

ISSN 1689-9024

YEARBOOK
of ANTITRUST
and REGULATORY
STUDIES

Vol. 2012, 5(6)



CENTRE FOR ANTITRUST AND REGULATORY STUDIES University of Warsaw

EDITORIAL BOARD

- Prof. **Tadeusz Skoczny** – Editor-in-Chief, CARS Director
Dr. **Agata Jurkowska-Gomułka** – Section Editor (Antitrust), CARS Scientific Secretary
Prof. **Krzysztof Klincewicz** – Section Editor (Management v. Regulation),
University of Warsaw, Faculty of Management
Ewelina D. Sage, Ph.D. (OXON) – Section Editor (Audiovisual Services),
CARS International Coordinator
Prof. **Andrzej Szablewski** – Section Editor (Energy & Telecommunications),
Technical University in Łódź
Dr. **Tomasz Zalega** – Editor (Economics of Antitrust & Regulation),
University of Warsaw, Faculty of Management

SCIENTIFIC BOARD

- Prof. **Anna Fornalczyk**, Chairwoman – Technical University of Łódź;
former President of the Antimonopoly Office
Prof. **Stanisław Piątek**, Vice-Chairman – University of Warsaw, Faculty of Management
Prof. **Eleanor Fox** – New York University, School of Law
Prof. **Katrina Kolesná** – Comenius University in Bratislava, Faculty of Law
Prof. **Janusz Lewandowski** – Warsaw University of Technology,
Institute of Heat Engineering
Prof. **Johannes Masing** – University of Freiburg; judge at the Federal Constitutional
Court in Karlsruhe
Prof. **Alojzy Z. Nowak** – Dean of the Faculty of Management of the University of Warsaw
Prof. **Gheorghe Oprea** – Polytechnic University of Bucharest, Romania
Prof. **Jasminka Pecotić Kaufman** – University of Zagreb,
Faculty of Economics and Business, Department of Law
Prof. **Franz Jürgen Säcker** – Free University of Berlin, Institute for German
and European Business, Competition and Regulation Law
Prof. **Stanisław Sołtysiński** – Sołtysiński Kawecki & Szlezak LPP
Prof. **Andrzej Sopoćko** – University of Warsaw, Faculty of Management;
former President of the Competition and Consumer Protection Office
Prof. **Rimantas Stanikunas** – Vilnius University, Faculty of Economics;
former Chairman of the Competition Council of the Republic of Lithuania
Prof. **Luboš Tichý** – Charles University, Prague, Faculty of Law
Prof. **Tihamér Tóth** – Pázmány Catholic University in Budapest
Prof. **Richard Whish** – University of London, Kings College
Prof. **Marek Wierzbowski** – University of Warsaw, Faculty of Law and Administration;
attorney-in-law
Prof. **Irena Wiszniewska-Białecka** – judge of the General Court of the European Union
Prof. **Anna Zielińska-Głębocka** – University of Gdańsk, Faculty of Economics;
member of the Monetary Policy Council

EDITORIAL OFFICE

Centre for Antitrust and Regulatory Studies (CARS)
University of Warsaw, Faculty of Management
PL – 02-678 Warszawa, 1/3 Szturmowa St.
Tel. + 48 22 55 34 126; Fax. + 48 22 55 34 001
e-mail: cars@mail.wz.uw.edu.pl
www.cars.wz.uw.edu.pl; www.yars.wz.uw.edu.pl

YEARBOOK
of ANTITRUST
and REGULATORY
STUDIES

Guest volume editor:

KRYSTYNA KOWALIK-BAŃCZYK

Vol. 2012, 5(6)



CENTRE FOR ANTITRUST AND REGULATORY STUDIES University of Warsaw



**Centre for Antitrust and Regulatory Studies
University of Warsaw, Faculty of Management**

Fourteenth Publication of the Publishing Programme

Copyright by Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu
Warszawskiego, Warszawa 2012

Volume supported by the Foundation for Polish Science
under the project Pomost/Powroty/2010-1/1/ NQC



Fundacja na rzecz
Nauki Polskiej

Language editor: James Hartzell

Statistic editor: Prof. Jerzy Wierziński

Cover: Dariusz Kondefefer

ISSN 1689-9024

PUBLISHER



University of Warsaw
Faculty of Management Press
PL – 02-678 Warsaw, 1/3 Szturmowa St.
Tel. (+48-22) 55-34-164
e-mail: jjagodzinski@mail.wz.uw.edu.pl
www.wz.uw.edu.pl

LAYOUT



ELIPSA Publishing House
PL – 00-189 Warszawa, 15/198 Inflancka St.
Tel./Fax (+48-22) 635-03-01; (+48-22) 635-17-85
E-mail: elipsa@elipsa.pl; www.elipsa.pl

**YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
VOL. 2012, 5(6)**

Contents

Editorial foreword	5
List of acronyms	7
 ARTICLES	
MAŁGORZATA KRÓL-BOGOMILSKA, Standards of Entrepreneur Rights in Competition Proceedings a Matter of Administrative or Criminal Law?..	9
ANNA BŁACHNIO-PARZYCH, The Nature of Responsibility of an Undertaking in Antitrust Proceedings and the Concept of ‘Criminal Charge’ in the Jurisprudence of the European Court of Human Rights	
ALEKSANDER STAWICKI, Competence of Common Courts in Poland in Competition Matters	
RAFAL STANKIEWICZ, The Scope of Application of the Provisions of the Administrative Procedure Code in Competition Enforcement Proceedings.....	
MACIEJ BERNATT, Can the Right To Be Heard Be Respected without Access to Information about the Proceedings? Deficiencies of National Competition Procedure	
PRZEMYSŁAW ROSIAK, The <i>ne bis in idem</i> Principle in Proceedings Related to Anti-Competitive Agreements in EU Competition Law	
MATEUSZ BŁACHUCKI, SONIA JÓŹWIAK, Exchange of Information and Evidence between Competition Authorities and Entrepreneurs’ Rights...	
INGA KAWKA, Rights of an Undertaking in Proceedings Regarding Commitment Decisions under Article 9 of Regulation No. 1/2003	

- BARTOSZ TURNO, AGATA ZAWŁOCKA-TURNO, Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?.....
- KRYSZYNA KOWALIK-BAŃCZYK, Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings.....
- MARIUSZ BARAN, ADAM DONIEC, EU Courts' Jurisdiction over and Review of Decisions Imposing Fines in EU Competition Law
- JAN SZCZODROWSKI, Standard of Judicial Review of Merger Decisions Concerning Oligopolistic Markets.....

CASE COMMENTS

- Concurrence of wills – a necessary ingredient of an agreement restricting competition.
Case comment to the judgment of Court of Competition and Consumer Protection of 8 February 2011 – *ZST Gamrat S.A. v President of the Office of Competition and Consumer Protection* (Ref. No. XVII Ama 16/10) Commented by MONIKA A. GÓRSKA
- The *EMPiK* and *Merlin* concentration prohibition: Would the European Commission reach a similar verdict?
Case comment to the decisions of the President of the Office of Competition and Consumer Protection of 4 November 2010 *Polska Telefonía Cyfrowa Sp. z o.o.* (DOK-9/2010) and of 24 February 2011 *Polkomtel SA* (DOK-1/2011)
Commented by MATEUSZ RADOMYSKI.....

BOOKS REVIEWS

- Maciej Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [*Procedural fairness in the proceedings before the competition authority*], Wydawnictwo Naukowe Wydziału Zarządzania, Warszawa 2011, 373 p.
Reviewed by MAREK K. KOLASIŃSKI

BIBLIOGRAPHY 2010

Compiled by MACIEJ BERNATT, AGATA JURKOWSKA-GOMUŁKA

Editorial foreword

The Editorial Board is pleased to present the sixth volume of the **Yearbook of Antitrust and Regulatory Studies** 2012, 5(6). This year two volumes of YARS are issued: the current volume concerning the rights of undertakings in both Polish and EU antitrust proceedings, and a 'regular' volume (YARS 2012, 6(7)).

This volume (YARS 2012 5 (6)) focuses on issues concerning the rights of undertakings at different stages of antitrust proceedings, looking at the issues from both the Polish and European perspectives. The European perspective covers the issues connected with fair proceedings in the meaning of the European Convention on Human Rights and Fundamental Freedoms (ECHR), as well as a broad selection of topics relating to the European Union law. The first two articles deal with the fundamental question of the nature of the antitrust proceedings. Professor Małgorzata Król-Bogomilska analyses the standards of entrepreneurs' rights in competition proceedings from this very perspective, trying also to answer the question whether the Polish antitrust proceedings should be perceived as a matter of administrative or criminal law. Anna Błachnio-Parzych more specifically deals with the notion of "Criminal Charge" in the jurisprudence of the European Court of Human Rights, also in the context of the Polish antitrust proceedings, coming to the conclusion that some of the antitrust charges under Polish law can be perceived as criminal ones. Aleksander Stawicki presents the Polish system of judicial review of decisions issued by the Polish national competition agency (UOKiK President). These decisions are reviewed in the regular courts and in theory they exercise full jurisdiction. The author critically assesses the present practice of using the existing competences in a narrow way. Further on, Rafał Stankiewicz presents the scope of application of the provisions of the Polish Administrative Procedure Code in antimonopoly proceedings, highlighting the specificity of the Polish antitrust proceedings held in front of the UOKiK President as a particular administrative proceeding. Next Maciej Bernatt assesses the scope of entrepreneurs' access to information during and about the Polish antitrust proceedings, concluding that in its present shape it does not guarantee in full the right to be heard.

Przemysław Rosiak's article opens the part of this volume that deals more broadly with the European Union issues, albeit not abandoning the Polish perspective. He analyses the *ne bis in idem* principle in proceedings related to anti-competitive agreements in EU Competition Law, fully exposing its implications for Polish undertakings. Mateusz Błachucki and Sonia Józwiak present the practice and consequences of the exchange of information and evidence between competition authorities. This 'free movement of evidence' can have far-reaching consequences for the undertakings concerned. Next Inga Kawka analyses the rights of an undertaking that participates in the proceedings for the issuance of a commitment decision under Article 9 of Regulation 1/2003. The author critically assesses the existing practice and questions whether it should constitute a model for the Polish solutions. Bartosz Turno and Agata Zawłocka-Turno raise the important problem of the scope of the legal professional privilege (LPP) and the privilege against self-incrimination (PASI) in EU Competition Law in light of the coming into force of the Lisbon Treaty. The authors consider the existing jurisprudence as insufficient and present several arguments for reform. Krystyna Kowalik-Bańczyk analyses the principle of the EU Member States' procedural autonomy in antitrust proceedings in light of the existing jurisprudence of the European Court of Justice concerning the rights of defence. In particular she analyses the obligation to apply this jurisprudential *acquis* in national antitrust proceedings. Mariusz Baran and Adam Doniec analyze the EU courts' jurisdiction for reviewing decisions imposing fines in EU Competition Law. *Last but not least* Jan Szczodrowski analyses the standard of judicial review of merger decisions concerning oligopolistic markets, pointing out some important analogies and comparisons between the EU and Polish practice.

