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Economic Determinants of Regulatory Decisions in the Polish Telecommunications Sector

by

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Abstract

The main policy goals undertaken by public authorities, primarily increasingly competitive telecommunication markets, are achieved through various and distinct administrative actions. *Ex post* public interventions are meant to protect competition by responding to actions that restrict or violate free market competition (proceedings concerning: the abuse of a dominant position and anti-competitive agreements). *Ex ante* interventions shapes the relationships among market participants in the framework of merger control and pro-competitive sector-specific regulation. The aim of this study is to determine to what an extent economic criteria are used in the assessment of the competitiveness of Polish telecommunication markets by the competition authority and the Telecoms Regulator (respectively, the President of UOKiK, and the President of UKE) in four distinct types of competition related proceedings: merger control, abuse of a dominant position, anti-competitive agreements, and sector-specific regulation. The paper presents the results of an analysis of qualitative and quantitative criteria applied in decisions (and resolutions)

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issued by both of the authorities in the past eleven years (2003–2013). To this end, 194 publicly available decisions were analysed.

Résumé

L'objectif principal des actions prises par les autorités publiques, qui est un marché de télécommunication compétitif, est atteint par les différentes actions régulatoires. Des régulations ex post assurent les fonctions protectrices de la concurrence en répondant aux actions qui restreignent ou violent la concurrence (ces procédures concernent: les abus de position dominante, les ententes illicites). Des régulations ex ante influent sur la concurrence en contrôlant les fusions et la réglementation pro-concurrence spécifiques à un secteur, ce qui conditrionne les relations entre les participants d'un marché. Le but de cette étude est de déterminer le degré d'utilisation des critères économiques afin d'évaluer la compétitivité des marchés de télécommunication par les autorités de régulations (le Président de l'Office de protection de la concurrence et des consommateurs, le Président de l'Office des communications électroniques) dans quatre types différents d'action (dans le domaine du contrôle des fusions, les abus de position dominante, ententes illicites, régulations spécifiques à un secteur donné). Cet article présente les résultats des analyses des critères qualitatifs et quantitatifs appliqués dans les règlements délivrés par les autorités de régulations dans les onze dernières années (2003–2013). 194 règlements publiquement disponibles (décisions et résolutions) ont été analysés.

Classifications and key words: competitiveness assessment; decisions; ex ante regulation; ex post regulation; Poland; qualitative criteria; quantitative criteria; resolutions; telecommunications markets

I. Introduction

Telecommunications is particularly dependent on effective regulation as it is a network industry evolving from a centrally planned economy and state-owned monopolies towards a private economy based on free market mechanisms. The sources of such regulations are found not only in the legislative legacy of the sector, but also in its economic and technical aspects. The specificity of the functioning on this kind of markets results from the need to use special infrastructure, which is difficult, or often impossible to duplicate. The so-called incumbent operators often have exclusive or privileged access to such infrastructure. Competition on many Polish telecommunication markets has not yet developed to a degree sufficient to make it possible to move away from the use of the well-tailored tools of sector-specific regulation used by the National Regulatory Authority (hereafter, NRA) responsible for

the supervision of the Polish telecoms sector – the President of the Office of Electronic Communications (hereafter, President of UKE). It is thus still necessary, on Polish telecommunication markets, to use sector-specific regulation which actively fosters the development of effective competition, alongside the activities undertaken in this field by the National Competition Authority (hereafter, NCA) – the President of the Office of Competition and Consumer Protection (hereafter, President of UOKiK).

