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Centre for Antitrust and Regulatory Studies, University of Warsaw, Faculty of Management
www.cars.wz.uw.edu.pl

More economic approach to exclusivity agreements: how does it work in practice? Case comment to the judgment of the Court of Appeals in Warsaw of 25 February 2010 – *Lesaffre Polska* (Ref. No. VI ACa 61/09)

Introduction

No other topic draws as much attention in competition law as the need for an economic approach[1] and yet, it is still a 'deficit' approach. Authorities enforcing competition protection rules are still very attached to the formalistic approach and this is an affliction not only of the Polish but also of the EU authorities and courts[2].

The judgments delivered in 2010 by the Polish first and second instance courts responsible for competition matters in the *Lesaffre* case[3] appears here as an exception[4].

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[1] This trend is articulated in the Community legal order, in particular in the 90's: joined cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others v. Commission*, ECR [1998] III-3141, para. 136-137, although the need was also expressed earlier: 56/65 *Société Minière et Technique*, ECR [1966] 235.

This postulate is widely discussed in the Polish literature; see: A. Jurkowska [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [*The Act on Competition and Consumer Protection. Commentary*], Warszawa 2009, pp. 379-380, and in judicature it appeared, among others, in the sentence of the Court of Appeals of 13 February 2007, VI ACa 819/07, LexPolonica 1455907.

[2] See A. Jurkowska–Gomułka, 'Doktryny orzecznicze sądów wspólnotowych w sprawach konkurencji po 1 maja 2004 r.' ['Judicial decisions of the Community courts on competition matters after 1 May 2004'] in: A Jurkowska-Gomułka (ed.), *Orzecznictwo sądów wspólnotowych w sprawach konkurencji w latach 2004-2009* [*Jurisprudence of Comunity courts in competition matters in the years 2004-2009*], Warszawa 2010, pp. 28-32; the author described 'missed opportunities' in *Microsoft*, *Wanadoo* and *o2* cases. Cf. also EC Decision COMP/E.-1/38-113/ *Prokent-Tomra*, and Court's judgment of 9 September 2010 in T-155/06 *Tomra* case.

[3] Judgement of the Court of Competition and Consumer Protection of 18 August 2008, XVII Ama 83/07.

[4] It should be noted that the UOKiK President issued (after the contemplated judgment) decision DOK-8/2010 of 26 August 2010 in Wrigley Polska case, where the authority analyzed in detail, applying the economic approach, the possibility of an anti-competitive effect resulting

Facts and overall assessment of the decisions

Lessafre Bio Corporation S.A. with a seat in Wołczyn is a Polish manufacturer of yeast and improvers with a strong position in the national market – its share in both the production market and wholesale sales exceeds 30%[5]. In a decision dated 29 December 2007 (DOK-164/2007), the Polish Competition Authority – the President of the Polish Office of Competition and Consumer Protection (in Polish: *Urząd Ochrony Konkurencji i Konsumenta*; hereafter, UOKiK) established that Lesaffre and its 45 distributors engaged in an anti-competitive practice, as set forth in the applicable at that time Article 5(1)(6) of the Act on Competition and Consumer Protection[6] of 15 December 2000 (hereafter, Competition Act 2000). According to the Competition Authority, the banned practice took place in connection with the execution by Lesaffre of its distribution agreements which contained an exclusivity clause concerning the purchase of baking yeast by its distributors. In the conclusions of the decision, the UOKiK President stated that 'the purpose and effect [of the contested contractual provision] was to restrict access to the market of baking yeast sales to undertakings not covered by the agreement'.

The Polish Court of Competition and Consumer Protection (in Polish: *Sąd Ochrony Konkurencji i Konsumenta*; hereafter, SOKiK) and later the Court of Appeal in Warsaw (in Polish: *Sąd Apelacyjny*: SA) both disagreed with the approach of the Competition Authority and indentified a number of errors in its analysis of the notion 'object and effect of restricting competition'. These errors can be divided into three groups, those associated with: 1) the standard of the analysis performed in the case, 2) evidence deficiencies, and 3) burden of proof. As a result, SOKiK performed, subsequently confirmed by the Court of Appeal, a constructive analysis of the case by indicating which factors need to be evaluated before the Competition Authority (and in the business practice – an undertaking) qualifies an exclusive purchase clause (non-compete clause) as restricting competition on the relevant market.

As a result of the evaluation performed by SOKiK and confirmed by the Court of Appeal, the original administrative decision issued by the UOKiK President was changed. The judgments denied therefore that Lesaffre had actually engaged in the alleged competition restricting practice.

