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# The Role of Innovation in Enforcement Cases – Note by Poland

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More documents related to this discussion can be found at www.oecd.org/competition/the-relationship-between-competition-and-innovation.htm.

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# *Poland*

1. Innovation is a critical factor that Polish Competition Authority considers when enforcing antitrust regulations. The role of innovation in enforcement of competition cases is multifaceted, touching on aspects such as market dynamics, consumer welfare, and the competitive process. This contribution delves into the intricacies of how innovation influences and is influenced by competition law enforcement, guided by practical examples from the Polish market and enforcement by the Office of Competition and Consumer Protection in Poland (UOKiK). It starts with an introductory section that sets the stage for the subsequent analysis (**1.**). The body of the contribution is then structured to progressively address specific cases that illustrate the interplay between competitive harm and innovation (**1.1. – 1.3**). The text then transitions to a broader discussion on the role of innovation as a legitimate justification within competition law, examining how innovative efforts can be viewed through the lens of legal and economic justification for certain market practices (**2.**). Subsequently, the focus shifts to an examination of how innovation influences the definition of relevant markets and the assessment of market power, incorporating a critical analysis of the traditional approach to market definition in light of innovation dynamics (**3.**).

## 1. Theories of harm and innovation

2. The theory of harm in the context of innovation is foundational to understanding the enforcement of competition law. It is predicated on the idea that certain market behaviors, particularly those stemming from entities with dominant market positions, can significantly dampen the incentives to innovate. The Polish cases of Poczta Polska, Visa exemplify how innovation can be constrained by the misuse of market power, be it through exploiting competitors' innovations, imposing market standards that discourage new entrants, or dampening the competitive pressure that is essential for innovation.

3. These examples underscore a complex landscape where anti-competitive practices can subdue innovation's momentum. The theory of harm posits that when companies are allowed to undermine the competitive process, whether through appropriation of innovations or coordination that reduces the impetus to innovate, the entire market suffers. This stagnation not only reduces incentives but can also lead to a misallocation of resources that could have otherwise be directed towards innovative development.

### 1.1. The Polish Post case (Decision No. DOK-2/2021)

4. In March 2021, UOKiK issued a commitment decision, based on both Polish and European Union competition law regulations, which enabled independent postal operators to compete fairly with Poczta Polska, the Polish incumbent postal service provider (PP)[1]. Enforcement cases scrutinizing the abuse of dominance are integral to the preservation of innovation in competitive markets. They examine if a company’s conduct in safeguarding or expanding its market share impedes the competitive process, particularly the process of innovation. The Polish postal incumbent: Poczta Polska’s case vividly illustrates such concerns.

[1] See: https://uokik.gov.pl/news.php?news_id=17263.

5. PP operates within a unique market framework. As the designated operator for universal postal services, PP is mandated by specific regulations under the Postal Law to offer services universally. While it adheres to these obligations, PP simultaneously competes with other entities for non-universal postal services. In these sectors, PP's dual role – as both competitor and contractor – becomes controversial. Independent postal service providers, who have their own networks within Poland, rely on PP's infrastructure to offer nationwide services. Herein lies the potential for market distortion due to PP's significant market position.

6. The allegations against PP focused on practices that might have leveraged its dominant position to unfairly benefit at the expense of innovation and competition. Specifically, for the purposes of concluding agreements concerning provision of its services to independent postal service providers, PP required its contractors (independent postal service providers) to provide detailed commercial information about their customers, a practice that seemed unnecessary for the provision of postal services and suggested potential customer poaching. The compulsory sharing of such sensitive information can be particularly damaging in a competitive environment, as it may allow PP to undercut its competitors by targeting their customer base directly, thereby reducing the competitors' ability to invest in and offer innovative services.

7. In the above case, the 'free-riding' on the innovation efforts of the competitors by forced sharing of customer information without incurring corresponding costs represents a classic detriment. Despite substantial investments in innovation made by independent postal service providers, the sharing of client information with their competitor (PP) allowed Poczta Polska to reap benefits for which it did not pay, thereby distorting competitive dynamics and potentially reducing the overall incentives for market innovation. Such practices by PP could have not only unfairly advantaged it over its competitors but also stifled innovation in the sector. If new entrants or existing companies cannot predict costs, compete on a level playing field, or fear the loss of their customer base, their incentive to innovate diminishes. This could lead to a less competitive market with fewer choices and potentially higher prices for consumers.

