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Practices Restaining Competition in Poland

Silesian Journal of Legal Studies 1, 60-67

2009

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PRACTICES RESTRAINING COMPETITION IN POLAND

I. GENERAL ISSUES

The necessity to follow competition rules by competitors is the elementary feature of contemporary free market economy. The idea of competition is based on competition between independently acting entrepreneurs, aiming at the achievement of an advantage over other undertakings acting on the same market and aiming to take over acceptance of consumers and obtaining success on the relevant market and, as a consequence, assuring positive results for economy as well as for the society itself [1].

Competition law may be divided into three general groups. Firstly, the law of combating unfair competition, which is focused on the assessment of situations when the source of infringement of competition comes from market actors who, interested in maximizing of their income, use methods, which are generally considered as unfair. Recently, these kinds of conducts are regulated in the act on combating unfair competition of 16th April 1993 [2].

Secondly, subvention law, which focuses on cases where competition is distorted due to state intervention, which is related to the fact that undertakings may offer their products or services in prices and under conditions, which do not result e.g. from their low costs of activity but from the fact that their activity is co-financed by taxpayers. Such activities are subject to provisions of the subvention law (apart from binding regulations of the law of the EU the basic act in force in Poland is the act on procedure in cases regarding state aid of 30th April 2004[3]).

And the last of these three sections is the antimonopoly law (usually referred to as antitrust), which regulates cases, in which the threat to competition comes from market actors who intend to restrain or eliminate competition on the relevant market. The basic legal act in Poland in that field is the competition and consumer protection act of 16th February 2007 [4], hereinafter referred to as "the antitrust act".

It is worth mentioning that the first antitrust regulation was created in the United States of America in 1890 as a result of the initiative of senator Sherman. It is known under name: the Sherman Act. Both Polish and EU antitrust regulations have their source in competition protection assumptions shaped by the American model[5].

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[1] More about the idea of competition: A. Fornalczyk "Biznes a ochrona konkurencji", Cracow 2007, p. 13 and further.

[2] Dz.U. 03.153.1503 with further changes.

[3] Dz.U. 07.59.404 with further changes.

[4] Dz.U. 07.50.331 with further changes.

[5] More about issues related to American antitrust law "Amerykański I europejski system ochrony konkurencji", UOKIK, Warsaw 2007; W. Gumienny "Porozumienia pionowe we wspólnotowym prawie konkurencji oraz w prawie antytrustowym Stanów Zjednoczonych Ameryki", Cracow 2004; T. Woś „Amerykańskie prawo antymonopolowe", Cracow 1992.

II. THE COMPETITION LAW OF THE EUROPEAN COMMUNITY

Main sources of the competition law in the EU are the European Community Treaty (ECT), in particular art. 81 ECT and art. 82 ECT[6].

According to art. 81 ECT any prohibited and incompatible with the common market are all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

a) directly or indirectly fix purchase or selling prices or any other trading conditions;
b) limit or control production, markets, technical development or investment;
c) share markets or sources of supply;
d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby, placing them at a competitive disadvantage;
e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Agreements or decisions prohibited by the aforementioned article are null and void by virtue of the law. Nevertheless, provisions of section 1 shall be inapplicable in the case of:

– any agreement or category of agreements between undertakings,
– any decision or category of decisions by associations of undertakings,
– any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Art. 82 says that any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
b) limiting production, markets or technical development to the prejudice of consumers;

[6] More about issues related with harmonization of EU regulations see in: C. Banasiński (red.), M. Kępiński, B. Popowska, T. Rabska "Recent problems of Polish and EU competition law", UOKIK, Warsaw 2006.

c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

EU competition rules, which are addressed to any undertakings acting on the common market (both private and state-owned), apply in full range within the territory of Poland. They also regard undertakings, having their seat outside the territory of EU, if their practices reflect in a negative manner on trade between member states.

Regulation of the Council of EU no 1/2003 of 16th December 2002 on implementation of provisions of art. 81 and 82 ECT is also significant for competition law of EU. In case of concentration of undertakings, the borderline between application of state regulations and EU law is determined by regulation of the Council of EU no 139/2004 of 20th January 2004 on supervision of concentrations of undertakings [7].

III. POLISH ANTITRUST REGULATION

The competition and consumer protection act determines conditions of development and protection of competition counteracting: firstly – practices restraining competition, secondly – practices infringing common interests of consumers and thirdly – concentrations of undertakings and their associations that have negative influence on competition. The essence of practices restraining competition is to limit decisive independence of other market actors i.e. contractors, competitors and consumers. Practices restraining competition may have individual or group (collective) character – depending on number of undertakings applying a specific practice.

