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Information sharing in the case law of the President of the Polish Office of Competition and Consumer Protection – *the role of trade associations on the special example of the cement cartel decision*

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Abstract:

Present paper examines the case-law of the President of the Polish Office of Competition and Consumer Protection (UOKiK) with respect to the information sharing through trade associations in Poland. It is divided into four main parts. First part offers preliminary remarks on the concepts of information sharing and trade associations themselves. Second part is devoted to the case-law of the President of the UOKiK wherein information sharing within trade associations was perceived solely as an auxiliary tool facilitating/enabling implementation of anticompetitive practices. Third part of the paper focuses on the exchange of confidential commercial information as a separate infringement of the antimonopoly law. The findings of this part are based on the analysis of the recent decision of the President of the UOKiK in the cement cartel case which resulted in the imposition of the highest fines in the twenty years history of the Office. Finally, the last part contains concluding remarks, as well as some *de lege ferenda* suggestions.

If anyone actually knew everything that economic theory designated as data, competition would indeed be a highly wasteful method of securing adjustment to these facts.

F.A. Hayek, *Competition as a Discovery Procedure,*1968.

1. Introduction

1. It is a truism to say that information, *sensu largo*, is of the utmost importance for the functioning of the undertakings on the market. Information on the market may be beneficial to all competitors, consumers and thus the competitive process[1]. It is also apparent that existence and exchange of information increases transparency of the market.

2. A clear distinction needs to be made between the issues of market transparency for consumers and market transparency for undertakings. Market transparency for consumers is essential for having competition on a market. Absent consumers' possibility to make informed price comparison undertakings could essentially act as monopolists even in the markets with many professional participants[2].

3. Market transparency, due to information exchange between competitors, limited to the competitors, or some competitors might also adversely affect the competitive process. The increased level of transparency, and thus reduced 'discovery' or 'surprise' effect between competitors restricts *internal* competition between the participants of the exchange, as well as *external* competition between participants and non-participants to the exchange[3], when raising information asymmetry and thus barriers to entry.

4. Therefore, competition law rules on the anticompetitive agreements might be applied to the practices of information sharing by the undertakings. Article 6(1) of the Polish Act of 16 February 2007 on Competition and Consumer Protection[4] (hereinafter also referred to as Antimonopoly Act), the provisions of which are patterned on these of Article 101 of the Treaty on the functioning of the European Union[5], prohibits agreements which have as their object or effect elimination, restriction or any other infringement of competition in the relevant market. Upon a broad legal definition of Article 4(1.5) of the Polish Antimonopoly Act, as 'agreements' shall be understood: i) agreements concluded between undertakings, between associations thereof and between undertakings and their associations, or certain provisions of such agreements, ii) concerted practices undertaken in any form by two or more undertakings or associations thereof, iii) resolutions or other acts of associations of undertakings or their statutory organs.

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[1] Whish R., *Competition Law*, Oxford University Press 2009, p. 525.
[2] Kühn K.U., Vives, X., *Information Exchanges Among Firms and their Impact on Competition*, p. 92.
[3] Capobianco A., *Information Exchange under EC Competition Law*, Common Market Law Review, N. 41, p. 1252.
[4] O.J. 2007, Nr 50, Pos. 331, with changes.
[5] O.J. 9.5.2008, C 115/47.

5. Information exchange might occur in a context of other anticompetitive practices, as a mean of their preparation or implementation, it might also constitute an infringement in itself, when reducing or removing uncertainty between competitors so that competition is restricted.

6. As a general rule confirmed by the recent case-law of the President of the UOKiK[6], based on the case-law of the Court of Justice of the European Union, agreements on the exchange of information are incompatible with the rules of competition if they reduce or remove the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted[7].

7. Information sharing agreements perceived as a stand-alone competition law infringements usually demand effects-based analyses[8], to be pursued by the antimonopoly authorities *in casu;* on a case-by-case basis[9]. Under such analysis (i) the economic conditions of the relevant market, (ii) the characteristics of the system of the exchange of the information, as well as (iii) the types of information exchanged need to be scrutinized[10].

