

## ***Solvents to the Rescue – a Historical Outline of the Impact of EU Law on the Application of Polish Competition Law by Polish Courts***

by

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### ***Abstract***

The article is devoted to the influence of European competition law on the application of Polish competition rules by Polish courts. It covers references to EU law that has been made throughout 20 years of its history. It aims at identifying various instances where EU law has been invoked to provide Polish competition rules with the actual content as well as different modes of referrals to EU law.

### ***Résumé***

L'article concerne l'influence de la loi européenne de la concurrence sur l'application des règles polonaises de concurrence par des tribunaux polonais. L'article couvre les références à la loi de l'UE développée au cours des 20 années de son histoire.

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Son but est d'identifier des instances où la loi de l'EU a été invoquée pour donner aux règles polonaises de la concurrence le contenu actuel et les modes de référence à la loi de l'UE.

**Classifications and key words:** EU competition law; judicial application of competition law; Europe's Agreement; spontaneous harmonization; relevant market; consumer detriment; restriction of competition

## I. Different approaches to the application of EU law in competition proceedings before and after the accession

The application of competition law is very apt for external (foreign) influences due to its specific history, its exportation from the United States to other legal cultures, creeping internationalization of rules as well as extra-territorial jurisdictional issues. Complex economic considerations and market regulation are coupled with the resulting restrictions of fundamental freedoms protected at the national, regional or international level. All these factors encourage both the authorities entrusted with the enforcement of competition rules as well as adjudicating courts to seek guidance on the methods of their application in more developed legal systems. Such an approach allows them to avoid potential instances of incorrect enforcement. It also enables the business community, at least to some extent, to gain clarity as to what types of market practices are likely to be questioned under antitrust rules. Any infant stage of a competition law regime benefits also from technical assistance from the representatives of more advanced jurisdictions. A significant degree of readiness to refer to the jurisprudence and legal doctrine of other legal systems follows such initial help.

Considering that the substantive provisions of Polish competition law have been modelled on Articles 101 and 102 TFEU, the EU has provided Poland with substantial level of technical assistance in the ambit of its national competition law. *Acquis communautaire* is easily accessible and has drawn considerable interest of Polish legal doctrine. Unsurprisingly, national jurisprudence has also frequently referred to EU competition rules in proceedings outside the coverage of Article 3 Regulation 1/2003<sup>1</sup>. This article reviews the influence of

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<sup>1</sup> See examples listed by: T. Skoczny, *Przeciwdziałanie praktykom monopolistycznym w świetle orzecznictwa*, Warszawa 1994, p. 180–181; T. Skoczny, *Die Angleichung der Wettbewerbsregeln in den neuen und zukünftigen Mitgliedstaaten an das Gemeinschaftsrecht. Polen*, Baden-Baden 2006, p. 69; G. Materna, *Pojęcie przedsiębiorcy w polskim i europejskim prawie ochrony konkurencji*, Warszawa 2009, p. 186–187.

EU law on the judicial application of Polish competition law. It will not cover issues resulting from the parallel application of EU and national competition rules in the same proceedings but try instead, to determine whether and to what an extent has Polish competition law been harmonized with EU law in practice.

The impact of EU law on the judicial application of Polish competition law is of significant practical importance due to the numerous references made to EU law both by the President of the Polish Competition and Consumer Protection office (UOKiK President) and the scrutinized undertakings<sup>2</sup>. The impact of EU law on the application of Polish competition rules by the antitrust authority is outside the scope of this study. This is so because of one of the peculiarities of the Polish antitrust enforcement system whereby the courts reviewing the decisions issued by UOKiK have full jurisdiction over the factual and legal considerations contained therein.

Article 68 and 69 of the European Agreement<sup>3</sup> obliged Poland to approximate, among other things, its competition rules<sup>4</sup>. However, legal doctrine<sup>5</sup> had inspired referrals to EU competition law long before the actual entry into force of this act. At the time when national legal rules had been interpreted, EU law had been in an auxiliary manner<sup>6</sup>. Polish courts continued

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<sup>2</sup> See for example the judgment of the Competition and Consumer Protection Court (SOKiK) of 29 May 2006, XVII Ama 9/05, UOKiK Official Journal 2006 No. 4, item 58, where some of the arguments raised against the UOKiK decisions dealt with its incompatibility with 'European case-law' on the non-compete obligation. In the judgment of 29 May 2008 (XVII Ama 53/07, UOKiK Official Journal 2008 No. 4, item 37), SOKiK did not accept the plea that the UOKiK decision imposing fines for the infringement of Polish competition rules was issued in breach of European guidelines on fine setting.

<sup>3</sup> European Agreement establishing association between the Republic of Poland and European Communities and their Member States, Brussels 16 December 1991 (Journal of Laws 1994 No. 11, item 38).

