UNITED STATES, EUROPE AND POLAND. DIFFERENT STAGES OF ANTITRUST TYING WAR IN THE NEW ECONOMY.

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Microsoft's case has led to heated debates, both in Europe and the United States of America, on the abuse of the dominant position and on the prohibition of tying. This discussion, both in Europe and the United States, is not finished. In this article the author presents legal implications of tying products in Europe and Poland and confronts them with the American approach to tying. In Poland, a country with a fast developing economy, with the growing level of foreign investments, discussion on monopolist practices under the conditions of a fast technological development[1] has not really commenced yet. The problems of innovation and development of New Economy undertakings has gained new impetus following Poland's accession to the European Union. It is a matter of time when the anti-trust law begins to show interest in them. There are some indications that this has already taken place. In the first part of this article the author briefly presents the discussion related to Microsoft III case in the United States insofar as it pertains to New Economy issues. The second and third parts address legal and political aspects of the Microsoft case in the European Union. In the fourth part legal aspects related to tying practices in Poland are presented. The article aims to show that instrumental and mechanical treatment of tying practices used by firms having the market power under conditions of technological progress is not proper. The problem of antitrust analysis of such practices is universal, as universal as these practices are. However, the problem is solved differently in the United States and in Europe and the reasons for such a different approach are rooted in the legal system and policy enforcement. Microsoft antitrust is global. After US and European cases, Korean competition authority has found Microsoft guilty of tying practices[2]. Regarding Microsoft problems with tying it is necessary to ask the question whether tying practices are characteristic only to enterprises like Microsoft or constitute a general problem from the New Economy perspective. An important question here is (to paraphrase M. D. Bradley and D. W. Jansen)[3]: should we teach an old economy dog New Economy tricks?

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[1] This development is particularly noticeable, which should be emphasized in the context of the problems discussed in this article, in the IT sector, where a double-digit growth is forecast for the software market, according to IDC reports for the years 2004-2008, http://polishmarket.com/next.php?category=5; see also older analyses at http://www.mac.doc.gov/ceebic/countryr/Poland/plitsector.htm

[2] http://www.techweb.com/wire/software/174904470

[3] *Should we teach an old economy dog New Economy tricks? The role of a postal service in the New Economy,* D. Jansen (ed.), *The New Economy and Beyond*, Edward Elgar 2006, p. 174.

USA – Caution! Network effect…

The Courts. Microsoft III case resulted in a thorough and extensive discussion in the American antitrust doctrine[4]. It is not the author's intention to summarize this discussion or present it systematically but to identify some important elements to allow for some further observations. This discussion will definitely continue in the USA, although it has reached some peak after the decision of the Court of Appeals. The conditions for its development were ideal: two court rulings have been issued, based on completely different premises. While the District Court was in favour of applying a modified *per se* test, based on Jefferson Parish v. Hyde[5] case, the Court of Appeals was in favour of applying the rule of reason. The most important element of reasoning of the Court of Appeals was "astonishment". The Court of Appeals stated that it was the first time it had to deal with such strong technological tying and consequently ordered to apply the rule of reason as a stricter standard for the plaintiff, the rule of reason. The Court of Appeals, referring to Microsoft's integration of one of APIs bundled with Windows (Internet Explorer browser), noted that *these and other novel, purported efficiencies suggest that judicial experience provides little basis for believing that, "because of their pernicious effect on effect on competition and lack of any redeeming virtue", a software firm's decisions to sell multiple functionalities as a package should be "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use"*. Explaining why it was necessary to refrain from applying the Jefferson Parish separate product demand test and referring to Areeda et al., the Court of Appeals pointed out to the uselessness of the *per se* test to the analysis of innovative solutions. The Court noted that *under per se analysis the first firm to merge previously distinct functionalities (e.g. the inclusion of starter motors in automobiles) or to eliminate entirely the need for second function (e.g. the invention of the stain-resistant carpet) risks being condemned as having tied two separate products because at the moment of integration there will appear to be a robust distinct market for the tied product*. Irrespective of how we evaluate the subsequent part of the Microsoft case, at this stage the most important questions have been asked, to which the doctrine has provided different answers.

New Economy in the literature – a short review[6]. Where does this 'astonishment' in the case of antitrust analysis of software platforms come from? It comes from the knowledge, which we have gained so far, about New Economy and the critical approach to its current state. The anti-trust problems of New Economy are generally found in the literature, although there is no single approach to the problem. Posner claims that the notion of New Economy comprises such industries as the manufacture of computer software; the provision of services by Internet-based businesses, and communication services and equipment that support the first two industries. Comparing traditional industries with new-economy industries, he characterizes the latter using such attributes as: falling average costs (on a product) over a broad range of output, modest capital requirements relative to what is available for new enterprises from the modern global capital market, very high rates of innovation, quick and frequent entry and exit, and economies of scale in consumption, the realization of which may require

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[4] U.S. v. Microsoft Corp., 253 F.3d (D.C. Cir 2001), hereinafter: Microsoft III.

[5] Jefferson Parish Hospital District No. 2 v. Hyde, 466 U. S. 2 (1984); on Jefferson Parish tying legality test see: R.M. Steuer, *Exclusive Dealing After Jefferson Parish*, Antitrust L. J. 54/1985, pp. 1229ff.; Ch. Ahlborn, D.S. Evans and A.J. Padilla, *The Antitrust Economics of Tying: A Farewell to Per Se Illegality*, April 21, 2003, Antitrust Bulletin 2003, http://ssrn.com/abstract=381940, pp. 9-14.

[6] I do not aim to thoroughly confront the view on New Economy industries; I want only to point out that it is necessary to make a prudent analysis of the cases related to New Economy industries in antitrust enforcement; an extensive review of the literature on network effects can be found in G.J. Werden, *Network Effects and Conditions to Entry: Lessons from the Microsoft Case*, Antitrust L. J. 69/2001, pp. 87-111, in particular supra note 4 on p. 87.

monopoly or interfirm cooperation in standards settings[7]. Analysing the problem of government intervention in the new economy, Posner is not in favour of the policy of zero enforcement, which could *deprive us of important information about competition and monopoly in this vital sector of the national economy*[8]. However, Posner does not give any comprehensive answer about what the policy of intervention in the sector of New Economy should look like; he only gives advice to the "prudent enforcement agency and sensible court": caution. Summers seem to adopt a similar assumption – he suggests five rules that should be taken into account in designing antitrust policy in the area of New Economy. The fifth of the rules formulated by Summers is based on Hippocratean "first do no harm"[9]. Liebowitz and Margolis, on the other hand, analysed software markets in the context of the Microsoft case on the basis of their particular features, namely: a) The winner-take-all (or most) result, which, if consistent with network effects, cannot distinguish between network effects, economies of scale, and scalability, b) lock-in or interia concept, c) tipping effect, d) implications of distinction between network effects and economies of scale[10]. Liebowitz and Margolis assumed that antitrust implications derived from theories surrounding network effects appear to be unwarranted in software industry. Lack of any evidence indicating that network effects have the pernicious effects that have been attributed to them, made them advance a thesis that *it is unwise at this time for network effects to be granted any important role in antitrust*[11]. C. Shapiro sets forth six basic principles for firms competing in the new economy: 1) innovation is king (no company can afford to stand still, and ultimately performance is driven by innovation not pricing, 2) intellectual property is becoming 'Sword and shield', 3) Multiple versions are common (information products exhibit very strong economies of scale, with most 'first copy costs'), 4) complements are critical (while there is nothing new in the need for products to be able to work together, the degree of integration in high-tech markets creates the need to work closely with partners to create high-tech systems), 5) Networks rule, 6) Monopoly power lives[12]. N. Economides characterizes markets with network effects, pointing out such features as: 1) ability to charge prices on both sides of the network, 2) externalities internalized or not, 3) fast network expansion, 4) inequality of market shares and profits, 5) monopoly may maximize total surplus, 6) no anti-competitive acts are necessary to create market inequality, 7) free entry does not lead to perfect competition, 8) different nature of competition, and, 9) path dependence[13]. Economides assumes that the legal system does not yet have a framework for the analysis of competition policy issues in network industries, given Microsoft III case as an example. Economides expresses hope that in future new economy antitrust cases, *there will be a deeper understanding and application of the economics of networks and of the way that the law should apply to network industries*. In a discussion on new economy there were voices pointing to the lack of significant differences, which could affect antitrust enforcement of cases considering new economy industries. Another interesting approach to tying is the analysis of G. J. Sidak. Analyzing the software market as a technologically dynamic market characterized by its distinctive features, Sidak proposed his test to evaluate tying in such a market[14]. The test consists of four steps, where competition authority has to answer four questions, which are 1) is the market

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[7] R. Posner, *Economic Analysis of Law*, Aspen Publishers, p. 323.