8. There are different channels by which information may be exchanged between the undertakings. Direct contacts and meetings constitute one possible mean of shearing information[11]. Communications may also take place within organized structures and institutions[12]. Similarly, trade association, industry chambers and professional self-governments, especially when granting competitors opportunities to meet repeatedly, can contribute to the contacts taking place under their auspices spilling over into illegal anticompetitive activities[13]. It was observed that information sharing agreements usually occur within the institutional form of trade associations[14].

9. What is more, it shall be also noted that dissemination of information by independent third parties (consultancy, law firms) might also considerably influence the transparency of the market. However, currently it seems that nor present European, nor Polish regulations offer

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[6] See: Decision of the President of the UOKiK, 8 December 2009, Ref. Nr DOK-7/2009, par. 490. Compare: Subsection 3 here-below.

[7] ECJ, 28 May 1998, *John Deere Ltd v. Commission*, C-7/95, para: 90 and ECJ, 2 October 2003, *Thyssen Stahl AG v. Commission*, C-194/99, para: 81, as well as ECJ, 23 November 2006, *Asnef-Equifax v. Ausbanc*, C-238/05, para: 51.

[8] Whish R., *op. cit.*, p. 526.

[9] *Asnef-Equifax v Ausbanc* , C-238/05, para 54.

[10] Whish R., *op. cit.*, p. 527-530.

[11] 24.10.1991, *Rhône-Poulenc SA v. Commission*, T-1/89, para: 102.

[12] Such as it was the case of e.g. *Poutrelles Committee* or *Walzstahl-Vereinigung*. See: European Commission, 16 February 1994, *94/215*/ECSC, CFI, 11 March 1999, T-134/94.

[13] For the European case-law in this respect see e.g.: Bissocoli E. F., *Trade Associations and* Information Exchange *under US Antitrust and EC Competition Law*, World Competition, 23(1), p. 79-106 and references given therein. For the Polish case-law see Subsection 2 here-below.

[14] Kühn K.U., Vives, X., *op. cit.*, p. 41. See also examples of the U.S. and U.K. case-law given therein at p. 59-73.

clear basis for challenging truly independent activities of genuinely autonomous third parties in this respect[15].

10. Trade associations play a crucial role as forums for discussion of the issues of common interest for the representatives of many industries, benefiting their members when increasing their effectiveness, and also triggering efficiency of the market[16]. As a general rule, sharing of information constitutes an emanation *per excellence* of their statutory functions.

11. Nevertheless, trade associations may be also directly or indirectly involved in the restraints of competition[17]. Next to exchanging opinions and experiences, information sharing within trade associations may raise antitrust concerns. It is worth noting that in case of information sharing within trade associations, due to the synergy effect of membership of certain undertakings in the trade association and additionally their participation in information sharing, external competition between members and non-members and thus participants and non-participants of the information exchange seems to be even more likely to be restricted. Accordingly, such practices receive constantly growing attention from the competition authorities.

12. Polish Antimonopoly Act in Article 4(1.2) advances a broad legal definition of "associations of undertakings" as encompassing chambers, associations and other organizations associating undertakings, as well as associations of such organizations. Hereinafter we also use the terms association, as well as trade association in this broad meaning.

13. We have chosen to examine the case-law of the President of the UOKiK related to different forms of participation of trade associations in information exchange which was examined as a tool supporting other directly anticompetitive practices, as well as the recent decision of the President of the Office in which information sharing (*inter alia* within a trade association) has been for the first time declared infringing itself provisions of the Polish Antimonopoly Act. We do not at length discuss the issue of liability of trade associations.

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[15] However, potential anticompetitive character of such activities could largely depend on the degree of the involvement of the competitors therein and their liability could be based on the similar preconditions as this of e.g. trade associations. Compare: Capobianco A., *op. cit.*, p. 1261-1262.

[16] It is worth noting that different cooperatives and trade groups can be traced back to the merchant guilds in the middle ages, ever since they have contributed to the development of many economies. See: OECD, Competition Committee, *Trade Associations Policy Roundtable, Background Note by the Secretariat,* DAF/COMP(2007)45, p. 17 and references given therein.

[17] It is also worth remembering that the etymology itself of the word 'antitrust' reflects the fact that many of the first competition laws were enacted in reaction to different industry-wide associating activities and forms of cooperation, such as combinations and trusts. See: *ibidem* and references given therein.