As such, the assurance of a competitive telecoms sector is the fundamental objective pursued by both public authorities through a variety of administrative actions. *Ex post* public intervention realizes competition protection objectives by responding to the actions of undertakings that have restricted or violated competition. *Ex ante* intervention influences the competitive relations among the participants of telecommunication markets in the framework of merger control and pro-competitive sector–specific regulation. The above public interventions take the form of proceedings conducted by the President of UKE and the President of UOKiK. Each of these proceedings includes the assessment of the degree of the competitiveness of markets. Although the tasks in the field of competition protection and pro-competitive sector-specific regulations are formulated differently, both authorities evaluate market competitiveness in each of their decision-making processes. Such assessment, which requires the use of appropriate quantitative and qualitative criteria, provides a detailed diagnosis of the relations among economic entities functioning in the scrutinised market. The diagnosis specifies the market power of the investigated undertakings and their ability to form relationships with other market participants.

Interventions by administrative authorities require the examination of the degree of competition found on specific telecommunication markets. It is important, however, to apply appropriate evaluation methods to ensure the effectiveness of the decision-making process, which determines the outcome of the final decisions (and resolutions[1]) in competition law and sector-specific proceedings. Administrative tools, meant to promote or protect competition in the telecoms sector, cannot be used effectively without a prior detailed investigation of the relevant market – an investigation suitable for each type of proceedings. The selection of economic instruments (quantitative criteria and qualitative criteria) and the way how they are used by the authorities in the evaluation process of the degree of competition found on given relevant markets has, therefore, a significant impact on the whole process of regulating telecommunication markets in an *ex ante* or *ex post* manner.

[1] For the sake of clarity, this text will use the English term ‘decision’ to cover both decisions (in Polish: *decyzje*) and resolutions (in Polish: *postanowienia*) issued by the President of UKE (NRA) since the official name of the administrative act does not affect the following analysis.

The aim of this study is to determine the extent to which economic criteria are applied while assessing the competitiveness of telecommunication markets in Poland by the President of UOKiK and by the President of UKE in particular types of competition-related proceedings: merger control, abuse of a dominant position, anti-competitive agreements and sector-specific regulation. The paper presents the results of an analysis of the application of qualitative and quantitative criteria in decisions issued by the President of UOKiK and the President of UKE over the past eleven years (2003–2013).

II. Assessment of market competitiveness

The aim of the assessment of market competitiveness is to determine whether a market participant, or a group of participants, is within a normative category (dominant position or significant market power), which subjects them to specific legal consequences in the form of obligations, prohibitions and penalties. This assessment allows the authorities to determine whether the level of competition that currently occurs, or may occur in the future, may cause the need to issue an administrative decision regarding this field. In most cases, the assessment of the competitiveness of a given relevant market tends to determine whether a particular undertaking holds a dominant position upon it individually – called 'significant market power' (hereafter, SMP) in the ambit of sector-specific regulation. It is also possible that a group of undertakings, at least two, together holds a joint dominant position on that market (known in sector-specific regulation as collective SMP). With respect to anti-competitive agreements, the President of UOKiK verifies whether the market shares of the undertakings participating in the investigated agreement result in liability. In case of low combined market shares, liability may be excluded (so-called *de minimis* agreements). In pre-emptive merger control cases, the NCA analyses whether the reviewed transaction will cause a significant impediment of effective competition (hereafter, SIEC) by creating or strengthening a dominant position or by making anti-competitive behaviour of the undertakings more likely in the future. Regardless of how the circumstance tested were normatively defined by the authority in relation to the preparation of an administrative decision, a prerequisite for the issuance of such a decision is to assess the competitiveness of the relevant market.

Depending on the type of mandate carried by the authorities in given proceedings, the task of assessing the degree of market competition is structured differently. Different states of the market sought by the authorities are presented in Table 1.

