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"Anti-competition agreements" and legal options to pursue claims for damages before common courts[1]

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Abstract:

Aim: In the article the situation is discussed where the refusal by an energy supplier to connect other companies to join the network, will be treated (in Poland and the EU) as a prohibited abuse of a dominant position by this company. The identification of such practices is important because EU sectoral legislation does not contain specific provisions requiring companies managing and operating oil pipelines to conclude agreements with other companies to join their networks or to deliver oil.

Design / Research methods: The aim of the article was achieved through doctrinal analysis of the relevant Polish and EU law and by analyzing guidelines issued by EU bodies. In the study, also functional analysis is applied, allowing to examine the functioning of the law.

Conclusions / findings: Access to oil pipelines and the sale of their transmission capacity are determined by the network owners themselves. These owners are private oil companies, not being regulated by European Union law. The obligation to connect other entities to its own network by power transmission companies in Poland results only from the general provisions of Polish competition law. It is shown that refusal to access the network is a manifestation of prohibited abuse of dominant position, which is prohibited whenever the dominant activity is detrimental to allocation efficiency. In particular this concerns the case when the supply of goods or services objectively necessary for effective competition on the market in general is denied, and leads to the elimination of effective competition in the market and/or harm to consumers.

Originality / value of the article: The article discusses the reasons for the legal obligation for energy companies involved in the transmission of crude oil to connect other companies into their own network. This obligation significantly influences the business conducted by the transmission companies.

Implications of the research: The presented research results are useful for assessing decisions issued by the President of UOKiK (the Polish Office of Competition and Consumer Protection) and in the judgments of Polish common courts and EU courts.

Key words: public competition law, anti-competition agreements, relevant market, the abuse of dominant position

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1. Introduction. The concept of relevant market

To apply the Polish or EU competition law[2] to any business sector in order to eliminate anti-competition practices, it is necessary to outline relevant markets for each of the sectors in question. Pursuant to competition law, restrictions that the law aims to eliminate always occur and must be identified in a "relevant market" that sets out a platform for competition between undertakings (cf. Article 6(1) in principio and Article 9(1) in principio of the Competition and Consumer Protection Act of February 16, 2007, consolidated text: Official Journal 2017, item 229; cf. item I.2 of the Commission Notice on the definition of relevant market for the purposes of Community competition law EU OJ 1997, C372/5). Moreover, the notion of relevant market is a point of reference for the determination of market share, and hence, market strength, of particular undertakings.

A relevant market must be identified at least with respect to goods and location. In terms of goods, the market of products (goods) is the market of goods which, due to their purpose, price and properties, including quality, are considered substitutive by their buyers (Article 4(9) of the Competition and Consumer Protection Act, items II.7 and II.15–19 of the Commission Notice on the definition of relevant market for the purposes of Community competition law). In particular sectors, relevant markets are defined as specific types of activity (or phases of the economic chain) that involve specific products (goods), their production, sales and servicing. Nonetheless, it is always necessary to take account of the fact that products within one category vary by type, technical specification, purpose, function, price or technical properties, meaning that product-specific sales or servicing market can be further subdivided into product submarkets specific to certain types of products characterised by different technical properties, fit for different purposes and sold at a significantly different price than other types of products. As a result, the buyers of specific

[2] In this discussion the term "competition law" is used as construed in public competition law or anti-monopoly law, inclusive of bans on practices restricting competition, namely agreements that restrict competition or involve abuse of one's dominant position. Competition law construed in this way does not cover unfair competition law.

products or related services do not treat various types of products as interchangeable substitutes[3].

At the same time, it must be assumed that the production and sales markets for specific products are inclusive of activity involving the production and sales of spare parts for those products. It means that the production and sales of spare parts do not constitute a separate relevant product market that would be independent from production and sales markets of specific goods (cf. European Commission Notice – Guidelines on vertical restraints, EU OJ 2010, C 130/1, item 91).

From the geographic perspective, a relevant market is the area where, due to the type and properties of goods (products) being produced or sold, the existence of access barriers to the market, consumer preferences, significant differences in price and transport costs, competition conditions are similar (Article 4(9) of the Competition and Consumer Protection Act; items II.8 and III.28–32 of the Commission Notice on the definition of relevant market). Given this definition of the geographic criterion of a relevant market, the production market for specific goods can be either global, European or national. When it comes to the manufacturing of specific product types, it is quite likely that competitive environment may be relatively homogenous in the entire Europe or even globally. However, it is also quite common to come across a situation where the main (dominant) global producer organises sales and servicing of goods and space parts they produce in specific states, creating separate trade areas (separate distribution regions), by way of appointing separate (dedicated to particular states specifically) the distributors and dealers authorised to sell and service their products on those national territories, but not elsewhere. In such a situation, new businesses willing to engage in the sales or servicing of those products face significant, practically insurmountable access barriers. These barriers set out territorial borders for specific relevant markets from geographical perspective, rendering any tenders, international or pan-European purchases impossible.

[3] It seems that the differentiation of product markets for specific products is also reasonable given the lack of substitution of supply: the lack of substitutivity of certain types of products from the perspective of producers or, at least partially, due to the lack of substitutivity from the perspective of sellers and service providers.

