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Selected Regulations against Anti-Competitive Practices according to EU Law

Introduction

Competition is an important element of the market. It is a process by means of which market participants pursue their own interests by attempting to present their offers that are more beneficial than others in terms of price, quality or other properties that influence the decision-making process regarding the conclusion of a transaction. Competition occurs both among buyers and among sellers. Buyers compete with other buyers for a limited amount of goods on the market, while sellers compete with other sellers to attract consumers. Competition can be of price and non-price type. It may concern price, quality, weight, volume, appearance, power, durability, terms and conditions of sale or warranty, etc.

In order to present the concept of competition infringement and to indicate the most restrictive anticompetitive practices, some prohibited activities are listed in Article 101 par. 1 of the Treaty on the Functioning of the European Union (TFEU) (former Article 81 par. 1 of the Treaty establishing the European Community). The list of anti-competitive practices is provided only for illustration purposes and indicates the most typical anti-competitive behaviour. The actions listed directly in the text of the Treaty are: directly or indirectly fix purchase or selling prices or any other trading conditions; limit or control production, markets, technical development, or investment; share markets or sources of supply; apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. The list does not exhaust all the methods in which competition can be infringed. It also does not mean that the above-mentioned action automatically violates the prohibition under Article 101 of the TFEU. Other conditions for infringement of the prohibition must be fulfilled and no exemption from the prohibition may be granted pursuant to Article 101 par. 3 of the TFEU.

Moreover, we can specify several examples of abuse of a dominant position (Article 102 TFEU): imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions; limiting production, markets or technical development to the prejudice of consumers; applying dissimilar conditions to equivalent transactions with other business partners, thereby placing them at a competitive disadvantage; and making the conclusion of contracts subject to acceptance by the partners of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of those contracts. This list also does not exhaust all ways of abusing a dominant position[1].

Therefore, the aim of the study is to identify selected possible anti-competitive practices and regulations against these practices in the EU.

Market models according to the criterion of competition intensity

Depending on the intensity of competition on individual markets, according to economic literature, there are four basic market models. These are as follows: perfect competition, pure monopoly, monopolistic competition and oligopoly. The basic properties distinguishing individual market models are presented in Table 1.

There is a large number of producers in a perfectly competitive market. All producers produce and sell homogeneous products, which means that the goods of one producer are indistinguishable from the goods of all other producers. Consumers are fully aware of the price level offered by different

[1] Consolidated version of the Treaty on the Functioning of the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=PL (Accessed 28/09/2021); M. Lorenz, An introduction to EU Competition Law, Cambridge University Press, New York 2013, pp. 128–241; A. Andreangeli, The public enforcement of Articles 101 and 102 TFEU under Council Regulation No 1/2003: due process considerations, in: I. Lianos, D. Geradin (eds.), Handbook on European Competition Law. Enforcement and procedure, Edward Elgar, United Kingdom, Cheltenham 2013, pp. 138–180.

Table 1. Features defining the basic models of the market

Feature	Competition Perfect	Competition Monopolistic	Oligopoly	Pure Monopoly
Number of companies	Plenty	Many	A few	One
Type of product	Standard	Differentiated	Standard or differentiated	Unique, no very close substitutes
Control over price	None	Certain, but to a limited extent	Limited by mutual interdependence, significant in the event of collusion	Significant
Conditions for entry into the market	Very easy	Relatively easy	Considerable obstacles	Entry is difficult
Non-price competition	None	Considerable emphasis on advertising, name or trademark	Considerable, especially related to product differentiation	Mainly *public relations* advertising
Examples	Agriculture	Retail trade, production of shoes and dresses	Production of steel and vehicles	Water and telephone networks

Source: D.R. Kamerschen, R.B. McKenzie, C. Nardinelli, Ekonomia, Gdańsk 1991, p. 564; D.N. Dwivedi, Microeconomics: theory and applications, Pearson Education, India, Delhi 2008, p. 290.

producers and it does not matter to them from whom they buy. New companies can always enter the market of a given product, and companies operating in a given market can withdraw from it, as the costs of entering and withdrawing from it are negligible. There are a large number of consumers on the market, none of them strong enough to influence the market price of the product. There is no non-price competition. Individual companies have no control over the formation of the price for the product because each company produces such a small fraction of the total output that when it increases or decreases, it does not affect the total supply of the product, and hence its price. The price of a product is given and its producer can in no way affect it, it can only adapt to it. However, all companies together can influence its price, which can increase or decrease as a result of changes in total demand or total supply[2].

[2] D.N. Dwivedi, Microeconomics: theory and applications, Pearson Education, India, Delhi 2008, pp. 294–309; G. Carrol, Market structures, in: A. Griffiths, S. Wall

Monopoly is an agreement, association or union of enterprises, or a single enterprise having the entire or a significant part of production or services, which enables it to establish favourable conditions for production and prices, and achieve high profits.

