

**The *EMPiK* and *Merlin* concentration prohibition:
Would the European Commission reach a similar verdict?
Case comment to the decision of the President of the Office for
Competition and Consumer Protection of 3 February 2011 –
Merlin.pl S.A. and NFI EMPiK Media & Fashion S.A (DKK-12/2011)**

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I. Introduction

On 3 February 2011, the President of the Office of Competition and Consumer Protection (the Polish national competition agency, hereafter referred to as the UOKiK, after the Polish acronym), pursuant to Article 20(1) of the Act of 16 February 2007 on competition and consumer protection¹ (hereafter referred to as the Competition Act) and in relation to Articles 13(1) and 13(2)(2) of said Act, issued Decision number DKK-12/11 (hereafter, the Decision). It ruled against the takeover of Merlin.pl S.A. by NFI EMPiK Media & Fashion S.A.² on the basis that 'the concentration will result in a significant impediment to competition'³.

¹ Journal of Laws of 2007 No. 50, item 331, as amended.

² UOKiK's press release 'NFI Empik/Merlin – UOKiK prohibits the concentration', 4 February 2011. It was the sixth UOKiK decision prohibiting concentration since 2004.

³ The Decision, p. 78.

On 15 February 2011 EMPiK announced that it would appeal the decision of the President of the UOKiK to the Court of Competition and Consumer protection⁴ (the Regional Court in Warsaw, hereafter sometimes referred to as the Court) on the basis of Article 479(28)(1) of the Polish Civil Procedure Code⁵. This appeal is based on two grounds. Firstly, although the decision of the UOKiK President unequivocally states that neither EMPiK, nor Merlin.pl, nor the new company which would arise as a result of the merger of EMPiK and Merlin.pl would have a dominant position, the UOKiK still prohibited the merger. Secondly, even though the merger would have a possible effect on competition on the markets, the evaluation made by the UOKiK President of the scope of the actual effect on competition, as well as the evaluation of development phases and market dynamics, the barriers to entering the market, and other material factors, was conducted completely erroneously and insubstantially. The outcome of the case before the Court of Competition and Consumer protection is still pending at time of publication of this commentary.

The decision of the UOKiK President is especially interesting and significant for three reasons. Firstly, the UOKiK conducted the most thorough market research in its history among undertakings operating on the culture-related products' market. More than 1110 competitors of EMPiK and Merlin.pl, such as publishing houses, distributors, and on-line stores, were requested to present their opinion on the merger. Secondly, the decision was handed down recently, and thus there are no legal comments or articles on the case so far. Thirdly, the e-commerce and non-traditional channels of distribution in Poland are rapidly growing, therefore the appropriate determination of the relevant market in this case may have a significant impact on future decisions of the UOKiK as well as the future market.

For the purposes of this commentary, in order to investigate the decision of the President of the UOKiK it will be assumed that the proposed concentration between EMPiK and Merlin.pl has a Community dimension. As a result, the decision will be examined hypothetically from the perspective of the European Commission, but in accordance with Polish merger regulations. This commentary constitutes, in the end, an attempt to demonstrate that the European Commission would not have issued a prohibition decision against the concentration between the undertakings. There are three main deficiencies in the decision which support this conclusion:

⁴ EMF, 'Presentation of results for 4Q 2010. Development plans. The appeal by NFI Empik Media & Fashion S.A. of the decision of the President of the Office of Competition and Consumer Protection (UOKiK)', available at <http://www.emf-group.eu/?jezyk=en&id=288>. This information was also confirmed in a number of interviews given by Empik's management, for example in: T. Gryniewicz, 'EMPiK powalczy o Merlina i wniesie odwołanie od decyzji UOKiK' ['Empik will fight over Merlin and appeal the decision of the UOKiK'], *Wyborcza.biz* where Maciej Szymański, the CEO, stated: „We will appeal”.

⁵ Article 479(28)(1) of the Polish Civil Procedure Code (consolidated version: *Journal of Laws 2010 No. 155, item 1037*) states that: 'The Regional Court in Warsaw – the Court of Competition and Consumer Protection – shall have jurisdiction over appeals from decisions of the President of the Office of Competition and Consumer Protection, referred to in this Chapter 'President of the Office'.

- 1) significant errors in determining the relevant market;
- 2) deficiencies in proving that the concentration would result in a significant impediment to effective competition, together with disregard of the time factor;
- 3) substantial procedural errors.

II. Relevant markets

1. UOKiK's definition of the relevant markets

The decision of the UOKiK President was made on the basis that the intended concentration would result in a limitation of competition on the Polish market in the following sectors:

- 1) the domestic retail market for sale of on-line non-specialised books;
- 2) the domestic retail market for sale of on-line music CDs recorded on traditional media;
- 3) the domestic market for purchasing non-specialised books;
- 4) the domestic market for purchasing music CDs recorded on traditional media.