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from the use of loyalty discounts (discounts for the participation in business and discounts for the execution of purchase plans) and found no possibility of the occurrence of such an effect.

[5] A higher market share deprives the party of the possibility to benefit from the block exemption referred to in the Regulation of the Council of Ministers on the exemption of certain vertical agreements from the ban on agreements restricting competition (Regulation of 30 March 2011 currently in force; Regulation of 19 November 2007 in force during the *Lesaffre* proceedings).

[6] This provision corresponds to Article 6(1)(6) of the current Act on Competition and Consumer Protection of 16 February 2007 (Journal of Laws 2007 No. 50, item 331, as amended).

Key legal problems and key findings of the courts

Competition law assessment of exclusive purchasing agreements in competition law

Article 6(1)(6) of the current Act on Competition and Consumer Protection of 16 February 2007 states that an agreement may be prohibited on account of its competition restricting object or effect. The possibility to demonstrate that the agreement had both an anti-competitive aim and result is not excluded however. Not unlike other antitrust bodies, the Polish Competition Authority is often not satisfied with demonstrating the anti-competitive purpose of an agreement only (although such assertion is obviously sufficient to qualify it as prohibited) and thus tends to establish its actual or potential anti-competitive effects also.

Pursuant to such classification, there are agreements which can be clearly qualified as prohibited due to their anti-competitive object (hard core restrictions such as price agreements, market divisions, etc.) as well as those, which can be deemed prohibited because of their potential or actual anti-competitive effects. The latter include exclusive purchase agreements (as in the said case) and other exclusivity agreements[7]. The growing rationalization of antitrust enforcement policies has led (among others) to exclude such agreements from the scope of conducts which restrict competition by their very object. That is, under the fundamental condition that the parties to the agreement do not exceed (according to the current legal status) a 30% market share in the supply and purchase markets respectively [8].

In light of these obvious assertions, it is all the more surprising that the UOKiK President assumed that the scrutinized agreement restricted competition due to its anti-competitive object. Interestingly, the theoretical possibility of such a classification was not ruled out by the Polish court of first instance. Contrary to the views of the European judicature[9] and the position of the European Commission[10], SOKiK stated that 'the Court does not accept as justified the plaintiff's statement that such clauses in mutual agreements are not treated as violating competition law on account of the purpose but only on account of the effect of restricting access to the market. Assessment of the agreement between the manufacturer and distributors, which contains an exclusivity clause, as being contrary to antimonopoly

[7] See two major EU decisions on this issue: 23/67 *Brasserie de Haecht v Wilkin*, ECR [1967] I-525 and C-234/89 *Delimitis v Henninger Bräu*, ECR [1991] I-935, see also: Van Bael and Bellis, *Competition Law of the European Community*, WoltersKluwer, Fifth Edition, p. 285 et seq.; R. Whish, *Competition Law*, Oxford University Press, Fifth Edition, p. 603.

[8] The Vertical Block exemption previously in force made its use for agreements containing an exclusive supply obligation conditional on not exceeding by the purchaser and its capital group of the share threshold, § 4.2 of the Regulation of 19 November 2007.

[9] See footnote 4 above.

[10] See European Commission Guidelines on Vertical Restraints, OJ [2010] C 130/01, exclusive purchase agreements classified as '*single branding*' or as a form of '*non-compete*'.

law, may result from the finding that the parties had intended to exclude or restrict competition'[11].

This view is rather controversial, given the currently applicable approach to such agreements. Fortunately, this interpretation has not ultimately led the Polish courts to any erroneous conclusions. Both courts adjudicating in this case stated in the end that the examination of both the object and effect of the scrutinized agreement should take place 'after a comprehensive legal and economic analysis' was performed.

The standard of the analysis of exclusivity agreements and evidentiary insufficiencies in administrative proceedings

The judgments delivered by SOKiK and the Court of Appeal contain a critical assessment of the formalistic approach taken by the Competition Authority. In this respect, SOKiK stated first of all that: 'the authority has contended its assessment of the agreement to its formal aspect' and 'the allegations concerning agreements with such an exclusivity clause […] should not only be supported by a formal assessment of the contract, but also, and most of all, by the consideration of the specific economic context in which this took place' [12]. This criticism, as well as the refusal to accept the use of the formalistic approach by the UOKiK President, should be by all means approved.

Both courts have identified the necessity to analyze the challenged clause (its object and effect) and its practical operation, that is, to consider the economic and market context applicable during the time it was in force. SOKiK emphasized also that *'Without* reference to the economic situation on the wholesale baking yeast market, it is impossible to determine whether, and if so when, the agreement could have negatively affected competition on this market…'. 'In the Court's opinion, depending on the commercial context existing in the market, the contractual clause in question may either show the anti-competitive purpose of the agreement or suggest Lesaffre's intention to form – by legal means – a specific distribution network'[13].

