POLAND

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Abuse of a Dominant Position and Globalization

1. Introduction

Anticompetitive unilateral conduct is prohibited by article 9 of the Act of Competition and Consumer Protection (hereinafter the "**Act**"). According to article 9(1) of the Act, the abuse by one or more undertakings of a dominant position within a relevant market shall be prohibited. This legislation constitutes a development of the general rule laid down in article 1(2) of the Act, whereby the Act regulates the principles and procedures for counteracting practices that restrict competition (restrictive practices). The prohibition of the abuse of a dominant position is a unilateral practice in the form of acts or omissions of a undertaking with a significant degree of market power. The structure of this regulation is based on the provisions of article 102 TFEU. In addition, Polish competition law considers the abuse of a dominant position as contrary to general public interest. The prohibition laid down in article 9(1) is absolute, which means that the law does not provide any means of exemption[1].

Article 9 (2) of the Act provides a list of examples which constitute the most typical and the most frequent types of abusive conducts applied in practice. Pursuant to the above mentioned provision, the abuse of a dominant position may, in particular, take the form of:

1) direct or indirect imposition of unfair prices, including excessive or predatory pricing, delayed payment terms or other trading conditions;

2) limiting production, sale or technological progress to the prejudice of contracting parties or consumers;

3) application to equivalent agreements with third parties onerous or not homogenous agreement terms and conditions, thus creating for these parties diversified conditions of competition;

4) making conclusion of the agreement subject to acceptance or fulfilment by the other party of another performance having neither substantial nor customary relation with the subject of the agreement;

5) counteracting formation of conditions necessary for the emergence or development of competition;

6) imposition onerous agreement terms and conditions, yielding to this undertaking unjustified profits;

7) dividing the market according to territorial, product, or entity-related criteria.

The list should be seen as an indicative catalogue of examples, which means that other anticompetitive practices of a dominant undertaking that affect the interests of competitors, clients and contractors may be considered as abuses of dominant position. This open catalogue may be helpful to identify the main features of an abusive behaviour within the market..

Pursuant to article 9(3) of the Act, any legal transactions that constitutes an abuse of a dominant position is null and void in their entirety, or in its respective part. The invalidity will particularly apply to contracts between the dominant undertaking and its clients and contractors, if the agreements were concluded as a means of carrying out restrictive practices. Unilateral legal transactions may also be considered as invalid.

The first Polish regulations concerning competition protection, which were established in the interwar period, applied only to cartels and did not have a rule prohibiting anticompetitive unilateral conduct, The provisions for providing means to combat antitrust practices were introduced to the act as of 1987. The statute at that time,

[1] A. Stawicki, E. Stawicki (eds.). Ustawa o ochronie konkurencji i konsumentów. Komentarz, Warsaw 2011.

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however, still did not differentiate between the two basic forms of anticompetitive conduct, i.e. restrictive agreements and the abuse of a dominant position[2].

The Act of 24 February 1990 for the first time included the list of prohibited practices along with the separation of the anticompetitive practices into restrictive agreements and the abuse of a dominant position. Furthermore, the act created the basis for the formation of the Antitrust Office, which was allowed to issue decisions prohibiting such practices and determining the conditions of these prohibitions. Moreover, in the case of an increase in prices of goods or services which resulted from the application of prohibited practices, the Authority had the capacity to issue decisions decreasing those prices. Undertakings had to notify the Office about the intent to carry out a merger or a transaction which resulted in a change of control over the companies involved, as well as of the intent to establish a new company, if these could lead to obtaining a dominant position[3]. The statute was subject to many amendments in the 1990s.