Aside from this very rich selection of research papers, the current volume of YARS also contains two commentaries concerning key decision in Polish jurisprudence, and a review of Maciej Bernatt's book on procedural justice in Polish antitrust proceedings. They add to the general picture stemming from this issue, i.e. that the Polish antitrust procedures might be in need of some improvement as far as European standards are concerned.

The Editorial Board hopes that this issue of YARS will aid the reader in understanding the mechanisms for protection of undertaking's rights, both in Polish and EU antitrust proceedings.

Warsaw, March 2012

Krystyna Kowalik-Bańczyk
Guest volume editor

List of acronyms

POLISH COMPETITION AND REGULATORY AUTHORITIES:

- UOKiK**
(*Urząd Ochrony Konkurencji i Konsumentów*) – Office for Competition and Consumer Protection
- SOKiK**
(*Sąd Ochrony Konkurencji i Konsumentów*) – Court of Competition and Consumer Protection
- UKE**
(*Urząd Komunikacji Elektronicznej*) – Office of Electronic Communications
- URE**
(*Urząd Regulacji Energetyki*) – Energy Regulatory Office
- UTK**
(*Urząd Transportu Kolejowego*) – Rail Transport Office

OTHER INSTITUTIONS:

- CFI** – Court of First Instance
- ECJ** – European Court of Justice
- ECtHR** – European Court of Human Rights
- NCA** – National Competition Authority
- GC** – General Court

LEGAL ACTS:

- CFR** – Charter of Fundamental Rights of the European Union
- Competition Act** – Polish Competition and Consumers Protection Act of 2007

ECHR	– European Convention for the Protection of Human Rights and Fundamental Freedoms
KC (<i>Kodeks Cywilny</i>)	– Polish Civil Code
KPA (<i>Kodeks Postępowania Administracyjnego</i>)	– Polish Administrative Procedure Code
KPC (<i>Kodeks Postępowania Cywilnego</i>)	– Polish Code of Civil Procedures
KPK (<i>Kodeks Postępowania Karnego</i>)	– Polish Code of Criminal Procedure
PT	– Polish Telecommunications Law of 2004
TEC	– Treaty on European Communities
TEU	– Treaty on the European Union
TFEU	– Treaty on the Functioning of the European Union
OTHER ACRONYMS:	
LPP	– legal professional privilege
PASI	– privilege against self-incrimination

A R T I C L E S

Standards of Entrepreneur Rights in Competition Proceedings – a Matter of Administrative or Criminal Law?

by

Małgorzata Król-Bogomilska*

CONTENTS

- I. Introduction
- II. The complex nature of competition cases – assessment criteria
- III. Dispute over the criminal nature of competition proceedings and fines
 - 1. Nature of fines in the light of the Council regulations
 - 2. Practical orientation of the debate
 - 3. The scientific, jurisprudential aspect of the dispute
 - 4. Position of the Supreme Court of the Republic of Poland in the *TP SA* case – judgment of 14 April 2010, ref. no. III SK 1/10
- IV. A dispute over classification or over standards?
 - 1. The controversy persists, while fines have been growing
 - 2. Different paths lead to one end
 - 3. New rules of judicial cooperation in criminal matters
- V. Conclusions

Abstract

The question of standards of entrepreneur rights in competition proceedings has been for many years considered as one of the most controversial issues. Its importance has been increasing considering that the application of antitrust regulations is often concomitant with a wide-ranging interference with the freedom of economic activity. This interference manifests itself in cases concerning both restrictive practices and the control of concentrations. Valuable source of inspiration for a debate on the need to take into account numerous standards of rights in competition proceedings

* Prof. Małgorzata Król-Bogomilska, Ph.D. Professor at the Faculty of Law and Administration of the University of Warsaw and at the Institute of Law Studies of the Polish Academy of Sciences; Head of the Department of Competition Law at the Institute of Law Studies of the Polish Academy of Sciences. This article is based on a conference paper.

was the dispute over the nature of competition proceedings and fines (the controversy around ‘a criminal law nature’ of competition cases). The jurisprudence of Strasbourg judiciaries explicitly stresses that in the assessment of a case nature due consideration should rather not be given to formal classifications set forth in legal provisions but to the real nature of the case. The ECJ did not share the assumptions adopted by the European Court of Human Rights on the legitimacy of a wide interpretation of the “criminal charge” notion within the meaning of Article 6(1) ECHR. In the present EU jurisprudence on competition law, there have been more and more judgments which deal with standards of rights stemming from the ECHR. In the context of an ever growing severity of penalties, the guarantee function of law has been gaining in importance, and hence the standards to be respected in competition proceedings are of a bigger weight.

Major changes were brought by the entry into force, on 1 December 2009, of the Treaty of Lisbon. The implementation of the concept aiming at an even stronger reinforcement of the position of fundamental rights was sealed by granting the EU Charter of Fundamental Rights of 2000 the binding force by including this Charter into the EU primary law and by defining the basis for the EU accession to the ECHR (Article 6 TEU). The introduction of new rules of judicial cooperation in criminal matters may contribute in future to a better dynamic of the criminalization of the most serious violations of competition law in the EU Member States (Article 83 and following of the TFEU).

Résumé

La problématique des standards en matière de droits des entrepreneurs dans les affaires de concurrence est considérée comme particulièrement controversée depuis des années. Son importance s’accroît en raison du fait que l’application du droit de la concurrence entraîne souvent une ingérence fort poussée dans la liberté d’exercer une activité économique. Celle-ci relève tant des actions concernant les pratiques restreignant la concurrence que le contrôle des concentrations.

Le débat sur la nature des affaires de concurrence et les amendes (querelle regardant la nature criminelle des affaires de concurrence) a été une inspiration importante pour la discussion concernant la nécessité de prendre en considération plusieurs standards des droits dans les procédures de concurrence. Dans la jurisprudence des autorités de Strasbourg, pour évaluer le caractère des affaires, l’accent est sensiblement mis moins sur la classification formelle faite en vertu de textes juridiques que sur la nature réelle de ces affaires. La Cour de Justice ne partage pas la thèse de la Cour européenne des droits de l’homme au sujet du bien fondé d’une interprétation large de la notion d’ « accusation criminelle » au sens de l’art. 6(1) de la Convention européenne des droits de l’homme. La jurisprudence communautaire actuelle en matière de droit de la concurrence voit pourtant s’accroître le nombre d’arrêts qui abordent la question des standards des droits découlant de la Convention européenne des droits de l’homme. La nécessité de garantir les droits fondamentaux est accentuée en particulier en raison de la nature répressive des sanctions appliquées en vertu de la législation communautaire.

L'entrée en vigueur du traité de Lisbonne, le 1^{er} décembre 2009, apportait un changement capital. Celui-ci était lié notamment à la réalisation d'une conception visant à renforcer définitivement la position des droits fondamentaux dans l'Union européenne. La force obligatoire octroyée à la Charte des droits fondamentaux de l'UE de 2000 et son intégration dans le droit primaire de l'UE, ainsi que la définition des fondements de l'adhésion de l'UE à la Convention européenne des droits de l'homme (art. 6 du Traité sur le fonctionnement de l'UE) réalisent cette conception. Puis, la mise en place de principes nouveaux de collaboration dans les affaires pénales peut contribuer à dynamiser à l'avenir le processus de criminalisation des infractions les plus graves au droit de la concurrence dans les Etats membres (art. 83 et suiv. du traité sur le fonctionnement de l'UE).

Classifications and key words: standards of entrepreneur rights; competition proceedings; administrative law; criminal law; fines; judicial cooperation in criminal matters; the criminalisation; hard core cartels.

I. Introduction

The standards of **entrepreneur rights in competition proceedings** has been considered for many years as one of the most **controversial** issues in competition law. Its importance has increased in recent years, taking into account that the application of antitrust regulations is often concomitant with a wide-ranging interference into **the freedom of economic activity**. This interference manifests itself in cases concerning both **restrictive practices** and **control of concentrations**.

The impact of this issue manifests itself in particular by the types of sanctions imposed on entrepreneurs for certain breaches of competition law. In competition proceedings, one may distinguish **three types of sanctions**, which will be discussed in this paper:

- administrative law sanctions,
- civil law sanctions, and
- penal sanctions.

For reasons which will become clear, a major part of the discussion should be focused on penal sanctions. At the same time, in an era when both the number and the value of **penalties** applied in cases of breaches of antitrust law have been increasing, much more significance should be given to those standards of entrepreneur rights which fulfil the legal function of a **guarantee**. It is also of primary importance to ensure the full transparency of the legal process, which needs to make clear the legal basis upon which sanctions are imposed, the method of fixing of their amount, and the definition of rules under which such sanctions are imposed.

The issue concerning the types of standards of entrepreneur rights to be observed in antitrust proceedings should be discussed taking into account **each of the abovementioned types of sanctions**. In fact all three types result in, as has already been said, a wide-ranging interference into the freedom of economic activity.

Considering the above, this issue should be addressed using a specific sequence of scientific methodological inquiry. In the first instance, the discussion should focus on the nature of competition proceedings and their **implications for the definition of the relevant entrepreneur rights**. This phase of inquiry forms the topic of this article.

To start with, it is worthwhile to overview the catalogue of rights which may be used in respect of such entities as **entrepreneurs**, and then to review the catalogue of rights which may and should be applicable in **competition cases**. The discussion concerning the latter should be pursued taking into account the particular specificity of:

- infringements, and
- sanctions.

In the first instance, an analysis needs to be made from the perspective of the definiteness of the infringement. In this respect, the fundamental question to be discussed is whether the use of an open catalogue of restrictive practices in competition law allows for the application of penal sanctions on similar grounds as administrative sanctions. Therefore, the question is whether it is possible to apply penal sanctions for ‘unnamed’ practices, and even more so to practices not recognized by previous antitrust jurisprudence as illegal, or whether the principle of *nullum crimen sine lege* should be used, as in criminal law.

II. The complex nature of competition cases – assessment criteria

In order to define the notion of a ‘competition case’, one needs to identify:

- the object of such case, as well as the types of substantive law norms used as a basis for resolution (concerning both infringements and sanctions);
- the nature of the body with the competence to resolve the case, and the process for appealing from decisions of such body;
- the types of procedures applicable during the relevant proceedings.

In competition proceedings the decisions are taken under competition law, i.e. a set of legal provisions which aim to protect competition on the market against any infringement leading to its restriction and/or causing prejudice to the interests of entrepreneurs and consumers. Competition law is a part

of public administrative law. Competition cases concern either restrictive practices or breaches connected with the concentration of undertakings.

Among the sanctions provided for by the Polish Act of 16 February 2007 on Competition and Consumer Protection¹ (hereafter, the Act) we may list the following:

- **purely administrative sanctions:** (e.g. an order to refrain from a restrictive practice or prohibiting the implementation of an anti-competitive concentration);
- **civil law sanctions** (e.g. the nullity of a legal action which constitutes abuse of dominant position), and
- **penal sanctions** (financial penalties imposed, e.g., for restrictive practices or for concentrations made without the consent of the President of the Office of Competition and Consumer Protection (the Polish national competition authority)).

