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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)

Facts

The selective, limited to the territory of the Silesia province only, application by Marquard Media Polska of very low retail prices for its sports newspaper entitled '*Przegląd Sportowy*' (1 złoty)[1] was found as anticompetitive by the President of the Polish Office of Competition and Consumer Protection (hereafter, UOKiK) in a decision of 2 June 2006 (RKT-35/2006). Such conduct constituted in the opinion of UOKiK an abuse of a dominant position in the form of: the imposition of unfair prices, counteracting the creation of conditions necessary for the emergence or development of competition and market sharing (Article 8(2)(1) and (5) and (7) of the Act of 15 December 2000 on Competition and Consumer Protection[2]); the same forms of abuses are listed under the current Act of 16 July 2007 on Competition and Consumer Protection[3]. Marquard Media was ordered to refrain from the said practice and was fined a total of 1 972 600 złoty (approx. 500 000 euro).

Marquard Media (plaintiff) appealed the UOKiK decision to the Court of Competition and Consumer Protection (SOKiK) but the decision was upheld. The plaintiff appealed the first instance judgment to the Court of Appeals in Warsaw; the appeal was dismissed. As a result, Marquard Media submitted a cassation request to the Supreme Court which accepted it, even though not all of its objections were considered justified. The Supreme Court ultimately quashed the ruling of the Court of Appeals and remanded the case for re-examination. The judgement was annulled because of infringements of both substantial (erroneous definition of the relevant market) and procedural (incorrect formulation of the conclusion of the UOKiK President's decision) provisions.

[1] In other regions the prices of that newspaper as much higher reaching 1,80-2,20 złoty.
[2] Journal of Laws 2005 No. 244, item 2080.
[3] Journal of Laws 2007 No. 50, item 337; see Article 9(2)(5) and (7) of the Competition Act.

Key legal problems of the case and key findings of the Supreme Court

Above-cost price cutting

Among the main objections raised by UOKiK against the conduct of Marquard Media was the selective use of glaringly low prices of '*Przegląd Sportowy*' in a single Polish geographic region. The Supreme Court found those prices to be 'unfair' even though they were above-costs. However, according to EU jurisprudence, prices can be treated as unfair (see Article 102a TFEU) and thus predatory[4], when they are below costs. Similar statements can be found in recent Polish jurisprudence[5] and decisions of the UOKiK President[6].

Public intervention in above-cost price cutting has its justification solely under very specific market circumstances that have not occurred in this case. The rules of competition law should be constructed and interpreted so as to realize its ultimate goal – enhancing consumer welfare[7]. Consumer welfare is usually safeguarded when the most efficient firms are operating on the market. The imposition of public restrictions on such undertakings, limiting their ability to fully benefit from their efficiencies, may be thus in conflict with the proper realization of the consumer welfare objective. Speaking for the rule of principled legality of above-cost price cutting are also other reasons such as the prevention of 'cherry-picking'

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[4] Also Polish doctrine generally defines glaringly low prices within the meaning of Article 9(2)(1) of the Competition Act as 'predatory'; see D. Miąsik, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [*Act on competition and consumer protection. Commentary*], Warszawa 2009, p. 634; C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [*Act on competition and consumer protection. Commentary*], Warszawa 2009, p. 250, 251; K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [*Act on competition and consumer protection. Commentary*], Warszawa 2008, p. 365, 366. Still, in this case, the Supreme Court did not use the 'predatory pricing' terminology, noting only their 'unfair nature', referring to Article 9(2)(1) of the Competition Act. Avoiding this terminology suggests that it was the selective nature of the price cuts that the Court saw as the main argument in favour of finding the scrutinized practice as abusive.

[5] See e.g. judgment of the Supreme Court of 18 February 2010, III SK 28/09 (not yet reported) where it was stated, that unless the price reduction is not below costs, it does not restrict competition.

[6] See e.g. decision of the UOKiK President of 26 August 2009 (RBG-411-10/06/BD) where it was pointed out that 'under the Competition Act, it is in principle permissible to reduce the price of the product or services as an element of the 'competitive fight' unless such price is below costs'.

[7] See D. Miąsik, 'Controlled Chaos with Consumer Welfare as the Winner – a Study of the Goals of Polish Antitrust Law' (2008) 1(1) *YARS* 55-56; see also points 5 and 6 of 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.

by business rivals[8] or the lack of necessity to regulate prices by the competition authority[9].

Having considered the aforementioned arguments, it should be postulated that all legal solutions (including juridical ones) that depart from that principled legality rule should be thoroughly examined and should appropriately substantiate their own correctness in the given circumstances, explaining why such solution has no (or very little) risk of false positives that result in other negative consequences of over-deterrence. Serious objections can be expressed therefore with respect to the very brief and somewhat casual (accepted by that Court without any further justification) statement issued in this case by the Supreme Court stating that the scrutinized price was unfair (and thus illegal) even though it was set above the cost level. While it is true that the Supreme Court did not establish a violation of Article 9(2)(1) of the Competition Act by Marquard Media, its came to that conclusion for reasons different to the treatment of above-cost prices as unfair – the lack of an infringement was ultimately based on the non-fulfilment of the 'imposition condition'. In this respect, the Supreme Court rightly assumed that the unfair price (glaringly low) cannot be 'imposed' on the competitor, operating on the same market level that the dominant firm: horizontal relation – by reducing the prices by the latter[10] (competitor – at least formally – is still free to fix the prices of his products).