8. Recognizing the potential harm, UOKiK intervened, deeming PP's practices as potentially abusive and ordering the company to amend its market conduct. Under the commitment decision, PP shall not have its pricing terms made dependent on information about the operator's customers. This prevents PP from taking over potential customers of its competitors. The enforcement action against Poczta Polska not only sought to protect competition but also aimed to safeguard the incentives for innovation among postal service providers. By enforcing such measures, UOKiK has helped ensure a marketplace conducive to economic growth and consumer welfare.

## 1.2. The Visa case (Decision No. DAR-15/2006)

9. In November 2006, UOKiK issued an infringement decision (based on both Polish and EU competition law) against twenty banks for collectively setting the fees charged on transactions made with Visa and MasterCard cards. UOKiK declared the practices, which had been applied for as long as 13 years, to be unlawful. The proceedings conducted by UOKiK showed that the level of the interchange fee was not based on objective criteria, such as costs borne by banks for the development and functioning of the payment system, but was determined by way of an agreement of entrepreneurs who communicated with each

other in order to obtain additional revenue from each transaction made with Visa and MasterCard cards[2].

10. In the Visa case, the stipulations regarding interchange fees stand as a further illustration of the manner in which concerns about innovation are integrated into the assessment of potential harm under the scrutinized theories. The proceedings initiated upon a complaint of the Polish Organisation of Commerce and Distribution, were conducted under Polish and EU law against 24 entities: 20 banks, Visa Europe, Visa International, MasterCard Europe and the Polish Bank Association. Banks were accused of restricting competition in the market for acquiring services by means of the joint setting of interchange fee rates, separately in Visa and MasterCard systems. Together with Visa Europe, Visa International, MasterCard Europe and the Polish Bank Association they were also charged with coordinating activities in order to restrict access to the relevant market. UOKiK found that banks participating in the proceedings did restrict competition by means of the joint setting of the interchange fee rates. A charge of coordinating activities in order to restrict market access has not been confirmed by collected evidence.

11. The banks – parties to the proceedings – participate in Visa and/or MasterCard payment card systems (most of them issue cards in both systems). Meeting in the fora grouping Polish members of Visa and MasterCard, the banks jointly set, separately for Visa and MasterCard systems, rates of the domestic interchange fee.

12. A potential consequence of the agreement on the interchange fee rates is also a hampered development of new payment systems, which require participation of banks (e.g. as issuers) for their correct functioning. The banks may not be willing to participate in a system that will not bring them profits comparable with the profit made on the collection of the interchange fee on every transaction made with a card they issue. Consequently, even a more effective, lower cost payment system may be hampered in its development, with detriment to innovation and consumers[3].

## 1.3. The mobile television case (Decision No. DOK -8/2011)

13. In the realm of mobile television, the sharing of information among providers led to a decline in the impetus for innovation. The intrinsic drive to innovate, fueled by the fear of falling behind competitors, was significantly muted due to the dissemination of this information, thus dampening the drive to develop novel product innovations.

14. In December 2011, UOKiK issued an infringement decision (based on both Polish and EU competition law) against Polkomtel, Polska Telefonia Cyfrowa, PTK Centertel, and P4, in which it was decided that they had concluded an unlawful and competition-restricting agreement according to the Polish and EU competition law[4]. The operators agreed on their conduct towards the wholesale operator of mobile television. Unlawful practices caused a delay in the development of new services on Polish market. UOKiK ordered to discontinue the practice and imposed on all cartel participants fines exceeding PLN 113 mln.[5]

[2] See: https://uokik.gov.pl/news.php?news_id=1004.

[3] This case is still in the judicial stage.

[4] See: https://uokik.gov.pl/news.php?news_id=3086.

[5] However, the decision was ultimately reversed. In its judgment on October 31, 2019 (case number I NSK 58/18), the Supreme Court stated that the lack of implementation of mobile TV in the market was not due to an agreement among operators, but was caused by factors beyond their control.

