agreements restricting competition between Ruch S.A. in Warsaw and Franpress and Kolportaż Prasy ROLKON Sp. z o.o. in Poznań

On 16 July 2004 the President of the OCCP issued two decisions concerning agreements concluded between Ruch S.A. in Warsaw and Franpress and Kolportaż Prasy ROLKON Sp. z o.o. in Poznań.

The proceedings in this case were instituted by the OCCP *ex officio* in connection with press information on the conclusion of partner cooperation agreements between RUCH S.A. in Warsaw and companies: FRANPRESS Sp. z o.o. and ROLKON Sp. z o.o. on 9 and 10 January 2003.

The aim of the agreements was defined in the preambles of the documents, where the undertakings declared that they are *willing to jointly influence the shape of the Polish press distribution market*. According to the agreements, this cooperation was supposed to consist in partnership in activities affecting the shape of the press distribution market, as well as on limiting rivalry and competing only in relation to the level and quality of services. The undertakings declared also that they shall keep the course of negotiations confidential. The agreement concluded by RUCH S.A. with ROLKON Sp. z o.o. was terminated by the latter in March 2003, while the agreement concluded with FRANPRESS Sp. z o.o. is still in force.

The evidence gathered in the course of the proceedings allowed finding that the aim of the agreements concluded by RUCH S.A. with ROLKON Sp. z o.o. and FRANPRESS Sp. z o.o. contradicted the competition law. Both the content of the agreements and the circumstances of their conclusion prove it. The undertakings agreed that they shall undertake joint actions aiming at affecting press distribution market and also declared the desire to limit the rivalry between them. The cooperation – initiated by the agreements – would constitute an extremely serious threat for the competition in the concerned sector. This would affect also the companies' contracting parties, namely the publishers of newspapers and magazines.

Taking the above into consideration, the President of the OCCP recognized the cooperation agreements as competition restricting practices prohibited by law and – in the case of Franpress – ordered the cessation of their use.

Both decisions are not yet final and binding. The companies have brought appeals before the Court of Competition and Consumer Protection.

Case regarding conclusion of an agreement restricting competition between Fiat Auto Poland S.A. and 12 car dealers

In the decision No. RKT-01/2004 the President of the OCCP recognized the practices consisting in the conclusion of an agreement restricting competition between Fiat Auto Poland S.A. (hereinafter referred to as: FAP) and the aforementioned undertakings as restricting competition and infringing the prohibition mentioned in the Antitrust Act. The agreement consisted in direct or indirect fixing the terms of sale of goods, limiting and controlling the sales, as well as limiting the access to the market or eliminating undertakings not covered by the agreements by refusing to sell passenger cars to DCS Auto Turyn Sp. z o.o. for reselling due to the fact that DCS Auto Turyn Sp. z o.o. is not their end user.

In the light of the antitrust law it is inadmissible to strictly prohibit the supply of goods under the agreement by distributors operating in a selective distribution system to undertakings not-belonging to the distribution system (including also the distribution of new motor vehicles) Even in the case of the distribution of new motor vehicles, which is a little more liberal in relation to the admissibility of quantitative selective distribution (the FAP S.A. distribution system which is currently operating has such features), it is not possible to reserve the admissibility of the supply of goods covered by an agreement to undertakings not-belonging to the distribution system.

By reserving the requirement for the Mover to be a "end customer", the Mover has been unlawfully eliminated from the national motor vehicle distribution market. The aim, as well as the result, of the concluded agreement was to eliminate the Mover from the national motor vehicle distribution market, since by concluding the agreement FAP S.A. and its distributors have directly fixed both the terms of the sale of goods (ban on cooperation with the Applicant), as well as the terms of their purchase (the requirement that DCS shall be the "end customer"). Restricting competition on the relevant market has first of all occurred within the scope of intra-brand competition, since the activities of the intermediaries could also weaken the distributors' territorial exclusivity by strengthening the passive sales of new motor vehicles. Restricting competition could also threaten inter-brand competition, as nothing hinders the intermediary representing the demand side from purchasing cars of various makes. Although in this case the territory of the Republic of Poland was assumed to be the territorially relevant market, it should be noted that from the moment of the accession to the European Union the activity of intermediaries, operating currently within the EU territory shall also cover the territory of Poland.

According to the competition authority, the aforementioned actions by FAP S.A. and its distributors have eliminated DCS Auto Turyn from the motor vehicle distribution market, since this entrepreneur, as not being a member of the distribution system established by FAP S.A., had no possibility to distribute new cars offered by FAP S.A. Due to the above it is not possible to conduct activity consisting in purchasing cars on behalf and on the account of customers, since the strict prohibition by FAP S.A. eliminated any possibility to cooperate with undertakings which do not belong to the FAP S.A. network. On the other hand, this action impeded the emergence of competition on the market of intermediaries acting on behalf and on the account of customers, and deprived the consumers of the advantages resulting from increased competitiveness, mainly with respect to prices.

At present this decision is not final and binding, as FAP S.A. has appealed to the Court of Competition and Consumer Protection.

Cases where Article 11a of the Act on competition and consumer protection has been applied

Taking into account the fact that the infringement of the prohibition to abuse a dominant position specified in the Act on competition and consumer protection by not implementing the obligation specified in § 17 (4) of the Regulation of the Minister of Economy of 21 October 1998 on detailed conditions for connecting entities to electric power networks, covering the connection costs, electric power trade, provision of transmission services, network traffic and network exploitation, and recipient service quality standards (Journal of Laws No. 135 of the year 1998, Item 881) and consisting in the electric power company being obliged, if within five years after the construction

of the connection new entities are connected to it, to calculate the shared costs of network construction or extension for these entities and to calculate the new fees for connection, and in the case of a surplus in the fee paid for the connection by the first entity – to return this surplus, has been rendered plausible in the course of antitrust proceedings instituted ex officio, the President of the Office of Competition and Consumer Protection obliged the ENEA S.A. Group, with its corporate seat in Poznań among other things:

- to develop and implement a system allowing for the identification of the cases where the obligation to calculate shared costs of network construction or extension, to calculate new fees for connection and to return the surplus in this fee to the entitled persons arises, as well as to implement this system until 28 October 2005,
- to establish a full list of entities connected to the network in the period from 21 November 1998 do 28 October 2000, which until the day of issuing this decision due to the connection of another entity have acquired the right to recover the surplus in the fee paid for the connection within one month from the decision becoming final and binding, , as well as to calculate within the same time limit the amounts to be returned to those entities,
- to pay the entities specified in Item 1b of the decision the calculated amounts of surpluses together with statutory interest within two months from the decision becoming final and binding.

On the basis of Article 11 a (3) of the Act on competition and consumer protection:

- to submit the description of the system mentioned in Item 1a of the decision within two weeks from the day of the decision becoming final and binding,
- to submit a list of entities connected to the network in the period from 21 November 1998 until 28 October 2000, which until the day of issuing this decision due to the connection of the entity acquired the right to recover the surplus in the paid fee for connection together with the amounts of the surplus, within a month from the day of the decision becoming final and binding,
- to submit a statement about completing the payment of surpluses for entities specified in Item 1b of this decision, attaching documents in the form of writings notifying about the calculation and method of payment of the surplus, as well as documents confirming the payment in relation to at least 10 % of entitled entities, within three months from the day of the decision becoming final and binding,
- to submit until 30 November 2005 a list of entities, which acquired the right to recover the surplus in the period from the day of issuing this decision until 28 October 2005, including at least the following information: data of connection of the entitled entity, its address, date of connection of the second entity, the amount of the calculated surplus and the date and method of its payment.

In relation to the above, ENEA S.A declared that it shall prepare a breakdown of entities numbered among group IV and V, connected to the network provided for in the local spatial development plan, which were connected between 21.11.1998 and 28.10.2000 (according to documents on the receipt of fixed assets) and within 5 years from its construction another entity was connected to it. If it turns out that the obligation to calculate a new fee and to return the surplus to the first entity has emerged, such surplus shall be paid.

The fact that the entrepreneur has infringed Article 8 (1) of the Act on competition and consumer protection by desisting from fulfilling the obligation specified in § 17 (1) of the Regulation on

connections was indisputable and was not questioned by the company. ENEA S.A. has also undertaken actions aiming at eliminating the effects of the infringement and at establishing a system for monitoring cases where the obligation to recalculate the fees and return the surplus may emerge in order to prevent such infringement in the future. In this circumstances the President of the OCCP has decided that all premises necessary for the issuance of a decision on the basis of Article 11a (1) of the Act on competition and consumer protection have occurred.

Abuse of a dominant position

According to the definition included in the Act on competition and consumer protection, a dominant position means a position of an entrepreneur which enables him to prevent the efficient competition on the relevant market thus enabling him to act to a significant extent independently form competitors, contracting parties and consumers.

The Act introduces also a presumption, according to which an entrepreneur has a dominant position if its market share exceeds 40%. The essence of this presumption is that it may be refuted both by undertakings and by the antitrust authority. This means that an entrepreneur may be recognized as having a dominant position even if its market share is less than 40 % (e.g. 30 %), and it may also be stated that although the entrepreneur's market share exceeds 40% (amounts to 50%), it does not have a dominant position. Ultimately, in the event of a dispute regarding the possession of a dominant position, the fact of having appropriate market power shall be decisive. While in the first case the burden of proof of a dominant position rests on the OCCP, in the latter case this burden rests on the entrepreneur with a market share exceeding 40 %.

The Act on competition and consumer protection introduces the prohibition to abuse a dominant position in Article 8 (1) Article 8 (2) includes a list of competition restricting practices consisting in the abuse of a dominant position on the market.

This list is an open list and the practices mentioned there shall be regarded as most frequent. It should be also emphasized that the Act on competition and consumer protection does not include a ban on having a dominant position, but only a ban on the abuse of such a position.

In the event the abuse of a dominant position by an entrepreneur is found, the President of the Office of Competition and Consumer Protection shall issue a decision on recognising a practice as restricting competition and order the cessation of its use. In the event the market behaviour of an entrepreneur no longer infringes the prohibitions specified in Article 8, the President of the Office shall issue a decision on recognising a practice as restricting competition and declares the cessation of its use.

Most important rulings regarding the abuse of a dominant position on the basis of examples of proceedings held by the President of the OCCP in the year 2004:

Abuse of a dominant position by PKP Cargo S.A., Warsaw

On 17 June 2004, the President of the Office of Competition and Consumer Protection issued a decision where he recognised that the actions of PKP Cargo S.A., with its corporate seat in

Warsaw, consisting in conditioning the conclusion of a long-term transport contract on obliging the contracting party to:

- refrain from undertaking competitive actions (in relation to product groups covered by the contract), aiming at conducting economic activity within the scope of performing railway transports of goods,
- using only services provided by PKP Cargo S.A in case of railway transport of certain goods,
- using transport services offered by PKP Cargo S.A. for transporting goods other than listed in Annex No. 1 to the contract according to the principle of preferred choice, i.e. in any case where the terms of an offer submitted by PKP Cargo S.A. are not worse than the terms offered by other carriers,
- accepting the clause that violation of the contractual clauses shall be the basis for contract termination by PKP Cargo S.A. without notice, constitute a practice restricting competition specified in the Act of 15 December 2000 on competition and consumer protection and ordered its cessation.

In the course of the antitrust proceedings it has been found that on one hand, there is no supply substitution on the national goods transport market, since other carriers, both those currently operating, as well as potential new entities, are not able to commence or develop competitive activity. On the other hand there is also no substitution on the demand side. As a result of signing long-term contracts including loyalty clauses, PKP Cargo connected a significant part of the biggest recipients of railway transport services with own operations, and this made it impossible for its competitors to organize cooperation with a sufficient number of entities to allow the emergence of effective market counterbalance, creating competitive conditions in this field of services, and thus preventing PKP Cargo from using its market power.

In the national market of railway transports of goods, PKP Cargo is able to a significant degree to operate independently from competitors and contracting parties, and the long-term contracts concluded uphold or increase the opportunity for such operations in the future by eliminating potential competition.

It should be also indicated that the operations of PKP Cargo questioned by the OCCP may indirectly affect final prices of goods transported by this carrier. This is extremely important in the case of concluding long-term contracts. One of the premises for signing such a contract in general is obliging oneself to provide PKP Cargo with a specified load of goods. Therefore, long-term contracts concluded with entities providing very large amounts of such goods as coal, building materials, metallurgical products, solid fuels, etc for transportation. The clauses of long-term contracts may thus indirectly affect the increase of prices of these goods as a consequence of the increase of their transport costs. As a result, the effects of such actions will affect also the end users (unlimited circle of consumers) e.g. by the increase of coal prices or heating prices.

Due to the above reasons, the antitrust authority has found that the actions on the part of PKP Cargo are of universal nature and affect all contracting parties of PKP Cargo – both current and potential – and indirectly also consumers as end buyers of particular goods and services.

The OCCP has also found that PKP Cargo through its actions not only impedes the freedom of undertaking economic activity by competitors, but also in a prohibited manner differentiates the position of its contracting parties. According to the Office, discounts shall be granted to a

contracting party on the basis of objective and transparent criteria, such as the quantity and value of goods transported and factors affecting the costs incurred by PKP Cargo. Benefits received by PKP Cargo's contracting parties under long-term contracts that are considered to be the loyalty discounts do not fulfill these criteria.

Because of the present shape of the long-term contracts concluded by PKP Cargo, the contracting parties ordering transport of exactly the same amount of identical goods on the same route and using the same type of draft of cars may be treated not in the same way. If one of these entities uses only PKP Cargo services, and another entity transports an additional amount of goods on own, the first entity will receive more benefits from PKP Cargo (as it will be able to use transport services under long-term contract) than the second one (which will not be able to use transport services under long-term contract), even though the costs incurred by PKP Cargo in relation to the transport of goods for both these entities are identical.

PKP Cargo, through concluding long-term contracts for transport of goods and including therein clauses on refraining from undertaking competitive actions (in relation to groups of goods covered by a contract) aiming at conducting economic activity consisting in performing railway transports of goods, has as a result deprived entities conducting competitive activities or aiming to commence such activities in the future of the possibility to compete with the dominant entity. Anticompetitive clauses exclude in particular the possibility to gradually provide full transport service to contracting parties by carriers independent from PKP Cargo. These entities must decide either to completely resign from PKP Cargo's services and undertake competitive activities in relation to this entity or to resign from providing railway transport services and use only this type of transport services provided for by PKP Cargo. As long-term contracts are concluded for a period of at least 2 years, PKP Cargo effectively postpones the possibility of competition emergence and development on the market for railway transports of goods thanks to these contracts.

The decision of the President of the OCCP is not final and binding. As a result of PKP Cargo's appeal the case is currently examined by the Court of Competition and Consumer Protection.

Abuse of a dominant position by Telekomunikacja Polska S.A.

In the concerned case Netia S.A. accused Telekomunikacja Polska S.A. of impeding the subscribers' ability to use domestic long distance and international connection services provided for by Netia S.A. on the pre-selection basis and counteracting the shaping of conditions necessary for the development of competition.

In the course of the proceedings it was found that TP S.A. demanded subscribers who submitted at its organizational units a pre-selection order to present a copy of the contract concluded with Netia as a prerequisite for the realization of the order. Therefore, the subscribers were forced to fulfill more requirements determining the ability to use pre-selection function than stated in the binding provisions of law, and TP S.A. gained access to information about the content of contracts for the provision of telecommunications services concluded by alternative operators.

It should be noted that the requirements being conditions for the ability to use services provided for on pre-selection basis are specified by the provisions of the binding law and no operator

(including TP S.A.) may impose additional obligations, the fulfilment of which is a condition for the launch of pre-selection function.

According to the President of the OCCP actions of TP S.A. impeded the subscribers' ability to exercise the right they are entitled of free choice of the operator providing domestic long distance and international connection services. Furthermore, the introduction of this kind of additional requirements by TP S.A. provided this company with the access to the content of contracts concluded by alternative operators, and this led to an even better market position of the Company – providing it with knowledge about the conditions of their competitors' operations and with the ability to undertake actions precisely aimed at competitors.

The concerned decision is currently not final and binding.

Abuse of a dominant position by ZAiKS Association of Authors in Warsaw

On 16 July 2004 the President of the OCCP in the decision No. RWA-21/2004 recognized as competition restricting practice the abuse of dominant position on the national market of collective management copyrights to music works by ZAiKS Association of Authors in Warsaw among other things by:

- forcing authors transferring works for protection, who are or are not members of this association, to give ZAiKS Association of Authors exclusive authorization to manage rights to these works (granting licences for the use of these works) in relation to public performance and mechanical records (which constitutes an infringement of the Act on competition and consumer protection),
- making transfer for management of the right to grant licences for public performance of works, mechanical recording and radio or television broadcasting the condition for performing collective management of these rights for the benefit of persons being members of this association, (which constitutes an infringement of the Act on competition and consumer protection) and ordered the cessation of the use of such practices.