2. Information exchange with participation of trade association as a tool supporting anticompetitive practices

2.1. General remarks

14. The case-law of the President of the UOKiK contains examples of different anticompetitive practices which were supported by the information exchange between undertakings taking place with participation and/or via intermediary of trade associations. Nevertheless, it was not until the recent decision of the President of the UOKiK issued in the cement cartel case when information exchange *inter alia* within a trade association was qualified as an infringement of antitrust rules on its own.

15. Upon the case-law of the President of the UOKiK the following three patterns of the anticompetitive practices, mirroring different roles of trade associations with respect to their engagement in the infringement, may be identified:

- the practices pursued on the initiative of an association, which played the role of an initiator, or a leader,
- the practices with respect to which an association was only an executor of a strategy of associated entrepreneurs, and could have been established mainly for this reason,
- the practices which consisted in the participation of the associations in broader agreements with other associations or other undertakings[18].

2.2. Association as an initiator or a leader of the anticompetitive practices

16. The first pattern often concerns the markets where a larger number of undertakings exist, typically having each quite limited market power and/or where there exist the associations with a well established position, often finding their foundation directly in legal regulations or in traditionally important public policies, such as the associations constituting professional self-governments. The pattern is often pursued at the local level, where many associations act

[18] See: OECD, Competition Committee, *Trade Associations Policy Roundtable, Contribution of Poland,* DAF/COMP(2007)45, p. 177-187.

independently, as well as on the markets for services related to the so-called liberal professions[19].

17. In the decision of 29 November 1999, the President of the Polish Office of Competition and Consumer Protection fined the participants of so-called *Lower-Silesian transportation cartel* who were jointly fixing prices of regular fare and reduced fare bus tickets for the national regular and express lines on the local Lower-Silesian market for intercity bus communication. The combined market shares of the undertakings amounted to 90%.

18. The President of the UOKiK established that upon initiative of the National Chamber for Motor Vehicle Transportation and Shipments, Branch Office in Wrocław, the directors of the undertakings met and exchanged information on the price-lists to be implemented. The Antimonopoly Court in its judgment issued in the appeal against said decision underlined the role of the Chamber absence whose initiative the agreement would not have taken place and who played the role of its moderator[20]. However, the Chamber was not found liable of the infringement.

19. It is worth noting that the agreement was concluded by the undertakings following the liberalization of the prices of bus tickets for express (as of 1 February 1995) and regular bus lines (as of 1 January 1999), which were previously centrally determined by the Ministry of Transportation. Therefore, said practice could result in annihilating the practical effects of the liberalization reform on the relevant geographical market.

20. In the appeal against the decision the undertakings claimed *inter alia* that no antitrust liability can be found as their conduct was determined by lawful public measures, i.e. that they were compelled by the provisions of Article 11(1) the Act of 15 November 1984 Transportation Law[21] to render public the information on prices they charge (so called state action defense). This defense was not sustained by the Court, which underlined the difference between making public the information on the prices that had already been implemented and

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[19] See: *ibidem.* For the examples of characteristics of the markets related to the services of architects and civil engineers see: recent *Report of the President of the UOKiK on the competition on the national market for professional services – architect and civil engineers* (Ref. Nr DAR-401-02/06/NS). See also decision of the President of the UOKiK concerning price fixing by the National Chamber of Notaries (Ref Nr DDF-31/2002) whose code of conduct provided that "attracting clients with lower rates" than the maximum ones enlisted by the Regulation of the Ministry of Justice, establishing maximum rates for the services of notaries public, constituted an instance of "unfair competition" and subjected it to disciplinary measures. The Chamber was found liable. See also decisions concerning chambers of veterinarians (Ref. Nr.: RKR – 47/2004, RLU 10/04, RŁO 9/2004, RTK-67/2004, RWA-20/2005, RWR 52/2005, RWR 51/2005 and pharmacists (Ref. Nr RPZ 36/2005), the chambers were found liable. None of these decisions concerned exchange of information as a separate infringement of the competition law.

[20] Judgment of the Antimonopoly Court of 7 February 2001, Ref. Nr XVII Ama 25/00, p.7.

[21] O.J. 2000, Nr 50, Pos. 601 with changes.

exchanging information in order to jointly fix prices. The information exchange has not been examined as a separate infringement of the provisions of the Antimonopoly Act.