Competition cases in Poland are conducted by the President of the Office of Competition and Consumer Protection (hereafter, the UOKiK President, retaining use of the Polish acronym). The UOKiK is a central body of government administration appointed by the President of the Council of Ministers. Any appeals from or complaints concerning decisions of the President of the UOKiK are heard by a common pleas court (Regional Court – Court of Competition and Consumer Protection, acting as a court of first instance). Appeals from the rulings of this Court are examined by the Court of Appeals in Warsaw, and relevant cassation appeals by the Supreme Court.

The complex nature of any competition case manifests itself in the hybrid nature of procedural rules and Codes applicable to the procedures used in cases before the President of the UOKiK, i.e.:

- **administrative procedure** – set forth in the Act on Competition and Consumer Protection, and in all matters not covered by the Act, defined by the provisions of the Code of Administrative Procedure;
- **civil procedure** in questions pertaining to evidence, as set forth in the Code of Civil Procedure (hereafter, KPC),
- **criminal procedure** applies to searches (also sometimes called inspections), as defined in the Act on Competition and Consumer Protection, and in all matters not covered by the Act, by the provisions of the Code of Criminal Procedure.

In judicial proceedings initiated by appeal from a decision of the President of UOKiK, cases are settled under the rules of civil procedure, which may lead to the presumption that such litigations are qualified as civil cases. Indeed they are formally defined as civil cases; considered as civil litigations because

¹ Journal of Laws 2007 No. 50, item 331, as amended.

they are heard under the KPC provisions. However, competition cases are also defined as *sensu largo* ‘economic cases,’ which may be examined under separate procedures². This legal state of affairs will be binding only until 3 May 2012³.

III. Dispute over the criminal nature of competition proceedings and fines

1. Nature of fines in the light of the Council regulations

The controversy around the nature of competition proceedings and the fines imposed for infringements of competition law has persisted for several decades, despite the fact that, since the very beginning, this issue was seemingly resolved in two Council regulations: Regulation no. 17/62 implementing Articles 81 and 82 of the EC Treaty⁴, and Regulation no. 4064/89 on the control of concentration between undertakings⁵. Both regulations stated that these decisions ‘shall not be of a criminal law nature’.

The debate, which continues despite the aforementioned resolutions, points to the fact that the question of fines was defined in the abovementioned Council regulations only formally, and that this does not exclude reflections on their real nature⁶. It has been emphasized that such an approach was taken with the aim of avoiding any problems of a constitutional nature which

² See here: T. Ereciński, [in:] T. Ereciński, J. Gudowski, M. Jędrzejewska, *Komentarz do kodeksu postępowania cywilnego. Część pierwsza. Postępowanie rozpoznawcze*, vol. I, Warszawa 2004, p. 1052; M. Szydło, Ł. Błaszczak, ‘Sprawa antymonopolowa jako przykład sprawy administracyjnej oraz sprawy gospodarczej’ (2005) 7-8 *Przegląd Sądowy* 138 and following.

³ Article 479¹ § 1 of the KPC provides that the provisions of Section IVa ‘Proceedings in economic cases’ shall be applicable for ‘cases in civil law relations between entrepreneurs pertaining to their economic activity (economic cases)’. The provisions of § 2, point 3 of this Article complement the definition of economic cases and set forth that ‘Within the meaning of this Section, shall also be considered economic cases, those: (...) which belong to the competence of courts under competition protection legislation (...)’. This legal state of affairs shall be binding until 3 May 2012, i.e. until the entry into force of the Act of 6 September 2011 amending the Act on the Code of Civil Procedure and some other acts (*Journal of Laws* 2011 No. 233, item 1381), which will annul separate proceedings for economic cases and, thus, the competition protection cases shall be subject to applicable civil proceedings rules.

⁴ OJ [1962] L3/2004, as amended.

⁵ OJ [1969] L 395/1, as amended.

⁶ See W.P.J. Wils, ‘La Compatibilité de Procédures Communautaires en Matière de Concurrence avec la Convention Européenne des Droits de l’Homme’ (1996) 3-4 *Cahiers du Droit Européen* 333-334.

might have resulted from recognition of the Commission's powers in 'criminal jurisdiction'.

The debate continues today, after the replacement on 1 May 2004 of the above-cited regulations with new Council regulations which contain analogical provisions stating that decisions which impose fines thereunder shall not be of a criminal law nature. Such an approach is adopted in Article 23(3) of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty⁷ and in Article 14(4) of Regulation 139/2004 on the control of concentrations between undertakings⁸.

2. Practical orientation of the debate

Action for infringement of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms

In the jurisprudence, the controversy surrounding the 'criminal law nature' of competition cases emerged in the 1980s. At that stage, the dispute was predominantly **practically oriented**.

The position asserting the criminal law nature of competition cases and assigning a criminal character to fines and procedures applicable in such proceedings was claimed by undertakings in their actions against the decisions of the Commission raised in proceedings before the Court of Justice of the European Union (hereafter, 'the ECJ'), and later on before the Court of First Instance⁹ (hereafter, 'the CFI'). This particularly intense stage of the debate was one of the main topics described in this author's monograph on the penalties in competition law, published in 2001¹⁰.

The essential line of defence adopted by undertakings against the European Commission's decisions imposing fines rested on the assumption that any case in which a fine is imposed by the Commission is in fact of a criminal nature. It was also pointed out that despite the 'criminal nature' of such a case, the liability is decided on by **the Commission**, which is **not a judicial authority**.

⁷ OJ [2003] L 1/1, as amended.

⁸ OJ [2004] L 24/1.

⁹ Created in 1988 (today known as the General Court).

¹⁰ M. Król-Bogomilska, *Kary pieniężne w prawie antymonopolowym: w ustawie o ochronie konkurencji i konsumentów, w europejskim prawie wspólnotowym*, Warszawa 2001, p. 184 and following. In the Polish literature, the topic of the nature of antitrust cases and the legal consequences of their definition is also discussed in the works of K. Kowalik-Bańczyk, *Problematyka ochrony praw podstawowych w unijnych postępowaniach w sprawach z zakresu ochrony konkurencji*, vol. 39, Centrum Europejskie Natolin, 2010, p. 24 and following; and of M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, p. 64 and following.

For the undertakings upon whom fines were imposed, this assumption was the basis for the claim that the fines constituted a **violation by the Commission of Article 6(1)** of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, the ECHR). According to Article 6(1) ECHR: ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.

As stated above, the action for infringement of Article 6 ECHR raised by undertakings against the decisions of the Commission was based on the allegation that ‘the Commission is not a judicial authority’ within the meaning of Article 6. In cases in which fines were imposed, the claim of infringement of Article 6 ECHR rested on the ‘criminal law nature’ of the case.

Actions for infringement of Article 6 ECHR were also lodged in cases in which the Commission solely ordered an undertaking to withdraw from an agreement (e.g. in *Fedetab* case). In this respect, the position supporting the application of Article 6 ECHR rested on the underlying civil law nature of the case¹¹. The Court of Justice shared the opinion that the Commission could not be considered as a judicial authority within the meaning of Article 6 ECHR (as in *Fedetab* and in *Pioneer* cases). However, it concluded that such an argument was irrelevant, as the Commission was bound to respect the procedural guarantees provided for by Community law¹².

Valuable inspirations

The jurisprudence of the Strasbourg courts (the Commission of Human Rights and the European Court of Human Rights; hereafter, the ECtHR) provided a major inspiration for undertakings’ appeals of Commission decisions before EU courts, by stressing the criminal law nature of competition cases. However, ECtHR’s broad interpretation of the notion of ‘criminal charge’ as used in Article 6 ECHR (also covering some administrative law cases) has until now appeared solely in cases concerning proceedings at the national level. Considering that neither the European Communities nor the

¹¹ The civil law nature of such cases is discussed in the context of exemptions granted under Article 81(3) [previous article 85(3)] of the Treaty and under the control of concentrations. D. Waelbroeck, D. Fosselard, ‘Should the decision-making power in EC antitrust procedures be left to an independent judge? – The impact of the European Convention of Human Rights on EC Antitrust procedures’ (1994) 14 *Yearbook of European Law* 114–115. See D. Waelbroeck, D. Fosselard, ‘Should the decision-making power...’, pp. 114–115. See also W.P.J. Wils, ‘La Compatibilité...’, p. 335.

¹² D. Waelbroeck, D. Fosselard, ‘Should the decision-making power...’, pp. 114–115. See also W.P.J. Wils, ‘La Compatibilité...’, p. 339.

EU as such have yet been party to such a case before the ECtHR, the ECtHR cannot be said to have examined directly the question of the conformity of the Community (EU) procedures with the ECHR¹³.

Cases concerning Community procedures, if any, filed in the Commission of Human Rights led to the issuance of a finding that the ECtHR did not possess *ratione personae* competence. Such an argument was used in *M and Co* case, wherein the Commission of Human Rights also took the occasion to comment on the criteria of infringement assessment, stating that ‘the legal system of the European Communities was providing for effective control of the observance of fundamental rights, as they result *inter alia* from the ECHR’¹⁴.

In one of the examined cases, i.e. the *Golder case* (1975), the European Court of Human Rights ruled that the preliminary question should not be whether the dispute settlement authority is a court within the meaning of Article 6(1) ECHR, but whether the nature of the case (civil or criminal) creates ‘the right to a tribunal’ and ‘to a fair trial’. The Court stressed that in the event of an assumption that Article 6(1) ECHR related solely to the judicial proceedings, the signatory States could, without any breach of the Convention, liquidate national courts or deprive them of competence in specific categories of cases and transfer jurisdiction to authorities dependent on the executive power¹⁵.

In the proceedings before the ECJ in the *Orkem* case, Advocate General Darmon, while pointing in his opinion to the criminal law nature of antitrust procedures which are applicable in the European Community and lead to the imposition of fines, quoted the judgment of the European Court of Human Rights in the *Öztürk* case. Nevertheless, later he considered that the assumption of the criminal law nature of the procedure in *Öztürk* case was doubtful¹⁶.

Even the most recent publications still quote the judgment of the European Court of Human Rights of 8 June 1976 in the *Engel* case, in which the Court identified three criteria vital to determining the criminal law nature of

¹³ W. P. J. Wils, ‘Is Criminalisation of EU Competition Law the Answer?’, [in:] R. Zäch, A. Heinemann, A. Kellerhals (eds.), *The Development of Competition Law: Global Perspectives*, Cheltenham 2010, p. 254.

¹⁴ D. Waelbroeck, D. Fosselard, ‘Should the decision-making power...’, p. 118.

