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Impact of the New Approach to Article 102 TFEU on the Enforcement of the Polish Prohibition of Dominant Position Abuse

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Impact of the New Approach to Article 102 TFEU on the Enforcement of the Polish Prohibition of Dominant Position Abuse

by

Konrad Kohutek*

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Abstract

This paper will analyze the impact of the modernized approach to Article 102 TFEU on the application of the prohibition of dominant position abuse contained in Polish competition law. For that purpose, several questions will be answered. Has the consumer-welfare standard already become, or will it become (in particular under the influence of the effects-based approach), the decisive criteria for the finding of a violation of Article 9 of the Polish Competition Act as well as its past

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equivalents? Will EU's new approach to the abuse of dominance lead to a re-orientation of the goals pursued by Polish competition law on unilateral conduct? Has Polish enforcement practice attached as much emphasis to the protection of market structures as some EU cases that might have justified the accusation of over-enforcement? Has the recent reform introduced any new requirements, standards or tests in the procedural dimension of the application of the ban on the abuse of dominance and if so, to what an extent will they influence the traditional approach employed by Polish antitrust and judiciary institutions?

In order to answer these questions, relevant Polish legislation and case-law will be analyzed. The article will try to establish the actual scope of the change relating to substantive as well as procedural rules which will (or should) affect the enforcement of Article 9 of the Polish Competition Act under the impact of the new EU approach.

Résumé

Cet article a pour but d'analyser l'impact de l'interprétation modernisée de l'article 102 TFUE sur l'application de l'interdiction de l'abus de position dominante dans la loi polonaise. Dans ce but, nombreuses questions seront adressées. Par exemple, le bien être des consommateurs, est-il déjà, ou sera-t-il dans le future (en particulier, sous l'influence de l'approche fondée sur les effets), le critère décisif pour constater une violation de l'article 9 du Droit de la concurrence polonais, aussi que leurs équivalents?

La législation polonaise et la jurisprudence seront analysées. Cet article tente d'établir l'étendue actuel des changements relatifs aux règles substantives et procédurales, qui affectent (ou devraient affecter) le renforcement de l'article 9 du Droit de la concurrence polonais sous l'influence de la nouvelle approche de l'UE.

Classifications and key words: abuse of a dominant position; effects-based approach; consumer harm; exclusionary conduct; anticompetitive foreclosure; rule of reason; efficiency-defense; over-enforcement; 'as efficient competitor' test; standard of proof.

I. Introduction

A new Guidance on exclusionary abuses by dominant undertakings was published by the European Commission on 9 February 2009 in all languages of the EU Member States¹. The Guidance specified the Commission's modernized approach to the application of the prohibition of dominant position abuse

¹ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ [2009] C 45/02, hereafter, Guidance.

contained in Article 102 TFEU; particular issues² concerning this reform will be discussed further in this paper.

The principles of the application of the Polish prohibition of dominant position abuse laid down in Article 9 of the Competition Act³ cannot remain unaffected by this reform. First, this provision is designed to fulfil a very similar (if not identical, see below) ultimate goal to Article 102 TFEU. Second, there are only a few substantially insignificant differences in the wording of those two legal rules⁴. Third, what speaks in favour of the interpretation of the Polish prohibition in line with the new Guidance is not only Poland's membership in the EU but also, potentially even more importantly, the 'membership' of the UOKiK President in the European Competition Network. Finally, Article 102 TFEU is directly applicable in all Member States and so the Polish antitrust authority, national courts⁵ and private entities are entitled to apply this provision directly in relation to dominant firms in Poland.

II. 'Consumer harm' as the ultimate objective of the modernised approach to the ban on the abuse of dominance: the lack of reorientation?

According to the underlying concept of the reform, the prohibition of the abuse of a dominant position is designed to protect consumers. More

² For a more detailed analysis of major issues underlying this reform and the solutions adopted in the Guidance, see e.g.: E. Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law*, Oxford, Portland, Oregon 2010, p. 353–430; N. Petit, 'From Formalism to Effects? The Commission's communication on Enforcement Priorities in Applying Article 82 EC' (2009) *World Competition* 32(4) 483–497; D. Ridyard, 'The Commission's article 82 guidelines: some reflections on the economic issues' (2009) 30(5) *European Competition Law Review* 45–51; M. Kellerbauer, 'The Commission's new enforcement priorities in applying art. 82 EC to dominant companies' exclusionary conduct: a shift towards a more economic approach?' (2010) 31(5) *European Competition Law Review* 175–186.

³ Act of 16 February 2007 on competition and consumer protection (Journal of Laws 2007 No. 50, item 337, as amended; hereafter, Competition Act).

⁴ T. Skoczny, 'W sprawie modernizacji stosowania zakazu nadużycia pozycji dominującej' [in:] C. Banasiński (ed.) *Ochrona konkurencji i konsumentów Polsce i Unii Europejskiej*, Bydgoszcz 2005, p. 107. The Author rightly notes that the prohibitions (emerging from the aforementioned provisions) should not be applied on the basis of different rules and concludes that also the 'Polish' ban on the abuse of dominance should be the subject of modernisation.

⁵ See Article 5 and 6 of 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 Treaty, OJ [2003] L 1/1; see also K. Kohutek, 'Stosowanie reguł wspólnotowego prawa konkurencji przez sądy krajowe' (2006) 8 *Europejski Przegląd Sądowy* 13–21.

significantly, consumer harm has become a decisive factor for an intervention by the Commission in unilateral conduct⁶ (see below, point III) – it relates to harm of economic nature that takes the form of higher prices, lower quality of goods and the limitation of offer and innovation⁷. In this context, the notion of ‘consumers’ is interpreted in economic terms reflected by all market participants operating on the demand-side⁸ (i.e. not only final consumers, but also intermediate producers, distributors and other users of the products or services⁹).