Both courts have identified a number of factors that the Competition Authority should have considered before qualifying the agreement as prohibited due to its object or effect. The UOKiK President has either completely overlooked those issues during the administrative proceedings or ignored the counter-evidence provided by the applicant (Lesaffre) in their context. The indication by the courts of these circumstances is of dual significance. First, it reveals how the 'economic approach' may be applied to specific economic situations. Second, it holds a meaningful educational value as it analyzes a specific type of an exclusivity agreement/clause – *nota bene* a very

[11] Judgment of the Court of Competition and Consumer Protection of 18 August 2008, XVII Ama 83/07.

[12] Page 13 of the SOKiK judgment; the issue is continued by the Court of Appeal in a less unequivocal manner, see pp. 20–21 of the judgment of the Court of Appeal in this case.

[13] SOKiK judgment, p. 15.

popular stipulation in commercial practice – in terms of its 'competition restriction'. Thus, it may prove very useful to undertakings.

Speaking of the first important factor that has escaped the UOKiK President's notice, SOKiK ascertained that '… in order to limit access to the baking yeast wholesale distribution market, Lesaffre would certainly need to conclude the agreement with a large number of contractors…'. This condition is defined as tied market share[14]. The court of first instance considered in this respect evidence presented by the applicants which demonstrated that 77% of yeast distributors were not bound by the exclusivity agreements in question ('Data presented in Appendix 1 convinces that the exclusivity clause had not had a significant impact on the distribution structure').

The number of entities active on the market overall and the number of those not bound by the scrutinized exclusivity on the distribution level may be, in fact, of greater significance to the evaluation of the clause than the market power of the entity applying the restriction. In the Dutch *Heineken*[15] case, the scrutinized beer producer held a market share exceeding 50%[16] in the *Horeca* channel. However, the Dutch Competition Authority, confirmed later by the adjudicating apples court, ascertained therein that the contested agreement did not foreclose the beer distribution market in the *Horeca* sales channel to other potential producers. This decision was based on the fact that 40% of the market was not bound by exclusive agreements with any of the competing beer suppliers as well as the fact that all *Heineken* buyers could easily withdraw from the contested exclusivity (upon a two-month notice).

In its judgment, SOKiK has carried out an even deeper analysis of this issue. It stated that the potential purpose of the agreement may be implied from the selection criteria of the distributors covered by it, that is, their market power and the scale of the cooperation with the supplier. In order to determine foreclosure, SOKiK found it insufficient to rely on the number of contractors covered by the agreement and Lesaffre's market shares. SOKiK's approach represents its discerning assessment of the original decision. It puts also the economic approach to practical use replacing the formalistic method applied by the Competition Authority which relied simply on 'statistics'.

Second, both SOKiK and the Court of Appeal emphasized that the 'attractiveness' of the scrutinized exclusivity clause should also be subject to an analysis. In other words: when determining the 'restriction of access' prerequisite, SOKiK stressed the necessity to analyze whether the clause in question was actually capable to create an economic barrier to entry for other baking yeast producers. Based on the evidence gathered in the proceedings before the court of first instance, SOKiK considered this issue in light of an analysis of the potential anti-competitive object and later, anti-competitive effect of the agreement. When establishing the lack of a restrictive purpose, SOKiK referred to circumstances demonstrated by Lesaffre. These factors

[14] Van Bael and Bellis, op.cit., p. 286.

[15] Decision 2036-91 *Heineken-Horecaover-eenkomsten* of 28 May 2002 (Van Bael and Bellis, op.cit., p. 288, par. 634).

[16] The share in the production market was almost identical to the share assigned to *Lesaffre.*

concerned the mutual benefits resulting from the policy for both the producer and its distributors covered by the contested agreement (circumstances not challenged by the Competition Authority). This evidence has in fact excluded the existence of the alleged anti-competitive object of the agreement. As regards its anti-competitive effect, SOKiK has again pointed out that the Competition Authority has not demonstrated the grounds for its findings. The UOKiK President was also said to have failed to challenge (by way of certain evidence) the applicant's assertion that'…entry into the yeast distribution market does not require significant expenditures nor specific technical efforts' (p. 18 of the judgment).

Third, as correctly noted by SOKiK, the binding effect of the exclusivity clause determined the object and effect of the agreement as well. The court of first instance justly noted here that Lesaffre's evidence demonstrating the short duration[17] and flexibility of the exclusivity obligation (possibility to withdraw from the exclusivity upon resignation from the associated bonus) has not been disproven by reference to its 'commercial nature'[18].