A significant step in the evolution of Polish competition law came with the adoption the Act of Competition and Consumer Protection on 15 December 2000. It introduced the foundations of the current system of competition and consumer protection. In view of Poland's expected accession to the European Union, the legislator reformulated some of the provision in order to achieve conformity with requirements laid down in EC competition law. As a result, article 8, which then regulated the prohibition of abusing dominant position, was based on art. 82 of The Treaty establishing the European Community. Foreseeably, a number of changes were introduced into the act after Poland's accession to the European Union in 2004. As regards the regulation of unilateral anticompetitive conduct, the list of abuses was extended to so as to include market sharing practices[4]. The statue of 2000 was replaced by the Act of Competition and Consumer Protection of 16 February 2007, which is still in force. The new legislation was a means of implementing Regulation (EC) No 2006/2004, and created the occasion to make some crucial amendments to the version of the Act from 2000.

Interestingly, in the field of law of unfair competition, one can also find provisions that prohibit practices similar to those banned by the Act as regards anticompetitive unilateral conduct. The act of 16 April 1993 on combating unfair competition introduces measures of preventing and combating unfair competition in B2B relations in the interest of the general public, the undertakings and their customers. A similar role, yet for B2C relations, is played by the act of 23 August 2007 on combating unfair commercial practices, which defines unfair commercial practices in business and professional area and introduces measurer counteract such practices in the interest of consumers and the public.

2. Definition of Abuse

The Act, similarly to the provisions of the TFEU that it is based on, does not include a legal definition of what constitutes an abuse of a dominant position. Article 9 of the Act - the only provision that specifically refers to this form of anticompetitive behaviour - as in the case of article 102 TFEU, only states that such an abuse in the relevant market by one or more undertakings shall be prohibited. It further lists certain examples of practices that will undoubtedly be found to raise particular competitive concerns on the part of the NCA, e.g. direct or indirect imposition of unfair prices, including excessive or predatory pricing. Thus, like its TFEU predecessor, article 9 of the Act in order not to limit the potential scope of its application, functions on the basis of a general clause banning abusive behaviours of dominant undertakings[5]. Hence, it is more than understandable why the Polish lawmaker decided to follow the example given by the EU legislator and abandoned the idea of formulating a statutory definition of abuse. It is worth mentioning, however, that unlike the TFEU, the Act does contain a precise definition of a "dominant position".

[2] C. Banasiński, Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej (studia prawno-ekonomiczne), Warszawa 2005.
[3] Ibidem.
[4] D. Miąsik, *Rozwój polskiego prawa konkurencji*, SPP 2013, Nr 1;
[5] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*. Warsaw 2011, p. 303.

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It was thus left to the decisional practice of the President of the Office of Competition and Consumer Protection (hereinafter, the "Authority" or the "PCA") and the national courts to establish the definition of an abuse of a dominant position. Or, as a matter of fact - as is the case in EU law – several working definitions in order make use of the open-ended nature of the prohibition and its applicability to a variety of, sometimes not yet even identified, forms of abusive behaviours. One also has to bear in mind that the generality of the ban also reflects the fact that its precise meaning will also depend on the specific aims pursued by a country's antimonopoly regulation[6].

As a consequence, for a practice to be found to constitute an abuse of a dominant position on the basis of article 9(1) of the Act, it must not only meet the conditions of this provision but also go against the aims and axiology of the Act itself as expressed in its article 1(1). Therefore, the PCA will have to establish the existence of public interest that has been infringed in order to pursue an anticompetitive behaviour. In practice, decisions of the PCA and the Polish Court of Competition and Consumer Protection (hereinafter the "Competition Court") usually follow this pattern[7]:

i. first, the institution has to identify the existence of a public interest in instigating an intervention against a potential violation;
ii. then, on the basis of the fact that there is no legal definition of what constitutes such an "abuse", which in turn imposes the necessity to rely on the aims and axiology of the Act itself, the relevant authority (the PCA or the PCCCP) will declare that, according to the existing jurisprudence and the views of the law scholars, two types of practices fulfil the conditions of the prohibition laid down in article 9 of the ACT, i.e. "exclusionary" and "exploitative" practices;
iii. finally, a specific behaviour will either be found to constitute one of the "named" types of abuses, i.e. those listed under article 9(2), or more seldom, an "unnamed" violation, i.e. one which will be prohibited on the basis of the general clause laid down in article 9(1) of the Act. Such a practice will also have to qualified as belonging to the category of either "exclusionary" or "exploitative" practices, or in some cases, as exhibiting features of both of these categories.[8]