The legal instruments (including the ban on the abuse of dominance) contained in all three modern Polish competition laws¹⁰, were aimed at the protection of consumer interests or, at the very least, their protection constituted one of their main goals. Article 1 of the current Competition Act (similarly to the Act of 2000 and the preamble of the Act of 1990) explicitly speaks of the ‘protection of consumer interests’. It is worth noting however, that public protection of consumers was not necessarily commonly attributed to the prohibition of the abuse of dominance¹¹, in particular after rules on collective consumer interests were added to the Act of 2000 (see Article 24 – 28 of Competition Act). In order to determine whether that ban has indeed been applied as a means of preventing consumer harm, it is thus necessary to analyze Polish jurisprudence and, to a certain extent, also the administrative practice of the UOKiK President. Such an assessment leads to the conclusion that even before the formal endorsement of the recent reform, Polish courts have quite often passed judgments in which consumer harm constituted at least one of the criteria, if not even one of the decisive factors considered

6 See point 5- 6 of the Guidance.

7 See point 6 of the Guidance.

8 The notion of consumer is broadly (economically) interpreted also under Polish antitrust rules; see D. Miąsik, T. Skoczny [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 56, 57, 935.

9 See note No. 15 of the Guidance.

¹⁰ The Act of 24 February 1990 on Counteracting Monopolistic Practices and Consumer Protection (consolidated text: Journal of Laws 1997 No. 49, item 318 as amended; hereafter, the Act of 1990); the Act of 15 December 2000 on Competition and Consumer Protection (consolidated text: Journal of Laws 2005 No. 244, item 2080, as amended; hereafter, the Act of 2000) and of course the current Competition Act.

¹¹ Still, the explicit statement in the very wording of the act that its provisions are aimed at the public protection of the interests of consumers justifies the finding that the Competition Act is already (i.e. without necessity of amending its regulations) ‘formally prepared’ to pursue the ultimate aim of the modernized EU approach.

within the antitrust assessment of unilateral conduct¹². This fact is confirmed by both older¹³ and more recent¹⁴ rulings.

However, other rulings lack the assessment of the impact of the scrutinized conduct on the economic situation of consumers. At the same time, they presented both conclusions: one, that despite the lack of such an analysis did not raise meaningful or substantial objections (because of no false positives¹⁵ or no false negatives¹⁶) and another that could be seen as, at least, debatable¹⁷. Finally, it is possible to identify some Polish judgments where the protection of consumer interests was deemed to be of secondary importance, realized

¹² See also D. Miąsik, 'Controlled Chaos with Consumer Welfare as the Winner – a Study of the Goals of Polish Antitrust Law' (2008) 1(1) *YARS* 49-51.

¹³ See for example the judgment of the Antimonopoly Court of 26 April 1995, XVII Amr 67/94, Lex 56343, where the court required the consideration of the consumer interests (participants of the insurance market) by examining whether, and if so, how they benefited from sending them to car repairers that cooperated with the dominant insurer; judgment of the Antimonopoly Court of 17 June 2002, XVII Ama 98/01, UOKiK Official Journal 2002 No. 3-4, item 173, where the court ordered the consideration (also) of the interests of passengers representing the demand-side of the market and their harm in the form of depriving them from the right to choose a contracting party.

¹⁴ See for example judgment of the Court of Competition and Consumer Protection of 29 June 2007, XVII Ama 14/06, UOKiK Official Journal 2007 No. 4, item 45 (imposition of limitations in access to ski-slopes/lifts operated by the dominant firm on those who rented ski equipment from its competitors by requiring them to pay an additional fee); see also judgement of the Supreme Court of 19 October 2006, III SK 15/06, (2007) 21-22 *OSNP*, item 337 (infringing consumer interests by making it impossible to undertake the activity at stake by practically all potential competitors); judgement of the Supreme Court of 14 January 2009, III SK 24/08, not yet reported (excluding or limiting the possibility of offering more attractive conditions of rendering of liquid rubbish collection services).

¹⁵ For example the rightful qualification of the non-compete obligations as anticompetitive (judgment of the Antimonopoly Court of 21 October 1994, XVII Amr 16/94, (1995) 4 *Wokanda*).

¹⁶ For example the correct acquittal of the use of uniform prices in the wholesale petrol market (judgment of the Supreme Court of 21 February 2002, I CKN 1041/99, (2002) 9 *Wokanda*) or rightful acquittal of the refusal to appoint the profession location of lawyer at place, which that lawyer had indicated in his motion (judgment of the Supreme Court of 29 May 2001, I CKN 1217/98, (2002) 1 *OSNC*, item 13).

¹⁷ See for example judgment of the Supreme Court of 19 August 2009, III SK 5/09 (not yet reported) where selective above-cost price cutting in the market of sport newspapers has been found to be anticompetitive (risk of false positive). Fortunately that risk was here only theoretical, as the Supreme Court quashed the condemning ruling of the Court of Appeals on other grounds; see K. Kohutek, 'Shall selective, above-cost price cutting in the newspaper market be qualified as anticompetitive exclusion? Case comment to the judgement of the Supreme Court of 19 August 2009 - *Marquard Media Polska* (Ref. No. III SK 5/09)' (2010) 3(3), p. 294.

merely ‘by the way’ of the protection of the main aim of the Competition Act – ‘an atmosphere in which economic activity is conducted’¹⁸.

The protection of consumers from economic harm was thus one of the main goals (sometimes even the ultimate aim) realized by the Polish prohibition of the abuse of dominance. This realization is confirmed by doctrine which, while characterized by a certain ‘chaos’ in relation to the identification of the goals of Polish competition law, has nevertheless reached the conclusion that consumer-welfare is to be treated as its ultimate aim¹⁹. The implementation of the paradigms of the EU reform is unlikely therefore to lead to a functional re-orientation of the enforcement of Article 9 of the Competition Act as far as the determination of the goals of the Polish ban is concerned. Indeed, the Supreme Court stressed nearly a decade ago, during an investigation of a potential breach of that prohibition, that the Antimonopoly Act is not aimed at the protection of an individual undertaking but rather, that it protects competition as an institutional phenomenon²⁰. Such statement²¹ is fully in line with the Commission’s declaration concerning its new enforcement priorities for Article 102 TFEU in relation to exclusionary abuses. The Commission found that ‘what really matters is protecting an effective competitive process and not simply protecting competitors’²². The spirit of recent UOKiK decisions is based on a similar approach²³.

