

Forgotten Issues When Talking about the More Economic Approach to Competition Law in Poland

by

Anna Laszczyk*

CONTENTS

- I. Introduction
- II. More economic approach in the light of the decisions of the UOKiK President
 1. Introductory remarks
 2. Consumer welfare
 3. Individual exemptions
 4. Objective justification
 5. Other economic doctrines
 6. Conclusions
- III. Has the economic approach been used in Poland before its EU accession?
- IV. To what extent should the more effects approach be advocated?
- V. What kind of more economic approach is being applied and what kind should be applied?
- VI. Conclusions

Abstract

For the last fifteen years, competition policy in the European Union has been dominated by the ‘more economic approach’, or rather the ‘effects-based approach’, as it has recently been called. A similar trend can be observed in Polish competition law. Its mechanisms have been implemented into normative acts and the National Competition Authority seems to have, at least partially, adopted such approach

* Ph.D. candidate at the Faculty of Law and Administration, Łódź University; anialaszczyk@gmail.com.

also. On the other hand, some important issues related to the application of the more economic approach seem to have been overlooked by the Polish debate on this subject. These include questions such as: (i) whether such approach was present in Polish competition law even before the formal economisation of EU competition law; (ii) to what extent should the more economic approach be advocated and what are its limitations; (iii) how economic evidences should be assessed and whether neoclassical economics is enough. These issues will be analysed in the light of the decisions of the UOKiK President and the judgments of the Polish courts. The resulting conclusions will help provide answers to questions on the use of the more economic approach which have so far been avoided in Poland. The final aim of this paper is to assess the stage of the application of the more economic approach to Polish competition law and to assess its future perspectives.

Résumé

Pour les quinze dernières années, la politique de la concurrence dans l'Union européenne a été dominée par l'approche plus économique ou d'une approche fondée plutôt sur les effets, comme elle a été récemment appelée. La même tendance peut être observée dans la loi polonaise sur la concurrence. Ses mécanismes ont été mis en œuvre dans les actes normatifs autant que le président d'Office pour la protection de la concurrence et des consommateurs (OPCC) semble avoir au moins partiellement adopté cette approche. D'autre part, certains sujets importants liés à l'application de l'approche plus économique pour le droit de la concurrence semblent être omis dans le débat polonais sur ce sujet. Il s'agit notamment des points suivants: (i) la question de savoir si cette approche était présente dans la loi polonaise sur la concurrence avant même son institutionnalisation par la Commission européenne; (ii) dans quelle mesure devons-nous opter pour l'approche plus économique et quelles sont ses limites; (iii) la façon dont nous devrions évaluer les preuves économiques et si l'économie néoclassique est suffisante. Ces questions seront analysées à la lumière des décisions du Président d'OPCC et les jugements des tribunaux antimonopole. Les conclusions de l'analyse de la jurisprudence serviront à fournir les réponses aux questions omises sur l'approche plus économique en Pologne. L'objectif final de cette étude est d'évaluer le stade de l'application de l'approche plus économique à la loi polonaise sur la concurrence et d'évaluer ses perspectives d'avenir.

Classifications and key words: more economic approach, effects based approach, more differentiated rules, consumer welfare, individual exemptions

*Unless economic efficiency is held to be of no importance
one can no more avoid the use of economic models
in [the application of competition policy]
than one can avoid speaking prose.*

R. Schmalense¹

I. Introduction

For the last fifteen years, competition policy in the European Union has been dominated by the ‘more economic approach’, or rather the ‘effects-based approach’, as it has recently been called². A similar trend could be observed with respect to Polish competition rules. The mechanisms of the more economic approach have been implemented into national normative acts³. Such approach has also been adopted, at least partially, by the Polish competition authority – the UOKiK President (National Competition Authority, NCA). However, despite the fact that the more economic approach has long since been introduced into competition policy, controversies about its application remain including, in particular, its influence on legal certainty and the duration and costs of competition proceedings. On the other hand, some important issues related to the application of the more economic approach to competition law seem to be missing from the Polish debate. These include questions such as: (i) whether such approach was present in Polish competition law even before the formal economisation of EU competition law; (ii) to what extent should the use of the more economic approach be advocated, what are its limitations and what is a meta-more economic approach to competition law, (iii) how economic evidences should be assessed and whether neoclassical economics is enough in this context.

These issues will be investigated in light of the decisions of the Polish competition authority and the judgments of Polish courts competent to

¹ R. Schmalense, “On the Use of Economics Models in Antitrust: the ReaLemon Case” (1979) 127 University Pennsylvania Law Review 994.

² The origins of the more economic approach in EU competition law can be found in 1999 when the first Commission Regulation No. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the EC Treaty to categories of vertical agreements and concerted practices was enacted. However, European courts have pointed out far before then that antitrust cases cannot be analysed without considering their economic context. See, e.g., the judgment of ECJ of 6 February 1973 concerning SA Brasserie de Haecht v Wilkin-Janssen, ref. No. C-48/72.

³ Safe harbours applied with regard to vertical agreements may serve as an example here. See Regulation of the Council of Ministers of 30 March 2011 concerning the exemption of some vertical restraints from the prohibition of the anticompetitive agreements (OJ 2011, No. 81, item 441).

oversee competition matters. The analysis will be performed on the basis of the following criteria: (i) consumer welfare as the final aim of competition rules; (ii) application of individual exemptions to anticompetitive practices; (iii) application of an objective justification to the abuses of dominance doctrine; (iv) application of other economic doctrines. Conclusions from the analysis of Polish competition case law and jurisprudence will help provide answers to question that have so far been “avoided” concerning the more economic approach in Poland. The final aim of this paper is to assess the stage of the application of the more economic approach to domestic competition law as well as to assess its future perspectives.

II. More economic approach in the light of the decisions of the UOKiK President

1. Introductory remarks

The main aim of this section is to analyse the decisional practice of the UOKiK President in order to see whether, and how, the Polish competition authority applies the more economic approach in its competition assessments. The following concepts were taken as benchmarks for the analysis: (i) consumer welfare and, to a certain extent, the notion of efficiency; (ii) individual exemptions; (iii) objective justification; (iv) other economic concepts including the single economic unit doctrine and ancillary restraints.

2. Consumer welfare

The reorientation of competition policy towards consumer welfare is visible since the popularisation of the Chicago school of law and economics⁴. According to its academic followers, the final aim of competition law is to promote consumer welfare. The main criterion for the assessment of

⁴ By contrast, the Harvard school focused on the idea of market failure and the SCP paradigm (Structure-Conduct-Performance). According to its supporters, the aim of competition policy is not only the achievement of certain economic targets, but also the protection of SMEs re-distributional goals and preventing the concentration of political power. On the aims of competition law see Z. Jurczyk, *Kartele w polityce konkurencji Unii Europejskiej*, Warszawa 2012, p. 65–105, M. Motta, *Competition Policy: Theory and Practice*, Cambridge 2004, p. 17–30.

all market practices is efficiency⁵. Consumer welfare is maximised with an efficient allocation of goods – efficient means here that a change is impossible from one allocation to another, which makes at least one individual better off without making any other individual worse off. The above is known as Pareto efficiency and it reflects the model of perfect competition⁶. Consumer welfare is now recognised by the European Commission as the ultimate goal of competition law⁷. The NCAs of EU Member States follow this approach.