2.3. Association as an executor of a strategy of associated entrepreneurs

21. The practices of the second pattern are often encountered in the markets where there is a relatively small number of undertakings, each with relatively high market power. The role of a trade association in the anticompetitive infringement on the markets of this kind may be entirely shaped by the competitors and predominated by their policy. Therefore, members of the association shall not escape antitrust enforcement by acting through the intermediary thereof, its role being purely instrumental.

22. In the decision of 6 April 1992 the President of the Polish Office of Competition and Consumer Protection found that thirty two sugar refineries acting on the national market participated in the anticompetitive agreement consisting in fixing basic prices for sugar[22]. The communications between the undertakings were facilitated by the National Council of Sugar Refineries, wherein sugar refineries were represented[23]. The information exchanged between the undertakings was not examined as a separate infringement of the provisions of the Antimonopoly Act. The decision was upheld by the Antimonopoly Court in the judgment of 1 March 1993.

23. The practices described in the recent President of the UOKiK's decision issued in the cement cartel case also represent the second pattern[24].

2.4. Association directly participating in anticompetitive practices together with other associations or other undertakings

24. The third of the mentioned patterns concerns active cooperation of associations between themselves or with other undertakings.

25. Anticompetitive agreements of this kind might be concluded due to specific market structures characteristics. The decisions of the President of the Polish Office of Competition and Consumer Protection issued in cases of taxi corporations constitute an exemplification of this pattern. In the most recent decision of 26 march 2010, the President of the Office fined

[22] Ref. Nr DO-I-500/26/91.
[23] See: judgment of the Antimonopoly Court of 1 March 1993, Ref. Nr Amr 37/92.
[24] Decision Ref. Nr DOK-7/2009. See: Subsection 3 here-below.

three taxi corporations for fixing prices on the local market for taxi transportation in Gdansk[25]. The corporations were found liable. The information exchanged between the associations was not examined as a separate infringement of the provisions of the Antimonopoly Act.

26. Such agreements might be also concluded by local trade associations with the aim of increasing the territorial scope of particular anticompetitive practices, already pursued locally, and thus ensuring their greater stability and reducing the risk of competitive entry of the undertakings acting in other parts of the country.

27. In the decision of 7 June 2006 the President of the Office found that seven tax and financial advisers' associations[26] concluded an agreement restricting competition on the national market for tax advisory services, consisting in direct or indirect fixing of prices by publishing price lists for tax advisory services in the monthly magazine „Tax Advisers Forum". In the course of the proceedings it was established that in the said magazine the price lists for tax advisory services were published twice (in March 2002 and February 2003). The lists contained *inter alia* suggested minimum prices. The price list of 2002 was elaborated on the basis of the information on the prices charged by the individual tax advisers being members of the Consultative Council of the magazine (and at the same time being members of the local tax advisers' associations). The price list of 2003 was based on the amendments to the list of 2002 sent via e-mails by the correspondents of the magazine. It was also proved that during the meetings of the Consultative Council of the „Tax Advisers Forum" information regarding the prices used by individual tax advisers was exchanged. The associations were found liable of the infringement. The information exchanged between the associations was not examined as a separate infringement of the provisions of the Antimonopoly Act.

3. Information exchange *inter alia* with participation of trade association as an anticompetitive practice – cement cartel decision

3.1. General remarks

28. In the decision of 8 December 2009, the President of the Polish Office of Competition and Consumer Protection for the first time examined exchange of information directly by the

[25] Ref. Nr RGD-5/2010.
[26] Ref. Nr RKT-31/2006.

competitors, as well as via the intermediary of trade association and a law firm as a separate infringement of the competition law (next to two other charges of price-fixing and market sharing).

29. Following multiple signals from the market and the results of the market analyses[27], on 26 April 2006, the President of the Office instituted explanatory proceedings[28] in order to examine an alleged anticompetitive agreement concluded by the producers of grey cement. Within the proceedings between May and June 2006, inspections with search were conducted in the premises of Górażdże Cement S.A., Lafarge Cement S.A., Grupa Ożarów S.A.[29], Cemex Polska Sp. z o.o., Cementownia Nowiny Sp. z o.o., Cementownia Warta S.A., Cementownia Nowa Huta S.A., Cementownia Odra S.A., as well as of the Association of Cement Producers and Industrial Property Law Firm – Optimas. Two leniency applications were filed during the proceedings. On 21 June 2006, Lafarge Cement S.A. filed the application for reduction of fine, amended on 22 June 2006 with the application for immunity from fine. On 23 June 2006, Górażdże Cement S.A. filed its leniency application.