It was stated unequivocally that neither *EMPiK*, nor *Merlin.pl*, nor the entity that would arise as a result of the concentration would have a dominant position on any of the above-mentioned markets.

2. Allegations that the relevant markets were wrongly defined

The domestic retail market for sale of on-line non-specialised books was defined erroneously. According to the UOKiK President, despite the partial substitution of the traditional and online sales channels their mutual interaction still cannot be regarded as substitutable enough to form a market on its own. Consequently, the competition authority decided to separate internet sales of each product and consider them as separate markets. Such an approach appears entirely inconsistent with the European Commission's case law⁶.

The landmark decision where the European Commission conducted a detailed analysis of the book market is *Lagardere/Natexis/VUP*⁷. It was highlighted that books follow a so-called 'book chain,' which involves various players at its different stages: the publisher, the distributor, the marketer, the wholesaler, and the dealer. There were a number of product markets recognized in this chain, such as the market for

⁶ However, it should be noted that the print media market does not play a significant role in EC competition law, and there are a limited number of cases in this respect: Commission Decision, Case IV/M.1377, *Bertelsmann/Wissenschaftsverlag Springer*; Commission Decision, Case IV/M.1275, *Havas/Bertelsmann/Doyma*; Commission Decision, Case COMP/JV.39, *Bertelsmann/Planeta/NEB*; Commission Decision, Case IV/M.1455, *Gruner/Jahr/Financial Times*; Commission Decision, Case IV/M.1401, *Recoletos/Unidesa*.

⁷ Case COMP/M.2978.

publishing rights, the market for marketing and distribution service, and others. Moreover, two additional markets were identified, i.e. the market for sales of books at the wholesale level and the market for sales of books at the retail level. Most importantly, the European Commission unequivocally stated that the retail sales of books in all channels form a single product market. Consequently, according to the *Lagardere/Natexis/VUP* decision it can be argued that the traditional and the online markets should be treated as a single product market⁸.

The definition of the relevant market has a decisive bearing on the evaluation of a competition law case. If the consumer is not able to purchase a specific item using the traditional channel, (s)he can still benefit from a possible purchase on the alternative channel, i.e. via the Internet. Hence, on the basis of the above considerations, it can be argued that if the European Commission evaluated the present case it is highly probable that both the traditional and the online channels would be treated as substitutable markets.

There were a number of arguments given by the UOKiK in support of its definition of the relevant market, and as a result its prohibition of the concentration. For the purposes of this commentary, they may be assembled into the following two groupings: arguments related to the purchasing process, and arguments related to consumers' characteristics.

2.1. THE PURCHASING PROCESS VIA TRADITIONAL DISTRIBUTION CHANNELS AND VIA THE INTERNET

The UOKiK President provided a number of arguments related to the purchasing process which require, according to the UOKiK, that the two markets should be regarded as separate.

Firstly, it was argued that in the internet channel the customer does not have any contact with the product and its seller, because the buyer cannot see the product, verify whether there are any defects in workmanship, or determine whether the product fully meets his/her needs. The Commission would not raise such an argument, as it can be assumed that it would be fully aware of the Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts, which provides a number of elementary legal rights to consumers that ensure a certain level of consumer protection throughout the EU with respect to contracts entered into via the Internet. The Commission would particularly rely on Article 4, i.e. 'Prior information' and Article 6, i.e. 'Right of withdrawal.' Moreover, Recital 11 of the Directive states that '(...) the use of means of distance communication must not lead to a reduction in the information provided to the consumer (...).' Consequently, the arguments raised by the UOKiK appear to be irrelevant.

⁸ Such a division of the market was also followed in another leading European Commission decision, *Egmont/Bonnier*, Case COMP/M.4611; see para. 13 and 19. See also: C. Boeshertz, T. Kleiner, G. Nouet, L. Petit, U. von Koppenfels, V. Rabassa, V., 'Lagardère/Natexis/VUP: big deal in a small world' (2004) 1 *EC Competition Policy Newsletter* 8-14.

