



# Pros and Cons of Counterfactuals in Unilateral Conduct Cases

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# Counterfactuals - an economic concept?

**Counterfactual (CF) used in other academic fields**

- **History - to assess the impact of historic decisions/events**

**Used in Economics beyond Antitrust:**

- **e.g. Policy Impact Analysis**
  - **“The Actual” scenario (aka “The Benchmark”, “As-Is”)**
  - **(several) CF scenarios (aka “What-If, or “But-for”)** - to evaluate various policy options
- **Antitrust - a natural field for CF**

# Areas of applicability

## Non-controversial:

- merger control
- Art.101 infringements “by effect”
- Art.101(3) exemptions
- designing remedies (all types of infringement)
- damages estimation
- ex-post evaluation of interventions

## Controversial - Unilateral conduct:

“arguably, a no go area” (Veljanovski 2010) vs  
“arguably, identifying a CF is more  
straightforward” (Colley & Marsden 2010)

# CFs in art.102 cases - controversies

**1. In theory, the Commission endorses the use of CF in art. 102 cases**

**But this is not reflected in decisional practice e.g. Telekomunikacja Polska case (Geradin & Girgenson 2011)**

**2. Effects-based approach is gaining popularity**

**But hybrid approach, a mixture of form-based and effects-based approach, prevails (de la Mano)**

**3. “Bright-line” tests (e.g. as-efficient competitor test) not fully compatible with CF approach (they are benchmarks, not full CF scenarios)**

## Small(er) agency perspective

**Resource -constrained agencies (e.g. UOKiK) tend to rely more on form-based approach and standard “bright-line” tests in decisional practice**

- **simpler tools work in court, why spend resources on CF analysis;**
- **we don't want to start the escalation of economic analysis, we cannot beat the other side on that**
- **one exception - recent collective dominance case (pending) where a tailor-made CF was articulated in the Statement of Objections/notification of antitrust proceeding**

## Small(er) agency perspective

However, we do use CF approach in enforcement practice

- relevant market delineation - hypothetical monopolist test is in fact a CF exercise (Colley & Marsden 2010)
- case selection/prioritization - helping case handlers with “They say they have to do it this way” or “They say this is a common business practice” arguments;
- simple analysis, more qualitative/theoretic than quantitative
- example: PGNiG exclusive dealing case - does the upstream take-or-pay contract with Gazprom justify exclusive arrangements with end customers?  
How would PGNiG’s incentives to compete downstream and bargaining power vs. Gazprom be affected if conduct is ceased? - analyzed, but not mentioned in the SoO

## Concluding remarks

1. Agencies cannot do away with CF analysis in complex unilateral conduct cases, where tailor-made theories of harm are constructed;
2. Agencies can (should?) do away with CF analysis in “standard” cases, such as predatory pricing, margin squeeze or refusal to deal, where simpler tools seem to work fine;
3. Agencies should integrate CF analysis into enforcement practice, in decision practice only where necessary