Volume 4 Issue 3 2017

JCRL

Journal of Corporate Responsibility and Leadership

Corporate Social Responsibility in Management
Theory & Business Practice

Infringements of Competition Rules: An Analysis of Unethical and Illegal Behaviours of Entrepreneurs in Poland

DOI: http://dx.doi.org/10.12775/JCRL.2017.016

Joanna Hernik
The Faculty of Economics, West Pomeranian University of Technology in Szczecin, Poland
e-mail: jhernik@zut.edu.pl

Abstract

Purpose: Certainly, competitiveness and competition are attributed to human nature. But it is no longer certain that this also applies to ethical behaviour and responsibility, although responsible businesses are also those which respect the law. For this reason, many countries established institutions and laws protecting equal opportunities of entrepreneurs on the market. The purpose of this article is to analyse cases of non-compliance with the rules of fair competition, and then to determine characteristics of the analysed cases in terms of a sphere of activity of an entrepreneur, and the nature of violation. In particular, there will be examined agreements restricting competition and abuse of entrepreneur's dominant position. Finally, trends in changes will be identified.

Design/methodology/approach: A critical analysis of literature, an analysis of legal acts, and an analysis of violations of law reports were used. Empirical data about violations were taken from reports of the Office of Competition and Consumer Protection, which aim is to protect competition in Poland. Cases from 2012 and 2015 were taken for analysis (54 in total).

Findings: All the cases from 2012 and 2015 were analysed. Regarding non-competition agreements, only companies were accused (no public institutions). Within three years, the nature of violation changed from imposition of prices to fixing behaviours

of companies in tenders. In case of abuse of entrepreneur's dominant position, the main group of accused organisations were self-governments (communes). Again, within three years the nature of violation changed from imposition of unfavourable contracts to burden of unfair fees. Because of the large number of factors influencing behaviour of entrepreneurs on the market it is impossible to determine rationales of the change, so for that reason only their nature is described. **Research and practical limitations/implications:** Information about violations of law was taken from reports of the Office of Competition and Consumer Protection, and due to the large material range, cases from years 2012 and 2015 were selected for analysis. For more accurate results, a broader scope of research should be included, so this work can be a base for further research. **Originality/value:** The article discusses spheres of business and types of actions that are not in line with fair competition practices. **Paper type:** theoretical with case analysis.

Keywords: ethics, competitiveness, illegal contracts, irresponsible business, dominant position of an entrepreneur.

1. Introduction

Competition has always been connected with business. Problems with adherence to rules of competition are not new, as they were discussed for example in the middle of the 19th century – one can find a strong criticism of the situation in the construction and architecture industry and lack of free competition in London in the 19th century. There were reports that construction contracts were taken over by the same architects who, consequently, blocked young professionals from accessing the market (Austin, 1841). Or, another example can be the problem of banking monopoly and the consequences of introducing competition in the banking system in the Great Britain (The Parliamentary Debates, 1833). From the very beginning, it was obvious that competition is more fundamental than cooperation, but it must be shaped by culture and education (May and Doob, 1937, p. 191).

The free movement of economic forces through the open transfer of capital, goods, people and services is the foundation of the European Union (McGowan, 1996, pp. 13–26). This open transfer has forced the unification of law and the introduction of principles of common, fair competition. McGowan states that the foundations of the EU

competition policy were laid in the 1950s and the early 1960s within the provisions of the Treaty of Rome (1957), establishing the European Economic Community (McGowan, 1996, p. 13). He also underlines that there are currently five areas of the EU competition policy activities: cartels, monopolies and dominance, nationalized industries and public utilities, state aids, mergers. In the 1980s, deregulation, privatisation and liberalization became a new vision of the future, where industrial planning was to be replaced by competitiveness. In 1990, the position of the Competition Commissioner was created, and became the sole merger authority for the European Economic Area.

The literature about competition in the EU very often concerns such problems as rules of competition, which were laid down by Articles 81 to 89 of the EC Treaty, and their adaptation in the member countries (Ellis, 2006, pp. 22–41). All these rules can be divided into five main pillars:

- restrictive agreements and concerted practices;
- abuse of a dominant position;
- merger regulation;
- liberalisation of the monopolistic sectors;
- prohibition of state aid.