The UOKiK President regularly stresses the importance of consumer welfare and yet an evolution in the manner of thinking of the goals of competition policy can be observed. In 2002, the NCA stated in one of its cases⁸ that the objectives of the Polish Act on Counteracting Monopolistic Practices and Consumer Protection⁹ (hereafter: Act of 1990) are to ensure the development of competition, protecting undertakings exposed to anticompetitive practices as well as protecting consumer interests. This was, in practice, a repetition of the goals of competition law as stated in the Act of 1990. D. Miąsik rightly indicates that great confusion had existed at that time concerning the functions and goals of competition rules¹⁰ seeing as the protection of competition is actually a function, rather than a goal, of competition rules. The UOKiK President explained in the same case that competition law is aimed at the protection of competition with regard to undertakings and with regard to consumers – such rules are meant to protect their interests understood as an ‘institutional phenomenon’¹¹.

The policy pursued by the UOKiK President seems to be a poorly conceived mixture of various economic doctrines. On the one hand, an ordoliberal

⁵ On interesting considerations on the issue to what an extent should competition law promote efficiency see: W. Kerber, “Should competition law promote efficiency? Some reflections of an economist on the normative foundations of competition law”, [in:] J. Drexler, L. Idot., J. Moneger (eds.), *Economic theory and competition law*, Cheltenham 2008.

⁶ The alternative criterion for the assessment of efficiency is Kaldor-Hicks (called potential Pareto efficiency). Accordingly, the allocation of goods is efficient providing that those who are better off can potentially compensate those worse off.

⁷ See e.g. European Commission, Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to the abusive exclusionary conduct by dominant undertakings (hereinafter: Guidance) (OJ 2009 C 45/02), para 19.

⁸ The decision of the UOKiK President of 14 August 2002 concerning Katowickie Zakłady WYROBÓW Metalowych S.A., Grodkowskie Zakłady WYROBÓW Metalowych S.A., Wytwórnia Sprzętu Pożarniczego „OGNIOCHRON” S.A., No. RKT-44/2002.

⁹ Act of 24 February 1990 on Counteracting Monopolistic Practices and Consumer Protection, consolidated text: Journal of Laws 1997, No. 49, item 318, as amended (hereinafter: Act of 1990).

¹⁰ D. Miąsik, “Controlled chaos with consumer welfare as the winner – a study of the goals of Polish antitrust law” (2009) 1(1), *YARS* 35 et seq.

¹¹ See footnote 9.

approach is visible in the NCA's focus on taking protective measures directed at weaker market players. On the other hand, a Chicago approach can be observed in the fact that consumer interests are taken into account. It is interesting to note that the UOKiK President seems to have linked competition solely to undertakings, and that consumer interests were left as a separate 'institutional phenomenon'¹². This is clearly contrary to the current approach pursued by the European Commission whereby the protection of competition is seen as ultimately benefiting consumers.

With the passing of time, the approach of the Polish competition authority has been changing as well. In a case from 2004, the UOKiK President expressed an opinion that competition that functions correctly also influences the consumer market¹³ as it makes it possible to make rational choices which fully satisfy consumer needs. It should be remarked that such view corresponds with the focus on allocative efficiency. The UOKiK President stated in the same case that the aim of the prohibition of anticompetitive agreements is not only to maximise efficiency, but also to protect consumer interests. This standpoint was repeated in decisions issued in 2006¹⁴. The aforementioned view reflects a classical Chicago approach focusing on the maximisation of utility and efficiency.

In current decisions¹⁵, the UOKiK President expresses the view that the aim of the Act on the Competition and Consumers Protection¹⁶ (hereafter Act of 2007) is to benefit consumer welfare. Nevertheless, some ordoliberal considerations can still be observed, for instance, in decision no RPZ-32/2011. The UOKiK President had stated therein that competition protection is also relevant to the interests of undertakings that are limited in, or deprived of, the possibility to compete on the market as a result of an anticompetitive practice¹⁷.

¹² *Ibidem*.

¹³ Decision of the UOKiK President of 30 November 2004 concerning "EURO-TAXI" Przedsiębiorstwo Usługowo-Handlowe, "RADIO-TAXI 919" P.U.H. BUŻ&BUŻ s.c., Zrzeszenie Transportu Prywatnego w Rzeszowie – "Super-Taxi", No. RKR-39/2004.

¹⁴ See e.g. decision of the UOKiK President of 18 September 2006 concerning Polifarb Cieszyn-Wrocław S.A., Praktiker Polska Sp. z o.o., OBI Centrala Systemowa Sp. z o.o., Castorama Polska Sp. z o.o., Leroy Merlin Polska Sp. z o.o., NOMI S.A., Saint-Gobain Dystrybucja Budowlana Sp. z o.o., MGI Polska Sp. z o.o., No. DOK-107/2006.

¹⁵ See e.g. decision of the UOKiK President of 30 December 2013 concerning Zdzisław Janczyk Usługi Sprzętowo-Transportowe, Drużbice, Anna Wierucka, Drużbice, "EKO SERWIS" Sp. z o.o., No. RŁO-58/2013.

¹⁶ Act of 16 February 2007 on the Competition and Consumer Protection (OJ 2007, No. 50, item 331, as amended), hereafter: the Act of 2007.

¹⁷ Decision of the UOKiK President of 22 November 2011 concerning "DOM HANDLOWY OPROGRAMOWANIA DHO Biuro Poszukiwania Rodzin i Informacji Genealogicznych w Polsce DHO Biuro Architektoniczne", Dabkomp Sp. z o.o., No. RPZ-32/2011.

As far as the efficiency criterion is concerned, the UOKiK President has so far been mainly focusing on static efficiency – dynamic efficiency has not been explicitly considered by the Polish competition authority. It is difficult to draw any binding conclusions from this fact. On the one hand, it may mean that the UOKiK President does not intervene in cases involving R&D¹⁸. On the other hand, unlike the current experiences of the European Commission, Polish competition authority has not yet faced many cases involving intellectual property rights and advanced technological issues. The pharmaceutical and high-tech sectors are not among the key interests of the NCA. That might be at least partly because these industries have not experienced as significant a development in Poland yet as they have in some other EU Member States.

3. Individual exemptions

An individual exemption is a kind of rule of reason in European and national competition law. The UOKiK President often invokes the rule of reason and economic efficiency as the underlying concepts of individual exemptions¹⁹. The burden of proving the existence of such efficiencies remains on the applicants and the NCA has set a very high standard of proof here – the undertakings concerned are obliged to provide empirical evidences of their claims²⁰. The Polish competitor authority does not accept vague assertions based on general economic and marketing theories only²¹.