Table 1. States of the market analysed in various types of proceedings

Type of proceedings	Responsible authority	States of the market
Sector-specific regulation	President of UKE	The presence of individual or collective SMP
Merger control	President of UOKiK	SIEC in the future (in particular through the creation or strengthening of a dominant position on the market) – horizontal, vertical or conglomerate impact of the merger on the market in the future
Abuse of a dominant position	President of UOKiK	The existence of an undertaking with a dominant position, or at least two undertakings holding a dominant position collectively
Anti-competitive agreements	President of UOKiK	Impact of the agreement on the market. Fulfilment by the participating undertakings of the criteria necessary for exemption from the prohibition of agreements (e.g. *de minimis* doctrine – low market shares of undertakings on the market or block exemption)

These different market states, which are examined by the NRA and NCA in specific types of their proceedings, determine the method chosen for the assessment of the competitiveness of the relevant markets. While the methods used are to some extent similar, the sets of criteria employed in the evaluation carried out within each of these four types of proceedings are different. To a large extent, it is the authority that determines the selection of the economic instruments that best reflect the situation on the relevant market.

It is particularly important to determine whether the scrutinised undertaking holds a dominant position for the application of the abuse prohibition. It is necessary to use certain instruments and economic categories to define and establish dominance[2]. An undertaking that individually holds a dominant position has market power on the relevant market. Article 4 (10) of the Polish Act of 16 February 2007 on Competition and Consumer Protection[3] (hereafter, CL) contains the legal definition of a dominant position. The latter is based on the definition of dominance developed by the European Court of Justice (hereafter, ECJ)[4]. According to the legal definition, dominance is a position of an undertaking: '(…) which allows it to prevent effective competition in

[2] M. Szydło, *Nadużywanie pozycji dominującej w prawie konkurencji*, Warszawa 2010, p. 82.

[3] Journal of Laws 2007 No. 50, item 331, as amended.

[4] There is no legal definition of a dominant position in the EU law. This concept is based on the judgments of EU courts, mainly in Case 27/76 *United Brands v Commission* [1978] ECR 00207, and Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 00461; C. Banasiński, S. Piontek (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009,

a relevant market thus enabling it to act to a significant degree independently of its competitors, contracting parties and consumers; it is assumed that an undertaking holds a dominant position if its market share in the relevant market exceeds 40%'[5].

In accordance with the definition contained in the Polish Telecommunications Law Act (hereafter, TL)[6] 'a telecommunications undertaking shall have significant market power if it enjoys individually an economic position in a relevant market equivalent to dominance within the meaning of Community Law'[7]. In this context, the preamble to the Framework Directive[8] states that the concept of market dominance should be understood as it has been defined in the jurisprudence of the ECJ and the Court of First Instance[9]. In accordance with the Framework Directive, an undertaking holds SMP if, individually or jointly with others, it enjoys a position equivalent to a dominant position – '(…) a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers'[10]. This is the classic definition of domination[11] and so the regulatory concept of SMP is an equivalent of the competition law notion of a dominant position[12]. In other words, it is a 'clone' of this institution[13]. The definitions of these two terms (contained in the Framework Directive and in the CL), indicate a link between sector-specific regulation and competition law[14]. The institution of a dominant position is used for competition protection, and the institution of SMP is a key element of sector-specific regulation[15].

p. 128; T. Skoczny, *Komentarz do art. 4*, [in:] T. Skoczny (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 235.

[5] Article 4 (10) CL.

[6] Act of 16 July 2004 – Telecommunications Law, Journal of Laws No. 171, item 1800, as amended.

[7] Article 25a (1) TL.

[8] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ [2002] L 108/33 (amended by: Regulation 717/2007 of the European Parliament and of the Council of 27 June 2007, OJ [2007] L 171/32; Regulation (EC) No 544/2009 of the European Parliament and of the Council of 18 June 2009, OJ [2009] L 167/12; Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, OJ [2009] L 337/37).

[9] Para. 25 of the preamble to Framework Directive.

[10] Article 14 (2) of Framework Directive.

[11] A. Streżyńska, 'Pozycja rynkowa operatorów w nowych dyrektywach UE i w Prawie telekomunikacyjnym' (2002) 3 *Prawo i Ekonomia w Telekomunikacji* 9.

[12] T. Skoczny, 'Ocena konkurencyjności rynków', [in:] S. Piątek (ed.) *Regulacja rynków telekomunikacyjnych*, Warszawa 2007, p. 212.