Secondly, it was stated that a customer of an online store cannot purchase the product 'right away', but he/she usually needs to wait for it for a few days. Moreover, for books or CDs which are regarded as niche products, the waiting period may even amount to a few weeks. Consequently, such conditions prevent or impede the realization of certain 'shopping missions,' such as buying in an emergency or purchasing a last-minute gift. Again, for the Commission this argument would appear immaterial, taking into consideration that if a niche book or CD is not on stock in a traditional store, the customer similarly needs to wait for a certain period of time. The notion of 'buying in an emergency' also remains obscure. The UOKiK President also stated that an additional obstruction in this area is that the ordered products can only be received in pick-up locations operated by a limited number of stores. It can be assumed that the European Commission would conduct a more detailed research, which would indicate that *EMPiK* currently operates 166 pick-up locations while *Merlin.pl* currently offers 1,234 pick-up locations. Moreover, the competition authority claimed that if pick-up services are not used, the client is 'forced' to rely on services provided by the Polish Post or courier companies. The UOKiK did not, however, provide examples of other possible (i.e. less forcible) methods of delivery, simply presuming they do not exist.

Thirdly, it was claimed that for a number of consumers the process of making payments on the internet remains a major problem. The difficulty is, however, that the Polish competition authority did not provide any relevant research relating to this issue. It is doubtful that the Commission would issue such a bald statement in any competition law case, let alone one of this gravity, without presenting a valid analysis of consumer preferences.

Fourthly, it was stated that online stores 'prefer' cashless transactions, while there is still a 'significant percentage' of customers who do not use cashless transactions in traditional channels. Once again, no relevant research was given to support either statement and the assumed percentage was not defined. In addition, according to Polish legislation if an online store serves consumers, it must enable them to pay upon the delivery of goods.⁹ While consumers may also pay for products in online shops prior to delivery, this method of payment is based on their choice, which indicates that they also have the ability to pay upon receipt.

Lastly, the UOKiK described other characteristics of purchasing via the internet which it also considered relevant. Interestingly, two out of its five short observations contradict each other. According to the first, the internet stores have lower costs of acquiring and maintaining pick-up points, paying the staff responsible for customer service, and maintaining storage of goods. On the other hand, the fifth observation stated that internet sales incur increased expenditures on efficient and effective operating systems, logistics, and IT¹⁰.

⁹ A. Janowski, 'Czy sklepy internetowe muszą umożliwiać płatność przy odbiorze?' ['Do Internet stores have to allow payment upon receipt?'], 25.05.2009, 42(561) *Gazeta Podatkowa* 16.

¹⁰ The Decision, pp. 20–21.

2.2. CONSUMERS' CHARACTERISTICS

The second group of arguments relates to the characteristics of consumers purchasing books. The UOKiK considered the demographic profile of consumers as an important difference between traditional and internet commerce. The UOKiK President concluded that the vast majority of people who are over 45 years old do not use internet commerce, a finding which was not supported by any research. Moreover, statistical data was provided to indicate that the number of people between 55 and 64 and 65 and 74 years old who purchase online remains completely irrelevant inasmuch as that percentage is changing quite quickly according to the competition authority itself. Undoubtedly, the European Commission would verify whether persons below the age of 45 who use online stores also use traditional stores. Furthermore, such research would probably indicate that such persons use both channels, therefore, the division into online and traditional sales channels is artificially drawn.

It was claimed that 'the majority' of consumers shopping on the internet incur the costs of delivery of products and that, as a consequence, they 'try to' construct their orders in such a way that the cost of delivery is the lowest, which means they order a number of products simultaneously. Even though the notions of 'the majority' and 'try to' were not defined, it appears that UOKiK President omitted the fact that if a customer purchases multiple books in a traditional store there is also the possibility of a discount. Moreover, it is probable that the Commission would also take into account the financial and/or time costs of obtaining a product.

The UOKiK President also stated that one element that significantly differentiates traditional commerce from online commerce is the importance of 'customer confidence' in the vendor. Personal contact with the seller (even unknown) and the product is assumed to foster a situation whereby the consumer is willing to buy products. It is alleged that in such situations the risks inherently connected with online transactions are absent. These risks apparently concern the situation when the seller does not fulfil the contract or the product does not comply with its advertised specifications. It was also claimed that in traditional channels the customer would obtain a guarantee that the vendor would ensure the possibility of return. Once again, it appears that the UOKiK President completely disregarded Polish and European legislation relating to consumer protection with respect to distance contracts, while relying on an alleged 'special bond' between the customer and the vendor which is not proven. The Commission certainly would be aware of the legislation and would not invoke such artificial concepts.

III. Assessment of the concentration's effect on competition

With regard to the potential impact of the concentration on competition, the UOKiK President stated that competition on the domestic retail market for sale of on-line non-specialised books would be significantly reduced if the concentration were allowed. None of the other market participants would be a competitive counterweight

to the new entity. A number of arguments in support of this thesis were provided and are summarized below¹¹.

Firstly, the data taken into account while estimating market shares assumed that all entities in the market are competitors to *EMPiK* and *Merlin*, while in fact they are not, because they will not exert competitive pressure on the merged entity.