It seems that the UOKiK President has so far only issued one non-infringement decision on the basis of an individual exemption²². The case concerned a hard-core restriction – price fixing. The entities concerned, belonging to an association of undertakings providing rafting services on the Dunajec River, agreed on their service prices. However, the association managed to prove that their agreement satisfied the conditions for an

¹⁸ Such opinion is presented by D. Miąsik, *op. cit.*, p. 48.

¹⁹ On the economic analysis of anticompetitive agreements and its potential justifications see: A. Fornalczyk, *Biznes a ochrona konkurencji*, Warszawa 2012, p. 87-142.

²⁰ Decision of the UOKiK President of 26 April 2011 concerning Scotts Poland sp. z o.o., No. DOK-3/2011.

²¹ See e.g. decision of the UOKiK President of 31 December 2012 concerning Przedsiębiorstwo Usługowo-Asenizacyjne ASTWA Spółka z o.o., MPO Spółka z o.o., No. RLU-38/2012 where the NCA stated that for the purposes of benefitting from an individual exemption the undertaking must deliver verifiable and reasonable evidences. If the company only makes plausible (and does not prove) that conditions to qualify for an individual exemption are met, it will not qualify for an exemption.

²² Decision of the UOKiK President of 4 November 2011 concerning Polskie Stowarzyszenie Flisaków Pienińskich on the Dunajec River in Sromowce Niżne, No. RKT-33/2011.

individual exemption. The UOKiK President accepted the view that the agreement contributes to more effective service provision which consisted, *inter alia*, of the creation of a single, joint point of ticket sales which accepts credit card payments. This improvement was said to benefit consumers, in particular organised tourists groups which could use the services in a more convenient manner. It was also stressed that the possibility to provide services more efficiently benefits the overall development of regional tourism. It was further established that the said efficiencies would not occur without such restriction. As far as eliminating competition was concerned, the UOKiK President pointed out that Polish rafters face competitive pressure from their Slovak counterparts.

Such decision is quite unique seeing as, in general, a “slow death of Article 101(3) of the TFEU”²³ and its national equivalents can be observed. Nevertheless, the importance of the aforementioned case should not be overestimated either. Apart from this decision, it is somewhat difficult to identify and understand the UOKiK President’s attitude towards individual exemptions. This is partly because the majority of undertakings accused in Poland of entering into an anticompetitive agreement do not claim that their arrangement may in fact be justified under Article 8 of the Act of 2007 (equivalent of Article 101(3) TFEU). Even for those that do make such claim, the justification they provide is usually insufficient and/or unsubstantiated. Nevertheless, if ever there is such chance, that is, the undertakings provide some efficiency claims even with regard to only one of the presumptions, the NCA tries to broaden its analysis to the other presumptions also²⁴. It even sometimes engages in such an analysis on its own initiative, however these are exceptional examples²⁵.

Although the above trend should be assessed positively, seeing as the UOKiK President seems to take the initiative to popularise individual exemptions, the NCA is also known to adopt a slightly formalistic approach. For instance, it has been concluded in several resale price maintenance (RPM) cases, even without the entrepreneurs’ initiative, that although fixing a minimal price may contribute to efficiency improvements, that practice cannot benefit consumers overall²⁶. The NCA expressed thus the view in

²³ Treaty on the Functioning of the European Union (OJ 2008, No. 115). See an interesting post on this issue: [http://chillingcompetition.com/2011/10/28/the-slow-death-of-article-1013/\(3.04.2014\)](http://chillingcompetition.com/2011/10/28/the-slow-death-of-article-1013/(3.04.2014)).

²⁴ See e.g. decision of the UOKiK President of 19 July 2013 concerning Krajowa Izba Urbanistów, No. RKT-21/2013.

²⁵ See e.g. decision of the UOKiK President of 29 December 2011 concerning Roland Polska sp. z o.o., No. DOK-13/2011.

²⁶ Decision of the UOKiK President of 12 August 2011 concerning Euromark Polska S.A., Przedsiębiorstwo Handlowo-Usługowe „Arpis” sp. z o.o., „Millenium Sport” s.c.,

one of its decisions that competition harm outweighs any potential benefits with respect to this type of practice²⁷. Such an approach may discourage undertakings from arguing in favour of an individual exemption. This attitude may be further strengthened by the interpretation provided by the doctrine and the European Commission. Indeed, in another case²⁸, the UOKiK President quotes Commission guidelines²⁹ which state that hard-core restrictions are unlikely to ever satisfy the efficiency criteria. The Polish competition authority is also known to have even invoked scholarly opinions claiming that there is a negative presumption that hard-core restrictions do not satisfy the conditions of an individual exemption³⁰.

This attitude shall be assessed negatively. In principle, there is nothing in the wording of Article 8 of the Act of 2007 (or Article 101(3) TFEU) which could prevent the use of an individual exemption to hard-core restrictions. Moreover, such policy may negatively influence the incentives of undertakings to properly substantiate an individual exemption claim. It is fair to say that this situation reflects a vicious circle. The exemption conditions may not be very sophisticated in the literal sense, but putting them into practice is challenging. Undertakings may lack motivation to even attempt to argue for an exemption in the light of the soft law and policy of the UOKiK President. If undertakings do not even try to claim an exemption, the NCA cannot provide any guidance on the issue of individual exemptions. If there is no guidance, undertakings do not know how to prove efficiencies and thus prefer not to argue for an individual exemption in the first place. It might even be more likely that they fail to put substantial resources into an empirical analysis. If there is no empirical analysis, and the claims aim to make efficiencies plausible rather than actually prove their existence, the UOKiK President dismisses the motion. Here is where the vicious circle closes or starts.

The fact should be acknowledged, however, that it is the role of administrative bodies to do as much as possible to put the law into action. Furthermore, if the final aim of competition rules is to benefit consumer welfare, the UOKiK President cannot disregard potential efficiencies which could arise from agreements which are anticompetitive at first sight. Even if the burden of proof remains with the undertakings, the NCA should help

Firma Handlowa „Boss” s.c., Eskapada w Mińsku Mazowieckim, Firma Handlowa „Presto” w Pałecznicy, Tandem Zieliński i Spółka, No. RKT-22/2011.

²⁷ *Ibid.*

²⁸ See decision of the UOKiK President of 27 December 2012 concerning Orlen Oil sp. z o.o., No. DOK-9/2012.

²⁹ Commission Notice: Guidelines on Vertical Restraints (OJ 2010 L 102/1), para 47.

³⁰ A. Zawłocka-Turno, B. Turno, “Ustalenie sztywnych lub minimalnych cen odsprzedaży jako porozumienie ograniczające konkurencję ze względu na cel (przedmiot) w prawie unijnym” (2011) 4(73) *Ruch Prawniczy, Ekonomiczny i Socjologiczny*.

incentivise them to at least try to benefit from individual exemptions. This may be done through soft law guidance as well as through a change in the attitude towards the possibility of exempting hard-core restrictions.