2. Anti-competition contractual clauses

Typically, producers distribute their products by developing distribution chains or dealer networks based on civil law contracts made between producers and such distributors or dealers. In the competition law terminology, such contracts are referred to as vertical agreements or distribution agreements. Obviously, vertical agreements are necessary to run regular business activity in the field of sales and servicing of goods. However, in practice, some of those agreements contain a number of contractual clauses that are in direct conflict with the Polish and EU competition law, violate the ban on agreements restricting competition under Article 6(1) of the Competition and Consumer Protection Act[4] and under Article 101(1) of the Treaty on the Functioning of the European Union (TFEU)[5] which makes them patently invalid based on the effective laws themselves (cf. Article 6(2) of the Competition and Consumer Protection Act and Article 101(2) TFEU). Even if some of the contractual clauses included in vertical agreements are not directly incorporated into the relevant contracts but simply follow from the so-called agreed practices, this is without prejudice to their anti-competition nature and does not impact their classification as illegal and invalid from the perspective of competition

[4] Article 6(1) of the Competition and Consumer Protection Act reads: "Any agreements which have as their object or effect the prevention, restriction or other distortion of competition within the relevant market shall be prohibited, in particular those which: 1) directly or indirectly fix purchase or selling prices or any other trading conditions; 2) limit or control production, market sale, as well as technical development or investments; 3) share markets for the sale of goods or sources of supply; 4) apply dissimilar or onerous contract terms to similar transactions with third parties, thereby placing them at a competitive disadvantage; 5) make the conclusion of contracts subject to the acceptance or fulfilment by the other party of other obligations that by their nature or according to the customary usage have no connection with the subject of such contracts; 6) restrict access to the market to undertakings not covered by the agreement, or eliminate them from the market; 7) fix the terms and conditions of bids proposed by undertakings entering a tender, or by those undertakings and the undertaking that organises a tender, including, in particular, the scope of works or price (bid rigging)".

[5] Art. 101(1) TFEU provides: "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

law (see the definition of "agreement" laid down in Article 4(5) of the Competition and Consumer Protection Act and Article 101(1) in principio TFEU).

One of the most important restrictions to competition that originate from vertical agreements is a rule preventing distributors or dealers from selling products to certain clients, defined either as the designation of a specific territory (such as a portion of state's territory) where such distributors or dealers can operate or as the designation of the category of clients to whom distributors or dealers are authorised to sell specific products. It is one of the most far-reaching competition restrictions that negatively affect consumers, as it practically involves the division of the (relevant) market by territories or client groups. Such restrictions can be a consequence of direct obligations, such as the requirement to give up sales to certain clients or to clients from certain territories or the requirement to forward orders from such clients to other distributors or dealers. Yet another type of restrictions result from indirect measures aimed at preventing a distributor or dealer from selling goods to certain clients. Such measures include: refusal to pay or a decrease of bonuses or rebates, discontinuation of deliveries, decrease of delivered volumes or restricting supply to match the demand on the assigned area or among target group only, threats of termination, requesting higher prices for goods to be exported, restricting the volume of goods that could be exported or the obligation to transfer profits to the supplier of devices (European Commission Notice – Guidelines on vertical restraints, item 50). These restrictions result in relevant market sharing and as such are prohibited under Article 6(1)(3) of the Competition and Consumer Protection Act and Article 101(1)(c) TFEU.

This type of competition restriction includes also the practice of exclusive allocation of customers. When applied, the suppliers – producer of goods marketed under a specific brand – agrees to sell its products to one distributor only, on condition that the products will be resold to one specific group of customers, defined in terms of geographic criterion (registered seat or the place of business activity or the place where a request for servicing was lodged). At the same time, it is typical to impose on distributors or dealers certain restrictions concerning active sales to other groups of clients allocated on exclusive terms to other distributors or dealers. Threats to competition that are inherent in restrictions of this type include reduced

internal competition between brands and market sharing, which may facilitate pricing discrimination. What is more, the exclusive allocation of clients inherently leads to preventing other distributors from accessing the market and reduces competition at that level (European Commission Notice – Guidelines on vertical restrains, item 168). This category of competition restrictions violate Article 6(1)(2), 6(1)(3) and 6(1)(6) of the Competition and Consumer Protection Act and Article 101(1)(b) and 101(1)(c) TFEU.

Yet another competition restriction typical of vertical agreements involves restrictions to active and passive sales to end users. In fact, distributors or dealers belong to a selective distribution network organised by producers. Simultaneously, competition law requires that dealers in a selective distribution system be not restricted with respect to the selection of users to whom products or services will be sold (no restrictions on the selection of purchasing agents acting on such behalf of users are allowed).[6] In a selective distribution system, dealers should be free to engage in active and passive sales to all end users, including the sales via the Internet (European Commission Notice – Guidelines on vertical restrains, item 56). Restrictions to this freedom violate Article 6(1)(2) of the Competition and Consumer Protection Act and Article 101(1)(b) TFEU. Another group of serious restrictions to competition arising from distribution agreements involve restrictions that prevent parallel imports of products and spare parts to the territory of a specific state. Such clauses typically provide that dealers or distributors have no other import channels apart from direct imports from the producer. They are unable to import such goods using other foreign distributors or dealers located in other states. As a result, such clauses included in distribution agreements prevent parties from engaging in a so-called parallel import of goods and spare parts to a specific state. Those provisions constitute a flagrant breach of EU competition law and are classified as single market sharing. As such, they violate Article 101(1)(c) TFEU.