The development of technology makes the execution of copyrights to music works by an individual author impossible or at least inefficient in many fields of exploitation, such as radio or television broadcasting or public performance etc. The same work my be at the same time broadcasted in many various media or performed publicly by many performers at various locations. Therefore, the need for specialised entities dealing with collective management and protection of copyrights has emerged. They grant licences on behalf of authors for the use of their works and collect relevant receivables. ZAiKS is the biggest organization of this type.

In the course of the proceeding it has been found that authors transferring their works to ZAIKS for protection are forced to transfer to it the exclusive right to grant licences for their public performance, as well as recording. The Association does not allow for a situation where the author decides which exploitation fields of their work to entrust for management to ZAIKS, and which of them to another organization. Thus, without the Association's agency, an author is not able to exercise their rights in relation to certain exploitation fields and independently decide e.g. about the terms of using their works on music albums.

At the beginning of the year 2004 the Association partially ceased to use practices it was accused

of in relation to those authors who are not its members, but entrust it with the protection of their rights. Since 1 January these persons may choose between entrusting ZAIKS with the management of copyrights either in all its exploitation fields, or excluding the so – called right to mechanical recordings. The authors not being members of the Association still have to give ZAIKS exclusive authority to manage their rights in relation to public performance of a work.

The position of OCCP is convergent with the European case-law. The European Commission has many times stressed that collective management of copyrights shall be as little restrictive for the authors as possible. In its decisions concerning German organization GEMA the Commission declared that preventing authors from transferring rights related only to certain exploitation fields of a work for management is unjustified.

The decision is not final and binding, ZAiKS has appealed to the Court of Competition and Consumer Protection.

Control of mergers between undertakings

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

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

Only those mergers which exert of may exert influence on the territory of the Republic of Poland are subject to the initial control of the President of the OCCP. Their performance is thus subject to prior obtaining the consent of the President of the Office. The emergence of the obligation to notify about the intention depends also on the level of the turnover of the merger participants – the intention of merger is subject to notification in the case where a combined turnover of the undertakings performing the merger (and their capital groups) in the financial year preceding the year of the notification exceeds EUR 50 million.

However, the Act provides for a number of situations where (due to potentially insignificant influence of the planned merger in the market or the lack such an influence) the notification obligation is lifted.

The currently binding provisions of the Act on competition and consumer protection no longer

provide for the criterion of low market share (up to 20%) as a premise for exempting from the obligation to notify the intention of merger. Furthermore, since 1 May 2004 the possibility to apply exemption from the obligation to notify the intention of merger due to the low turnover of the entrepreneur, over which the control is being taken over (which stocks or shares are being acquired) does not apply to mergers resulting in the emergence or strengthening of the entrepreneur's dominant position.

In the proceeding regarding the notification about the intention of concentration the President of the OCCP may issue the following decisions:

- consent for the performance of a merger – if the competition on the market will not be significantly restricted as a result of the merger, in particular by the emergence or strengthening of dominant position,
- conditional consent if the aforementioned assumptions are fulfilled after completion of specified requirements,
- prohibition of the performance of a merger – if as a result of the merger the competition on the market will be significantly restricted, in particular by the emergence or strengthening of dominant position on the market,
- consent for the performance of a merger - resulting in a significant restriction of the competition on the market, in particular by the emergence or strengthening of a dominant position on the market, if issuing the consent is justified, and in particular:
  a) the merger shall contribute to economic development or technological progress,
  b) the merger may exert a positive impact on the national economy.

It should be emphasized that the current legal regulations in relation to the control of mergers are based on the so called test of significant competition restriction. This means that when examining an intention of concentration the President of the OCCP verifies, whether the planned merger shall not lead to a significant restriction of competition, which may be manifested *inter alia* by the emergence or strengthening of dominant position on the market.

The decisions expressing consent for the performance of merger empires if the merger is not effected within 2 years after the date of issuing the consent. Nevertheless, it is possible to prolong the consent for the consecutive year if this will not cause negative effects for the competition.

Mergers on financial services market

On 15 September 2004 the President of the OCCP on the basis of Article 17 in connection with Article 12 (1) and (2) (2) of the Act on competition and consumer protection and on the basis of Article 104 of the Code of Administrative Procedure in connection with Article 25 (1), Article 27 and 28a of the Act on National Investment Funds expressed consent for taking over by CA IB Fund Management SA, with its corporate seat in Warsaw („CA IB FM") the direct control over: PZU NFI Fund Management Sp. z o.o., with its corporate seat in Warsaw („PZU NIF FM"), 2. National Investment Fund S.A., with its corporate seat in Warsaw („2. NIF"), Progress SA National Investment Fund, with its corporate seat in Warsaw („NFI Progress") and E. Kwiatkowski National Investment Fund, with its corporate seat in Warsaw („E. Kwiatkowski NIF").

The OCCP has found that the aforementioned transactions will not cause the increase of mergers in the markets where the companies belonging to the portfolios of the leading National Investment

Funds managed by PZU NIF FM operate, of which CAIB FM intents to become a dominant entity, and CA IB FM will not strengthen its market position, since at present it does not conduct any activity. The conducting of activities within the scope of management of private equity/venture capital funds in Poland planned by this company in the future shall not, according to the antitrust authority (due to the lack of relevant markets the merger could affect) – cause the strengthening of a position of any merger participant.

Mergers in media market

Non-performance of the obligation to notify the intention of concentration by Polskapresse Sp z o.o.

The concerned case regarded the non-performance of the obligation to notify about the intention of concentration, mentioned in the Act on competition and consumer protection by Polskapresse Sp z o.o, with its corporate seat in Warsaw. The merger consisted in the take over of direct control over Dolnośląskie Wydawnictwo Prasowe Sp. z o. o., with its corporate seat in Wroclaw, – through the acquisition of a part of this Company's assets in the form of an undertaking in the meaning of the Civil Code, as well as in another manner, i.e. it consisted in including in the Enterprise Purchase Act concluded between Polskapresse Sp. z o.o. and Dolnośląskie Wydawnictwo Prasowe Sp. z o.o. with the participation of Orkla Media AS – a non-competition clause between the aforementioned undertakings within the period of 5 years.

For the purpose of showing the anticompetitive effects of the performed merger, the regional press market has been divided into to separate market, namely: press as information market and press as advertising space market.

The conducted quantitative and structural analysis of the effects of the concerned merger unambiguously indicates that Polskapresse Sp z o.o. achieved a strong dominant position on the both aforementioned markets, in particular on the regional daily press market of general informative character on the territory of Dolnośląskie voivodship.

The proceedings were concluded with the issuance of decision No. RWR 7/2004 of 11.02.2004, ordering Polskapresse Sp. z o.o., due to the non-performance of the obligation to notify about the intention of concentration resulting from the aforementioned act, to divest the enterprise acquired from Dolnośląskie Wydawnictwo Prasowego Sp z o.o, with its corporate seat in Wrocław, within six months from the day the decision becoming final and binding.

The divestiture of the enterprise, excluding the rights to publish ,,Wieczór Wrocławia", means in practice the sale of the ,,Słowo Polskie" press title and related proprietary and non-property assets. The sale of this press title to another publisher is of key importance for restitution of competition on the regional press market in the Dolny Śląsk area. In the concerned decision for the first time the provisions of the aforementioned Act on competition and consumer protection, allowing the President of OCCP to order, by means of an administrative decision, the divestiture of the entirety or a part of the property if as a result of the performed merger the restitution of effective competition on the market is otherwise impossible, i.e. may not be caused autonomously by market forces. This decision is not final and binding.

Non-performance of the obligation to notify about the intention of concentration by Oficyna Wydawnicza Głos Wielkopolski Spółka z o.o., with its corporate seat in Poznań

On 11 February 2004 the President of the Office of Competition and Consumer Protection, after holding antitrust proceedings instituted *ex officio*, as a result of finding:

- the performance of concentration consisting in Oficyna Wydawnicza Głos Wielkopolski Spółka z o.o., with its corporate seat in Poznań, taking over the control over Prasa Poznańska Spółka z o.o., with its corporate seat in Poznań, through the acquisition of a part of property from this Company, forming an organized set of tangible and intangible assets necessary to conduct economic activity in relation to editing and publishing Gazeta Poznańska daily and other publications and in concluding an agreement with this Company regarding regular cooperation based on the principle of exclusivity in relation to acquiring and placing announcements and advertisements in press titles published by Oficyna Wydawnicza Wielkopolski, without the notification of the intention of this merger, as required.
- and the restitution of competition on the market being impossible otherwise, issued a decision ordering Oficyna Wydawnicza Wielkopolski Spółka z o.o., with its corporate seat in Poznań:
- immediately after this decision becoming final and binding to submit a statement of termination of the agreement concluded with Prasa Poznańska Spółka z o.o. regarding regular cooperation in relation to acquiring and placing announcements and advertisements in press titles published by Oficyna Wydawnicza Wielkopolski Spółkę z o.o., in the manner specified in § 8 (2) of this contract,
- to sale part of the property acquired on the basis of „Contract on sale of organized part of the enterprise", forming an organized set of tangible and intangible assets necessary to conduct economic activity in relation to editing, publishing and distribution of „Gazeta Poznańska" daily and other publications specified in Annex 1.1.7 to this contract, as well as, on the basis of the Act imposed a financial penalty on Oficyna Wydawnicza Wielkopolski Spółka z o.o., with its corporate seat in Poznań, for the non-performance of the obligation to notify about the intention of concentration specified in the aforementioned Act.

During the year 2003 several transactions were concluded between Prasa Poznańska or Polskapresse on one side and Oficyna Wydawnicza Wielkopolski on the other. None of these transactions was notified to the President of the OCCP. Having analysed all actual and legal circumstances, the President of the OCCP arrived at the conclusion that the performed merger consisted in Oficyna taking over the control over the whole entrepreneur – Prasa Poznańska Spółka z o.o.

The fact that Oficyna had acquired the editorial part and in this way had obtained control over this part of Prasa Poznańska was not questioned by the undertakings. The OCCP found that Oficyna also took over the control over advertising part of the Prasa Poznańska. In consequence, it was found that the merger consisted in Oficyna taking over the control over the whole Prasa Poznańska.

Article 19 (2) of the Act on competition and consumer protection introduces an exception to the principle of issuing decisions prohibiting the performance of a merger in spite of the occurrence of premises specified in subparagraph 1 of this provision, in the case when desistance from banning is justified by specific circumstances – the merger would contribute to economic development or technological progress or it might exert an influence on national economy. In this

case it would be extremely difficult to prove possible social benefits. Possible positive effects of the merger, in particular achieved thanks to the synergy effect in the effectiveness of operations of editorial staff and their logistics facilities, which may lead to savings and cost reduction, would be in the final analysis eliminated by the threat of restrictions in relation to the freedom of speech and democratic public control. This threat is not diminished by the fact that Oficyna has so far continued publishing both titles. The performed merger has lead to limiting the pluralism among publishers. An inevitable consequence of this merger is limiting the variety of views and opinions. This threatens public interest which shall be protected in a direct way, due to the special position of the press in a state governed by law.

Taking the above into consideration, if the obligation to notify about the merger was fulfilled in the case of the concerned merger, the entities intending to perform this merger would not be obtain the consent of the President of the Office of Competition and Consumer Protection.

The order to conduct actions specified in the conclusion of the decision results from the declared impossibility to otherwise restore competition on the regional press market of general informative character in Wielkopolska. The only alternative for these action would be a real possibility of the emergence of a new publisher of regional daily press within the next two – three years, resulting from autonomous functioning of market mechanisms. At present entering the market by a new publisher in the aforementioned period may be excluded as highly improbable. It is determined by the economic nature of the press market, in particular regional daily press market.

Oficyna Wydawnicza Wielkopolski has appealed against this decision.

Court case-law in antitrust cases

In connection with the judgement of the Constitutional Tribunal of 12 June 2002 (Ref. No. P 13/01) stating that Article 47931 of the Civil Proceedings Code, providing only for single-instance nature of the proceedings in antitrust cases, is unconstitutional (judgements of the Regional Court in Warsaw – Court of Competition and Consumer Protection might have been appealed before the Supreme Court in the form of cassations) – since 18 August 2004 in connection with the amendment of the provisions of the Civil Proceedings Code – the judgements of the Court of Competition and Consumer Protection may be appealed against before the Court of Appeal, and then a cassation may be lodged before the Supreme Court.

Case-law of the Supreme Court

In the year 2004 the Supreme Court issued **31** rulings in antitrust cases in the year 2004.

Judgements:
Total number – **25**,
Including:
a) Cassations lodged by the President of the OCCP, allowed by the Supreme Court – **9**,
– referring the case for re-examination – **6**,
– dismissing the appeal – **3**,
b) Cassations lodged by the President of the OCCP - dismissed – **2**,

c) Cassations lodged by another party of the proceedings – reversing a judgement favourable to the President of the OCCP – **4**,
d) Cassations lodged by another party of the proceedings – reversing a judgment unfavourable to President of the OCCP – **4**,
e) Cassations lodged by another party of the proceedings, dismissed – upholding a judgment favourable to the President of the OCCP – **6.**

Orders:
Total number: **6**,
Including:
a) referring the cassation for re-examination to the Court of Appeal – **1**,
b) presenting a question of a point of law to the increased composition of the bench of the Supreme Court – **1,**
c) accepting the cassation for examination – **1**,
d) other decision – **3**.

Description of the most important judgements of the Supreme Court:

Judgement of 7 April 2004 concerning the appeal by National Council of Notaries Public in Warsaw against the President of the Office Competition and Consumer Protection (File Ref. No. III SK 28/04)

As a result of the appeal by the National Council of Notaries Public against the decision of the President of the OCCP No. DDF - 31/2001 of 20 May 2002, in which he declared as a competition restricting practice the conclusion of an agreement consisting in including in the Notary's Public Code of Professional Ethics (hereinafter referred to as Code of Ethics) the clause, which declared attracting clients by offering lower remuneration for notarial services as a manifestation of unfair competition and a particularly glaring case of unfair competition and ordered the cessation of this practice, the Court of Competition and Consumer Protection in the judgement of 14 May 2003 (judgement of 14 May 2003, file ref. no. XVII Ama 55/02) amended the appealed decision of the President of the OCCP in such a manner as to discontinue the administrative proceedings. As a result of examining the cassation lodged by the OCCP, the Supreme Court dismissed the appealed judgement and referred the case for the re-examination to the Court of Competition and Consumer Protection.

According to the position of the President of the OCCP, the National Council of Notaries Public by declaring in the Code of Ethics that attracting clients by a notary by offering lower remuneration for the services performed is a manifestation of unfair competition within the corporation and subject to the application of disciplinary penalties, limited in this manner the possibility to fix the remuneration in negotiations. In order to avoid being accused of acting not in accordance with the Code of Ethics, a notary shall not offer his clients a lower fee for the performed services than the maximum fee. As a consequence, the Council's resolution deprives the clients of the free choice of a notary public offering services for a lower fee than his competitors.

According the Supreme Court the inability to offer a lower remuneration (as a particularly glaring case of unfair competition – under the Code of Ethics) contradicts the principles of the free market. Fixing maximum notarial fees excludes the possibility to introduce a general ban on offering a remuneration lower than resulting from the maximum notarial fee. The interpretation of the expression „attracting clients" by the Court of Competition and Consumer Protection was

according to the Supreme Court not compliant with the literal meaning of the provisions of the Code of Ethics.

The standard has been declared by the Supreme Court not only as non-ethical and non-compliant with the binding legal order, but also non-compliant with other provisions of the Code of Ethics. The Supreme Court has at the same time agreed with the position of the President of the OCCP that „formulating the provision in such a manner causes a notary fearing actions non-compliant with the Code and in order to avoid possible disciplinary proceedings will not offer the clients fees lower than maximum fees established in the Regulation of the Minister of Justice".

In the statement of reasons for the judgment the Supreme Court cited also the most recent case-law concerning the practice of self-government bodies of the notaries public aiming at the elimination of fees lower than maximum fees being offered by notaries.

In consequence, the Supreme Court found the objections of the President of the OCCP justified, regarding *inter alia* the avoidance of a decision on the merits of the case by the Court of Competition and Consumer Protection, by discontinuing the administrative proceedings, while „the reasons of the judgements indicate that the Court did not *de facto* find the use of a competition restricting practice, which would have affected the result of the proceedings". In connection with the above, the Supreme Court referred the case for re-examination.