[8] R. Posner, *Antitrust in the New Economy*, John M. Olin Law & Economics Working Paper No. 106, p. 11.

[9] L. H. Summers, *Competition Policy in the New Economy*, Antitrust L.J. 353/2001, p. 358.

[10] S.J. Liebowitz, S. E. Margolis, *Causes and Consequences of Market Leadership in Application Software*, A Paper presented at the conference: Competition and Innovation in the Personal Computer Industry, April 24, 1999.

[11] Liebowitz and Margolis...

[12] C. Shapiro, *Competition Policy in the Information Economy*, August 1999, http://haas.berkeley.edu/~shapiro/comppolicy, p. 2ff.

[13] N. Economides, *Competition Policy in Network Industries: An Introduction*, NY Univ. June 2003, CLB Working Paper 3-10, available at: http://papers.ssrn.com/abstract=386626

[14] J. Sidak, *An Antitrust Rule for Software Integration*, Yale Journal on Regulation 18(1)2001, p. 25 ff.

technologically mature or technologically dynamic, 2) is it plausible that consumers benefit from sub-additive costs or super-additive demand resulting from program integration, 3) is it probable that integration will preserve a monopoly over the tying product by substantially reducing competition from the tied product, 4) will the reduction, if any, in competition cause consumer welfare losses that exceed the consumer welfare gains from sub-additive costs or super-additive demands.

On the other side critics were rather sceptical about distinctive features of new economy and distinctive features of software market. R. Litan, noticing the distinguishing features of new economy, sees the active role of antitrust enforcement in this area[15]. Litan, assuming that such practices as exclusive dealing and tying should be as illegal in new economy as they have been in the "old economy", states that antitrust enforcement agencies must be even more vigilant in high-tech markets[16].

The views discussed above are only a fragment of economic discussion on New Economy. Economists agree that there are differences between network economy industries and non-network industries. Although they quite similarly characterize the features of new economy industries, there is no common agreement what competition policy within new economy markets should be like. It seems that on the basis of the analysis of economists' and lawyers views on competition policy, one could find strong justification to the thesis that the specific nature of new economy industries does not exclude application of competition policy to them; however, this policy should be prudent and should take this specific nature into account. It seems that the Microsoft case and the discussion of American antitrust lawyers resulted in a visible shift from the *per se* analysis of tying to the rule of reason analysis where the network effect is at stake.

European Union – tying under Articles 81 and 82 of the Treaty

Tying in articles 81 and 82 of the Treaty. In EU law the prohibition of tying practices as manifestation of the abuse of the dominant position has been regulated in art. 82(1)d of the Treaty Establishing the European Community (hereinafter: *The Treaty*), among other infringements mentioned as examples. This prohibition refers to making 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. It is emphasized that this provision in the wording adopted in the Treaty has the character of an absolute prohibition (*per se*), unlike the prohibitions stipulated in art. 81, which relate to agreements between undertakings and decisions of associations of undertakings. Prohibition of tying has also been regulated in art. 81(1)e, with the exception that like other prohibitions formulated in this provision, it can be excluded under art. 81(3) of the Treaty. This exclusion may relate to, e.g. practices contributing to the improvement or production of distribution of products or to the development of technical and economic progress[17]. The Treaty differentiates between the prohibitions of practices on competitive markets and practices on markets on which competition is restricted or excluded; it treats the latter more restrictively. The rule of reason contained in art. 81(3) of the Treaty and its application makes one think that as regards tying applied to competitive markets views on the effectiveness of tying are acceptable[18]. recognizes the fact that rivalry is an essential driver of economic driver of economic efficiency, including dynamic efficiencies in the shape of innovation.

As regards the treatment of the prohibition to abuse the dominant position by imposing tying practices in the European law, the doctrine refers to general assumptions, which are the basis of

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[15] R.E. Litan, *Antitrust and the New Economy*, U. Pitt. L. Rev. 62/2001, p. 431.

[16] See also: R. Pitofsky, *Challenges of the New Economy: Issues at the Inersection of Antitrust and Intellectual Property*, 68 Antitrust L.J. 2000, p. 560 ff.

[17] More: C. Ritter, *The New Technology Transfer Block Exemption under EC Competition Law*, Legal Issues of Economic Integration 31(3)2004, p. 161ff.

[18] On the nature of Art. 81(3), see a comment of Ch. Bellamy, *Focusing on the European Perspective of Judicial Dialogue: Issues in the Area of Competition Law*, Texas Int'l L. J. 39/2004, p. 465.

prohibitions stipulated in art. 82 of the Treaty. This prohibition is determined with a view to market structure. Consequently, the issue of extracting profits by monopolist or consumer protection loses its significance[19]. In cases related to the use of tying practices by entities with a dominant position, basic importance is attached to protection of competition, through protection of weaker players of the market game[20]. This is what should differentiate the European and American approach to cases of abusing the dominant position. This is what determined the judicial decisions of the European Commission and courts in older cases related to tying practices (Napier Brown v. British Sugar[21], Eurofix-Bauco v. Hilti[22], Tetra Pak II[23]). The analysis of the judicial policy of the Commission and the Court of First Instance in these cases confirms the tenet that protection against the consequences of tying practices is concerned with protection of smaller players of the market against monopolists[24]. First cases related to the abuse of the dominant position through the imposition of tying indicate a fairly restrictive approach of European bodies to the prohibition of tying. Despite attempts at acquittal of the charge by reference to objective justification, none of the companies managed to convince the Commission and the courts about the legality of tying practices. Hilti charged with tying practices attempted was to relate the practice for the benefit of consumers, the Court decided that Hilti did not provide convincing evidence to substantiate this claim and also noted that what Hilti did was not in line with the principle of proportionality[25]. Hilti did not manage to defend its case but it does not follow from the Court's decision that under other conditions the defence would not be effective.

Commission v. Microsoft - the test. Older cases of ruling on the basis of art. 82(1)d bring associations with the decisions of American courts, which are based on the application of the prohibition *per se*. In the judicial decisions of European Commission there are already some elements related to tying practices, which indicate the progressive erosion of this restrictive line of reasoning. The most recent ruling on the imposition of tying practices by the dominant company is the decision issued in 2004 by the European Commission in the case related to Microsoft's tying Windows Media Player to its operating system, Windows[26]. Analysing the violation of the prohibition on tying practices in the cases quoted above, the courts and the Commission used a test, the elements of which were slightly modified by the Commission in the *Commission v. Microsoft* case. The legality test of tying applied by the Commission should include the following elements: 1) the tying and tied goods are two separate products, 2) the undertaking concerned is dominant in the tying product market, 3) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product, 4) tying forecloses competition[27]. The test applied by the Commission in *Commission v. Microsoft* has been presented differently in the literature by Dolmans and Graf, who, when commenting on the

[19] A. Jones, B. Sufrin, *EC Competition Law*, Oxford 2001, s. 374.

[20] E.M. Fox, comparing American and European law says that '(...) while economics has a role in EU analysis, it is much less center stage than in the United States'. The European Union is concerned about competitive opportunities for small and medium-size firms, raising the economic level of worse-off nations, and general notions of "fairness".', *US and EU Competition Law: A comparison*, a study available at http://www.iie.com, p. 340; see also Jones & Sufrin, p. 374;

[21] Napier Brown v. British Sugar, OJ (1998) L 284/41.