¹⁵ See M.A. Nowicki, *Europejska Konwencja Praw Człowieka. Wybór orzecznictwa*, Warszawa 1998, p. 140 (theses 660 and 661). For more on this subject see also W.P.J. Wils, ‘La Compatibilité...’, p. 339 and following

¹⁶ D. Waelbroeck, D. Fosselard, ‘Should the decision-making power...’, pp. 114–115, p. 116. The thesis of the criminal law nature of competition cases is convincingly claimed by Wils, who refers to the judgment in *Öztürk* case. He also quotes the judgments of the European Court of Human Rights in other cases, i.e. *Engel*, *Lutz*, *Bendenoun* (W.P.J. Wils, ‘La Compatibilité...’, pp. 333, 334).

the case: (1) whether or not the provision(s) defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law, disciplinary law, or both concurrently. This, however, provides no more than a starting point; (2) the very nature of the offence, which according to the Court is a factor of great importance; and (3) the nature and degree of severity of the penalty that the person concerned risks incurring. The second and third criteria mentioned above constitute the factors which carry the greatest weight. Moreover, these two criteria are alternative, not cumulative. In order for Article 6 to apply by virtue of the words ‘criminal charge’ it suffices that either the offence in question, by its nature, should be considered ‘criminal’ from the point of view of the Convention, or that the ‘person’ charged is liable to a sanction which, in its nature and degree of severity, belongs in general to the ‘criminal’ sphere. It might be noted that a relative lack of gravity of a penalty does not necessarily divest an offence of its inherently criminal character¹⁷.

The subject literature also tends to refer to the opinion of Advocate General Darmon presented in 1992 in the *Wood Pulp* case¹⁸, in which he equalled fines assessed by the European Commission to criminal punishment and added that: ‘(...) the Commission decision in the field of competition is another matter entirely, particularly where it orders a trader to pay a fine and is therefore manifestly of a penal nature’.

While the *Öztürk* case was not a competition case, in these proceedings the European Court of Human Rights defined helpful criteria for interpretation of the notion of ‘a criminal law case’. In the opinion of the Court, in the first instance the nature of the case should be examined on the basis of **the nature assigned to a given infringement by the national law** of the defendant, i.e. whether, in the light of such law, the definition of a given infringement is derived from criminal law or not. Among other criteria the Court listed, alternatively: **the nature and the degree of possible sanction for the infringement**¹⁹.

The opinion of Advocate General Darmon submitted in the previously mentioned *Orkem* case is widely considered to have caused some doubts within the ECJ as to the validity of its previous case law. Indeed, for the first time the Court of Justice in its judgment decided to leave open the issue whether Article 6 ECHR was applicable to EC antitrust procedures. The ECJ stated that: ‘as for Article 6 ECHR, considering that this article may be invoked

¹⁷ On this subject see also T. K. Giannakopoulos, *Safeguarding Companies’ Rights in Competition and Anti-dumping/Anti-Subsidies Proceedings*, 2nd ed., Alphen aan den Rijn 2011, pp. 21–22.

¹⁸ Opinion of Advocate General Darmon in joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 (*Wood Pulp*).

¹⁹ W.P.J. Wils, ‘La Compatibilité...’, p. 332 and following.

by the undertaking in antitrust proceedings, it should be stated that the fact that this provision covers the right not to be forced to testify against oneself neither results from its contents, nor from the jurisprudence of the European Court of Human Rights'. It seems hard to deny that the use of the phrase – 'considering that this article (Article 6 ECHR) may be invoked...' – while it does not amount to an unqualified acceptance, is certainly not an exclusion of the application of Article 6 in antitrust proceedings²⁰.

The judgment of the European Court of Human Rights in the *Öztürk* case was later referred to by Judge Vesterdorf, serving as Advocate General in *Polypropylene* case. When describing the nature of fines imposed under Regulation 17/62, he pointed out that such fines '(...) in fact, notwithstanding what is stated in Article 15(4), have a criminal law character'²¹.

When analysing the possible criminal law nature of the legal means used in accordance with the provisions of Article 81 of the EC Treaty (at present Article 101 TFEU), reference should be had to the opinion of the Commission of Human Rights in the *Stenuit* case, heard as a result of a complaint for infringement of Article 6(1) ECHR. It was filed following the imposition of the fine by the French Minister of Finance and Economy for anti-competitive behaviour. It was alleged in the complaint that the fine was in fact equal to the application of liability of a criminal type. The Commission of Human Rights, pointing to the nature and the severity of the sanction in question, underlined the explicit referral of this case to the principles of criminal law. Moreover, it stressed the resemblance of the function to be fulfilled by the imposed sanction to the preventive function of measures typical for criminal law, i.e. of fines and deprivation of liberty. This statement of the Commission of Human Rights is seen as expressly recognizing that the fine imposed by the Minister of Finance and Economy for anti-competitive actions was equal to the application of criminal liability²².

While referring in these proceedings to the judgments of the European Court of Human Rights in the *Campbell* and *Fell* cases, as well as in *Öztürk* case, the Commission of Human Rights underlined that the ECHR does not reject *per se* the differentiation between criminal law and disciplinary law, nor negate the value of drawing a distinction between these two domains. However, this does not mean that such a classification should be decisive from the point of view of the purposes of the Convention. If the signatory States were able to classify, at their discretion, infringements as either disciplinary measures or as criminal offences, and by so doing were able to determine the applicability of Article 6 ECHR, the provisions of the Convention would

²⁰ D. Waelbroeck, D. Fosselard, 'Should the decision-making power...', p. 116.

²¹ D. Waelbroeck, D. Fosselard, 'Should the decision-making power...', p. 117.

²² D. Waelbroeck, D. Fosselard, 'Should the decision-making power...', pp. 122–123.

in fact lose their practical meaning. As a consequence, the definition of ‘criminal offence’ for the purposes of Article 6 should be based on objective criteria, compliant with the purposes of the Convention. In this respect, when referring to the jurisprudence of the European Court of Human Rights, the Commission of Human Rights underlined the necessity to take into account – when determining the criminal nature of an infringement - the provisions which define such infringement, its nature, as well as the degree of severity of possible sanctions.

The jurisprudence of the Strasbourg courts explicitly stresses that in an assessment of the nature of a case, due consideration should rather not be given to the formal classification set forth in legal provisions, but to the real nature of the case.

In cases in which European antitrust procedures leading to the imposition of fines were applied, the European Court of Human Rights pointed to many features which tended to prove their criminal law nature. It stated that such procedures were applied to undertakings with no particular status; that the fines imposed were deprived of a compensatory nature (and thus became deterring and repressive measures); that the rules defined in Articles 81 and 82 of the EC Treaty (at present Articles 101 and 102 TFEU) were applied preventively; and that the range of possible fines was significant²³.

Reference should also be made to the judgments of the European Court of Human Rights **which justified the application of Article 6 ECHR**, in cases decided under antitrust procedures, **by virtue of their civil law nature**. Such an approach has appeared in cases reviewed arising from proceedings which did not end with the imposition of a fine. Even though the judgments of the European Court of Human Rights in this line of cases refer to national procedures, such decisions should be taken into account when assessing the nature of cases examined by the European Commission under Community law pursuant to the provisions of Article 81 and 82 of the EC Treaty (at present Articles 101 and 102 TFEU)²⁴.

Divergent directions in the jurisprudence of the EU courts

One should stress that even if the ECJ cannot be said to share all the assumptions adopted by the European Court of Human Rights on the legitimacy of a wide interpretation of the notion ‘criminal charge’ within the meaning of Article 6(1) ECHR, nonetheless in the present EU jurisprudence on competition law one encounters more and more judgments which deal

²³ D. Waelbroeck, D. Fosselard, ‘Should the decision-making power...’, pp. 122–123.

²⁴ N. Green, ‘Evidence and proof in EC competition cases’, [in:] P.J. Slot, A. McDonnell (eds.), *Procedure and Enforcement in EC and US competition law*, London 1993, p. 130.

with standards of rights stemming from the ECHR. The need to ensure adequate guarantees of fundamental rights is mainly stressed in the context of the repressive nature of certain sanctions applied under the Community legislation²⁵.

It seems worthwhile to focus on the CFI judgment of 8 October 2008, T-69/04 in the *Schunk GmbH* and *Schunk Kohlenstoff-Technik GmbH* cases, in which the Court analysed the modalities of penalties imposed in the light of Article 7 ECHR. The Court ruled that the principle of legality of sanctions stems from the principle of certainty, which is part of Community law, and thus requires that Community legislation should be clear and precise. At the same time, the Court stated that the percentage method of fixing a penalty ceiling does not violate the principle of legality set forth in Article 7 ECHR²⁶. The same position was taken by the CFI in its judgment of 5 April 2006, T-279/02, in the *Degussa AG* case²⁷. Moreover, in the judgment in *Schunk* case, the CFI listed several previous judgments which referred to the guarantee of rights (with standards stemming from the ECHR)²⁸.

As an example, one may quote the judgment of the ECJ of 7 July 1999, C-199/92 P in the *Hüls AG* case, which assumes that the CFI has not violated the principle of presumption of innocence defined in Article 6(2) ECHR, and goes on to elaborate that the presumption of innocence under Article 6(2) ECHR is one of the fundamental rights which, according to the Court's settled case-law, is reaffirmed in the preamble to the Single European Act and

²⁵ B. Beauchesne, *La protection juridique des Entreprises en Droit Communautaire de la Concurrence*, Paris 1993, p. 189; D. Elles, 'Introduction to the Report on Enforcement of Community Competition Rules', [in:] Slyn Lord of Hadley, S.A. Pappas (eds.), *Procedural Aspects of EC competition law*, Maastricht 1995, p. 16 and following.

²⁶ See M. Król-Bogomilska, 'Sposób określenia wysokości kar we wspólnotowym prawie ochrony konkurencji a zasada z art. 7 Europejskiej Konwencji Praw Człowieka' (2009) 6 *Europejski Przegląd Sądowy* 47 (commentary to the CFI judgment of 8 October 2008 (T-69/04) in *Schunk* case).

²⁷ See OJ [2006] C 131/37. The Court of Justice by its judgment of 22 May 2008, C 266/06 P *Degussa AG v Commission*, rejected the appeal of Degussa AG against the CFI in that case (see OJ [2008] C 171/4).

²⁸ The enumerated judgments included, among others, the ECJ judgment of 9 July 1981 in 169/80 *Gondrand Frères* and the *Garancini* case, ECR [1981] 01931; of 18 November 1987 in 137/85 *Maizena* case, ECR [1987] 04587; of 13 February 1996 in C-143/93 *van Es Douane Agenten* case, ECR [1996] I-00431; of 15 May 1986 in 222/84 *Johnston* case, ECR [1986] 1651; of 22 October 2002 in C-94/00 *Roquette Frères* case, ECR [2002] I-09011; the CFI judgment of 20 February 2001 in T-112/98 *Mannesmannröhren-Werke* case, ECR [2001] II-00729; the ECJ judgment of 21 September 2006 in C-167/04 *JCB Service* case, ECR [2006] I-8935; of 7 June 2007 in C-76/06 P *Britannia Alloys & Chemicals* case, ECR [2007] I-04405; of 13 December 1984 in 106/83 *Sermide* case, ECR [1984] 04209; the CFI judgment of 14 May 1998 in T-311/94 *BPB de Eendracht* case, ECR [1998] II-01129; and the CFI judgment of 20 March 2002 in T-23/99 *LR AF* 1998 case, ECR [2002] II-01705.

in Article F(2) of the Treaty on European Union (at present Article 6 TEU), and is protected in the Community legal order.