Aside from some recent rulings²⁴, it would be difficult to find any Polish judgments that would resemble some of the well-known but controversial rulings based on the former Article 82 TEC, which have raised criticism because of their protectionism of competitors rather than the process of

¹⁸ Judgment of the Court of Competition and Consumer Protection of 16 November 2005, XVII Ama, UOKiK Official Journal 2006 No. 1, item 16.

¹⁹ D. Miąsik, ‘Controlled Chaos...’, p. 55-56; see also K. Kohutek, [in:] K. Kohutek, M. Siemradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2008, p. 341–342.

²⁰ Judgment of the Supreme Court of 29 May 2001, I CKN 1217/98, (2002) 1 OSNC, item 13 where the court found that since the scrutinised practice of the dominant firm concerns an individual interest of the undertaking (here: a lawyer), than the provisions of the Antimonopoly Act are not applicable. Individual rights can be protected before civil or administrative courts.

²¹ The courts and the UOKiK President have subsequently often referred to the quoted statements of the Supreme Court as an appropriate interpretation of the aims of the Antimonopoly Act and the values protected by its rules.

²² See point 6 of the Guidance.

²³ See decision of the UOKiK President of 24 August 2009, RBG-9/2009 stating that the rules laid down in the Antimonopoly Act (including the ban on abuse) are aimed at the protection of the mechanism of competition safeguarding the highest possible level of consumer welfare.

²⁴ See in particular the judgment of the Supreme Court of 19 August 2009, III SK 5/09, not yet reported; see K. Kohutek, ‘Shall selective...’, p. 294.

competition²⁵. Unlike EU law however, Polish antitrust was never concerned with the so-called ‘integration’ goal realized in Europe primarily by the elimination of trade barriers between Member States. The pursuance of this objective, including the ‘active’ enforcement of the abuse prohibition, has contributed greatly to the creation of a very structure/form-based approach to its application²⁶ facilitating an elevation of the ‘integration’ aim over that of ‘competition’. In light of the recent reform, the former has already given way, or at least will do so in the near future, to the fundamental aim of community competition rules²⁷, that is, enhancing consumer welfare.

III. General approach to exclusionary conduct: between the ‘old’ and ‘new’ definition

The protection of consumers is thus meant to be a major aim of the modernized approach to Article 102 TFEU. The ‘essence’ of that reform manifests itself in establishing the ‘consumer harm’ criteria as a direct prerequisite of an intervention by the Commission against unilateral conduct (see, below). The prevention of consumer harm has been the ultimate, general aim of the ban on the abuse of dominance also under the traditional ‘forms-based’ approach. It finds its support in a famous statement of the Court of Justice in *Continental Can*²⁸, the first judgment examining a suspected infringement of that prohibition. The court stated there that this provision (originally Article 86) is not only aimed at practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on effective competition²⁹.

It seems legitimate to conclude therefore that the key change introduced by the recent reform is not reflected in the establishment of new paradigms for Article 102 TFEU³⁰. Instead, it manifests itself primarily in the modification of the methods of examining whether a dominant firm’s conduct is harmful

²⁵ See in particular: T-203/01: *Michelin v Commission*, ECR [2003] II-5917; C-95/04 P *British Airways plc. v Commission* ECR [2007] I-2331; C-202/07 *France Télécom S.A. v Commission* (not yet reported); see also E. Fox, ‘We Protect Competition, You Protect Competitors’ (2003) 26(2) *World Competition* 149–165.

²⁶ And thus to increase, at least potentially, the number of decisions that could constitute false positives.

²⁷ A fact noticed by Polish doctrine; see T. Skoczny, ‘W sprawie modernizacji...’, p. 112–114.

²⁸ 6/72 *Europemballage/Continental Can v Commission* ECR [1973] 215.

²⁹ Para. 26 of the *Continental Can*.

³⁰ Literature contains opposite findings also; see for example T. Eilmansberger, ‘Neue Paradigmen im Europäischen Recht?’ (2009) 4 *Zeitschrift für Wettbewerbsrecht* 438.

to consumers and thus prohibited whereby the term ‘methods’ is understood as procedural measures as well as modifications in substantial soft-law. The latter refers in particular to changes in the general concept of exclusionary abuse³¹. In light of the Guidance, exclusionary abuse should be associated with anticompetitive foreclosure leading to consumer harm³². The reformed approach to exclusionary conduct has thus a narrower scope than the ‘definition’ developed in *Continental Can* and *Hoffman La-Roche*. A negative impact on the structure of competition and a presumed only harm to consumers (‘indirect’) are no longer sufficient. Under the new effects-based approach, not only is it necessary to demonstrate harm to the structure of competition (foreclosure) but also that such foreclosure is the cause of consumer harm³³.

The analysis of relevant jurisprudence (see, point II) clearly suggests that the Polish prohibition of the abuse of dominance is already being used as a means of protection against (at least) indirect³⁴ consumer harm. The key question here is whether the ban on exclusionary abuse has also in Poland already become (or will do so in the future) a legislative instrument designed to prevent only direct (actual or likely) consumer harm or, in other words, will consumer harm act as a direct operational criteria of differentiating anticompetitive practices from legal conduct of dominant entities.

It would be difficult to answer that question in the affirmative and even more so, to deliver an unambiguously positive answer. First, even though Polish jurisprudence has quite often treated consumer interests as an important factor in antitrust assessments of unilateral conduct, consumer harm itself was usually ‘only’ inferred³⁵. Moreover, general substantial framework of exclusionary conduct constructed in recent case law³⁶ does not relate to

³¹ Exploitative practices of dominant companies have not been encompassed by the reform (see, point V).