Pure monopoly means that one company is the sole producer or supplier of a given product or service. The product of monopoly has no good or close substitute. Pure monopoly is protected against competition through economic, technological, legal or other barriers that prevent other entities from entering the market. The monopolist may or may not undertake advertising activities. In contrast to a company that operates under free competition, a monopoly company may raise the price of its product by selling less, or lower it to sell more. It selects a price-quantity combination in order to maximise its profit.

The most common form of monopoly is natural monopoly. It is a branch of the economy in which long-term average and marginal costs decrease as production increases, which leads to a single company dominating production.

An example of a natural monopoly are utilities, such as those with electricity, telephone and water networks[3].

In a monopolistic competition and in an oligopolistic market, and sometimes even in an anti-competitive market, companies can agree to behave as if they were a single monopoly, thus creating a cartel. Cartel is an organisation of independent producers who seek to exclude their competitors by jointly regulating market shares, production levels and prices in order to raise prices and profits above the levels dictated by the competitors.

It is important to note that in many countries the expansion of monopolies is limited by the state's antitrust activities, prohibiting any forms of collusion and efforts to monopolise the market and unfair methods of competition.

There are many producers in monopolistic competition, each of them producing a relatively small fraction of the total output that reaches the market. Particular companies make products that do not differ much from

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(eds.), Economics for business and management, Pearson Education Limited, United Kingdom, Harlow 2005, pp. 200–211; D.R. Kamerschen, R.B. McKenzie, C. Nardinelli, Ekonomia, Gdańsk 1991, pp. 559–584.

[3] D.N. Dwivedi, Microeconomics: theory and applications, Pearson Education, India, Delhi 2008, pp. 310–353; G. Carrol, Market structures, in: A. Griffiths, S. Wall (eds.), Economics for business and management, Pearson Education Limited, United Kingdom, Harlow 2005, pp. 211–217; D. R. Kamerschen, R.B. McKenzie, C. Nardinelli, Ekonomia, Gdańsk 1991, pp. 585–610.

each other, however, the products of one company possess certain features that distinguish them from the products of other companies. The products of different companies are close, but not perfect substitutes. It is fairly easy to enter the market, but there are costs involved. A new company must bring to the market a product that is different from the one offered by others and win customers. Forms of non-price competition such as advertising, quality, etc. prevail. In the case of monopolistic competition, companies have limited control over the price of a product. This is mainly influenced by the degree of product differentiation as well as the number and proximity of competitors. As a result of the existence of close substitutes, in the event that a company raises their price, customers have the option to choose other producers. However, companies have groups of loyal consumers who prefer their products, which means that a small increase in price will not persuade these consumers to look for a close substitute offered by their competitors[4].

Oligopoly is defined by the fact that a small number of producers or sellers dominate the entire market of a given product. Each of the companies supplies the market with a large part of the total output, therefore their activities have a significant impact on other companies. Oligopolistic companies produce identical products, e.g. steel, copper, zinc, or very diverse products, e.g. cars, washing preparations, cigarettes. It is very difficult for new companies to enter the oligopolistic market. Non-price competition involves advertising and quality, especially with regard to differentiated products. The most important feature of oligopolistic companies is their mutual dependence on decisions regarding prices, i.e. a price decision of one company may significantly affect the sales of other companies. If a given company lowers its price, it will increase its profits at the expense of its competitors as a result of increased sales. Competitors may also lower their prices down to that company's price level or lower them even further to increase their sales. The result of such conduct may be a price war, bringing losses to all companies. When a company raises its price, it bears the risk of losing the market, while other companies benefit from maintaining the current price. Hence, companies are less likely to change prices frequently in the oligopolistic market. In order to prevent a price war from occurring, oligopoly companies can conclude price agreements according to which they

[4] D.N. Dwivedi, Microeconomics: theory and applications, Pearson Education, India, Delhi 2008, pp. 354–381; G. Carrol, Market structures, in: A. Griffiths, S. Wall (eds.), Economics for business and management, Pearson Education Limited, United Kingdom, Harlow 2005, pp. 218–221; D.R. Kamerschen, R.B. McKenzie, C. Nardinelli, Ekonomia, Gdańsk 1991, pp. 612–614.

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can raise or lower their price together. In the absence of price agreements, the principle of price leadership can be applied, in which the strongest company acts as the leader in determining prices among the dominant few in the market, while the remaining companies follow the pricing they set[5].