In its judgment of 8 February 2007, C-3/06, in the *Groupe Danone* case, the ECJ stated that ‘the principle that penal provisions may not have retroactive effect under Article 7(1) ECHR is common to all the legal orders of the Member States and forms an integral part of the general principles of law whose observance is ensured by the Community judicature’. The ECJ ruled that Article 7(1) ECHR in particular enshrines the principle that offences and punishments are to be strictly defined by law (*nullum crimen, nulla poena sine lege*), which would preclude the retroactive application of a new interpretation of a rule establishing an offence. A similar position was taken by the ECJ in its judgment of 28 June 2005, in the *Dansk Rørindustri* case (joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P²⁹).

In its judgment of 8 July 2007, T-99/04, in the *AC-Treuhand AG* case³⁰, the CFI ruled however that the Community judicature had not made an explicit ruling on that question, and that such an interpretation of Article 81(1) EC [at present Art. 101(1) TFEU] is not contrary to the principle of *nullum crimen, nulla poena sine lege*, which need not necessarily have the same scope as when it is applied to a situation covered by criminal law in the strict sense, because the procedure before the Commission under Regulation 17 is merely administrative in nature. Thus, any undertaking which adopted collusive conduct, including consultancy firms not active on the market affected by the restriction of competition, could reasonably have foreseen that the prohibition laid down in Article 81(1) EC was applicable to it in principle. Such an undertaking could not have been unaware, or at least was in a position to realise, that a sufficiently clear and precise basis could be found in the former decision-making practice of the Commission and in the existing Community case-law for expressly recognising that a consultancy firm is liable for an infringement of Article 81(1) EC where it contributes actively and intentionally to a cartel between producers which are active on a market other than that on which the consultancy firm itself operates.

In this judgment, the ECJ referred to the principle of *nulla poena sine lege certa* stated in Article 7(1) ECHR, which requires the fine to be predictable to the recipient of the decision. The ECJ quoted also its previous judgments in which it was stated that a penalty provided for under Community law, even where it is not a criminal penalty, cannot be imposed unless it rests on a clear and unambiguous legal basis³¹.

²⁹ ECR [2005] I-05425.

³⁰ ECR [2008] II-010501.

³¹ 117/83 *Könecke*, ECR [1984] 3291, para. 11, and 137/85 *Maizena*, ECR [1987] 4587, para. 15.

3. The scientific, jurisprudential aspect of the dispute

Various positions have been adopted in the discussions concerning the criminal law nature of fines in Community competition law. On one extreme is the radical position **denying** that infringements and fines have **any criminal law nature**. In the middle there exists a moderate position, the proponents of which define competition law sanctions as *sui generis* or *quasi-penal*. And at the other extreme is the opposite position, which expressly underscores the **criminal law nature** of competition law infringements and of the fines applicable under such regulations.

According to the **opponents of the thesis of the criminal law nature** of competition law infringements and relevant fines, not only should their formal classification in legal provisions be considered as decisive in this respect, but in addition their non-criminal nature is further supported by factors such as the attribution of competence to impose fines to a non-judicial authority, the impossibility to change a fine into an arrest, and the lack of records of such sanctions in both national and community registries. They also stress that the obligations resulting from the imposition of fines are writs of execution, and that the coercive execution of such obligations takes place in accordance with the provisions of the civil law procedure applicable in the country in which such execution takes place.

The proponents of the **middle ground position** claim that such sanctions bear some specific penal 'elements' which distinguish them from administrative measures, but also do not conform to those elements of a traditionally 'criminal law' nature. They define such sanctions as 'quasi-penal' or '*sui generis* measures'³². Such a middle ground position is most forcefully argued for by Tiedemann. In his opinion, the determination of such provisions as belonging strictly to criminal law is counter posed by the administrative nature of the procedure leading to the imposition of a fine, the appeal procedures for appealing a fine, and the lack of personal coercion measures in case of the non-payment of the fine³³. At the same time however, the repressive aim of fines imposed for breaches of competition law constitutes an argument, according to Tiedemann, for classifying such fines as a repressive type of law, i.e. as an element of criminal law in the broadest meaning of the term³⁴.

³² G. Grasso, 'Rapport de synthèse sur le système de sanctions administratives des États membres des Communautés Européennes', [in:] *The System of Administrative and Penal Sanctions. Vol II- Summary Reports*, Luxembourg 1995, p. 80.

³³ K. Tiedemann, 'Principes généraux applicables aux sanctions communautaires. Projet de rapport général', [in:] *The System of Administrative and Penal Sanctions..*, p. 19.

³⁴ K. Tiedemann, 'Principes généraux applicables...', p. 19.

It should also be added that the ‘*quasi-penal*’ nature of liability applicable in the competition law enforcement system of the European Union is also mentioned and used as a justification for the provisions of the Recommendation No. R (88)18 of the Committee of Ministers to Member States concerning the liability of enterprises having legal personality for offences committed in the exercise of their activities³⁵.

Some scholars and articles also reveal a radical position, i.e. **recognition of the criminal law nature** of fines used in competition law for cases of restrictive practices. This line of thought is represented, above all, by Wils. When assessing sanctions from a practical point of view, he claims that in practice such penalties are not very different from the fines adjudged by a criminal court. Their aim is not only to stop the infringement, but also to prevent any such infringements in the future. According to him, any fine which is aimed at fulfilling a preventive function must necessarily bear an element of criminal punishment. This element is demonstrated by the possibility to impose a penalty for a breach which has already ceased.³⁶

The argument for a wide interpretation of the term ‘criminal’ has been elaborated on by Wils in his more recent papers. He has underlined the developments in the jurisprudence of the European Court of Human Rights, within the framework of Article 6 of the ECHR, of the autonomous notion of ‘criminal’, which covers administrative proceedings which meet the following conditions:

- the offences are defined by a general rule, applicable to all citizens;
- the rule is linked to penalties in the event of non-compliance;
- the sanctions are intended not as a pecuniary compensation for damage, but essentially as a punishment to deter offenses;
- *and* – the sanctions are severe³⁷.

Harding is considered to be another proponent of the assumption of the criminal law nature of fines in competition law. He sees in them a response to breaches which constitute ‘a form of delinquency’. He also stresses the existence of a model of ‘criminal’ procedure applicable to cases of fine imposition. He claims that even if such fines are not ‘criminal’ from the formal point of view, they are in fact used as punitive measures in order to fulfil a deterrence function. The formal label should not dissimulate their repressive end³⁸.

³⁵ See the Explanatory Memorandum on Re Recommendation No. R (88) 18 of the Committee of Ministers to Member States, concerning the liability of enterprises having legal personality for offences committed in the exercise of their activities (see: www.wcd.coe.int).

³⁶ See W.P.J. Wils, ‘La compatibilité...’, p. 344

³⁷ W.P.J. Wils, ‘Is Criminalisation...’, p. 254.

³⁸ C. Harding, *European Community Investigations and Sanctions. The Supranational Control of Business Delinquency*, Leicester 1993, p. 334.

However, in one of his more recent publications, entitled 'Enforcing European Community rules', Harding makes an assessment of the procedures and sanctions adopted in contemporary competition law and points to a 'quasi-criminal' model, adding that criminal law is being introduced to the Community legal system 'by the backdoor'³⁹. He describes this existing legal state of affairs as an 'uneasy mix of criminal and administrative enforcement'⁴⁰.

The conviction that fines and infringements under competition law are criminal law stems from various sources. The thesis that competition law has an inherent 'criminal law nature' is considered to be a reflection on the nature of infringements which lead to punishment, the rules applicable to define liability for such infringements, the nature of punishments, and the nature of procedures applicable to establish such liability. A major factor in this respect is that the legal systems of some States specifically define selected particularly gross breaches of competition law as offences⁴¹.

It is also stressed in the literature that the criminal law nature of competition law and of relevant sanctions may be supported by the fact that the legal liability for infringements is often based on criminal law principles, such as the significance of wilfulness and negligence giving rise to alleged breaches, and consideration of the various degrees of involvement of undertakings in such breaches. The legal literature on Community competition law also points out the existence of various defences taken from criminal law, such as necessary self-defence or a state of necessity⁴².

When elaborating on the criminal law nature of fines imposed under Regulation 17/62, Wils stresses their non-compensatory character and the fact that their aim is to punish and to prevent further breaches. In his opinion, their penal nature is also supported by the setting of their ceiling amounts⁴³.

The arguments for recognition of the criminal nature of competition law infringements should not be taken to mean that the proponents of such a position share a conviction that the power of the Commission to conduct cases and to impose fines on undertakings should be questioned. Wils stresses that the compliance of the procedures under which the Commission issues its decision to impose fines with the provisions of Article 6 of the ECHR

³⁹ C. Harding, 'Models of Enforcement: Direct and Delegated Enforcement and the Emergence of a "Joint Action" Model', [in:] C. Harding, B. Swart (eds.), *Enforcing European Community Rules. Criminal Proceedings, Administrative Procedures and Harmonization*, Aldershot, Brookfield, Singapore, Sydney 1996, pp. 25–26.

⁴⁰ C. Harding, 'Models of Enforcement...', p. 39.

⁴¹ C. Harding, 'Models of Enforcement...', p. 81 and following. On this subject see also J. Maitland-Walker, *Competition Laws in Europe*, Butterworths 1995.

⁴² See also on this subject, M. Wagemann, *Rechtfertigungs und Entschuldigungsgründe im Bussgeldrecht der Europäischen Gemeinschaften*, Heidelberg 1992, p. 87 and following.

⁴³ W.P.J. Wils, 'La compatibilité...', p. 334.

is ensured by the right to appeal a Commission decision to impose a fine to CFI, and the corollary right of this court to overrule such decision⁴⁴. A similar view has been stated by Andreangeli, author of the monograph 'EU Competition Enforcement and Human Rights', published in 2008. She claims that those seeking to counter the argument that the Commission procedures are in violation of the ECHR tend to use, as a counter-argument, the right to appeal to the CFI and, ultimately, to the ECJ. In addition, the ECJ has a specific grant of unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or a periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed⁴⁵.

4. Position of the Supreme Court of the Republic of Poland in the TP SA case – judgment of 14 April 2010, ref. no. III SK 1/10

Note should be taken of the judgment of the Polish Supreme Court, in which it refers generally to the nature of financial penalties imposed on undertakings by administrative authorities, including the **UOKiK** President. In the justification of its judgment, the court emphasizes the need to ensure a higher level of judicial protection of the rights of entrepreneurs who are accused by market regulatory bodies of an infringement which carries with it the potential imposition of a painful financial sanction. According to the Court, the Republic of Poland is obliged to ensure the effectiveness of the ECHR provisions in the national legal order of Poland.