³² According to the Commission (point 19 of the Guidance) ‘anticompetitive foreclosure describes a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of a dominant undertaking whereby the latter is likely to be in a position to profitably increase prices to the detriment of consumers’; whereby the notion of ‘price increase’ is also used for other (than price) ways in which the parameters of competition (such as output, innovation, the variety or quality of goods/services) can be influenced (point 11 of the Guidance).

³³ See also e.g. N. Petit, ‘From Formalism...’, p. 486.

³⁴ What relatively often meant in EU case-law the presumed/alleged harm only or simply harm that is just potentially possible (see in particular cases: *Michelin II*, *British Airways*, *Wanadoo*).

³⁵ And thus becoming similar to ‘indirect consumer harm’ within the meaning of the *Continental Can*.

³⁶ The Polish Competition Act, similarly to ‘hard’ Community law, does not provide for the definition of abuse determining only the notion of a dominant position (see Article 4 point 10 of the Competition Act).

consumer harm. In the opinion of the Supreme Court: ‘anticompetitive abuse of a dominant position constitutes such a conduct of a dominant undertaking that while being objectively contrary to normal competition, may influence the structure developed by community courts’ (see *Hoffmann La-Roche* case³⁷). That concept was strongly influenced by ordo-liberal thoughts, based on the so called ‘formal/structured-based approach’ to the abuse of dominance. It over relies on such values and goals as: striving for the integrity of the common market, economic freedom and fairness³⁸. Many of those postulates have been revised under the effects-based approach, a fact reflected at least to some extent by the new Guidance. The Polish concept of exclusionary conduct, even though presenting some intellectual progress in comparison to the *Hoffman La-Roche* formula (see below), is neither close to the wording nor even to the essence of anticompetitive foreclosure (within the meaning presented by the Commission). Its content makes no reference to consumer harm, it also ignores the fact that the basic intervention condition in exclusionary conduct can give rise to the risk of condemning practices that in fact do not/are not likely to harm consumers, being harmful only to the competitor’s of the dominant firm at most³⁹ (risk of false positives). Downplaying the consumer-harm-condition can be all the more meaningful considering that the Supreme Court created that concept in a judgment passed more than half a year after the EU reform⁴⁰. As far as the scope of the general approach to exclusionary conduct is concerned, it can be assumed therefore that Polish judiciary has not yet fully accepted its substantial, modernized framework. Taking into account

³⁷ 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461; see para. 91 of that judgment where the Court ruled that: ‘the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition’.

³⁸ For a detailed presentation of the ordo-liberal school (Freiburg school), see e.g. D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford 2001, p. 271-333; see also, Ch.A. Ahlborn, A.J. Padilla, ‘From Fairness to Welfare. Implications for the Assessment of Unilateral Conduct under EC Competition Law’ [in:] C-D. Ehlermann, M. Marquis (eds.) *European Competition Law Annual 2007. A Reformed Approach to Article 82 EC*, Hart Publishing, Portland 2008, p. 64-69.

³⁹ What also occurred in that case (see judgment of the Supreme Court of 19 August 2009. III SK 5/09). It can be inferred from its content that ‘harming a competitor’ of the defendant constituted in fact the main criterion of considering his price-based conduct as anticompetitive (see also K. Kohutek, ‘Shall selective...’, p. 294.

⁴⁰ The Guidance was issued in December 2008 (in English); its translations were published on 9 February 2009.

the non-binding character of the Guidance, this in itself does not constitute a violation of EU law. The approach of the Supreme Court proves that it has taken a reserved stance towards EU trends⁴¹ and remained, at least to some extent⁴², ‘loyal’ to more traditional concepts (shaped by community courts and not by the Commission⁴³). For the time being however, it would be unjustified to conclude on the basis of a single judgment only that the general concept of exclusionary conduct has already been fully developed and commonly accepted in Poland⁴⁴. Such a finding is strongly dependant on the ‘will’ and ‘frequency’ of recalling that concept in future judgments⁴⁵ and decisions of the UOKiK President.

IV. Procedural requirements and mechanisms under the ‘effects-based’ approach

1. Tendency to increase the standard of proof

It is likely that the most ‘practically appreciable’ change caused by the EU reform will be reflected by an increase⁴⁶ of procedural requirements for demonstrating whether a dominant firm’s conduct is anticompetitive. The Commission, national authorities and any others claiming that a violation of the ban on abusive conduct took place will have to prove not just an inferred

⁴¹ ‘Formalised’ primarily by the executive authority of the Commission in the form of appropriate soft law documents.

⁴² The presented concept departs somewhat from *Hoffman La Roche*. For example, it rightfully does not speak of weakening of competition (allegedly caused by the mere fact of the very presence of the dominant undertaking on the given market). There is no direct relation between market concentration and the restriction of competition on that market; see also W. Kolasky, ‘What is competition? A comparison of U.S. and European perspectives’ (2004) Spring-Summer *The Antitrust Bulletin* 32, 33.

⁴³ The Commission itself explicitly declares that the Guidance is not intended to constitute a legal statement and is without prejudice to the interpretation of Article 82 by the ECJ or CFI (point 2 of the Guidance).

⁴⁴ The judgment of 19 August 2009, III SK 5/09, contains however the first as extensive declaration on the Supreme Court’s general approach to exclusionary conduct.

⁴⁵ However in one of its latest rulings, the Supreme Court referred to the presented judgment (see footnote above) and especially to the ‘disproportionality condition’, i.e. an element of the general concept of exclusionary abuse (developed in the latter); see judgment of the Supreme Court of 18 February 2010, SK 28/09 (not yet reported) where the reduction of prices (for international calls) has not been qualified as disproportionate (on the market affected by the conduct of a dominant undertaking).

⁴⁶ See also N. Petit, ‘From Formalism...’, p. 497.

but an actual⁴⁷ or likely⁴⁸ consumer harm – it will thus not be sufficient to demonstrate an indirect⁴⁹ or potentially possible harm only. So far, Polish abuse cases did not normally include a detailed assessment of the influence of the conduct on the economic situation of consumers⁵⁰ (indicating⁵¹ that the practice under scrutiny actually harmed or will likely harm consumers). Establishing a violation of the said prohibition was limited to the evaluation of the legal conditions of a given practice (usually listed in the Competition Act⁵²), without analyzing its market effects (a fact noted by doctrine⁵³).

