

Competition and consumer protection a.d. 2019

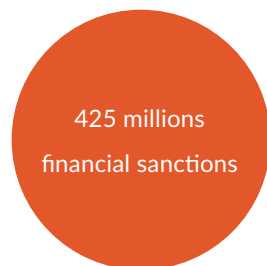


Modzelewska & Paśnik
COMPETITION REGULATION LITIGATION

Protecting competition A.D. 2019

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FINING POLICY



Statistically speaking, 2019 was a year of record fines. **The total amount of financial sanctions imposed on undertakings exceeded PLN 425 million (over 20 times the amount in 2018) and was the second highest in the history of the Polish competition authority (“PCA”).** Higher penalties were imposed only exactly 10 years earlier - in 2009 - when the cement cartel decision was issued (fining the participants more than PLN 411 million). However, **none of the highest fines were imposed for a practice restricting competition.**

Yet at the same time the fining policy has become less transparent: **guidelines on the setting of the fines for practices infringing collective consumer interests were removed from the PCA’s website.** This is disappointing, especially when the overwhelming majority of high fines were imposed for infringements of collective consumer interests.

Setting of the fines remains a discretionary power of the authority – there is a great need for more transparency and foreseeability in this area.

At the same time, the **PCA also settled its very first case:** an Austrian company Brother received a 10% reduction of the fine for agreeing not to challenge the decision in court (decision RKR-10/2019). The company had also made a leniency application, which resulted in a further 30% reduction. The Vienna-based undertaking further benefitted from the principle of proportionality: **the fine was calculated based on the income generated exclusively in Poland.**

Record fines in 2019:

▶ PLN 172m imposed on Engie Energy Management Holding for failure to provide the requested information in merger control proceedings in relation to the construction of the Nord Stream 2 pipeline (the PCA suspects that a group of undertakings may have attempted to circumvent the law by creating a company financing the construction of the gas pipeline without the necessary clearance);

172,000,000 zł

Engie Energy Management Holding

▶ More than PLN 120m imposed on Volkswagen for misleading consumers as to the level of nitric oxide emissions;

120,607,288 zł

Volkswagen

▶ Almost PLN 50m imposed on Yetico for infringing collective consumer interests by misleading consumers as to the properties of its Styrofoam panels;

120,607,288 zł

Yetico

▶ Over PLN 50m imposed on Polkomtel for charging customers additional fees not covered by the contract;

50,634,687 zł

Polkomtel

▶ The maximum amount of the fine, PLN 8.3m, imposed on T.B. Fruit Polska for dishonestly abusing its contractual advantage.

8,336,319 zł

T.B. Fruit Polska

ANTICOMPETITIVE AGREEMENTS

In 2019 the PCA issued 12 decisions concerning anticompetitive agreements: more than the year before (only 2 decisions in 2018), but largely in line with the 2016-2017 statistics.

By contrast, the fines imposed for anticompetitive agreements were low and together totalled just under PLN 5.25m. The reason may be that no less than 11 decisions in 2019 related to bid-rigging, an infringement usually committed by smaller companies. In 10 of these cases the fined undertakings coordinated the terms of the offers submitted in public procurement proceedings. 3 decisions concerned the market for the supply of fruit, vegetables and canned food.

It is worth noting that the authority decided to close proceedings in one case due to lack of evidence of coordination between the undertakings. The authority found that in a number of procurement proceedings one party would fail to complete its incomplete bid if the next best offer was that of the other party. This, however, could be explained by the nature of the relevant market. In PCA's view these circumstances alone were not sufficient to find an infringement of competition law.

The PCA also fined Brother, a printer manufacturer, for fixing minimum resale prices with its distributors.

ABUSE OF DOMINANT POSITION

Enforcement of the prohibition of abuse of dominance was even more limited last year than in 2018. With the exception of a PLN 2,000 fine for failing to provide information by a customer (SURFACE ALU-TECH sp. z o.o.) of an undertaking suspected of abusing its dominance, the PCA issued no decisions concerning this type of infringement.