Judgement of the Supreme Court of 7 April 2004 concerning the appeal of Wyższa Szkoła Nauk Humanistycznych i Dziennikarstwa (School of Humanities and Journalism) in Poznań against the President of the OCCP (File Ref. No. III SK 22/04)

The President of the Office of Competition and Consumer Protection imposed, by means of an decision, a financial penalty on Wyższa Szkoła Nauk Humanistycznych i Dziennikarstwa (School of Humanities and Journalism) in Poznań (hereinafter referred to as: WSNHiDz) for the non-performance of the obligation to provide on the request of the President of the OCCP data and information, necessary to establish rules and conditions for performing educational activity by public and non-public institutions of higher education functioning in Wielkopolska. The school did not provide the information, stating that there are no legal grounds for imposing such an obligation on it, as a higher school is not an entrepreneur in the meaning of Article 4 (1) (a) of the Act on competition and consumer protection.

WSNHiDz appealed against the decision of the President of the OCCP, demanding the reversal of the appealed decision in its entirety. In the statement of reasons WSNHiDz raised that the only act which applies to its activities is the Higher Education Act of 12 September 1990, under which the concept of services of general interest does not occur at all. It emphasized that in the light of the Constitution of the Republic of Poland extending the subjective scope of the antitrust act by means of intensive interpretation is inadmissible.

The Court of Competition and Consumer Protection has dismissed the appeal. The Supreme Court examining the case declared that in accordance with Article 45 of the Act on competition and consumer protection undertakings or their associations are obliged to provide all necessary information upon the demand of the President of the OCCP. The right of the President of the OCCP corresponding with this obligation refers to its tasks; and may be exercised in a form specified in the Act.

The Supreme Court declared the position of WSNHiDz as having no justified grounds. The Supreme Court did not agree with the arguments of the party lodging the cassation, stating that activity consisting in providing paid educational services by a non-state college has neither the nature of an economic activity nor of a service of public interest. Taking into consideration the Constitution of the Republic of Poland, the provision of education shall be deemed, according to the Supreme Court, a task of public authorities. At the level of higher education this task is implemented by public and non-public universities and colleges. In the light of the Higher Education Act the latter, just as public universities and colleges, may be granted subsidies and are tax exempted. Furthermore, as the Supreme Court emphasized, non-public universities and colleges have been many times qualified in case-law as entrepreneurs or an entities conducting economic activity. In the statement of reasons for the resolution of 3 July 2003, III CZP 38/03 ('Prokuratura i Prawo' 2004/1/39) the Supreme Court expressed the view that paid and systematic provision of teaching classes by a non-public university or college is the provision of services by a legal person on its own behalf, professionally, in an organized and permanent manner, and therefore is a clear participation in the economic turnover. „Regarding the above, an activity consisting in the provision of paid educational services by a non-public university or college in a manner complying with the requirements to recognize this activity as economic activity in the meaning of the Economic Activity Act allows to declare such an entity as an entrepreneur."

The claiming WSNHiDz is therefore covered by the subjective scope of the Act on competition and consumer protection, at least according to the definition of an entrepreneur extended in this Act.

In relation to the above, the Supreme Court has dismissed the cassation of WSNHiDz as unjustified.

Case-law of the Court of Competition and Consumer Protection

The Court of Competition and Consumer Protection issued in the year 2004 the following number of rulings.

Judgements:
Total number: **131**,
Including:
a) declaring clauses of a contract format as abusive – **76**, in **70** rulings the Court declared abusive clauses questioned by the President of the OCCP,
b) dismissing the appeal against the decision of the President of the OCCP – **38**,
c) amending the decision of the President of the OCCP – **17**.

Orders:
Total number: **68**,
Including:
a) dismissing the appeal against the decision of the President of the OCCP – **28**,
b) discontinuing the proceedings – **4.**
c) dismissing the motion – **13**,
d) dismissing the complaint – **8,**
e) supplementing an order – **1**,
f) dismissing the appeal – **1,**

g) exempting from the entry to the complaint – **2**,
h) other – **11**.

Description of the most important rulings of the Court of Competition and Consumer Protection:

Judgement of 24 March 2004 concerning the appeal by Zamojska Korporacja Energetyczna S.A. in Zamość against the President of the Office of Competition and Consumer Protection (File Ref. No. XVII Ama 29/03)

The President of the Office Competition and Consumer Protection issued a decision of 28 November 2002, No. RLU-22/02, in which:

- In Item I.1. he ordered Zamojska Korporacja Energetyczna (Zamość Power Corporation) S.A. (hereinafter referred to as: ZKE S.A) to cease to impose in electric power purchase contracts for individual recipients clauses onerous for them, stating that the rights and obligations of the parties of the contract are specified among others by ZKE S.A. Electric Power Tariff without simultaneous informing about its provisions,
- In Item I.2. he ordered ZKE S.A. to cease to impose in the aforementioned contracts a clause onerous for individual recipients in the form of exclusion of its liability for the performance of exploitation works or repair of failures on the recipient's grounds,
- In Item II he imposed on ZKE S.A. a financial penalty in the amount of PLN 35,000.

ZKE S.A. appealed against this decision, demanding its amendment in its entirety by not finding the use of the alleged practices and in consequence renouncement of the imposed financial penalty.

The Court of Competition and Consumer Protection dismissed the appeal, stating that electric power tariff is an act of administrative law having consequences within the scope of civil law in a situation, where apart from a list of prices and rates of fees it specified the terms of their application. The conditions for applying specific tariff prices and rates specify the content of the contract format they relate to. In such an event the content of a norm to bind the power supplier and recipient shall be derived from two sources: civil law and administrative law – energy law. Therefore, if the tariff regulates in any scope the rights or obligations of parties of a civil law contract, it constitutes a part of such a contract regardless of the will of the parties. As results from the content of the appealed decision competition restricting practices described therein relate to consumer turnover. Therefore, the power contract formats designer to be used in this turnover bind the individual recipient – consumer under principles specified in Article 384 – 385^3 of the Civil Proceedings Code. In the examined case the President of the Office in a justified manner emphasized the necessity to deliver a contract format together with relevant tariff provisions in the consumer turnover. Such a view based on Article 384 § 1 and 2 of the Civil Code in the Court's opinion finds basis in the necessity to ensure the consumer the possibility to familiarize himself with all norms of the power contact he is going to access by means of adhesion. In the light of the content of the aforementioned provision the contract format established by the party binds the other party if it has been delivered to the latter party at the moment of concluding the contract. If using a contract format in the given relations is customarily accepted, it binds also if the other party could easily know about its content. However, this does not refer to contracts concluded with consumer's participation, excluding contracts commonly concluded in relation to minor, on-going matters of everyday life.

In the Court's opinion, the adhesive method of concluding contracts on power purchase and transmission is a custom not only of the appealing party, but of other power undertakings. At the same time, there are no doubts that such contracts do not belong to contracts concluded commonly in relation to minor, on-going matters of everyday life and that in the concerned case they are concluded with consumers in the meaning of Article 22^1 of the Civil Code. Therefore, ZKE S.A. was obliged to deliver to the other party all clauses of the contract format at the moment of concluding. It did not fulfill this obligation, since in relation to a part of contractual clauses it only referred to the content of the Tariff, which includes also clauses necessary to read the content of the contract format and to reconstruct the norm to bind both parties of the contract. The appealing party does not deliver this Tariff to the other party of the contract (the consumer), assuming that publishing it and making available at its own organizational units is sufficient.

Such conduct has been rightly declared illegal in the consumer turnover and not compliant with the clarity and intelligibility criterion of the contract format. The non-performance, in the consumer turnover, of the obligation to attach this part of tariff to the contract format (e.g. in the form of an abstract), which is referred to by the contract format, not only exerts a civil law effect in the form of the consumer being not bound by the contract terms, but also an administrative law effect related to the liability regime under of the Act on competition and consumer protection.

The fact that there are difficulties in familiarizing oneself with all the recipient's rights resulting from the concluded power purchase and transmission contract has another consequence, namely that due to the incomplete knowledge of these rights, due to causes lying on the appealing party's side, exercising these rights by the consumer may turn out onerous or even impossible. Such a situation, in relation to the rights, but not the obligations of the power recipient, not only exhausts the content of the general clause of the unnamed practice restricting competition, but may also be recognized as an abuse of a dominant position on the basis of the Act on competition and consumer protection, through creating onerous conditions for redress for the consumers.

Assessing the practice under Item I.2 of the appealed decision in the light of charges of the appeal, the Court declared justified the objections of the President of the Office relating to the provision in the part of the following wording: „The recipient shall be obliged to ensure the Seller access to the grounds where the connection or power line crosses for the purpose of performing exploitation works by undertakings aimed at maintaining the facilities in accordance with PN/E-05100 and PN-05125 and shall not raise any claims in relation to the performance of this works (e.g. cutting trees near the connection, digging the cable out for repair)…". In this respect the Court joins the position of the appealed decision, according to which there is a high probability of inflicting damage to the recipient's property while performing the aforementioned works. The wording of the cited part of the contract leaves no doubt that the power recipient has no possibility of redress in relation to damages inflicted by ZKE S.A. as a result of performing works on his grounds. A different interpretation of the clause being analysed not based on its literal meaning, and instead referring to another aim of implementing it in the turnover, as well as indicating that in practice the recipients had been effectively claiming compensation for damages on grounds could not have been taken into consideration, since the Court is obliged in an antitrust case to assess the conduct of an entrepreneur from the point of view of effects it may cause on the market, even hypothetically. In

the specific situation such an effect could be waiving the right to redress of the consumer exactly on the basis of the contract. This situation has been rightly identified as unnamed practice restricting competition under the Act on competition and consumer protection.

In relation to the above, the Court dismissed the appeal.

Judgement of the Regional Court in Warsaw – Court of Competition and Consumer Protection of 1 September 2004 concerning the claim by Zjednoczone Przedsiębiorstwo Rozrywkowe S.A. w Warsaw and Bingo Centrum Sp. z o.o. in Katowice (File Ref. No. XVII Ama 13/03)

The President of the OCCP in his decision No. RŁO 30/2002 of 31.12.2002 did not find the use of competition restricting practices in relation to the sale of gambling machines by Novo Poland Sp. z o.o. (hereinafter referred to as: Novo), American Poker (hereinafter referred to as: Poker machines) and Austrian Gaming Industries GmbH (hereinafter referred to as: AGI).

The President of the OCCP assumed that the global market of video poker gambling machines to be the relevant market in this case. At least 22 undertakings operate on this market and offer video poker gambling machines for sale. The lack of a dominant position was the ground for refusing to pronounce practices relating to the charge as an abuse of a dominant position.

The claimants appealed against the aforementioned decision, demanding amending it in its entirety and the adjudication of the costs of proceedings for their benefit.

The Court of Competition and Consumer Protection shared the view of the President of the OCCP in relation to identifying the relevant market.

The Poker gambling machines manufactured by AGI are used for conducting economic activity consisting in running arcades with gambling machines. This activities are regulated by the Act of 29 July 1992 on games of chance and mutual wagering, introducing the division into gambling machines games and gambling machines games with low prizes. AGI manufactures the first group of gambling machines. Taking into consideration the type and features of the machines, every gambling machine with high prizes, which in accordance with Article 15b of the aforementioned act has been approved for the use and operation by the minister competent for public finance, constitutes a substitute.

Neither in the course of the antitrust proceedings nor in the course of the appeal proceedings has it been proved that other features of this group of gambling machines, and in particular their price or quality, are significant distinguishing features of particular types of gambling machines or their groups. In particular it has not been proved that the lack of Poker gambling machines manufactured by AGI influences the activity related to running game arcades, and thus, the undertakings without these gambling machines would lose part of their customers.

Part of undertakings operating in the Polish market do not use gambling machines manufactured by the interested party at all, and this proves the lack of them to be no obstacle.

Video poker games are significantly popular in some markets. However, their share is quite constant and not related to any particular type of this game.

In the Court's opinion no rational grounds have been presented which would support limiting the market geographically to include only the Polish market. The price of gambling machines is relatively high in comparison with their weight and volume and this makes transport costs an insignificant part of all costs. It is economical to transport them even for large distances. No obstacle has been proved to exist and make the purchase of gambling machines on the world market impossible or impede it significantly. This is confirmed by the fact that gambling machines by manufacturers from the United States of America and from Japan are used in Poland.

Financial penalties

The financial penalties register at the Office of Competition and Consumer Protection included 114 items in the year 2004.

1. In 2004 the OCCP imposed financial penalties for the amount of **PLN 174,207,474.59**

2. The entities paid in **PLN 2,144,046.38**

Including:

- Payments relating to the year 1997	**PLN**	**600**
- Payments relating to the year 1998	**PLN**	**50,000**
- Payments relating to the year 1999	**PLN**	**11,544**
- Payments relating to the year 2000	**PLN**	**5,000**
- Payments relating to the year 2001	**PLN**	**121,708.80**
- Payments relating to the year 2002	**PLN**	**1,509,892.30**
- Payments relating to the year 2003	**PLN**	**320,661.88**
- Payments relating to the year 2004	**PLN**	**124,639.40**

3. Difference: **PLN 174,082,835.19**

(Penalties imposed in the year 2004 – payments relating to decisions issued in the year 2004)

Including:

- OCCP reduced penalties on its own **PLN 9,580,227.00**
- Cases being examined or pending for a decision in an appeal proceedings **PLN 164,159,538.69**

-Decisions imposing penalties being final and binding as of 31 December 2004:

- Penalties not paid **PLN 343,069.50**

4. Moreover, there are the State Treasury's receivables resulting from final and binding decisions issued in the preceding years in the financial penalty register (exclusive of the year 2004), which became final and binding until the end of December 2004, in the amount of : **PLN 263,641.10**

Including:

- the payment shall be made in subsequent instalments as the penalty was arranged in instalments: **PLN 22,774.24**
- postponement of the payment of financial penalty until 31.12.2004: **PLN 7,000.00**
- discontinuance of the execution proceedings: **PLN 21,474.06**
- declaring the entity's bankruptcy: **PLN 191,198.00**
- others to be paid : **PLN 21,194.80**

Implementation of the Act on competition and consumer protection in relation to practices infringing collective consumer interests

The provisions regulating the proceedings in cases of practices infringing the collective consumer interests were implemented in connection with amendment of the Act of 5 July 2005 on competition and consumer protection (Journal of Laws No. 129, Item 1102) However, as a result of implementation of the Directive 98/27/EC of the European Parliament and the Council of 19 May 1998 on injunctions for the protection of consumers' interests, Title IIIa was added, along with Chapter 4 added to Title V of the Polish act, which defined the subject and the procedure of proceedings before the President of the OCCP within this scope. The concept of practices infringing collective consumer interest yet unknown in the Polish legislation was defined. According to this provision these are practices consisting in unlawful actions of undertakings which threaten collective consumer interests. This concerns in particular: abusive clauses in standard forms of contract entered in the register of standard forms of contract clauses that have been pronounced inadmissible as well as breach of the obligation to provide reliable, truthful and complete information to the consumer, unfair or misleading advertising, and other acts of unfair competition prejudicial to collective consumer interest.

Proceedings in cases concerning infringement of collective consumer interests may be instituted through a decision, or on an *ex officio* basis. It may be also preceded by an explanatory investigation. A motion for the institution of proceedings on the matter of practice infringing collective consumer interest may by filed by: the Civil Rights Ombudsman, the Insurance Ombudsman, the Consumer Ombudsman, a consumer organization, as well as a foreign organization entered on the list of organizations entitled to file a motion to institute proceedings in the Member States of the European Union.

The President of the OCCP shall, in a decision on pronouncing a practice as infringing collective consumer interest, order that the same be discontinued (he may rule that the decision be immediately enforceable in whole or in part where an important consumer interest so warrants) Moreover, the President of OCCP has the right to identify measures for removing lasting effects of the infringement of collective consumer interests, in particular to bind the entrepreneur to issue a single or recurring declaration with such content and in such form as may be prescribed in the decision.

However, if in the course of proceedings, it turns out that the entrepreneur did not infringe the provisions of the Act on competition and consumer protection, the President of the OCCP shall issue a decision stating that the given practice does not infringe the collective consumer interests. It should be emphasized that a decision recognizing a given practice as infringing collective consumer interests (and ordering its discontinuance) is not issued, if the undertakings discontinued this practice. Since 1 May 2004 a catalogue of decisions which may be issued by the President of the OCCP was supplemented with a decision recognizing a practice as infringing collective consumer interests and finding its discontinuance. It is an analogue decision to the one issued on the basis of Article 10 in the matter of practices restricting competition and allowing the President of the OCCP to rule in case when the entrepreneur in fact did use such practice, but he discontinued it on the day the decision was issued.