Importantly, one of the key objectives of EU competition law is to establish single internal market, namely to integrate the national markets of member states. To attain this objective it is necessary to ensure that the abolished national barriers to transborder trade created by member states (such as bans on restrictions on imports)

[6] Unless the restriction aims to protect the exclusive distribution system applied elsewhere.

are not replaced by barriers created by undertakings themselves (cf. e.g.: Odudu 2006: 13-14; Szydło 2006: 180 ff). These bariers include distribution agreements that involve prohibitions or restrictions affecting parallel imports.

Yet another major competition restriction arising from vertical distribution agreements involves preventing independent service or repair facilities from acquiring spare parts directly from manufacturers of such components. These restrictions can be direct or indirect in nature. Indirect restrictions typically consist in limited provision of technical information and specialist equipment necessary for the independent repair or service providers to use such spare parts (European Commission Notice – Guidelines on vertical restrains, item 59). Restrictions belonging to this category violate Article 6(1)(2) and 6(1)(6) of the Competition and Consumer Protection Act and Article 101(1)(b) TFEU.

A different type of prohibited restrictions to competition occurring in vertical (distribution) agreements is the non-competition clause imposed on the Polish distributors or dealers. As a result, the distributors or dealers cannot acquire or service products sold under competitive brands or can do so only within a law limit corresponding to the volume of their total purchases of such devices (European Commission Notice – Guidelines on vertical restrictions, item 66). Such clauses often involve a restriction directly or indirectly preventing the Polish distributors or dealers (belonging to a selective distribution network) from buying goods for the purpose of resale from specific competitive suppliers. Such restrictions, which tantamount to preventing competitive suppliers from accessing the market, are classified as a form of a collective boycott (European Commission Notice – Guidelines on vertical restrictions, item 69). The foregoing restrictions violate Article 6(1)(2) and 6(1)(6) of the Competition and Consumer Protection Act and Article 101(1)(b) TFEU.

The latter kind of restrictions to competition found in vertical agreements is particularly common, which obviously does not mean that other restrictions are less relevant or less damaging to competition. It involves restrictions that result from the violation of basic rules of organisation by suppliers within a selective distribution network. As already mentioned above, distribution network operating in Poland are often intended (at least in theory) as selective distribution network (or, in any case,

they do not operate as exclusive distribution networks)[7]. In this context it is necessary to explain that selective distribution can adversely affect competition in a number of ways: by decreasing internal inter-brand competition and, in case of cumulative effect, by causing the foreclosure of certain types of distributors, softening of competition and facilitation of collusion between suppliers and buyers. To assess possible anti-competition effects of selective distribution, a distinction needs to be made between purely qualitative selective distribution and quantitative selective distribution. In the case of purely qualitative selective distribution, dealers are selected on the basis of strictly objective criteria required by the nature of the product, such as training of sales personnel, the service provided at the point of sale, a certain range of products being sold, etc. The application of such criteria does not put a direct limit on the number of dealers. As a rule, purely qualitative selective distribution is not considered a violation of Article 6(1) of the Competition and Consumer Protection Act or Article 101(1) TFEU for the lack of anti-competition effects, provided that the following three conditions are satisfied. First of all, the nature of the product in question must necessitate a selective distribution system, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use. Secondly, resellers must be chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all and made available to all potential resellers and are not applied in a discriminatory manner. Thirdly, the criteria laid down must not go beyond what is necessary (European Commission Notice – Guidelines on vertical restraints, item 175).

In the case of selective distribution networks operating in Poland, the foregoing conditions are not always met. As an example one could refer to the condition that requires distributors and dealers to be selected on the basic of objective criteria that

[7] "Selective distribution agreements, like exclusive distribution agreements, restrict on the one hand the number of authorised distributors and on the other the possibilities of resale. The difference with exclusive distribution is that the restriction of the number of dealers does not depend on the number of territories but on selection criteria linked in the first place to the nature of the product. Another difference with exclusive distribution is that the restriction on resale is not a restriction on active selling to a territory but a restriction on any sales to non-authorised distributors, leaving only appointed dealers and final customers as possible buyers. Selective distribution is almost always used to distribute branded final products" (European Commission Notice – Guidelines on vertical restraints, item 174).

must be qualitative, homogenous, available to all possible distributors and dealers and applied in a non-discriminatory manner. However, often the selection criteria are highly subjective and arbitrary, diversified depending on the category of potential parties and not openly available to all (not publicly known). Moreover, they are applied in a discriminatory, or sometimes even fragrantly discriminatory manner. Such a discrimination is manifested, among other things, by refusing to admit undertakings with extensive sales and service networks, having good reputation and strong background in selling and servicing specified products to the distribution network.

