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The Standard and the Burden of Proof in Competition Law Cases – Note by Poland

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1. Introduction

1. In this contribution prepared by the Polish Office of Competition and Consumer Protection (UOKiK), we share our observations on the standard of proof in antitrust cases.

2. This contribution deals only with cases concerning anticompetitive agreements and abuse of dominance. It does not cover the standard of proof in merger cases.

2. Current landscape

2.1. General background

3. Our institutional model and legal framework for antitrust enforcement generally resembles that used by the European Commission. We are an administrative antitrust agency and our task is to enforce: (a) Article 101-102 TFEU; (b) our national antitrust law, which generally follows the language and spirit of relevant provisions of the TFEU and EUMR.

4. However, our institutional model is different insofar as our decisions can be appealed to a specialised competition court (which, however, also deals with consumer and regulatory cases), and then further to the Court of Appeals, and the Supreme Court. The Competition Court and the Court of Appeals hear cases on the merits, and new evidence can be presented in court proceedings. The Supreme Court hears cases on the point of law – complaints to the Supreme Court, however, are not infrequent.

5. The fact that we enforce Article 101-102 TFEU (often in parallel with our own national provisions) means that the standard of proof applicable in our cases is often the one defined by the EU courts in relation to Article 101-102 TFEU.

2.2. Enforcement practice

6. As a civil law jurisdiction (i.e., not a common law jurisdiction), we do not use any formal standard of proof with varying levels of proof. Instead, the relevant decision-maker (i.e., the administrative agency or the court) needs to have a conviction that certain facts, based on an overall assessment of evidence, have been proved enough to find an infringement. This can be based on direct or indirect evidence. Legal presumptions are occasionally used.

7. Due to interactions between EU law and our own national rules (including the fact that sometimes they are applied in parallel), various tests and presumptions can follow from one of those branches of law, or from both of them at the same time. A few examples are provided below.

8. When it comes to legally defined rules, both Article 101(3) TFEU and our national equivalent of this provision envisage that based on individual criteria, a seemingly restrictive agreement can be found in line with competition law. However, both Article 2 of the Regulation 1/2003 and our national legislation also set forth that when it comes to the criteria mentioned earlier, the burden of proof is on the undertaking, not the agency.

9. There are, however, certain rules that are only generally defined in EU case law but made into statutory law in our national legislation. For instance, the EU legislative acts do not include formal presumptions with regard to the dominant position, and EU case law merely includes examples when dominance was found. Our national legislation, in turn, presumes dominance when an undertaking holds 40% market share.

10. Likewise, EU case law generally assumes that once it is proven that an anticompetitive agreement was made, it is for the parties of this agreement to prove that it was fully terminated. In our national legislation, this is made into a binding rule that also covers abuse of dominance.[1] Furthermore, EU case law includes a rather general presumption that when a parent company holds all or almost all shares in a subsidiary, it exerts decisive influence over it – under our own national rules, this presumption is applied when the parent company holds more than 90% shares.[2]

11. Conversely, there are certain rules that have been defined in EU case law, which are generally applicable in national proceedings, but without legislation or any landmark national case specifically saying that this rules applies. For example, EU case law includes basic rules concerning the distancing of an undertaking from anticompetitive arrangements (an undertaking that does not distance itself from those arrangements can be presumed to take part in them).

12. Likewise, when it comes to concerted practices under EU case law, the causal link between concerted action and the market conduct of undertakings is presumed to exist.[3] While this rule is not replicated in our legislative acts or any landmark case, the rule is typically applied, in particular taking into account cases where both EU and national law are applied in parallel.

2.3. Types of evidence

13. Both direct and indirect evidence is acceptable under our rules of evidence. Economic evidence can be presented as well.

14. In practical terms, indirect evidence has been primarily used in bid rigging cases, often concerning local markets. This is because in local markets we are less often in a position to use direct evidence, with colluding undertakings usually having close (informal) contacts. Indirect evidence in this type of cases is typically accepted by the courts, only occasionally leading to annulments.

15. In larger collusion cases, we more often rely on direct evidence, in particular in more recent enforcement. This is mostly due to more effective use of forensic IT in the period from around 2017, which led to a more frequent acquisition of high quality direct evidence. In the past, some of our large cases that strongly relied on indirect evidence did not withstand court scrutiny.[4]

[1] Article 10(3) of the Polish Competition Act.

[2] Article 6b(3) of the Polish Competition Act.

[3] Case C-8/08 *T-Mobile* [2009] EU:C:2009:343.

[4] This concerned, for example, Decision DOK-8/2011 (*DVB-H*), which concerned an alleged cartel between Orange, T-Mobile, Polkomtel, and P4 with regard to DVB-H (mobile television) in 2009.

3. Challenges

16. While the outline provided by us in the previous section might seem generally positive, the reality of enforcement is not without challenges. We believe some of those challenges are more rooted in national circumstances, and some are part of broader trends.

17. As discussed in our contribution to another OECD roundtable, our jurisdiction did not adopt a clear assessment standard.[5] However, a general drift towards a more economic approach is traceable, with economics-related findings becoming more important (either in fact, or at least nominally and in declaratory terms).

18. A good example of that is the presumption of dominance, mentioned earlier.[6] While it might seem that a presumption of dominance at 40% market share offers a very low bar when it comes to proving dominance, the presumption became illusory, since due to the more economic approach, more emphasis is put on market definition (and depending on definition, the market share might change significantly). Furthermore, whether the conduct of an undertaking is found relevant enough to be abusive also depends on the economic narrative – in consequence, even an easy finding of a dominant position does not mean that an infringement is found easily.