A novelty implemented together with the last amendment of the Act on competition and consumer protection is the possibility for the President of the OCCP to accept – in the course of the proceeding in the matter of practices infringing collective consumer interest, if on the basis of case

circumstances, information contained in the motion or being the basis for instituting the proceeding *ex officio* it shall be rendered plausible that the entrepreneur uses a practice – an obligation by this entrepreneur to undertake or to discontinue specific actions aiming at preventing these infringements. Then the President of the OCCP may, by way of a decision, impose an obligation to actually exercise the undertaken commitments and to determine the final date for their realization.

The decision of the President of the OCCP is subject to appeal to the Regional Court in Warsaw – the Court of Competition and Consumer Protection, lodged within two weeks from the date when the decision has been delivered. The parties can appeal against the court judgement to the Court of Appeal, and against the judgment of this court – lodge a cassation to the Supreme Court.

In the case when the entrepreneur does not execute the final and binding decision of the President of the OCCP ordering the cessation of practices infringing collective interests of consumers or the court judgment upholding such decision, he is subject to a fine. On the basis of Article 102 of the Act, the President of the OCCP may impose on undertakings, by way of a decision, a financial penalty being an equivalent of from EUR 500 to 10 0000 per each day of delay in execution of decision.

Proceedings in cases of applying practices infringing collective consumer interests may be instituted in the course of their application by the entrepreneur and within one year from their discontinuance. Such solution aims at among other things protecting consumers, who purchase goods and use services of an entrepreneur in the period following the termination of unfair promotional campaign.

Proceedings by writ of payment in the matter of protecting collective consumer interests

Organizational unit of the OCCP	General number of conducted proceedings	The number of concluded proceedings together with indication of their outcome		
		Finding decision	Not finding decision	Discontinuance of proceedings
Department of Consumer Policy (DDK)	9	7	0	0
Bydgoszcz	24	15	1	1
Gdańsk	65	43	0	5
Katowice	30	23	0	1
Kraków	24	14	1	0
Lublin	24	21	1	0
Łódź	16	1	1	1
Poznań	8	2	1	1
Warszawa	21	9	1	3
Wrocław	43	19	2	3
Total	264	154	8	15

The most significant proceedings concerning practices infringing collective consumer interests conducted by the President of the OCCP in the year 2004:

The case concerning the use of practices infringing collective consumer interests by Bank Zachodni WBK S.A.

Due to numerous complains of consumers as to the mode of introduction of new services for holders of payment cards of Bank Zachodni WBK SA, the President of the OCCP instituted an explanatory proceeding in this case, and subsequently – in August 2004 – an antitrust proceeding. In 2004 the bank launched its new service: the "Financial Insurances Package" for persons using debit cards and an analogous service – called "Your safety" - for credit card holders. The contract that new customers were given to sign provided for the possibility to select the relevant service, or to give it up, while the customers who already had the cards were to select it impliedly. As it was determined by the OCCP, except of a leaflet containing general informational about the insurance – consumers did not receive any information regarding the change of the contract. It should be emphasized that both services implied additional charges. Such mode of offer introduction was considered by the President of the OCCP as a practice infringing collective consumer interests. Since according to provisions of the Civil Code of 17 April 1994, the new standard form of contract issued in the course of the duration of the continuous contract (and these are the ones in case of banking services) is binding once it was delivered to the consumer and the consumer did not terminate the contract on the closest date possible. Such mode of the new offer introduction was considered by the President of the OCCP as a practice infringing collective interests of consumers. This principle also refers to the tariff of payments and provisions. At the same time, it was stipulated in contracts of the WBK S.A. that changes of the contents shall be done in form of an annex. In relation to the above, introduction of an insurance package, and consequently change of the contract could have been implemented only on the basis of an annex to this contract. In turn, charging consumers with payments associated with the insurance (change of the tariff) could occur only by sending relevant information to the consumer indicating the time available for termination of the contract. The bank failed to comply with any of the aforementioned conditions. Sending leaflets, which are treated by the consumers rather as an encouragement to use new services and not binding information about changes of the contract, cannot be considered the fulfillment of the condition.

The case concerning practices infringing collective consumer interests by Telekomunikacja Polska S.A.

The institution of actions by the President of the OCCP followed enormous numbers of complaints received from the consumers (approximately 500 complaints), indicating that upon liquidation of customer service points by TP S.A., as well as in consequence of implementation of a new management system relating to the method of contacting with the customers, the consumer can no longer fully realize services and obtain any reliable and complete information. The only source of contact with the operator was via a telephone line, the so-called "Blue line", which was introduced in place of all closed customer service offices. The new solutions were supposed to introduce the telephone-only system of contact with TP S.A. customers. According to explanations provided by the operator, the system was prepared with due diligence, taking the standard forms of proceedings of the foreign operators into consideration, however, practice shows a completely different reality.

In the course of the proceeding it was found that the system does not function properly. Taking operator's activity into consideration together with the fact that over 10 million subscribers are attended, it should be noted that the method of organization of such undertaking has a great influence on the situation of the operator's subscribers. Accumulation of telephone calls often led to blocking the telephone lines. Moreover, the operator could not keep up with realization of services continuously ordered by the subscribers. Consumers were also not able to among other things present the proof of payment of outstanding invoices, which led to groundless interruption in provision of services by the operator. The consequence of this situation was past due reaction of Telekomunikacja Polska S.A. on complaints and claims of the subscribers delivered in writing or via telephone.

The case concerning practices infringing collective consumer interest by Telekomunikacja Polska S.A.

The subject of proceedings in this case were the so-called diallers (dialling program) – a software installed on the computer when visiting certain Internet sites. As a result, customers received high telephone acts from Telekomunikacja Polska S.A. for services, which they did not order. TP S.A. rendered this kind of services without signing a contract with the subscriber. Therefore, it implied most of all the lack of appropriate standard forms of contract and definition of principles, on the basis of which the service was rendered. Videotext services and diallers are considered remote services. Therefore, it is inadmissible to impose sanctions on the consumers, for instance in the form of discontinuation of provision of services by TP S.A. or contract termination in case of failure to pay for the services provided by third parties. The operator also should not charge for blocking access to an additional service. In his decision, the President of the OCCP also referred to TP S.A. attempts to prevent recovery of claims, pronouncing as inadmissible practice among other things the company's failure to include data concerning the audiotext data suppliers, as well as evading by Telekomunikacja Polska S.A. the responsibility to provide information about these suppliers to the customers.

The President of the OCCP ordered desistance from the aforementioned practices, at the same time imposing on TP S.A. obligations specified in the decision, i.e.:

- To develop standard forms of contract or contract clauses specifying the principles of rendering the Internet and audiotext services access (including among other things, the definition of a dialler and principles of its operation),
- To provide information on the subject of the consumer's right to renounce the contract within 10 days from filing the complaint,
- To order the contents of trade information or advertising in a form that enables consumers to find their way around in the context of which entities and to what extent are responsible for rendering audiotext services and what is the object of the service, the fee and the way to recover the claim.

The decision is not final and binding. The case is currently being examined by the Court of Consumer and Competition Protection.

Implementation of the provisions of the Act on proceedings in matters relatings in matters relating to state aid

General information

Monitoring of state aid

General information

As of 1 May 2004, fundamental changes took place in legal regulations in relation to state aid. In relation to the accession, the Act of 27 July 2002 on conditions for admissibility and supervising state aid for undertakings (Journal of Laws, No. 141 Item 1177, as amended), which defined the conditions of admissibility of state aid and the principals of its supervision, was repealed. Since the accession date, Poland is obliged to enforce Community regulations concerning state aid, in particular provisions defining the conditions of admissibility of aid and the course of action before the European Commission. The conditions of state aid admissibility have been contained in over 40 legal acts and documents adopted by the European Commission forming the so-called soft law. Also case-law of the European Court of Justice and the Court of Fist Instance has a considerable influence in this area.

In relation to the mentioned change of regulations, it should be reminded that since Poland's accession to the European Union, the proceedings in cases of granting state aid had a solely national nature (it was taking place between the national organs of public administration). It also seems that mainly the influence of granted aid on competition on the national market was considered when evaluating the admissibility of granted aid. Imposing Community law in the area of public aid results in the fact that when evaluating whether obtainment of specific financial resources constitutes state aid, its possible effect on the competition between Member States should be considered. This implies that conducting such evaluation is more complicated and requires more work. Moreover, the outcome of such an evaluation can always be challenged by the European Commission. Therefore, in case of doubts as to the compliance of a given resource with a common market, one should forward questions to the European Commission and issue a formal notification.

According to the Treaty establishing the European Community (EC), the Member State has an obligation to inform the European Commission, as to the principle, about any plans to grant aid (excluding *de minimis* aid and aid granted within the framework of block exemptions) and to restrain from granting it, until a decision in this matter is made by the European Commission. The notification procedure in state aid cases is defined in the Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (Journal of Laws L 83 of 27.03.1999) In the preliminary proceeding, the European Commission makes a decision within two month in the matter of aid notified by a specific Member State, whereas the two-month terms counted from the moment of receipt by the Commission of all required information – from the evaluation of compliance of planned aid with the common market. In case of doubts, as to the conformity of the planned aid with the common market, the Commission institutes explanatory proceedings. In the course of these proceedings, the Commission should issue a decision within 18 months.

The Act of 30 April 2004 on proceedings in matters relating to state aid (Journal of Laws No. 123, Item 1291), which regulates the course of proceedings in cases related to state aid at the national level, entered into force on 31 May 2004.

The eight resolutions defining the general reporting duties of entities granting state aid and its beneficiaries, as well as information transmitted to the President of the OCCP for the purpose of giving opinion regarding planned state aid or notification of this aid to the European Commission were issued on the basis of the aforementioned act. Since the accession date, the European Commission acts as the authority controlling the process of granting state aid in Poland. Prior to

the accession, this was the function of the President of the OCCP, who currently has the competence of the authority monitoring the process of granting state aid. According to the Act on proceedings in matters relating to state aid, the President of the Office issues an opinion regarding the draft state aid schemes and individual aid prior to their formal notification to the European Commission. In this opinion, the President of the Office expresses his position on among other things the issue of conformity of proposed actions with the Community market, and in case of any unconformities, the President proposes particular solutions aiming at removal of these unconformities. The opinion of the President of the OCCP is not final and binding.

Legal acts, which are the basis for granting aid and at the same time contain conditions for admissibility of this aid, can function as aid schemes. According to the balance per January 2005, there are 37 nationwide aid schemes, which are compliant with community regulations, in force in Poland. At the same time, another 23 draft schemes and 20 individual aid drafts were submitted to the European Commission, and await the decision.

Monitoring of state aid

The Act on proceedings in matters relating to state aid regulates issues related to proceedings in cases related to state aid at a national level. According to the aforementioned act, the following are the tasks of the President of the OCCP:

- Giving an opinion on aid and individual draft aid schemes,
- Notification of aid drafts and individual aid schemes to the European Community through a Permanent Representation of the Republic of Poland to the EU,
- Conducting the notification proceedings before the European Commission – in performing this task, the President of the OCCP cooperates with relevant public administration authorities responsible for preparing the draft aid schemes, and in case of individual aid with aid granting authorities and beneficiaries of aid,
- Representing the Republic of Poland before the Court of Justice and the First Instance Court,
- Monitoring of state aid.

The proceedings in the matter of granting state aid, especially in cases of individual aid, due to the necessity to obtain consent of the European Commission are getting longer and require much more work on the side of the OCCP and other public administration authorities than in the pre-accession period. It results from the necessity to formally address the Commission, as well as to prepare appropriate notification forms, to prepare explanations and materials upon request of the Commission, to conduct arrangements with the Commission, to participate in working meetings with the Commission, usually in Brussels.

The representatives of the OCCP either participate or are members of specific groups, committees, such as: committee for financial support of the investments, the foreign investments committee, the shipyard sector restructuring committee, committee for controlling the use of public resources in the process of restructuring of the Polish Railway Company (PKP), or the energy policy committee.

Depriving the President of the OCCP of the supervisory authority competence did not cause a decrease in the number of tasks performed by the Office. The role of the President of the Office as the authority giving opinions regarding draft aid schemes, individual aid drafts or individual aid

drafts for restructuring subject to notification causes that every such project reaches the OCCP along with a motion to issue appropriate opinion. Moreover, an extensive number of aid granting entities addresses the Office with inquiries whether specific actions are compliant with the Community law and with a request to indicate the course of proceedings in a given case. Therefore, after 1 May 2004, the number of telephone inquiries and interpretative inquiries directed to the OCCP in a written and electronic form has increased.

In 2004 the OCCP handled the following cases relating to state aid:

- Restructuring of the iron and steel industry,
- Restructuring entities in the heavy organic synthesis sector,
- Restructuring the shipbuilding industry,
- Restructuring the hard coal mining sector,
- Restructuring entities within the framework of the Act on commercialization and privatization (the aid granting authority – the Ministry of Treasury), the Act on restructuring certain public receivables from undertakings, the Act on restructuring undertakings of particular significance to the labour market (aid granting entity – the Industrial Development Agency) and within the framework of the Tax Regulation,
- Restructuring long-term contracts,
- Financial support of investments,
- State aid granted entities operating within special economic zones,
- State aid granted to supported employment undertakings,
- State aid granted by district employment agencies,
- State aid granted to public broadcasting units,
- State aid granted within the scope of culture and national heritage preservation (cinematography, cultural institutions, historic monuments),
- State aid granted by the Polish Agency for Enterprise Development,
- Public-private partnerships,
- State aid granted for environmental protection,
- State aid granted within the scope of structural funds.

In 2004 the OCCP issued approximately **540 opinions**, including 471 prior to the accession. After the accession, 79 opinions were issued, out of which 70 concerned aid scheme, and 9 concerned individual aid drafts.

Moreover, the employees of the Office of Competition and Consumer Protection prepared analyses and studies concerning the granted state aid. The most important document in this respect is the "Report on state aid granted to undertakings in Poland in 2003" prepared in the year 2004.

In 2004 the OCCP continued works on implementing effective system for controlling the state aid that would improve the transparency and data flow and ensure a credible record of granted aid. Works on the SHRIMP computer system for more precise monitoring and improvement of state aid control procedures in Poland and ensuring coordination of actions taken by aid granting entities and other entities subject to the Act on proceedings in matters relating to state aid were carried out.

The employees of the OCCP also prepared materials and explanations designated for the Internet site of the Office, which due to the aforementioned changes of regulations required a complete reconstruction.

Implementation of the provisions of the Act on combating unfair competition

General information

Collective breakdowns for 2004 of cases handled within the frameworks of implementation of the Act on combating unfair competition

General information

The superior objective of the Act of 16 April 1993 on combating unfair competition (Journal of Laws from the year 2003, No. 153, Item 1503), hereinafter referred to as the Act on combating unfair competition, is to prevent and fight unfair competition in economic activities in public interest, of undertakings and customers.

The act contains a general provision, stating that the deed of combating competition is an action conflicting with law or good customs, if it threatens or infringes the interest of another entrepreneur or customer.

A catalogue of deeds specified in the act is not limited. These are most frequently encountered in practice deeds infringing law and honesty principles in economic activity conducted by undertakings. The Act on combating unfair competition shows that the deeds of unfair competition defined in the act are merely an example of behaviours incompliant with fair competition.

An exemplary case under the Act on combating unfair competition handled by the Office in 2004 was **the case was instituted upon a motion of the Voivodship Consumer Ombudsperson in Międzyrzecze in relation to suspicion concerning infringement of provision of the Act on combating unfair competition by Karls & Swenson – Kancelaria Finansowa Sp. z o.o. in Warsaw.**

On 29 December 2004 the President of the OCCP in his decision No. RWA-38/2004 refusing to institute proceedings upon a motion of the Voivodship Customer Ombudsperson in Międzyrzecze in relation to recognizing action by Karls & Swenson – Kancelaria Finansowa Sp. z o.o. in Warsaw as a practice infringing collective consumer interests within the meaning of Article 23 of the Act on competition and consumer protection, consisting in the use of a misleading advertisement – and ordered its discontinuance.

According to the Mover, the advertisement of services rendered by Karls & Swenson – Kancelaria Finansowa Sp. z o.o. in Warsaw is misleading to the consumers. As in the advertisement, between the information: "*All over the world experts from Financial Offices help their customers*" and the information: "*with us you will pay off all your credits*" the word "CREDIT" is standing out. According to the Mover, the advertisement of Company's activities of the aforementioned contents is formulated in a manner that suggests the customer that the Company's activity is based on granting credits. In reality, the entrepreneur does not grant credits, but conducts activities based on rendering agency and consultancy services in the area of obtainment of credits and loans. According to the Mover, the contents of the advertisement – due to the term "CREDIT" that stands out – is misleading consumers into believing that the Company provides services based on granting credits. In relation to the above, the Mover in his motion indicated the infringement by the Company of the Act on competition and consumer protection.