[22] Case IV/30.787 Eurofix Bauco v. Hilti, OJ 1988 L 65/19; Case T – 30/89, Hilti (1991), ECR II – 1439; Case C – 53/92 Hilti (1994) ECR I – 667.

[23] Case IV/31.043, Tetra Pak II, OJ 1992 L – 72/1, Case T – 83/91 Tetra Pak II (1994) ECR II – 775, Case C – 333/94 Tetra Pak II (1996) ECR I – 5951.

[24] See A. Jones, B. Sufrin..., refering to Court of First Instance in Tetra Pak II, p. 374.

[25] D.G. Goyder, *EC Competition Law*, Oxford 2003, p. 301; Ch. Ahlborn, D.S. Evans and A.J. Padilla, *The Antitrust Economics of Tying...*, p. 22.

[26] Commission Decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty, COMP/C – 3/37.792, not yet officially published, hereinafter: Commission v. Microsoft.

[27] Commission v. Microsoft (5.3.2.1., 794).

Commission's decision and drawing conclusions from the previous decisions in cases related to tying practices, suggested a five-pronged method to evaluate tying practices, consisting of: 1) dominance of the seller in the market for the "tying product", 2) existence of a "tied product" that is separate from the tying product; 3) coercion, i.e. conduct forcing customers to buy the tied product together with the tying product; 4) a restrictive effect on competition for the "tied product"; and 5) absence of a proportionate justification for the coercion[28]. As regards the distribution of the burden of proof this should mean the presumption that the interest in maintaining untouched competition is greater that the interest of the dominant company[29]. As regards the burden of proof, this implies that it is the monopolist who must prove that there are benefits from tying, which cannot be achieved when less restrictive measures are applied, which outweigh the anti-trust consequences[30]. Critics of this solution argue that proving it creates *de facto* an obstacle, which cannot be overcome by the dominant company[31]. Dolmans and Graf's interpretation differs from the test which the Commission formulated in its justification of its decision in the case against Microsoft – first of all through the direct incorporation of the element of objective justification and proportionality. One must agree with the view that neither legal norms nor judicial decisions formulated a generally accepted standard of the decision that no abuse of the dominant position has been found although conduct that meets the normative prerequisites of art. 82 has been proved[32]. Separation of proportionality from objective justification, compared to the position taken by the Commission, must be regarded a more transparent solution. Reference to the principle of proportionality and objective justification is not, however, nothing else but an attempt to systematically sum up the existing European judicial decisions related to art. 82 of the Treaty. Acceptance of objective justification and the principle of proportionality as the fifth element of the legality of tying practices and their subsequent interpretation are postulates which must be directed to the legal doctrine and to the Court which hears now the case appealed by Microsoft.

Objective justification. The Commission and the Court of First Instance refer to *objective justification* in cases of violation of art. 82 of the Treaty. Reference to *objective justification* helps to differentiate between the conduct conditions by legitimate economic reasons[33]. When the action of a firm that has a dominant position is considered to be "objectively justified" or "objectively necessary", it goes beyond the scope of art. 82 of the Treaty[34]. European bodies also expressed their position on the concept of objective justification in cases of violations of art. 82(1)d of the Treaty. Most suggestions on how this *objective justification* in tying practices should be understood comes from the Commission's decision in the *Commission v. Microsoft* case. Referring to Microsoft's arguments the Commission stated that in was not proven in the case that a tying transaction was *objectively justified* by pro-competition effects, which would outweigh the upsetting of competition that it has caused. The Commission also indicated that the benefits derived from the transaction in question relate first of all to Microsoft's benefits and are not proportional to anti-trust effects on the market, caused by the tying of the products. It seems that proving objective justification for tying transaction could entail:

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[28] M. Dolmans, T. Graf, *Analysis of Tying Under Article 82 EC: The European Commission's Microsoft Decision in Perspective*, World Competition Vol. 27, 2/2004, p. 226.

[29] Dolmans, Graf..., p. 237.

[30] Dolamns, Graf...

[31] D. Evans, A.J. Padilla, *Tying Under Article 82 EC and the Microsoft Decision: A Comment on Dolmans and Graf*, http://ssrn.com/abstract=596663, forthcoming in World Competition 2005; although I share their point of view, I doubt that Commission will accept different concept of burden of proof, considering the textual sound of Art. 82 of the Treaty.

[32] T. Skoczny, in: J. Barcz, *Prawo Unii Europejskiej. Prawo materialne i polityki*. Wyd. PiPG 2003, p. 228.

[33] A. Jones, B. Sufrin,..., p. 251,

[34] A. Jones, B. Sufrin...

1) indication of pro-competitive effects of the tying transaction, which could not be achieved if the competition were not foreclosed, 2) passing of the proportionality test, i.e. indication that benefits for the dominant companies and the market are not one-sided, that there is appropriate proportion between them. The Commission's decision in *Commission v. Microsoft* case expands on the views expressed earlier in judicial decisions on objective justification related to tying practices. However, these indications continue to be very general and there will be interpretation doubts about them[35]. Although objective justification has not become, as yet, part of the test of legality of tying practices in judicial decisions passed by European bodies, this doctrine creates the possibility of their more extensive evaluation, taking into account wider application of the economic approach. This approach is already noticed in *Commission v. Microsoft*. However, can we take a step further and say that this means acceptance of the rule of reason in European judicial decisions concerning abusing of dominant position? A positive answer to this question would be probably too far reaching, despite comments on *Commission v. Microsoft* case, from which it follows that the Commission applied in it the rule of reason, although under a different name[36]. Furthermore, the analysis of the justification to *Commission v. Microsoft* case reveals that the Commission in its evaluation of Microsoft's practices focused on the analysis of the legality test of tying practices. Consequently, a conclusion can be drawn that the test applied by the Commission is more like the test applied in Jefferson Parish v. Hyde[37]. The application of the rule of reason to the interpretation of art. 82 of the Treaty would have to be connected with significant revaluation as regards the interpretation of the European law and acceptance of the pragmatic approach. It seems that objective justification implies the necessary reference to the pragmatic argument[38] in order to prove that the interpretation of the prohibition of tying practices should consider economic and social consequences of tying. Reference in the European judicial decisions to objective justification seems to go in the direction of greater flexibility as regards the application of art. 82 of the Treaty. In this sense objective justification is understood by some authors[39] as an equivalent of the American rule of reason.

Proportionality. Dolmans and Graf, while accepting the possibility of applying the principle of proportionality to interpret art. 82(1)d of the Treaty, point out that it should consist of the following elements of evaluation 1) effectiveness, entailing proof that tying effectively allows the firm to achieve the claimed benefits, 2) necessity, entailing proof that tie benefits cannot be achieved by any less restrictive means; 3) balance of interests pleads in favour of the tying practice. The application of the third element of the proportionality test must, in Dolmans and Graf's opinion, be connected with the necessity to cope with the presumption that the interests of maintaining undistorted competition outweigh the interests of dominant company[40]. As regards objective justification, it must be noted

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[35] T. Skoczny, …, p. 228.

[36] At a press conference on Microsoft case, ex - commissioner Mario Monti, when explaining European Commission's decision, said that the decision did not mean that tying practices were prohibited per se; while doing a detailed analysis of Microsoft's practices he said also, referring to the American judicial decisions described below: we used the rule of reason although we don't call it like that in Europe), cf. http://www.eurunion.org/news/press/2004/2004/20040047; see I. Maher's comment to the European approach to the rule of reason in a review article, *Re-imagining the Story of European Competition Law*, Oxford Journal Of Legal Studies, Vol. 20, 1(2000), p. 155ff.

[37] Evans, Padilla, *Tying Under Article 82 EC and the Microsoft Decision: A Comment on Dolmans and Graf*, http://ssrn.com/abstract=596663, forthcoming in World Competition 2005.