MERGER CONTROL

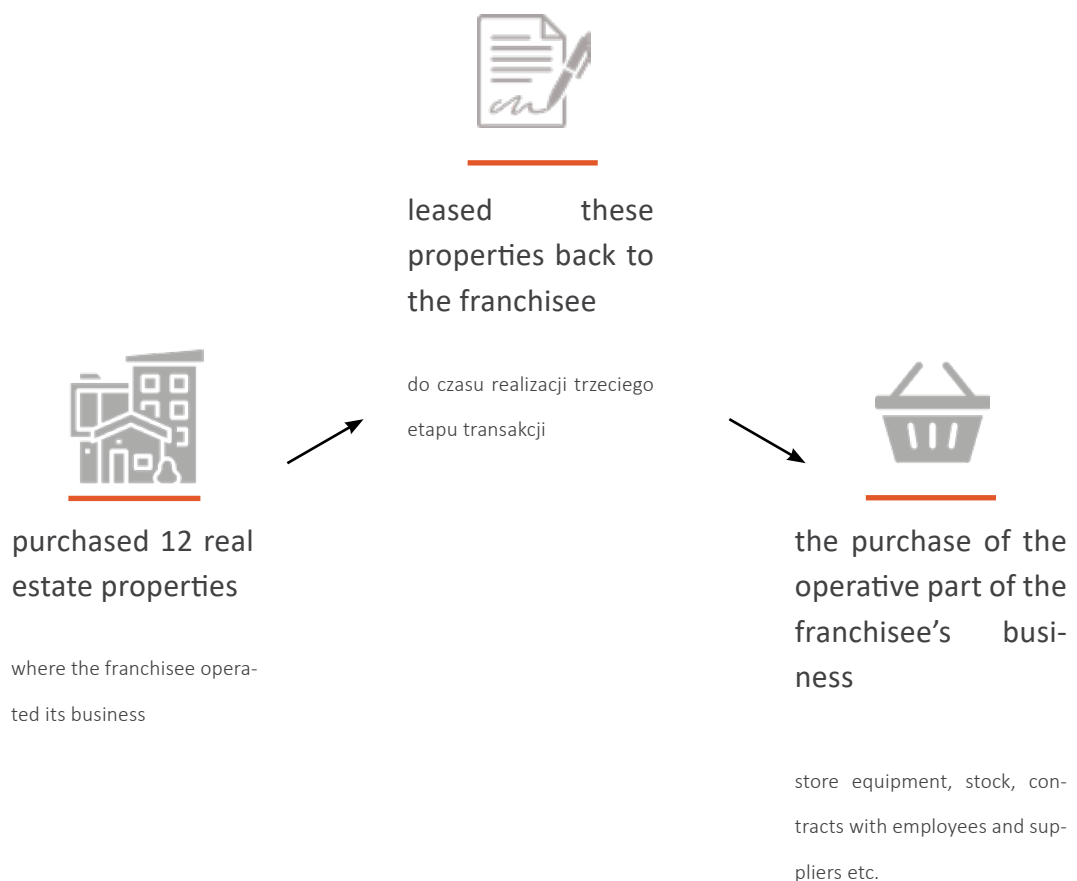
Last year the PCA issued 274 merger control decisions. According to publicly available information, none of the notified transactions were blocked, although the authority carried out in-depth market investigation in no less than 10 cases. In 6 of these cases the PCA granted the clearance on condition that part of the undertaking (either the acquirer or the target) be sold. Typically this would consist of selling particular outlets such as petrol stations (BP/Arge), pharmacies (Panathea/Dolnośląska Grupa Apteeczna, DOZ/Medix) or a cinema (Multikino/ Cinema 3D).



274
merger control
decisions

Since 2017 the PCA has, similarly to its European counterparts, eagerly sanctioned gun-jumping and this trend continued throughout 2019. Last year the PCA imposed a PLN 100,000 fine on the supermarket chain Dino for implementing a concentration without the necessary clearance. The decision concerned a three-stage transaction between Dino and its franchisee. Dino (i) purchased 12 real estate properties where the franchisee operated its business and then (ii) leased these properties back to the franchisee until (iii) the purchase of the operative part of the franchisee’s business (store equipment, stock, contracts with employees and suppliers etc.). Dino notified the transaction only after signing the lease agreement (the second phase). In addition, the franchise agreement allowed the supermarket chain to influence the resale prices as well as the terms of delivery and sale. On that basis the PCA found that Dino had gained control over the franchisee’s stores without the necessary clearance. The decision sent a clear signal that multi-phase transactions must be notified before the implementation of the first stage.

Three-stage transaction between Dino and its franchisee



Another company fined for gun-jumping was Polska Żegluga Morska Przedsiębiorstwo Państwowe (PŻM). The administrator of PŻM was nominated president and sole member of the board of Fundusz Rozwoju Spółek (FRS). This amounted to acquiring control without clearance and resulted in a penalty of PLN 45,000.