What is more, competition law prohibits the organisation of selective distribution networks that are not purely qualitative and are based on qualitative-mixed criteria. Such additional selection criteria that directly limit the potential number of distributors or dealers include, for instance, requiring the minimum or maximum sales, or are manifested by the fixing of the number of dealers (European Commission Notice – Guidelines on vertical restraints, item 175). Those restrictions are unreasonable and constitute disproportionate restraints for the mechanism of competition on the market of specified goods in Poland. Furthermore, they violate Article 6(1)(2) and 6(1)(6) of the Competition and Consumer Protection Act and Article 101(1)(b) and 101(1)(c) TFEU.

At this point it needs to be emphasized that the anti-competition nature of the contractual clauses discussed above and included in distribution agreements is not remedied by the fact that some of the Polish distributors or dealers are owned by foreign producers or make part of producer's group. Although the Polish and EU competition laws contain a rule that agreements between members of the same group (for instance between the parent company and its subsidiary) are not subject to provisions on anti-competition agreements, this rule is applicable only if such intra-group agreements are made to internally allocate tasks between group members. The abovementioned exemption from anti-competition agreements applicable to agreements between members of the same group does not apply whenever such agreements have impact on economic relations and competition outside the group, that is when their impact is not limited to the internal intra-group relations (the Supreme Court judgement of January 19, 2001, file ref. no I CKN

1036/98; Jurkowska 2009: 375-376; Kohutek 2008: 259-262; Modzelewska-Wąchal: 68). In consequence, this exemption cannot be applied to distribution agreements if such agreements go beyond the allocation of economic tasks within the capital group and organize the entire Polish market of sales and servicing of a specific product or otherwise significantly affects competition on that market and situation of other market participants. In consequence, distribution agreements discussed in this paper fall within the scope of prohibitions introduced in Article 6(1) of the Competition and Consumer Protection Act and Article 101(1) TFEU.

Nevertheless, it must be emphasized that anti-competition clauses included in vertical agreements may be exempted from the ban on anti-competition clauses based on the Article 8 of the Competition and Consumer Protection Act and Article 101(3) TFEU. Article 8 of the Competition and Consumer Protection Act and Article 101(3) TFEU allow for exempting certain agreements or clauses from the ban on anti-competition agreements introduced in Article 6(1) of the Competition and Consumer Protection Ban and Article 101(1) TFEU respectively, insofar as such agreements or clauses, even if they can be classified as anti-competition to a certain extent, bring about specific proconsumer and general economic benefits and do not introduce disproportionate or significant restrains on competition.[8] Those exemptions from prohibitions laid down in the Article 8 of the Competition and Consumer Protection Act and Article 101(3) TFEU can be either block exemptions, meaning that they can be introduced by relevant regulations issued in Poland by the Council of Ministers (according to the Article 8(3) of the Competition and Consumer Protection Act) or in the European Union by the European Commission

[8] Article 8(1) of the Competition and Consumer Protection Act reads: "The prohibition referred to in Article 6.1 does not apply to any agreements which, at the same time: 1) contribute to improving the production or distribution of goods, or to promoting technical or economic progress; 2) allow consumers or users a fair share of the resulting benefit; 3) do not impose any restrictions on the undertakings concerned that are not indispensable to achieving these objectives; 4) do not afford such undertakings the possibility of eliminating competition within the relevant market in respect of a substantial part of the goods in question". Meanwhile, Article 101(3) TFEU provides that provisions of Article 101(1) TFEU may be declared inapplicable in the case of any agreements "which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not: a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

(based on the relevant authorisation included in the Council regulation issued pursuant to Article 103(1) and Article 103(2)(b) TFEU), or individual exemptions based on the individual assessment of specific agreements or clauses However, a vertical (distribution) agreement cannot be granted a block or individual exemption based on Article 8 of the Competition and Consumer Protection Act and Article 101(3) TFEU if, for instance, suppliers or buyers of a specific product in Poland account for more than 30% of sales of that product countrywise, as this threshold, pursuant to relevant regulations on block exemptions cannot be exceeded (paragraph 8 of Regulation of the Council of Ministers of March 30, 2011 exempting certain types of vertical agreements from the ban on agreements limiting competition, consolidated text: Official Journal 2014, item 1012; Article 3 of the Regulation of the Council (EU) No. 330/2010 of April 20, 2010 on bankruptcy proceedings, Official Journal on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, EU OJ 2010, L 102/1). Moreover, no exemption will apply if the clauses included in the agreements (e.g. market division clauses, clauses discriminating against independent sellers, clauses foreclosing access to the market) are labelled as the so-called black clauses and classified as the most serious and the most consequential restrictions to competition law, which are banned and cannot be granted any individual (cf. European Commission Notice – Guidelines on vertical restraints, items 96, 168-188) or block exemption (paragraph 11(2),11(3), 11(4) and 11(5) of the Regulation of the Council of Ministers of 30 March 2011 on the exemption of certain types of vertical agreements from the ban on anti-competition agreements; Article 4(b), (c), (d) and (e) and Article 5(1) of the Regulation of the Council (EU) No. 330/2010 of April 20, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices).