4. Objective justification

Anticompetitive agreements may be exempted on the basis of individual exemptions while practices which amount to an abuse of a dominant position may be rationalized (and therefore not sanctioned), at least in theory, by an objective justification. Although, unlike individual exemptions, the concept of an objective justification was not put into relevant legislation, jurisprudence seems to recognise this doctrine. The CJEU acknowledged that even a dominant undertaking has the right to protect its commercial interests³¹. A widespread scholarly discussion emerged on what kind of objective justification should be accepted as exempting the practice from the ban contained in Article 102 TFEU and its national equivalents³². Efficiency and meeting-competition defences were analysed here³³.

This concept was also used by the Polish competition authority. The UOKiK President stressed in a decision issued in 2013 that, when assessing certain behaviour, its organisational, technical, legal and/or other aspects shall be taken into account as well³⁴. So far however, the Polish competition authority has considered the issue of an objective justification in detail only in refusal to supply cases³⁵. For instance, in a decision concerning access to a bus station, the NCA remarked that access may be denied only if the dominant's contracting party: (i) was late with its payments for the service in question; (ii) does not fulfil its contractual obligations; (iii) uses the facility in an improper manner³⁶. It was said in addition that a dominant company is also

³¹ See the judgment of CFI in joined cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line AB and Others v Commission* (2003) ECR II-3275.

³² On the concept of objective justification see E. Rousseva, *Exclusionary Abuses in the EC Competition Law*, Oxford 2010, p. 259-294.

³³ *Ibid.*

³⁴ Decision of the UOKiK President of 29 March 2013 concerning Towarzystwo Budownictwa Społecznego Wrocław sp. z o.o., No. RWR-7/2013.

³⁵ See decisions of the UOKiK President: of 1 October 2012 concerning Marti Solaner Development sp.j., No. RKR-40/2012, of 28 June 2012 concerning Przedsiębiorstwo Komunikacji Samochodowej, No. RBG-14/2012, of 31 May 2011 concerning Wodociągi Białostockie Sp. z o.o., No. RLU-6/2011, of 7 July 2008 concerning PSE Operator S.A., No. DOK-5/2008, of 14 February 2005 concerning EnergiaPro Koncern Energetyczny S.A., No. RWR-10/2005.

³⁶ Decision of the UOKiK President of 28 August 2012 concerning Przedsiębiorstwo Komunikacji Samochodowej w Łomży Sp. z o.o., No. RLU-16/2012.

entitled to refuse to supply access to an essential facility if granting such access would be excessively difficult³⁷. However, according to the UOKiK President, a given practice of the dominant undertaking shall be objectively justified by reasons other than the intention to restrict competition. Such reasons shall be proportionate and non-discriminatory³⁸.

In the majority of its decisions, the NCA seemed to have accepted a justification for the contested behaviours on grounds which were beyond the control of the dominant company³⁹. In other words, the scrutinised practice, which could have amounted to an abuse, was in fact “forced” upon the dominant company by external factors. Still, it was pointed out in one decision that an objective justification may be accepted if it is proven that it increases the efficiency of the dominant undertaking⁴⁰. The UOKiK President has stated also that a dominant company has a right to choose its contracting parties in a manner enabling it to make detailed and achievable business, cost and investment plans⁴¹. The NCA pointed out however in other decisions that actions of a dominant undertaking meant to protect its own business interests cannot comprise anticompetitive practices⁴². Therefore, if the dominant company is of the opinion that its contracting party applies an unfair competition practice, it should file a claim with the relevant court rather than refuse to cooperate⁴³.

It follows from the decisional practice of the UOKiK President that the NCA applies the objective justification doctrine following EU examples⁴⁴. Nevertheless, it has so far only even applied it to refusal to supply cases, including their specific form namely access refusal to an essential facility. However, the use of objective justifications should not be limited to this form of an infringement only. Instead, it should be applied to any practice which could amount to an abuse, including pricing practices.

³⁷ Decision of the UOKiK President of 28 June 2012 concerning Przedsiębiorstwo Komunikacji Samochodowej Sp. z o.o. in Elbląg, No. RBG-14/2012.

³⁸ Decision of the UOKiK President of 10 May 2010 concerning Spółdzielnia Mieszkaniowa Cegielka, No. RWR-9/2010.

³⁹ On a similar tendency under EU competition law see: E. Rousseva, “The Concept of ‘Objective Justification’ of an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC?” (2006) 2(6) *The Competition Law Review* 45.

⁴⁰ Decision of the UOKiK President of 31 December concerning Gmina Biskupiec, No. RBG-24/2009.

⁴¹ *Op. cit.*

⁴² Decision of the UOKiK President of 7 July 2009 concerning PKP Cargo S.A., No. DOK-3/2009.

⁴³ *Op. cit.*

⁴⁴ On EU competition law application of objective justification see E. Rousseva, “The Concept of...”, *op. cit.*

Moreover, the UOKiK President has so far mainly accepted justifications related to external factors, which force a dominant company to engage in certain behaviours. The efficiency justification has not been used yet. It is also not clear who should bear the burden of proof with regard to the objective justification defence. Unlike with respect to individual exemptions under Article 8 of the Act of 2007, Poland has no legal provisions governing the application of the objective justification doctrine. Administrative cost-efficiency would require this burden to be placed on the interested dominant undertaking seeing as it can avoid the related costs more efficiently than the NCA⁴⁵. It should thus be the entrepreneur to uncover the potential efficiencies or justifications of its own actions because of its superior knowledge of the market environment surrounding the contested activity. It would therefore take the dominant company less time and money to explain it. Furthermore, it is in the best interest of the investigated undertaking to quickly prove the existence of an objective justification in order to shorten the proceedings. The role of the UOKiK President should be to assess the arguments and data put forward by the dominant undertaking as well as to incentivise it and provide guidance on how to effectively claim an objective justification.

5. Other economic doctrines

The UOKiK President applies other economic concepts also which are not explicitly determined in binding legislation. They include, for instance, the ancillary restraints and the single economic unit doctrine.

Ancillary restraints are deemed to fulfil the criteria of a competition restricting agreement, but are so closely linked to the main subject of the primary agreement, that without them, the latter would not be concluded. The UOKiK President referred to this concept in several decisions stating, *inter alia*, that ancillary restraints shall be directly and objectively related to the main subject of the agreement⁴⁶. Additionally, the proportionality principle should be obeyed and so the restraint shall not be more severe than what is necessary taking into account the economic aim of the primary agreement. Still, the UOKiK President has recently concluded that RPM used in a franchising agreement cannot be seen as an ancillary restraint⁴⁷.

⁴⁵ R.H. Coase, "The Problem of Social Cost" (1960) 3 *Journal of Law and Economics* 3 et seq.

⁴⁶ Decision of the UOKiK President of 27 December 2012 concerning Akuna Polska sp. z o.o., No. DOK-7/2012.

⁴⁷ Decision of the UOKiK President of 25 June 2013 concerning Sfinks Polska S.A., No. DOK-1/2013.