It appears that the need to meet an increased standards of proof will, or at least should constitute a significant change in the enforcement of Article 9 of the Polish Competition Act. The fact should be stressed however that at least in some Polish cases both the likelihood and the form of consumer harm have been reliably inferred from ‘mere life experience’⁵⁴ (i.e. without reference to a complex economic assessment or even any at all). With respect to other cases, and in particular ‘complicated’ ones, the assumption of such a presumed harm (or lack thereof) would be doubtful under the reformed methodology concerning the establishment of abuse. In such cases, proving or disproving consumer harm will often require the conduct of an analysis of the actual and future (long-term) market conditions on the scrutinized markets, including some hypothetical evaluations⁵⁵.

⁴⁷ See points 21, 37, 52 of the Guidance.

⁴⁸ See points 20-22, 30, 31, 36, 50, 52, 63, 70, 71 of the Guidance.

⁴⁹ I.e. the harm, inferred from the infringement of the market structure (competitors’ harm).

⁵⁰ Leading to the creation of a coherent and reliable theory of consumer harm; see P. Lowe, ‘The Design of Competition Policy Institutions for the 21st Century – The Experience of the European Commission and DG Competition’ (2008) 3 *Competition Policy Newsletter*.

⁵¹ On the basis of particular evidence (like: higher prices, limited output or choice, etc.).

⁵² The list of statutory abuses is longer in the Polish Competition Act than in Article 102 TFEU, including seven (however also only exemplary) forms of conduct that may constitute an abuse of dominance.

⁵³ T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsiki (eds.), *Ustawa...*, p. 614.

⁵⁴ See e.g. decision of the UOKiK President of 24 August 2009, RBG-9/2009, UOKiK Official Journal 2009 No. 4, item 31 where a violation of Article 9 of Competition Act was found by reference to ‘mere life experience’. The President indicated that the market entry of the dominant firm’s competitor would without a doubt lead to measurable benefits for customers (in particular in the form of cost reductions).

⁵⁵ I.e. establishing the likely way in which the relevant market will develop and in particular whether consumers would be better or worse off in the absence of the conduct in question (so called ‘an appropriate counterfactual’; see point 21 of the Guidance). Some elements of ‘counterfactual methodology’ can be found in an ‘older’ Polish ruling; see judgment of the Antimonopoly Court of 15 March 1995, XVII Amr 66/94 (1996) 3 *Wokanda* where the court indicated that the proof that monopolistic practices satisfy the consumers’ needs better

Nonetheless, some recent judgments of the Supreme Court have placed greater emphasis on the performance of a more detailed market assessment in order to deliver economically reliable grounds speaking for, or against, the occurrence of consumer harm caused by the conduct under consideration. The court ruled in one of its judgments that the mere limitation of another company's freedom to act (usually concerning the competitor of the dominant entity) is not sufficient to establish a violation of Article 9 of the Competition Act; such limitation must be capable of having actual or likely (but logically explained) impact on the level of competition on the market. Proof that the imposition of a contractual clause has raised the costs of the contracting parties of a dominant undertaking (compared to their costs borne in the absence of such clause) has also been recognized by the Court as a necessary condition to qualify such clause as anticompetitive⁵⁶. In a subsequent case, the Supreme Court reversed a ruling of the Court of Appeals due to, among other things, the inability to demonstrate an allegedly negative impact of the dominant undertaking's conduct on the economic conditions of a given market and thus also (i.a.) on prices of services rendered on that market⁵⁷. Finally, the Supreme Court has treated a decision of the UOKiK President⁵⁸ as defective because it did not present the operational conditions of the Polish gas market in the relevant period of time (a crucial factor for the evaluation of the effects on competition and consequently also consumers of the practices of market participants⁵⁹). The aforementioned judgments⁶⁰ suggest that Polish jurisprudence is considering following the trend to increase the standard of proof required to establish a breach of the prohibition of dominant position abuse⁶¹.

One of the objectives of the reformed approach to the application of Article 102 TFUE is increasing the transparency and predictability of its enforcement.

than their absence, dismisses the endangering of the public interest brought about by those practices.

⁵⁶ Judgment of the Supreme Court of 19 February 2009, III SK 31/08 (not yet reported); for a detailed analysis of this ruling see K. Kohutek, 'Zarzut nadużycia pozycji dominującej na rynku usług weterynaryjnych. Glosa do wyroku SN z dnia 19 lutego 2009 r.' (2009) 4 *Glosa* 93-109.

⁵⁷ Judgment of the Supreme Court of 3 March 2010, III SK 37/09 (not yet reported), where the court explicitly stated that the UOKiK President, obliged to demonstrate a violation of competition rules, has not met the required standard of proof.

⁵⁸ Decision of the UOKiK President of 9 August 2005 (DOK-91/2005).

⁵⁹ Judgment of the Supreme Court of 15 July 2009, III SK 34/08 (not yet reported).

⁶⁰ Both repealing the verdicts of the Court of Appeals and sharing (at least partially) the arguments put forward by the defendant.

⁶¹ Literature has treated the first of the judgment of 19 February 2009, III SK 31/08 as an example of the use of the economic approach by Polish judiciary, i.e. concentrating the assessment on the effects of the conduct in question; T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 614.

The fulfilment of this goal is better to be seen in the procedural dimension as well. It is because of creating legal instruments, tests, presumptions and defences which are designed to facilitate self assessment by dominant firms (*ex ante*) as well as assessment by those charging them with a violation of competition law to construct the presumption of the abuse. It pertains especially to solutions such as: dominance screen, the lack of *per se* abuses, 'as efficient' competitor test or efficiency defence.

2. The lack of *per se* abuse?

Under the new approach to Article 102 TFEU there shall be no *per se* abuses⁶² (the correct standpoint in particular in the dimension of substantial law⁶³). In other words, no practices will be condemned solely on the basis of their form or intrinsic features. As opposed to hard-core cartels, unilateral practices quite frequently are of 'dual nature' – capable of having simultaneously anti- and pro-competitive effects.