Certainly, all publications underline that the competition policy exists to stop companies from behaving in a manner harmful to competition, which is to serve the equal development of the common market (Nugent, 1997, p. 76; Stiglitz, 2004, pp. 78–79). Normalisation of rules might raise some countries' objections, especially if they were stronger in some businesses, and could quickly gain new markets. However, the unification of law had to take place. On the other hand, entrepreneurs do not directly report dissatisfaction from common regulations, but, then again, some of them simply do not respect the rules of fair competition, and of course this could be called irresponsible business.

Research conducted by Hernik and Gębarowski (2011, pp. 147–157) show that only 55% business people in Poland agree that not everything is allowed in business, and some rules must be followed. Since almost half of entrepreneurs believe that they are allowed to do what they want, it must be stated that the competitive economy needs regulations. Legislation has lately become very important also in terms of the common European market, and the need to harmonize the law (Fitzpatrick and Davison, 1997, pp. 179–186).

Due to introduction of legal norms, and thanks to establishment of special institutions (offices), it is possible to state the extent to which

the rules of free competition are observed in a given country. The purpose of this article is to analyse the cases of competition infringement, and then to determine characteristics of the analysed cases in terms of a sphere of activity of an entrepreneur, and the nature of violation. In particular, there will be examined agreements restricting competition and abuse of entrepreneur's dominant position. The starting point for the analysis will be legal acts in force in Poland, followed by breaches of competition rules resolved by the Office of Competition and Consumer Protection.

It should be mentioned that Poland underwent economic transformation after 1989. The introduction of a democratic system, transition from a centrally-controlled economy to a free-market economy, and an adoption of broad reforms, were the driving forces for Poland's new economy. Nowadays, there is a competitive market in the country, and all rules of competition and capitalism can be observed. In Poland, the main act referring to competition is the Law of 16 February 2007 on Competition and Consumer Protection (consolidated text: Journal of Law 2017, item 229). This act is based on the provisions of the Treaty on the Functioning of the European Union and specifies conditions for development and protection of competition, as well as rules of protection of public interest, and interests of entrepreneurs and consumers in the country.

2. Research methodology

The cognitive activities carried out in the presented study included:

- documentary studies on legislation related to competition;
- documentary studies on competition infringement cases in Poland, published on the website of the Office of Competition and Consumer Protection;
- quantitative and qualitative comparative analysis.

The main problem in the research was the selection of cases to be analysed: should they be the cases reported to the office, according to the date of their submission, or cases qualified as violation of law, so according to the date of issue of a decision? In every country, the responsible institution (office) announces sentences with some delay, which depends on complexity of the case. In that situation, the analysis could include all reported cases, including the ones that are not yet

resolved. But then it would not be known whether the allegations were correct and whether we were dealing with a violation of competition rules. Therefore, the only solution was to analyse the sentenced violations of the law, and this approach was applied in this article. To better understand the changes, the cases from 2012 and 2015 (with a three-year break) were included into the analysis.

3. The nature of competition infringement

A free competition system is defined as one in which supply and demand control the market situation freely, without the government's involvement (Cambridge Dictionary, nd). Similarly, the Financial Times Lexicon describes free competition a system in which companies operate without a lot of government control, and prices are determined by supply and demand (Financial Times Lexicon, nd). It should be noticed, however, that anti-competitive behaviour can be observed not only in government control, but also in unfair, or even illegal, behaviours of other companies, or – speaking broadly – market participants. So, now the issues of free competition apply to entrepreneurs, public institutions, as well as local governments and non-governmental organisations.

The European Commission informs that the basic provisions on free competition are contained in the Treaty on the Functioning of the European Union (TFEU). A number of regulations were adopted later, either by the Council or the Commission (EU Competition Law Rules, 2013). However, the main types of practices restricting competition are included in the TFEU, articles 101, 102 and 106 (EU Competition Law Rules, 2013, p. 10,11). These paragraphs indicate that practices which restrict competition can take two forms: 1) the multilateral, i.e. agreements of at least two independent entrepreneurs; 2) the unilateral, which means entrepreneur's abuse of their dominant position in the market.

It should be clarified that an agreement may be understood from the civil law perspective as a written agreement, but also as a 'gentlemen's agreement' (oral, informal one), and exchange of sensitive information from the perspective of a competition process (e.g. confidential information on pricing policy). All such agreements are obviously unlawful.