According to the prevalent opinion in the academia and jurisprudence, the far-reaching similarity between the Polish provision and its EU equivalent makes it possible for the national courts and the PCA – which after all have the capacity to apply and enforce the rules of both Polish and EU competition law - to base their decisions on the interpretations of the prohibition already developed in the case law of the EC and the CJEU.[9] It is therefore not infrequent for the aforementioned entities to refer in their rulings to some of the seminal definitions of abuse developed in EU jurisprudence, e.g. the *special responsibility*[10] doctrine developed by the CJEU judgment in the case 322/81 *Michelin I*.[11]

And yet, Polish courts have not refrained from providing their own interpretations of the concept adapted to the specific facts of the cases they analysed. An oft quoted example is the judgment of the Polish Supreme Court of 19 August 2009 in the case against Marquard Media Polska (Ref. No. III SK 5/09), where the court, expanding on some parts of the reasoning behind the CJEU's ruling in case 85/76 *Hoffmann – La Roche* and C-62/86 *AKZO*, in fact confirmed the validity of the standard EU approach to the issue of abuse of a dominant position. [12] The Court - specifically targeting exclusionary abusive practices - stated that what constitutes an anticompetitive abuse of dominance is a behaviour of an undertaking in a dominant position that, being objectively contrary to the patterns of normal competition, might influence the structure of the dominated market or another market, and takes the form of measures which have no relation with competing for buyers on the merits, or takes the form of measures, which though normally employed when competing in a competitive market, are still disproportional

[6] *Ibidem*, p. 303
[7] *Ibidem*; T. Skoczny (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*. Warsaw 2014, p. 434.
[8] *Ibidem.*
[9] *Ibidem*, p. 428.
[10] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*. Warsaw 2011, p. 305.
[11] PCA Decision No. DOK-3/2009 of 7 July 2009.
[12] T. Skoczny (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*. Warsaw 2014, p. 433

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on the market affected by the behaviour of the dominant undertaking, and thereby hinder the maintenance or development of competition that still exists on the market."

3. Exploitative and Exclusionary Abuse

The distinction between exploitative and exclusionary practices, though, as mentioned before, clearly reflected in the jurisprudence and decisional practice of Polish institutions responsible for the enforcement of competition law, is not visible in the Act. As in the case of article 102 TFEU, the sample catalogue of forbidden practices indicated in article 9(2) is not phrased in a manner that would enable a linear differentiation between the two categories of abusive conduct, e.g. article 9(2)(1) which mentions all price-related forms of abuse, such as direct or indirect imposition of unfair prices, including excessive or predatory pricing, delayed payment terms or other trading conditions, which comprise both exclusionary and exploitative practices. Furthermore, according to the views of legal scholars, it is also difficult to clearly distinguish the character of some of the examples of abuses listed under article 9(2), since some of the types of conduct described therein could easily fall under both of these categories, an opinion which seems particularly applicable to measures limiting production, sale or technological progress to the prejudice of contracting parties or consumers described in article 9(2)(3) of the Act. Here again, it must be borne in mind that identifying a given abuse as belonging to one type or the other will also be dependent on the axiology and aims pursued by the antimonopoly regulation. For if the main objective of competition law is the protection of consumers, and not the maintenance of an open and diversified structure of the market, the role of exclusionary abuse diminishes – certain practices, even though "harmful" for the competitors of the dominant undertaking, might be tolerated because of the consumer welfare they bring. [13]

Notwithstanding the aforementioned, as was already indicated in Section 2, the PCA and national courts typically attempt to categorize a given anticompetitive practice as falling into the category of either "exclusionary" or "exploitative" abuses. This allows them to more easily rely on the guidelines already established by the academia or jurisprudence, thereby compensating for the vagueness of the undefined and open-ended notion of "abuse of a dominant position". As a result, there are some distinct interpretations of the notions developed by Polish institutions entrusted with the enforcement of competition law.