Polish jurisprudence has generally not applied a formula of *per se* illegality to any specific forms of unilateral conduct, a fact not disproved by the realization that abuse charges were often evaluated by the examination of the fulfilment of statutory conditions of a given 'named' example of abuse⁶⁴ (see above). Indeed, judgments can be identified where the courts ruled explicitly that some forms of conduct (potentially exclusionary or discriminatory) are not in themselves anti-competitive (e.g.: exclusive dealing⁶⁵, non-linear pricing for the rent of premises⁶⁶,

⁶² See R. Whish, *Competition Law*, Sixth Edition, Oxford University Press 2009, p. 196, 197.

⁶³ The Commission reserved the right not to carry out a detailed assessment before concluding that the conduct in question is likely to result in consumer harm and thus is likely to be abusive (anticompetitive). Such 'simplified methodology' of finding abuse (or at least of adopting of the presumption of abuse) shall be limited to such conduct only that apparently can solely raise obstacles to competition and create no efficiencies (see point 22 of the Guidance); so called 'opt-out clause'.

⁶⁴ The majority of those cases pertained to exploitative practices (see Article 9 (2) point 1 and 6 of Competition Act) which do not usually have exclusionary/anticompetitive effects; also those practices shall be 'formally' classified as anticompetitive; see K. Kohutek, 'Naruszenie interesu publicznego a naruszenie konkurencji – rozważania na tle praktyk rynkowych dominantów' 2010 (7) *Państwo i Prawo*.

⁶⁵ Judgment of the Antimonopoly Court of 10 September 1992, ZO 500/92, (1993) 2 *Wokanda*; judgment of the Antimonopoly Court of 8 January 1997, XVII Amr 65/96, (1998) 1 *Wokanda*.

⁶⁶ Judgment of the Antimonopoly Court of 13 March 2002, XVII Ama 23/01, Lex 56377.

applying regressive rents for the lease of land or standings on the local fair⁶⁷, network access refusal⁶⁸, price discrimination⁶⁹).

3. 'As efficient competitor' test: conceptually already applied

One of the key rules associated with the effects-based approach assumes that in principle only competitors that are at least as efficient as dominant firms deserve ('indirect'⁷⁰) antitrust protection⁷¹. The so called 'as efficient competitor' test is an instrument designed to facilitate the legal qualification of a dominant firm's price-based exclusionary conduct.

Even before the formal introduction of the EU reform, some Polish judgments already referred at least to the very concept underlying this standard. In one of such verdicts, the Supreme Court stressed the competitive advantage enjoyed by the dominant undertaking due to earlier economic expansion and concluded that the ineffectiveness of its competitors was caused by that very advantage⁷². In other cases, inefficient competitors did not gain antitrust protection⁷³.

The approach adopted in these judgments was conceptually based on the assumptions underlying the 'as efficient competitor' standard. They did not however apply the methodology of that test which requires the comparison

⁶⁷ Judgment of the Antimonopoly Court of 21 January 1998, XVII Ama 59/97, Lex 56167.

⁶⁸ Judgment of the Supreme Court of 15 July, 2009 III SK 34/08 (not yet reported), where the court found as incorrect the treatment as abusive of each refusal of the rendering of transmission services of imported gas (that took place before 1 May 2004).

⁶⁹ Judgement of the Supreme Court of 19 August 2009, III SK 5/09 (not yet reported), in which the court indicated that price-differentiating is *per se* not anticompetitive even when carried out by a dominant undertaking.

⁷⁰ Under the reform, the prohibition is not 'in itself' designed to protect competitors of dominant undertakings (see point 5 and 6 of the Guidance). The ultimate goal of its enforcement is to prevent consumer harm whereby its pursuance can 'by the way/indirectly' also protect some categories of competitors of dominant companies.

⁷¹ See point 23 of the Guidance.

⁷² Judgment of the Supreme Court of 21 February 2002, I CKN 1041/99, (2002) 9 *Wokanda*.

⁷³ See for example judgment of the Supreme Court of 28 January 2002, I CKN 112/99, (2002) 4 *Biuletyn Sądowy* where the court associated competition with an instrument of improving efficiencies pointing out that the elimination of ineffective undertaking constitutes the essence of (market) rivalry; see also Judgment of the Antimonopoly Court of 17 June 2002, XVII Ama 98/01, UOKiK Official Journal 2002 No, 3-4, item 173, where the court indicated that the essence of competition equals a situation where those who as the result of market rivalry lost their contracting parties, will be forced out of the market, frequently experiencing financial losses.

of prices of goods/services offered by the dominant entity with the costs of their production⁷⁴ (whereby, as a matter of principle⁷⁵, a conduct shall not be condemned if the prices are above a certain level of costs⁷⁶). However, some recent decisions of the UOKiK President concerning price-based practices of a dominant undertaking⁷⁷ already include a price-cost analysis⁷⁸ based on appropriate evidence⁷⁹. Reference to the price-cost methodology has also been made in the latest judgments of the Supreme Court which stated that as long as price-cutting does not result in a reduction of prices below the costs incurred by the defendant, than such practice cannot be seen as anticompetitive⁸⁰.

4. Efficiency defence: the application of the rule of reason to the abuse of dominance

The Commission has explicitly permitted the invocation of the objective justification defence or efficiency defence by dominant firms under the reformed approach to Article 102 TFEU⁸¹. It is the 'efficiency-institution' that matters most in the light of the basic assumptions underlying the reform. A dominant entity is entitled to rebut the presumption of anticompetitive foreclosure by demonstrating that in the affected markets the likely efficiencies brought about by its conduct outweigh any likely negative effects on competition and consumer welfare⁸².

Polish antitrust provisions (in line with Article 102 TFEU) do not stipulate any formal exceptions ('exemptions') from the prohibition of abuse. Still, some both recent and past judgments can be identified where the practices of

⁷⁴ Point 25 of the Guidance.