To support this statement, the Mover cited in his motion a consumer who was mislead into believing that the Company grants credit on preferential terms in relation to the ones offered by commercial banks, and went to the Company's headquarters to obtain a credit. It was only there that he found out that the Company does not grant credits, but conducts activity based on individual representation of customer interests before banks and other financial institutions.

According to the OCCP, the contents of the Company's advertising unambiguously indicate that the Company is conducting activities based on provision of agency services. The idea that the consumer had about the Company being a credit-granting facility is a mistake, and moreover it cannot be considered that the false idea of reality was created under the influence of individual elements of the advertisement contents. Even when it is assumed that not every customer has knowledge that granting credits is an activity restricted to banks, then out of the tone of advertisement contents as such, one cannot conclude that assistance provided by the Company in obtainment of a credit facility implies obtainment of a credit facility from the Company. Moreover, it is impossible to go along with the statement that the act of misleading consist in free association by the recipient of the term "CREDIT" that stands out next to the name of the entrepreneur contained in the advertisement. According to the OCCP, the term "CREDIT" that stands out, aims merely at drawing recipient's attention to the advertisement. However, it is not identical as an attempt to mislead a customer as to the actual object of Company's operations. The entrepreneur renders services related to the possibility of obtaining a credit, yet he does not grant credit himself.

In view of the Branch Office, from the contents of the advertisement it does not seem that the Company renders services related to granting credits. Literally, it appears that the employees of the Company only help their customers – as it seems – in the process of obtainment of a credit facility. The fact that the word "credit" was bolded or written in a larger font does not imply that the advertisement is misleading customer through the use of the word "credit" with reference to Company's activity, which is not based on granting credits. It is not written anywhere that the Company grants credits. Moreover, in the contents of the advertisement the following inscription was included: „*with us you will pay off your credit*." According to the Branch Office, this statement additionally strengthens the meaning of the statement "*all over the world employees of Financial Offices help their customers*."

When evaluating whether a given advertisement is misleading the consumer, the behaviour of the customer making a decision to purchase goods or services on the basis of an advertisement should also be considered – appropriately to statement in Article 16(2) of the Act on combating unfair competition. Evaluation of customer behaviour should not be taken out of the context of conditions in force in a given market segment (cf. judgement of the Supreme Court of 3 December 2003, case No. I CK 358/02).

Therefore, in the opinion of the President of the Office, it is also important that currently, in relation to the Act amending the act on combating unfair competition and the Consumer Credit Act entering into force on 3 August 2004, the ban on activities in the so-called pyramid system was heavily publicized in the mass media. Provision of services in a consortium was related to among other: infringement by the entrepreneur of provisions of the Act on combating unfair competition, by misleading customers as to the nature of conducted operations, as well as the provisions of the Banking Act of 29 August 1997 (consolidated text Journal of Laws from the year 2002 No. 72, Item 665 as amended), through offering consumer credits by entities that do not have the legally required permits. Thanks to the presence of publications and programmes regarding the undertakings granting credits that operate on the market in the media, the consumers were informed about the nature of activities conducted contrary to the law, which in turn influenced the increased awareness of consumers, especially with the fact that granting a credit is a bank-related activity, execution of which the bank is entitled to.

Moreover, in the opinion of the Branch Office, also the model of a consumer who is proficient in the area Community law, in which a person is aware, critical, "enlightened", and makes use of opportunities generated by the information and education actions addressed to this person, should be considered. The concept of an aware consumer should be considered rooted in the case-law of the European Court of Justice (cf. E. Łętowska: *Europejskie prawo umów konsumenckich* The European consumer contract law C.H. Beck Publishing House, Warsaw 2004).

The decision emphasized that the aforementioned model is not an abstract concept, established in isolation from existing realities, but is substantiated with information actually transmitted to the consumer and the level of knowledge shaped by among other things the interest of media for these issues. Therefore, the case is based on the consumer, who can understand the information that is directed to him in a correct manner. Simultaneously, the European depiction defines requirements towards the consumer, demanding for him to be reasonable and careful, yet at the same time emphasizes that it implies information and threats that are actually directed towards the consumer.

In relation to the above, the President of the OCCP decided that constant presence of the issues related to illegally operating undertakings offering credits to consumers in the media causes that the consumer is adequately prepared and educated in that respect, and the fact that only banks are granting credits should be better known.

The decision is final and binding.

Collective breakdowns for 2004 of cases handled within the framework of implementation of the Act on combating unfair competition

No.	Organizational units of the OCCP	Total number of proceedings in 2004	Number of concluded cases
1	Branch Office in Bydgoszcz	0	0
2	Branch Office in Gdańsk	16	14
3	Branch Office in Katowice	0	0
4	Branch Office in Kraków	2	2
5	Branch Office in Lublin	6	6
6	Branch Office in Łódź	1	1
7	Branch Office in Poznań	17	13
8	Branch Office in Wrocław	1	1
9	Branch Office in Warsaw	15	15
10	Department of Consumer Policy – at the Headquarters in Warsaw	108	86
11	Total	166	138

Implementation of the provisions with respect to abusive clauses

General information

Collective breakdown for the year 2004 of cases handled within the framework of implementation of provisions concerning abusive clauses

Examples of cases in the area of abusive clauses handled by the Office of Competition and Consumer Protection in 2004

Results of nationwide inspections conducted by the OCCP in the year 2004 in relation to the use of abusive clauses

General information

Basic legal acts regulating the issues of abusive clauses in Poland are:
- The Civil Code,
- The Civil Proceedings Code.

1. Provisions of the Civil Code are applicable when evaluating the general terms of contracts or regulations in terms of abusive clauses. Abusive clauses are the provisions that are not agreed upon individually with the consumer and which shape his rights and obligations in a manner conflicting with good customs, strikingly infringing his interests. Such provisions are not binding to the consumer. However, it does not concern provisions specifying mainly benefits of the parties, including price or remuneration, if they were formulated in an unambiguous manner. Contractual clauses are considered not to be agreed upon individually, if the consumer had no actual influence on to the contents of the clause. In particular, this refers to clauses of contracts that were adopted from the standard form of contract proposed to the consumer by the contracting party. The burden of proof that the clause was in fact individually agreed upon lies upon the person that is referring to that fact. The list of exemplary 23 abusive clauses is contained in Article 385^3 of the Civil Code.

The provision of Article 385^3 is formulated as an interpretative clause, according to which the doubts as to the admissibility of the use of the clause in consumer trade shall be settled towards considering the evaluated provision as an abusive clause.

It should be emphasized that this is the list of exemplary abusive clauses. This means that also other clauses can be classified as abusive, if they comply with conditions specified in Article 3851(1) of the Civil Code, namely that the provisions are not agreed upon individually, they shape the rights and obligations of the consumer in a manner conflicting with good customs and strikingly infringe his good interests.

The complaint in the case can be instituted by anyone, who according to the offer of the defendant could conclude a contract containing a questioned clause. Consumer organizations, voivodship (municipal) consumer ombudsman, and the President of the OCCP are also entitled to institute a complaint.

In 2004 the OCCP instituted a series of actions aiming at effective enforcement of the consumer law. Elimination of unfair market practices concerning abusive clauses took place through a regular inspection of standard forms of contracts used. Within the framework of performing tasks in the area of abusive clauses, the OCCP conducted national inspections of entire market segments. In 2004, the activities of undertakings from the following industries were controlled:
- Communication insurances,
- Contracts concluded on-line,
- Import of cars,
- Car dealers,
- Provision of education services by non-public schools.

Controls were conducted throughout Poland through 9 branch offices of the OCCP. A representative group of undertakings in a given sector was subjected to the control – starting from

the largest and best known companies, all the way to small ones operating on local markets. On the basis of the obtained information, a group of most frequently used abusive clauses conflicting with provisions of the Civil Code was identified. Following, letters containing the indication of infringements and an order to discontinue the questioned clauses were sent to the undertakings and in cases of a failure to comply with the motion of the OCCP by the entrepreneur – suits for considering the questioned clauses as abusive were directed to the Court of Competition and Consumer Protection.

Collective breakdown for the year 2004 of cases handled within the framework of implementation of provisions concerning abusive clauses

Proceedings in cases of considering clauses of standard forms of contract as abusive
(including suites filed to the Court of Competition and Consumer Protection)

	Total number of proceedings	**Number of proceedings concluded as the entrepreneur complied with charge of the Office and amended the questioned clauses.**	**Number of suits filed to the Court of Competition and Consumer Protection**	**The number of clauses considered abusive and entered into the abusive clauses register**
Department of Consumer Policy at the OCCP headquarters	39	60	0	19
Bydgoszcz	29	12	11	6
Gdańsk	86	9	17	35
Katowice	169	57	28	13
Kraków	115	60	1	0
Lublin	132	26	19	16
Łódź	48	30	0	53
Poznań	67	16	2	1
Warszawa	122	34	1	0
Wrocław	74	44	3	0
Total	**881**	**348**	**82**	**143**

Examples of cases in the area of abusive clauses handled by the Office of Competition and Consumer Protection in 2004

Bank rules and regulations analysis – bank accounts administration

Case concerning use of abusive clauses by PKO S.A.

The concerned case refers to consideration of clauses of the student credit contract as abusive

within the scope of obligation to have a (paid) bank account in PKO S.A. According to the OCCP, the clauses obliging the consumers to have a current account at the Bank, in which they want to obtain a credit are conflicting with good customs, strikingly infringe the interests of consumers and as such should be considered banned. Also the clause mentioned in Article 385^3 (7) of the Civil Code of 23 April 1964 (Journal of Laws No. 16, Item 93 as amended) can be considered abusive. According to this article, an abusive clause is constituted by among other things the conditioning of conclusion or execution of a contract on conclusion of another contract, which is not directly connected with the contract containing the clauses being assessed.

The case is currently examined by the Court of Competition and Consumer Protection.

Analysis of contracts concluded with consumers by Electricity Distribution Plants

Case concerning the use of abusive clauses by Zakład Energetyczny Koszalin S.A. in Koszalin

In this case, the President of the OCCP filed a claim before the Court of Competition and Consumer Protection to consider as abusive and prohibit Zakład Energetyczny Koszalin S.A. in Koszalin to use in the standard form of contract signed with the consumer for sale of A type electricity, the paragraph 10 (1) (b): „*The seller can terminate the contract without notice in case of: ….b/ illegal consumption of electricity*" as conflicting with Article 385^1 (1) and 385^3 (15) of the Civil Code.

Clauses of the contract for sale of electricity should not infringe the provisions of the Energy Act. According to the Article 6(3)(2) of this act, a sanction which a supplier can impose in case of an illegal electricity consumption, consists in the discontinuance of electricity supply. The Energy Act, as well as subsequent regulations issued on its basis, does not provide for any other additional sanctions, including immediate termination of the contract, due to illegal consumption.

In its judgement of 6 January, the Court considered the aforementioned clause to be abusive (XVII Amc 135/03.)

Analysis of contracts concluded with consumers by tour operators

Case concerning the use of abusive clauses by JET TOURISTIC POLSKA Sp. z o.o. with its corporate seat in Szczecin

The object of the analysis conducted by the OCCP in the concerned case was the standard form of contract entitled "Participation conditions" used by the aforementioned entrepreneur conducting economic activities in the area of provision of tourist services and organization of tourist events. It was found that this standard form of contract contains 10 clauses that may be considered abusive.

The clauses called into question include:

- Settlements between the tour operator and the customer,
- Rights of the tour operator to unilateral change of the programme of the tourist event (even the possibility to shorten it without compensation),
- Settlements in case when the customer terminates the contract,

- Exclusion of the tour operator from liability for actions of his subcontractors and their contracting parties,
- Exclusion of the tour operator from liability for damages incurred by the customer due to theft, destruction or damage of the luggage or health impairment,
- Indication of a court appropriate to settle the contentious issues.

In principle, these clauses exclude the liability of the tour operator for any damages incurred by the tourists – the consumers, in the course of their participation in a tourist event. The liability for non-performance or improper performance of the contract by the tour operator – for instance for shortening of stay abroad, for action of tour organizer's contracting parties and their subcontractors is excluded. Moreover, these clauses allow the tour operator to change the object of the service and terms of the contract any way he wants, and also make it difficult for the consumer to terminate the contract, as well as limit the possibility to file complaints.

The case is currently examined by the Court of Competition and Consumer Protection.

Analysis of contract concluded with consumers by telecom operators

Case concerning use of abusive clauses by TELE 2 POLSKA Sp. z o.o.

The President of the OCCP filed a complaint before the Regional Court in Warsaw – the Court of Competition and Consumer Protection to consider certain clauses of the standard form of contract used by Tele 2 Polska Sp. z o.o. in Warsaw as abusive and to ban their use in consumer trade, called "*Rules and regulations of telecommunication services provided by TELE 2 POLSKA Sp. z o.o.*" when concluding contracts for provision of telecommunication services through pre-selection.

Including a clause of the following content: „*The operator reserves the right to transfer the receivables due from the Subscriber, resulting from the conclusion and execution of a Contract, onto entity he selected*" enables the Operator to freely dispose of receivables due from the Subscriber without his knowledge and consent. On the basis of considered Rules and regulation, the Operator is granted absolute freedom to decide about the receivables from the Subscriber that he has. The statement that was called into question has signs of an abusive clause defined in the Civil Code, as it allows for transfer of right to claim the payment of receivables due onto another person without the consent of the consumer to this cession and infringes the Civil Code, stating that a clause of a contract concluded with the consumer that was not individually agreed upon, do not bind him, if they shape his rights and obligations in a manner conflicting with good customs, strikingly infringing his interests (abusive clauses).

According to the OCCP the statement: „*The Operator is not responsible for non-performance or improper performance of Services resulting from improper functioning of telecommunication networks of other telecom operators*" may exclude the responsibility for damages incurred due to inability to use the services in every case, regardless the fault and scope of liability. The company provides its services, within the scope of the contract on the basis of use of the telecommunication network of Telekomunikacja Polska S.A., which provides Tele 2 with the access to its telecommunication network when executing pre-selection. The consumer, who is not a party of a contract with TP S.A. may not files complaints towards this company for improper functioning of the network, whereas Tele 2 has a right to do so as a party to the contract with its subcontractor.

The above statement has the features of an abusive clause specified in the Civil Code, that especially clauses, which exclude or significantly limit the liability towards the consumer for non-performance or improper performance of a commitment are considered abusive, and in the considered case for exclusion of liability for circumstances, for which the sued company should be responsible. The concerned statement may additionally infringe the Civil Code.

Results of nationwide inspections conducted by the OCCP in the year 2004 in relation to the use of abusive clauses

Educational services – non-public higher education

214 non-public schools were included in the study. Irregularities were found in the case of **151** entities.

The individual units of the OCCP examined respectively:

1. Branch Office of the OCCP in Bydgoszcz – 16 non-public higher education institutions; Irregularities were fund in 11 cases,
2. Branch Office of the OCCP in Gdansk – 34 non-public higher education institutions; irregularities were fund in 16 cases,
3. Branch Office of the OCCP in Katowice – 29 non-public higher education institutions; irregularities were fund in 27 cases,
4. Branch Office of the OCCP in Kraków – 26 non-public higher education institutions; irregularities were fund in 13 cases,
5. Branch Office of the OCCP in Łódź – 27 non-public higher education institutions; irregularities were fund in 21 cases,
6. Branch Office of the OCCP in Lublin – 26 non-public higher education institutions; irregularities were fund in 13 cases,
7. Branch Office of the OCCP in Poznań – 13 non-public higher education institutions; irregularities were fund in 11 cases,
8. Branch Office of the OCCP in Wrocław – 20 non-public higher education institutions; irregularities were fund in 19 cases,
9. Branch Office of the OCCP in Warsaw – 23 non-public higher education institutions; irregularities were fund in 20 cases.

Education services – foreign languages teaching

382 undertakings who organize foreign language courses were included in the study. Irregularities were found in the case of **223** entities.

The individual units of the OCCP examined respectively:

1. Branch Office of the OCCP in Bydgoszcz – 16 entities organizing foreign language courses; irregularities were found in 12 cases,
2. Branch Office of the OCCP in Gdańsk – 59 entities organizing foreign language courses; irregularities were found in 27 cases,
3. Branch Office of the OCCP in Katowice – 36 entities organizing foreign language courses; irregularities were found in 12 cases,
4. Branch Office of the OCCP in Kraków – 79 entities organizing foreign language courses;

irregularities were found in 76 cases,
5. Branch Office of the OCCP in Łódź – 78 entities organizing foreign language courses; irregularities were found in 42 cases,
6. Branch Office of the OCCP in Lublin – 25 entities organizing foreign language courses; irregularities were found in 7 cases,
7. Branch Office of the OCCP in Poznań – 19 entities organizing foreign language courses; irregularities were found in 11 cases,
8. Branch Office of the OCCP in Wrocław – 42 entities organizing foreign language courses; irregularities were found in 14 cases,
9. Branch Office of the OCCP in Warsaw – 28 entities organizing foreign language courses; irregularities were found in 22 cases.