15. In 2011, UOKiK took action against four telecom operators: Polkomtel, Orange Polska, T-Mobile, and Telefonia Cyfrowa Centertel, for their practices related to the planned launch of a mobile television platform called 'nMobile'. The aforementioned telecom operators, who were major players in the Polish market, decided to collaborate on the implementation of a joint venture for mobile TV services using DVB-H technology. This collaboration raised concerns about potential anticompetitive behavior. UOKiK investigated the matter and concluded that the companies have engaged in an illegal agreement that restricted competition. UOKiK found that the operators exchanged information that have reduced uncertainty about future market conduct, thus potentially limiting competition between them. The investigation revealed that the operators have been attempting to carve up the market for mobile TV services, which prevent competition on merits. By creating a unified platform without allowing for independent innovation, the operators might have effectively reduced the incentive to create new and potentially competing technologies.

16. Thus, the case addressed the complicated relationship between collaboration necessary for certain technological advancements and the preservation of competitive market dynamics.

## 2. Innovation as a legitimate justification

17. While competition law primarily concerns the preservation of market structure and the prevention of monopolistic behaviors, the recognition of innovation as a legitimate justification for certain market practices represents a progressive evolution. Through the lens of several Polish cases adjudicated by the UOKiK, it becomes apparent that innovation can indeed serve as a legitimate justification for practices that may initially seem to limit competition. As seen in the UOKiK's cases of Uber[6] and Otomoto (Explanatory proceedings No. DOK2-400-5/17), when innovation serves the larger purpose of enhancing consumer welfare and market efficiency, it justifies a reevaluation of a given behavior under competition norms. In a rapidly changing economic environment, this nuanced understanding of innovation's role in competition law ensures that regulations are calibrated not just to preserve the status quo, but to encourage the very progress that benefits consumers and the economy at large.

18. In the context of the on-going public debate on the benefits but also potential threats to competition and consumers posed by online platforms on the passenger services market, UOKiK presented its opinion on this matter[7]. Like other competition and consumer protection authorities around the world, UOKiK is closely monitoring and analysing the effects of the emergence on the market of online platforms including those facilitating contact between drivers and passengers, such as Uber. UOKiK's view was that the monitoring carried out so far did not give reasons for opening proceedings in this case with regard to protection of consumer interests or competition.

19. In the Uber case, the quintessential balance between innovation and competition was put to the test. UOKiK acknowledged Uber's primary competitive advantage, which was derived from its innovative use of modern information technologies. Unlike traditional taxi services, Uber's platform introduced a disruptive business model that leveraged technology to provide consumers with a novel and efficient transportation service. This case underscores a pivotal notion: innovation can occasionally justify a temporary dip in

[6] See: https://uokik.gov.pl/download.php?plik=17910.

[7] See: https://uokik.gov.pl/download.php?plik=17910.

competition levels. The rationale is that the consumer benefits brought about by innovative services – enhanced convenience, competitive pricing, and service customization – can counterbalance the potential downsides of reduced competition in the short term. In essence, if the long-term gains in consumer welfare and market efficiency outweigh short-term competition constraints, innovation can be seen as a legitimate and even necessary driver of market dynamics.

20. Turning to the case of Otomoto, UOKiK observed how investment in innovation can act as a defensible business rationale. Otomoto, an online vehicle class ads, was scrutinized for practices that could potentially be seen as abusing its dominant market position. The investigative focus was on whether the platform's ability to monetize its investments in innovation could be justified. Otomoto's pricing strategies did not reflect excessive price hikes. Therefore, the investment in innovation – such as user-friendly interface improvements, database management, and service personalization – was recognized as a pro-competitive force and thus its monetization was not seen as an antitrust issue. The case shows that when companies use their profits from a dominant position to invest in innovation, leading to more efficient and higher-quality services without imposing unfair prices on consumers, such actions can be aligned with the principles of healthy competition.

21. Both cases are emblematic of a broader perspective in competition law, where innovation is not merely seen as a factor in the competitive process but as a goal in and of itself. The essence of competition is not just to prevent market power but to ensure that such power, when it exists, is used in service of consumer welfare and economic progress.