<sup>4</sup> G. Materna, *Pojęcie przedsiębiorcy...*, p. 193–194. More about duties stemming from Articles 68–69 of the Europe's Agreement see: S. Sołtysiński, 'Dostosowanie prawa polskiego do wymagań Układu Europejskiego' (1996) 4–5 *Państwo i Prawo* 31, and regarding competition law in particular S. Sołtysiński, 'Problematyka prawa antytrustowego w układzie o stowarzyszeniu między RP a EWG' [in:] *Rozprawy z polskiego i europejskiego prawa prywatnego*, Kraków 1994, p. 445–461; M. Król-Bogomilska, *Kary pieniężne w prawie antymonopolowym*, Warszawa 2001, p. 27–30; E. Wojtaszek-Mik, *Umowa franchisingu w świetle prawa konkurencji Wspólnoty Europejskiej i polskiego prawa antymonopolowego*, Toruń 2002, p. 166–169; T. Skoczny, *Die Angleichung...*, p. 27–29.

<sup>5</sup> T. Skoczny, *Przeciwdziałanie praktykom...*, p. 179; E. Nowińska, *Reguły konkurencji a umowy dystrybucyjne i serwisowe w zakresie pojazdów samochodowych*, Warszawa 1995, p. 22; S. Sołtysiński, 'Dostosowanie prawa...', p. 40; I. Wiszniewska, 'Dostosowanie polskiego prawa antymonopolowego do prawa europejskiego', (1996) 1–4 *Studia Prawnicze* 142.

<sup>6</sup> 'Because of the economic importance of such agreements, which generally produce more positive than negative effects from the point of view of competition process, and given the lack

making references to EU law after Article 68 and 69 of the European Agreement entered into force. They have avoided somehow to make any references to the approximation duty<sup>7</sup>. Caution in invoking the European Agreement as a potential source of the duty to interpret Polish competition law inline with EU provisions law can be explained by the position of the Supreme Court. The latter has clearly stated in cases concerning intellectual property that the duty to approximate Polish law with European rules did not oblige national courts to use European standards when applying domestic legislation in areas covered by Articles 68 and 69<sup>8</sup>.

Following the accession, a cautious approach towards the Europeanization of Polish antitrust jurisprudence has been noted by the Supreme Court on three occasions. In cases without an effect on intra-Community trade, *acquis communautaire* in the area of antitrust is said to serve only as ‘a source of intellectual inspiration, example of legal reasoning and understanding of certain legal institutions, which may be helpful in interpreting the provisions of Polish law’<sup>9</sup>. Thus, there is no duty to apply Polish competition rules in conformity with European jurisprudence in purely national cases. Therefore, the failure to deliver a judgment compatible with a specific judgment of the General Court or Court of Justice, or indeed Commission’s guidelines or notices, does not equal a recognizable infringement of the Polish equivalents of Articles 101 or 102 TFEU. This does not mean of course that references to EU law are not necessary or are indeed unwelcome. Instead, there is a constant need to persuade the court that the deviance from European standards leads to the misapplication of Polish law.

Interestingly enough for a foreign reader, albeit not surprising for those familiar with the peculiarities of the Polish legal system, an alternative approach to the impact of EU law on purely national cases can also be identified. In this context, factual harmonization resulting from the ‘genetic’ bond between

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of specific legal rules in the Polish act relating to such forms serving to organize the market exchange of goods, there should be no barriers – in the opinion of SOKiK – in interpreting the provisions of the antimonopoly act with due account of the positive experience of the European Union with such agreements’ – judgment of SOKiK of 8 January 1997, XVII Amr 65/96, (1998) 1 *Wokanda*, item 60; see also judgments of SOKiK of: 6 December 1995 (XVII Amr 47/95, (1997) 1 *Wokanda*, item 55) and 4 February 1998 (XVII Ama 66/97, LEX nr 56330, for further analysis see E. Wojtaszek-Mik, *Umowa franchisingu...*, p. 143.

<sup>7</sup> Judgment of SOKiK of 8 January 1997, XVII Amr 65/96, (1998) 1 *Wokanda*, item 60 – ‘interpretation of Article 6 of the Antimonopoly Act should include – as far as possible – the legislation in force in the European Union, due to the fact of signing the Europe’s Agreement’.

<sup>8</sup> Judgments of the Supreme Court of: 8 January 2003, III RN 239/01 and III RN 240/01, (2004) 3 *OSNP*, item 42; and 17 February 2004, I PK 386/03, (2005) 1 *OSNP*, item 6.

<sup>9</sup> Judgments of the Supreme Court of: 9 August 2006, III SK 6/06, (2008) 1-2 *OSNP*, item 25; 6 December 2007, III SK 16/07, (2009) 1-2 *OSNP*, item 31; of 3 September 2009, III SK 9/09, not reported.

Polish and European competition rules is said to oblige Polish courts to fully recognize *acquis communautaire* when applying relevant provisions of national law<sup>10</sup>. This approach was adopted in at least one case concerning restrictive agreements whereby SOKiK declined to hold a genuine agency agreement to be a competition restricting practice within the meaning of the Polish equivalent to Article 101 TFEU.