Internet services

64 of undertakings providing Internet services were studied. Irregularities were found in the case of **37** entities.

The individual units of the OCCP examined respectively:
1. Branch Office of the OCCP in Bydgoszcz – 1 entrepreneur providing Internet service; irregularities were found in 1 case,
2. Branch Office of the OCCP in Gdańsk – 0,
3. Branch Office of the OCCP in Katowice – 0,
4. Branch Office of the OCCP in Kraków – 8 undertakings providing Internet services; irregularities were found in 7 cases,
5. Branch Office of the OCCP in Łódź – 33 undertakings providing Internet services; irregularities were found in 14 cases,
6. Branch Office of the OCCP in Lublin – 21 undertakings providing Internet services; irregularities were found in 14 cases,
7. Branch Office of the OCCP in Poznań – 0,
8. Branch Office of the OCCP in Wrocław – 0
9. Branch Office of the OCCP in Warsaw – 1 entrepreneur providing Internet services; irregularities were found in 1 case.

Retail – Sale of second-hand passenger cars

45 car dealers were included in the study. Irregularities were found in the case of **29** entities.

The individual units of the OCCP examined respectively:
1. Branch Office of the OCCP in Bydgoszcz – 2 car dealers; irregularities were found in 2 cases,
2. Branch Office of the OCCP in Gdańsk – 3 car dealers; no irregularities were found,
3. Branch Office of the OCCP in Katowice – 3 car dealers; irregularities were found in 0 cases,
4. Branch Office of the OCCP in Kraków - 5 car dealers; irregularities were fund in 5 cases,
5. Branch Office of the OCCP in Łódź – 13 car dealers; irregularities were found in 11 cases,
6. Branch Office of the OCCP in Lublin – 9 car dealers; irregularities were found in 1 case,
7. Branch Office of the OCCP in Poznań – 2 car dealers; irregularities were found in 2 cases ,
8. Branch Office of the OCCP in Wrocław – 3 car dealers; irregularities were found in 3 cases,
9. Branch Office of the OCCP in Warsaw – 5 car dealers; irregularities were found in 5 cases,

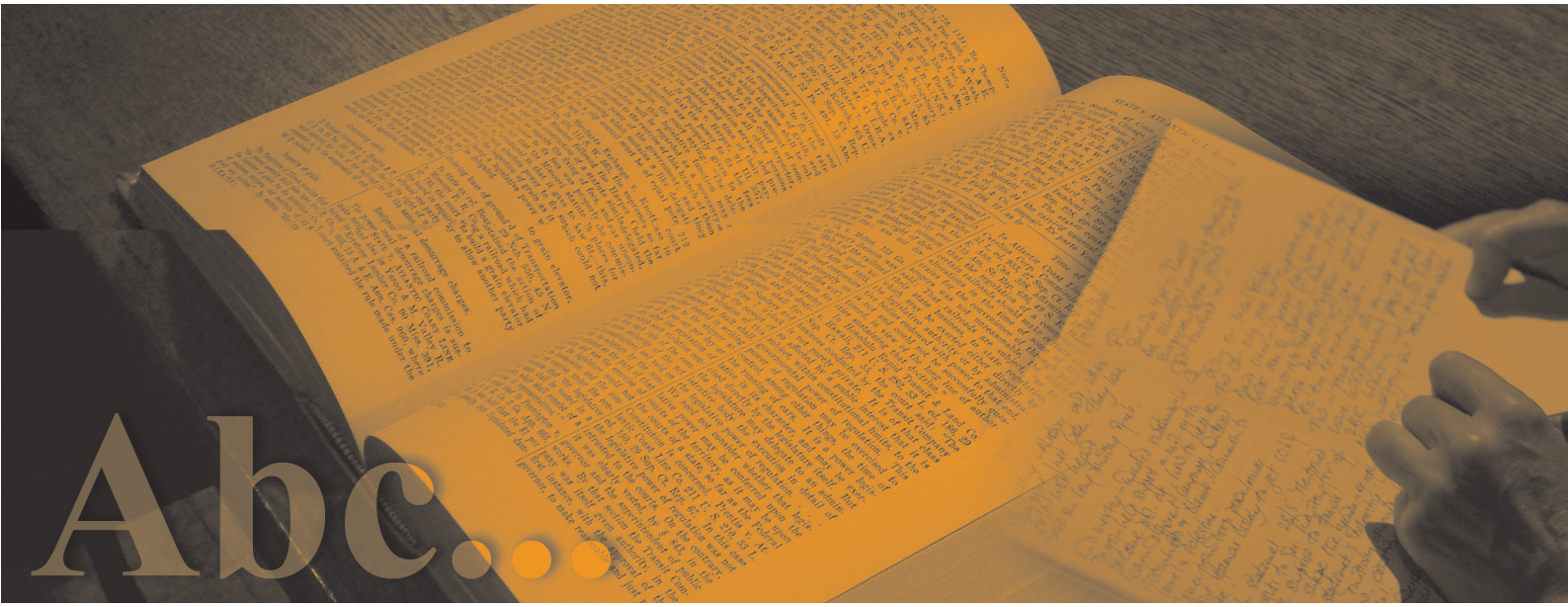
Tourist services

97 tour operators were included in the study. Irregularities were found in case of **35** entities.

The individual units of the OCCP examined respectively:

1. Branch Office of the OCCP in Bydgoszcz – 0;
2. Branch Office of the OCCP in Gdańsk – 0,
3. Branch Office of the OCCP in Katowice – 2 tour operators; irregularities were found in 2 cases,
4. Branch Office of the OCCP in Kraków - 20 tour operators; irregularities were found in 15 ,
5. Branch Office of the OCCP in Łódź – 24 tour operators; irregularities were found in 1 case,
6. Branch Office of the OCCP in Lublin – 17 tour operators; irregularities were found in 11 cases,
7. Branch Office of the OCCP in Poznań – 31 tour operators; irregularities were found in 3 cases,
8. Branch Office of the OCCP in Wrocław – 0,
9. Branch Office of the OCCP in Warsaw – 3 tour operators; irregularities were found in 3 cases.

Moreover, in 2004 the OCCP controlled undertakings operating among others in real estate trade agency, vehicle haulage services, cable television operators, financial services and special event organizations, waste disposal.



Implementation of provisions of the Act on Polish language

The Polish Language Act imposes on the Office of Competition and Consumer Protection and the Trade Inspection the obligation to control the compliance with provisions of the Act. According to the amendment to the Act, in force since 1 May 2004, aside the aforementioned institution, the obligation to control compliance with provisions of the Act is also imposed on the voivodship (municipal) consumer ombudsman and the National Labour Inspectorate. Since the date of the provisions of the Act entering into force, the OCCP and Trade Inspection, as control authorities, which initiated information and education campaign, aiming at popularization of the Act and explanation of interpretative doubts. Moreover, the Trade Inspection included provisions of the Act into its control plans following the Office's initiative.

In 2003 the OCCP issued 20 written replies in the matter of interpretation of provisions of the Act. In 2004, no entities submitted any inquiries.

The President of the OCCP addressed five orders to entities that do not comply with the provisions of the Polish Language Act on the basis of the Act of 16 April 1993 on combating unfair competition /Journal of Laws from the year 2003, No. 153, Item 1503 as amended/, classifying incompliance with provisions of the Polish Language Act as a deed of unfair competition, consisting in action conflicting with law or good customs, threatening or infringing the consumer interest) The expression of OCCP's opinion was initiated by complaints, which the OCCP received from consumers. These claims concerned the failure to attach a manual in Polish language to audio/video devices.

Similarly as in the previous years, the Trade Inspection performed tasks resulting from Article 7 and 7a of the Polish Language Act on on-going basis in the course of control actions.

The Trade Inspection Chief Inspector took actions consisting in inspiring and coordinating the inspections carried out by voivodship inspectorates of the Trade Inspection in this area. In the inspection plans of national significance and in detailed inspection plans being developed, a recommendation was entered to include the compliance with provisions of the Polish Language Act into examination in the course of conducted inspections. Therefore, during almost every inspection, the inspectors paid attention whether undertakings respected the obligation to label goods in Polish language, preparing manuals and information about proprieties of goods in Polish.

In 2004 the Trade Inspection conducted **15177** inspections, the object of which was among other verification whether undertakings complied with the provisions of the Polish Language Act. In the course of conducted inspections, in 357 cases infringement of obligations defined in the Polish Language Act by the undertakings under investigation was found, which constitutes approximately 2.4% of investigated institutions.

The found irregularities can be grouped in the following way:
1. Lack of names of goods in Polish,
2. Using description of goods only in a foreign language,
3. Lack of manuals in Polish,
4. Use of only foreign language version of warning signs.

In 2004 the OCCP in relation to found irregularities issued 162 motions for penalty, with reference to the accusation of infringement of the provisions of the Polish Language Act. In 38 cases the

motion was not filed at a court, and only Article 41 of the Penalty Code was enforced. It should be pointed that except of control activities, the Trade Inspection also instituted other steps aiming at eliminating the irregularities and preventing their further development in the future.

Moreover, the employees of the OCCP granted to the undertakings and consumers legal advices in the areas of legal status in force. The OCCP also instituted informative proceedings related to propagating knowledge regarding provisions of the Polish Language Act among the aforementioned entities *inter alia* in press, radio and television.

Implementation of provisions of the Act on general product safety

General information

International cooperation in the area of general product safety

General information

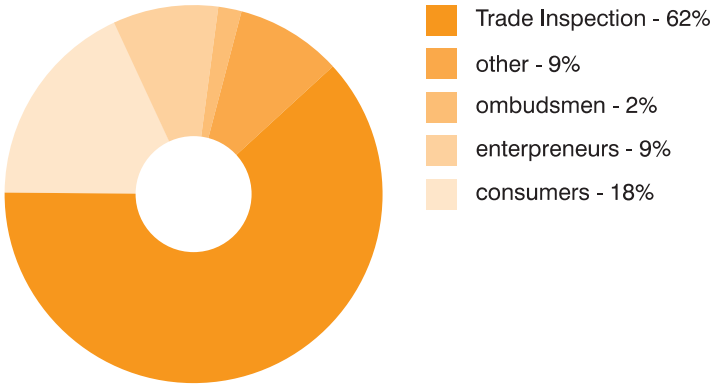
According to Article 13 of the Act of 12 December 2003 on general product safety (Journal of Laws from the year 2003, No. 229, Item 2275), the President of the OCCP acts as a supervisory body over the general product safety. These tasks are performed in cooperation with the Trade Inspection.

The President of the OCCP is responsible for conducting explanatory investigations and administrative proceedings in the matter of general product safety. The findings of inspections conducted by the Trade Inspection are the main source of information about the products.

In 2004 the President of the OCCP instituted proceedings in **106** cases, which implied a significant increase of the number of instituted explanatory proceedings in relation to the previous years (for instance in 2003, **69** explanatory proceedings were instituted).

In 2004 the OCCP received information regarding dangerous products from the following sources:

1. notification of the Trade Inspection Chief Inspector – **65** notifications about dangerous products, which constituted 62% of the total number of notifications,
2. information from the consumers – **19** (18% of the total number of notifications),
3. information from undertakings – **10** (9% of the total number of notifications),
4. information transmitted by the voivodship consumer ombudsmen - **2** (2% of the total number of notifications),
5. products tested within the framework of the NETWORK project – **8**,
6. other sources – **2**.



The following were among other the products, towards which the President of the OCCP instituted actions:

1. furniture and articles for children – **24**,
2. lighters – **14**,
3. furniture – **13**,
4. electrical products – **8,**
5. automotive articles – **8,**
6. construction products – **7,**
7. windscreen washer fluids – **6.**

In **63** cases, the President of the OCCP instituted administrative proceedings. This implies the increase of the number of proceedings in relation to the previous years (in year 2003 **44** proceedings were instituted, and in 2002 – **28** proceedings).

The General Product Safety Act imposes on undertakings the obligation to inform the President of the OCCP about dangerous products introduced by them on to the market. In 2004 undertakings voluntarily transmitted 15 notifications.

According to the general Product Safety Act, a decision imposing on the entrepreneur the obligation constituted a basis to enter a product into the dangerous products register.

In 2004, **10** new products were entered into the register. These were:

1. YoYo's (5),
2. Toys and child care articles containing phthalates,
3. „Mascot + chocolate" set,
4. UPS power supply adaptor,
5. Baby walkers,
6. Over-voltage protector.

In 2004, the President of the OCCP submitted to the prosecutor's office **3** notifications about cases of committing a crime by undertakings consisting in failure to enforce the decision of the President of the OCCP.

In 2004 the Regional Administrative Court considered **2** complaints of undertakings against decisions issued by the President of the OCCP – in one case the proceedings were discontinued as the charges were dropped by the entrepreneur, while in the second case the court dismissed the complaint.

International cooperation in the area of general product safety

The OCCP represents Poland in the *Committee of the Directive 2001/95/EC on general product safety* within the scope of international cooperation on general product safety. The "Network" working group, in which all Member States of the EU participate, comes under the Committee of the Directive 2001/95/EC. The task of the group is to coordinate joint inspection projects and comparison of their outcomes.

In 2004 Poland participated in inspections of:

1. candles,
2. baby high chairs,
3. baby beds.

The OCCP also participates in works of the **PROSAFE** organization (Product Safety Enforcement Forum of Europe) related to international cooperation in the area of market supervision, and especially in the area of toys and personal protective equipment. PROSAFE is a co-author of many projects initiated by the European Commission. In 2004, the OCCP together with Trade Inspectorate actively participated in development of a project for estimation of threats caused by products.

Since 1 May 2004 Poland is a member of the **RAPEX** system. It is a system of exchange of information about dangerous products between the European Commission and Member States of

the European Union. The basis for functioning of the RAPEX system is the Directive 2001/95/EC of the European Parliament and the Council of 3 December 2001 on general product safety.

Description of some cases

Proceedings in the case of ORVALDI 300 power supply device

In a letter from 6 June 2003, the President of the Office of Competition and Consumer Protection was informed about a placement by introduction by the company ORVALDI Power Protection sp. z o.o. of a dangerous product on the market– namely the ORVALDI 300 type of power supply device. Out of the provided information it seemed that despite the fact that the product received a certificate of conformity with the "B" sign, the product does not comply with the requirements of the PN – EN 60950 standard in the area of resistance of thermoplastic component to overheating, due to which it threatens the safety of users.

On the basis of an investigation report transmitted to the OCCP on 6 December 2004, it was found that the UPS ORVALDI 300PL uninterruptible power supplier does not comply with the requirements of the PN-EN 60950 standard in the area of resistance of the thermoplastic components to overheating, as well as with respect to durability of the marking. According to the contents of this report, the markings on the cover of the power supplier indicate that the device was produced in December 2002.

Therefore, the aforementioned investigation produced evidence that the ORVALDI 300PL uninterruptible power supplier caused the same threats to health and life of the consumers as ORVALDI 300 uninterruptible power supplier, which was considered dangerous by the President of the OCCP and entered onto the register of dangerous products and confirmed the suspicions that the ORVALSI 300PL uninterruptible power supplier is in fact the questioned ORVALDI 300 device entered onto the market under a changed name.

Introduction onto the market by the company ORVALDI Power Protection Sp z o.o. (a limited liability company) of a product that was entered to the register of dangerous product falls into the criteria of a crime defined in the General Product Safety Act. In relation to the above, acting on the basis of the Criminal Proceedings Code, on 2 February 2005 the President of the Office of Competition and Consumer Protection informed the Regional Public Prosecutor of the Warsaw Ochota District about commitment of a crime by a member of the management board of the ORVALDI Power Protection Sp. z o.o. (a limited liability company).

Implementation of provisions of the Act on conformity assessment system

General information
New Approach Directives

General information

In 2004, the provisions of the Conformity Assessment System Act were realized by the OCCP according to the "*Executive Programme for implementation of the market supervision system within the scope of new approach directives*", which was adopted by the Council of Ministers on 13 May 2003. The main objective of the Executive Programme was to prepare a reliable and effective system assessing the conformity of products with the fundamental requirements. This document defined the basic directions of operations and contained the schedule of works planned for 2004 and undertaken by authorities making up the system of control of goods covered by the new approach directives. The financial resources for development of the market supervision system were ensured through creation of a target reserve in the Budget Act. Resources from this reserve were activated in stages, starting from March 2004.