[38] Ch. Perelmann, L. Olbrechts-Tyteca, *The New Rhetoric. A treatise on Argumentation*, Notre Dame 1969, p. 266 and D.N. MacCormick, R. Summers, *Interpreting Statutes. A Comparative Study*, Worcester 1991, p. 141.

[39] See: J. Mensching, explaining on behalf of the European Commission the motivation behind the decision on Commission v. Microsoft case, *The Microsoft Decision-promoting innovation*, Sweet and Maxwell, 4th Annual Competition Law Review Conference, 22 October 2004.

[40] Dolmans, Graf..., p. 237.

that Dolmans and Graf separate it from the proportionality test. The proportionality principle fits well into the situation in which what is to be decided is restriction of rights and freedom, because this is what we deal with in case when tying practices are to be enforced. But it is only one of the principles, which may be taken into account within the fifth element of the proportionality test suggested by Dolmans and Graf. From this point of view, the argument to refer to the principles of the European law adequate to the case under analysis seems justified. This reference may relate to general principles as well as detailed principles that are characteristic of the anti-trust law. Their formulation is the task of the legal doctrine and judicial decisions.

Modernization v. revision of the Treaty? In conclusion to this part of the discussion it must be said that in European judicial decisions the prohibition of the dominant position by the imposition of tying practices, despite *prima facie* absolute (*per se*) character of art. 82(1)d of the Treaty, is weakened. The Commission does not accept the view formulated in the judicial decisions of American courts, according to which in the case of software platforms the rule of reason should be applied, but introduces elements of rationalization of prohibition to its judicial decisions. The doctrine of *objective justification*, which is being developed in European judicial decisions, seems to liberalize the application of art. 82(1)d of the Treaty. However, *objective justification* has no literal reference in art. 82(1)d of the Treaty. Hence, the road to the liberalization of this regulation can lead to the "deepening" of its interpretation or implementation of the postulates about its modernization, which have already been formulated[41]. One of the arguments in favour of the amendment of the provisions of art. 82 of the Treaty is the necessity to relate to the principles of modern economy and to the basic aim of anti-trust regulations, i.e. consumer welfare[42]. These arguments are very sound. Companies holding a dominant position, operating within the framework of New Economy, cannot be derived of the basic value for each company, i.e. the certainty of the law. So far, liberalization of the judicial decisions as regards interpretation of art. 82(1)d of the Treaty gives companies only some, not fully defined, possibilities to be freed from the charge. Uncertainty, however, remains, which also affects the choices of future investments. Today it is difficult to definitively say in which direction the judicial decisions of European bodies related to art. 82(1)d of the Treaty will go. It is equally difficult to say whether art. 82 will be modernized in the foreseeable future. However, considering the European competition policy and the present approach to dominant firm practices, an amendment of art. 82(1)d of the Treaty seems doubtful over a short time span. Reinterpretation of article 82 coming out from guidelines prepared by the EC Commission seems to be more probable.

European competition policy – pro-active, interactive or neutral?

Lisbon strategy: the bad news… The views on the European approach to the prohibition of abusing dominant position, discussed in the first part of this article, which are rooted in normative differences between art. 81 and 82 of the Treaty, were also the subject of policy statements made by previous European Commission. In order to understand well the sense of what the Commission said, we must first refer to the sources of the Lisbon strategy adopted in 2000, which determines the road of Europe's economic development. Understanding the Commission's policy helps us to understand Evans and Padilla commenting *Commission v. Microsoft*, who claim that the mechanical approach to tying concerning technologically sophisticated products is not a good thing in promoting the Lisbon Agenda[43]. As a

[41] B. Sher, *The Last of the Steam–Powered Trains: Modernizing Article 82*, European Competition Law Journal 5/2004, p. 243ff.

[42] B. Sher..., p. 245.

[43] D. S. Evans and A.J. Padilla, *Tying Under Article 82 EC and the Microsoft Decision: A Comment on Dolmans and Graf*, http://ssrn.com/abstract=596663, forthcoming in World Competition 2005.

result of the adoption of the Lisbon strategy the path of Europe's economic development supporting R&D and innovation[44] has been found. One of the significant reasons for the adoption of the strategy was the will to level the comparative advantage of US economy. What we have after the adoption is the idea of active promotion of the model of economy based on knowledge, which is also manifested at the conceptual level and directly in increased pressure on financial support to R&D in economy, using structural funds. The Lisbon strategy assumed an active role of member states and a special role of SMEs in its implementation. The goals, expressed in this way, can, in fact, make Evans and Padilla believe in the sensible approach to technologically sophisticated products in EU. However, the problem is that the Lisbon strategy is directly reflected in the European competition policy. In a communication *A Pro-active Competition for a Competitive Europe*[45] the Commission said that such pro-active competition should aim at a better attainment of the aims defined in the Lisbon strategy and characterises it as:

- *improvement of the regulatory framework for competition which facilitates vibrant business activity, wide dissemination of knowledge, a better deal for consumers, and efficient economic restructuring throughout the internal market,*
- *enforcement practice, which actively removes barriers to entry and impediments to effective competition that most seriously harm competition in the internal market and imperil the competitiveness of European enterprises.*

At the same time the Commission was sceptical about the innovative role that dominant firms could play in economy. Referring to empirical findings, the Commission stated in the Communication that they do not give *one conclusive support to the idea that market competition and reduced competition is conducive to innovation*. In the Commission's opinion there was *evidence that suggests that likelihood of innovation is higher among firms in competitive industries*. Furthermore, fewer competitors and higher average profits, according to the Commission's view, were also associated with lower productivity growth. This vision of competition under conditions determined by the Lisbon strategy, was, however, simplified. In particular the Commission did not address the problem of New Economy industries, where the aims determined by the Lisbon strategy are *de facto* implemented. The approach to that problem by New Economy industries became most evident in the USA in the discussion of the Microsoft III case. Economics and lawyers have noticed the problem, have analysed it thoroughly, and have expressed fears about the possibility of reliable antitrust analysis of factual situations in which such industries abuse their market power. Such cautionary approach to New Economy industries was motivated by the statement that economic theory has not fully investigated yet how it functions. It seems that this conclusion should have been incorporated into the Commission's communication. In this sense the communication was not "interactive". The Commission did not solve the problem of New Economy industries and laid out the principles of competition policy avoiding any possible doubts.

... and some good news. However, there were also positive elements in the Commission's communication, which could indicate the growing role of the economic approach to the future enforcement of the legal standards of competition protection (*competition rules as well as their enforcement in individual cases will be based on a more economic based approach)*. The Commission related its remarks on the economic approach to some practices, such as tying, thus opening the road to economic analysis whether these practices *hurt consumers or yield greater efficiency*. If the

[44] M. Swora, *Uniwersytet i władze regionu – prawne aspekty współdziałania w obliczu przyjęcia Polski do Unii Europejskiej,* Humaniora Foundation Bulletin 16(2004), p. 66.

[45] Communication from the Commission: *A Pro-active Competition for a Competitive Europe*, Brussels 20.4.2004, COM(2004) 293 final.

implementation of the Commission's policy incorporated also industries with market power, it would be a significant change of the existing policy. The Commission, while analyzing the targets of antitrust rules and their enforcement said that they are meant to *prevent dominant firms from abusing their position by engaging in anti-competitive business practices (e.g. exclusion of competitors) so as to maintain or enhance their position in the marketplace*. At the same time, however, the Commission also stipulated that *these rules need to take into account the distinction between agreements and practices that are overall anti-competitive and those where anti-competitive concerns are offset by pro-competitive effects*. The importance of these short signals from the Commission can be evaluated only through the prism of its involvement as regards enforcement of art. 82.