The purpose of the competition and consumer protection act is to protect competition as a mechanism of gaining effectiveness of activities and as a protection of consumers as well as other undertakings against exploitation of them by the strongest actors of the relevant market. The act protects public interest.

Addressees of the competition and consumer protection act are especially entrepreneurs and consumers i.e. subjects that purchase goods and services for purposes not related with providing business activities. Entity treated as a entrepreneur on the ground of the act is the entity which follows the definition of the entrepreneur of the freedom of business activity act of 2nd July 2004 [8]. The antitrust act treats as an entrepreneur:

a) a natural person, a legal person and the organized entity that does not have legal status, for which the act grants legal capacity, organizing or providing services of public utility, which are not the business activities in the meaning of provisions of the freedom of business activity act,
b) a natural person performing profession on his own and on his account or providing business activity within the frame of acting the aforementioned profession,

[7] More about new EU regulations see: E. Derkacz, A. Jurkiewicz, B. Pęczalska, E. Piontek (red.) "Reforma wspólnotowego prawa konkurencji", Zakamycze 2005.

[8] Dz.U. 07.155.1095 with further changes.

c) a natural person, who controls at least one entrepreneur, even if the person does not provide business activity in the meaning of provisions of the freedom of business activity act, if undertakes further activities being a subject to the concentration control,
d) associations of entrepreneurs i.e. chambers, unions and other organizations gathering entrepreneurs, as well as associations of these organizations – for purposes of provisions regarding practices restraining competition and practices infringing common interests of consumers.

A dominant entrepreneur is an entrepreneur who possesses control over another entrepreneur. Any forms of direct or indirect obtainment of authorities, which taking into account all legal and factual circumstances, solely or jointly, enable the entrepreneur's decisive influence on other entrepreneurs and undertakings are counted as taking the control over other entrepreneur.

The competition and consumer protection act does not regulate and does not infringe rights, which may arise based on provisions regarding protection of intellectual property.

It regards exclusive rights, i.e. possessed by one concrete person (author), who may use them with exclusion of other persons and may use them in a commercial way, based on provisions of the intellectual property law act of 30th June 2000[9] and which belong to authors of patents, utility patterns, industrial patterns, inventions (including bio-technologic ones), trademarks and also based on the copyrights and kindred rights act of February 1994[10], which belong to authors of works of individual character (in any shape e.g.: literate, journalistic, scientific works, software expressed in words, mathematic symbols, graphic signs as well as artistic works, photography, music pieces, audiovisual works).

The antitrust act has exterritorial range of application. Place of virtual or potential cause of unwelcome i.e. anticompetitive effect of specified market behavior determines the application of the act. In case of those anticompetitive practices, of which effects are revealed outside the territory of Poland the antitrust act does not apply, even if entrepreneurs undertaking such action have their seat in Poland.

IV. PROHIBITION OF PRACTICES RESTRAINING COMPETITION EXPRESSED IN THE ANTITRUST ACT

The prohibition of practices restraining competition may take the form of agreements restraining competition[11] (practices relatively prohibited) or practices the abusing of dominant position[12] (practices strictly prohibited).

The condition of determining the existened of a practice restraining competition is to determine a relevant market. The relevant market is a market of goods, which because of their purpose, price and properties, including quality, are recognized by their purchasers as substitutes and are offered in an area, in which, because of their

[9] Dz.U. 03.119.1117 with further changes.
[10] Dz.U. 06.90.631 with further changes.
[11] Art. 6 of the antitrust act.
[12] Art. 9 of the antitrust act.

kind, properties, existence of barriers of entry to the market, preferences of consumers, significant differences in pricing and costs of transportation, conditions of competition are similar. Traditionally the, determination of a relevant market requires three elements to be analyzed[13]:

a) Product relevant market (assortment market), where the basic criteria for distinction is substitutability i.e. exchangeability of concrete goods (from the average purchaser's point of view, whose needs these goods will satisfy).
b) Territorially relevant market (geographical market). Such market is determined by the area of sale, on which there are homogenous, identical or similar competition conditions on the appropriate product relevant market. The geographical market may be regarded as local (area of the town, city, commune), regional (area of several provinces), national, EU or global.
c) Temporarily relevant market. It regards markets in which factor of time is of crucial meaning for competition.