30. The antimonopoly proceedings were instituted on the 28 December 2006. As a result thereof, in the decision of 8 December 2009[30] the President of the Office established that 7 grey cement manufacturers, namely:

- Lafarge Cement S.A.,
- Górażdże Cement S.A.,
- Grupa Ożarów S.A.,
- Cemex Polska Sp. z o.o.,
- Dyckerhoff Polska Sp. z o.o.,
- Cementownia Warta S.A.,
- Cementownia Odra S.A.,

the combined market share of which amounted to almost 100 % of the Polish market for production and sale of grey cement[31], concluded anticompetitive agreement consisting in (i) price-fixing, (ii) market sharing and (iii) exchange of confidential commercial information, at least as of 1998. The President of the Office found also that Cementownia Nowa Huta S.A., Ekocem Sp. z o.o. and Cementownia Rejowiec S.A. have not participated in said

27 Ref. Nr DAR-4001/9/03/DK.
28 Ref. Nr DOK1-400/6/06/KR.
29 On the basis of Article 101(1.3) of the Antimonopoly Act of 15 December 2000, Grupa Ożarów S.A. was fined for non-cooperation during said inspection consisting in changing the content of an inspected document (See: Decision of 19 April 2007, Ref. Nr DOK-48/07).
30 Decision Ref. Nr DOK-7/2009.
31 See: Decision Ref. Nr DOK-7/2009, point: 405.

infringements. The decision was issued on the basis of the provisions of both Polish Antimonopoly Act (the previously in force Act of 15 December 2000 on Competition and Consumer Protection) as well as the Treaty.

31. As it was already underlined, when answering the question whether information exchange can be anticompetitive in itself a detailed effects-based analysis is usually required. The assessment must consider the potential effects that the information exchange could have in the market compared to the competitive situation occurring in the absence of the information sharing agreement[32]. Typically three groups of relevant factors need to be analyzed, i.e.: (i) the economic conditions of the relevant market, (ii) the characteristics of the system of exchange of the information, (iii) as well as the type of information exchanged. When establishing the infringement consisting in exchange of confidential commercial information the President of the Office examined these factors respectively, taking account of the case law of the European Commission and the Court of Justice of the European Union.

3.2. Characteristics of the grey cement market in Poland

32. The characteristics of the relevant market on which the information exchange took place were considered by the President of the UOKiK. Accordingly, within the assessment pursued *in concreto*, first the degree of concentration and the structure of the supply and demand sides on the market were examined. The competition restricting effects are more likely to occur in the oligopolistic markets, where the products are homogenous, than in the markets of more atomistic structure, where the products are differentiated[33]. The degree of transparency on this kind of markets is usually already relatively high even prior to information exchange.

33. Although numerous different kinds of grey cement exist, which mainly differ in their properties, depending on proportion of the ingredients used for their production, or according to the process of the production itself, the grey cement should be qualified as homogeneous product, which does not require a narrower segmentation[34]. This is primarily due to the fact that the same intermediate, i.e. clinker is used for the production of different kinds of grey cement. Accordingly, price differences between various types of the cement mostly depend on

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[32] Compare: European Commission, *Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services,* O.J. 2007, C 215, p. 3-15, para: 45, see also: ECJ, 28 May 1998, *John Deere Ltd v. Commission*, C-7/95, para: 75-77.

[33] See: Decision of the European Commission, 17 February 1992, *UK Agricultural Tractor Registration Exchange*, 92/157/CEE. See also Whish R., *op. cit.*, p. 527.

[34] Compare: Commission Decision of 30 November 1994 (C.33.126 and C.33.322), and 11 November 1998 (IV/M.1157 – Skanska/Scancem).

the content of the clinker – being also its most expensive ingredient. Even though the ingredients used for the production of its various kinds by different manufacturers may vary in quality depending on their source of origin, the final products must meet the same standards. Price and quality competition are thus of importance on this market. What is more, as a general rule, different types of grey cement may be used interchangeably. For these reasons, the inter-brands competition does not have a significant meaning with respect to grey cement. Finally there are no products which could be perceived as direct substitutes for grey cement[35].