Secondly, *EMPiK* and *Merlin* are close competitors in the relevant market. Their brands are equally recognisable and they offer similar products, therefore customers can make complex purchases. For their clients, *EMPiK* and *Merlin* are close substitutes and the concentration would have a negative effect on the market.

Thirdly, according to the intended concentration the market leader would be taken over by the entity in second place in the market. Consequently, not only are the parties to the concentration close competitors competing against each other, but they also dominate over other entities in the market. Therefore, direct market rivalry will be hampered by the large market share of the new entity.

Fourthly, it was noted that there are often no alternatives other than *EMPiK* and *Merlin* for a significant number of wholesalers, therefore they are destined to contract with one or the other.

In the following sections, the UOKiK's arguments are examined.

1. Market shares

The UOKiK's conclusions were based on its own research. Its investigation focused on the participants in the concentration in relation to their main competitors in the domestic online retail market of non-specialist books (as evidenced in Table 9 of the Decision). According to the study, the market share of the 44 competitors of *EMPiK* and *Merlin.pl* amounted to approximately 85% in 2009. Accordingly, *EMPiK*'s and *Merlin.pl*'s share in the market amounted to approximately 15%. Consequently, it can be argued that the proportion of market shares, as determined by the UOKiK's own research, does not present an independent basis for the prohibition of the concentration. Moreover, *EMPiK* claimed that the UOKiK President did not address, firstly, the evidence presented by the company and, secondly, the available analyses and studies¹² which provided evidence that its actual share on the market is much lower than that presented by the competition authority.

Furthermore, according to the UOKiK President, if the concentration was allowed, the degree of concentration, measured by the Herfindahl-Hirschman Index (HHI)¹³, would increase between 166 and 239 points and would significantly limit competition on the relevant markets. Strangely enough, it was only the *increase* of the HHI and

¹¹ See the Decision, pp. 62-74.

¹² NFI Group, press release 'Presentation of results for 4Q 2010, Development plans, the appeal by NFI Empik Media & Fashion S.A. of the decision of the President of the Office of Competition and Consumer Protection (UOKiK)', 15 February 2011, p. 9.

¹³ The HHI Index is the sum of the squares of the market shares of every firm in the market before and after the proposed merger.

not the *actual* post-merger HHI which was identified. According to the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings¹⁴, the Commission is unlikely to identify horizontal competition concerns in a market with a post-merger HHI below 1000¹⁵, or even between 1000 and 2000¹⁶. It appears therefore that the HHI on the relevant markets was not taken into account by the President of the UOKiK, and it cannot be concluded that the planned concentration would significantly limit competition based on the HHI data provided.

At this point it may be noted that there is also an argument raised by Hovenkamp according to which the HHI is over-relied upon in merger review cases¹⁷. Hovenkamp claims that the Index adds a appearance of great analytical rigor in the merger analysis, because it ‘gives superficially precise ‘readabouts’ of market concentration’¹⁸ while in fact the analysis is based on ‘assumption, conjecture, and even speculation’¹⁹. Hovenkamp’s criticism appears to be especially relevant in the current case where, according to UOKiK, the companies merger would increase the HHI *precisely* between 166 and 239 points. By providing such exact numbers the UOKiK’s research gives an illusion of extreme accuracy and flawlessness. This analysis assumes however that all firms on the markets indicated by the competition authority behave in the same way and that their performance can be predicted strictly from the structure of such markets. The question arises whether the behaviour of companies on a market that is expanding approximately 30% per year can be predicted with such precision. Lastly, taking into consideration that the market definition in the current scenario was defined too narrowly, by squaring the HHI numbers the error may becomes even more prominent, assuming that the HHI regime was rigorously applied.

Additionally, in its justification the competition authority declared that it is practically impossible to calculate the exact value of the national purchase market. Instead, it relied on the highly subjective statements of surveyed companies – competitors of EMPiK and Merlin.pl.

It ignored the fact that, although EMPiK’s online sales have been developing and growing since 2005, Merlin.pl remains an extremely strong and ambitious market player. The status quo of two strong companies on the same market could lead to a devastating price war, i.e. a situation when competitive rivalry is accompanied by an excessive use of price instruments which successfully decrease both prices and profit margins²⁰. Although such a price war would be initially good for consumers, who would benefit from lower

¹⁴ OJ [2004] C 31.

¹⁵ Para 19.

¹⁶ Para 20.

¹⁷ H. Hovenkamp, *The Antitrust Enterprise: Principle and Execution*, Cambridge: Harvard University Press, 2005, pp. 212-214.

¹⁸ H. Hovenkamp, *The Antitrust Enterprise...*, p. 213.

¹⁹ H. Hovenkamp, *The Antitrust Enterprise...*, p. 213.