Antitrust regulations according to the Treaty on the Functioning of the European Union

Prohibition of anti-competitive agreements and no abuse of a dominant position were taken into account in terms of antitrust regulations according to the Treaty on the Functioning of the European Union. Antitrust regulations relate to following agreements: agreements that fix prices or commercial terms; agreements restricting production, disposal or development; agreements on market sharing or sources of supply; discriminatory agreements; tying agreements[6].

Pricing in both horizontal and vertical agreements is one of the most restrictive anti-competitive practices. It is prohibited to fix prices directly (e.g. minimum prices) and indirectly (e.g. by setting price components, margins, discounts, restrictions on the granting of discounts, payment terms, rules for calculating prices, the amount, date of introduction and duration of price increases, publishing catalogues with prices). It is not permissible to fix, even merely indicatively or by way of recommendation, the prices charged to third parties, as this leads to the elimination of internal competition between the participants to the agreement or concerted practice. Freedom to set prices in the market is one of the most important aspects of undistorted competition and any unauthorised influence on the way prices are set is prohibited. Price determination, even on an indicative basis, allows competitors to anticipate the pricing policy of companies that are active in the market and thus to influence the normal competitive game. The

[5] D.N. Dwivedi, Microeconomics: theory and applications, Pearson Education, India, Delhi 2008, pp. 382–424; G. Carrol, Market structures, in: A. Griffiths, S. Wall (eds.), Economics for business and management, Pearson Education Limited, United Kingdom, Harlow 2005, pp. 222–245; D.R. Kamerschen, R.B. McKenzie, C. Nardinelli, Ekonomia, Gdańsk 1991, pp. 615–624.

[6] Article 101, Consolidated version of the Treaty on the Functioning of the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=PL (Accessed 28/09/2021).

prohibited practices included, for example, a dual pricing system, differentiated according to whether the products were intended for domestic or export resale (refusal of discounts for whisky sold for export), the setting of a 'code of conduct' by a publishers' association introducing general terms and conditions for pre-established prices for the sale of books (the authorities did not accept the argument that such a sales system was justified by the need to protect small sellers). EU authorities can grant a block or individual exemption for price fixing agreements. For example, the block exemption covers (under certain conditions) – and indefinitely – joint price fixing between maritime carriers within liner conferences, as well as joint price fixing in the rail, road and inland waterways sectors.

Mutual agreement on other terms of trade may include, for example: rules for participation in exchanges that prevent access to exchanges by certain market participants, introduction in the rules of a trade fair of temporary prohibitions on participants from participating in competing events of this type, agreements between undertakings to eliminate subcontractors, imposition of guarantee conditions or product quality, etc.

Agreements to restrict or control production, markets, technical development or investment aim at reducing or eliminating internal competition between the members of the agreement. The parties to the agreement consciously give up the freedom to determine the level of production or the level of technical or investment development. These types of agreements are most often designed to reduce overproduction and to protect the current market structure and prices. Practices consisting of setting production quotas or limits, often introducing financial sanctions for non-compliance, and agreements aimed at reducing production capacity are prohibited under EU law. Certain agreements to limit or control production or technical development may be block exempted under specialisation or research and development agreements.

This type of agreements favours the obstruction of the common market and is concluded both horizontally (e.g. export ban) and vertically (e.g. exclusive sale agreements). The protection of geographically divided markets is expressed in the application of trade policy (e.g. pricing policy) in isolation from competition from the other members of the divisional agreement, which is thus often effective at all. The practice of re-dividing the EU market is particularly detrimental to the integrationist aims of the Treaty. By entering into 'divisional' agreements, companies aim to maintain the status quo in the market. The parties to an anti-competitive agreement or practice shall allocate a separate market share to each participant or determine for each participant a percentage of that market share. Market sharing can be

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done by imposing sales or delivery quotas, dividing clientele. For example, an agreement between European cement producers aimed at respecting home markets and prohibiting the export of cement within Europe, which could destabilise neighbouring markets, has been considered by the CJEU as a market-sharing practice. Within distribution systems, the "division" clauses consist, in particular, in prohibiting parallel imports within the same distribution network. Exclusive dealing arrangements consist of an obligation on a supplier to supply only one seller with a particular product for resale within a defined area. Exclusive purchasing agreements, on the other hand, oblige the seller to purchase products for resale only from a particular supplier.

Applying unequal conditions to business partners for the same benefits is intended to discriminate against certain counterparties (recipients of products and services) as well as consumers. Discrimination occurs when different actions are taken in relation to business partners in the same situation, putting some of them at a competitive disadvantage. Discriminatory action must originate from practices undertaken jointly by enterprises. Examples of discriminatory treatment may include the application of differential price reductions, the imposition of surcharges only on certain entities, the unequal way of granting guarantees. There is interpretative guidance from EU authorities on the conditions justifying price differentials. The Court of Justice has indicated that the permitted price differentiation may be due to differences in certain cost elements, the amount of taxation, the level of remuneration, customs duties, marketing conditions, currency parity and even the intensity of competition.