Meanwhile the very first gun-jumping decision was annulled by the competition court. The 2017 decision concerned an acquisition of control by Bać-Pol over Klementynka, a chain of warehouses. In its judgment dated 22.10.2019 (XVII AmA 49/17) the court found that the PCA had failed to prove the amount of turnover which was generated by the properties acquired by the buyer.

INSPECTIONS

The number of inspections in 2019 was as high as the year before. PCA officials conducted dawn raids in undertakings from a variety of sectors: IT, automobile, cosmetics, office equipment, cables and wires. The inspections were usually carried out as part of investigations into alleged price fixing and market sharing.

The frequent use of dawn raids in the recent years has sparked a need for clarifying certain practical aspects of inspections and controls. The PCA itself recognised this need by publishing on its website “Guidelines for undertakings – PCA inspections”. Unfortunately, the document does not go beyond reciting the legal principles in a more accessible manner, without illuminating the subject any further.

JUDICIAL REVIEW OF PCA DECISIONS – SELECTED TOPICS

In 2011 the PCA imposed **finer in excess of PLN 100m** on four mobile phone operators for allegedly participating in an anticompetitive agreement (decision DOK-8/2011). The decision, as well as the judgment of the competition court (which annulled the decision – judgment XVII AmA 112/12) were widely debated, including by the authority itself (which publicly commented on the judgment and announced an appeal).

The case, which was both significant and interesting, was eventually resolved in 2019 when the Supreme Court (in its October judgment – I NSK 58/18) agreed with the operators and refused the cassation complaint of the authority. The courts had found that there was no coordination between the undertakings: the market conditions resulted from the parties' individual decisions which were justified by the macroeconomic and market context as well as the profitability forecasts.

Insufficient evidence also led to the annulment of another decision of the PCA. The 2016 decision concerned fixing minimum resale prices by a supplier of hygiene products, cleaning cloths and paper. **In its judgment of 2.12.2019 (XVII AmA 23/17) the competition court ruled that a contract clause requiring customers to report the rebates they grant was not enough to establish the alleged practice.** The court further ruled that the PCA should always define the relevant market and consider the actual and potential effects on competition, whether or not the agreement in question restricts competition by object or by effect.

The implication [of the judgment in the mobile phone operators case] is that any allegation of an anticompetitive agreement must be based on solid evidence and the market effects must clearly result from the coordination between undertakings.

Last but not least, 2019 brought the resolution of a widely discussed SPHINX case. In 2018 the Court of Appeal had ruled that setting prices for franchisees of a national restaurant chain was not justified (the undertaking had failed to prove that the conditions for an individual exemption were satisfied) but radically decreased the fine from over PLN 460,000 to only PLN 50,000 due to the limited effect of the practice. The Supreme Court upheld the appellate judgment (I NSK 89/18).

Imposing any fine should be guided above all else by the principle of proportionality (article 31(1) of the Polish Constitution), i.e. the fine must be proportionate to the type of the practice and the harm it caused as well as its effects. Supreme Court (I NSK 7/18)

2019 also brought a judgment addressing in detail the question of the appropriate level of the fines imposed by the authority. The Supreme Court (I NSK 7/18) ruled, among else, that providing information and documents upon the PCA's request cannot be separately rewarded as "cooperation with the authority".

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Protecting consumers A.D. 2019

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In 2019 the PCA issued 69 decisions concerning the prohibition of infringing collective consumer interests (article 24 of the Polish Act on competition and consumer protection).

The authority's decisions most commonly concerned infringements of collective consumer interests (CCI) which violated the Act on preventing unfair market practices. Many decisions also concerned infringements of the Act on consumer credit, the Act on consumer rights, the Telecommunications Law, the Act on providing services by electronic means, the Act on addressing complaints by entities operating of the financial market and on the Financial Ombudsman, Acts about compulsory insurance, Insurance Guarantee Fund and the Polish Office of Insurers, and the act on the protection of the rights of a purchaser of a dwelling or a single family home.

Decisions of the PCA in cases concerning infringement of CCI **2019**



19 decisions

finding an infringement of collective consumer interest (including 12 that were immediately enforceable)



32 decisions

finding an infringement of CCI and a concluding that the practice had ceased



69 decisions

concerning CCI issued in 2019*



17 decisions

commitment decisions



1 decisions

decision closing proceedings

* according to the PCA's decisions data base, consulted on 29.3.2020 at www.uokik.gov.pl

In 2019 the PCA issued a number of decisions concerning sales presentations which infringed consumer rights. For example, invitations to such presentations (be it by phone, text or mail) would not state the events' true purpose while at the same time suggesting that their aim is to carry out medical check-ups. In other cases consumers would be misled as to the price of the product and made believe that the products on sale were available at a discounted rate. Two of the PCA decisions concerned MLM schemes (decision RGD-8/2019 (CL Singapur) and DOZIK-12/2019 (Lyoness Europe AG)).