⁷⁵ In certain circumstances the Commission has however reserved the possibility of interfering in the pricing policy of dominant companies also where a less efficient competitor exerts competitive pressure (see point 24 Guidance).

⁷⁶ See points 26 – 27 of the Guidance.

⁷⁷ Predatory pricing in particular.

⁷⁸ Probably under the influence of the reform and its methodology of price-based exclusionary conduct evaluation.

⁷⁹ See e.g. decision of the UOKiK President of 26 August 2009, RBG-411-10/06/BD; decision of the UOKiK President of 30 April 2009, RLU-411-02/06/MW, decision of the UOKiK President of 31 March 2009, RKR-4/2009.

⁸⁰ Judgment of the Supreme Court of 18 February 2010, III SK 28/09 (not yet reported). The Supreme Court ruled however in an earlier judgment that prices can be treated as unfair also when they are set above costs; see judgment of the Supreme Court of 19 August 2009, III SK 5/09 (not yet reported).

⁸¹ See points 28-30 of the Guidance.

⁸² See point 30 of the Guidance where the Commission determined the conditions of the use of the *efficiency-defense*; they are similar to the pre-requisites laid down in Article 101(3) TFUE.

dominant firm that 'looked abusive' *prima facie* were not condemned because of circumstances constituting their objective justification (*sensu largo*). Moreover, the first modern Polish Antimonopoly Act of 1990 contained an explicit legal basis to 'legalize' the conduct of a dominant undertaking that would otherwise be seen as a monopolistic practice (Article 6 of the Act of 1990⁸³). This provision became the basis for the establishment of the rule of reason⁸⁴ in Polish antitrust. Among market practices of dominant companies that have escaped condemnation are: the conclusion of agreements with specific car repairers only⁸⁵; rendering an exclusive right to sell or buy goods on a specified territory⁸⁶; collecting fees for telecoms services that were not included in the price list and were subsequently counted among telephone fees⁸⁷.

The formal framework established in the Act of 1990 has thus, paradoxically, corresponded better to the new EU standards than the provisions contained in later Polish legislation. Article 6 of the Act of 1990 effectively provided a legal basis for an 'exemption' from the ban on the abuse of dominance in cases where such an exemption was economically justified⁸⁸. The court had rightly stressed in that context that 'the indispensability of the monopolistic practice' (within the meaning of that provision) shall be examined not only from the perspective of certain facts but also from the point of view of economic insights⁸⁹.

Subsequent legislation did not contain an 'equivalent' rule. Its absence should explain the lack of cases in the last decade where the practices of a dominant firm

⁸³ The wording of that provision has been cited in footnote no. 89.

⁸⁴ See for example judgment of the Supreme Court of 2 June 1999, I CKN 43/98, (1999) 12 *OSNC* 216; see also D. Miąsik, *Regula rozsądku w prawie antymonopolowym*, Zakamycze 2004, p. 374-413.

⁸⁵ Judgment of the Antimonopoly Court of 26 April 1995, XVII Amr 67/94, Lex 56343. In this judgment the court ruled that the Antimonopoly Office should have examined whether likely benefits resulting from the practice (*prima facie* abusive) outweigh the expected restrictions of competition.

⁸⁶ Judgment of the Antimonopoly Court of 8 January 1997, XVII Amr 65/96, (1998) 1 *Wokanda*, where it was said that the scrutinized practices can be legalized (on the basis of Article 6 of the Act), if they (i.a.) safeguard proper benefits to consumers.

⁸⁷ Judgment of the Antimonopoly Court of 25 January 1995, XVII Amr 51/94, (1995) 12 *Wokanda*. The examined practice had not been qualified as abusive because it contributed to development of national telecoms which in turn helps satisfy the social needs of the society in a more efficient way.

⁸⁸ That provision provided, that the abuse of dominance prohibition shall not apply, when the practices of the dominant undertaking were technically or economically indispensable for conducting an economic activity and did not lead to a significant restriction of competition. The burden of demonstrating such circumstances lies with the person who invoked them. It is thus not only the concept but also the procedure and the conditions that are similar to those established by the Commission in points 28-30 of the recent Guidance.

⁸⁹ Judgement of the Antimonopoly Court of 25 January 1995, XVII Amr 51/94, 12 (1995) *Wokanda*.

that had some anticompetitive effects were not qualified as abusive on the basis of a 'pure' efficiency defence or, in other words, because of the use of the rule of reason under Article 9 of the Competition Act. Such a legislative environment does not of course hinder, or indeed eliminate, the permissibility of the use of an efficiency defence also under current provisions. The conditions sets out in the recent Guidance could serve here as a point of reference for the UOKiK President, Polish courts and dominant undertakings. Existing case-law (see above) and the interpretation of the pre-requisites of Article 6 of the Act of 1990 could also be helpful, at least to some extent, to the implementation of the efficiency defence under the effects-based approach associated with the application of the prohibition laid down in Article 9 of the current Competition Act.

V. Exploitative practices: of no antitrust concern under the new approach?

The recent reform is relevant to only one category of unilateral conduct – exclusionary practices⁹⁰. The Commission stressed that the number of future interventions against such conduct will decrease significantly ('last resort intervention'⁹¹). However, exploitative practices (primarily the imposition of excessive prices or other onerous contractual conditions) constituted the subject matter of the majority of Polish abuse cases⁹² due to the specific structure of many Polish markets (most often local) affected by the conduct of dominant undertakings. In many cases, dominant undertakings were natural/'network'⁹³ or legal monopolies, which used to be the case in relation to territorial self-government units or other entities that by order of those units organized or rendered⁹⁴

⁹⁰ The most frequently investigated by the Commission type of unilateral practices.

⁹¹ See point 7 Guidance where the Commission declares that it will intervene rather exceptionally in such cases, i.e. in particular where the protection of consumers and the proper functioning of the internal market could be otherwise not adequately ensured. The Commissioner for Competition Policy N. Kroes noted also that 'fairness played a prominent role in the enforcement of Section 2 of the Sherman Act in a way that is no longer the case', concluded that a similar development could take place in Europe; N. Kroes, 'Preliminary Thoughts on Policy Review of Article 82', speech delivered at the Fordham Corporate Law Institute, New York, 23rd September 2005 http://ec.europa.eu/competition/speeches/index_2005.html.