Looking for policy. When we evaluate the pro-active consumer policy on the basis of the Communication we can say that it does not change the existing paradigm. The policy continues to protect competition, through which the *consumer welfare* should be accomplished. The report does not give any indications to change EU's restrictive policy with respect to undertaking with a dominant position, deepens the vision of economic and technological development made with the participation of mainly the weaker market players. The absence of any reference to the new phenomena that accompany economic development, while at the same time the aims of competition protection in the field of their impact are defined, is the drawback of the policy. Any intervention by competition protection bodies is connected with the disturbance of market structure (justified or not). Identification of political aims, which do not take into account the specific nature of markets characterized by dynamic technological progress, where, according to Economides, leaps to new and more technologies are expected, while the specific nature of winning technologies are unknown[46], results in unpredictable consequences should such policy be implemented. From this point of view in the extensive area of New Economy a better solution would be to implement a neutral policy, if not preventive, rather than pro-active.

The Microsoft case can be consider as an incentive for the discussion on modernization of article 82 of the Treaty. This discussion has been commenced by the current European Commission but its outcome is difficult to predict before the final judgment in the Microsoft case. Modernization of article 82 of the Treaty was the main subject of interest of discussion paper prepared to promote a debate as to how EU markets are best protected from dominant companies' exclusionary conduct which risks weakening competition on a market[47]. The paper suggested a framework for the continued rigorous enforcement of Article 82, built on the economic analysis, and setting out possible methodology for the assessment of some of the most common abusive practices. One of the most common practices – according to the authors of the paper – was tying. The paper described tying and bundling and proposed two possible defences: objective justifications and efficiencies. According to the report tying can be objectively justified when the reasons of quality or good usage of the products necessary to protect the health or safety of the consumers[48]. Efficiency defense could be based on the argument that tying generates produce savings in production, distribution and transaction costs or innovation[49]. Following the discussion paper, the public debate has been carried out[50]. In the time of writing this article only the hope to accept the Commission's approach can be expressed.

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[46] N. Economides, *Competition Policy in Network Industries: An Introduction*, NY Univ. CLB Working Paper 03-10, p. 24.

[47] J. Gual, M. Hellwig, A. Perrot, M. Polo, P. Rey, K. Schmidt i R. Stenbacka, EAGCP REPORT: *An Economic Approach to Article 82*, June 2005.

[48] Id. point 8.2.4.

[49] Id.

[50] http://ec.europa.eu/comm/competition/antitrust/others/article_82_webstream.html

Prohibition of tying in Poland: Where were we? Where are we? Where are we going?

Tying in Polish antimonopoly law 1990-2000. The problem of antitrust regulations under conditions of market economy appeared in Poland after the fall of communism in countries of Central and Eastern Europe (1989)[51]. The first act regulating the antitrust issues in the new conditions was enacted in 1990[52]. Poland adopted an extended version of the act, which thoroughly regulated the prohibition of abusing dominant position[53], including the prohibition of tying. The system of antitrust bodies included the Antimonopoly Office[54] and the Antimonopoly Court. Enforcement policy of the Polish Antimonopoly Office has from the very beginning been targeted at fighting illegal monopoly practices such as imposition of onerous contract terms, tying arrangements etc[55]. This policy was conditioned by a considerable degree of monopolization – the remnant of the centrally planned economy[56]. The Antimonopoly Act offered the possibility of applying the rule of reason exclusionary clause to anti-monopoly conduct and abuse of market power, regulated in its art. 6. To be exempted from the charge of illegal conduct, a defendant firm had to prove that the practice is "necessary to conduct an economic' activity and does not result in 'significant restriction of competition'[57]. The burden of proof to demonstrate the exclusive circumstances rested with the defendant firm[58]. In the judicial decision of the Antimonopoly Court from the time when the Antimonopoly Act of 1990 was in force we can find relatively many cases of illegal tying. The judicial decisions from that period related to the evaluation of tying were very liberal on the one hand, and on the other they did not give any reasons to say that the economic approach was very extensive. The Court focused rather on verbal analysis, without going into economic details. On the other hand, the cases tried then were not very sophisticated cases of tying. For example, they concerned:

- cases of coercion – the dominant press distributor forced agents of retail points of press sale to buy products other than press offered by him; refusal meant having to pay liquidated damages,
- the dominant undertaking, holding exclusive rights to organize the Dominican Fair in Gdańsk[59], forced restaurant owners who hired room and eating space during the fair, to sell in the outdoor gardens beer from one brewery only, indicated by the organizer;
- the municipal water and sewage company charged 100% higher rates for water and waste disposal from companies, claiming the surplus would be allocated for investment.

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[51] R. Pittman, *Abuse-of-Dominance Provisions of Central and Eastern European Competition Laws: Have Fears of Over-Enforcement Been Borne Out*, World Competition 27(2)2004, p. 245; R. Pittman, *Competition Law in Central and Eastern Europe: Five Years Later*, http://econwpa.wustl.edu:8089/eps/io/papers/0111/0111001.pdf

[52] Act of 24.02.1990 on counteracting monopolist practices and protection of consumer interests, consolidated text, Journal of Laws 52/1999, item 547 (hereinafter: Antimonopoly Act of 1990), as amended; antitrust regulations existed in Poland earlier but they referred only to the practices of state-owned enterprises; cf. an extensive analysis of the evolution of the Polish anti-trust law in Ch. Harding and M. Kepinski, *The Polish Law Against Monopolistic Practices*, Eur. Comp. L. Rev. 5/2001, pp. 181-189.

[53] C. Brzezinski, *Competition and Antitrust Law in Central Europe: Poland, The Czech Republic, Slovakia, And Hungary*, Michigan J. Int'l Law 15/1994, p. 1138.

[54] More on the Antimonopoly Office and its powers in that period: R. W. Mastalir, *Regulation of Competition in the "New" Free Markets in Europe: A Comparative Study of Antitrust Laws in Poland, Hungary, Czech and Slovak Republics, and Their Models*, N.C. J. Int'l Law & Comp. Reg. 19/1993, pp. 75ff.

[55] C. Brzezinski, pp. 1146-1147.

[56] C. Brzezinski, p. 1147; D. E. Reed, *Creating Competitive Market Economies in Poland and Hungary*, Adm. L. Rev. 48/1996, p. 522.

[57] T. Skoczny, *Harmonization of the Competition Law of the EC associated countries seeking for EU membership with the EC competition rules*, http://www.ecsanet.org/conferences /ecsaworld3/skoczny.htm; R. Pitman. referring to M. Sendrowicz, in: *Competition Law…*, pp. 15-16; C. Brzezinski..., p. 1134.

[58] S. Gronowski in OECD report, *Judicial enforcement of Competition Law*, OCDE/GD(97)200, p. 81ff.

[59] The right to organize a traditional fair was granted to the Dominican order by the bulla of Pope Alexander IV in 1260; the fair is held every year in Gdańsk.

In the cases presented above the court based its decisions on the civil and legal analysis of mutual obligations, applying the equivalence test, and noticing contractual rather than economic aspect of tying. The court was inclined to acquit the companies of the charge saying that there was an objective economic need (even if on the part of one party to the agreement only), the service was equivalent (services are proportional, e.g. the company makes justified outlays).

Tying and Poland's accession to the European Union. Another period in the Polish antitrust law started when Poland had to adapt its law to EC competition law. In 2000 the *Competition and Consumer Protection* Act[60] was enacted. By the force of this law specific tasks, including enforcement, were entrusted to the President of Office for Competition and Consumer Protection (OCCP President), who combines the investigative and prosecutional functions with the decision making function (including also with respect to decisions related to e.g. finding illegal practices of firms holding a dominant position). The Court of Competition and Consumer Protection performs adjudicative functions and hears appeals from the decisions of OCCP President. The procedure of conduct is hybrid[61], consisting of elements of administrative and civil procedure before President and modified economic-civil procedure before Court[62]. *Competition and Consumer Protection Act of 2000*, in a manner identical to that in art. 81 and 82 of the Treaty, separates agreements, which have as their object or effect elimination, restriction or any other infringement of competition (art. 5) from individual or collective practices of abusing a dominant position on the relevant market (art. 8)[63]. Both prohibitions mention tying as an exemplary practice, which consists in making conclusion of the agreement subject to acceptance or fulfilment by the other party of another performance having neither substantial nor customary relation with the subject of agreement (art. 5 section 5 and art. 8 section 2 point 4 *Competition and Consumer Protection Act of 2000).* Unlike the Antimonopoly Act of 1990, the new regulation does not extend the prohibition of tying to the rule of reason. Since the implementation of the new act there have not been any decisions on the basis of which some general conclusions could be drawn about the approach to tying.