Fourth, it is very significant that SOKiK recognized that '… the finding of a large market share in the relevant market is in itself insufficient to demonstrate the existence of an anti-competitive purpose or/and effect of the agreement'. This statement touches upon the notion of the 'competition structure' of the market, a concept translated by commentators as the need to consider, as a major factor in the assessment, not only the market power of the supplier but also the buying power of the distributors. SOKiK has additionally indicated that the existence of a competition restriction can be assumed on the basis of market shares alone only with respect to super-dominance. Any other market 'configuration' requires full analysis '… with reference to the entirety of the legal and factual context, with particular consideration to the economic situation'[19] at hand.

SOKiK has also addressed another meaningful aspect of the overall assessment of the case: the potential negative effect of a situation where exclusivity is also applied by other suppliers (cumulative foreclosure). The Competition Authority has ignored this issue despite numerous guidelines in this respect deriving from European case-law[20].

Notwithstanding the courts' use of the economic approach which is, in itself, a fact of great significance in view of Polish case law, neither of the judgments is free from defects. Most importantly, SOKiK's analysis does not seem consistent. It

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[17] Richard Whish draws attention to this aspect of exclusivity [in:] *Competition Law*, *op.cit.,* by stating, that such clauses introduced for a period of less that one year are unlikely to restrict competition; a high probability of such restrictions exists when clauses are in force for five years or longer; detailed analysis should be conducted in cases where a period 1-5 years is concerned.

[18] SOKiK's assessment was even more far-reaching stating that 'The freedom of entering the exclusive contract, the possibility of withdrawal upon notice and the variability of the distribution model as found by the Authority, rather contradicts the finding concerning the foreclosure of the distribution market and the restriction of the possibility to conduct business activity or to start it by baking yeast producers (importers)'.

[19] Page 17 of the SOKiK judgment.

[20] See, e.g., judgments in cases: T-9/93 *Schöller*, ECR [1995] II-1611 and T-65/98 *Van de Bergh Foods*, ECR [2003] II-4653.

linked economic indicators to the anti-competitive object of the agreement, which lead to a repeated analysis of the same circumstances from different perspectives, i.e. perspective of the anticompetitive object and effect. SOKiK ultimately failed to convincingly lie down its analysis and in fact avoided making any final conclusions about the case. It seems, SOKiK stopped its assessment half-way and concluded that insufficient evidence has to result in concealment of the decision as it was adopted by the President of the UOKiK while the facts that were analyzed by the court definitely gave the grounds to judge the case in its entirety. Following this cautious approach, the Court of Appeal concluded that the Competition Authority's decision was unfounded as the prerequisites determining the existence of a restrictive practice (market foreclosure or competition elimination) had not been properly demonstrated by the UOKiK President.

Burden of proof in the judicial part of antitrust proceedings

Polish courts adjudicating competition law cases frequently consider the issue of the burden of proof. This is so because standard procedural rules are to be applied to situations very different to normal commercial proceedings (where one business sues another and hence bears the burden of proving the grounds of its legal action). The discussed peculiarity is a consequence of the procedural model applicable to juridical proceedings in competition law cases in Poland. The model assumes the initiation of court proceedings before SOKiK with a challenge of the administrative decision issued by the Competition Authority. As envisaged in the Polish rules of civil procedure, it is the appeal that initiates first instance contradictory proceedings 'in the matter of the appeal of the decision of the UOKiK President'[21].

The course of the judicial proceedings starts with an administrative decision issued by the Competition Authority which qualifies a given conduct as anti-competitive. When justifying such finding, the UOKiK President should put forward evidence reflecting the Authoirty's conclusions. If a party to the administrative proceedings disagrees with that decision, it can appeal the decision to SOKiK. Submitting the appeal has to be equated therefore to a summons in standard civil proceedings. Thus, the appealing party should challenge either the facts or legal qualification applied by the Competition Authority in its decision. The appealing party usually identifies the deficiencies of the decision or presents new evidence meant to challenge the conclusions reached in the decision. Despite those initiatives, SOKiK (being the defendant in the judicial proceedings) should not remain passive. First, it is entrusted with the enforcement of competition protection priorities under the Act on Competition and Consumer Protection. Second, the conclusions of the Competition Authority do not bear any special evidentiary value in the court proceedings. To the contrary – its

[21] See, numerous precedents confirming such conclusions, e.g. judgments of the Supreme Court: of 29 May 1991, III CRN 120/91 (1992) *OSBCP* 5, item 87; of 7 October 1998, I CKN 256/98 (2000) *OSP* 5, item 68; of 24 October 2002, I CKN 1465/2000, not reported; of 25 May 2004, III SK 50/2004 (2005) *OSNP* 11, item 166.

statements must be properly grounded. Thus, when responding to an appeal, the Authority should present evidence (as applied in the decision or found at a later stage) that confirms the correctness of the conclusions of its administrative decision.