Such an approach is very debatable because the relationship between national and EU competition rules is governed by Regulation 1/2003. The latter act does not however contain a duty of a consistent interpretation and application of national competition rules in cases without an effect on intra-Community trade. The jurisprudence of the ECJ is also clear that such an obligation is applicable where national law directly refers to European competition rules as a benchmark used to examine a specific market conduct<sup>11</sup>. Still, such an approach is also very pragmatic. The application of different legal standards in European and national proceedings results in a divergent treatment of the undertakings under investigation<sup>12</sup>, a fact that can be explained only in part by the differences in the goals of the European and the Polish competition law regime.

Full referral to *acquis communautaire* when applying Polish antitrust rules in domestic cases, is also supported by constitutional considerations<sup>13</sup>. The divergence of the treatment of Polish undertakings in European and national proceedings leads in some cases to the application of stricter national rules and to their disapplication in others. It may be argued therefore that any restriction of the constitutional freedom of entrepreneurship resulting from a decision of the UOKiK President based on national law only, is not warranted by an important public interest within the meaning of Article 22 of the Polish Constitution<sup>14</sup>. This is particularly true for restrictive agreements where Article 3 Regulation 1/2003 precludes the application of stricter national

<sup>10</sup> With direct reference to article 101 TFEU, judgment of SOKiK of 29 March 2006, XVII Ama 86/04, not reported.

<sup>11</sup> C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio p. Compañía Española de Petróleos SA* [2006] ECR I-11987, para. 22.

<sup>12</sup> See resolution of the Supreme Court of 23 July 2008, III CZP 52/08, (2009) 7–8 *Orzecznictwo Sądów Polskich*, item 86, annotated by R. Poździk, see also annotations by R. Trzaskowski, ‘Kompetencja sądu do ustalania nieważności czynności prawnych będących przejawem nadużywania pozycji dominującej oraz nieważności porozumień ograniczających konkurencję’ (2009) 9–10 *Palestra* 635–643 and A. Jurkowska-Gomułka, ‘W stronę umocnienia prywatnoprawnego wdrażania zakazów praktyk ograniczających konkurencję – glosa do uchwały SN z 25.07.2008 r. (III CZP 52/08)’ (2010) 5 *Europejski Przegląd Sądowy* 43.

<sup>13</sup> This problem was noted by the Supreme Court in judgment of 6 December 2007, III SK 20/07, (2009) 3–4 *OSNP*, item 55.

<sup>14</sup> See judgment of the Constitutional Court of 21 April 2004, K 33/03, (2004) 4 *Orzecznictwo Trybunału Konstytucyjnego*, item 31, para. 13.

provisions where an agreement is liable to affect intra-Community trade. This approach is not as convincing in abuse cases seeing as Article 3 Regulation 1/2003 clearly allows for the application of stricter national rules even in cases where an effect on EU trade is present but there is no violation of Article 102 TFEU<sup>15</sup>.

## II. Providing a meaning to imprecise provisions

The judicial application of the notion of a dominant position provides one of the best examples of EU law referrals seeking guidance on how to properly understand basic competition law institutions<sup>16</sup>. Polish law initially stated<sup>17</sup> that an undertaking was dominant when it did ‘not meet with substantial competition on the national or local market’. Courts quickly pointed out that this provision failed to determine the essence of ‘market dominance’. In order to fill the gap, the Polish Court for Competition and Consumer Protection (SOKiK) decided to refer to *acquis communautaire*<sup>18</sup>. On this basis, the definition of dominance was read as concerning a market position allowing the undertaking concerned ‘to prevent effective competition on the relevant market by providing it with the ability of behaving to a significant extent independently of its competitors, customers and ultimately consumers’<sup>19</sup>. Although minor changes were made later on, this definition was ultimately introduced into the Competition and Consumer Protection Act of 2000 (Competition Act of 2000)<sup>20</sup>.

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<sup>15</sup> T. Skoczny, ‘W sprawie modernizacji stosowania zakazu nadużycia pozycji dominującej’ [in:] C. Banasiński (ed.), *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej*, Warszawa 2005, p. 107.

<sup>16</sup> R. Janusz, M. Sachajko, T. Skoczny, ‘Nowa ustawa o ochronie konkurencji i konsumentów’ (2001) 3 *Kwartalnik Prawa Publicznego* 186.

<sup>17</sup> Article 2 point 6 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 Antimonopoly Act).

<sup>18</sup> Judgments of SOKiK of: 8 June 1994, XVII Amr 70/93, LEX no. 55924; 31 May 1995, XVII Amr 9/95, (1995) 6 *Wokanda*, item 55; 29 September 1999, XVII Ama 24/99, LEX no. 56385; 17 March 1999, XVII Ama 77/98, (2000) 8 *Wokanda*, item 58; 3 February 1999, XVII Ama 76/98, LEX no. 56157; 29 September 1999, XVII Ama 24/99, LEX no. 56385.

<sup>19</sup> Judgments of SOKiK of: 8 June 1994, XVII Amr 70/93, LEX n. 55924; 31 May 1995, XVII Amr 9/95, (1995) 6 *Wokanda*, item 55; 29 September 1999, XVII Ama 24/99, LEX no. 56385; 17 March 1999, XVII Ama 77/98, (2000) 8 *Wokanda*, item 58; 3 February 1999, XVII Ama 76/98, LEX no. 56157.