Polish competition authority before and after the accession to the EU has done great job facing the conditions of accession regarding the implementation of European competition law and approximation of Polish competition law to the EU law. Though the conditions of Polish economy under transition (and it refers to all CEE economies as I strongly believe) are particular and the specific tasks concerning opening particular markets (as for example telecommunications market) occurs[64]. Opening these markets is not merely the job for general competition authority but for the agencies regulating particular sectors of the economy as well[65]. The proposed modernization of article 82 of the Treaty

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[60] Competition and Consumers Protection Act, Official Journal of the Republic of Poland, No 03.86.804, English text available at www.uokik.gov.pl/download/Dz_U_03_86_804tjen.doc

[61] This approach is adopted in Polish doctrine, by reference to the American hybrid procedure concept, cf. Z. Kmieciak, *Postępowanie w sprawach ochrony konkurencji a koncepcja procedury hybrydowej*, Panstwo i Prawo 2/2000, p. 33ff.

[62] S. Gronowski..., p. 31.

[63] More on the harmonization of the law in view of Poland's accession to the European Union, see: T. Skoczny, *Harmonization of the Competition Law…*

[64] Analyzing the cases considered by the OCCP Office and specific tasks of the President of OCCP, R. Pernetta noticed that: T*hese cases illustrate the difficult (and different to EU countries) position of the UOKK. The institution major task is to support the de-monopolisation policy of the government (Article 12). This means that the Office as a state agency had to act mostly against state owned market entities. The many of these cases belong also to the so-called strategic (like telecommunication or energy supply) branches or to those which undergo severe economic crisis (agriculture and steelwork)* See: R. Pernetta, *Adaptation of the Requirements of Acquis Communautaire in the Polish Competition Law*, http://www.hausarbeiten.de/faecher/hausarbeit/juy/7368.html

[65] E.g. the new president of polish authority regulating market for electronic communications (Office of Electronic Communications) strongly introduces the policy of opening telecommunication market for the alternative operators to the monopolistic firm operating in this market – Telekomunikacja Polska SA.; see: http://www.en.uke.gov.pl.

for the economy under transition poses some threats and promises. The fresh look at the article 82 of the EC treaty should not be seen as an obstacle for the CEE economies. What the newly accessed and accessing countries can offer to the EU as I strongly believe is strengthening the vision of vigorous competition emphasized by the current Commission. This vision had already let EEC countries undergo the change from centrally planed to market economy.

The ETS case. In one of the interesting cases regarding tying of OCCP President one is worth analysing because of the topicality of the problem. The two main reasons for that are as follows: 1) the actual situation, which was the basis for the decision, is in a particular sense part of the New Economy problem and, from that point of view, it is universal, 2) the problem has not been solved in a satisfactory manner by the Polish antimonopoly agency[66] (OCCP President's decision was not appealed and will not be heard by the Court). In its decision OCCP President, assuming a purely contractual approach, said that there was no legal basis to charge fees for smart cards in local public transport. OCCP President briefly presented the findings of facts, defined the relevant market, said that there was coercion and that the commune, acting like an undertaking[67], had market power. The case was adjudicated on the basis of arguments, which were rather verbal in nature than economic. Although OCCP President did not explain this clearly, the reason given for that decision was the fact that city transportation is not regulated in statutory regulations[68]. The Polish Transportation Act[69] does not clearly regulate who should charge for the services rendered by city transport operators. These problems require that the extent of subsequent discussion be defined – it will focus on the description of the actual situation and will address the issues, which the Polish competition protection office did not address that make the factual situation of the case interesting. The case in question relates to the introduction of a modern Electronic Ticketing System (ETS)[70] in local transportation system, incorporating smart cards. The commune, which introduced the system, tyied modern media - smart cards (*tied product*) with seasonal tickets (*tying product*)[71]. Making an assumption that the

[66] In this sense OCCP President's decision can be seen also in a broader context as a manifestation of the law and its application lagging behind scientific and technical progress.

[67] Commune acting as an entrepreneur (even in the area of services of general economic interest) may be a subject of antitrust perocedure in Poland; in the case in question the commune organized city transport through its internal unit, in later ETS case a community owned limited liability company, which outsourced card issuing to an outside firm was the subject of antitrust proceedings before OCCP President; the case ended with a consent decision that obliged city operator to take only deposit (not a price) for smart cards (what is promising), based although on this same false premises like the decision under question (what is not...), Consent decision of OCCP President 19.10.2004, No. RPZ 25/2004.

[68] The problem of the regulatory framework of the 'services of general economic interest' or 'services of general interest' (if city transport services are included in that category), which are stipulated in art. 16 and 86(2) of the Treaty, the role of these services in the satisfaction of social needs and the standards of their delivery has been the subject to interventions and initiatives of the Commission, e.g. Services of general interest in Europe COM/2000/0580 final; Green Paper on Services of General Interest, COM/2003/270/final; Market performance of network industries providing services of general interest: a first horizontal assessment, SEC/2001/1998. The problem of services of general economic interest delivery has not been addressed by OCCP President in the case in question. Although the problem is interesting and worth discussing, it goes beyond the scope of this article, in which the present author focuses on the features, which could be applied to network industries not necessarily delivering services of general economic interest, trying to emphasize the universal character of the problem.

[69] Transportation Act of 15.11.1984, Official Journal of the Republic of Poland, 50/2000, item 601 as amended.

[70] In the system under analysis no money but a ticket was stored in the card; the ticket gave right to a number of rides in a given period. Under the Transportation Act, such a ticket is treated as a document confirming conclusion of a transportation agreement. In this sense it is difficult to treat this systems as a system of electronic payment; on US states regulations of electronic stored value payment, see: J. Rinearson, *Regulation of Electronic Stored Value Payment Products Issued by Non-Banks Under State "Money Transmitter" Licensing Laws*, Business Lawyer 58/2002, p. 317ff.

[71] Decision of 27.02.2004 on finding the capital city (commune) of Warsaw guilty of restricting competition, Official Journal of OCCP No 3/2004, item 302 (Polish version available at http://www.uokik.gov.pl)

regulations of the Transportation Act do not allow to charge for smart cards, OCCP President issued a decision, which, in fact, prohibited collection of such charges. In the subsequent part of this article I will discuss the elements, which were considered in the ETS case and those, which should have been considered.

Market definition in the ETS case. OCCP President defined the market in this case as the local market of transportation services, which uses vehicles of the local public transport[72]. Market players, who were considered in the case in question, included: transport operator, which was the transport card issuer, and passengers (buyers of seasonal tickets). There were also distributors of cards and tickets, however problems with access to the distribution system were discussed at another hearing before OCCP President[73]. On the market defined as above there can be also other players – suppliers of applications; their services are offered together with the basic application supplied by the transport operator. In the case in question the only application was the application offered by the city operator. The ticket system, in which OCCP President was interested, can be termed a closed system, in which the transport operator is also the card issuer[74]. In this system it is also possible to outsource card issue (the city transport operator outsources card issue to another entity, which issues them on his behalf). But there are also different open systems, defined as consisting of multiple card issuers and multiple service providers (merchants). Within transport industry, an open system describes a fare payment system in which an outside organization's card is accepted for use within the transit agency[75].

Dominant position in the ETS case. OCCP President had no problem with defining the dominant position[76]. He referred to the Local Self-Government Act of 1990[77], according to which organization of city transport in the commune is the responsibility of the commune (gmina). Holding a dominant position or having market power by city transport operators is fairly common in the world[78]. What is significant for the existence of illegal practice restricting competition is the abuse of the dominant position. In Poland such abuse is defined as illegal abuse of market power by one or a few undertakings, leading to the restriction of the independence of other market players and coerced participation in the market according to the principles that have been imposed, usually less favourable, than would be case if unhindered market mechanisms in the presence of competition were at play.