In the discussed judgments, both courts (SOKiK and the Court of Appeals) explicitly marked the roles to be played by both parties to the judicial proceedings, that is, Leseffre and the UOKiK President. They concluded that the burden to prove facts and their qualification applied in the contested decision lies on the Authority. In their judgments, not only did the courts note the shortcomings of the assessment performed by the UOKiK President but, after conducting its own evidentiary proceedings, SOKiK actually found that the facts of the case were in contradiction to the facts asserted by the Authority. Such 'active' approach in evidencing before SOKiK is indispensable for procedural reasons because, as concluded by the Polish Supreme Court in its judgment of 25 May 2004[22], 'the nature of administrative proceedings makes it impossible for a civil court to base its judgment on the facts established by the administrative authority'.

Judicial proceedings in competition law matters cannot be qualified as a typical litigation where it is the plaintiff who makes 'claims' and provides evidence to support them. To the contrary: since the Authority is the 'claiming' party in its decision, the burden of proof to evidence the grounds for its conclusions lies also on that UOKiK President. This duty is to be derived from the Act on Competition and Consumer Protection as well as Article 6 of the Polish Civil Code. This rule is not altered by the mere fact that the term 'defendant' is used in relation to the UOKiK President in judicial civil proceedings.

Since the Authority failed to prove the grounds of its decision, SOKiK changed it and concluded that no prohibited agreement took place. The Court of Appeal additionally emphasized that '… in a situation when the President of the Office imposes a serious fine on an anti-competitive agreement, qualified as a violation of Article 5(1)(6) of the Act on Competition and Consumer Protection of 15 December 2000, and the plaintiff denies applying such agreements by putting forward evidence justifying a different object and effects of the agreement, as well as proposing evidence demonstrating figures reflecting the market situation and concluding that there was no market access restriction for undertakings not covered by the agreement, which could limit the competition on the baking yeast's production market, the obligation was on the defending authority to prove that its assessment contained in the administrative decision was justified [emphasis added]'.

One more issue should be addressed in this context: what is the scope of evidence to be presented by a plaintiff in order to successfully challenge a decision issued by the UOKiK President. It can be claimed that it is sufficient for an appellant to deny the decision and by doing so, to 'activate' the burden of proof on the side of the Authority. The latter should then fully evidence its decision before the courts. Interestingly, European judicature consider this issue in the following way: it is sufficient for a challenging party to present an alternative explanation in order for the burned of proof to move to the Commission, the latter will then have to prove

[22] III SK 50/2004 (2005) *OSNP* 11, item 166.

that the explanation contained in its decision is the only reasonable one and that other alternatives should be excluded[23].

The explicit confirmation of the assignment of the burden of proof in competition law cases is of great interpretative value. Undertakings struggle to appeal the decisions issued by the UOKiK President since they must evidence that the facts of the legal qualification applied therein are erroneous. Alternately, they must provide the court with evidence that the Competition Authority failed to conduct the administrative proceedings in a fair and legal way. From this perspective, the court's role may be incorrectly shifted to the assessment of the grounds of the appeal rather than to the assessment of the actual practice attributed in the decision to the appealing undertaking. The accurate assignment of the burden of proof in juridical proceedings helps the adjudicating courts to make their assessment from the correct perspective.

Final remarks

The approach applied by both of the adjudicating courts in the Lessafre case demonstrates that the use of a truly 'economic' approach is possible at every stage of competition law proceedings. The courts performed a valuable task in presenting a number of factors belonging to the 'economic context' toolbox. These factors should cast some light onto the legal qualification of exclusivity agreements concluded by non-dominant undertakings. They could be universally applied in other 'exclusivity cases'. Legal practitioners would have preferred to have had a similar approach taken at an even earlier stage of the proceedings, that is, already by the Competition Authority. And finally, the courts confirmed that the UOKiK President is to prove both: an anti-competitive object and effect. This burden is not shifted away from the Authority merely due to the 'change of roles' in judiciary proceedings.

Małgorzata Modzelewska de Raad
Attorney At Law (adwokat), Wierzbowski Eversheds law firm, Warsaw.

[23] See: C.S. Kerse, *EC Antitrust Procedure*, Sweet&Maxwell, Fifth Edition, p. 478.