The President of the OCCP is the authority monitoring the system of controlling. Giving opinions regarding plans of periodical control conducted by specialist authorities, keeping record of products incompliant with fundamental requirements and collecting information about the operation of the control system are among its tasks. Specialized authorities control whether products fulfill the fundamental requirement and conduct administrative proceedings in relation to products inconsistent with fundamental requirements.

Actions in the following areas and directions, defined in the Executive Programme were realized in 2004:

- preparation of legal and institutional bases for the market supervision system,
- efficient and effective control of products placed on the market,
- organization of cooperation between authorities forming the market supervision system,
- eliminating threats caused by products inconsistent with the fundamental requirements,
- development of a system for collecting and exchange of market supervision information.

Formal grounds for cooperation of authorities forming the market supervision system were included into drafts of agreements prepared by the OCCP. On 24 February 2004, the President of the OCCP signed a contract with 7 specialised authorities, and on 21 October – with the Chief Construction Supervision Inspector.

Because of the necessity of particular cooperation of the system with customs authorities, the OCCP prepared a draft agreement between the Head of Customs Service and the President of the OCCP and the Trade Inspection Chief Inspector, which was signed on 19 October 2004.

In order to ensure an effective cooperation of the authorities making up the market supervision system, on the basis of a resolution of the President of the OCCP of 8 October 2004, a permanent commission of an opinion-giving and advisory nature called *the Market Supervision Steering Committee* was established. The first session of the Committee took place in December 2004. The Committee is also a forum of permanent cooperation of authorities that participate in the system.

In order to ensure a proper preparation of employees of the authorities specialised in realization of tasks anticipated in the Conformity Assessment System Act, the OCCP trained over 1000 employees of these authorities in the course of 24 training sessions. Trainings were organized in a manner enabling cooperation of inspectors from different specialized authorities who work in the same region.

In 2004 works on the new version of IT system for market supervision, called HERMES 2 were launched. This system enables managing data and information flow between the OCCP and the specialized authorities. Until the full version of the system is launched, the specialized authorities transmit data to OCCP on forms defined in the Regulation of the Council of Ministers of 14 April 2004 on flow of information regarding control of products placed on the market.

New Approach Directives

The President of the Office of Competition and Consumer Protection is not directly responsible for implementation of provisions of the new approach directives into the Polish law. These works were carried out by resorts responsible for individual market areas under the new approach directives, namely the Ministry of Economy and Labour, the Ministry of Infrastructure (supervising 4 out of 8 specialized authorities), the Ministry of Environment and the Ministry of Health (new approach directives that are outside the system monitored by the President of the OCCP)

All 23 new approach directives related with the Conformity Assessment System Act were implemented into the Polish law in 2004 and are used.

In 2004 the employees of the OCCP participated in works or EU authorities and meetings of Member States regarding the new approach directives, namely in debates of Committees, meetings of Administrative Cooperation Groups (ADCO) for individual directives and Meetings of the Working Groups. Thanks to the participation in these meetings it was possible to get acquainted with the organization and the market supervision activities in individual Member States, proposals of amendments in Union's legislation within this scope and practical problems related to realization of the tasks referring to market supervision, which appear on individual national markets.

The OCCP also participated in works on a guide to the Personal Protective Equipment Directive 89/686/EEC, within the scope of the Administrative Cooperation Group (ADCO) Because the directive covers a large group of products (both protective equipment used for sports and protective equipment used in workplaces), the guide has a great significance for both the undertakings and the authorities that implement the directive.

The OCCP together with the Office of Telecommunication and Post Regulation organized a meeting of the Administrative Cooperation Group (ADCO) within the framework of Directive 89/336 on Electromagnetic Compatibility (EMC) The meeting took place in Warsaw on 9-10 September 2004. It was the fist such type of meeting organized by the Polish market supervision authorities. Except of discussion on current matters in the area of market supervision realized by Member States, the meeting was an opportunity to present the principles of functioning of the Polish market supervision system.

Since 2004 the OCCP together with the Trade Inspection participated in the "**Baltic Initiative**" programme, which aims at intensification of cooperation of market supervision authorities in the Baltic Sea area and establishment of lasting organizational structures supporting contacts of authorities responsible for market supervision in this part of Europe. The Federal States of

Northern Germany, Denmark, Estonia, Finland and Poland participate in this project. Actions anticipated within the scope of this project are based on a coordinated market control over products subject to the Low Voltage Directive (LVD)

The OCCP and individual specialized authorities start cooperation with market supervision authorities in other European Union countries. It enables to get to know and cumulate experiences of other countries in the area that is new for Poland. This cooperation brings very good results and is appreciated by the specialized authorities and the OCCP.

Liquid fuels quality monitoring and control system

The system for monitoring and control of liquid fuels quality was organized for the purpose of collecting information indispensable to prepare a report for the European Commission about the quality of fuels in Poland, and in order to eliminated fuels of improper quality from the market. The programme was launched on 1 May 2004 and comprises of two parts: the so-called European and the national part. The fuel quality control is conducted within both scopes, the differences refer to:

a) the objective:
   - within the framework of the European part monitoring in relation to the statistical quality of fuels in Poland (a report for the European Commission shall be prepared on the basis of inspections conducted within the framework of this part of the system),
   - within the framework of the national part aims at detection of a fuel of improper quality and elimination of such fuel from the market;

b) the inspected entities:
   - within the framework of the European part the Trade Inspection controls only petrol stations and in-house stations,
   - within the framework of the national part the Trade Inspection controls petrol stations, in-house stations and wholesalers;

c) the criteria for selection of the station to be inspected:
   - within the framework of the European part stations designated for control are drawn from the list of stations administered by the system manager,
   - within the framework of the national part the Trade Inspection selects stations to be inspected on the basis of additional criteria, such as consumer complains or results of the previous inspection;

d) the number of examined parameters:
   - within the framework of the European part all parameters mentioned in the Regulation of Minister of Economy and Labour of 16 August 2003 on qualitative requirements for liquid fuels (Journal of Laws No. 192, Item 1969) are always examined;
   - within the framework of the national part only some parameters specified in the Regulation can be examined.

The first report for the European Commission shall contain information regarding fuel quality in Poland based on results of inspections conducted by the Trade Inspection in the period from 1 May 2004 until 31 December 2004.

The Act on quality monitoring and controlling system for liquid fuels and liquid biofuels entrusted the President of the OCCP with the function to manage the quality monitoring and controlling

system for liquid fuels. Within the scope of management of the quality monitoring and controlling system for liquid fuels, the OCCP realized the following tasks in 2004:

To prepare and administer the list of undertakings conducting economic activity in the area of fuel trade (including petrol stations) and assigning these entities with identification numbers

For Trade Inspection to be able to run an effective inspection of fuel quality and realization of tasks imposed by the act, lists of undertakings and petrol stations were preared. For the purpose of preparing the database, different resources were used – mainly analyses conducted by the OCCP and information deriving from among other things inspections conducted by the Trade Inspection. Currently there are almost 1500 undertakings and 800 petrol stations listed in the register. This data is subject to change, as the database is constantly updated and supplemented.

Moreover a standard format of identification numbers was established, and then numbers were assigned to all entities in the database. The numbers contain elements allowing for identification of the place and the type of entity (station, wholesaler).

Keeping a list of accredited laboratories

The aforementioned list is kept on the basis of a list transmitted to the system Manager by the Polish Centre for Accreditation. This list is updated prior to commencement of a subsequent controlling period, and the data regarding the laboratories with accreditation to test quality of fuel is transmitted to the Trade Inspection, which then orders a test of a fuel samples to specific laboratories.

Calculating the number of stations designated for inspections within the so-called “European” part of the quality monitoring and controlling system for liquid fuels, draw of stations designated for inspection and transmitting the list to the Trade Inspection

The number of stations designated for inspection within the framework of the “European” part of the system was calculated on the basis of statistical data concerning among other the number of stations in individual provinces. A random selection of stations to be inspected is a requirement of a European standard, according to which the Polish fuels quality monitoring system is organized. In 2004 the random drawing was conducted twice – for the summer period (May – September) and winter (October – April) The names of the drawn stations complete with their numbers and addresses were then transmitted to the Trade Inspection for planning.

Preparing quality controlling programmes for liquid fuels and liquid biofuels and accepting the inspection plans presented by the Trade Inspection

In 2004 fuels quality control programmes – for the summer period (May – September 2004) and the winter period (October 2004 – April 2005) were prepared by the Office of Competition and Consumer Protection. Information contained in these programmes concerned in particular:

- Division of tasks between the OCCP and the Trade Inspection,
- Subjective and objective scope of inspections,
- Criteria for selection of stations to be controlled within the national system,
- Method of preparing and carrying out inspections,

- Principles of cooperation with laboratories,
- Criteria for selection of laboratory for conducting tests of samples,
- Principles for concluding with laboratories contracts for realization of tests,
- Trade Inspection's reporting principles.

On the basis of Inspection Programmes, the Trade Inspection prepares detailed Inspection Plans, which require analysis with respect to conformity with guidelines contained in the Control Programme and approval of the President of the OCCP.

Development on the method of fuel sample labelling

The method of labelling a fuel sample taken from the station and the warehouse was set in such way, that identification of the entrepreneur, petrol station and warehouse is impossible in the course of conducting the laboratory testing. Data is transmitted to the Trade Inspection Chief Inspector, who in line with this method and keeping the confidentiality principle assigns numbers to subsequent fuel samples taken by inspectors in course of the inspection.

Collecting data necessary to prepare annual collective reports on fuel quality in Poland

The Act *on quality monitoring and controlling system for liquid fuels and liquid biofuels* imposes on the Manager the obligation of annual preparation and presentation to the Council of Minister (until 31 May 2005) and the European Commission (30 June 2005) of a report on the quality of fuels sold in the country. Poland shall prepare such reports for the first time in 2005. The reports will contain results of monitoring conducted in 2004.

Cooperation with the Trade Inspection

According to the act, the President of the OCCP manages the quality monitoring and controlling system for liquid fuels with the assistance of the Trade Inspection. The role of this institution consists mainly in undertaking and conducting control actions. Cooperation between the OCCP and the Trade Inspection within this scope includes most of all the exchange of information regarding the course of inspection, as well as emerging problems, which must be solved up to date. Moreover, the OCCP receives from the Trade Inspection regular reports containing results of inspection, which are used to complete the existing databases, transmitting public opinion control results and preparing reports on quality of fuels.

Cooperation with other departments, organizations, experts

The OCCP cooperated with other departments and organization in matters resulting from the Act on quality monitoring and controlling system for liquid fuels and liquid biofuels. The cooperation with respect to legal grounds of the quality monitoring and controlling system for liquid fuels was conducted in 2004 mainly by the Ministry of Economy as a department responsible for preparing legal acts within the framework of the state energy policy. Moreover the representatives of the OCCP participated in conferences organized by organizations associating undertakings who deal with liquid fuels trade, subject of which was the improvement of quality of fuel sold on the Polish market.

The activities of the OCCP within the scope of quality monitoring and controlling system for liquid fuels is supported by the know-how, especially in matters related to chemical processes or production technology or composition of fuels. Because of that in 2004, the OCCP organized a training on this subject, in which the representatives of Trade Inspection and Ministry of Finance (excise tax specialists) participated.

Cooperation with the European Commission and the IFQC within the framework of quality monitoring and controlling system for liquid fuels

The representatives of the OCCP participated in meetings of the Working Group of the European Commission, which deals with Directive 2003/17/EC of 3 March 2003 amending the Directive 98/70/EC relating to the quality of petrol and diesel fuels. The European Commission transmits the information on how to monitor quality of fuels and how to prepare the reports. The OCCP also established a contact with the international organization called International Fuel Quality Centre, which aims at improving the fuel quality all over the world.

Collecting information from the consumers

Through the Internet site, the OCCP receives complaints from consumers in relation to petrol stations selling fuel of improper quality. All information is transmitted to the Trade Inspection, which takes these complaints into consideration when planning subsequent inspections.

Other tasks performed by the President of the OCCP

Cooperation with consumer organizations

Cooperation with consumer organizations

Legal framework of cooperation of the OCCP and non-governmental organizations is defined by the Act of 15 December 200 on competition and consumer protection (Journal of Laws from the year 2003, No. 86, Item, 804 as amended) and the Act of 24 April 2003 on public benefits and voluntary assistance (Journal of Laws No. 96, Item 873 as amended) On the basis of the Act on public benefit and voluntary services, in 2004 the OCCP supported (or entrusted) consumer organizations with realization of public tasks, the aim of which was publicising and protection of consumer rights.

In cooperation with the Consumer Federation, the OCCP:

1. Conducted nationwide free of charge consultancy and legal aid within the scope of consumer rights and possibilities to issue claims,
2. Provided legal aid in proceedings before common and conciliation courts, including writing suits on behalf of consumers.

In cooperation with the Association of Polish Consumers, the OCCP:

1. Developed a Newsletter and conducted legal consultancy for voivodship (municipal) consumer ombudsmen,
2. Organized training for voivodship (municipal) consumer ombudsmen (among other on the subject of telecommunications law as well as tourist and financial law),
3. Developed and printed consumer publications,
4. Supported food expertise.

In cooperation of the Polish Society of Economic Housekeeping, the OCCP:

1. Supported comparison tests for two types of products – realized by the Polish Society of Economic Housekeeping.

In cooperation with the Consumer Centre, the OCCP:

1. Supported nationwide education of the young consumer,
2. Supported the development and printing of a brochure containing a collection of consumer law provisions, standard forms of letters to the undertakings, as well as standard forms of suits.

The idea to appoint a Council of Competition and Consumer Protection, assuming the establishment of two teams: the consumer team and undertakings team was established in order to coordinate actions for protection of consumer interest. The Council of Competition and Consumer Protection is and opinion-giving-advisory authority of the President of the OCCP. Its formal appointment took place pursuant to a resolution of the President of Competition and Consumer Protection. The opening session of the CCCP took place on 19 March 2003. In 2004, the Council of Competition and Consumer Protection (CCCP) was transformed into Council for Good Economic Practices. The transformation aimed at strengthening the position of this opinion-giving authority of the President of the OCCP.

The following are among tasks of the CCCP:

1. Presenting drafts of legislative changes within the scope of competition and consumer protection, techniques and forms for conducting consumer education, conducting consumer policy,

2. Preparing studies and information regarding the condition of consumer protection and the protection of consumer interests in individual sectors of the economy,
3. Investigating cases and issuing opinion in matters submitted by the President of the Office.

Moreover, according to the outline defined on 27 July 2004, the Council of Competition and Consumer Protection (CCCP) was transformed into the Council for Good Economic Practices. The transformation aimed at strengthening the position of the opinion-giving authority of the President, which is the Council for Good Economic Practices. It was expressed through regulation of competence of the Council in the Act of 16 April 2004 amending the Act on competition and consumer protection and amending several other acts (Journal of Laws No. 93, Item 891) The President, the Council commenced operations as the opinion-giving authority of in the end of 2004.

When performing the tasks in the area of cooperation with territorial self-government authorities, among which a statutory task is protection of consumer interests (Article 26(15) of the Act on competition and consumer protection) in 2004 the OCCP organized, just like in 2003 two meetings with municipal and voivodship consumer ombudsmen from the Mazowieckie voivodship. The first meeting was dedicated to summary of activities of ombudsmen in 2003 and discussion of formal requirements of an application to institute antitrust proceedings and proceedings in the matter of infringement of collective consumer interests. The 2nd Annual Training Workshop for Mazowiecke voivodship consumer ombudsmen took place on 22-24 September 2004 in Kozienice. The meeting concerned the role of the Consumer Ombudsman within the scope of shaping legal awareness of consumers and actions taken against infringement of their rights – experiences of the Mazowieckie voivodship.

On the basis of Article 147 of the Act of 21 September 1997 the law on public trading of securities, in the period from 1 January until 1 May, **345** notifications about purchase or sale of shares of public companies reached the President of the OCCP. In relation to the amendment of the Act on public trading of securities of 12 March 2004, undertakings no longer have the obligation to transmit this information to the President of the OCCP.

Market research and analyses

Nature of market research and analyses conducted by units of the OCCP

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

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

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

The research conducted in relation to particular proceedings, due to limited timeframes resulting from procedures accompanying the proceedings and attitude for verification of hypothesis, rarely provide conclusions reaching fat beyond the framework of the proceeding.

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

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

A research, which related only to realization of the first of the mentioned objectives, namely collecting evidence for antitrust proceedings was excluded from the report, and the focus was on research of a more extensive reach, which were conducted within the scope of competition monitoring in sectors and on markets located on the objective and geographic area of operations of the departments of jurisprudence and branch offices, and on market analyses carried out by the Department of Market Analyses.