3.1. Exclusionary abuse

As a matter of fact, the PCA employs a fairly straightforward definition of exclusionary abuses, using the term to denote practices that exert a direct influence on the condition or development of competition.[14] The brevity of the formulation should, however, not be seen as an indication of the lesser importance of this type of anticompetitive behaviour for the Authority. In fact, as in the case of most competition authorities, the PCA's enforcement mostly focuses on exclusionary abuses. This results from a variety of reasons, which contribute to the general orientation of EU competition law enforcement in relation to abuses of dominance on protecting the structure of the market. Exploitative practices are in general easier to eradicate as they cannot on their own function for extended periods of time – new market entries will enable consumers to choose more affordable offers. Moreover, exclusionary abuses, with their potential to eliminate competitors from a given relevant market, may lead to harmful and possibly irrevocable changes to the structure of that market.[15]

As a matter of fact, this preoccupation with exclusionary practices is reflected in the inclusions of an additional type of "named" forbidden practice among those listed under article 9(2) of the Act, i.e. conduct that counteracts the formation of conditions necessary for the emergence or development of competition.[16] This provision, also referred to as the "little general clause", constitutes a codification of the aforementioned definition of an exclusionary abuse as a means of simplifying the enforcement of this type of practices for the Authority. Even though in theory article 9(2)(5) of the Act can be considered as giving little more added value beyond codifying what has already been established in other sources of competition, the practical dimension of this fact is not

[13] *Ibidem*, p. 436; A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*. Warsaw 2011, p. 323.
[14] PCA's Decision No. RPZ-32/2007 of 12 September 2008.
[15] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*. Warsaw 2011, p. 324.
[16] *Ibidem*, p. 349

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irrelevant. Instead of having to refer to the jurisprudence concerning some of the "unnamed" but later identified forms of abusive behaviour, the PCA can directly apply a specific and very broadly defined statutory instrument in order to easily establish a violation of the Act.

The aforementioned concise definitions of what constitutes an exclusionary abuse have often been further expanded upon in the jurisprudence. A recent example is the ruling of the Competition Court of 22 February 2012 (Ref. No. XVII AmA 171/11), which states that under exclusionary practice one should understand a behaviour of an undertaking in a dominant position which may result in the foreclosure of a market, or the complete or partial exclusion of the development of the activity (increase of supply) of undertakings already functioning on a given market, or the exclusion of the possibility of market entry by other undertakings (i.e. those which are not yet active on this market), and this practice is simultaneously harmful to consumers. Hence, the PCCCP makes clear that while Polish competition law aims to protect a diverse structure of the market, it will not do so at the expense of consumer welfare but in order to strengthen it.

3.2. Exploitative abuse

As for exploitative practices, the PCA indicates that their primary aim or effect is the infringement of the interests of market actors related to other aspects than those connected with competition, by making use of the existing advantage they have over their clients and contractors (regardless of the fact whether these are undertakings or consumers). At the same time, Polish courts identify only two "purely" exploitative practices, namely the direct or indirect imposition of unfair prices regulated under article 9(2)(1),[17] and the imposition of onerous agreement terms and conditions, yielding unjustified profits as mentioned in article 9(2)(6).[18] This confirms the existence of difficulties in establishing a clear-cut distinction between these two types of abusive practices, as indicted in Section 3.

4. Price-Based and Non-Price-Based Abuse

Under the Polish competition law regime, the distinction between price-based and non-price-based examples of abuse of a dominant position can be found in text of article 9 (2) of the Act itself.

Article 9 (2) section 1) of the Act expressly states that an abuse of a dominant position can amount to *direct or indirect imposition of unfair prices, including excessive or predatory pricing*. As M. Blachucki has commented[19]: *the analyzed practice covers all strategies regarding the abuse of a dominant position that lead to price manipulation to the detriment of contractors or consumers. This outlawed price strategy consists in charging prices regardless of the commercial value of the good or service offered (...)To establish such abuse of dominance it is necessary to compare the cost of production and the price.*

The decisional practice of the PCA regarding abuse cases, a distinction is made between price-based and non-price-based ones in the sense that any decision issued by the Authority indicates the legal provisions that have been violated by the fined undertaking. It is the most convenient way to assess whether the PCA examines price-based or non-price-based abuse in a given case.