Infringements of collective consumer interests were most commonly found in the services sector, in particular in financial services (consumer credit and loans) and e-commerce.

The highest fines imposed for infringing CCI were imposed on Polkomtel (in one decision, totalling PLN50 634 687) for reserving the right to charge additional fees for streaming data and charging these additional fees to consumers.

In 22 decisions where an infringement of collective consumer interests was found the PCA did not impose a financial penalty. With few exceptions, the authority obliged undertakings to remove any continuing effects of the infringement. These obligations would usually entail a publication of a statement on the company website and sending to consumers letters with information required by the PCA. In four decisions the authority obliged the undertakings to compensate the consumers (decisions RKR-2/2019 (Nowa Telefonía), DOZIK-3/2019 (Netia), RBG - 4/2019 (Bank BGŻ BNP Paribas S.A), RBG-1/2019 (Vectra)).

The number of decisions addressing infringements of collective consumer interests issued in 2019 (especially when compared to 2018, when only 48 decisions were issued) as well as the spectacular fines imposed for anti-consumer practices demonstrates the PCA's heightened scrutiny in this area.

Highest fines imposed for CCI infringements in 2019

50,634,687 PLN
 (Polkomtel)

49,745,460 PLN
 (Yetico)

34,918,515 PLN
 (Cyfrowy Polsat)

3,936,270 PLN
 (Exitó)

2,881,070 PLN
 (BNP Paribas)

It is very likely that the PCA will continue to scrutinise the financial services sector in the near future – the decision in the case of IdeaBank in 2020 could be a teaser of what is to come. In future consumer credit cases the PCA will undoubtedly rely on the the guidance of the Court of Justice set out in judgment C-383/18 Lexitor.

The Court of Justice judgment dated 11.09.2019 in case C-383/18 Lexitor sp. z o.o. against Spółdzielcza Kasa Oszczędnościowo-Kredytowa im. Franciszka Stefczyka, Santander Consumer Bank S.A., mBank S.A.

“So far as concerns the ‘total cost of the credit’, Article 3(g) of that directive defines it as all the costs, including interest, commissions, taxes and any other kind of fees which the consumer is required to pay in connection with the credit agreement and which are known to the creditor, except for notarial costs. That definition does not therefore contain any restriction relating to the duration of the credit agreement at issue.”

“(…) the effectiveness of the right of the consumer to a reduction in the total cost of the credit would be reduced if the reduction of the credit could be limited to the taking into account of only those costs presented by the creditor as dependent on the duration of the contract, given that, as was noted by the Advocate General in point 54 of his Opinion, the costs and the breakdown thereof are determined unilaterally by the bank and the charging of fees may include a certain profit margin.”

I expect that financial institutions will proportionally, on a linear basis, settle all fees paid by the client who has repaid earlier the consumer loan or credit.”

Prezes UOKiK, Tomasz Chrósty, 2.03.2020 r.
source: www.uokik.gov.pl

BLACKLISTED CONTRACT CLAUSES

2019 saw **18 decisions** blacklisting contract clauses, which is 10 more than the year before. In 2 cases the decisions imposed commitments without a fine.

In a vast majority of cases the proceedings ended with a fine. Whenever the PCA imposed a financial penalty, it also required the addressees to remove any continuing effects of the infringement.

The highest fine in relation to a blacklisted contract clause was imposed on UPC Polska sp. z o.o. (RBG-10/2019) and it exceeded PLN 33m. UPC Polska was also required to remove any ongoing effects of the infringement, which included for example repaying any charges that had been unfairly paid by consumers.

The second highest fine in this category of infringements was imposed in a decision issued in late 2019. The PCA objected to contract terms which set the currency exchange rates used for calculating credit payments. The fine imposed on Getin Noble Bank Spółka Akcyjna amounted to more than PLN 13m. A similar decision, also concerning the method for determining the currency exchange rates, resulted in a fine of PLN7m for Deutsche Bank Polska. Thus, the PCA kept the financial sector under a close scrutiny, as was the case in 2018. According to the information published on the PCA's website, investigations are ongoing against no less than seven entities operating on the financial market.

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