²⁰ A similar situation occurred in the late 1990s/early 2000s in the United States, where the three biggest online booksellers, Amazon, barnesandnoble.com. and borders.com, immediately matched the 60 percent off on all New York Times best sellers announced by Amazon.

prices, in the long run it would threaten the companies involved. Furthermore, analysts indicate that the “cut-throat” competition eventually reduces the expected margins and revenues, and thus jeopardizes the long-term prospects for the online bookselling business in general.²¹ The competition among booksellers is still dominated by building brand-name recognition through advertising, supported by high-quality customer service and marketing, developing user-friendly website designs, tailoring content to individual tastes and expanding the range of products, offering e-mail updates on book categories specified by readers, and delivering better reviews. However, a price war on Polish market can already be observed, reflected in the fact that, for example, both competitors regularly offer significant discounts on bestsellers. Merlin.pl has already introduced a ‘buy one, get one free’ scheme, ‘buy one, get a gift free’ scheme, ‘buy a book, get a discount on CD’ scheme, and reductions on products of particular publishing houses²².

The UOKiK also did not take into account that it has been relatively difficult for both Merlin.pl and *EMPiK.com* to further expand in the last few years. The companies face competition not only from small e-bookstores (such as *wysylkowa.pl*, *lideria.pl*), but also from individual sellers on *Allegro.pl*, the Polish equivalent of eBay, which has forced the companies to constantly decrease their prices, leading to a decrease in profits. Attracting buyers has been increasingly difficult, despite broadening their offers to electronics, toys, cosmetics, even gardening tools & equipment and ‘do it yourself’ tools (which, however, completely failed). Moreover, the companies are aware that within a short period of time they will need to invest in digitalization, introduce e-books, and start selling digital music and movies and compete with Amazon’s Kindle and Apple’s iPad.

To conclude, even if the size and amount of market share established was regarded as decisive, it still did not constitute an impartial basis for prohibition of the transaction. From the research conducted by the UOKiK President, it appears clear that the merged entity would not reach a dominant position. Furthermore, the UOKiK’s analysis provided a very static vision of firms and their market shares, ignoring the possibility of a “price war” and mathematically assuming that the market shares of other firms will remain unchanged. Such an approach seems entirely erroneous considering that Amazon, the world’s largest online retailer, is expected to launch its services in Poland in March or April 2012,²³ and when Amazon enters a market, ‘the market must change’²⁴.

²¹ G. Gately, ‘Online Book Price War Worries Wall Street’, 18 May 1999, available at <http://www.ecommercetimes.com/story/51.html>.

²² For more information on price wars in the book industry see, K. Clay, R. Krishnan, E. Wolff, D. Fernandes, ‘Retail Strategies on the web: price and non-price competition in the online book industry’ (2002) 3 *Journal of Industrial Economics* 351-392.

²³ M. Fura, ‘Za pół roku Amazon będzie w Polsce. Czy gigant rozjedzie nasz rynek?’ [‘Amazon will be in Poland in a half-year. Will the giant roll over our market?’] *Gazeta Prawna*, 24.10.2011; S. Czubkowska, ‘Amazona jeszcze w Polsce nie ma, ale wojna już trwa’ [‘Amazon’s not in Poland yet, but the war is already started’] available at http://biznes.gazetaprawna.pl/artykuly/595414,amazona_jeszcze_w_polsce_nie_ma_ale_wojna_juz_trwa.html.

²⁴ *Ibid*, a quote by a novelist K. Gessen.

2. Time factor in relation to the market of electronic trade

Control of concentrations between undertakings verifies potential dominance in the future, in contrast to, for example, abuse of a dominant position, which relates to past behaviour. Therefore control of concentrations is inherently forward looking. As a result the variation over time factor may have a substantial impact on the intended concentration, particularly on markets where market conditions are changing swiftly in an unexpected manner.

While the European Commission recognises the so-called ‘time factor’ in merger control, it can be claimed that the Polish competition authority, in its analysis of the competitive assessment of this proposed concentration, did not recognize the time factor at all, or that even if it did, did not adequately take it into consideration.

The reference point for the UOKiK President was the situation in 2009. The research conducted was based mainly on 2009 reports, such as the ‘Report on the telecommunications market in Poland’, ‘Polish e-commerce market,’ and ‘Information society in Poland,’ as well as on the 2010 ‘Report on the telecommunications market in Poland – individual clients.’ Statistical results from 2006-2010 compilations, even if known later, were not taken into account. The 2009 data related to, *inter alia*, the average value of a completed order/internet sales purchase, the share of online sales of books through pick-up points in relation to the total amount of revenue from online sales, the number of pick-up points, the national market for non-specialized retail sale of books²⁵ and CDs²⁶, the percentage of EU citizens purchasing books over the internet, the number of households which have access to broadband internet and its increase in comparison to 2008, the availability of fixed broadband, and internet access via cellular networks and its increase in comparison to 2008.