Nevertheless, even if one assumed that at least some of the contractual clauses discussed above would not be classified as black clauses which are prohibited as such, to prove that such clauses are eligible to be exempted from the ban introduced in Article 8(1) of the Competition and Consumer Protection Act or Article 101(3) TFEU is very difficult and troublesome. The undertakings concerned bear the

burden of proving that such exceptional conditions have been satisfied (Article 8(2) of the Competition and Consumer Protection Act; European Commission Notice – Guidelines on vertical restraints, item 96), which means that they would be required to prove beyond any doubt that the significant (and indisputable) restrictions to competition caused by them on the Polish market of sales and servicing of a specific product are highly beneficial to users (end buyers) of such products and do not go beyond what is necessary for the udders to obtain such benefits. Meanwhile, one can hardly speak of any perceptible and undisputable benefits for users (final buyers) if, taking account of the abovementioned clauses used in vertical agreements, users cannot freely chose their sellers or the entity from which to procure servicing and maintenance services, and are *de facto* deprived of the possibility to benefit from increased competition on relevant markets that would provide them with a wider choice, better quality of service and lower prices.

3. Practices involving the abuse of dominant position on relevant markets

The Polish competition law defines dominant position as the position of an undertaking that enables it to prevent effective competition being maintained in a relevant market by giving it the power to act to an appreciable extent independently of its competitors, customers and consumers; it is assumed that an undertaking has dominant position where its market share in a relevant market exceeds 40 per cent (Article 4(10) of Competition and Consumer Protection Act). This definition is based on an analogous definition in the EU competition law, which assumes that the dominant position means such a position of an undertaking which enables it to prevent effective competition in the relevant market by acting in a manner appreciably independent from other competitors, customers and, finally, also consumers. This notion of independence is related to the degree of competitive constraint exerted on the undertaking in question. Dominance entails that these competitive constraints are not sufficiently effective and hence that the undertaking in question enjoys substantial market power over a period of time. This means that the undertaking's decisions are largely insensitive to the actions and reactions of

competitors, customers and, ultimately, consumers (Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, EU OJ, C 45/7; hereinafter: "Communication from the Commission on exclusionary conduct by dominant undertakings").

One special instance of dominant position is collective dominant position. In the Polish and EU competition law, collective dominant position is defined as the market strength of specified undertakings belonging to oligopoly which enables them to act to an appreciable extent independently from other competitors, business partners and consumers and to prevent effective competition on the relevant market (in other words, such undertakings are not subject to any significant competitive pressure, including the pressure exerted by potential competitors and balancing demand power). Furthermore, another defining feature of collective dominant position is the fact that the undertakings concerned (oligopoly members), thanks to their mutual connections, pursue a common market policy (behave in the same way in the market). These mutual connections between undertakings can take form of formal contracts, interest in equity, informal agreements or intentional, anti-competition parallelism (tacit coordination). Such connections should be permanent and fossilized by the existence of certain revenge measures discouraging oligopoly members from abandoning common policy (Szydło 2010: 95-104).

Collective dominant position is enjoyed by undertakings that take up almost the entire market by engaging in actions that are inter-dependent and involve the anticipation of other undertaking's conduct, ensuring mutual response to possible market moves. Typically, such undertakings give up on intensive mutual competition, but rather adjust (assimilate) their market conduct anticipating analogous conduct on the part of other undertakings. Such a mutual tacit collusion or a covert agreement can be significantly facilitated and made probable if a selective distribution network is organized in Poland in a manner allocating clients to specific distributors or dealers on exclusive basis, restricting or preventing them from engaging in active sales of such goods to other groups of clients. This organisational model in a selective distribution network, based on the exclusive assignment of clients by all suppliers, is an important factor facilitating collusion, not only between

suppliers, but also between distributors or dealers (European Commission Notice – Guidelines on vertical restraints, item 168). What is more, other aspects of organization and functioning of selective distribution networks of both producers suggest far-reaching understanding of mutual interests and the awareness of the fact that tacit agreement and intentional parallelism of their market conduct would give them a better chance of obtaining higher profits than fierce competition.

Undertakings that enjoy a dominant position, including collective dominant position, cannot abuse it. Article 9(1) of the Competition and Consumer Protection Act provides that the abuse by one or more undertakings of a dominant position within a relevant market is prohibited. Simultaneously, Article 102(1) TFEU specifies that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between member states. Article 9(2) of the Competition and Consumer Protection Act and the second sentence of Article 102(2) list instances of dominant position abuse practices that affect competition and consumers to the greatest extent. These include: imposing unfair transaction terms and conditions, limiting market sale to the prejudice of customers or consumers, preventing the development of the conditions necessary for the competition to emerge or develop or the sharing of markets according to the criteria of territory or entity. In fact, these practices violate the Article 9 of Competition and Consumer Protection and Article 102 TFEU and insofar as they represent legal transactions, they are invalid (cf. Article 9(3) of the Competition and Consumer Protection Act).