Regarding Point 1 (multilateral practices), agreements which restrict competition may be horizontal or vertical. The former is concluded between competitors, i.e. entrepreneurs operating on the same level of

turnover, for example producer – producer; whereas vertical agreements are concluded between entrepreneurs operating at different levels of trade, for example manufacturer – retailer. Behaviour that violates competition rules may, in particular, include: common price fixing (price collusion), joint decisions on volume of production or sales, division of the market or groups of consumers between entrepreneurs, entering into tenders with behaviour determined between participants.

Regarding Point 2 (unilateral practices): abuse of dominant position is the behaviour of an entrepreneur with significant market power, leading to distortion of competition in the market. The already mentioned The Law on Competition and Consumer Protection imposes a presumption that an entrepreneur has a dominant position if their market share exceeds 40%. The abuse of a dominant position may, in particular, include: imposing unfair prices (e.g. excessively high or abnormally low), limiting production in order to artificially drive up prices, concluding agreements depending on another transaction, other activities destroying competition, such as dumping. The typical feature of all these practices is that they would not have existed if an entrepreneur did not use (abuse) their market power. The Commission shall ensure application of the provisions of this law and shall, where necessary, address appropriate directives or decisions to the Member States. That is why, on basis of the provisions of the Treaty on European Union (OJ EC 325 of 24 Dec 2002), the law on competition was adopted in Poland (Law of 16 Feb 2007 on Competition and Consumer Protection, consolidated text: Journal of Laws 2017, item 229).

In Poland, the main institution supervising adherence to free competition is the Office of Competition and Consumer Protection, and this institution receives reports on breaches of the competition rules. The President of the Office initiates the proceedings *ex officio* and then announces a decision whether the examined activity violated competition rules. If the free competition laws have been violated, the president decides what the entrepreneur must do: the decision may include cessation of activities, changes in documents (usually in contracts), and financial penalties. According to para 106 of the Law on Competition and Consumer Protection, the president may impose on the entrepreneur a fine up to 10% of a revenue achieved in the financial year preceding the year of imposition of the penalty. It should be emphasized that a fine can be imposed on an entrepreneur regardless of whether they violated the law intentionally or unintentionally. The

fine imposed by the president of the Office should be a repressive act (i.e. to be a punishment for violating the provisions of the Competition and Consumer Protection Law), as well as preventive and disciplinary (i.e. put a stop to similar violations in the future). The President also sets the timeframes during which the entrepreneur must implement changes, e.g. within X months the contract templates must be changed; in addition, the entrepreneur is obliged to submit a report on implementation of accepted commitments within X months from the date of the final decision.

4. Cases of breach of competition – analysis

4.1. Agreements restricting competition

In 2012, the Office of Competition and Consumer Protection issued 21 decisions related to agreements restricting competition. After analysing all decisions, 3 out of 21 proceedings were excluded from the sample. Thus, 18 verdicts were taken into consideration.

In case of agreements restricting competition, 4 kinds of organisations were accused, mostly commercial law entities (limited liability companies, general partnership companies); they accounted for 66.6% of all cases. 5 cases were related to individual entrepreneurs (27.7%) and 3 were related to associations (16.6%). Once case (5.5%) was linked to public institutions (hospitals).

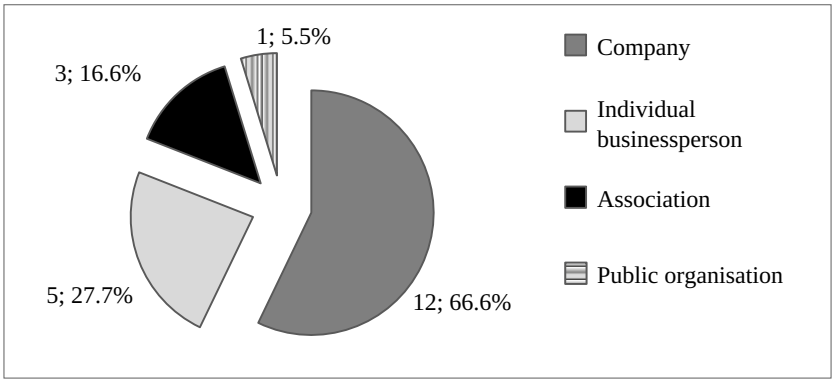

Figure 1. Organisations accused of agreements restricting competition in 2012

Source: own research based on reports of the Office of Competition and Consumer Protection (https://decyzje.uokik.gov.pl).