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[72] Pursuant to Article 4(8) of Competition and Consumer Protection Act of 2000, relevant market shall mean market of products, which by reason of their intended use, price and characteristics, including quality, are regarded by the buyers as substitutes, and are offered on the area in which, by reason of their nature and characteristics, existence of market access barriers, consumer preferences, significant differences in prices and transport costs, the conditions of competition are sufficiently homogeneous.

[73] Decision of 19.09.2003 No RWR – 24/2003 on finding the capital city (commune) of Warsaw guilty of restricting competition by abusing its dominant position on the seasonal ticket distribution market through the restriction of the number of retail sellers of bearer seasonal tickets. Official Journal of OCCP No 1/2004, item 276. (Polish version available at http://www.uokik.gov.pl).

[74] *Multipurpose Fare Media: Developments and Issues*, TCRP Project A – 14, Multisystem Inc. Dove Associates Inc., Mundle Associates, Research Results Digest, 16/1997, p. 15.

[75] *Multipurpose fare Media...*

[76] According to Article 4(9) *Competition and Consumer Protection Act of 2000*, dominant position shall mean position of the company which allows him to prevent the efficient competition on the relevant market thus enabling him to act in a significant degree independently from competitors, contracting parties and consumers; it is assumed that company holds a dominant position where his market share exceeds 40%.

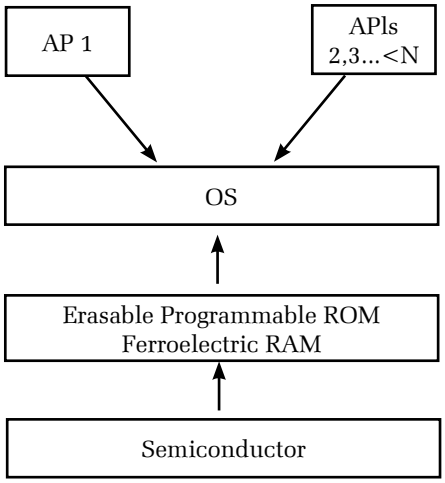
[77] Official Journal of the Republic of Poland 142/2001, item 1591, as amended.

[78] On public transportation see J.M. Rebello, *Automated Ticketing Systems: The State of Art And Case Studies*, LCSFP The World Bank Knowledge Management Project 1999, available at: http://Inweb18.worldbank.org/external/lac/lac.nsf/Sectors/Transport

Coercion in the ETS case. Passenger coercion found by OCCP President took place after the replacement of the old seasonal tickets with a magnetic strip for new smart card tickets. The price of a seasonal ticket was fixed, although dependant on the time over which it was valid. A fixed price was paid for the ticket card. The total price that the consumer had to pay was the sum of the two prices. The price for the smart card was questioned; although what was questioned was not the price itself but the principle according to which it was paid (*tying*). At the same time passengers could not buy tickets separate from the medium (e.g. magnetic cards, paper tickets) – they were coerced to buy both the smart card and the ticket. It should be added that as regards single rides, the ticket system was based on a paper ticket, where no price had to be paid for the paper medium (we can only guess who finally paid costs of printing, distribution, etc.).

Other issues. OCCP President did not address the substantial (e.g. technological) or customary relations with the subject of agreement, stating in principle that such relations do not exist. In the justification of the decision no trace can be found of the discussion of even the simple separate demand product test, although one could argue that because of the lack of the possibility to choose from among other applications the ticket medium did not have its own market as the chip card had no other functionality – it was only used to charge seasonal tickets. In this sense tying satisfied the separate product demand test and one could not speak about illegal tying. There is no reference to the characteristics of the market, innovative character of the project, consumer welfare, and pro-competitive and anti-competitive effects. It seems that real antitrust law problems, if they exist at all, begin where OCCP President did not unfortunately get in his argumentation.

Strong technological relations in ETS. In order to get to the heart of the matter, which makes the case in question universal, we must relate to the technology of chip cards. A chip card is nothing else but a piece of plastic with an embedded pre-defined, limited memory (physical and operational) and an operating system. The card becomes functional when specific applications have been loaded into it (see the figure below). The applications are loaded to smart cards in the form of an electronic signal.



In the case of smart cards, their standard could be a problem, in the context of the technology and interoperability of cards[79]. The selection of credit card manufacturer in a simple model of a closed system, where city cards are offered by city transport operator depends on the operator's preferences.

[79] *Multipurpose Fare Media*…, p. 26.

The problem is important from the technological point of view, if we assume that the system of card readers used to read the applications embedded in the smart cards can read only one standard. The operator's preferences can also take into account safety issues, if, e.g. the operator offers a system of personalized smart cards, which allows to read the ticket in an open system. The problem of choice may also relate to the acceptance of contact and contactless or combined cards[80]. The choice of a specific option could mean exclusion from the market; on the other hand a preference system, which is cannot be fully justified using criteria other than technological advancement.

APIs problem. Let us notice that limited memory in the smart card means, from the economic point of view, limitation as regards transferring specific services – applications (APIs) by means of it. APIs loaded into chip cards can be of different character (e.g. loyalty programs, rights, money). The problem that was encountered in Poland relates to the loading into chip cards of services provided by a dominant firm (one-purpose card). The circumstances of the case did not indicate that the city transport smart card in the Polish case was open for other applications (multi-purpose card), but suppose it was, and dominant firm issued the card with those applications... Considering the American and European Microsoft cases – would that not mean the opening of yet another front of the semiconductor's war? The solution of the problem revealed in the ETS system is not simple because APIs in this situation in fact recreated existing dominance on a particular market of seasoning tickets. Charging for the medium created additional problem of dominance on the market of card issuers. This problem is in some countries solved by creation of legal monopolies in the situation where APIs entitle to use public services. After a couple of decision regarding electronic ticketing systems issued by the OCCP President it seems that the system evolved towards taking only a deposit for the medium (card). Taking a deposit is commonly accepted in the cities around the world that decided to introduce such systems.

Costs and benefits. For the antitrust analysis of electronic payment systems of basic importance are the costs and benefits connected with their introduction. The costs of introducing a new ticket system based on an electronic ticket comprise mainly the following: 1) system design, 2) procurement and installation of fare collection and dispensing equipment, 3) procurement and installation of computer system, 4) installation or modification of communications infrastructure and system, 3) purchase or production of media, 4) day-to-day administration, 5) maintenance and repair, 6) marketing, 7) sales and distribution, 8) revenue accounting, 9) training[81]. System operating costs can include additional services (e.g. personalization connected with personal data collection and data storage allowing for the recovery of the ticket). The existing benefits can be described through the prism of transport operator and consumer. The benefits are most clearly seen if we compare modern ticket systems based on smart cards with traditional systems based on e.g. paper tickets or magnetic cards[82]. In Poland, from the point of view of the passenger's benefits, in case of ETS introduced in a few different cities, it was possible to observe that ETS resulted in shorter queues in front of ticket offices (alternative labour costs), better assurance (possibility to recover a personalized ticket – an alternative insurance cost), comfort of travellers (possibility to load tickets for different bus lines), flexibility (e.g. possibility to flexibly set the start date of ticket validity, return or exchange before the beginning of its validity period), safety (identification of smart card holder in case of e.g. collapsing or traffic accident). Unfortunately, it was not possible to observe other benefits, existing in the form of additional applications as OCCP President's action stopped ETS projects. From the point of view of

[80] *Multipurpose Fare Media...,* p. 23.
[81] *Multipurpose Fare Media...,* p. 29.
[82] J. M. Rebello…

the transport operator, the benefits included tightening the ticket system (notorious counterfeiting of paper tickets), possibilities connected with the introduction of the Intelligent Transport System and telematic solutions (better logistics – smaller fuel consumption), flexible tariffs tailored to passenger needs[83]. The need to assure respect for smart cards is a strong argument in favour of pricing in ETS; this effect can be achieved by fixing a price or a deposit for the card.