With regard to other economic concepts, the European Commission pursues a doctrine according to which a group of companies which belong to the same capital group, and which are under the control of a parent company, shall be deemed a single economic unit. Such doctrine was accepted by the Polish competition authority since the very early days of Polish antitrust history⁴⁸. The UOKiK President accepts the view that entities belonging to the same capital group form a single economic unit, unless it is proven that the scrutinised undertakings behave independently on the market and may thus be deemed to be competitors⁴⁹.

6. Conclusions

Summarising the above, the Polish competition authority introduces many economic concepts into its reasoning. A significant evolution can be observed as far as the goals of competition law are concerned. In the past, consumer welfare considerations were rather incidental. There can be no doubt however that consumer welfare is now seen as the final goal of competition law. Nevertheless, a few critical remarks shall be made with regard to this approach. Consumer welfare seems to function as a catch-all tool which makes it sometimes possible to pursue badly grounded harm theories⁵⁰. The great problem that arises here is that of the standard of proof with regard to the potentiality of the negative effects of a certain practice. According to competition rules, for a certain practice to be condemned by competition authorities, it shall at least have the potential to harm competition – actual negative effects do not have to take place. In principle, this is a reasonable assumption provided that it is not overused. Bearing in mind administrative efficiency, a 100% case-by-case analysis model would be too costly and so a reliance on well grounded economic laws and the assumption of competition harm associated with hard-core restrictions seems to be desirable. However,

⁴⁸ Decision of the UOKiK President of 6 December 2000 concerning SeCeS-Pol Sp. z o.o., Gdańskie Przedsiębiorstwo Energetyki Ciepłej GPEC Sp. z o.o., Zakład Usług Ciepłowniczych Sp. z o.o. w Gdańsku, No. RGD-34/2000; see also judgment of the Antimonopoly Court of 17 January 1995, ref. No. XVII Amr 54/95; judgment of the Supreme Court of 19 January 2001, ref. No. I CKN 1036/98.

⁴⁹ Decision of the UOKiK President of 31 December 2010 concerning Ogrody Polskie sp. z o.o. we Wrocławiu and others, No. DOK-11/2010.

⁵⁰ G.J. Werden, “Consumer welfare and competition policy”, [in:] J. Drexler, W. Kerber, R. Pudszun (eds.), *Competition Policy and the Economic Approach*, Cheltenham 2011, p. 35. The author considers consumer welfare as a shibboleth, i.e. a notion which does not have a meaning, but is instead invoked as an implicit pledge not to find a violation of competition law on the basis of competitor injury alone.

potentiality cannot be supported if it serves as a shortcut for the condemning of a practice.

In the light of the jurisprudence review provided in the following sections of this paper, certain issues are considered which are rarely presented in the Polish debate about the more economic approach.

III. Has the economic approach been used in Poland before its EU accession?

Competition law is one of the few legal fields firmly grounded in economics because of the actual object of the legal rules, which are concerned with business activities and aimed at detecting harmful infractions. It should be mentioned that economics was intrinsic for antitrust even before the formal start of the law and economics movement⁵¹.

The Act of 1990, the source of Poland's first competition rules, had in its preamble an explicit reference to its objectives – the protection of undertakings and the protection of consumer interests. Although the first of these two aims does not fit well into the current understanding of competition law, the enforcement of which should focus on competition not competitors, jurisprudence has effectively restricted the potential incentives to overuse this concept. While the two above objectives seem to have the same weight when reading the original preamble, competition protection was probably the most important aim at that time, considering the state of the Polish economy at the beginning of the 1990ties⁵² when many markets were monopolised and many oligopolies existed. The Act of 1990 was mainly meant to foster competition and lead to a decrease in prices. There was also public interest working behind the scene which, although not explicitly present in the legal text, was nevertheless later developed by the judiciary overseeing competition matters⁵³. This criterion served as a tool for not putting resources into cases which did not infringe competition but only impacted the interests of individuals.

Furthermore, public interest was associated directly with consumer welfare. In one of its judgements, the Antimonopoly Court ordered the Antimonopoly Office (predecessor of the current NCA) to analyse what effects on consumer welfare caused by agreements between an insurer and car repair businesses⁵⁴. The parties agreed therein on cash-free repairs of cars belonging to the clients

⁵¹ K. Metelska-Szaniawska, J. Bełdowski, "Wprowadzenie" to the Polish edition of: R. Cooter, T. Ulen, *Ekonomiczna analiza prawa*, Warszawa 2009.

⁵² D. Miąsik, *Reguła rozsądku w prawie antymonopolowym*, Kraków 2004, p. 363–366.

⁵³ Judgment of the Antimonopoly Court of 24 January 1991, Amr 8/90, (1992) 2 *Wokanda*.

⁵⁴ Judgment of the Antimonopoly Court of 15 March 1995, ref. No. XVII Amr 66/94.

of the investigated insurer – insured individuals thus had the possibility to use cash-free services of those car repairers that cooperated with the given insurer. According to the Antimonopoly Office, the alleged competition restraint lay in the restriction of the freedom of consumers to choose which repairer they wish to use as well as on the restriction taking place on the market of the provision of car repair services, seeing as market access might have become more difficult for some of the undertakings which did not cooperate with the scrutinised insurer. When analysing the case, the court suggested that a consumer survey should be conducted in order to determine the potential effects of the practice.

Poland's first competition act deserves attention also because it explicitly touched upon the problem of what might today be called objective justification. Article 6 of the Act of 1990 stated that abuses of dominance and anticompetitive agreements may be exempted if they are necessary to perform the economic activity in question in light of its organisational, technical or economic circumstances. In order to be exempt from the prohibition, the practice could also not restrict competition to a significant degree. The burden of proving the above circumstances lay on the entrepreneurs. Leaving aside the fact that the wording of this provision would require many improvements, the mere idea of institutionalising the objective justification doctrine and making it equal to individual exemptions should be assessed positively.

Many questions arise now when discussing the issue of an objective justification including whether it should be assessed in a similar manner to individual exemptions. In the past, the judiciary called this the rule of reason⁵⁵. Although the notion of the rule of reason was different then from its current understanding, it should be mentioned that courts did their best to interpret it in a pro-EU law manner⁵⁶. To illustrate, a case may be presented concerning supply refusal committed by a public transport undertaking, which refused to supply tickets on a wholesale level to an independent retailer because the latter's shop was situated near to the point of sale belonging to the scrutinised transport services provider. The transport service provider explained its practice as decreasing its costs related to ticket sales. In this case, the Antimonopoly Office did not take into account the explanations provided by the undertakings.

The Antimonopoly Office was provided with some guidelines on this issue by the Antimonopoly Court. Firstly the judiciary stated that Article 6 of the Act of 1990 only exempted practices which might be justified as benefitting individual interests of undertakings. According to the judiciary, such interpretation was both incorrect and incompatible with EU law.

⁵⁵ Judgment of the Supreme Court of 2 June 1999, ref. No. I CKN 43/98.

⁵⁶ Judgment of the Antimonopoly Court of 6 January 1997, ref. No. XVII Amr 65/96.