Moreover, in its questionnaires to third parties, the UOKiK asked for 2009 data related to, for example, their financial results or the position of their suppliers and clients. In addition, the market expansion period of EMPiK on the Polish market was verified for the period between 2006 and 2009.

The time factor appears to be a central aspect in this scenario, especially taking into consideration the nature of the businesses, the fact that Poland is a fast growing post-transition economy, and the rapid and dynamic changes on the e-market. The online market position in Poland cannot be characterized as established and permanent, as the internet remains a very active distribution channel. This statement can be supported by the May 2011 Boston Consulting Group report ‘Polska Internetowa. Jak Internet dokonuje transformacji polskiej gospodarki’ [‘Internet Poland. How the Internet is transforming the Polish economy’] where it was declared that ‘the internet economy has a huge growth potential. In the next five years, it will expand at a rate twice the size of GDP growth (14% per year, nominal GDP growth rate). As a result,

²⁵ Interestingly, the UOKiK noted that since between 2006 and 2009, its value has increased by approximately 130% and it is *very dynamic* (emphasis added), p. 33 of the Decision.

²⁶ Similarly, the UOKiK noted that between 2006 and 2009 the market value increased from PLN 23 million to PLN 51 million.

in 2015 the value of this sector will reach PLN 75 billion, i.e. 4.1% of the Polish GDP. Using optimistic assumptions, an even greater growth of the internet economy can be expected in relation to the GDP, up to 4.9% in 2015²⁷. Moreover, Grzegorz Cimochoowski, the director of the Warsaw Boston Consulting Group bureau, claimed that: 'The Poles are the most active users of the Internet, and we are in the forefront when it comes to searching information on the Internet'²⁸. According to Euromonitor International, Polish e-commerce increased 35% in value in 2010 and 33% in 2011²⁹.

It can be assumed, therefore, that the European Commission would not only review the 2006-2009 period and the current situation of e-commerce, but also the projections regarding the situation in the foreseeable future. It is highly probable that there are a number of factors which should be scrutinized, such as the entrance of new competitors into the market (together with potential barriers to entry), and the market position of both companies taking into account three opposing scenarios, i.e. their possible decreased, increased. or unchanged position on the market.

It can be assumed that in defining the relevant markets in the current case the European Commission would not rely on the above-mentioned reports, because the data that they present is largely irrelevant. Undoubtedly, the Commission would not see how the data concerning the number of people who possess a computer and how they connect to the Internet bears on the number of people who purchase the relevant products online. The appropriate research on which the Commission would rely would rather define the number of people who possess a computer and at the same time use traditional channels, i.e. bookstores, or online sales channels, i.e. websites.

Moreover, even if the UOKiK's assumption that the traditional and the internet channels of distribution should be regarded as separate may still be of some relevance, there is strong evidence that in the foreseeable future these two distribution channels will become mutually substitutable. Research into this issue should have been conducted by the UOKiK, but it was not. It can be stated with confidence that the European Commission would recognise the time factor in its research and take into account future market forecasts.

III. Breaches of procedural rules

Procedural justice can be viewed as one of the most fundamental concepts in EU law. Although it is not directly referred to in the Treaty on the Functioning of the European Union³⁰, the case law of the Court of Justice of the European Union has identified general principles of administrative justice, among which one of the most

²⁷ Boston Consulting Group, 'Polska Internetowa. Jak internet dokonuje transformacji polskiej gospodarki', May 2011, p. 37, available at http://polskainternetowa.pl/pdf/raport_BCG_polska_internetowa.pdf.

²⁸ Grzegorz Cimochoowski, quoted in E. Bendyk, 'Złoto z Internetu' ["Gold from the Internet"] (2011) 20 *Polityka* 2807, p. 35.

²⁹ Quoted in <http://www.internetstandard.pl/news/366877/Czas.na.e.commerce.w.Polsce.html>.

³⁰ OJ [2010] C 83.

important is the right to be heard. These principles are not restricted to civil rights and criminal charges, but also apply to administrative procedures. The concentration notification procedure before the UOKiK is of an administrative nature³¹.

According to Article 96(1) of the Competition Act, in cases of concentration the antimonopoly proceedings should be completed no later than two months from the date of their institution. The proceedings in the within case commenced in July 2010 and the decision was issued in February 2011, therefore the decision was taken after seven months. Article 96(2) states that it is possible for the UOKiK to prolong the final date of termination of proceedings by an additional 14 days provided that the conditions set forth in Article 19 are satisfied, but these conditions were not present in the case in issue. Therefore, the length of the proceedings must be considered as contrary to the applicable law and unjustified. It was also claimed by EMPiK that during the course of proceedings the UOKiK delivered eighteen forms to EMPiK to complete, containing additional questions which were drafted in advance (hence only the date was inserted on a form), which were sent separately and with no relation to the previous ones³². The company is arguing that the aim of such 'procedure' by the competition authority could only be to delay the date of the issuance of the decision³³.