[13] S. Piątek, *Sieci szerokopasmowe w polityce telekomunikacyjnej*, Warszawa 2011, p. 53.

[14] T. Skoczny, *Ocena…*, p. 225.

[15] S. Piątek, *Sieci…*, p. 53.

The President of UKE analyses and evaluates the competitiveness of relevant markets in order to determine whether any given undertaking individually holds SMP. In these proceedings, specific evaluation criteria established for the needs of pre-emptive sector-specific regulation are taken into consideration in addition to the general rules applicable to the determination of a dominant position formulated in EU law. The TL does not currently contain a direct list of criteria used to assess the existence of single SMP – it merely contains a reference to the list of criteria set out in the European Commission's guidelines on market analysis[16]. However, the TL does contain a catalogue of criteria used to assess collective SMP[17].

Quantitative analysis, which mainly consists of the evaluation of market shares, is considered as supplementary in the process of assessing the position and strength of the scrutinised undertakings. It also signals the need to conduct a qualitative analysis[18]. The criterion of market share is regarded as a preliminary filter which determines market dominance[19]. In accordance with competition law, it is impossible to accept a simplified relationship between exceeding the pre-determined level of market share (40%) and the existence of a dominant position[20]. The criterion of market share cannot automatically prejudge the existence of an undertaking with a privileged position on the market[21]. This criterion is relevant to the assessment of market power, but it is not the sole relevant criterion[22]. The size of existing market shares does not reflect competitive pressure from potential competitors, i.e. undertakings which are not active on the relevant market. That is why an administrative decision based solely on an assessment of the degree of market competition based solely on the criterion of market share can be unreliable. To fully determine the economic position of undertakings, it is necessary to determine the existence of potential competition also. Legal and economic entry barriers as well as the likelihood of expansion of those already present on the market must be identified as well. The most significant economic barriers include: sunk costs, economies of scale and scope, access to key resources and a well established position. Another important factor in the market power assessment

[16] Article 25a (2) TL refers to European Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications network and services, OJ [2002] C 165/03 (hereafter, guidelines on market analysis).

[17] Article 25a (4) and (5) TL.

[18] A. Fornalczyk, *Biznes a ochrona konkurencji*, Kraków 2007, p. 47.

[19] D. Chalmers, G. Davies, G. Monti, *European Union Law. Cases and Materials*, Cambridge 2010, p. 999.

[20] M. Szydło, *Nadużywanie…*, p. 81–82.

[21] S. Piątek, *Prawo telekomunikacyjne. Komentarz*, Warszawa 2005, p. 246.

[22] R. Whish, *Competition Law*, Oxford 2009, p. 40.

process is the position of customers[23]. The finding of a dominant position may be avoided by the existence of strong countervailing buying power, despite high market shares of the undertaking concerned, the existence of high entry barriers and market expansion.

Due to the rebuttable nature of the legal presumption in dominant position proceedings, they should not be limited to the determination of the level of market shares in cases of unilateral practices. It is usually necessary to also use qualitative criteria which make it possible to indicate the sources of market power. Such a multidimensional assessment is required to determine the existence of a dominant position. All the key facts should be considered in order to determine dominance[24] – the fulfilment of qualitative evidences must be demonstrated[25]. Those conditions play a decisive role for the assessment of market power. The rebuttable quantitative criterion of 40% market share plays a supporting role only – it is less relevant than qualitative criteria[26]. Market share can pre-determine whether the existence of a dominant undertaking is likely. It does not, however, provide any information about the possibility of acting independently from other market players[27]. Although it is possible to hold a dominant position even if the statutory threshold of 40% market share is not exceeded, this is less likely because the law sets the quantitative threshold for the presumption of dominance at a low level[28].