When ordering the Antimonopoly Office to reconsider the case, the court ordered it to analyse the effects of the practice on consumers. As far as the objective justification is concerned, the court took into account the issue of proportionality, currently an element of individual exemptions. It stated that only the least burdensome for other market players practice shall be legalised under Article 6 of the Act of 1990⁵⁷.

The single economic unit doctrine was also present in Polish competition law as early as the 1990ties. The Antimonopoly Court stated that the relations between a parent company and its subsidiaries are not the focus of Polish competition law⁵⁸. Any agreements between such parties should thus not be assessed in light of their compatibility with competition law. This stance was further confirmed by the Supreme Court which stated that the application of Polish competition law to such holdings is restricted⁵⁹.

An interesting approach has developed in Poland with respect to vertical restraints. Both the judiciary and the authority used to be quite lenient towards such practices whereby market shares and market power constituted the main criterion for their assessment. The judiciary stated that vertical restraints, in particular exclusivity agreement, may harm competition if they foreclose the market⁶⁰. This was usually associated with a dominant position. A market share of 30% was not seen as enough to foreclose the market. Moreover, the Polish courts took the view that consumers may be better off when vertical restraints take place.

Efficiency was also considered by the judiciary and not only, as was previously mentioned, in terms of allocative efficiency⁶¹. A very interesting judgement was delivered in this context by the Antimonopoly Court in 1999⁶² and concerned a case where a cable TV operator applied excessive prices. The court stated that a cost analysis is not the best tool for assessing the practice as this may discourage price cuts and therefore weaken efficiency. Although not explicitly, the court referred in this case to productive efficiency, used comparative methods and contrasted prices charged by other cable TV operators.

Summing up, the more economic approach is not a novel concept within the Polish competition law system. It has been present since the early beginnings

⁵⁷ Judgment of the Antimonopoly Court of 21 December 1994, ref. No. XVII Amr 42/94.

⁵⁸ Judgment of the Antimonopoly Court of 17 January 1995, ref. No. XVII Amr 54/95.

⁵⁹ Judgment of the Supreme Court of 19 January 2001, ref. No. I CKN 1036/98.

⁶⁰ Judgement of the Antimonopoly Court of 25 June 1997, ref. No. XVIIAmA 19/97.

⁶¹ Meaning that competition facilitates consumers to choose the best products they search for or that competition forces undertakings to behave in an efficient manner.

⁶² Judgement of the Antimonopoly Court of 10 March 1999, ref. No. XVII AmA 86/98.

of Polish antitrust history. The application of the more economic approach was varied and sometimes led to mixed results. Nevertheless, it should be kept in mind that not only was all this happening at the beginning of Polish competition law it also coincided with the reintroduction of market economy. With the passing of time, some concepts were rejected, some modified and some institutionalised. A good example here is provided by the merger regulations. In 1990, the benchmark for the prohibition of a concentration was obtaining a dominant position – currently, it is a significant impediment of effective competition in both EU and Polish law. The fact that jurisprudence focused on the effects of the competition practice should certainly be assessed in a positive light.

IV. To what extent should the more effects approach be advocated?

It is currently often said that the UOKiK President, and NCAs in general, should extensively (or even more extensively) apply the effects approach⁶³. This trend is especially noticeable with regard to vertical restraints and in particular to RPM. It has to be said that what is missing from the Polish debate on the use of the more economic approach is a meta-economic approach, understood here as an analysis of the efficiency of the effects based approach⁶⁴.

The issue of RPM may be a good example for meta-analysis considerations as there is no agreement on the effects of such practice. It must be stressed, for the sake of clarity, that it is not the purpose of this paper to give a view on the justification (or lack thereof) for the illegality of RPM. This practice serves merely as an example to show that calls for the use of the more economic approach should not only rely on an economic analysis of the practice itself, but also on the economic analysis of the costs associated with the use of a case-by-case analysis.

It used to be a generally acknowledged belief that RPM is a hard-core restriction prohibited almost *per se*. This approach is now changing and the majority of scholars claim that RPM creates efficiencies⁶⁵ – a realisation that

⁶³ See e.g. A. Jurkowska-Gomułka, “Stosowanie zakazu porozumień ograniczających konkurencję zorientowane na ocenę skutków ekonomicznych? Uwagi na tle praktyki decyzyjnej Prezesa Urzędu Ochrony Konkurencji i Konsumentów w odniesieniu do ustawy o ochronie konkurencji i konsumentów z 2007 r.” (2012) 1(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, p. 48–49.

⁶⁴ See also A. Fornalczyk, “Biznes ...”, *passim*.

⁶⁵ On the considerations of economic efficiencies see the recent recipient of the E-concurreres Award article by A. Font Galarza, F.P. Maier-Rigaud, P. Figueroa, “RPM under

justifies abandoning the hard-core restriction view and promoting a case-by-case analysis. The discussion became more wide-spread with the judgment of the U.S. Supreme Court in *Leegin*⁶⁶ and, in Poland, with the judgment of the Supreme Court in *Roben Polska*⁶⁷. While the *Leegin* case changed the way of looking at RPM from a *per se* ban to the rule of reason, the Polish Supreme Court noted three circumstances where RPM might be justified. The latter is a very beneficial judgement for undertakings seeing as it gives them more specific guidance on claiming efficiencies under Article 8 of the Act of 2007.

Without taking a final position on RPM, as that would remain outside the scope of this paper, a generalisation is in order here when talking about the efficiency of applying competition law. It is reasonable to assume that the application of competition law should minimise type I and II errors (false positives and false negatives respectively⁶⁸). For these reasons the use of the more economic approach is desirable as it improves the understanding of the market and the circumstances accompanying a certain practice. Yet the enforcement of competition law should also minimise transaction costs and aim at administrative efficiency. If a certain practice causes negative effects in 99% of the cases, it is unreasonable from the point of view of administrative efficiency to each time engage in a detailed scrutiny of such practice, in order to detect this 1% of the cases where the practice might cause positive effects. The costs of such proceedings are likely to outweigh any benefit arising from such practice⁶⁹.

Optimally more differentiated rules are thus a desirable solution here. Rule differentiation should be understood as adding additional assessment criteria to existing legal norms. The concept of optimally more differentiated rules was developed by Kerber and Christiansen⁷⁰. It deserves attention as an example of a thoughtful insight into the law and economics of competition law. The authors are aware that the application of more differentiated rules may lead to a decrease in type I and type II errors. They however also draw attention

EU Competition Law: Some Considerations from a Business and Economic Perspective” (2013) November (1) *CPI Antitrust Chronicle*.

⁶⁶ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007).

⁶⁷ Judgment of the Supreme Court of 23 November 2011, ref. No. III SK 21/11.

⁶⁸ False positives are decisions of the competition authorities sanctioning practices which do not restrict competition and thus should not be sanctioned. False negatives take place when the competition authority does not sanction a practice although it restricts competition.

⁶⁹ J. Haucap, “Bounded rationality and competition policy”, [in:] J. Drexel, *op. cit.*, p. 221.