The Supreme Court stresses that the Convention standards have for many years been taken into account in its own jurisprudence assessing the application of Polish legislation⁴⁶, in compliance with the assumption that, since Poland joined the Council of Europe, the jurisprudence of the European Court of Human Rights may and should serve the Polish judiciary and jurisprudence as an importance source of interpretation of Polish internal legislation, as such efforts would help to avoid decisions being appealed from Polish courts to the European Court of Human Rights⁴⁷.

In the *TP SA* case, the Supreme Court maintained its position, expressed in its previous jurisprudence, that financial penalties imposed by market

⁴⁴ W. P. J. Wils, 'Is criminalisation...', p. 256.

⁴⁵ On this subject see A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham 2008, p. 23.

⁴⁶ In particular, the Court referred to the following resolutions: dated 10 April 1992, ref. no. I PZP 9/92, and dated 9 January, ref. no. III SPZP 1/07 (*LEX* no. 520369).

⁴⁷ Ruling of the Supreme Court of 11 January 1995, ref. III ARN 75/94, (1995) 9 *OSNAPiUS* item 106.

regulatory bodies are not sanctions of criminal nature. However, considering the position of the European Court of Human Rights, it stressed that in matters in which the entrepreneur is saddled with a financial penalty, the rules of judicial verification of the legality of such a decision should be compliant with the requirements similar to those binding upon a court which would rule in a criminal case. In other words, the case before it – an appeal against the decision of an administrative body imposing a financial penalty on a telecommunications company - should be examined taking into consideration the standards of rights' protection applicable to defendants in criminal proceedings.

IV. A dispute over classification or over standards?

1. The controversy persists, while fines have been growing

Today it can be observed that the catalogue of rights to be respected in the course of competition proceedings is growing in importance. This stems from the increasing number and volume of penalties imposed by competition authorities for breaches of respective national and EU legislation.

According to the most recent data of the European Commission from 7 December 2011⁴⁸ – during the current year, the total amount of fines imposed by the EC for cartel cases totalled EUR 614,053,000. In the previous year, fines amounted to EUR 2,868,676,432. A certain 'record' was hit in 2007, when the total amount of fines charged by the EC in this category of cases totalled EUR 3,313,427,700. Until now, the highest fines were imposed in a case involving a cartel arrangement between four manufacturers of car windshield glass: *Asahi Glass Company, Saint Gobain, Pilkinton and Soliver*. The highest fine in this case, amounting to EUR 896,000,000 was to be paid by Saint Gobain⁴⁹. According to the European Commission, for at least five years these undertakings had mutually arranged product prices, market shares, and the volume of windshield glass supplies to specific car manufacturers⁵⁰.

The tendency to impose higher financial penalties for restrictive arrangements is also observable in Poland, where according to applicable legislation the financial penalty to be imposed for such practices by the UOKiK President may amount to 10% of the revenue earned in the accounting year preceding the year within which the fine is imposed. For example, in a case involving a

⁴⁸ Available at ec.europa.eu/competition.

⁴⁹ Decision of 12 November 2008, COMP/39.125.

⁵⁰ Case pending before the Court, ref. no. T-56/09.

cartel of cement producers, by decision of 8 December 2009, no. DOK-7/09, the entrepreneurs who participated in the cartel were assessed fines in a total amount of PLN 411,586,477⁵¹.

It seems beyond any doubt that, in the context of the ever growing severity of penalties assessed, the rights' guarantee function of the law has been gaining in importance, and hence the standards of rights to be respected in competition proceedings are magnified in importance.

2. Different paths lead to one end

Until now, various paths have been taken in order to arrive at a recognition of the ECHR as the source of such standards. Pursuit of a legal recognition of the criminal law element in competition cases has not been, and should not be mistaken for, the lone path leading to this end.

The importance of the ECHR for European institutions was formally confirmed as early as in the 5 April 1977 Joint Declaration by the European Parliament, the Council, and the Commission on fundamental rights⁵².

The next step on the road was the adoption of the Single European Act of 28 February 1986, the preamble of which designates the ECHR standards as Europe unifying instruments. The actions of the European Community towards the universal respect of human rights were also listed in the Human Rights Declaration, adopted in Luxembourg, on 29 June 1991.

Article 6 of the Treaty on European Union of 1992 expressed the principle of respect by the EU for the rights guaranteed under the ECHR as rights derived from the common constitutional traditions of the EU Member States and the treatment of such rights as general Community law principles.

Major changes were brought about by the entry into force, on 1 December 2009, of the Treaty of Lisbon. This evolution was in particular due to the fact that the European Union gained a separate legal personality. The implementation of the concept aiming at an even stronger reinforcement of the position of fundamental rights within the EU was sealed by:

- granting binding legal force to the EU Charter of Fundamental Rights of 2000 by including this Charter in the EU primary law; and
- defining the basis for EU accession to the ECHR

Article 6(1) TEU stipulates that the EU recognizes that the rights, freedoms and principles defined in **the Charter of Fundamental Rights of the EU** of 7

⁵¹ Case pending before the Court of Competition and Consumer Protection, ref. no. XVII Ama 173/10–178/10.

⁵² OJ [1977] C 103/1.

December 2000, in the meaning adapted accordingly on 12 December 2007 in Strasbourg, should have a binding force equal to the Treaties.

In the first declaration on the provisions of the Treaties (TEU and TFEU), i.e. in the **Declaration on the Charter of Fundamental Rights of the EU**, it is declared that that document has a legally binding force, and confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms as they result from the constitutional traditions common to the Member States.

Simultaneously, Article 6(2) TEU states that the EU shall accede to **the European Convention for the Protection of Human Rights and Fundamental Freedoms**. This act will have no impact on the EU competences as defined in the Treaties. Paragraph 3 of this Article lays down the principle that the fundamental rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms and stemming from common constitutional traditions of Member States are part of the EU law as general principles of EU law.

3. New rules of judicial cooperation in criminal matters

It should also be mentioned that, with the entry into force of the Treaty of Lisbon, an essential change has taken place in the foundations of EU legislation. The introduction of this modification may contribute in the future to a better system of classifying criminalisation of the most serious violations of competition law in the EU Member States.

One of the most significant modifications lies in the effect of the amended provisions of the Treaty on the Functioning of the European Union (hereafter, TFEU)⁵³ on the principles of cooperation between EU Member States in criminal matters. The Treaty of Lisbon marks the end of the EU's three pillar structure. Pursuant to the provisions of the TFEU legal acts used as a basis for legislation on judicial cooperation in criminal matters will be **directives** of the European Parliament and of the Council adopted in the ordinary legislative procedure.

The key provisions for definition of the legal bases and rules of cooperation in criminal matters in the EU can be found in Article 83 of the TFEU (in Chapter 4 on judicial cooperation in criminal matters). This Chapter is included under Title V, Part I, and Title V is entitled: 'Area of freedom, security and justice'⁵⁴.

⁵³ OJ [2008] C 115/47 (TFEU consolidated version).

⁵⁴ On this subject see M. Szwarc-Kuczner, *Kompetencje Unii Europejskiej w dziedzinie harmonizacji prawa karnego materialnego*, Warszawa, 2011, p. 44 and following; M. Wąsek-Wiaderek, 'Unijne i krajowe prawo po Traktacie Lizbońskim – zarys problematyki' (2011) 1–2 *Palestra* 7 and following.

The provisions of Article 83(1) TFEU stipulate that: ‘The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis’.

These areas of crime include: ‘(...) terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime’.

The TFEU also contains provisions which open the way for further enlargement of the EU institutional powers in criminal matters. Pursuant to Article 83(1), sentence 3 of the TFEU the Council ‘may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph’. In order to adopt such a decision, ‘it shall act unanimously after obtaining the consent of the European Parliament’.

Chapter 4 of the TFEU includes even wider options for legislating on criminal matters; options which omit the requirement of unanimity of the Member States. Article 83(2) TFEU states in this respect: ‘If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76⁵⁵’.

The principles set forth in the abovementioned provisions refer to the rules of cooperation in strictly criminal matters. The modifications in question may however exert some influence in the future on the creation of EU legal bases for combating certain of the most serious violations of antitrust law, by stimulating changes in the criminal law of the Member States. It may be hoped that in the near future such modifications of the Treaties will foster the process of criminalisation of the most serious breaches of antitrust law in EU Member States.

In light of the above, it would certainly be advisable to start a wider debate on the subject. In this author’s abovementioned monograph on the

⁵⁵ Article 76 of the TFEU provides that the acts referred to in Chapter 4 – on judicial cooperation in criminal matters – together with the measures referred to in Article 74 which ensure administrative cooperation in the areas covered by these Chapters, shall be adopted: (a) on a proposal from the Commission, or (b) on the initiative of a quarter of the Member States.

penalties in competition law published in 2001, it was postulated **to introduce into Polish law the criminalisation of most serious breaches of competition law**, particularly in the case of **hard-core cartels**⁵⁶. The entry into force of the Treaty of Lisbon and the present possibilities of EU bodies to influence criminalisation processes in Member States under Article 83(2) TFEU provides **solid grounds for actions leading to such criminalisation** in a wider group of EU Member States^{57/58}.

IV. Conclusions

Today, European legislation has consistently asserted, in two Council Regulations (1/2003 and 139/2004), that fines laid down therein ‘shall not be of a criminal law nature’. Despite that, there continues to be vigorous debate over the nature of competition cases and of the fines assessed for infringements of competition law.

The controversy surrounding the ‘criminal nature’ of antitrust cases, and sometimes as well of other administrative law cases in the context of the right to a tribunal as set forth in Article 6(1) ECHR, constitutes a valuable impetus for a corollary debate on the need to take into account numerous other standards of rights in competition proceedings conducted by the European Commission, and in administrative competition enforcement proceedings at the national level as well.

Today, regardless of the degree of acceptance of the ‘criminal’ element in competition proceedings and the ‘criminal’ nature of fines or antitrust

⁵⁶ M. Król-Bogomilska, *Kary pieniężne...*, p. 257 and following.

⁵⁷ On this subject, see I. Simonsson, ‘Criminalising Cartels In the EU: Is There a Case for Harmonisation?’, [in:] C. Beaton-Wells, A. Ezrachi (eds.), *Criminalizing Cartels. Critical Studies of an International Regulatory Movement*, Oxford and Portland, Oregon 2011, p. 203 and following; G. Hakopian, ‘Criminalisation of EU Competition Law Enforcement – A possibility after Lisbon?’ (2010) 7 *The Competition Law Review* 157 and following.