## 2.1. Allegro case (Decision No. DOK-3/2022)

22. In November 2022, UOKiK issued an infringement decision against Allegro, a Polish e-commerce platform, claiming that Allegro abused its dominant position[8].

23. UOKiK has concluded that, in breach of Article 102 of the Treaty on the Functioning of the European Union, as well as Polish counterpart thereof, i.e. Article 9 sec. 1 of the Polish Act on competition and consumer protection, Allegro has engaged in self-preferencing practice, namely Allegro has favoured its own retail activity (conducted mainly through a merchant called "OSA") on its marketplace (operating under the domain name: Allegro.pl) compared to competing merchants' retail activity. As a consequence, Allegro has abused its dominance in one market (marketplace services) to get an undue advantage in the neighbouring market (retail activity), instead of competing on the merits.

24. Allegro operates a marketplace platform (operating under the domain name: Allegro.pl), as well as its own online store (named: Allegro Official Store – OSA). Thus, Allegro developed a hybrid model – first, selling goods from independent merchants, which rely on its infrastructure, and subsequently building its own online store. OSA was introduced at the end of 2015.

25. More favorable treatment of Allegro's retail activity consisted in the fact that: (i) for the purposes of its own retail activity, Allegro used information on the functioning of the marketplace and/or information on the buyers' behavior on the marketplace, relevant to positioning and displaying product offers by "Best Match" algorithm, which at the same time were not available to independent retailers selling subsidiary products on the marketplace; (ii) for the purposes of its own retail activity, Allegro used sale and

[8] See: https://uokik.gov.pl/news.php?news_id=19185.

promotional functionalities on the marketplace, which at the same time were not available to independent retailers selling subsidiary products on the marketplace.

26. When buyers search on Allegro, the default order of results is called "Best Match". It is designed to show the most relevant listings and it represents one of the main sources of traffic on the marketplace. The "Best Match" algorithm was intransparent to independent merchants on the marketplace. Only Allegro employees knew how the "Best Match" algorithm worked and what parameters exactly (and to what extent) were taken into account by this algorithm. Knowledge in this area could enable better adjustment of Allegro's retail offers on the marketplace to the functioning of this algorithm. Consequently, Allegro's offers were highly rated by the "Best Match" algorithm and were one of the first results in the search listings on the marketplace. Allegro's employees used internal tools, unavailable to other merchants, facilitating the matching of Allegro's offers to parameters of the "Best Match" algorithm.

27. Allegro used different functionalities on the marketplace, unavailable to other retailers, for its own sales and promotional purposes, such as: (i) possibility for OSA to generate discount coupons for buyers on the marketplace; (ii) OSA's advertisements (banners/displays) on the marketplace; (iii) so-called "third dot" and "black bar" on Allegro's main page; (iv) OSA's query suggestions (when buyers entered a query on the Allegro marketplace search engine, they obtained a suggestion to search for that query in the OSA's offers).

28. UOKiK established that the strategy of favoring its own sales activities was undertaken by Allegro in May 2015, when employees responsible for the Retail noticed that Allegro's own offers were poorly positioned in Allegro's search results by "Best Match" algorithm. At the same time, during this period, they took the first steps to favor Retail. In particular, Allegro's employees responsible for Retail, thanks to obtaining confidential information regarding the functioning of the Platform and cooperation with Allegro employees responsible for the functioning of the Platform, adjusted their activities so that Allegro's offers were highly positioned in sorting of the offers searched by users on the Platform by the "Best Match" algorithm.

29. Allegro case represents a complex scenario where the pursuit of innovation intersects with market conduct. The case of Allegro underscores the dual nature of innovation in the digital economy and its antitrust implications. While the platform's "Best Match" algorithm represents a significant technological advancement, UOKiK proceedings initiated in December 2019 shed light on the antitrust risk related to specific use of this innovation. Allegro's preferential treatment of its own retail operations could stifle competitive innovation by creating an uneven playing field. Allegro's behavior is indicative of how the misuse of innovative tools can hamper the overall market innovation landscape. By leveraging exclusive access to algorithmic data and functionalities of its platform, Allegro could unduly disadvantage third-party sellers, depriving them of the opportunity to compete effectively. This not only undermines the incentive for these sellers to innovate but also reduces the variety and quality of products available to consumers.