34. It shall be noted that the historical circumstances and conditions of the functioning of a given sector in the past might certainly influence its proneness to anticompetitive exchange of information between competitors active thereon. Similarly, these factors might affect the level of transparency on the markets, by increasing it, still prior to the exchange of information taking place. Especially the conditions of the functioning of some (strategic) sectors in the centrally-planned economies might have a bearing on their development after the transition into the market economies.

35. Accordingly, the political and economic changes of 1989/1990 influenced the nature of cooperation between cement companies in Poland. Prior to the transformation all cement manufacturers were members of *inter alia* Union of Cement Manufacturers, organization which centrally managed all cement companies in Poland. Economic decisions in relation to all member companies were taken by the Union. At that time, there was no competition in the Polish cement industry, neither *de facto*, nor *de iure*. The arrangements between the cement companies concerning production and sales were a common practice and the government was aware of the process[36].

36. In 1990s, the cement sector in Poland changed considerably. In the first years of political transformation, the cement sector underwent privatization and the main international cement manufacturers launched their production on the Polish market. In the early 1990s, at least 21 cement mills functioned on the market. Following the consolidation of the cement sector and transformations within particular groups, as well as consecutive takeovers and restructuring processes, in 2006 at least 13 cement mills remained on the market and one new mill was built[37].

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[35] See: Decision Ref. Nr DOK-7/2009, points: 374-395.
[36] See: Decision Ref. Nr DOK-7/2009, point: 98.
[37] See: Decision Ref. Nr DOK-7/2009, point: 32.

37. Moreover, the transformation also led to decisions being taken to establish a new association bringing together cement manufacturers. Consequently, in 1990, the Association of Cement and Lime Manufacturers was established. Since 2005 cement manufacturers have been the only members of the Association. In June 2005, the Association received its current name: the Association of Cement Manufacturers (hereinafter also referred to as: "the SPC"). Regular members of the association are, as a rule, natural persons, employees of cement manufacturers, while associate members include legal persons - cement manufacturers[38].

38. To sum up, the grey cement market in Poland constitutes a mature, relatively transparent oligopolistic market, with relatively high barriers to entry[39].

3.3. Characteristics of the systems of exchange of information

39. Specific characteristic of the system of exchange of information were envisaged by the President of the UOKiK, i.e. (i) duration of the exchange and frequency of the exchange[40], (ii) availability of the system to third parties[41], (iii) as well as formal organization of the exchange[42].

40. It was established that at least as of 1998, the undertakings restored some of mechanisms that they were familiar with in the period of centrally planned economy, namely agreements consisting in *inter alia* exchange of confidential commercial information.

41. Exchange of information took place via intermediary of (i) the Association of Cement Manufacturers and (ii) the Industrial Property Law Firm *Optimas*, in parallel confidential commercial was also (iii) directly exchanged by the undertakings.

42. The system of exchanging information through the Association of Cement Manufacturers was developed in 1990 when the Association was established and was patterned on this taking place within the Union of Cement Manufacturers.

43. Between 1994 and 2002, the Association collected detailed data on production volume of clinker and cement, total clinker sales, including export and cement sales in Poland and abroad. Throughout the years, the type of the data which was gathered and reported did not change considerably. On this basis SPC elaborated summaries containing data related to individual producers which were subsequently, on a monthly basis, rendered accessible

[38] See: Decision Ref. Nr DOK-7/2009, points: 96-108.
[39] See: Decision Ref. Nr DOK-7/2009, point: 495.
[40] Compare: ECJ, 23 November 2006, *Asnef-Equifax v Ausbanc* , C-238/05, par. 51.
[41] See: i*bidem*, par. 60.
[42] Compare: ECJ, 2 October 2003, *Thyssen Stahl AG v. Commission*, C-194/99, par. 81.

according to the exclusionary disclosure rules[43], i.e. they were distributed amongst the members of the Association only[44].

44. Moreover, in this period, the Association participated in exchange of the information on the basis of non-exclusionary disclosure rules[45]. Accordingly, it elaborated annual summaries of the information received monthly, also containing data related to individual undertakings, which were rendered accessible to third parties. Finally, the SPC issued annual bulletins also containing individual information to which third parties had access.