The goal of pre-emptive merger control is to prevent the creation of such undertakings, which may exercise a negative impact on the market by significantly restricting competition. In general, mergers do not endanger competition. They may even cause an increase in competitiveness, thanks to, among other things, lower costs and increasing business efficiency[29]. Additionally, mergers may allow the parties to compete more effectively with undertakings which already hold a dominant position. In the case of horizontal mergers, the creation or strengthening of a dominant position (or, for oligopolistic markets, collective dominant position) is one of the most common dangers leading to SIEC[30]. The fundamental criterion for assessing competitiveness, particularly considering horizontal mergers, is the market

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[23] C. Banasiński, S. Piontek (eds), *Ustawa…*, p. 129–133.

[24] C. Bongard, D. Möller, A. Raimann, N. Szadkowski, U. Dubejko, *Instrumenty ekonomiczne w prawie konkurencji*, Bonn/ Warszawa 2007, p. 73.

[25] T. Skoczny, Komentarz do art. 4, [in:] T. Skoczny (ed.), Ustawa..., p. 237.

[26] M. Szydło, *Nadużywanie…*, p. 93.

[27] C. Banasiński, S. Piontek (eds), *Ustawa...*, p. 132.

[28] M. Szydło, *Nadużywanie…*, p. 94.

[29] C. Banasiński, S. Piontek (eds), *Ustawa…*, p. 323.

[30] Para. 4 of Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ [2004] C 31/03 (hereafter, Guidelines on horizontal mergers).

shares of the undertakings concerned. It allows the evaluation of the market structure before and after the notified transaction as well as the assessment of the market power of its participants and their competitors. Data on the degree of current market shares is usually used for this analysis. Additionally, historical data may reveal changes in the strength of the undertakings concerned which can facilitate forecasts on the competitive situation likely to come. The competition authority must also take into account the dynamics of the market at stake and the possibility of potential instability while determining market shares and assessing market competitiveness[31].

III. Empirical base

The subject matter of this analysis is the application of economic criteria in the decision-making process of the Polish NRA and NCA with respect to telecommunication markets. The analysis covered 194 available decisions (and resolutions) issued by the President of UKE and the President of UOKiK in this field.

31 out of the analysed 194 decisions were issued by the President of UKE – they date from 2006 to 2013. They include 9 decisions on retail markets and 22 concerning wholesale. Selected decisions, relating to very similar markets (the so-called: market 9 – provision of call termination on individual public telephone networks provided at a fixed location; market 16 (7) – the provision of voice call termination on individual mobile networks and SMS termination market – provision of short text messages (SMS) termination on individual mobile networks), were not investigated. The undertakings at stake all hold a 100% market share on these markets.

The analysis also covered 163 decisions issued between 2003 and 2013 by the President of UOKiK concerning merger control, the abuse of a dominant position and anti-competitive agreements. More than half of these decisions (93) concerned restrictive practices: 76 decisions related to abuse and 17 to anti-competitive agreements. 70 decisions on merger control were also analysed. However, the NCA did not substantiate its decision in more than half of these merger cases (38).

This research is limited to the detailed analysis of the decisions of the NCA and NRA – the President of UOKiK and the President of UKE. Although their decisions are often appealed, the resulting judgments of the Supreme Court, the Court of Appeals in Warsaw and the Court of Competition and

[31] Paras. 14 and 15 of Guidelines on horizontal mergers.