The accused entities were mainly engaged in wholesale (55.5% of all analysed cases). 4 cases, approx. 22%, were related to services (taxi operations), and other cases were related to production activity, retail sale and public service (healthcare).

The most common violation of law was the imposition of prices in a distribution channel (12 cases; 66.6%). The enforcer was mostly an intermediary (wholesaler), and in one case a producer. The other group of violation of law concerned fixing prices between companies (4 cases; 22.2%), and 2 cases referred to determination of behaviour in a tender (11.1%). In 89% of cases the President of the Office imposed financial penalty on an enterprise; in total, in 2012 entrepreneurs had to pay a sum of EUR 3,877,976.23 (PLN 16,497,298.68).

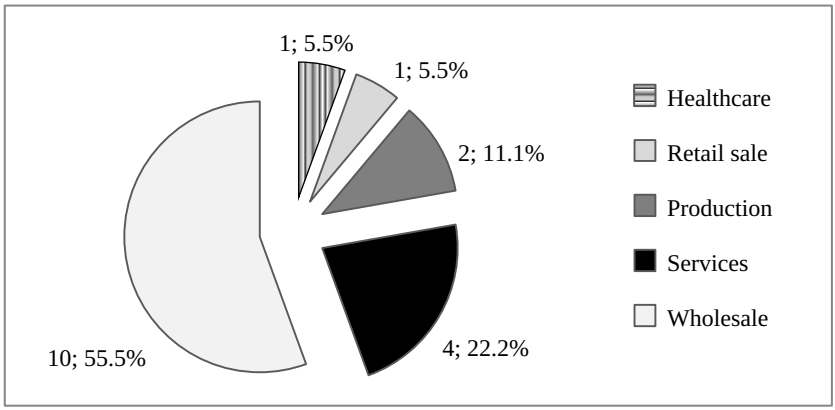

Figure 2. Domains of organisations' activities in case of agreements restricting competition in 2012

Source: own research based on reports of the Office of Competition and Consumer Protection (https://decyzje.uokik.gov.pl).

In 2015, it was noticed that the Office of Competition and Consumer Protection examined 13 cases related to agreements restricting competition. After analysing all decisions, 2 out of 13 proceedings were excluded from the sample. Thus, 11 decisions were taken into consideration. These 11 cases involved: 12 individual business people, 11 companies (limited liability companies, general partnerships) and one professional association. There were no public or religious entities.

The accused entities were mainly engaged in different services (legal, maintenance of green areas, security services, repair of comput-

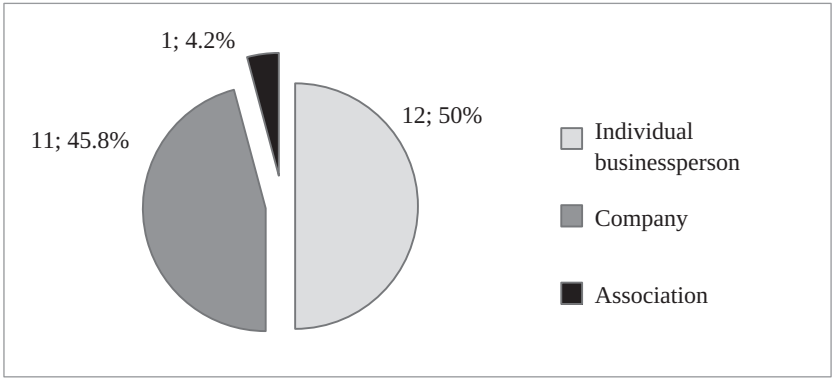

Figure 3. Organisations accused of agreements restricting competition in 2015

Source: own research based on reports of the Office of Competition and Consumer Protection (https://decyzje.uokik.gov.pl).