Other practices that can be classified as the abuse of dominant position involve blocking access to the market of sales and servicing of specific goods in Poland. These practices can take various forms, but their most flagrant and effective manifestations include: 1) consistent refusal to admit independent sellers and service providers to one's own distribution network in Poland, even if those independent applicants enjoy established reputation, extensive infrastructure and strong background; 2) preventing members of one's own distribution networks (distributors or dealers who are members of distribution networks of both dominant producers), not only located in Poland but also domiciled in other European states, from selling

specific goods and spare parts to independent sellers and service providers in Poland, thereby blocking their options to further develop business activity in the sales and servicing market. It must be emphasized that the effects of such exclusive practices by dominant producers are not limited to typical anti-competition effects, manifested by the weakening position or disappearance of independent sellers and service providers, but are detrimental to consumers wellbeing, limiting their options to chose between distributors or dealers offering better quality of services and forcing them to accept higher prices, as a result of the weakness or lack of competitive pressure that requires the participation of a higher number of sellers and service providers. Such practices violate Article 9(2)(2) and 9(2)(5) of the Competition and Consumer Protection Act and Article 102 TFEU (including Article102(b) TFEU).

Other manifestations of abuse dominant positions include the discrimination against independent sellers or service providers. From the perspective of Article 9 of Competition and Consumer Protection Act and Article 102 TFEU, both dominant suppliers should treat their existing and potential business partners equally and in a non-discriminatory manner, also when accepting them to their distribution networks. However, it is not the case when, without any reasonable cause, dominant undertakings refuse access to their distribution networks in Poland to certain independent sellers or service providers, even if such sellers or service providers meet all relevant criteria with regard to professional qualifications, experience, financial standing, qualified personnel and required infrastructure. Such practices violate Article 9(2)(3) and 5(2)(5) of the Competition and Consumer Protection Act and Article 101(1)(c) TFEU.

Yet another type of conduct that can be classified as a manifestation of dominant position involves the sharing of markets according to the criteria of territory or entity. In fact, these practices are very common – each of local Polish distributors or dealers is assigned a specific territory together with potential customers residing or domiciled in that area. A distributor or dealer sells or provides services to such customers, but cannot extend their activity to other regions of the country (it cannot execute orders made from other regions of Poland). This market sparing strategy creates a situation where a client from a specific region of Poland is directed, based

on their domicile, to a specified regional dealer and typically cannot buy the product or spare parts in another place on the territory or cannot hold a tender soliciting bids from various distributors or dealers. Moreover, also when using maintenance services the client must use services of their regional distributor or dealer, based on the client's domicile. This method of domestic and single EU market sharing is considered to be one of the most severe cases of dominant position abuse, as its impact is not limited to the effectiveness of competition (by decreasing client's arbitration options and depriving them from the benefits stemming from a wider choice, namely better quality of services or lower prices), but also undermines the very objective of the competition law, that is integration, especially in the case of the EU competition law. Such practices violate Article 9(2)(7) of the Competition and Consumer Protection Act and Article 102TFEU.

Yet another category of conduct classified as dominant position abuse involves certain exploitation practices with respect to end users. These practices consist in certain repressive actions taken against users should they attempt to procure a specific product or spare parts from independent sellers or attempt to use services of independent service providers. Such repressive activities can be manifested by the refusal to provide warranty services or the refusal to register a warranty service in the system, if not purchased from a distributor or dealer appointed by the producer, but from an independent seller. Those practices discourage end users from making purchases or servicing goods using independent undertakings. Not only do they exploit end users (by decreasing their freedom of choice and arbitration and depriving them of the option to benefit from a wider range of alternative offers), but are explicitly anti-competition, because they significantly hinder independent sellers or service providers from entering the sales or servicing market for a specified product in Poland, to the detriment of consumers. Such practices violate Article 9(2)(1) of the Competition and Consumer Protection Act and Article 102(a) TFEU.

4. The possibility to notify the President of UOKiK

Whenever producers and their Polish distributors or dealers engage in practices explicitly restricting competition, either by way of vertical agreements restricting competition or abuse of collective dominant position, the President of the Polish Office of Competition and Consumer Protection (hereinafter: President of UOKiK) must institute ex officio anti-monopoly procedure once they after obtaining information about such practices (Article 49(1) of the Competition and Consumer Protection Act). Before the anti-monopoly procedure is instituted, the President of UOKiK has also the option to institute an investigation procedure to make a preliminary determination whether any infringement of law justifying the institution of anti-monopoly procedure has taken place. At this stage the President of UOKiK determines whether the case has anti-monopoly relevance and examines the market, including its structure and the extent of its concentration (Article 48 of the Competition and Consumer Protection Act).

Although anti-monopoly procedure in matters concerning policies restricting competition is instituted by the President of UOKiK ex officio, everyone may report, by written notification, any suspected use of restrictive practices to the President of the Office, giving the grounds for such a notification (Article 86(1) of the Competition and Consumer Protection Act). This notification may include and specify, in particular: 1) the undertaking that is suspected of using a restrictive practice; 2) description of the findings of fact that constitute the grounds for the notification; 3) the provision of the Act or of the TFEU, the infringement of which is alleged by the notifying person; 4) demonstration of the infringement of the provisions of the Act or of the TFEU with sufficient indicia of reliability; 5) identification data of the notifying person (Article 86(2) of the Competition and Consumer Protection Act). Any documents that may constitute evidence of the infringement should be attached to the notification (Article 86(3) of the Competition and Consumer Protection Act). Within the time limit referred to in Articles 35-37 of the Act of June 14, 1960 – the Code of Administrative Procedure, the President of the Office informs the notifying person (entity) of the way in which the notification

is considered, including the statement of reasons (Article 86(4) of the Competition and Consumer Protection Act).