⁷⁰ A. Christiansen, W. Kerber, “Competition Policy with Optimally Differentiated Rules Instead of ‘Per Se Rules vs Rule of Reason’ (2006) 2(2) *Journal of Competition Law and Economics* 215–244.

to other effects of such differentiation such as regulations costs, rent-seeking and knowledge problems (related to NCA's limited knowledge of economics and case-specific knowledge). They therefore propose that rule differentiation should occur until the marginal reduction of the sum of the costs of type I and II errors (in other words, marginal consumer welfare benefits) equals the marginal costs arising from more extensive scrutiny. In the light of Kerber and Christiansen's analysis, a case-by-case assessment is not desirable as it always leads to great costs, which would not be outweighed by the gains resulting from such analysis. For these reasons, the authors argue that the more economic approach should be used for the creation of such optimally differentiated rules, rather than for the application of economics during case assessment.

Returning to the example of RPM, there is now no doubt that RPM is overall harmful but can, in some circumstances, also benefit consumer welfare. Following Kerber and Christiansen, it can be argued that to determine whether the call for the use of the more economic approach is reasonable with regard to RPM, the following questions should be answered:

- how often does RPM lead to positive consumer welfare effects?
- what is the scope of the reduction of false negatives and the scope of the increase of false positives resulting from the application of a case-by-case analysis?
- what are the dangers of distorted decisions resulting from the additional rent seeking problem?
- what are the additional regulation costs?

If: (i) RPM more often leads to positive consumer welfare effects than to negative ones, (ii) there is a big scope for the reductions of false negatives and, at the same time, there is insignificant increase of false positives, (iii) there is a minor rent seeking problem, (iv) there are insignificant regulations costs, than the competition authority should change its policy with regard to RPM.

The above questions prove the need for more empirical research in this area – no such empirical research is known to exist in Poland at the moment.

A case-by-case analysis should be used in exceptional circumstances only. Therefore, it cannot be applied to common practices which amount to the vast majority of all decisions issued by competition authorities. Exceptional circumstances should be understood, in particular, as novel practices or practices which occur in extraordinary circumstances only. For instance, practices in the pharmaceutical sector may serve as a good example here where a detailed investigation should be performed of “pay for delay” agreements or novel forms of abuses comprising patent misuse.

Individual exemptions seem to be a great solution for catching the remaining 1% of the unusual cases. It can be claimed that putting the burden of proof

on undertakings may be too onerous for them⁷¹. However, this is a reflection of efficient allocation.

Following a Coase theorem, if transaction costs and asymmetry of information exists, the entitlement should be given to the undertaking which values it the most and costs shall be attributed to the undertaking which can avoid them most cheaply⁷². There is no doubt that undertakings have a greater interest in proving that they meet the conditions for an individual exemption. It would also be generally cheaper for them to explain the alleged efficiencies. Undertakings know best their business, overall market features and their customers. Competition authorities, due to information asymmetry as well as time restraints and limited resources, would be more prone to errors or negligence. However, as mentioned previously, competition authorities should provide incentives to undertakings to apply for individual exemptions.

V. What kind of more economic approach is being applied and what kind should be applied?

Since the more economic approach was introduced, the question was rarely, if at all, discussed as to what kind of economics the UOKiK President would pursue. In 2008, D. Miąsik expressed his opinion that the application of competition law in Poland may be described as controlled chaos with consumer welfare as a winner⁷³. The UOKiK President has never made any statements on what direction the economisation of Polish competition law would take. Such a declaration seems necessary seeing as different outcomes can be expected from the adoption of the views of different economic schools. For instance, in the light of the dispute between the Harvard and the Chicago school, and their distinct normative criteria – total welfare vs. consumer welfare – the same merger may be assessed differently. According to the former (total welfare) a merger may increase efficiency in line with Kaldor Hicks efficiency⁷⁴. According to the latter, it should not have happened.

Such discrepancies are present in the enforcement of competition law considering that an econometric model is currently built for almost every case.

⁷¹ See D. Aziewicz, “Pytanie o zasadność stosowania analizy ekonomicznej wobec minimalnych cen odsprzedaży w polskim prawie konkurencji” (2013) 3(2) 19 *internetowy Kwartalnik Antymonopolowy i Regulacyjny* et seq.

⁷² R.H. Coase, “The Problem of Social Cost” (1960) 3 *Journal of Law and Economics* 3 et seq.

⁷³ D. Miąsik, *op.cit.*, *passim*.

⁷⁴ The solution is efficient in terms of the Kaldor-Hicks criterion if as a result of the change of entitlements those who are better off are able to compensate those who are worse off.

This may lead to ridiculous results such as those in the Microsoft case, for instance, where leading industrial economics experts covered almost the entire spectrum of economic models – from the most anticompetitive to a completely precompetitive one⁷⁵.

When talking about what kind of economics shall be applied by the UOKiK President, the discussion should not be limited to the neoclassical economic framework. Other economic approaches should also be considered. These include behavioural economics which is now increasingly applied by competition authorities⁷⁶. The main assumption of behavioural economics is that market players are not rational, as is assumed by neoclassical economics. In their seminal article, D. Kahneman and A. Tversky uncovered a series of biases and heuristics which influence human rationality so that a well established standard of homo oeconomicus can no longer be maintained⁷⁷. The concept of bounded rationality was therefore introduced. H. Simon, who formulated this notion, assumed that a boundedly rational person is intendedly rational, but only to a limited degree⁷⁸.

The impact of behavioural economics was studied by OFT in 2010⁷⁹. It identified several biases which affect consumer behaviours. In the opinion of the OFT, behavioural policy may enrich competition analysis and, at the same time, it neither invalidates the previous model, nor implies more interventions. A good example of the application of behavioural economics concerned Microsoft. As the OFT explained: when viewed through a behavioural lens, it becomes clear that consumers are significantly less likely to switch from the preinstalled Microsoft settings than might otherwise be expected. The OFT pointed out that small switching costs can have significant effects on consumer behaviour in the presence of consumer inertia, endowment effects, and default bias. The OFT remarked also that there are other tools which may be used to mitigate potential negative effects of certain undertakings' practice and consumer perception influenced by biases. These are market investigations, sector inquiries, consumer policy.

These diverse economic approaches can be multiplied further. Innovation policy applied to the pharmaceutical and high-tech sectors represents a very

⁷⁵ O. Budzinski, "Modern industrial economics: open problems and possible limits", [in:] J. Drexel, *op. cit.*, p 119. The author points out that one may observe a competition between experts which does not support an effective competition policy.

⁷⁶ G. Niels, H. Jenkins, J. Kavanagh, *Economics for Competition Lawyers*, Oxford 2011, p. 464–474.

⁷⁷ D. Kahneman, A. Tversky, "Osądy w warunkach niepewności: heurystyki i błędy poznawcze" constituting the appendix to: D. Kahneman, *Pułapki myślenia: o myśleniu szybkim i wolnym*, Poznań 2012.