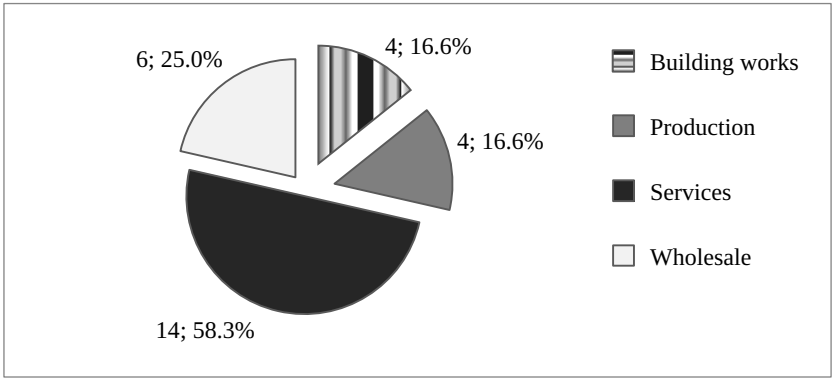

Figure 4. Domain of organisations' activities in case of agreements restricting competition in 2015

Source: own research based on reports of the Office of Competition and Consumer Protection (https://decyzje.uokik.gov.pl).

ers). This activity constituted 58.3% of all cases. Next, companies dealt with wholesale (25%), then production of goods and building works (16.6% each).

The most common violation of law was fixing company behaviours in tenders (8 cases out of 11; 72.7%). In 2 cases, it was limitation of business activities of contractors or competitors, and finally in one case it was a producer imposing prices on a distributor. It is worth noting

that 81.8% cases received a fine. In total, all entities had to pay a sum of PLN 2,981,700.68 of fines (in 2012 it was PLN 16,497,298.68).

4.2. Abuse of entrepreneur's dominant position

In 2012, the Office of Competition and Consumer Protection examined 40 cases concerning the abuse of entrepreneur's dominant position. As 4 proceedings were excluded (the accusation was dismissed four times), 36 cases were analysed (Figure 5).

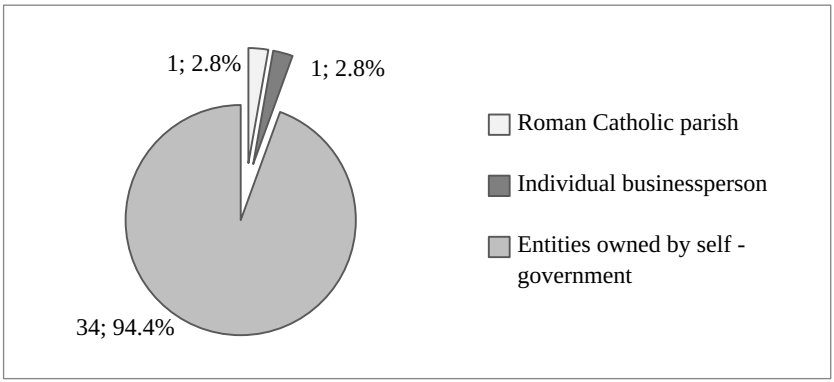

Figure 5. Organisations accused of abuse of entrepreneur's dominant position in 2012

Source: own research based on reports of the Office of Competition and Consumer Protection (https://decyzje.uokik.gov.pl).

Amid the accused entrepreneurs and organisations, there were:

- 1 Roman Catholic parish (2.8%);
- 1 individual businessperson conducting business activity (2.8%);
- 34 self-government entities belonging to communes (limited liability companies) or commune itself (94.4%).

The results show that among the analysed cases, the infringement of competition usually involved an imposition of unfavourable contracts (28 cases; 77.8%). Secondly, there was an imposition of unfair fees and charges (7 cases; 19.4%) followed by limiting competitors' activity (4 cases; 11.1%).

In case of abuse of entrepreneur's dominant position, the President of the Office rarely required a fine to be paid by an enterprise (only 16.6% decisions included a payment order). This is due to the fact that organisations blamed for an abuse of entrepreneur dominant position

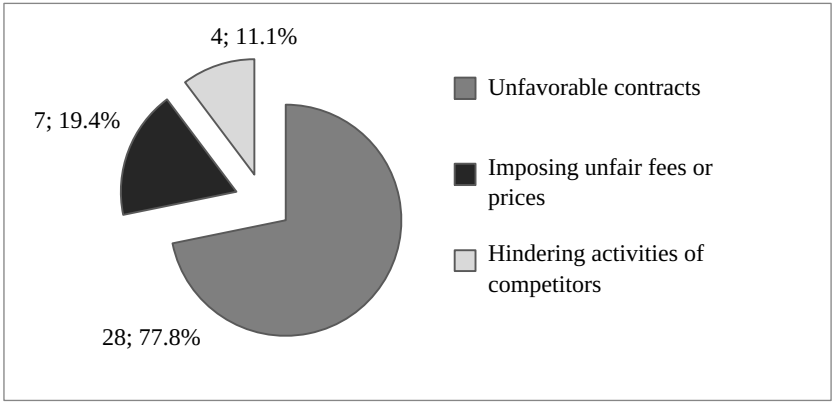

Figure 6. Types of unfair actions in terms of abuse of entrepreneur's dominant position in 2012.