<sup>20</sup> Consolidated text: Journal of Laws 2005 No. 244, item 2080 as amended.

Another example is provided by the judgment of SOKiK<sup>21</sup> concerning the notion of a ‘decision of association of undertakings’ taking the form of a resolution of the regional attorney’s chamber determining ‘the pattern of optimal service fees’ and ‘recommended price list’. When establishing whether such a resolution constitutes an act of the association of undertakings, SOKiK pointed out that pursuant to European jurisprudence ‘a recommendation of an association of undertakings which, regardless of its legal status (form), accurately states the policy of the association of coordinating the conduct of its members, constitutes a decision of such an association of undertakings within the meaning of article 81 of the EC Treaty’<sup>22</sup>. In a similar manner, the Supreme Court referred to EU law in its judgment of 9 August 2006<sup>23</sup> where it accepted that competitors may adapt their policies to changing market conditions and the behaviour of their competitors, including pricing policies; however, price-matching with proof of prior contact between competitors was declared to be covered by the notion of a prohibited price-fixing scheme<sup>24</sup>.

Most of the references to European law under this heading considered the delineation of the relevant market. They supported the conclusions drawn by the courts from the factual analysis of the cases under consideration. SOKiK referred in its judgment of 14 February 2007<sup>25</sup> to a decision of the European Commission<sup>26</sup> when declaring the national market for broadcasting rights to the Polish football league to constitute the relevant market at stake. In the judgment of 5 May 2008<sup>27</sup>, it also followed closely one of the Commission’s decisions<sup>28</sup> when determining the geographical extent of the relevant market under consideration. SOKiK ruled that no local market for grain shipment services exists that would include a single port-terminal only. Instead, it confirmed the existence of a national market for grain shipment services that included all sea terminals offering such services. In the same manner, the judgment of 29 October 2009<sup>29</sup> followed the approach of the European institutions pursuant to which ‘products such as the organization of airport services for carriers in a single airport may constitute a separate relevant

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<sup>21</sup> Judgment of SOKiK of 9 November 2006, XVII Ama 68/05, UOKiK Official Journal 2007 No. 2, item 20.

<sup>22</sup> With reference to 45/85 *Verband der Sachversicherer e.V.* [1987] ECR 405.

<sup>23</sup> Judgment of the Supreme Court of 9 August 2006, III SK 6/06, (2008) 1–2 *OSNP*, item 25.

<sup>24</sup> Judgment of the CFI T-1/89 *Rhône-Poulenc* [1991] ECR II-867.

<sup>25</sup> Judgment of SOKiK of 14 February 2007, XVII Ama 98/06, UOKiK Official Journal 2007 No. 2, item 22.

<sup>26</sup> Decision of the EC of 2 April 2003, COMP/M.2876 – *Newscorp/Telepiu*.

<sup>27</sup> Judgment of SOKiK of 5 May 2008, XVII Ama 103/07, not reported.

<sup>28</sup> Decision of the EC of 14 October 2005, COMP/M.3884 – *ADM Poland/Cefetra/BTZ*.

<sup>29</sup> Judgment of SOKiK of 29 October 2009, XVII Ama 126/08, not reported.

market, since when a carrier intends to offer its services on a given route, the access to the airport infrastructure situated on both ends of the route constitutes an essential factor for the provision of such a service<sup>30</sup>. As a result, each of the three regional airports located in southern and south-eastern Poland (that is, Rzeszów, Krakow and Katowice) was to be considered as a separate relevant market for handling services.

### III. Priority of purposive interpretation

Furthermore, references to EU law allowed Polish courts to depart from a literal interpretation of Polish competition rules. SOKiK ruled in its judgment of 25 June 1997<sup>31</sup> that a textual interpretation of Article 4 section 4 of the 1990 Antimonopoly Act led to the conclusion that any vertical agreement establishing a distribution network is a competition restricting practice. On the other hand, a teleological approach based on *acquis communautaire* led SOKiK to the conclusion that exclusive distribution agreements are not anticompetitive *per se*, even if they create distribution networks closed to other resellers. The Court rightly concluded that competition between producers takes place mainly at the retail level and takes the form of competition between the entire distribution networks. Their creation through agreements containing exclusivity clauses leads to ‘an increase of competition on the market and not its reduction’. It followed that that exclusive distribution agreements restricted competition only when competitors had been foreclosed from the substantial part of the market.

References to European standards led the courts to the conclusion occasionally that despite the statutory presumption, a 40% market share does not always amount to a dominant position. It is necessary instead to take into account the whole set of the circumstances of the case including the ‘business environment in which the undertaking concerned operates’<sup>32</sup>. Pursuant to this approach, the Courts of Appeals ruled that the financial strength of an undertaking does not warrant a dominant position on its own but that high market shares must be sustained for a longer period of time<sup>33</sup>.

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<sup>30</sup> With references to C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889 and C-18/93 *Corsica Ferries* [1994] ECR I-1783.