⁵⁸ Ireland was one of the first countries outside the US to introduce a comprehensive set of criminal sanctions into its civil antitrust regime. Since 1996, all of Ireland’s competition law prohibitions contain both criminal penalties and civil remedies. See P. Massey, J. D. Cooke, ‘Competition Offences in Ireland: The Regime and its Results’, [in:] C. Beaton-Wells, A. Ezrachi (eds.), *Criminalizing Cartels. Critical...*, p. 106. For instance, in the UK criminal responsibility for the cartel offence was introduced by the Enterprise Act 2002. On this subject see J. Joshua, ‘DOA: Can the UK Cartel Offence be Resuscitated’, [in:] C. Beaton-Wells, A. Ezrachi (eds.), *Criminalizing Cartels. Critical...*, p. 129 and following; M. Furse, *The Cartel Offence*, Oxford and Portland, Oregon 2004, p. 27 and following; C. Harding, J. Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency*, Oxford 2003, p. 260 and following.

sanctions, **there should be no doubt about the need to respect defined standards of entities' rights.**

With the entry into force of the Treaty of Lisbon, the need to refer to the ECHR as to the source of standards of entrepreneur rights in competition proceedings is also beyond any doubt. One of the urgent tasks is thus **to define such standards more precisely** in order to reconcile the principle of the effective protection of competition with the protection of entrepreneurs' rights, so that actions undertaken in favor of a more effective competition protection do not violate the guarantee function of competition law.

Literature

- Andreangeli A., *EU Competition Enforcement and Human Rights*, Cheltenham 2008.
- Beauchesne B., *La protection juridique des Entreprises en Droit Communautaire de la Concurrence*, Paris 1993.
- Bernatt M., *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [*Procedural fairness in the proceedings before the competition authority*], Warszawa 2011.
- Elles D., 'Introduction to the Report on Enforcement of Community Competition Rules', [in:] Slynn Lord of Hadley, Pappas S.A. (eds.), *Procedural Aspects of EC competition law*, Maastricht 1995.
- Ereciński T., Gudowski J., Jędrzejewska M., *Komentarz do kodeksu postępowania cywilnego. Część pierwsza. Postępowanie rozpoznawcze* [*Commentary on the Code of Civil Procedure. Part I. Adjudicative procedure*], Warszawa 2004.
- Furse M., *The Cartel Offence*, Oxford and Portland, Oregon 2004.
- Giannakopoulos T. K., *Safeguarding Companies' Rights in Competition and Anti-dumping/ Anti-Subsidies Proceedings*, 2nd ed., Alphen aan den Rijn 2011.
- Grasso G., 'Rapport de synthèse sur le système de sanctions administratives des États membres des Communautés Européennes', [in:] *The System of Administrative and Penal Sanctions. Vol II- Summary Reports*, Luxembourg 1995.
- Green N., 'Evidence and proof in EC competition cases', [in:] Slot P.J., McDonnell A. (eds.), *Procedure and Enforcement in EC and US competition law*, London 1993.
- Hakopian G., 'Criminalisation of EU Competition Law Enforcement – A possibility after Lisbon ?' (2010) 7 *The Competition Law Review*.
- Harding C., *European Community Investigations and Sanctions. The Supranational Control of Business Delinquency*, Leicester 1993.
- Harding C., 'Models of Enforcement: Direct and Delegated Enforcement and the Emergence of a "Joint Action" Model', [in:] Harding C., Swart B. (eds.), *Enforcing European Community Rules. Criminal Proceedings, Administrative Procedures and Harmonization*, Aldershot, Brookfield, Singapore, Sydney 1996.
- Harding C., Joshua J., *Regulating Cartels in Europe. A Study of Legal Control of Corporate Delinquency*, Oxford 2003.

- Joshua J., 'DOA: Can the UK Cartel Offence be Resuscitated', [in:] Beaton-Wells C., Ezrachi A. (eds.), *Criminalizing Cartels. Critical Studies of an International Regulatory Movement*, Hart Publishing 2011.
- Kowalik-Bańczyk K., *Problematyka ochrony praw podstawowych w unijnych postępowaniach w sprawach z zakresu ochrony konkurencji* [*The issues of the protection of fundamental rights in EU competition proceedings*], Centrum Europejskie Natolin, (2010) 39.
- Król-Bogomilska M., *Kary pieniężne w prawie antymonopolowym: w ustawie o ochronie konkurencji i konsumentów, w europejskim prawie wspólnotowym* [*Penalty payments in antimonopoly law: in the Act on competition and consumer protection, in European Community law*], Warszawa 2001.
- Król-Bogomilska M., 'Sposób określenia wysokości kar we wspólnotowym prawie ochrony konkurencji a zasada z art. 7 Europejskiej Konwencji Praw Człowieka' ['The manner of fixing the amounts of penalties in Community law of competition protection and the „no penalty without law” principle expressed by Article 7 ECHR'] (2009) 6 *Europejski Przegląd Sądowy*.
- Maitland-Walker J., *Competition Laws in Europe*, Butterworths 1995.
- Massey P., Cooke J. D., 'Competition Offences in Ireland: The Regime and its Results', [in:] Beaton-Wells C., Ezrachi A. (eds.), *Criminalizing Cartels. Critical Studies of an International Regulatory Movement*, Hart Publishing 2011.
- Nowicki M.A., *Europejska Konwencja Praw Człowieka. Wybór orzecznictwa* [*The European Convention on Human Rights. Review of Judgements*], Warszawa 1998.
- Simonsson I., 'Criminalising Cartels In the EU: Is There a Case for Harmonisation?', [in:] Beaton-Wells C., Ezrachi A. (eds.), *Criminalizing Cartels. Critical Studies of an International Regulatory Movement*, Oxford and Portland, Oregon 2011.
- Szwarc-Kuczer M., *Kompetencje Unii Europejskiej w dziedzinie harmonizacji prawa karnego materialnego* [*The European Union's competence in an area of the substantial criminal law harmonisation*], Warszawa 2011.
- Szydło M., Błaszczak Ł., 'Sprawa antymonopolowa jako przykład sprawy administracyjnej oraz sprawy gospodarczej' ['Anti-monopoly case as the exemple of administrative case and economic case'] (2005) *Przegląd Sądowy* 7-8.
- Tiedemann K., 'Principes généraux applicables aux sanctions communautaires. Projet de rapport général', [in:] *The system of Administrative and Penal Sanctions. Vol II- Summary Reports*, Luxembourg 1995.
- Waelbroeck D., Fosselard D., 'Should the decision-making power in EC antitrust procedures be left to an independent judge? – The impact of the European Convention of Human Rights on EC Antitrust procedures' (1994) 14 *Yearbook of European Law*.
- Wagemann M., *Rechtferitigungs und Entschuldigungsgründe im Bussgeldrecht der Europäischen Gemeinschaften*, Heidelberg 1992.
- Wąsek-Wiaderek M., 'Unijne i krajowe prawo po Traktacie Lizbońskim – zarys problematyki' ['The European Union and national law after the Treaty of Lisbon – outline of matter'] (2011) 1-2 *Palestra*.
- Wils W.P.J., 'La Compatibilité de Procédures Communautaires en Matière de Concurrence avec la Convention Européenne des Droits de l'Homme' (1996) 3-4 *Cahiers du Droit Européen*.
- Wils W. P. J., 'Is Criminalisation of EU Competition Law the Answer?', [in:] Zäch R., Heinemann A., Kellerhals A. (eds.), *The Development of Competition Law: Global Perspectives*, Cheltenham 2010.

The Nature of Responsibility of an Undertaking in Antitrust Proceedings and the Concept of ‘Criminal Charge’ in the Jurisprudence of the European Court of Human Rights

by

Anna Błachnio-Parzych*

CONTENTS

- I. Introduction
- II. Three criteria for treating a charge as criminal and their interrelation
- III. Formal qualification by the legislator
 - 1. Undertaking’s responsibility in antitrust proceedings as an administrative responsibility
 - 2. Decision on responsibility versus decision concerning administrative matters
- IV. Criminal nature of the offence
 - 1. Generally applicable norm
 - 2. The aim of the norm
- V. Type and severity of penalties
- VI. Conclusions

Abstract

The present article aims to answer the question whether an undertaking’s responsibility (sometimes also referred to as liability) in an antitrust proceeding held by the President of the Office of Competition and Consumer Protection (the Polish National Competition Authority) is of a criminal nature. The notion of ‘criminal charge’ is rather extensively construed in the jurisprudence of European Court of Human Rights, which has formulated the criteria for criminal responsibility. Taking these criteria into account, the author postulates that the severe character of pecuniary sanctions imposed in Polish antitrust proceedings is an argument for

* Anna Błachnio-Parzych, Doctor of Law, Institute of Legal Studies, Polish Academy of Sciences.

the criminal character of the proceedings. Thus the guarantees of Article 6 of the European Convention on Human Rights should be applicable to Polish antitrust proceedings.

Résumé

Le présent article a pour objectif de répondre à la question de savoir si dans une procédure de concurrence devant le Président de l'Office polonais de protection de la concurrence et des consommateurs, la responsabilité d'un entrepreneur est de nature à porter une « accusation dans une affaire pénale ». Cette notion a été créée par la jurisprudence de la Cour européenne des droits de l'homme, dans laquelle sont énumérés les critères d'une telle évaluation de la responsabilité. À force de les considérer, l'auteur du présent article conclut que le lien entre la violation des règles du droit de la concurrence d'une part et les conséquences sous forme de peines pécuniaires de l'autre, parle en faveur de la nature pénale de cette responsabilité. Cela conduit à la nécessité de respecter, dans la procédure de concurrence, les garanties que requiert en matière pénale l'art. 6 de la Convention européenne des droits de l'homme.

Classifications and key words: criminal charge; criminal penalty; human rights; responsibility in antitrust proceedings; nature of the responsibility

I. Introduction

This article aims to assess the nature of an undertaking's responsibility in antitrust proceedings held in front of the President of the Office of Competition and Consumer Protection (the Polish National Competition Authority, hereafter alternately referred to as the UOKIK President or Competition Authority) by contrasting it with the notion of 'criminal charge' in the jurisprudence of the European Court of Human Rights (hereafter, ECtHR or Court). First, the criteria for treating a charge as criminal is analyzed. Subsequently each of these criteria is applied to an undertaking's responsibility in Polish antitrust proceedings. Next the implications and consequences of qualifying a concrete responsibility as a criminal responsibility is examined. Beforehand however, some preliminary remarks provide an overview of the topic.

When one considers the nature of a particular kind of responsibility several issues need to be clarified. One is the qualification contained in the legislation. Another is the qualification that could have or should have been given by the legislators. In the first instance we analyze the nature of this responsibility as

it was designated by the legislators. The legislators had the choice between three different kinds of responsibility: criminal, civil and administrative. The qualification of the responsibility clearly stems from the branch of law that the legal act is enshrined in¹.

Considerations concerning the second issue – the basis for qualifying a responsibility as criminal, civil or administrative – are of a different nature. In this case one does not describe the decision taken by the legislators, but rather assesses its basis and formulates different postulates towards the legislation. This described distinction seems self-evident, however it needs to be underscored for the further analysis contained in this article. It should also be emphasized that this distinction is mirrored in the criteria developed by the ECtHR for assessing if ‘charge’ in a particular case analyzed by the Court is of a criminal nature.