The PCA's latest case-law concerning price-based abuses covers *inter alia* the case of Tauron Ciepło, a leading Polish energy provider. The Authority's investigation revealed that the undertaking in question charged its partners, in a manner that went against the law, an additional fee for the exceeding output they had ordered. The company also failed to make information available to customers about the parameters of the heat it supplied, which would allow them to determine whether its charges were calculated correctly. According to the PCA, Tauron Cieplo used its market position to impose illegal fees on customers and hinder them from asserting their

[17] Ruling of the Antimonopoly Court (predecessor of the Competition Court) of 19 November 2001, Ref. No. XVII Ama 2/01.
[18] Ruling of the Competition Court of 21 May 2010, Ref. No. XVII AmA 71/09.
[19] M. Blachucki, *Polish Competition Law – Commentary, Case Law And Texts*, Warsaw 2013, p. 39.

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rights. Nevertheless, since the company has committed to refrain from the practices the Authority did not impose fine[20].

On the other hand non-price-based abuse cases involve PGNiG a leading Polish undertaking as regards retail and wholesale of natural gas[21]. PGNiG has been accused of abusing its market position by applying contractual terms and conditions that were disadvantageous for undertakings active in the wholesale or retail purchases of natural gas. The contractual clauses that were challenged, limited the undertakings' ability to reduce the amount of the fuel ordered and to decrease the contracted power. PGNiG has committed to modify its contract templates and offer their customers a possibility to amend previously concluded agreements. As a result, the PCA decided to refrain from imposing fine on PGNiG.

Since Polish law regulations related to the abuse of dominant position cases are the direct equivalent of the rules contained in article 102 TFEU, there is no ground to claim that Polish jurisdiction has stricter rules than EU ones.

5. Enforcement

5.1. Decision-Making Practice

Based on the Reports issued annually by the PCA (statistics for 2014 not yet published), the table below illustrates the number of decisions issued by the Polish Competition Authority in selected years:

Subject – matter of the decision	**Number of the decision issued in a given year**				
	2009	**2010**	**2011**	**2012**	**2013**
Agreements restricting competition	**18**	**28**	**28**	**19**	**28**
Abuse of a dominant position	**89**	**68**	**72**	**67**	**64**

Unfortunately, there is no similar statistics concerning court's case-law available. No distinction between exploitative and exclusionary abuses has been made as well.

5.2 Competent Courts and Authorities

The main body responsible for the enforcement of competition law in Poland is the President of the Office of Competition and Consumer Protection (the "**Authority**" or the "**PCA**").

Under Polish law there are two types of proceedings related to competition infringements: explanatory proceedings and antimonopoly proceedings.

If the circumstances of the case indicate a possibility that the provisions of the Act have been infringed, the PCA may instigate, on an *ex officio* basis, explanatory proceedings - initially to determine whether an infringement that would justify the institution of antimonopoly proceedings took place.

Antimonopoly proceedings are always instituted on an *ex officio* basis (e.g., as a result of the explanatory proceedings). They are initiated with a resolution containing formal charges against the named parties.

Third parties (e.g., harmed competitors or customers) are not entitled to file a motion for the initiation of antimonopoly proceedings. They are only entitled to file a notice (complaint) on a potential breach of competition law. The Authority has discretion to decide whether the information contained in the notice justifies the initiation of proceedings.

[20] PCA's Decision No. RKT-39/2014 of 27 November 2014.
[21] PCA's Decision No. DOK-8/2013 of 31 December 2013.

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The decision of the PCA is subject to an appeal to the Competition Court, lodged within one month from the date of the delivery of the decision to the party to the proceedings. The Authority and the undertakings that committed the alleged practice are the parties to the proceedings.