<sup>31</sup> Judgment of SOKiK of 25 June 1997, XVII Ama 19/97, (1998) 7 *Wokanda*, item 47.

<sup>32</sup> Resolution of SOKiK of 3 October 1994, XVII Amr 5/93, (1995) 9 *Wokanda*, item 60.

<sup>33</sup> Judgment of the Court of Appeals of 20 November 2008, VI Aca 704/08, UOKiK Official Journal 2009 No. 2, item 16.



In the same manner, the Supreme Court ruled on 21 February 2002<sup>34</sup> that no restriction of competition occurred when a dominant producer and seller of oil and gasoline applied a unified countrywide wholesale price without taking due account of transportation cost differences. Such pricing policy did not aim at the elimination of the competitors of the dominant undertaking even though the latter was said to have enjoyed a competitive advantage over them resulting from its ‘earlier economic expansion in all potential trading levels of oil and gasoline distribution’. This judgment suggests that to establish abuse, it is not enough to show that a vertically integrated undertaking has an economic advantage resulting from its earlier, in comparison to its competitors on the wholesale or retail level, market entry and established market presence. The same applies to competitive advantages resulting from the economies of scope.

European competition law has surely greatly influenced the application of Article 6 of the Competition Act of 1990. This core provision prohibited both restrictive agreements and abuse (listed exhaustively in Articles 4 and 5) but only to the extent that they were ‘not necessary from a technical or economic point of view’. References to EU law led SOKiK to abandon the literal interpretation of this rule, which effectively allowed the interests of the scrutinized entity to be granted a very important role in adjudicating whether a restrictive practice was necessary for furthering the economic interests of the dominant undertaking. SOKiK ruled on several occasions that such an application of Article 6 of the Competition Act of 1990 would be unjust given the incompatibility of such an interpretation with EU law<sup>35</sup>. Courts focused on the impact of the scrutinized restrictive practices on consumer interests<sup>36</sup>. This approach had a key practical consequence – the competition authority was obliged by the courts to ‘determine and assess whether and to what an extent can the restriction (...) of competition on the relevant market (...) ultimately contribute to the improvement of consumer interests’<sup>37</sup>. As a result, both the restrictive agreements and abuses listed in Articles 4 and 5 were examined from the point of view of their impact on the economic benefits of consumers. Practices that restricted market rivalry, but enabled the parties to the agreement or the dominant undertaking to better satisfy consumer needs, were thus declared to be admissible.

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<sup>34</sup> Judgment of the Supreme Court of 21 February 2002, I CKN 1041/99, (2003) 1 *OSNC*, item 16.

<sup>35</sup> Judgment of SOKiK of 8 January 1997, XVII Amr 65/96, (1998) 1 *Wokanda*, item 60.

<sup>36</sup> Eg. judgment of SOKiK of 31 May 1995, XVII Amr 9/95, (1995) 6 *Wokanda*, item 55.

<sup>37</sup> Judgment of SOKiK of 8 January 1997, XVII Amr 65/96, (1998) 1 *Wokanda*, item 60.

#### IV. Structure of a competition analysis

Another area of influence of EU law on the judicial application of Polish competition law is the methodology of application. References to EU law led the courts to apply, at least partially, the European method of competition analysis. Most of all, the courts stressed the importance of proper market definition since the very beginning of modern Polish antitrust. Relevant market delineation was considered to be the precondition of a proper legal qualification of the business conduct under consideration<sup>38</sup>. In fact, not only the was the definition of relevant market but also the practice of its strict delimitation, established in *Hofmann La Roche*<sup>39</sup>, adopted from EU law. Following economic fields were declared to constitute a relevant market: coal, carbon coke, etylene, gas<sup>40</sup>, information and weather programs<sup>41</sup>; wholesale market for the delivery of pay-tv channels carrying scientific and nature programs in Polish<sup>42</sup>.

The practice of narrow market definition has continued after the accession. It was based on the argumentation that if a broader definition is accepted, then it may be difficult to identify undertakings with dominant position and that such difficulty may threaten the attainment of the goals of competition law.<sup>43</sup> Such reasoning is not convincing. The Court of Appeals has at least on one occasion rightly pointed out that the relevant market must be established not narrowly or widely, but properly.<sup>44</sup>

EU competition law was used by Polish courts to allocate the burden of proof in cases where the collaboration between undertakings took the form of concerted practice. The Supreme Court ruled on 9 August 2006 (III SK 6/06) that it is the competition authority that bears the burden of proving that a concerted price took place. On the other hand, it is up to the scrutinized

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<sup>38</sup> Judgment of SOKiK of 9 April 1997, XVII Ama 4/97, LEX no. 56458, with reference to 6/72 *Europemballage & Continental Can* [1973] ECR 215.

<sup>39</sup> Judgments of SOKiK of 4 October 1993, XVII Amr 29/93, (1994) 3 *Wokanda*, item 54; 26 October 1994, XVII Amr 24/94, (1995) 8 *Wokanda*, item 55.