Selective nature of price cutting

The selective nature of the price cut was seen by the Supreme Court as the main argument speaking for the qualification of the conduct of Marquard Media as an abuse of its dominant position. The Court saw it as an illegal price discrimination tactic that led to market sharing (Article 9(2)(7) of the Competition Act[11]). At the beginning of its argumentation, the Supreme Court correctly noted that price differentiation *per se* does not in itself constitute an anticompetitive practice, even when undertaken by a dominant company. Such conduct may be economically justified for instance due to cost variations (e.g. different publishing or transport costs). In its further exposition, the Court came to a controversial conclusion stating that: 'price differentiation based on the wealth level of users raises objections because it constitutes a form of price discrimination (buyers of the same product pay different prices depending on the place of purchase)'. This is a questionable stance, in particular from an economic point of

[8] Entering by the dominant firm's competitors solely those markets (or solely the selected segments of those markets) where that firm applies highest prices. Such practices are aimed at compensating high fixed-costs of the given activity on the whole market or on all other markets where the dominant firm is operating.

[9] Fixing the permissible 'price floor' which is binding on the dominant undertaking; see E. Elhauge, 'Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory – and the Implications for Defining Costs and Market Power' (2003) 112(4) *Yale Law Journal* 688.

[10] Similarly D. Miąsik, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa*..., p. 633.

[11] Pursuant to this provision, abuse may also consist of 'market sharing according to territorial, product, or entity-related criteria'.

view. In business relations, especially in sectors characterized by great disparity between fixed and variable costs (such as newspaper markets[12]), undertakings frequently attempt to reduce ('cover') their high fixed costs by striving to maximize their efficiency and thus profitability[13]. This is often achieved by price differentiation of the same or substitutive products based on variations in the level of demand for given goods or services in a certain geographic region or, indeed, from a certain category of users (consumers)[14]. Therefore, the scrutinized practice makes economic sense[15] whether or not rivals are foreclosed from the market[16]. Prohibiting selective price-cuts, also when undertaken by a dominant firm (as its 'response to competition'), though beneficial for its competitors is usually ambivalent to the economic interests of consumers[17].

Evaluation of an anticompetitive intent

The Supreme Court discerned an anticompetitive intent of Marquard Media's pricing policy on the basis of, in particular, the fact that the price differentiation took place in the region where the plaintiff was meeting especially strong competition from its business rival ('*Sport*'), to which that region was of particular importance. The Court emphasized in particular that the price differentiation occurred not immediately after the competing *'Sport'* newspaper became 'independent'[18], but instead in the

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[12] Cost of producing and selling of another copy of a newspaper is relatively low in comparison with high fixed costs characteristic for press markets (editorial and author's costs, printing, distribution etc.). The plaintiff argued also that differentiating newspaper prices is a common practice in the press industry resulting from factors such as: reading inclinations and the wealth level of actual or potential readers. Those arguments have not been taken into account by the Supreme Court.

[13] See E. Elhauge, 'Why Above-Cost Price Cuts...', p. 687.

[14] See also e.g. D. Geradin, N. Petit, 'Price Discrimination Under Competition Law: Another Antitrust Doctrine in Search of Limiting Principles?' (2006) 2 *Journal of Competition Law & Economics* 479-484.

[15] The 'no economic sense test' and its modifications (for example '*efficiency-test*') are used in US antitrust doctrine and jurisprudence as a mechanism facilitating the identification of anticompetitive practices; see e.g. G.J. Werden, 'The 'No Economic Sense' Test for Exclusionary Conduct' (2006) 31 *Journal of Corporation Law* 293; E. Elhauge, 'Defining Better Monopolization Standards' (2003) 56 Law Review 252; A.D. Melamed, 'Exclusive Dealing Agreements and Other Exclusionary Conduct – Are There Unifying Principles?' (2006) 73 *Antitrust Law Journal* 375 et seq.; R.A. Cass, K.N. Hylton, *Antitrust Intent* (2001) 74 *Southern California Law Review* 657.

[16] It is worth noting, that the plaintiff submitted data indicating that the application of price reductions of '*Przegląd Sportowy*' increased the number of its readers, having simultaneously little effect on the sales of the competing '*Sport*'. Assuming the correctness of this data, it seems rather obvious that consumers benefited from the price cuts.

[17] J. Vickers, 'Abuse of market Power' (2005) 115 *The Economic Journal* 250.