If the European Commission dealt with this case, Phase I proceedings which determine whether the transaction can be qualified as a concentration and has a Community dimension, are dealt with within 25 working days. Phase II of the investigation occurs when there are substantial suspicions of compatibility of a notified concentration with the common market, as in the current scenario. In Phase II proceedings, as a rule there are 90 working days for the Commission to complete its investigation, however this period can be extended to a maximum of 125 working days. Moreover, it needs to be noted that the Merger Regulation and decisions made by the Commission are based on four main principles, one of them being the provision of legal certainty through timely decision-making. EMPiK should have been given a swift reply in order for the company and its shareholders verify their market strategy. It appears, therefore, that the timing of the decision issued was totally unacceptable.

³¹ K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów, Komentarz [The Act on protection of competition and consumer. Commentary]*, LEX, 2008.

³² NFI Group, press release 'Presentation of results for 4Q 2010, Development plans, the appeal by NFI Empik Media & Fashion S.A. of the decision of the President of the Office of Competition and Consumer Protection (UOKiK), 15 February 2011.

³³ *Ibid.* Prof. Skoczny notes that the UOKiK President should be required to notify the parties about the proceedings in such a way that the intentions of the competition authority are known. This would guarantee proper communication between the parties and the UOKiK and would give the UOKiK the possibility to notify the parties about competition concerns as soon as they arise during the proceedings. See T. Skoczny, 'Polskie prawo kontroli koncentracji – ewolucja, model, wybrane problemy' ['Polish law on the control of concentrations – evolution, models, and selected issues'] (2010) 5 *Europejski Przegląd Sądowy* 21. If such an approach was adopted in the current case it is probable that the parties to the concentration would have reached a commitment decision and avoided the prohibition of the concentration.

There are other procedural objections of a substantive nature being argued by EMPiK, such as the breach of the right of EMPiK to actively participate in the proceedings and to be duly informed of the course of the proceedings. In particular, the company claims that:

- 1) the UOKiK did not undertake any dialogue with it concerning any different possible assessments of the market;
- 2) the UOKiK did not provide any information regarding the potential competition concerns which were included in its decision;
- 3) the UOKiK did not provide any information related to the material factual and legal circumstances which could or did influence its determination of the rights and duties of EMPiK, and deprived the company of the opportunity to conduct any discussion with the authority, particularly about a possible conditional decision;
- 4) the UOKiK President was not available for the companies and they were also not able to contact competent representatives and/or employees of the UOKiK, as evidenced by the fact that several weeks were needed in order to designate a date for a meeting regarding the course of the proceedings;
- 5) the UOKiK delivered its decision concerning the incorporation of supplementary materials to the evidentiary proceedings and supplied its answers to a letter submitted by the company during the proceedings a week *after* the issuance of the decision³⁴.

The right to a hearing is one of the most fundamental rights recognised by EU law. In *Air Inter SA v Commission*³⁵ the European Court of Justice stated that the right to be heard should be interpreted sufficiently broadly as to take account all facts, circumstances or documents whereby the administrative act may have an adverse effect (especially economic) on a party to the proceedings³⁶. If the European Commission examined the concentration request, access to files, reports and research would be have been open to EMPiK and Merlin as the parties directly involved³⁷. Furthermore, the Commission would not base its decision on information which EMPiK and Merlin did not have access to, especially considering the potentially detrimental character of such information to the companies.

Moreover, it is argued that there is no provision in the Competition Act that releases the UOKiK President from the duty to summon the parties to familiarise themselves with

³⁴ Ibid.

³⁵ Case T-260/94 *Air Inter SA v Commission*, [1997] ECR II-997.

³⁶ Similarly in *Hoffman-La Roche v Commission*, [1979] ECR 461, at para. 14: '(...) it does not nevertheless allow it to use (...) facts, circumstances or documents which it cannot in its view disclose if such refusal of disclosure adversely affect the undertaking's opportunity to make known effectively its views on the truth or implications of those circumstances, on those documents, or on the conclusions drawn by the Commission from them'.