<sup>40</sup> Judgment of SOKiK of 4 October 1993, XVII Amr 29/93, (1994) 3 *Wokanda*, item 54.

<sup>41</sup> Judgment of SOKiK of 14 September 2006, XVII Ama 71/05, UOKiK Official Journal 2006 No. 4, item 61.

<sup>42</sup> Judgment of SOKiK of 28 November 2008, XVII Ama 107/07, UOKiK Official Journal 2009 No. 1, item 6.

<sup>43</sup> Judgments of SOKiK of 14 September 2006, XVII Ama 71/05, UOKiK Official Journal 2006 No. 4, item 61; 18 January 2007, XVII Ama 101/05, UOKiK Official Journal 2007 No. 3, item 33; 28 November 2008, XVII Ama 107/07, UOKiK Official Journal 2009 No. 1, item 6.

<sup>44</sup> Judgment of the Court of Appeals of 8 August 2005, VI ACa 6/05, (2006) 2 *Glosa* 88.

undertakings to provide evidence that the alignment of their pricing policies resulted from parallel behaviour rather than a concerted practice<sup>45</sup>.

Polish courts adopted also from EU law the notion of agreements restricting competition by their object, before relevant statutory amendments were introduced. In the judgment of 6 July 1994<sup>46</sup>, SOKiK announced that horizontal market sharing agreements restrict competition by the very aim of monopolizing the markets at stake by the participants to the agreement, without the need for the agreement to succeed in attaining its goals.

## V. Determining the effect on competition

Reference to *acquis communautaire* is of greatest practical importance when determining whether a certain conduct is capable of restricting competition. It is tempting for the business community, legal practitioners and academics to determine which practices in what circumstances are either anti- or pro-competitive under the prevailing standard applied in EU law. European jurisprudence delivers important suggestions as to how various practices can be analyzed or proven, how can the legal arguments presented by the parties and authorities be evaluated and thus, how can they influence the judgment. EU law's influence in this context should always be welcomed seeing as it helps improve the quality of national jurisprudence. One should remain cautious however about their straightforward reception due to the existing differences in the legal goals of the two legal systems as well as their statutory language. The latter in particular may suggest that the Polish legislator wanted to achieve certain aims by defining given anticompetitive practices in such a way, that their Europeanization could be considered as *contra legem*.

EU law has indeed made a considerable impact on Polish jurisprudence in their treatment of certain market practices as anticompetitive. It is worth mentioning however that Polish courts have managed to avoid the pitfalls of a direct reception of European standards concerning the notion of a 'restriction of competition' that prevailed in the initial stage of Polish competition

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<sup>45</sup> With reference to 48/69 *Imperial Chemical Industries Ltd* [1972] ECR 619, which was interpreted by the Supreme Court as proclaiming that undertakings invoking parallel behavior must prove that such a behavior results from other circumstances than collusion. The Supreme Court reasoned that a similar position in respect of the burden of proof was adopted by the CFI in T-305/94, T-306/94, T-307/94, T-313/94–T-316/94, T-318/94, T-325/94, T-328/94, T-329/94, T-335/94 *Limburgse Vinyl Maatschappij and others* [1999] ECR II-931 and then by the ECJ in C-199/92 *Hüls AG* [1999] ECR I-4287.

<sup>46</sup> Judgment of SOKiK of 6 July 1994, XVII Amr 8/94, (1995) 3 *Wokanda*, item 56.

law. In most cases, they refused to equate the restriction of a freedom of an individual with a restriction of competition<sup>47</sup> in particular, in the field of vertical agreements. SOKiK swiftly emphasized here the importance of inter-brand competition<sup>48</sup>, consumer benefits resulting from distribution agreements and the fact that such agreements were at that time subject to a block-exemption from the prohibition of Article 101 section 1 TFEU<sup>49</sup>. As a result, Polish jurisprudence saw exclusivity clauses contained in distribution agreements as not anticompetitive *per se* (quite contrary to the strict reading of the statutory language used at that time). SOKiK required proof of market foreclosure even though it did not specify whether this requirement applied to the foreclosure of other suppliers or those interested in entering wholesale or retail distribution. Polish jurisprudence was clear however that market foreclosure exists when ‘the majority of resellers, due to the existence of networks of exclusive agreements, are not accessible for undertakings intending to enter a given product market’<sup>50</sup>. A careful examination of all legal and factual circumstances was required in all cases<sup>51</sup> resembling a full scale ‘rule of reason’ style of antitrust analysis. Agreements with the participation of a dominant undertaking were also accepted, provided that they allowed the dominant undertaking to better serve consumers<sup>52</sup>.

It is feasible to try and generalize the impact of EU law on the determination of the anticompetitive character of different market practices. Three broad categories of cases can be identified in this context.

In the first group, the adjudicating court refers explicitly to a specific EU judgment or Commission decision, which would directly support its conclusions regarding the impact of a given practice on competition (negative, positive or neutral). SOKiK declared for instance on the basis of *Commercial Solvents*<sup>53</sup> that it is prohibited in Poland to refuse to supply another undertaking with input necessary for the production of a final product, if the dominant

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<sup>47</sup> See an extensive analysis of the case-law in this respect by R. Poździk, *Dystrybucja produktów na zasadzie wyłączności w Polsce i Unii Europejskiej*, Lublin 2006, p. 250–262.