19. This leads to the first major challenge: while a general rise of the more economic approach (or at least an aspiration to follow it) can be traced in our jurisdiction, this becomes more inconsistent in practice, with the single most problematic challenge from the point of view of our national enforcement coming down to ambiguous case law. While in common law jurisdictions there is a clear tendency to read cases in terms of precedents, and at the EU level, it is typical for the CJEU to define certain rules and then to apply them, our feeling is that it is far less so in our own national cases.[7] In other words, aside from a handful of clearly defined issues (often procedural ones, e.g. whether an agency can pursue a 101 TFEU case only against a single party, not all parties to an agreement), judges fail to set forth criteria that are used consistently and by all judges. This shortcoming, however, is compensated by more clarity being offered by EU case law, which – in our case – is often applied in parallel to our national rules.

20. Some of this problem can be seen with regard to by object and by effect infringements. In our jurisdiction, this issue led a long discussion over the nature of RPM schemes. We signalled this issue in one of our other OECD contributions.[8]

21. There are a few reasons for which RPM cases caused much controversy in our enforcement: (i) from 2004 to around 2017, cases in our jurisdiction were rarely decided

[5] OECD, 'Advantages and Disadvantages of Competition Welfare Standards – Note by Poland' (2023) DAF/COMP/WD(2023)34 <https://one.oecd.org/document/DAF/COMP/WD(2023)34/en/pdf>, para 14-18.

[6] Para 9.

[7] This problem goes as far as to technical issues: our national courts do not use easily identifiable case names (undertakings names and products are often anonymised) and rarely supplement their rulings with paragraphs numbering (which makes it difficult to pinpoint specific passages of rulings, and refer to them in new cases).

[8] OECD, 'Advantages and Disadvantages of Competition Welfare Standards – Note by Poland' (2023) DAF/COMP/WD(2023)34 <https://one.oecd.org/document/DAF/COMP/WD(2023)34/en/pdf>, para 25-27.

under both national and EU law;[9] (ii) historically, anti-RPM enforcement represented a large portion of our decisions;[10] (iii) with numerous RPM cases and limited application of EU law, many of such cases required the national courts to present their own reasoning;[11] (iv) in the same period, the "more economic" approach started to receive more attention in our jurisdiction; (v) the overall process outlined above was further strengthened by the outcome of *Leegin* in the United States in 2007, seemingly with much confusion regarding the mode of analysis in European antitrust, as opposed to US antitrust.[12]

22. As mentioned in our earlier contribution, the RPM controversy has led the Polish Supreme Court to confirm on several occasions that RPMs generally constitute by object restrictions, but the fact that the Supreme Court needed to confirm this on several occasions over a relatively short period of time signals the general problem: lower instance courts encountered difficulties in making the assessment over whether an infringement is a by object or by effect one. No clear rules of assessment have been defined, occasionally leading individual judges of the Competition Court and the Court of Appeals to arrive at judgements that were later annulled by the Supreme Court. At the same time, the expectation of the lower instance courts (or at least some of the judges of those courts) to apply a by effect approach has not brought much clarity with regard to what needs to be proved and by what means, for the court to be satisfied with presented evidence.

23. Against this backdrop, the long struggle with RPM-related litigation largely sums up our views on the evolution of the burden of proof more generally. In an understandable way, a drift from a more form-based approach towards the more economic approach puts more burden on the party proving the infringement (i.e., private party or the enforcer). This is not always a bad development, in particular in jurisdictions that heavily rely on private enforcement, or where complainants can force a public enforcer to open a case. Yet some of the advocated advantages of the more economic approach, such as more consistency and certainty (one economic metric as opposed to an unspecified number of metrics or ambiguous metrics), might be weaker than often believed. Also, it should not go unnoticed that in particular in the context of large global undertakings, a competition law system that strongly relies on effects-analysis creates high enforcement barriers to a vast majority of competition authorities, with only a few public enforcers globally that can afford the needs of large scale litigation

24. What seems relevant is: (a) to have a clear idea what exactly needs to be proved; (b) by what means (what evidence and types of arguments are acceptable, and can be

[9] The reason for this was a very narrow and restrictive interpretation of EU law applied in our jurisdiction at that time.

[10] There are a few reasons for that. First, RPM cases were (and are) treated as by object restrictions, and cases used to be opened in relation to most RPMs (no strong prioritisation in the past; no soft enforcement measures such as warning letters). Second, RPMs have always been covered by our leniency programme. Third, seemingly, many undertakings in our jurisdiction employed RPM schemes, believing that competition rules do not apply to them, since prices were set by the producer/wholesaler – RPM arrangements could be requested or expected by retailers, and not operate as merely a policy implemented by the producer/wholesaler.

[11] This further coincided with the European Commission focusing more on horizontal cases in that period, with more RPM cases being decided only as late as in 2018.

[12] *Leegin*, 551 U.S. 877 (2007). The analysis of RPM under the rule of reason in the United States became a justification to contemplate using "by effect" category under our national antitrust law, yet without recognising that contrary to the US antitrust law, European antitrust laws, including those in our jurisdiction, typically do not use "strong" per se rules, but by object rules coupled with the possibility of making a defence under Article 101(3) TFEU or its national equivalents.

expected to be worth the attention and financial expenses); (c) how the burden of proof fits the general institutional landscape of a jurisdiction (e.g., more public enforcement or a strong role of private enforcement; more centralised enforcement with, for example, a single federal agency, or a more decentralised enforcement that uses the resources of a wider range of public authorities). It seems to us that in the context of a transatlantic competition dialogue, in particular the last of the factors mentioned above may be easily overlooked – and yet the logic and institutional setting of antitrust enforcement in the United States and Europe is not the same.