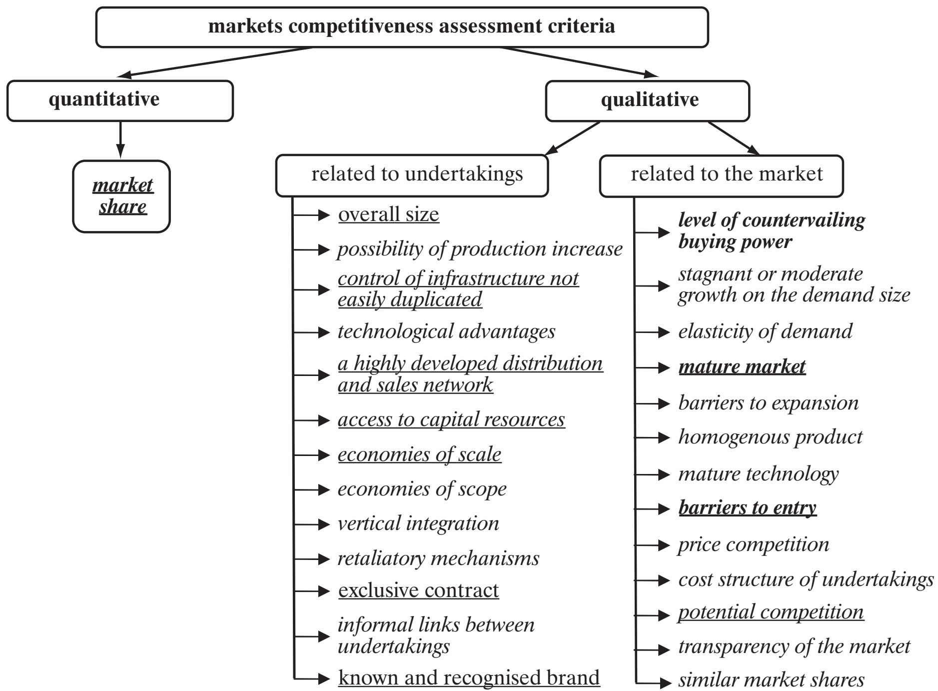
Consumer Protection (hereafter, SOKiK) have not been analysed in detail here. The above jurisprudence was omitted because it did not provide any new ways of assessing the competitiveness of telecommunication markets. It also did not contribute any new elements (criteria) to the analysis of the methods for the assessment of the degree of market competition, which could affect the practice of the relevant administrative authorities. Indeed, in cases where the judiciary had in fact present the competitive situation occurring on the relevant market at all, their coverage was usually limited to the assessments made earlier by the President of UOKiK or the President of UKE.

IV. Economic criteria used in telecoms decisions of the President of UOKiK and the President of UKE

The analysis of the decisions issued by the NCA and NRA has made it possible to identify the criteria for assessing the competitiveness of telecommunication markets used in their administrative practice in all four of the types of proceedings covered by this research. The criteria identified in this study were classified into three groups: quantitative (first group); qualitative related to undertakings (second group) and; qualitative related to the market (third group). The first division was made on the basis of quantitative and qualitative criteria. The first group (quantitative criteria) includes in fact only one criterion – market share – which plays, nevertheless, an important role in all of the proceedings. Additionally, market shares are the basis for the calculation of market concentration levels. By contrast, qualitative criteria constitute an extensive toolbox for determining the competitive situation of the case. Among them, two specific sets of criteria used for the assessment of the degree of market competition were established: those related to the undertaking or undertakings concerned (the second group) and those related to the characteristic of the market on which telecoms undertakings operate (the third group).

The classification of the criteria and their application by the President of UKE and the President of UOKiK in particular types of their proceedings is shown in Figure 1. The criteria used by the NRA are marked in italics. The criteria used by the NCA in cases concerning the abuse of a dominant position are underlined; those used in decisions concerning merger control are noted in bold. Only the quantitative criterion of market share was examined to determine whether the exemption for agreements of minor importance can be applied in proceedings concerning anti-competitive agreements (for clarity purpose, it is not indicated in Figure 1).

Figure 1. Classification of the criteria used for the assessment of market competitiveness in particular types of proceedings



The evaluation of the competitiveness of markets for the purpose of sector-specific regulation and merger control is different from the same assessment associated with violating the prohibition of competition restricting practices. This distinction places the focus of the authorities on the undertakings' future behaviours in the first case, and on their past actions in the second. In case of sector-specific regulation and pre-emptive merger control, the NRA and the NCA both examine the economic situation prevailing in the relevant market. The relevant market is always the starting point for assessing competitiveness here and the undertakings concerned are determined on these markets. Subsequently, their market position is assessed on these relevant markets. By contrast, the starting point for the assessments of the economic situation of a restrictive practices' case is the undertaking, or undertakings, suspected by the NCA of engaging in a prohibited practice. The market position of other operators on the relevant market is assessed later.