The definition of agreement is crucial for understanding the antitrust act. Agreement is understood as:

a) Any contracts concluded by and between entrepreneurs, their associations or entrepreneurs and such associations or several provisions of these contracts;
b) Settlements made in any form by two or more entrepreneurs or their associations;
c) Resolutions or other acts of associations of entrepreneurs or their statutory bodies.

Generally, anticompetitive agreements may be divided into horizontal and vertical ones[14]. Agreements between entrepreneurs acted at the same trade-level are named horizontal. Horizontal agreements (also known as cartels) reflect on competition in a more negative way than vertical ones. The competition law treats them more severely than vertical agreements. Vertical agreements are these which are concluded between entrepreneurs of different trade-levels[15].

A distribution agreement is a kind of vertical agreement and it is an agreement concluded between entrepreneurs acting on different trade-levels. The purpose of a distribution agreement is the purchase of goods made with an intention of further re-sale. There are several kinds of distribution agreements. There may be listed such distribution agreements as an exclusive purchase agreement, an exclusive sales agreement, a selective distribution agreement, a franchising agreement.

V. TYPES OF AGREEMENTS RESTRAINING COMPETITION

According to art. 6 of the antitrust act, agreements, which have as their object or effect the prevention, restriction or distortion of competition within the relevant mar-

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[13] More about relevant market for business activity see: A. Fornalczyk "Biznes a ochrona konkurencji", Cracow 2007, p. 22 and further.

[14] T. Szanciło, „Porozumienia ograniczające konkurencję", Przegląd Prawa Handlowego 2006/6, s. 37.

[15] More abort agreements restraining competition see: M. Tomaszewska, "Porozumienia w świetle orzecznictwa antymonopolowego", Glosa Przegląd Prawa Gospodarczego, 2005/1, s. 98 and further.

ket are prohibited. The antitrust act presents as an example the following groups of agreements restraining competition:

a) Price agreements – agreements, in which prices or other purchase or goods' sales conditions are directly or indirectly fixed,
b) Contingent agreements – agreements, in which production, sale, technical progress or investments are limited or controlled. Contingent agreements lead to the elimination of internal competition i.e. between its parties, which consciously resign from their freedom in determination of output, investment or technical development level. Determination of limits in amounts or value of sales or output is an example of such agreements.
c) Distribution agreements – agreements, in which the market of purchase or sales is artificially divided. The idea of distribution agreements is to divide market share and attribute these shares to concrete entrepreneurs. Such division is usually provided on the ground of territorial criterion, assortment criterion or subjective criterion.
d) Discrimination agreements – agreements, in which in similar contracts with third parties onerous or diversified conditions create different competition conditions.
e) Joint agreements – agreements, in which conclusion of contract depends on acceptance or execution of other performance by the second party and this performance has no subjective or customary relation to the subject of the contract.
f) Boycott – it is when the access to the market is limited or when those who are not parts of an agreement are eliminated. The idea of boycott is preparation of the settlement between at least two entrepreneurs in which parties are obliged to refuse conclusion of contracts with several entrepreneurs or groups of entrepreneurs (boycott of these entrepreneurs).
g) tacit collusion – agreement, in which entrepreneurs who are participants of a tender (or together with an organizer of such tender) collude and agree on concrete conditions of their offers (in particular: scope of works and payment).

The result concluding such an agreement is that it is null and void by virtue of law.

There are several specific types of agreements, which are normatively excluded from the general prohibition of the antitrust law. There are: so called *de minimis* agreements and block exemptions. Besides that the President of the Competition and Consumer Protection Office (hereinafter: UOKiK) may issue individual decision, accepting the agreement as not infringing the antitrust act.

De minimis agreements are these, which are concluded between competitors, whose joint market share in a previous calendar year did not exceed 5%. Besides that, the prohibition does not apply for agreements of entrepreneurs, who are not competitors, if joint market share of any of them in a previous calendar year did not exceed 10%.

In case of block exemptions the Council of Ministers decides in a form of regulation, which groups may be excluded from the prohibition of art. 6 of the antitrust act. These agreements have to contribute to improvement of output, distribution of goods or to technological or economical progress or give the purchaser or user a part of its profits. What is more, these agreements must not limit entrepreneurs in a higher level than necessary for achievement of these goals and they must not enable these entrepreneurs eliminate competition on the relevant market in the scope of significant amount of concrete goods.