Microsoft and the ETS case. A question arises – what makes Microsoft cases and introduction of ticket systems based on smart cards similar and what makes them different? In my opinion the answer can be found first of all in the concept of New Economy. In both cases what is common is the existence of the economies of scale and network effect. In the case of the introduction of ticket systems the need for alternative lower cost options (tokens, tickets, magnetic cards, etc.) is noticed. It is, however, found that given the high unit cost of smart cards it is not efficient to offer smart cards for one-time or occasional users[84]. In the case of smart cards used in city transportation it is the special feature connected with the addition of other functionalities to the system; the more transport or non-transport applications there are, the more useful is the card for the consumer[85]. The situation is similar to the credit-card networks, where benefit from credit card is two-sided: consumer's benefit is related to the number of application issuers that accept them and application issuers benefits from card acceptance are related to the number of cardholders[86]. Unlike the case of applications for Windows, applications for city transport smart cards can be rather made by retail chains, providers of city services, etc. The classification of city transport smart cards as a network good should not give rise to any doubts through the prism of views on credit card networks. The feature, which, in my opinion, makes introduction of smart cards in city transportation different from Microsoft case is market environment. Whoever describes New Economy points out mainly to the rate of innovation. In the case of modern media (smart cards) the services provided by dominant companies are not necessarily tied with the service provided by New Economy Industry, if we take into account the rate of innovation. This situation definitely takes place in Poland. City transport operators use the tricks of the New Economy, operating on the markets on which an easy application of the network effect and economies of scale is possible. Bundling smart cards to tickets meant rather reshaping of the pre-existing services. The situation in the ETS case was therefore different that in Microsoft cases, where the OS was tied to a specific application (Windows Media Player). It is the applications, which made access to specific services conditional, that were the tying good, and not the other way round. The diversity of solutions and actual situations is here a derivative of the possibilities offered by smart cards[87]. Smart cards are an interesting although difficult subject of antitrust analysis. Before they become another antitrust enforcement 'obsession', more attention should be paid to them in the antitrust literature.

Reasons for pragmatic approach in tying practices enforcement.

Polish writer Slawomir Mrozek playing with words asked once how to call a session at Ob river, and answered: Obsession. In the verbal sense we can assign specific meanings to the words "session"

[83] J. M. Rebello...

[84] *Multipurpose Fare Media...*, p. 28.

[85] Cf. A.F. Tieman, W. Bolt, referring to Rochet and Tirole findings, *Pricing Electronic Payment Services An IO approach*, EPA 2003 Annual Conference Paper No. 606, p. 5. available at: http://ssrn.com/abstract=424925.

[86] S. Chakravorti, *Theory of Credit Card Networks: A Survey of the Literature*, Rev. of Network Economics, Vol. 2, Issue 2 – June 2003, p. 55.

[87] Cf. e.g. C.L. Wilson, *Banking on the Net: Extending Bank Regulation to Electronic Money and Beyond*, Creighton L. Rev. 681(1997), p. 681; R. Libera, *The European Healthcard: The Time to Legislate is Now*, Boston College Int'l & Comparative L. Rev., p. 177ff.

"Ob" and "Obsession". The question that is often asked by antitrust bodies is the following: what are the conditions to connect "ob" and "session" in compliance with legal rules? Legal rules in the case of antitrust law are economically based rules. Therefore, only after the *designata* "ob" and "session" and "obsession" are placed in a strong economic context can an answer be given. The inability to investigate the economic context results in the return to their basic meaning. The basic sin of the Polish system of competition protection is (still) the lack of economic approach in legal analysis, which has been postulated by some representatives of jurisprudence for a long time[88]. On the other hand Poland is no exception amongst the European competition law systems, where economic approach (in a way practised in the US) is not widely accepted. There are significant achievements of Polish competition authority, that regard Europeanization of Polish competition law, building institutional capacity of the competition authority and the base of knowledge and experience in dealing with antitrust cases. The economic approach seems to be the future of (not only) Polish antitrust authority. Limitation of economic analysis while investigating antitrust cases means reduction of the costs of antitrust enforcement, on the other hand consequences, which are dangerous to consumers and competition, can appear. Perhaps this is what can explain considerable activity of OCCP President in Poland as regards condemning practices of abusing dominant position[89]. It seems that some revaluation can be expected shortly in connection with Poland's (as well as other newly accessed countries') participation in the European institutional system of competition protection, introduced by regulation 1/2003 of the Council[90]. This, however, means following the European standard of application of art. 81 and 82 of the Treaty[91]. The chances for developing some independent formula for the application of the domestic law to the abuse of the dominant position and tying practices are rather small, considering the existing experience and elimination of the rule of reason clause from the Polish legal order.

E. M. Fox is right claiming that the shape of the competition policy is the derivative of cultural and economic factors, separate for different states and continents[92], although developing globalisation makes antitrust problems universal. Poland, like other European countries, has her own firms (not necessarily of the Microsoft size) holding dominant position or attempting to obtain it on local or regional markets. For some such firms the problem of innovative re-shaping of existing services is vital. This problem can also relate to the rendition of services of general economic interest in Europe under conditions of developing privatization and private-public partnerships. What is typical of the city transportation services market in Poland and in the world is the more and more frequent use of innovative technologies. However, the context of network effect can be applied not only to the modern transportation services market; the features of new economy are more and more often observed, for example, in the case of the biotechnology market. In this context it is important to design a competition policy that takes into account modern economy individual and non-mechanical approach to tying. The modernization of the article 81 of the EC Treaty opening the way for the has already taken place, now there is a time for modernization of the article 82.

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[88] T. Skoczny, *Instrumenty relatywizacji i racjonalizacji zakazów praktyk ograniczających konkurencję*, in: *Granice wolności gospodarczej w systemie społecznej gospodarki rynkowej*, Katowice 2004, p. 247ff.

[89] R. Pittman, *Abuse – of – Dominance…*, p. 61.

[90] Council Regulation No. 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 OJ L1/1, from 1 May 2004, which replaces Council Regulation No. 17 of 6 Feb. 1962, 1967 OJ 13/2004; on regulation 1/2003 and its application in CEE countries, see: F. Emmert, *Introducing EU Competition Law And Policy in Central and Eastern Europe: Requirements in Theory and Problems in Practice*, Fordham Int'l L.J. 27/2003, pp. 654ff.

[91] The 'effect on trade concept' is of fundamental importance to the application of art. 81 and 82 of the Treaty, which in specific cases can cause significant difficulties. The Commission explains its position on that in: Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, (2004/C 101/07), OJ of EC of 27.2.2004, C 101/81.

[92] E.M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, NY Univ. L. Rev. Vol. 75 Dec. 2000, s. 1793.

Summary

Tying practices are common not only among firms having market power but also among firms holding market power. The case of tying on the market of public transport operators described above indicates that tying could generate significant consumer welfare. European antitrust bodies should be aware of far reaching consequences of their decisions. In particular, this means cautionary application of antitrust law in the case of new economy industries or such firms that use new economy tools in reshaping existing services. This means that it is necessary to go away from the mechanical and instrumental approach to the interpretation of the provisions of the Treaty and to the formulation of the aims of the European competition policy. As regards interpretation of art. 82(1)d of the Treaty, the developing doctrine of objective justification and adaptation of the proportionality principle are the elements, which indicate the flexible approach. As regards competition policy, development of a more economic approach to tying practices, announced by the European Commission, is an open issue. However, it means that Europe has not lived through her "moment of astonishment" in the same sense as was the case in the American antitrust doctrine and the decision of the Court of Appeals. The current Commission as I believe is eager to live it through.

Both as regards the law and competition policy, we must be aware of the extensive opportunities for tying practices in innovative companies. Microsoft case and the possibility of broad referring to New Economy issues have not been completed yet and we should hope that Posner's: '*Caution'* is given serious treatment by the European courts. This caution should also lead to the modernization of article 82 of the Treaty as proposed by the Commission responding to the problems of globalization and the New Economy.