<sup>48</sup> Judgment of SOKiK of 8 October 1997, XVII Ama 18/97, LEX nr 56576.

<sup>49</sup> Judgments of SOKiK of 8 January 1997, XVII Amr 65/96, (1998) 1 *Wokanda*, item 60; 9 April 1997, XVII Ama 4/97, LEX nr 56458; 25 June 1997, XVII Ama 19/97, (1998) 7 *Wokanda*, item 47; 6 December 1995, XVII Amr 44/95, published in (1997) 1 *Wokanda*, item 49.

<sup>50</sup> Judgment of SOKiK of 6 December 1995, XVII Amr 44/95, (1997) 1 *Wokanda*, item 49.

<sup>51</sup> Judgment of SOKiK of 9 April 1997, XVII Ama 4/97, LEX nr 56458; 25 June 1997, XVII Ama 19/97, (1998) 7 *Wokanda*, item 47; 6 December 1995, XVII Amr 44/95, (1997) 1 *Wokanda*, item 49.

<sup>52</sup> Judgment of SOKiK of 8 January 1997, XVII Amr 65/96, (1998) 1 *Wokanda*, item 60.

<sup>53</sup> Citing judgment of the ECJ in 6-7/73 *Instituto Chemioterapico Italiano S.p.A and Commercial Solvents Corporation* [1974] ECR 223.

undertaking intends to enter the market for the final good by itself<sup>54</sup>. Referring to *British Sugar* and *Hoffmann la Roche*, differential rebates were declared as discriminatory<sup>55</sup>.

In the second category, an EU standard concerning a given anticompetitive practice is initially established. The Court refers then to it in order to strengthen the persuasive force of its reasoning. One of its finest examples is provided by the judgment of SOKiK of 6 December 1995<sup>56</sup> examining whether a selective distribution scheme for fertilizers met the conditions established in European law. In another judgment<sup>57</sup>, SOKiK signalled that several clauses found in franchising contracts were to be considered as restrictive under European standards<sup>58</sup>. In the judgment of 4 February 1998<sup>59</sup>, the Court emphasized that ‘imposing in vertical agreements resale prices, minimum resale price in particular, is treated under EU law as one of the most grievous infringement of competition rules’. SOKiK was also influenced by European standards regarding non-compete obligations. It rules on 29 May 2006<sup>60</sup> that ‘a non-compete clause is justified when it protects the buyer entering the market occupied by the seller’. However, a non-compete clause is not justified when it is ‘not necessary to conclude the agreement to sell a business’. It is also not acceptable if the ‘term of the non-compete clause is too long’ particularly considering that ‘the longest non-compete obligation allowed in European jurisprudence cannot extend 5 years’. Last but not least, the Supreme Court pointed out in its judgment of 9 August 2006 (III SK 6/06) that price-fixing cartels are considered to be ‘one of the most serious infringements of the prohibition of competition restricting agreements’. They ‘have always been treated very restrictively (...) in the jurisprudence of the ECJ’<sup>61</sup>.

In the third approach, references are made to the judgments of the ECJ or the General Court when establishing particular elements of a restrictive practice. The judgment of the Supreme Court of 19 February 2009<sup>62</sup> is a good

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<sup>54</sup> Judgment of SOKiK of 27 November 1996, XVII Amr 45/96, (1998) 1 *Wokanda*, item 52.

<sup>55</sup> Judgment of SOKiK of 3 August 1994, XVII Amr 18/94, (1995) 5 *Wokanda*, item 60.

<sup>56</sup> Judgment of SOKiK of 6 December 1995, XVII Amr 47/95, (1997) 1 *Wokanda*, item 55.

<sup>57</sup> Judgment of SOKiK of 6 December 1995, XVII Amr 44/95, (1997) 1 *Wokanda*, item 49.

<sup>58</sup> Judgment of SOKiK of 21 July 1992, XVII Amr 12/92, (1993) 1 *Wokanda*, item 34.

<sup>59</sup> Judgment of SOKiK of 4 February 1998, XVII Ama 53/97, (1999) 2 *Wokanda*, item 52.

<sup>60</sup> Judgment of SOKiK of 29 May 2006, XVII Ama 9/05, UOKiK Official Journal 2006 No. 4, item 58.

<sup>61</sup> Citing judgment of the ECJ in 48/69 *Imperial Chemical Industries Ltd* [1972] ECR 619.