[18] It occured by terminating the licence agreement to publish '*Sport*'. Such agreement was concluded by Marquard Media with its competitor (*Katowickie Towarzystwo Kapitałowe SPORT Sp. z o.o.*) on 31 August 2000.

period generally most significant for the publishers of sporting news, that is, before the beginning of the new football season.

Considering the aforementioned circumstances, Marquard Media seems to have taken appropriate business measures that constituted a rather 'normal market reaction' to the emergence of a new rival or a situation where an already existing competitor makes its own products more attractive. Even a dominant undertaking is entitled to improve the attractiveness of its own products also by way of a price cut (in particular when they are above costs) – such practices reflect the very essence of desirable market rivalry. Indeed, recent jurisprudence of the Supreme Court[19] recognizes the use of the 'meeting competition defence' by dominant firms. Moreover, the circumstances of the case at hand indicated that Marquard Media applied its price cuts not directly after the emergence of a competitor[20] but approximately 5 months later[21]. That fact seems also relevant to the evaluation of that plaintiff's intent.

When is an antitrust intervention into selective, above-cost price cutting justified?

Antitrust interventions into above-cost price cuts may find its support under the consumer-welfare standard although only in exceptional circumstances conditioned upon specific market features such as: the existence of network effects[22], very high sunk costs of market entry, the incumbent benefiting from extensive experience in the industry and in particular, thanks to the so-called 'learning-by-doing' effects[23]. None of these features occurred in the scrutinized case. First of all, press markets do not suffer from network effects – the value of a given newspaper to a consumer (which influences her/his purchasing decision) is not dependant on the overall number of its readers[24]. Second, the plaintiff's competitor has been operating on the same market for a long time[25] (both

[19] See the judgment of the Supreme Court of 18 February 2010, III SK 28/09 (not yet reported) where it was emphasized that an undertaking: 'even if possessing a dominant position, is entitled to make its offer more attractive to its actual or potential customers or to adjust it to changed situation on the market'.

[20] On 11 March 2005, the date of the termination of the license agreement, the plaintiff's competitor began to publish '*Sport*' by himself.

[21] The price of '*Przegląd Sportowy*' was reduced before the beginning of the football season (usually in the second half of August).

[22] See e.g. G.J. Werden, 'Network Effects and Conditions of Entry: Lessons from the Microsoft Case' (2001) 69(4) *Antitrust Law Journal* 87. The Commission sets out an exception from the principle according to which Article 102 TFUE shall be applied to protect solely as efficient competitors as the dominant undertaking (see points 23 and 27 of Guidance). The application of that exception shall be limited in particular to markets characterised by network or learning effects (point 24 of Guidance).

[23] A.S. Edlin, 'Stopping Above-cost Predatory Pricing' (2002) 111(1) *Yale Law Journal* 950–955.

[24] The consumer's purchasing decision is usually influenced by such factors as: the content of given newspaper, its price, its form and publishing frequency.

[25] The newspaper '*Sport*' was issued since 1945; pursuant to the license agreement, the plaintiff acquired the exclusive right to issue that paper and to its trade mark while *Katowickie*

'*Przegląd Sportowy*' and '*Sport*' were issued in parallel for dozens of years); therefore the competitor was not exposed to high entry costs (sunk costs). Third, considering the start date of the price cut, it is doubtful whether it can be qualified as 'reactive'/ 'defensive'. The prices of '*Przegląd Sportowy*' were reduced some months after '*Sport*' became 'independent'[26]. This fact points to a more 'offensive'[27] nature of the scrutinized conduct, which is usually indicative of a desirable increase of competitive pressure rather than of anticompetitive practices.

Final remarks

The pricing conduct of Marquard Media and the circumstances of the case at hand have not justified the application of an exception from 'as efficient competitor standard' and extending antitrust protection to a less efficient rival of that undertaking. Despite the fact that the conclusion of the judgment was favorable to the plaintiff, the Supreme Court's statements concerning the antitrust evaluation of its conduct remains controversial. It is worth noting that the Supreme Court further developed in this case a general approach to exclusionary conduct under the Polish Competition Act. That jurisprudence may however also raise some substantial objections[28].

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Towarzystwo Kapitałowe SPORT Sp. z o.o (the competitor of Marquard Media) was still vested in the totality of its publishing rights and obligations. In such circumstances, it is unjustified to claim that the former company should be treated as a 'new' rival without proper 'experience in the industry'.

[26] The Supreme Court, stressing the fact that the prices of '*Przegląd Sportowy*' were cut in a pivotal period to sport season, found that fact as indicating an anticompetitive intent of the plaintiff. Such position is debatable. The period of increased interest of the sport press and thus increased demand for such papers, is beneficial for each undertaking operating in that market. Therefore each of them, being aware of that fact, has an equal opportunity to properly prepare itself (in particular by making its offer more attractive to its readers) before that period comes.

[27] See also A.S. Edlin, 'Stopping Above-cost...', p. 951, 952.

[28] See K. Kohutek, 'Impact of the new approach to Article 102 TFEU on the enforcement of the Polish prohibition of dominant position abuse' (2010) 3(3) *YARS*, p. 93.