30. Regarding UOKiK's charges against Allegro for using functionalities on the marketplace that were unavailable to other retailers, Allegro argued that its actions consisted in merely testing new functionalities on the platform and were aimed at fostering innovation on its platform, enhancing functionality, and ultimately providing better service to consumers. Allegro's argument hinges on the premise that testing new sales functions was essential to the innovative growth of the platform – a process that could lead to the rollout of improved features for all merchants once proven effective. Allegro emphasized that its experimentation with features like discount coupons, unique advertising displays, and search query suggestions were part of its innovative efforts to refine the user experience

and efficiency of the marketplace. However, the UOKiK took a different view, focusing on the potential anticompetitive effects of these practices.

31. Despite Allegro's assertion that their testing was in the interest of platform-wide innovation, UOKiK identified concerns over the extent and duration of Allegro's use of these sales and promotional tools. The functionalities being used solely by Allegro were not transient but were used over extended periods, significantly affecting sales optimization to Allegro's benefit. UOKiK's findings pointed out that these functionalities, while labeled as "tests", were deployed in such a way that they advantaged Allegro's retail activity to a considerable degree, thereby potentially skewing the competitive landscape. The use of these functions had a positive effect on the sales efficiency of Allegro's offers, including better displaying and positioning of Allegro's offers in relation to offers issued by independent sellers. Consequently, the use of the said functions by Allegro had an impact on the increase in Allegro's retail sales compared to the sales activity carried out on the Platform by third party sellers. In connection with the above, the UOKiK found that independent sellers could not compete on an equal footing with Allegro.

32. The arguments of Allegro, centered on the necessity of innovation within its platform, were not disregarded. Still, they were outweighed by the competition concerns. The crux of the UOKiK's position is that the competitive process must not be compromised by actions that could lead to self-preferencing in order provide a substantial advantage to the platform operator over independent merchants using the same platform. The principle at stake is the safeguarding of a level playing field where all participants have equal access to market-shaping innovations. In essence, while the promotion of innovation is a laudable and essential objective for a dynamic marketplace, it must be balanced against the need to maintain fair competition. This balancing act is at the heart of competition law, ensuring that the drive for progress does not undermine the market's integrity and the equality of opportunities for all its participants.

## 3. Innovation, market definition, and market power

33. Allegro case is illustrative of how the provision of innovative solutions can impact the appraisal of market power. Innovation acts in a twofold manner: as a competitive instrument and as a gauge for apprehending market dynamics. The 'first-mover advantage' acknowledging the benefits derived from being the initial entity to introduce a new, innovative solution in the market, exemplifies that significant market shares in fast-changing sectors might be fleeting. This is due to the strong network effects experienced by Allegro since its inception in 1999, which may not always reflect a long-term monopolistic market grip owing to rapid innovation cycles.

34. Competition law's objective is to curb the potential for market power to impede competition. Nevertheless, it should also acknowledge that in markets marked by brisk innovation market power can be transitory. This poses a dilemma for competition authorities: reconciling the fleeting nature of market power in such dynamic markets with the imperative to protect against anti-competitive conduct. However, the transient character of market dominance does not necessarily preclude the existence of a dominant position. Allegro's market share is neither unstable nor temporary, with the company consistently attaining very high market shares. The rapid expansion of the market is not indicative of an absence of a dominant position. Such growth is significant only if the market dynamics lead to frequent leadership changes, suggesting that any market power could be temporary. In the absence of such changes, market dynamics do not necessarily preclude or even complicate the assertion that an entity with persistently high market shares has a dominant position.

## 4. Conclusions

35. The examination of Polish competition law cases reveals a complex interplay between innovation and market competition. Overall, these cases conducted by UOKiK underscore the importance of balancing the promotion of innovation with the preservation of fair competition, affirming that while innovation drives market progress and consumer welfare, it must not contravene the principles of a competitive marketplace. The UOKiK's stance indicates that competition law must remain flexible, safeguarding against the misuse of market power while fostering an environment where innovation can thrive.