Source: own research based on reports of the Office of Competition and Consumer Protection (https://decyzje.uokik.gov.pl).

mostly belonged to local governments (communes) and there was of a lack of commercial activity. In 2012, 6 market entities paid in total PLN 90,432.

In 2015, the Office of Competition and Consumer Protection assessed 30 cases concerning the abuse of entrepreneur's dominant position. As 8 proceedings were excluded (the accusation was dismissed eight times), 22 cases were analysed. Among the accused entrepreneurs and organisations, there were:

- 14 public entities, including 6 entities of commercial law (e.g. limited liability companies belonging to the local communes) and 8 self-governments;
- 8 companies.

Among the analysed cases, in 2015 the infringement of competition usually involved imposing unfair fees or prices (13 cases, i.e. 59% of all cases), then contracts which were unfair and disadvantageous to customers (6 cases, 27.3%), and limiting activities of competitors (4 cases, 18.2%). To these data Figures 7 and 8 refer.

In 2015, the President of the Office of Competition and Consumer Protection appointed more financial penalties than 3 years before: in 8 out of 22 cases, that is 36.4% (in 2012 it was 16.6%). However, 3 public entities had to pay fines. In total, the Office adjudicated decision with fines for the sum of EUR 5,825,986.15 EUR (PLN 24,784,327.68; 274

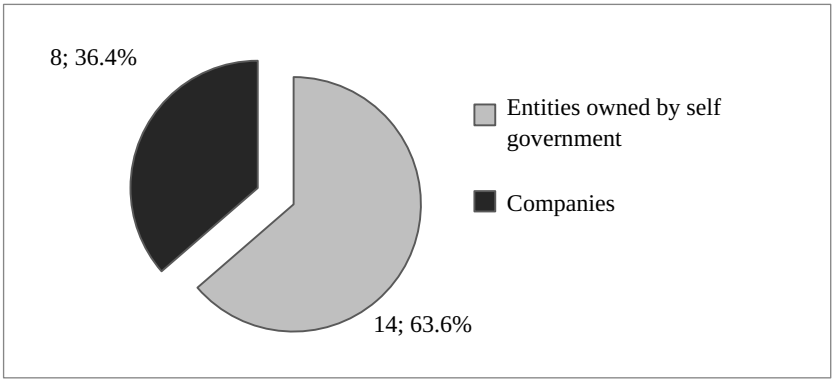

Figure 7. Organisations accused of abuse of entrepreneur's dominant position in 2015

Source: own research based on reports of the Office of Competition and Consumer Protection (https://decyzje.uokik.gov.pl).

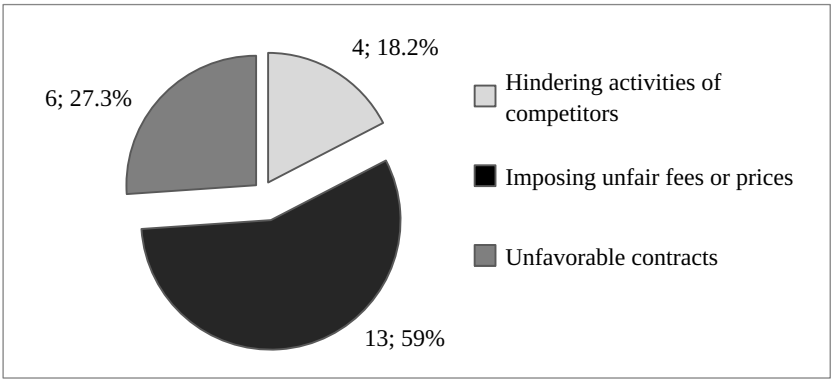

Figure 8 Types of unfair actions in terms of abuse of entrepreneur's dominant position in 2015

Source: own research based on reports of the Office of Competition and Consumer Protection (https://decyzje.uokik.gov.pl).

times more than in 2012!). However, it should be clarified that one decision ordered a penalty in the amount of EUR 3,343,661.92 (PLN 14,224,272.18 PLN) due to unfair performance of an earlier decision of the Office – the penalty included extra interest of EUR 5,000 per day. Without this amount, the imposed fines were EUR 2,482,324.23 (PLN 10,560,055.50; 117 times more than in 2012).