The starting point of the assessments in particular types of proceedings is determined by the selection of the qualitative criteria applied. If the NCA had used qualitative criteria in proceedings relating to the abuse of a dominant

position, it would have mainly applied those that describe the undertaking or undertakings operating on the market. Seven criteria related to undertakings (group 2) were analysed in abuse cases but only three qualitative criteria related to the market (group 3). By contrast, only three criteria related to the market (group 3) and not a single criterion from group 2 were analyzed in merger control proceedings.

The President of UKE used all or nearly all quantitative and qualitative normative criteria in his assessment of the competitiveness of Polish telecommunication markets. Moreover, decisions and resolutions issued by the telecoms regulator contain very elaborate justifications on the level of the competitiveness of the analysed markets. This fact makes it possible to determine what information on the relevant market and on the telecoms operators were actually sought and analysed by the NRA. Those parts of regulatory decisions which describe the use of particular economic criteria for the assessment of the degree of market competition usually contain very detailed justifications. They make it possible to identify the ways by which various economic criteria are used in Polish regulatory practice. This makes it easier to identify the practices of the sector-specific regulator in assessing competitiveness.

V. The evolution of the use of qualitative criteria or choice for a particular case?

The activity of the Polish telecoms regulator shows an evolution in the application of qualitative criteria for the assessment of the degree of competition on telecommunication markets. The President of UKE uses the criteria defined directly in the TL, or in the European Commission guidelines on market analysis which are referred to by TL. Initially however, that is during the first wave of telecommunication market reviews, all of the listed criteria tended to be used. The regulator repeatedly found however that some of them were not useful in the Polish context (e.g. technological advantages). This resulted, first, in the marginalization, and later in the omission of these criteria from the market analysis stage. At present, the President of UKE usually uses only those of the criteria which, in light of his previous practices, best reflect the competitive situation in Poland and may affect the NRA's final decision. A trend is also visible whereby a slightly different set of criteria is used with respect to wholesale markets than on the retail level because not all criteria are suitable for both types of markets. For example, the development of the distribution and sales network level was not considered in the assessment of

the degree of competition found on Polish wholesale markets within the second wave of their market review process because wholesale competitiveness is not influenced by this criterion. The evolution in the application of qualitative criteria should be considered as appropriate since criteria which do not affect the evaluation of a given market's are simply omitted.

None of the NRA's decisions were made solely on the basis of a market share analysis. Even decisions regarding markets dominated by undertakings that consistently hold a 100% market share, were issued on the basis of an analysis that covered market shares as well as qualitative criteria (i.e. markets for the provision of: call termination on individual public telephone networks provided at a fixed location or voice call termination on individual mobile networks or short text messages (SMS) on individual mobile networks). For example, within the second market review process, the NRA's decision on the position of PTC[32] on market 9 included, aside from market shares, the following qualitative criteria: lack of technical and economic grounds to construct an alternative telecoms infrastructure; existence of barriers to entry; easy or privileged access to capital markets or financial resources; vertical integration of the undertakings; lack of potential competition; existence of barriers to expansion and; lack or low level of countervailing buying power[33].