Tying agreements consist in making the conclusion of contracts conditional on the acceptance by business partners of additional services which, due to their nature or commercial usage, are unrelated to the subject of these contracts. The EU competition rules consider it unlawful to insert such clauses into agreements between undertakings which have as their object the use of tying agreements in the course of concerted action on the market, for example in the context of a cartel agreement, the undertakings involved make the conclusion of the contract subject to the additional acceptance of transport or insurance services. Individual tying agreements can only fall within the scope of the EU rules as cases of abuse of a dominant position[7].

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[7] A. Jones, B. Surfin, N. Dunne, UE Competition Law. Text, cases, and materials, Oxford University Press, Oxford 2019, pp. 137–276; L. D. S. Morais, Horizontal cooperation agreements, in: I. Lianos, D. Geradin (eds.), Handbook on European

Article 102 TFEU lists four examples of abuse of a dominant position: imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions; limiting production, markets or technical development to the prejudice of consumers; applying dissimilar conditions to equivalent transactions with other business partners, thereby placing them at a competitive disadvantage; and making the conclusion of contracts subject to acceptance by the partners of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of those contracts. The list does not exhaust all ways of abusing a dominant position[8].

Summary

To summarise the considerations regarding market structures, it is necessary to highlight that in the modern market economy there are: the sphere of the non-monopolised economy and the sphere of the monopolised economy. In the non-monopolised sphere, prices are shaped by the demand and supply mechanism described above; therefore, they are the result of the

Competition Law. Substantive aspects, Edward Elgar, United Kingdom, Cheltenham 2013, pp. 85–129; G. Faella, Vertical agreements, in: I. Lianos, D. Geradin (eds.), Handbook on European Competition Law. Substantive aspects, Edward Elgar, United Kingdom, Cheltenham 2013, pp. 174–216; N. Petit, The oligopoly problem in EU competition law, in: I. Lianos, D. Geradin (eds.), Handbook on European Competition Law. Substantive aspects, Edward Elgar, United Kingdom, Cheltenham 2013, pp. 259–349; M. Lorenz, An introduction to EU Competition Law, Cambridge University Press, New York 2013, pp. 128–187; K. J. Cseres, Competition Law and Consumer Protection, Kluwer Law International, Netherlands, The Hague 2005, pp. 271–278; I. Zużewicz, Prawo antymonopolowe, in: Z. Brodecki (ed.), Konkurencja, Wydawnictwo Prawnicze LexisNexis, Warszawa 2004, pp. 126–217.

[8] Article 102, Consolidated version of the Treaty on the Functioning of the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=PL (Accessed 28/09/2021); A. Jones, B. Surfin, N. Dunne, UE Competition Law. Text, cases, and materials, Oxford University Press, Oxford 2019, pp. 277–581; M. S. Gal, Abuse of dominance – exploitative abuses, in: I. Lianos, D. Geradin (eds.), Handbook on European Competition Law. Substantive aspects, Edward Elgar, United Kingdom, Cheltenham 2013, pp. 385–422; M. Lorenz, An introduction to EU Competition Law, Cambridge University Press, New York 2013, pp. 188–241; K. J. Cseres, Competition Law and Consumer Protection, Kluwer Law International, Netherlands, The Hague 2005, pp. 393–398; I. Zużewicz, Zakaz nadużywania pozycji dominującej, in: Z. Brodecki (ed.), Konkurencja, Wydawnictwo Prawnicze LexisNexis, Warszawa 2004, pp. 227–258.

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actions of the spontaneous forces of the market. On the other hand, in the monopolised sphere, prices are set by monopoly or oligopoly companies which, by regulating the size of their supply, set prices at the level which is the most favourable for them and which ensures maximum profit.

In the Treaty on the Functioning of the European Union were included regulations about prohibition of anti-competitive agreements and no abuse of a dominant position. These regulations were implemented to protect competitive on the UE market. An example of a market in Poland where anti-competitive agreements could theoretically occur is the mobile telephony market. It is an oligopolistic market. There are only four significant operators in this market and this fact could theoretically encourage to anti-competitive agreements. On the other hand, an example of a market that could theoretically encourage to the abuse of a dominant position is the fixed-line telephony market. There is only one dominant operator in this market. So, European law allows for a normal competitive game[9].

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[9] Raport o stanie rynku telekomunikacyjnego w Polsce w 2020 roku, Urząd Komunikacji Elektronicznej, Departament Strategii i Analiz, Warszawa, czerwiec 2021, pp. 33–45, 56–72.

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