Market research conducted within the framework of market monitoring

Market analyses conducted by branch offices in 2004.

In 2004 branch offices of the OCCP conducted a total of **67** market research. **53** research referred

to narrow idea of local markets. The remaining **14** research concerned the nationwide market. By the end of 2004, out of the conducted research **12** analyses were in progress, and the remaining ones were completed. The below table presents data concerning market research conducted by individual branch offices of the OCCP.

Market research conducted by Branch Offices of the OCCP in 2004

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

In 2004 the subject of interest of branch offices of the OCCP was mainly these sectors of economy, in which irregularities pointed out by consumers and undertakings most frequently emerge. Most research was conducted in relation to institution of a proceeding in a given case.

Market analyses conducted by the Headquarters of the OCCP in 2004

Market research conducted by the Department of Market Analyses has a broader nature than this type of activities undertaken by other units of the OCCP. Despite the fact, that the market situation usually inspires the institution of individual research, still the research conducted by the Department of Market Analyses aims not only at answering the current question, but conducting of as extensive market diagnosis as possible with respect to the level of competition.

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

Other research

In March 2004 the Department of Macroeconomic and Structural Analyses of the National Bank of Poland, prepared a material regarding the forecast of price changes in relation to Poland's accession to the European Union. It contained information about estimated prices if individual prices in the first quarter of membership in the EU. The objective of the aforementioned analyses was to prevent possible irregularities, through indication, which rises can be substantiated prior to

the access (trough change of for instance customs), and which not. It also aimed at informing the consumer that the scale of raises is not going to be as high as it was generally expected. Currently the analysis of collected information is in progress.

Moreover, the Department of Market Analyses, following the request of the Department of Consumer Policy cooperated with the Institute for Opinions and market Research – Pentor with respect to preparing two studies of consumer opinions concerning the press market and the cable television market. The result of the study served as additional evidence in merger and antitrust proceeding.

International cooperation and contacts with community authorities

Multilateral cooperation

Bilateral cooperation

Status of realization of PHARE projects in 2004

Multilateral cooperation

Cooperation with community authorities

Within the scope of contract with community authorities, the actions of the Office of Competition and Consumer Protection concentrated mainly on cooperation with the European Community. In 2004 the employees of the OCCP participated in sessions of plenary European Competition Network (ECN) Implementation Groups, as well as in sessions of subgroup of the aforementioned group, which was responsible for implementation of national legal orders of Member States of the EU, extraordinary programmes for mitigation of penalties in cartel proceedings.

In 2004 of the OCCP cooperated with the Competition Directorate-General, mainly within the scope concerning information exchange and participation of representatives of the Polish antitrust authority in working sessions organized by the European Commission.

Along with the expansion of the European Union in May 2004, representatives of the New Member States were invited to participate in meetings of the Group of National Experts of High Level. The first meeting of the Group, in which Poland participated, took place on 20 September 2004. In the sessions of the Group Poland was represented by the employees of the Office of Competition and Consumer Protection and Ministry of Economy and Labour.

Cooperation with the OECD

In 2004 three session of the OECD Competition Committee and working groups subordinate to it (February, June and October) Within this period also two meeting of the Joint Group on Trade and Competition (February and October) took place.

In October 2004 a joint session of the Competition Committee and the OECD Consumer Policy Committee took place.

The February session of the Global Competition Forum was very important from the point of view of the OCCP as an authority realizing the competition policy. During Session II of the concerned session, the OCCP delegation presented the position of the President of the OCCP regarding the experiences of the Polish antitrust authority within the scope concerning the use of competition policy as a tool for positive stimulation of economic growth in Poland. While during Session IV, the employees of the OCCP presented a position of the President of the OCCP regarding the relations between economic growth and implementation of the competition policy in Poland.

Moreover, in 2004 two sessions of the OECD Consumer Policy Committee (March and October) took place. During these sessions, an action programme of the Committee for the years 2005-2006 were approved, and the necessity to focus on sectors, which do not function properly from the competition protection point of view, i.e.: telecommunication, financial services, new technologies, electronic trade were emphasized. Moreover, issues related to cross-border cooperation in the area of enforcement of consumer law, including the progress in implementation of Cross-border Fraud Guidelines were discussed.

In 2004 the Polish competition authority, similarly like in the previous year cooperated with the OECD through the Ministry of Economy and Labour. Within the scope of its competence, the OCCP actively participated in preparation of session of the Legal Regulations Quality Committee, concerning matters related to the OECD. Within the scope of its characteristics, in 2004, the OCCP also developed content-related questionnaires prepared and transmitted y the OECD Secretariat through the agency of the Ministry of Economy and Labour.

International Competition Network

In 2004 employees of the OCCP actively participated in works of the Capacity Building and Competition Policy Implementation Working Group ("CBCPI") operating within the scope of the International Competition Network ("ICN") As a result of work in the aforementioned Working Group, a position of the Office in response to two content-related questionnaires was prepared. The first out of the two mentioned questionnaires referred to experiences of the Office within the scope of institutional development and competition policy implementation in the period of economic transformation. The second document contained a discussion of technical assistance schemes, which the Office used in the past several years.

Bilateral cooperation

Within the scope of bilateral cooperation, employees of the Polish competition authority answered numerous content-related questions directed to the OCCP by foreign competition authorities, non-governmental organizations dealing with subjects area similar to the scope of competence of the Office and private entities. Among other preparation of Offices input in the project realized by the Irish competition office, dedicated to analysis of human resources structures in authorities of European and candidate countries responsible for realization of competition policy, study prepares for the Australian Competition and Consumer Commission regarding the status of small and medium-sized enterprises in light of provisions of the Polish competition law).

Status of realization of PHARE projects in 2004

In 2004 the OCCP realized a total number of 5 schemes financed from pre-accession aid resources Phare and conducted project works on two subsequent projects within the scope of new financial instrument of the European Union the *Transition Facility 2004*, in the area of competition protection and the consumer protection system respectively.

I. In January 2004 realization of the **PHARE project 2001, PL0101.15.10 „Support of integration processes. The flexible reserve"**, which commenced in the end of 2003 and covered a cycle of trainings within the scope of community principles of state aid came to an end. In the period 12 - 19.01.2004 6 training sessions within the scope of state aid took place for a total of 249 persons – employees of the State Fund for Rehabilitation of Disabled Persons and representatives of supported employment undertakings and 5 trainings within the scope of special conditions for granting state aid in sensitive sectors for 110 undertakings from the shipbuilding, automotive, coal and steel sectors. In total, within the framework of scheme realization, 1150 persons were trained.

In the first quarter of 2004, 3 training for judges of common courts took place within the cope of realization of the **twinning agreement – *Twinning Light* PL01/IB/EC09TL "Judiciary competence in applying principles of competition of the European Union"**, which concluded a cycle of trainings in the IV quarter of 2003. In total, within the scope of the project, 302 judges were trained. A continuation of this cycle within the scope of a twinning agreement *Transition Facility 2004 "Competition Protection*" is planned.

Within the scope of the **PHARE 2001 project, PL0102.05 „Competition policy and consumer protection**" the following items were realized:

1. Technical Assistance Contract concerning state aid issues
2. Within the scope of investment component IT hardware was purchased for the OCCP and the Trade Inspection as well as laboratory equipment for Trade Inspection.
3. In the beginning of 2004, according to the EU procedures (*the Grant Scheme*) 3 non-governmental consumer organizations were assigned financial support in a form of grants for realization of consumer-related projects.
   Subsidies were granted to 3 projects:
   - "Collecting and publicizing of data regarding position of consumers on the Polish market of household articles" – **the Association of Polish Consumers**,
   - "Publicizing consumer knowledge on the subject of insurance market services" – **the Consumer Federation**,
   - "Strengthening the position of consumers on the food articles market through conducting independent comparison tests of selected products (cereal, potato chips)"– **The Polish Household Economics Association**,
4. On 15 October 2004 a nearly two year twinning agreement with a German partner operating in consortium with Austria (PL/IB/2001/EC/08) was ended. Actions realizes within the scope of this agreement, mainly contributed to increasing professional qualifications of Office's employees (among other internship and studio visits) The German foundations *Stiftung Warentest* realized 6 pilot comparison test projects of Polish products (rape seed oils, drillers, tights, face creams, washing powders and gels, white paints for walls), simultaneously transmitting part of know-how about among other methodology of executed tests to representatives of Polish organizations and institutions. A series of information brochures, presenting significant problems of the consumer law and showing methods of its enforcement on the Single Market of the European Union were published. Moreover, books in the area of competition and consumer protection were purchased for the Office's library.

II. The OCCP, as a leading institution coordinates actions within the scope of the **PHARE 2002 project, PL2002/000-605-02.01 "Market supervision"**, beneficiaries of which are among other the Office of Telecommunications and Post Regulation, National Labour Inspectorate, State Mining Authority and the Trade Inspection. In 2004 tender proceedings for purchase of IT equipment (Office of Telecommunications and Post Regulation, National Labour Inspectorate, State Mining Authority, Trade Inspection, OCCP) and laboratory equipment (Trade Inspection) were concluded.

Information activities of the Office

Shaping an effective consumer policy in Poland is one of the most important tasks of the Office of Competition and Consumer Protection. Effective information, education and promotion serves the purpose of realization of this objective. In 2004 the OCCP conducted intensive information and educational activities, the aim of which was increasing the awareness of consumers within the scope of the law currently in force and development among consumers a critical sense in such way that they can rationally choose and react on trade pressures. The priority in information policy of the Office was establishment of a dialogue forum between all market participants – consumers, producers and distributors. These actions contributed to the development of good practices codes in various market sectors.

Communication with the media

In 2004 the Press Office of the OCCP issued 140 press releases (90 of which concerned consumer issues, and 50 concerned consumer protection), 20 conferences and meetings with the media were organized. It is estimates that in 2004 the management of the OCCP 808 times appeared in printing and electronic media. Moreover, the OCCP appeared in publication of 6200 articles in nationwide and regional press.

Both the management and the employees of the OCCP were repeatedly invited to participate in radio and television informational and economic programmes, gave interview in Press, were on duty answering telephone calls in studios, gave advice during organized chat session. The representatives of the OCCP mainly explained and commented on the decisions issued by the OCCP.

It is worth mentioning here that last Lear, for the first time a conference organized by the OCCP (on liquid fuels quality) was broadcasted live by TVN24.

Consumer education

Consumer education is the most effective form of form of protection against unfair market practices. In 2004 the OCCP continues an active preventive policy, with educational campaigns serving the purpose of an important tool. These actions were based on tests and analyses, on the basis of which the most frequent cases negligence on the market were defined. In the described period, a total of eight educational campaigns dedicated to: bank, developer, tourist, energy, telecommunication, product quality, young consumer education services and promotional campaign preceding the referendum of Poland's pre-accession to the European Union.

Campaign – communication insurances

In 2004 the Office of Competition and Consumer Protection conducted intensive informational and educational activities dedicated to communication insurances. Data deriving from consumer opinion analyses regarding communication insurances were used in this campaign. The current situation of the communication insurances market and most frequently emerging irregularities which the consumers can encounter when concluding such types of contracts, were presented and developed by the OCCP in a report form.

Campaign – Consumer and advertising

The fundamental objective of the campaign organized by the OCCP was to make consumers

aware of the role of advertising as a commercial information transmission medium. In 2004 the OCCP conducted active informational and educational activities through among other presenting to the consumers how to properly use the information communicated in the advertising and how to defend oneself against advertisements that are unfair and misleading to the consumer.

Within the scope of this campaign the OCCP conducted a sociological study regarding consumer attitudes towards advertising and analyses of consumer market behaviours. The report from the study triggered a discussion about the effect of advertising on consumers and the level of social acceptance of the phenomenon of advertising. Consumer rights protection institutions, the advertising industry, media and the academic environment joined into the discussion about the role of advertising in shaping consumer attitudes. The discussion had a broad response in the Press and electronic media.

Out of the initiative of the Office of Competition and Consumer Protection, 16 episodes of an educational programme entitled "The Consumer" ("*Konsumer*") were broadcasted by TVP2. The broadcast was accompanied by a telephone duty to the radio and Press publications (among Rother in the "*Super Express*" daily newspaper and a weekly magazine "*Naj*").

Moreover, the employees of the OCCP participated in chats providing information on consumer rights. This was organized by the Internet portal Wirtualna Polska and the 1st Programme of the Polish Radio.

Promotion and marketing

The following should be included among the most important conferences, in which the representative of the Office of Competition and Consumer protection participated in 2004, or Conferences organized by the OCCP:

"Future of Self-Regulation in Poland and Europe"

An international conference, which took place on 26 May 2004 in the Business Centre Club headquarters. It was organized in relation to the visit of Mr Jean Paul Minagasson, Director-General of DG Enterprise and Industry in the European Commission. This conference was dedicated most of all to the presentation of solution proposals in the sectors, which need self-regulation the most. Moreover, issues related to establishment of social trust around the issue of self-regulation was discussed along with the emphasis of the role of the Office of Competition and Consumer Protection – as a coordinator and advisor when creating the good practices codes. In the end the presentations of the best codes of good practices were delivered.

"Electronic trade and consumer protection. Young consumers and the Internet"

An international conference under an honorary patronage of Mrs Barbara Labuda, Secretary of State in the Chancellery of the President of Republic of Poland, which took place on 7 October 2004 in the Belvedere Residence, within the framework of international cooperation of the OCCP with partners from Germany and Austria. During the meeting, a Consumer Policy Strategy of the OCCP for years 2004-2006 within the scope related with statutory competence of the President of the OCCP, concerning protection and safety of consumers on the Internet was presented. This conference was

also an opportunity to present the results of the report prepared by the Office of Competition and Consumer protection entitles "*E-commerce*", dedicated to the results of inspection of Polish e-commerce sites with respect to conformity of their resources with the law.

During the speech, too, main directions of consumer education were defined and the role of the OCCP in establishment of good practices codes in the discussed area was emphasized.

"Control of Concentration in Poland and the European Union The New Approach"

An international conference under an honorary patronage of Cezary Balasiński, the President of the Office of Competition and Consumer Protection, which took place on 12 October 2004 in the Foksal Multimedia Centre, within the framework of international cooperation of the OCCP with partners from Germany and Austria. During the meeting, new Polish and community legal regulations concerning control of concentration were presented. The conference was also an opportunity to present legal solutions that are in force in Member States of the European Union within the scope of control concentration.

"Advertising and the consumer"

A conference with participation of the academic environment, advertising creators and distributors environment organized on 11 March 2004 by the Office of Competition and Consumer Protection. During the meeting the results of a study "Advertising and the consumer – consumer attitudes towards advertising and diagnosis of consumer market behaviours" were presented.

Moreover, the following conferences were organized:

- "*Consumer opinions in the matter of communication insurances*" – press conference organized on 21 July 2004.
- "*Knowledge and attitudes of Polish undertakings regarding the competition protection law*" - a press conference organized on 27 July 2004.
- „*Friendly nursery school*" – a conference organized in July 2004, in course of which the management of the OCCP presented the situation of young consumers in Poland and educational programmes addressed to young consumers in years 2003-2004 and planned for realization by OCCP in 2005-2006.
- "*Information or manipulation? – how to protect information in relations between the PR, journalists and the publisher*" – the conference was organized on 6 December 2004 and constituted an element of informational campaign of the Association of Public Relations Companies entitles "Pure information", taking place under a honorary patronage of the President of the OCCP, Mr Cezary Banasiński. The campaign, directed mainly to the media environment and companies active in the Public Relations sector, had an informational nature and concerned irregularities with the Polish and the Community law, the so-called advertorials thus commercial sponsored articles, without an unambiguous marking the message as an article of an advertising-promotional nature.
- "*Social responsibility of business*" – a scientific conference organized on 4 November 2004 on the Poznań University, with participation of the academic environment and Deputies of the Polish Parliament and Euro-parliamentarians. The conference was an opportunity to present results of a study regarding "Social attitudes towards enterprises using elements of socially involved marketing: arbitrage of conciliation courts and good practices codes."

- „*Self-regulations in the area of advertising*" – in the course of a conference organized in Warsaw on 19 April 2004 by the Advertising Counsel, IAA and the Association of Advertising Agencies, the management of the OCCP expressed an opinion about advertising and consumer protection in relation to administrative forms of advertising control as a communication tool between undertakings and consumers.

Publishing activities

In 2004 the OCCP actively conducted publishing activities – it published a total of 25 publications, including: brochures, reports and leaflets (within the framework of the Phare 2001 Twinning PL/IB/2001/EC/08 Competition policy and consumer protection).

www.uokik.gov.pl