⁷⁸ H. Simons, *Models of Man*, New York 1957.

⁷⁹ Office of Fair Trading, "What Does Behavioural Economics Mean for Competition Policy" (2010).

widely discussed example here. Neoclassical economics is not well equipped to deal with innovation cases as it mainly focuses on static rather than dynamic efficiency. Insights from the Schumpeterian approach⁸⁰ and evolutionary economics⁸¹ are thus considered.

The analysed case law seems to prove that the UOKiK President mainly relies on the tools of neoclassical economics. Behavioural economics has not been explicitly applied.

Lawyer expectations cause another problem with the application of economics. Most do not realise that economics is a social rather than a hard science. It is a common mistake committed by lawyers to expect that economists will deliver bright line tests which would solve the problem in definite terms⁸². This may have even further consequences as overreliance on novel theoretical models may lead to an increase in false positives. Empirical verification is therefore desirable. S. Bishop emphasises this issue⁸³ arguing that as far as there are well established economic principles, a competition authority should analyse how the industry works and take into account facts of the case. Bishop warned about sophisticated economics, which relies in his opinion on theoretical possibilities without them being tested first, and the use of superficially more complex models and techniques. The above mentioned overreliance on theoretical models is partly triggered by the lack of a standard of proof with regard to the probability of anticompetitive effects.

VI. Conclusions

The main aim of this paper was to identify tendencies in the application of the more economic approach by the Polish competition authority in its decisional practice and to assess its future perspectives. This paper has also tackled some policy considerations related to the effects-based approach which have not yet been subject to a wide-scale discussion in Polish literature. The analysis of the decisions of the UOKiK President confirms that economic considerations

⁸⁰ See e.g.: J.D. Wright, "Antitrust, Multidimensional Competition and Innovation: Do We Have an Antitrust-Relevant Theory of Competition Now?", [in:] G.A. Manne, J.D. Wright (eds.), *Competition Policy and Patent Law Under Uncertainty*, p. 228–251.

⁸¹ See e.g.: D.J. Teece, "Favoring Dynamic over Static Competition. Implications for Antitrust Analysis and Policy", [in:] G.A. Manne, *op. cit.*, p. 203–227

⁸² F.M. Fisher, "Economic Analysis and 'Bright Line' Tests" (2010) 4 (1) *Journal of Competition Law & Economics*.

⁸³ S. Bishop, "Snake-Oil with Mathematics is Still Snake-Oil: Why Recent Trends in the Application of So-Called „Sophisticated” Economics is Hindering Good Competition Policy Enforcement" (2013) 9(1) *European Competition Journal* 67–77.

were present in Polish competition policy even before its EU accession⁸⁴. This tendency became more institutionalised in Polish law after 2004 and the development of the more economic approach in EU competition law.

The economics of competition law has become more sophisticated. It can be argued, however, that the UOKiK President does not apply the more economic approach to a sufficient degree. To respond fully to such claims, a meta-analysis of the effects-based approach should be considered. So far however, the main debate has concerned the use of economics with regard to certain practices. At the same time, the discussion has failed to cover issues such as the costs of such approach and its efficiency. As correctly noted by A. Jurkowska-Gomułka, the UOKiK President mainly repeats the considerations of the European Commission and the CJEU⁸⁵. Still, before any policy changes are introduced with regard to the legality of any market practices, empirical research should be performed. Bearing in mind the experiences of EU competition policy as well as that of other Member States, economics that goes too far and is too sophisticated seems to do more harm than good. Not only does it generate costs, it creates competition between experts, which might ultimately contribute to an increase in type I and II errors. Last but not least, there is an urgency to openly discuss which economic school the Polish competition authority is in fact following. So far, the UOKiK President has not been confronted with the challenges already facing other European competition authorities, such as heavy interferences between intellectual property rights and competition law in the pharmaceutical sector and the high-tech industries. The opinion has to be expressed therefore that the Polish competition authority should use the available time to prepare for such likely future challenges, *inter alia*, by considering different economic approaches including behavioural economics, innovations economics or evolutionary economics.

Literature

Bishop S., "Snake-Oil with Mathematics is Still Snake-Oil: Why Recent Trends in the Application of So-Called „Sophisticated” Economics is Hindering Good Competition Policy Enforcement" (2013) 9 *European Competition Journal*.

Christiansen A., Kerber W., "Competition Policy with Optimally Differentiated Rules Instead of 'Per Se Rules vs Rule of Reason'" (2006) 2(2) *Journal of Competition Law and Economics*.

⁸⁴ A. Laszczyk, "More Economic Approach in the European Union Competition Law – the appraisal of new methods and future perspectives" (2010) 1 *Polish Yearbook of Law and Economics*.

⁸⁵ A. Jurkowska-Gomułka, *op. cit.*

- Coase R., "The Problem of Social Cost" (1960) 3 *Journal of Law and Economics*.
- Cooter R., Ulen T., *Ekonomiczna analiza prawa*, Warszawa 2010.
- Drexel J., Kerber W., Podszun R., *Competition Policy and the Economic Approach*, Cheltenham 2011.
- Fisher F.M., "Economic Analysis and 'Bright Line' Tests" (2010) 4(1) *Journal of Competition Law & Economics*.
- Fornalczyk A., *Biznes a ochrona konkurencji*, Warszawa 2012.
- Gunnar N., Jenkins H., Kavanagh J., *Economics for Competition Lawyers*, Oxford 2011.
- Jurkowska-Gomułka A., "Stosowanie zakazu porozumień ograniczających konkurencję zorientowane na ocenę skutków ekonomicznych? Uwagi na tle praktyki decyzyjnej Prezesa Urzędu Ochrony Konkurencji i Konsumentów w odniesieniu do ustawy o ochronie konkurencji i konsumentów z 2007 r." (2012) 1(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Jurczyk Z., *Karteles w polityce ochrony konkurencji Unii Europejskiej*, Warszawa 2012.
- Kahnemann D., *Pułapki myślenia: o myśleniu szybkim i wolnym*, Poznań 2011.
- Laszczyk A., "More Economic Approach in the European Union Competition Law – the appraisal of new methods and future perspectives" (2010) 1 *Polish Yearbook of Law and Economics*.
- Manne G.A., Wright J.D., *Competition Policy and Patent Law under Uncertainty*, Cambridge 2011.
- Miąsik D., "Controlled chaos with consumer welfare as the winner – a study of the goals of Polish antitrust law" (2009) 1(1) *YARS*.
- Miąsik D., *Reguła rozsądku w prawie antymonopolowym*, Kraków 2004.
- Monti G., *EC Competition Law*, Cambridge 2008.
- Motta M., *Competition Policy: Theory and Practice*, Cambridge 2004.
- Rousseva E., *Exclusionary Abuses in the EC Competition Law*, Oxford 2010.
- Rousseva E., *Rethinking Exclusionary Abuses in the EU Competition Law*, Oxford 2010.
- Rousseva E., "The Concept of 'Objective Justification' of an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC?" (2006) 2(6) *The Competition Law Review* 45.