A ruling of the Competition Court may be subject to an appeal filed with the court of the second instance i.e., with the Court of Appeals. The ruling of the latter can be further appealed to the Supreme Court in the framework of a cassation appeal. However, a cassation appeal is accepted by the Supreme Court only in individually selected cases (e.g., where there is a novel issue of law, or there is a manifest error in the verdict of the Appeal Court).

Apart from the PCA, there are several administrative bodies in Poland that are working on improving effective competition on their respective markets – the sector regulators. Although in principle, their competences are different from the competences of the PCA (with regulators acting *ex ante*, and the PCA intervening *ex post*), in practice both the regulatory authority and the Authority may intervene in the same case simultaneously, both exercising their own jurisdiction.

The President of the Office of Electronic Communications ("President of UKE") is the national regulatory authority for the market of telecommunications and postal services. President of UKE cooperates with the PCA and with the National Broadcasting Council in the field of the enforcement of the rights of parties using postal and telecommunications service.

The President of the Energy Regulatory Office ("President of URE") is the central body of state administration responsible for the realization of tasks in the scope of fuel and energy management control as well as promotion of competition. The latter duty is to be enforced in cooperation with the PCA and the President of URE on energy enterprises practices which limit competition.

Moreover, it should be noted that there are additional regulatory bodies in Poland that are entitled to examine specific sectors in respect of their competitiveness, including abuse of the dominant position cases. These are the President of the Office of Rail Transportation as well as the President of the Civil Aviation Office.

In terms of the guidelines applicable to abuse cases, the PCA has published Guidelines on setting fines for practices restricting competition and Guidelines on commitment decisions. It is worth mentioning that all guidelines published by the PCA are not binding. And yet, the Authority stipulates that it will apply them in its proceedings.

5.3 Approach Followed by Competent Courts and Authorities

As already mentioned in Section 2, it should be stressed that Polish competition law by means of article 9 of the Act introduces a general clause prohibiting the abuse of dominant position. Unfortunately, the Act does not contain definition of the 'abuse' itself. In consequence, it is sometimes difficult to draw a clear line between illegal and legally-accepted market practices of dominant undertakings.

In order to better understand the concept of 'abuse', one should bear in mind what the overall goals of the Act are. Hence, competition enforcement, i.e. protection of competition, is seen as a mechanism to ensure the efficiency of business processes and the optimal allocation of resources, on the one hand, and the means of safeguarding public interest of consumers, on the other. Furthermore, the case-law of the PCA and the relevant courts can also provide some guidelines in that respect.

Since article 9 of the Act is almost entirely the same as its EU counterpart, when defining notion of 'abuse', the PCA or Polish courts base their analysis on the jurisprudence of EU courts and refer to well-rooted standards developed in seminal cases, such as *Hoffmann-La Roche* or *Michelin*. Moreover, well-developed tests assessing

whether particular behaviour amounts to an abuse such as 'No Economic Sense Test' or 'Equally-Efficient Competitor Test' or 'Consumer Welfare Test' also have considerable relevance under the Polish law regime[22].

In practice, EU competition authorities (including the PCA) may refer to each of the above mentioned concepts in order to grasp the difference between lawful conduct and behaviours that violate the law. The individual tests can be more or less useful to study the various manifestations that abuses of dominant position take on the market. It is always possible to use more than one test to analyse the specific facts.

It should also be noted that a given test can be used either at the stage of determining whether there is an abuse of a dominant position, or at the stage of justifying the alleged practice. Its place in the analysis depends essentially on the established concept of interpretation of the rules on abuse of dominant position[23].

Another method used for the assessment of whether a specific behaviour amounts to an abuse is by comparing it the examples of such abuses listed under article 9(2) of the Act. As it has already been indicated in Section 1 and 2, this list is not exhaustive but it describes practices that the PCA most commonly finds to constitute abuse.

[22] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*. Warsaw 2011.
[23] *Ibidem*.

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