⁹² It concerns mainly the period of time between 1990-2005.

⁹³ A significant part of the cases concerning exploitative abuses referred just to undertakings of such category.

⁹⁴ Under the Competition Act, the status of 'an undertaking' is attributed also to those organising or rendering public utility services which are not business activity (see Article 4 point 1a of the Competition Act); see also G. Materna, *Pojęcie przedsiębiorcy w polskim i europejskim prawie ochrony konkurencji*, Warszawa 2009, p. 90-103.

public utility services⁹⁵. Still, some ideas underlying the reform are already reflected⁹⁶ in a number of recent Polish judgments concerning the interpretation of the provisions on exploitative practices.

A reduction in interventions directed at exploitative practices⁹⁷ is to be expected in the future also in relation to the activities of the UOKiK President. Not only is such trend already practically underway⁹⁸ finding support in the latest rulings of the Supreme Court⁹⁹, it is confirmed by the official motto placed on the UOKiK's website¹⁰⁰ which indicates that the authority's focus on exclusionary conduct. The words '*You have a choice*' suggest that the President of UOKiK is intending to concentrate primarily on preventing and combating exclusionary practices that result in the limitation of choice¹⁰¹.

VI. Final remarks

The following conclusions can be reached on the basis of an analysis concerning the question to what an extent has the EU reform already affected or is likely to affect the substantial framework and enforcement procedure of Article 9 of the Polish Competition Act in the future.

⁹⁵ The statute gives the commune the exclusive right to render, and in particular to organise such services; see Article 7 of the Act of 8 March 1990 on the self-government of communes (consolidated text: Journal of Laws 2001 No. 142, item 1591, as amended).

⁹⁶ See for example judgement of the Supreme Court of 19 February 2009, III SK 31/08 (not yet reported) where the court ruled that the onerosity of the terms and conditions of an agreement (see Article 9(2)(6) of the Competition Act) shall be evaluated from both legal and economic perspective.

⁹⁷ Perhaps under the influence of the new approach of the Commission.

⁹⁸ See in particular the decisions of the UOKiK President issued in 2009 and 2010. Their majority refers to exclusionary practices. In the opinion of the UOKiK President, dominant undertakings have usually violated Article 9(2)(5) of the Competition Act ('counteracting the formation of conditions necessary for the emergence or development of competition').

⁹⁹ See the judgement of the Supreme Court of 18 February 2010, III SK 24/09 (not yet reported). In the opinion of the court, the imposition of excessive prices should in free market economy be found only exceptionally, and in particular, in relation to practices of those operating as network monopolists.

¹⁰⁰ According to this slogan: '*You have a choice. We've been taken care of that for 20 years*'. These words have been placed on the UOKiK's website on the occasion of the 20th anniversary of its creation (see: www.uokk.gov.pl and www.20lat.uokik.gov.pl).

¹⁰¹ It should be assumed that the notion of 'choice' is to be interpreted broadly implying also a rather broad scope of what practices restrict choice. It thus shall concern not only those that result in limiting market options or hampering innovation but also those that lead to higher prices (such prices – at least indirectly – limit the actual choice for consumers).

First, the reform should not lead to any revolutionary changes in the interpretation of Article 9 of the Competition Act in its axiological dimension, i.e., as far as the establishment of the ultimate purpose of the prohibition of the abuse of dominance. The economic interests of consumers are already frequently treated as the ultimate aim of this legal provision. Quite a number of Polish judgments have referred to the main ideas underlying the new effects-based approach to Article 102 TFEU. In the future however, an even stronger emphasis on the protection of consumer interests is to be anticipated, in particular, by attributing to it a sort of ‘exclusivity’ among all the other values protected by Article 9 of the Competition Act.

Second, in relation to the scope of the general substantial concept of exclusionary abuse, it is doubtful whether the basic change (the establishment of an explicit reference to consumer harm) has been deeply considered in the Polish jurisprudence. For the time being, it seems too early to make such far-reaching conclusions. The UOKiK President, or others claiming that a violation of Article 9 of the Competition Act took place, shall be required to conduct an appropriate market analysis of the contested anticompetitive practice whereby a credible consumer harm (not only potentially possible) acts as a decisive condition of finding at least the presumption of the violation of that provision.

Third, it cannot be assumed that some of the specific instruments encompassed by the EU reform (e.g. the lack of *per se* abuse; the permissibility of a ‘legalization’ of *prima facie* anticompetitive practices by reference to objective/economic justification; the application of the ‘as efficient competitor’ test) constitute a complete novelty for the application of the Polish equivalents to Article 102 TFEU. Referring to the latter operational rule, even though the methodology underlying that test has not been used in former Polish cases, a price-cost analysis of the dominant firm’s goods and services has been already incorporated into some recent decisions of the UOKiK President.

Finally, it is worth mentioning that as opposed to the wording of Article 102 TFEU, the Polish Competition Act contains a legal rule designed to reduce the scope of the interventions by the competition authority – the general condition that the act applies only to situations where the scrutinized conduct goes against the public interest¹⁰² (see Article 1(1) of the Competition Act). A correct interpretation of the ‘public interest-clause’ provides a formal basis of selecting only those practices of a dominant firm that truly justify the intervention by the UOKiK President¹⁰³ (reducing the risk of false positives).

¹⁰² Literature defines the requirement of public interest violation as an ‘intervention pre-requisite’; see D. Miąsik, T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 60.

¹⁰³ See also D. Miąsik, ‘Controlled Chaos...’, p. 42-43.

This clause prevents also the misuse of the Competition Act (including its ban on abuse) by preventing its enforcement merely to protect the interests of those entities ‘jeopardized’ by the intense competition from a dominant company¹⁰⁴. Such competition is generally favourable to consumers, both in the short- and the long-run.

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