5. Results and discussion

The conducted analysis shows that in the two selected years, the general number of competition infringements decreased by 39% (Figure 9). The largest decrease was observed in case of price fixing (2012: 15 cases; 2015: 1). A large drop was also observed in case of unfair contracts (2012: 28 cases; 2015: 6). In view of this trend, the rate of violations of competition per 1,000 enterprises also decreased (Table 1).

The collected data demonstrates that in case of agreements restricting competition, in 2012 the main activity was wholesale; in 2015 – services, such as repair of computers, maintenance of green areas or security services. In 2012, the most common violation of law was the imposition of prices in a distribution channel, while in 2015 it was unlawful coordination of behaviour during tenders.

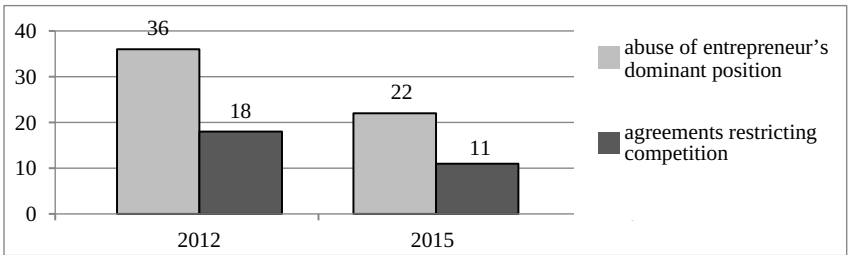

Figure 9. Number of competition infringements in 2012 and 2015

Source: own research based on reports of the Office of Competition and Consumer Protection (https://decyzje.uokik.gov.pl).

Table 1. The analysis of competition infringements in 2012 and 2015

	Type of competition rules infringement	2012		2015	
		Number of cases	Per 1,000 enterprises	Number of cases	Per 1,000 enterprises
	Agreements restricting competition	18	**0.007**	11	**0.005**
1	Including: Joint price fixing	15		1	
	Joint quantification of production or sale	-		-	

Table 1. continued

	Type of competition rules infringement	2012		2015	
		Number of cases	Per 1,000 enterprises	Number of cases	Per 1,000 enterprises
1	Share of market or groups of consumers	-		-	
	Limiting activities of competitors	1		2	
	Joint entering into tenders	2		8	
2	**Abuse of entrepreneur's dominant position**	36	**0.015**	22	**0.009**
	Including: Imposing unfair fees or prices	7		13	
	Unfair contracts	28		6	
	Limiting activities of competitors	4		4	
	In total	**54**	**0.023**	**33**	**0.014**

Source: own research based on reports of the Office of Competition and Consumer Protection (https://decyzje.uokik.gov.pl).

In case of abuse of entrepreneur's dominant position, in 2012 almost all cases were related to self-government entities, which imposed unfavourable contracts for communal services on recipients. In 2015, self-government entities continued to cause the majority of cases, but their number dropped by $^1/_3$. Instead, companies took their place. That year, most cases referred to imposing undue prices or fees.

Fighting with the competition is most often considered in terms of business activities. One can hear about squeezing wages, or neglecting quality of products and standards of production. Also behaviours referring to use of excessively high or abnormally low prices violate fair competition law (Fornalczyk, 2007, pp. 56–57). However, the analysis confirms this view as long as we talk about agreements restricting competition. In case of abuse of entrepreneur's dominant position, public entities (self-governments) are the organisations that exploit their power more often than businesses (Table 2).

Interestingly, the public sector is known to have numerous cases of ethical failures, like myopia (pursuit of short-term targets at the expense of long-term objectives), misrepresentation (deliberate manipulation of

Table 2. Characteristics of competition infringements in 2012 and 2015

Category	2012		2015	
	Agreements	**Abuse of position**	**Agreements**	**Abuse of position**
The sphere of activity	Wholesale	Public services	Commercial services	Public services
Dominant way of breaking the law	Imposing prices on contractors	Imposing unfavourable agreements	Fixing behaviour in a tender	Imposing unfair prices and fees
The sum of paid penalties [in EURO]	3,871,060.70	21,219.70	699,650.50	5,815,596.40

Source: own research based on reports of the Office of Competition and Consumer Protection (https://decyzje.uokik.gov.pl).

data), systematic misinterpretation of data, or gaming (manipulation of behaviour to get rewards for achieving targets). So, in the public sector there are many examples of unethical tactics used to achieve performance targets (Narayan, 2016, pp. 364–372), that has also been confirmed in our analysis.