VI. THE ABUSE OF A DOMINANT POSITION IN THE ANTITRUST ACT

The antitrust act does not prohibit having a dominant position. Nevertheless, art. 9 of the antitrust act says that the abuse of a dominant position by one or several entrepreneurs is prohibited. The dominant position is understood as the position of the entrepreneur, which enables him to effectively prevent competition on the relevant market by the creation of possibility to be independent on wide extent from competitors, contractors and consumers[16].

There must be two jointly fulfilled premises in order to determine the possession of the dominant position. Firstly, the possibility to prevent the efficient competition on the relevant market, and secondly, the ability of an entrepreneur to act relatively independently from competitors, contractors and consumers on the relevant market. There is a presumption that entrepreneur has a dominant position if his market share exceeds 40%. The presumption is a legal one and may be refuted. Possession of monopolistic position by entrepreneur is a qualified form of dominant position[17].

The abuse of a dominant position is in particular:

a) Direct or indirect imposition of unfair prices, including to exorbitant prices and blatantly low prices (predatory pricing), remote payment terms or other purchase or sale of goods conditions.
b) Limitation of output, sales, technical progress with harm to contractors or consumers.
c) Application of onerous or diversified conditions in similar contracts with third parties, which create different competition conditions, e.g. differences in pricing.
d) Making the contract depends on acceptance or execution of other performance by the second party and this performance has no subjective or customary relation to the subject of the contract (joint transactions).
e) Counteraction of creation of conditions necessary to rise and development of competition.
f) Imposition of onerous conditions of contracts by entrepreneur, which give him unjust profits.
g) Division of the market due to territorial, assortment or subjective criteria.

Any forms of abuse of dominant position by entrepreneurs are wholly or partially null and void.

VII. COMPETENCES OF THE PRESIDENT OF THE COMPETITION AND CONSUMER PROTECTION OFFICE

The central body of governmental administration appropriate in cases of competition and consumer protection is the President of UOKiK. His competences are:

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[16] More about domination in the competition law see: B. Pęczalska, "Ochrona konkurencji", Warsaw 2007, p. 180 and further.

[17] More about abuse of dominant market position of enterprises see: A. Fornalczyk, "Biznes a ochrona konkurencji", Cracow 2007, p. 41 and further.

a) Supervising the application of provisions of the antitrust act by entrepreneurs.
b) Issuance of decisions in cases regarding restriction of competition, in cases regarding concentration of entrepreneurs and in cases of practices restraining common interests of consumers as well as other decisions mentioned in the antitrust act.
c) Providing research of state of concentration of the economy and market behaviors of entrepreneurs.
d) Preparation of drafts of governmental programs of development of the competition and drafts of governmental consumer policy.
e) Cooperation with national and international bodies and organizations of consumer and competition protection.
f) Execution of tasks and competences of the body responsible for competition protection of the member state of EU, as determined in the resolution no 1/2003/WE and in the resolution no 139/2004/WE.
g) Execution of tasks and competences of the appropriate body and uniform liaison office of the member state of EU, as determined in the resolution no 2006/2004/WE.
h) Preparation and presentation of drafts of legal acts regarding competition and consumer protection to the Council of Ministers.
i) Submission of periodic reports of execution of governmental programs of development of the competition and consumer policy to the Council of Ministers.
j) Cooperation with self-government in the scope of consumer policy.
k) Initiation of research of goods made by consumer organizations.
l) Preparation and edition of publications and educational programs, which popularize knowledge about consumer and competition protection.
m) Contact with entrepreneurs in cases regarding consumer and competition protection.
n) Fulfillment of international obligations of the Republic of Poland in the scope of cooperation and exchange of information in cases of consumer and competition protection and in cases of state aid.
o) Gathering and popularization of jurisdiction in cases of consumer and competition protection, in particular by publication of decisions of the President of UOKiK at the website of UOKiK.
p) Cooperation with the President of the National Center of Criminal Information in the scope necessary for execution of legal tasks.
q) Execution of other tasks determined in the antitrust act and in other acts.
r) Giving opinions on drafts of public aid granted for entrepreneurs within the frame of aid programs and by individual decisions, prior to sending them to the European Council.
s) Providing proceedings and issuance of decisions in cases of practices restraining common interests of consumers[18].

The general rule is that one may appeal the decision of the President of UOKiK to the Competition and Consumer Protection Court in the District Court in Warsaw within 14 days since the day of delivery of decision to entrepreneur.

[18] More abort competences of the President of UOKiK see: B. Pęczalska, "Ochrona konkurencji", Warsaw 2007, p. 16 and further.