<sup>62</sup> Judgment of the Supreme Court of 19 February 2009, III SK 31/08, LEX no 503413, annotated by K. Kohutek, [in:] (2009) 4 *Glosa* 93.

example of this approach when determining under what conditions can a dominant undertaking abuse its market position on a related market<sup>63</sup>. It was declared there that such an abuse is possible in limited circumstances when the dominant undertaking is not present on the market affected by its practice. That is so particularly when it is preparing to enter this market and uses its market power held on the dominated market to control the competitive conditions in the related field<sup>64</sup>. On the basis of that statement, the Supreme Court ruled that lacking presence on the related market or the intention to enter it, the dominant purchaser of clutches could not have restricted competition on the market for veterinary services. Another example of this approach is delivered by the judgment of SOKiK of 7 May 2009<sup>65</sup>. The court ruled in this case that in order for a restrictive practice to be established (determining a single retail resale price for roofing slates), it is sufficient that a certain price was agreed upon among the undertaking concerned. There is no need to determine whether that price was actually applied by the undertakings concerned<sup>66</sup>.

## VI. Reception of legal institutions developed in EU law

The fact that EU competition law has been in force for over 50 years means that many of its legal concepts have already been developed and commented on by the doctrine. This extensive experience could be helpful in applying national law, particularly when it deals with issues unrelated to the goals of competition law and policy or do not involve provisions that have been worded differently by national legislators. The impact of EU law on the application of national competition laws can in such cases be not only more visible but also more systematic and consistent. One of the instances where EU law served as a reference for the development of Polish jurisprudence was the judgment of SOKiK of 29 March 2006<sup>67</sup> concerning a distribution agreement that restricted

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<sup>63</sup> The case concerned alleged abuse by the dominant purchaser of clutches for breeding chicks consisting of imposing upon the clutches farmers covered by purchasing agreements a requirement to have their clutches controlled by a veterinarian specified by the dominant purchaser. The NCA claimed that this requirement restricted competition on the (general) market for veterinary services by foreclosing it to other veterinarians servicing the regional market where the breeders were located.

<sup>64</sup> Citing judgment of the ECJ in 6-7/73 *Instituto Chemioterapico Italiano S.p.A and Commercial Solvents Corporation* [1974] ECR 223.

<sup>65</sup> Judgment of SOKiK of 7 May 2009, XVII Ama 140/07, not reported.

<sup>66</sup> Citing judgment of the ECJ in 246/86 *Belasco* [1989] ECR 2117 and the judgment of the CFI in T-64/02 *Heubach* [2005] ECR 2005 II-5137.

<sup>67</sup> Judgment of SOKiK of 29 March 2006, XVII Ama 86/04, not reported.

the agent's price setting ability. EU standards concerning genuine agency agreements were directly invoked by the court which ultimately decided that 'the failure of the national legislature to exempt such agreements from the prohibition of competition restraining agreements cannot lead to the conclusion that national law is more restrictive in that respect than European law'.

A similar example is delivered by the judgment of 29 May 2008<sup>68</sup>. SOKiK referred in this case to *C-204/00 Aalborg Portland et al.*<sup>69</sup> when deliberating whether the required standard of proof in respect of the existence of an agreement was met in the circumstances of the case. Following the lead provided by the Court of Justice, SOKiK ruled that the participation in the restrictive scheme can be established by 'single facts' such as 'the participation in meetings' or the 'silent approval of an unlawful initiative, without objecting to the scheme or whistle-blowing to the responsible authorities'. The court added that 'the fact that the undertaking concerned does not commit itself to abide by the outcomes of the meeting concerning policy alignment, does not exempt it from the liability for the participation in a cartel, unless it clearly protested against such an alignment'. Only then did SOKiK apply this standard to the facts of the case and ruled that since there was no such an objection, other cartel participants could have correctly assumed that the scrutinized entity would behave loyally to the agreed strategy. EU law was used by the court to determine whether, and when, can an undertaking concerned be held liable for having participated in a cartel when there is no evidence that it had actually approved the restrictive scheme.

## VII. Summary

Polish courts ruling on competition appeals have used, and are still using EU law in various ways in cases falling outside the scope of Regulation 1/2003. There is no doubt that such references influence the development of national jurisprudence and hence the understanding of domestic competition rules. It can be argued therefore that Polish jurisprudence has been 'unionized' to a great extent when it comes to the interpretation and application of the substantive provisions of its competition law.

The impact of European law on the application of Polish competition rules is rather selective. It seems that references to EU law are made primarily where solutions and arguments are being sought that would support the judicial

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<sup>68</sup> Judgment of SOKiK of 29 May 2008, XVII Ama 53/07, UOKiK Official Journal 2008 No. 4, item 37.

<sup>69</sup> Citing judgment of the ECJ in *C-204/00 Aalborg Portland and others* [2004] ECR I-123.

decision that has already been arrived to by the court. Therefore European law serves more as a practitioner's handbook than an analytical guide.

Another, yet unwelcome result of the frequent referrals to EU law in national cases particularly when establishing anticompetitive effect, is that what determines the outcome of the assessments is often the legal name of the form of conduct under consideration, rather than the facts of the case. The fact can even be questioned, whether the impact of the established judicial *acquis communautaire* is nowadays that beneficial considering the time-lag occurring between the attempts of the Commission to introduce an effect based approach incorporating a consumer welfare standard and its acceptance by the European Courts, which are then binding on the national judiciary.

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