6. Conclusions

Certainly, the above mentioned cases must be considered as unethical because they violate the principles of economic coexistence, and they are a breach of the adopted law. Summarizing the results, it can be concluded that:

In case of agreements restricting competition, only companies were accused (i.e. no public institutions). In 2012, these companies usually ran wholesale activity, while in 2015 – there were different services (also including wholesale). Within this three years period, the nature of violation changed from imposition of prices to fixing behaviour of companies in tenders.

In case of abuse of entrepreneur's dominant position, the main accused organisations were self-governments (communes), therefore the main area of activity was utility services. Again, within three years the nature of violation changed from imposition of unfavourable

contracts to imposition of unfair fees. Moreover, rulings issued by the Office began to contain much more financial fines, which may mean greater fiscalism in the public policy.

Unfortunately, it is not possible to investigate the causes of changes (although it would be very interesting), but these results may be used as a basis for further research on tendencies in entrepreneurs' behaviour and effectiveness of the law.

References

Austin, H. (1841), *Thoughts on the Abuses of the Present System of Competition in Architecture: With an Outline of a Plan for their Remedy*, J. Weale Architecture Library Publishing, London.

Cambridge Dictionary (nd), "Free Competition". Retrieved from http://dictionary.cambridge.org/ dictionary/english/free-competition (accessed 16 July 2017).

Ellis, J. (2006), "European Competition Law and Distribution via the Internet", *Journal of International Trade Law and Policy*, Vol. 5, Issue 2, pp. 22–41.

EU Competition Law Rules (2013), *EU Competition Law Rules Applicable to Antitrust Enforcement Handbook*, Publications Office of the European Union, Luxembourg. Retrieved from http://ec.europa.eu/ competition/antitrust/ legislation/handbook_vol_1_en.pdf (accessed 16 July 2017).

Financial Times Lexicon (nd), "Free Competition". Retrieved from http://lexicon.ft.com/Term?term=free-competition&mhq5j=e1 (accessed 16 July 2017).

Fitzpatrick, E., Davison, L. (1997), "Competition Policy and the Competing Interpretations of the Notion of Substantial Part of the Common Market", *European Business Review*, Vol. 97, Issue 4.

Fornalczyk, A. (2007), *Biznes a ochrona konkurencji*, Oficyna Wolters Kluwer Business, Kraków.

Hernik, J., Gębarowski, M. (2011), "Ethics as a Foundation of Management – a Valuable Resource or a Relic in Times of Crisis?", *Jurnal Ekonomi Bisnis*, Vol. 16, No. 3, pp. 147–157.

Law of 16 February 2007 on Competition and Consumer Protection, consolidated text: Journal of Laws 2017, item 229.

May, M.A., Doob, L.W. (1937), *Competition and Cooperation*, Social Science Research Council (U.S.), Washington.

McGowan, L. (1996), "Unmasking a Federal Agency: The European Commission's Control of Competition Policy", *European Business Review*, Vol. 96, Issue 5, pp. 13–26.

Narayan, A.K. (2016), "An Ethical Perspective on Performance Measurement in the Public Sector", *Pacific Accounting Review*, Vol. 28, Issue 4, pp. 364–372.

Nugent, N. (1997), *At the Heart of the Union: Studies of the European Commission*, Palgrave Macmillan UK, London.

Reports of Competition and Consumer Protection Office. Retrieved from https://decyzje.uokik.gov.pl/bp/dec_prez.nsf.

Stiglitz, J.E. (2004), *Globalizacja*, Wydawnictwo Naukowe PWN, Warszawa.
The Parliamentary Debates (Authorized Edition) (1833), Great Britain Parliament, T.C. Hansard Publishing, Vol. 20, London.
Treaty on European Union and the Treaty Establishing the European Community (2002), Official Journal of the European Communities, C 325 of 24 Dec. 2002.