³⁷ *SA Hercules Chemicals NV v Commission*, ECR [1991] II-171, at para. 54: 'It follows that the Commission has an obligation to make available to the undertakings involved in Article 85(1) proceedings all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved'.

the full body of evidence³⁸. There are no indications in the Decision that the parties were summoned to get acquainted with the entire body of evidence. Deprivation of a party to antimonopoly proceedings of access to the full body of evidence, or not informing a party that certain data is regarded as evidence, is contrary to Articles 9 and 10(1) of the Code of Administrative Procedure³⁹. Furthermore, Article 9 states that the UOKiK is obliged to notify the parties not only with regard to the initiation of antimonopoly proceedings, but also to any objections that the UOKiK might have during the course of the proceedings. EMPiK was not duly informed of the course of the proceedings.

There are other procedural objections claimed by EMPiK which relate to violation of the rules of evidentiary procedure on the basis of the surveys used. EMPiK claims, *inter alia*, that:

- 1) the surveys should not be used as principal evidence, as their representativeness was obscure; the developed methodology was incorrect; and the chosen questions and the data from the surveys was biased;
- 2) the surveys could only be used in examining public opinion, but not in determining the market value or the market shares of particular entities;
- 3) the surveys were not verified on the basis of financial statements, accounting books, or experts' opinions;
- 4) although 1100 surveys were received by the UOKiK, only several dozen were included in the files of the proceedings; and the decision was made based on this small sampling.

If the European Commission examined the concentration, it can be assumed with certainty that the rights of the defence would be fully respected during the proceeding. At every stage the Commission would have given EMPiK and Merlin the opportunity to present their views on the objections against them included in the surveys. Moreover, the Commission would base its decision only on objections to which the parties were given the full opportunity to respond to and submit their observations⁴⁰.

Lastly, the Decision of the UOKiK President indicated the possibility of raising the failing firm defence. Surprisingly, this is not the first time the UOKiK has mentioned such a possibility; rather it seems to have become a standard argumentation, or even assertion, on its part when issuing a negative decision regarding a concentration⁴¹. This appears to be an erroneous application of the defence, especially taking into account that neither Merlin.pl nor EMPiK raised the defence in their application⁴². The legal concept of defence in every legal system is based on the principle that it

³⁸ M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji [Procedural fairness in proceedings before competition authorities]*, Warsaw 2011, pp. 105-106.

³⁹ See, judgment of the Supreme Administrative Court of 31.05.2006, II OSK 810/05.

⁴⁰ See Articles 18(1) and 18(3) of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ [2004] L 24/1.

⁴¹ See, e.g. Decision DKK-421-/71/10/MAB *PGE Polska Grupa Energetyczna S.A./Energia S.A.*

⁴² Similarly, none of the parties raised the defence in Decision DKK-421-/71/10/MAB *PGE Polska Grupa Energetyczna S.A./Energia S.A.*

is the defendant, and not his or her adversary, who has the right to raise it⁴³. The reasons why the UOKiK referred to the possibility of raising this defence remain, at best, unanticipated and obscure.

Finally, it should be noted that the above-mentioned procedural objections were published in a press release issued by EMPiK to its shareholders shortly after the UOKiK's decision prohibiting the transaction was announced. Their validity cannot yet be verified. Taking into account the decision prohibiting the transaction and the prompt issuance of a press release, it is possible that such arguments are designed primarily to reassure current and potential shareholders. The press release is not of a legal nature, and only if EMPiK can adequately back up and support its statements by providing satisfactory evidence and documentation during the appeal will the arguments become credible.

V. Conclusions

Based on the above evidence, the hypothesis should be accepted that the European Commission would not have issued a prohibition decision against the concentration between EMPiK and Merlin.pl. Consequently, the appeal filed by EMPiK is not a surprise. In its Decision the UOKiK seems to have made a number of significant errors.

The purchasing process via the traditional distribution channels and via the internet were wrongly treated as non-substitutable channels. The UOKiK did not present a comprehensive market analysis. The research conducted by it in relation to consumers' characteristics was incoherent, chaotic, and confusing from both the legal and logical points of view. Arguments presented with regard to the competitive assessment of the concentration were incorrect and their overall nature did not point towards prohibition. The UOKiK wrongly determined the market shares of the parties to the concentration. It also completely ignored the time factor in relation to the rapidly expanding market of online trade.

Furthermore, a number of substantive procedural rules appear to have been breached, and the fundamental right of defence was ignored in such a prejudicial manner that the Court of Competition and Consumer Protection should annul the entire concentration proceeding.

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⁴³ In competition law proceedings before the Commission, the right of defence can be found in Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, which replaced Council Regulation (EEC) No 17 of 6 February 1962, as well as in unwritten rules that the Commission needs to respect, see R. H. Lauwaars, 'Rights of Defence in Competition Cases', [in:] D. Curtin et al. (eds.), *Institutional Dynamics of European Integration*, Leiden 1994, p. 497.