45. Following decisions issued by the Bundeskartellamt in 2002 concerning the cement cartels in Germany[46], the antitrust compliance of the information sharing system within SPC had been verified and in consequence thereof the system of exchange of information was changed[47].

46. Since January 2003 Industrial Property Law Firm Optimas started collecting data from cement producers and preparing aggregated reports. According to new rules of the exchange system, the data formerly submitted to the SPC is to be reported directly to Optimas which is required to treat this data in a confidential manner and not to make it available to the SPC and its members. On the basis of information received Optimas prepares monthly reports containing aggregated data on *inter alia* total clinker and cement production, total sales and export of clinker and cement per country, etc. The collected data is then submitted in the form of an aggregated report to the SPC, which makes this data available to its members. Since 2005, aggregated monthly reports are available on the SPC's website.

47. After the end of a given year, Optimas prepares annual aggregated statistical bulletins and submits them to the SPC. Moreover, once a year has passed after the end of a given year, Optimas prepares detailed annual statistical bulletins for this year and submits these to the SPC (e.g. the bulletin of 2006 presented the data of 2004). These bulletins present individual data concerning particular undertakings.

48. Throughout the whole period covered by the decision (1998-2008), i.e. both in the period when information was exchanged via intermediary of the SPC, and when the data was collected by Optimas, cement producers also exchanged information concerning their current monthly sales in Poland directly within so-called ”parallel system”.

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[43] Compare: Kühn K.U., Vives, X., *op. cit.*, p. 41.
[44] See: Decision Ref. Nr DOK-7/2009, points: 116-118.
[45] Compare: Kühn K.U., Vives, X., *op. cit.*, p. 41.
[46] See: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2003/2003_07_23.php Compare also: Heitzer B., *Unlawful forms of cooperation – case studies*, presentation given during International Competition Law Forum, Warsaw, April 2009, available at: http://forum.konsumenckieabc.pl/download/presentation_bernhard_heitzer_en.pdf
[47] See: Decision Ref. Nr DOK-7/2009, point: 123.

49. Within the "parallel system", information exchange was mostly based on the telephone conversations, which took place at the beginning of each month. In 2001 and 2002 exchange of information was even more intensive and was related to volumes of sale per each 10 days per month[48]. The contacts between cement manufacturers within this system did not follow any specific pattern. The information was mainly exchanged by telephone, next to e-mail and fax. It also happened that cement manufacturers used special pre-paid mobile phones which they possessed purposely to this end. Moreover, under this system of direct information exchange, cement manufacturers appointed a coordinator of the exchange, who was selected from the staff in charge of data exchange within the undertakings[49]. The undertakings did not prepare any shared chart or data report on the sales of all cement companies. Each undertaking collected and stored the exchanged data individually.

50. It shall be underlined that the information exchanged within this system was not shared with consumers, nor clients of the undertakings, nor with their competitors.

51. Cartels are unstable by nature[50]. This is true even in spite of two robust indirect and direct systems of information exchange being established, as well as other anticompetitive activities pursued jointly by the cartelists in this case. In 2005, the Ministry of Environment introduced the emission of gases trading system. It appeared that the data on cement sales submitted to the Ministry and the data exchanged between cement manufacturers differed. According to the data of the Ministry, cement production in Poland was much bigger than the data reported by cement manufacturers would suggest. Those discrepancies were due to the fact that Cemex Polska Sp. z o.o. deliberately understated its data on volumes of sale in 2001-2005. It was not until 2006 that the undertaking admitted to other cement manufacturers that its sales volume was higher than reported earlier. In 2005, the difference between the actual data and the data that Cemex Polska Sp. z o.o. reported to Optimas and shared directly with other manufacturers was approximately of 0.6 million tonnes of cement annually. The actual size of the cement market in 2005 was 4.6% greater than the data of cement manufacturers would suggest.

3.4. Characteristics of the information exchanged

[48] See: Decision Ref. Nr DOK-7/2009, points: 130-131.
[49] See: Decision Ref. Nr DOK-7/2009, points: 133-135.
[50] Compare: J. Faull, A. Nikpay, *The EC Law of Competition*, Oxford University Press 2007, p. 791.