If the abovementioned notification is placed and followed by anti-monopoly procedure, the parties to that procedure will be only the undertakings against whom the procedure has been instituted (that is the undertakings that have engaged in or are suspected to have engaged in practices restricting competition), not the notifying person referred to above.

The anti-monopoly procedure carried out by the President of UOKiK can be discontinued if the suspicion that practices restricting competition turns out to be unfounded, or ends with issuing one of the decisions referred to in Article 10 or Article 12 of the Competition and Consumer Protection Act, namely the decision declaring a specific practice to be a practice restricting competition if the President of UOKiK finds that the prohibitions laid down in Article 6 or Article 9 of the Competition and Consumer Protection Act or in Article 101 or Article 102 TFEU have been infringed (Article 10(1) of the Competition and Consumer Protection Act). In consequence, the President of UOKiK can issue decisions directly based on Article 101 and 102 TFEU if prohibitions laid down in those provisions have been infringed. In their decision referred to above, the President of UOKiK orders a practice infringing the prohibitions referred to in Article 6 or Article 9 of the Competition and Consumer Protection Act or in Article 101 or 102 TFEU to be discontinued if by the date of issuing the decision the undertaking has not discontinued the practice already (Article 10(2) of the Competition and Consumer Protection Act).

In a decision declaring a specific practice a practice restricting competition, the President of UOKiK may impose on the undertaking a financial penalty amounting to no more than 10% of the turnover generated in the financial year preceding the year in which the penalty is imposed (Article 106(1) of the Competition and Consumer Protection Act).

Pursuant to Article 93(1) of the Competition and Consumer Protection Act, procedures on practices restricting competition are not instituted if 5 years have elapsed as of the end of the year in which the practices were discontinued (cf. also

Article 76 of the Competition and Consumer Protection Act). Prescription does not apply if such practices continue to be used.

5. The right to pursue claims for damages before common courts

Every person who has suffered damage as a result of practice restricting competition, performed by producers or dealers, can claim damages under general laws. The option to claim damages pursuant to foregoing rules is open to any undertaking that has suffered as a result of practices restricting competition, in particular by losing a market share, clients, orders, contacts, or by the need to terminate previously made contracts, as well as the requirement to pay damages to any third parties. If such damage to undertaking's property was caused by intentional or unintentional practices restricting competition and if adequate cause-effect relationship can be found between such practices and the damage, undertakings engaging in such practices are liable for the damage under civil law rules and obliged to pay relevant compensation to the injured party. If no compensation is paid voluntarily, the injured party can claim damages before common courts.

A person injured by practices restricting competition may lodge a relevant claim for damages even before the President of UOKiK institutes anti-monopoly procedure concerning such practices and before they issue a decision which authoritatively confirms that the undertakings in question engaged in practices restricting competition. This option has been confirmed by the case law of the Polish Supreme Court (SC), which found that "whenever the President of UOKiK has not instituted a procedure or a procedure has been instituted, but has not ended with a decision referred to in Article 9 and 10 UOKiK 2000 [the decision declaring a specific practice a practice restricting competition and ordering its discontinuation and a decision declaring a specific practice a practice restricting competition and finding that it has been discontinued; note by W.Sz.], the court is competent to make its own findings with respect to the use of practices restricting competition when making an agreement, as a premise to declare the agreement invalid" (the Supreme

Court judgement of March 2, 2006, file ref. no. I CSK 83/05).[9] Based on the Court's thesis referred to above, one can a contrario deduce that once a relevant decision – declaring specific practice a practice restricting competition (previously issued on the grounds of Article 9 and 10 of the Competition and Consumer Protection Act of 2000, and currently on the grounds of Article 10 of the Competition and Consumer Protection Act in its current wording) – has already been issued by the President of UOKiK and if it has not been subsequently challenged by the Competition and Consumer Protection Court or the Supreme Court, the common court examining a specific civil case (in which a contract being a manifestation of a practice restricting competition was declared invalid either as a premise to establish liability for damage or as the main object of the proceedings) is bound by that decision and cannot make any individual findings as to whether some specific practice is a practice restricting competition, and, in consequence, whether legal transactions, manifesting such a practice, are absolutely invalid. In such cases this issue is explicitly (and positively) decided by the President of UOKiK and, potentially, by the Competition and Consumer Protection Court and the Supreme Court. M, if the anti-monopoly procedure before the President of UOKiK has not been initiated or, despite being initiated, has not ended with any decision, or, potentially, it ended with a different decision than a decision declaring a practice a practice restricting competition, a common court is fully competent to independently classify the practice of the dominant undertaking as a practice restricting competition (that is violating Article 6 or Article 9 of the Competition and Consumer Protection Act), which, if such a classification is made, would be a premise to declare legal transactions by which such a practice manifested itself invalid (alternatively, if administrative procedure before the UOKiK President has not been instituted yet or is pending, a common court could suspend the proceedings under Article 177(1)(3) of the Polish Code of Civil Procedure and wait for the decision of the President of UOKiK. The foregoing stance presented in the Supreme Court's case law has one unquestionable advantage – it enables common courts to apply the Competition and Consumer Protection Act directly (and broadly) and does not prevent them from declaring certain practices as

[9] S. Gronowski presented a similar opinion in legal literature, though during the effective period of the previous Anti-monopoly Law of 1990 (Gronowski 1998: 172).

practices restricting competition, and in consequence declaring invalidity of legal transactions by which such practices are manifested, even if it is no longer legally admissible for the President of UOKiK to issue a decision, for instance as a result of prescription (Szydło 2010: 254-255).