Qualitative criteria were used much less often by the President of UOKiK than by the President of UKE. The tasks of the NCA provide it with far more freedom as far as choosing the economic criteria used in its assessment. The President of UOKiK has a tendency to limit the scope of such analysis to the market share criterion. This fact shows the opportunism of the NCA, which is not obliged to use the normative catalogue of criteria that binds the telecoms regulator. The findings of the President of UOKiK are often based on the market share of one or more undertakings. The analysis of its decisions shows that the NCA has been studying market shares very thoroughly. In fact, only the market share criterion was used in decisions concerning anti-competitive agreements in order to determine the applicability of the exemption for agreements of minor importance. Despite the general recognition of the importance of qualitative criteria, all of the analysed decisions concerning anti-competitive agreements were based solely on the analysis of market shares. The same can be said for approximately 80% of abuse and merger control decisions were an evaluation of the competitiveness of the market was conducted at all. It is worth noting that more than 51% of these decisions concerning abuse were addressed to housing cooperatives, each of which holding a 100% market share.

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32 PTC – Polska Telefonia Cyfrowa.

33 Decision of the President of UKE of 26 October 2011, DART-SMP-6040-5/11 (22).

It is generally emphasized that qualitative criteria should be analysed alongside quantitative ones. Market shares should not be the decisive criterion for determining either dominance or the possibility of SIEC. Nonetheless, as opposed to the above mentioned practice of the sector-specific regulator, the qualitative criteria are very rarely analysed in practice by the NCA and they do not constitute a precise set.

Qualitative criteria used by the President of UOKiK are chosen on a case by case basis. Selected qualitative criteria were used in only 19,6% of the analysed abuse decisions and 20% of those merger decisions, were the President of UOKiK presented at all an analysis of the level of market competition. In general, these criteria did not prove crucial for the final assessment, as opposed to the criterion of market shares. It is worth noting that more qualitative criteria were used in abuse than in merger control cases. The structure of the decisions issued by the President of UOKiK in 2003-2013 is presented in Table 2.

Table 2. The structure of the decisions issued by the President of UOKiK between 2003–2013

	Abuse of a dominant position				**Anti-competitive agreements**			**Merger control**				
			Assessment								**Assessment**	
	Σ	**Lack of assessment**	**market shares**	**market shares and others criteria**	Σ	**Lack of assessment**	**Only market shares assessment**	Σ	**Without justifica-tion**	**Lack of assessment**	**market shares**	**market shares and others criteria**
2003	**11**	6	4	1	**3**	1	2	**10**	1	5	1	3
2004	**20**	10	8	2	**1**		1	**6**		2	4	
2005	**5**	2	2	1	**4**	1	3	**12**	4	1	7	
2006	**10**	5	5		**3**	2	1	**7**	6	1		
2007	**8**	1	2	5	**3**	1	2	**5**	3	2		
2008	**1**		1					**5**	2	1	1	1
2009	**1**	1			**1**		1	**3**	2		1	
2010	**5**		5					**7**	7			
2011	**7**		6	1	**1**		1	**5**	4		1	
2012	**5**		5					**5**	4		1	
2013	**3**		3		**1**		1	**5**	5			
∑	**76**	25	41	10	**17**	5	12	**70**	38	12	16	4

Most Polish competition law decisions do not contain an in-depth analysis of the assessment methods of the relevant market and the evaluation of the level of its competitiveness. More than 32% of the NCA's decisions on restrictive practices (nearly 33% for abuses and nearly30% for anti-competitive agreements) were not based on the assessment of the competitiveness of the relevant markets at all. This ratio exceeds 71% in merger control decisions. The results of this analysis show that only 17% of all decisions contain such an assessment made on the basis of at least one qualitative criterion in addition to the market share analysis. Unfortunately, there is no progress observed in this matter as of yet. Those qualitative criteria which had been applied were selected specifically for the analysis of particular markets.

The President of UOKiK investigates many merger cases. In many cases however, merger control has limited value for evaluation of the methods of competitiveness assessment, since it has been associated with a limited impact on the market. The NCA has not substantiated its decision in more than 54% of its decisions authorizing a concentration. This could indicate that in the case of the telecoms sector, the threshold required by law, updating concentration to gain prior clearance, is set at too low level. From the point of view of the general interest, and from the perspective of undertakings operating on Polish telecommunication markets, this is not a desirable situation.

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