52. Finally, the type (i.e. subject-matter), the level of aggregation, the level of detail, as well as the age of information which was exchanged was taken under consideration by the President of the UOKiK[51]. As a general rule, exchange of (i) confidential[52], (ii) individual[53], and (iii) current data[54], by the competitors has potentially restrictive effect on the competition, as opposed to exchange of (i) public, (ii) aggregated or statistical, and (iii) historical data.

53. The information shared by the cartelist via intermediary of the Association of Cement Manufacturers, the Industrial Property Law Firm Optimas, as well as within the direct system of exchange constituted a commercially sensitive data, as it *inter alia* concerned the volumes of production and sale. Additionally, especially within information exchange via intermediary of the Association, the data was even further detailed.

54. Data exchanged within the Association, as well as directly between the undertakings concerned individual volumes of production and sale of each undertaking.

55. Moreover, information exchanged within the Association, as well as directly between the undertakings was current and as a rule concerned periods of one month. As it was already underlined, it also happened that competitors exchanged information directly every 10 days.

56. Finally, the data exchanged via intermediary of the Optimas was either current but aggregated, or individual but historical.

3.5. Concluding remarks

57. The President of the UOKiK imposed on the undertakings maximum fines possible - i.e. upon provision of Article 101(1) of the previously in force Antimonopoly Act not exceeding 10% of *the revenue* earned in the accounting year preceding the year of issuance of the decision - totaling PLN 411 million. Lafarge Cement S.A. received a full immunity from fine, and Górażdże Cement S.A. received a reduction of 50%.

58. Since the role of the Association of Cement Manufacturers in the information exchange was solely instrumental and subordinated to the initiative of the undertakings, SPC was not found liable of the infringement.

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[51] See also subsection 3.3 here-above.

[52] See e.g.: European Commission, *Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services*, O.J. 2007, C 215, p. 3-15, para 51.

[53] See e.g.: Decision of the European Commission, 17 February 1992, *UK Agricultural Tractor Registration Exchange*, 92/157/CEE.

[54] See e.g.: *ibidem.*

59. It was also established that information exchange system *via* the intermediary of the Industrial Property Law Firm "Optimas" did not reduce or remove the level of uncertainty between the undertakings and therefore did not constitute breach of competition law.
60. All undertakings fined by the President of the Office filed appeals against the decision. The appellate proceedings are currently ongoing.

4. Conclusions and *de lege ferenda* suggestions

61. The practices of information sharing between undertakings raise different controversies in Europe, as well as in Poland, where many debates are being ignited analyzing such activities from both legal, as well as economic perspective[55]. However, neither one allows to derive a general conclusion on the pro- or anticompetitive nature of exchanging of information, which appear to be to the greatest extent case-specific.
62. There is a growing need for a clear-cut guidance on whether, and under which conditions such practices might constitute an infringement itself of the competition law. Currently, cases with similar facts might actually receive different legal qualifications. Therefore, competition authorities are increasingly offering sophisticated guidance for self-assessment. It is also important that any guidelines, regulations, or case-law in this respect is founded on a sound economic analysis. Similarly, competition authorities when examining such practices shall not limit themselves to a mechanical check-listing, but shall mind all the characteristics of a practice in question and scrutinize its potential effects on the competition on a relevant market.
63. Similarly, an unanimous interpretation of the bearing of fact that an information exchange has been structurally organized with a participation of a trade association on the assessment of the anticompetitive character of a given practice shall be adopted. Currently, opposite trends seem to develop under the European case-law[56]. There is no Polish case-law deciding the issue so far.
64. Due to the same reasons, although not discussed at length here-above the problem of conditions of liability of trade association shall be further scrutinized. This is particularly important for the legal regimes where execution of such liability is patterned upon provisions

[55] Compare: Capobianco A., *op. cit.*, p. 1252.
[56] See: Roques C., *L'échange d'informations en droit communautaire de la concurrence: Degré d'incertitude et jeu répété*, Concurrences 2009, N. 3, p. 8.

of Article 23(4) of Regulation 1/2003[57], providing that when a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine. This is not the case under Polish Antimonopoly Act.

60. To sum up, as opposed to the transparency of the market, legal transparency and certainty is always and without any doubt beneficial for the competitors and the competition. Therefore all competition authorities shall strive to increase the level thereof with respect to this constantly evolving issue of the assessment of exchange of information between undertakings, especially with participation of trade associations.

[57] O.J. 4 January 2003, L1/1.