A claim for damages caused by undertakings engaging in practices restricting competition will be a claim for compensation (that is a claim to remedy all losses and lost benefits and restoring, as far as possible, the condition existing before the damage occurred) and its substantive basis will not be limited to Article 6(1) and Article 9 of the Competition and Consumer Protection Act and Article 101 and 102 TFEU, but also provisions of Polish Civil Code on liability for tort and contractual liability (Stefanicki 2014: 177 ff).

We should expect that the legal situation of people willing to pursue claims for damages against undertakings engaging in practices restricting competition will become even stronger. Granting additional and stronger options to injured parties are being currently contemplated by the Ministry of Justice in the new draft Act on compensation for damage caused by competition law infringement (cf. https://legislacja.rcl.gov.pl/projekt/12283303). The act is to implement the Directive of the European Parliament and the Council 2014/104/EU of November 26, 2014 *on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union* **(**EU OJ of 2014, C 349/1**)**. Pursuant to the Directive, member states must ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm. Full compensation is to place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. In consequence, it must cover the right to compensation for actual loss and for loss of profit, plus the payment of interest (Article 3(1) and 3(2) of the Directive 2014/104/EU).

When pursuing their claim for damages caused by practices restricting competition, every injured party will have to prove before a common court that they have suffered damage, their scope and size, cause-effect relationship between such damage and practices restricting competition followed by specific undertakings and

will have to prove that such undertakings did indeed engage in such practices (such as the practices described in his paper) and prove their anti-competition nature.

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“Porozumienia o zwalczaniu konkurencji” i prawne możliwości wnoszenia roszczeń o odszkodowanie przed sądami powszechnymi

Streszczenie

Cel: Artykuł omawia sytuacje, w których odmowa przyłączenia przez przedsiębiorstwo energetyczne innych przedsiębiorstw do sieci, będzie potraktowana, w Polce i UE, jako zakazane nadużycie pozycji dominującej przez to przedsiębiorstwo. Wskazanie tych sytuacji jest istotne, bowiem unijnym prawie regulacji sektorowej nie istnieją przepisy zobowiązujące przedsiębiorstwa zarządzające i eksploatujące rurociągi ropy naftowej do zawierania z innymi przedsiębiorstwami umów o przyłączenie do ich sieci lub też umów o świadczenie usług przesyłu ropy naftowej.

Metodyka badań: Design / Research methods: Cel artykułu został osiągnięty poprzez analizę doktrynalną odpowiednich przepisów prawa polskiego i unijnego oraz poprzez analizę wytycznych wydawanych przez organy Unii Europejskiej. W badaniach uwzględniona została także funkcjonalna metoda analizy, pozwalająca badać prawo w działaniu.

Wnioski: Warunki dostępu do rurociągów ropy naftowej oraz sprzedaży ich zdolności przesyłowych ustalane są przez samych właścicieli sieci, prywatne spółki naftowe w państwach, przez które te rurociągi przebiegają, nie będąc regulowanymi przez prawo Unii Europejskiej. Sam zaś obowiązek przyłączania innych podmiotów do własnej sieci przez przedsiębiorstwa energetyczne zajmujące się przesyłaniem ropy naftowej w Polsce wynikać będzie jedynie z ogólnych przepisów polskiego prawa konkurencji. Rozważania pokazują, że odmowa dostępu do sieci będzie stanowiła przejaw zakazanego nadużycia pozycji dominującej i będzie działaniem zakazanym zawsze wówczas, gdy działanie dominanta będzie szkodliwym w zakresie efektywności alokacyjnej. W szczególności zaś, gdy dojdzie do odmowy dostawy towarów lub usług obiektywnie niezbędnych do skutecznego konkurowania na rynku niższego szczebla, odmowy o charakterze dyskryminacyjnym i doprowadzającej do wyeliminowania skutecznej konkurencji na rynku następującym, odmowy doprowadzającej do pokrzywdzenia konsumentów oraz odmowy nieusprawiedliwionej.

Wartość artykułu: Artykuł omawia przesłanki, których zaistnienie powoduje powstanie obowiązku przyłączania przez przedsiębiorstwa energetyczne zajmujące się przesyłaniem ropy naftowej innych podmiotów do własnej sieci. Obowiązek ten w sposób istotny wpływa na kształt prowadzonej działalności przez przedsiębiorstwa przesyłowe, zwłaszcza te, będące dominantami na rynku.

Implikacje: Zaprezentowane wyniki badań mogą zostać wykorzystane w decyzjach wydawanych przez Prezesa UOKiK oraz w wyrokach polskich sądów powszechnych i sądów unijnych.

Słowa kluczowe: publiczne prawo konkurencji, porozumienia o zwalczaniu konkurencji, rynek właściwy, nadużywanie pozycji dominującej.

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