In analyzing the nature of a responsibility, one first has to define the criteria of assessment. Foremost however the question ‘what is a responsibility’ needs to be answered. In the Polish legal doctrine one of the most popular definitions was formulated by W. Lang, who asserted that responsibility is a principle whereby an entity, if found liable, bears the consequences provided for by law for events or states of affairs which are subject to negative normative qualifications in a particular legal order². Therefore, the elements composing the structure of responsibility are: a responsible entity; events or states of affairs which are subject to a negative normative qualification; a principle which is the basis for attributing responsibility; and a sanction – a negative consequence for the responsible entity³. Distinguishing between each of these elements is important to an analysis of specific types or examples of responsibility. Having said that, attempts to classify various types of responsibility, sometimes also referred to as ‘liability’, according to the categories leads paradoxically to the conclusion that the classifications are not always distinct. This stems in part from the blurring of traditional differences between different types of liability⁴. One has to admit however that the boundaries were never very clear⁵.

It is also necessary to keep in mind that, in considering the nature of a specific type or example of liability and formulating conclusions about its

¹ W. Radecki, *Odpowiedzialność w prawie ochrony środowiska*, Warszawa 2002, p. 64.

² W. Lang, ‘Struktura odpowiedzialności prawnej’ (1968) 31 *Zeszyty Naukowe Uniwersytetu im. Mikołaja Kopernika* 12.

³ See W. Radecki, *Odpowiedzialność...*, pp. 60–61

⁴ See, *inter alia*: B. Szumiło-Kulczycka, *Prawo administracyjno-karne*, Kraków 2004, pp. 72–74.

⁵ This is illustrated by a debate that took place concerning the doctrine of Polish criminal law with the entry into force of the Act of 17 June 1966 on making some petty crimes offences in criminal-administrative jurisdiction (Journal of Laws 1966 No. 23, item 149). Cf. J. Skupiński, *Model polskiego prawa o wykroczeniach*, Wrocław 1974, p. 20.

desired shape, the results of the analysis may vary depending on which of these elements in the construction of the liability is treated as dominant. Its specific shape will determine the shape of the other elements in the structure and, in the end, the nature of the responsibility examined. For example, if the legislators decide that the consequence for a breach of a rule requiring or prohibiting particular conduct is to be imprisonment, this decision determines the shape of other elements of the structure of responsibility.

In Poland, the Constitutional Tribunal has on a number of occasions analyzed the issue whether a particular sanction, formally implemented as an administrative sanction, could be treated as a criminal sanction based on the autonomous meaning stemming from the Constitution. In many of its judgments the criteria for treating a sanction as criminal was its repressiveness⁶. In situations where the Constitutional Tribunal only identified a preventive nature in the sanction, it considered it unnecessary to apply the guarantees contained in Articles 2 and 31(2) of the Constitution. These guarantees consist of an obligation to identify guilt as a condition for liability, an individualization of the penalty, and the establishment of warranty and review mechanisms.

The Constitutional Tribunal has not, however, taken an uniform position on this issue. In a number of judgments the Tribunal adopted the position that the repressive or repressive-preventive nature of the sanction does not exclude an assessment that it is of an administrative nature⁷. In addition to the lack of uniformity in the criteria for distinguishing between administrative and criminal sanctions – in particular the importance of a finding that a sanction is punitive in nature – the Constitutional Tribunal also has not developed a uniform position on the method of identification of such features of sanctions in concrete cases⁸. Therefore, taking into account the importance of the European Convention on Human Rights (hereafter, ECHR), the object of this article is to examine the nature of an undertaking's responsibility in Polish antitrust proceedings, considered in light of the jurisprudence of the ECtHR.

⁶ See, *inter alia*: judgment of the Constitutional Tribunal of 08 December 1998, K 41/97 (1998) 7 *Orzecznictwo Trybunału Konstytucyjnego* item 117; judgment of the Constitutional Tribunal of 19 March 2007, K 47/05 (2007) 3 *Orzecznictwo Trybunału Konstytucyjnego-A* item 27; judgment of the Constitutional Tribunal of 12 May 2009, P 66/07 (2009) 5 *Orzecznictwo Trybunału Konstytucyjnego-A* item 65.

⁷ See, *inter alia*: judgment of the Constitutional Tribunal of 14 June 2004, SK 21/03 (2004) 6 *Orzecznictwo Trybunału Konstytucyjnego-A* item 56; judgment of the Constitutional Tribunal of 7 July 2009, K 13/08 (2009) 7 *Orzecznictwo Trybunału Konstytucyjnego-A* item 105; judgment of the Constitutional Tribunal of 22 September 2009, SK 3/08 (2009) 8 *Orzecznictwo Trybunału Konstytucyjnego-A* item 125.

⁸ See judgment of the Constitutional Tribunal of 15 January 2007, P 19/06 (2007) 1 *Orzecznictwo Trybunału Konstytucyjnego-A* item 2; judgment of the Constitutional Tribunal of 14 October 2009, Kp 4/09 (2009) 9 *Orzecznictwo Trybunału Konstytucyjnego-A* item 134.

II. Three criteria for treating a charge as criminal and their interrelation

The criteria decisive for classifying a responsibility as criminal were set forth in the ECtHR judgments dealing with infringements of Article 6(1) ECHR. This Article provides guarantees that have to be protected in civil and criminal matters. The level of protection is higher when ‘criminal charges’ are being adjudicated. The ECtHR distinguishes between matters belonging to the ‘core of criminal law’ and those that are not strictly criminal. The question whether the responsibility of undertakings stemming from decisions of the UOKiK President might be of a civil character is beyond the scope of this text.

As regards the criteria which are taken into account when determining whether a person was ‘charged with a criminal offence’ for the purposes of Article 6 of the Convention, the first is the classification of the offence under domestic law⁹. If the offence is classified as criminal under domestic national law, there is no doubt that the guarantees provided by Article 6 of the Convention should be applied. Thus for the purposes of this article only cases which are not formally classified as ‘criminal’ are analyzed.

The formal classification of an infringement proceeding as not being a matter of criminal law is not decisive however, and does not exclude it being determined to be of a ‘criminal character’. The ECtHR has emphasized in its jurisprudence that such a restrictive interpretation of Article 6 of the Convention would not be consonant with the object and the purpose of the Article¹⁰.

When, according to domestic law, a regulation providing for the imposition of certain punishments or sanctions is not classified as a matter of criminal law, the Court will concentrate on the nature of the offence and the nature and degree of severity of the penalty. These three criteria: the statutory classification of the case under national law, the nature of the (criminal) offence, and the type and severity of the penalties under the law are enumerated in the ECtHR judgment in the case of *Engel and Others v the Netherlands*¹¹. The Court has referred to these criteria repeatedly in later judgments, therefore they must be regarded as well-established¹².

⁹ See ECtHR judgment of 8 June 1976, *Engel and others v Netherlands*, appl. no. 5100/71, paras. 80–82.

¹⁰ See ECtHR judgment of 26 October 1984 *De Cubber v Belgium*, appl. no. 9186/80, para. 30.

¹¹ See ECtHR judgment of 8 June 1976 *Engel and others v Netherlands*, appl. no. 5100/71, paras. 80–82.

¹² See ECtHR judgment of 23 July 2002 *Janosevic v Sweden*, appl. no. 34619/97, para. 67; ECtHR judgment of 21 February 1981 *Öztürk v Germany*, appl. no. 8544/79, paras. 48–50; ECtHR judgment of 24 February 1994 *Bendenoun v France*, appl. no. 12547/86, para. 45.

Elaboration of the criteria governing an assessment of the criminal nature of a particular responsibility raises the further question about their relationship. An especially important relationship exists between the criteria: nature of the offence and the type and severity of the penalty imposed for its commission. In the judgment of the Court of 21 February 1984, *Öztürk v Germany*¹³, the ECtHR expressly stated that the Convention does not restrict the national legislators in their formulation of various categories of criminal offences and defining the boundaries between them. Such formulations are not, however, decisive for the purposes of application of the Convention. Otherwise, its application would depend on the will of states, which could, through a formal classification of a specific action, try to avoid its obligation to comply with the standards contained in Articles 6 and 7 of the Convention. Therefore, the Court has ruled that the concept of ‘criminal charge’ has an autonomous meaning under the Convention. Inasmuch as fulfillment of the first condition of the classification, i.e. when a case is formally criminal under the domestic law, makes the remaining criteria irrelevant, the question arises: what is the relation between the criteria of the nature of the act/offence and the type and severity of the penalty imposed for its commission?

According to the jurisprudence of the Court, both of them are considered sufficient for an assessment that the offence is a ‘criminal charge’¹⁴. It needs to be noted that evaluation of the criterion ‘the type and degree of severity of the penalty’ has an influence not only on the evaluation of the ‘nature of the offence,’ but also on evaluation of the legislators’ aim. Thus the Court has emphasized there are such close links between these criteria that they should be examined together¹⁵.

Whether, however, the criteria are cumulative or alternative is unclear. For example, in the judgment of 24 February 1994, in the case *Bendenoun v France*¹⁶, the ECtHR postulated that neither of the criteria alone was decisive, but that taken together, they constitute the test to assess the criminal character of a case. On the other hand, in the judgment of 23 July 2002, in the case *Janosevic v Sweden*¹⁷, the Court held that these criteria are alternative and mutually exclusive. To recognize a ‘criminal charge’ it may be sufficient to rely on one of them. However, if the analysis based on separate criteria does

¹³ Appl. no. 8544/79, para. 54.

¹⁴ ECtHR judgment of 8 June 1976 *Engel and others v Netherlands*, paras. 80-82; ECtHR judgment of 21 February 1981 *Öztürk v Germany*, para. 54.

¹⁵ See ECtHR judgment of 23 July 2002 *Janosevic v Sweden*, appl. no. 34619/97, para. 67; ECtHR judgment of 23 July 2002 *Västberga Taxi AB and Vulic v Sweden*, appl. no. 36985/97, paras. 78-79; ECtHR judgment of 1 February 2005 *Ziliberg v Moldova*, appl. no. 61821/00, para. 31.

¹⁶ Appl. no. 12547/86, para. 61.

¹⁷ Appl. no. 34619/97, para. 67.

not lead to a clear conclusion in the matter, it is well-established that the assessment should be based on their combination.

In this article, the subject of the assessment using the set of the criteria presented above concerns the responsibility of undertakings in antitrust proceedings. It should be noted at the outset that the vast majority of the judgments of the ECtHR do not concern such proceedings. This does not preclude using the judgments as a basis for assessing the nature of liability in antitrust proceedings before the Polish competition authority, but it does require caution in formulating conclusions. Nonetheless the criteria set forth above for assessing a liability as a ‘criminal charge’ are generally well-established in the jurisprudence of the ECtHR. They have been confirmed in cases relating strictly to antitrust proceedings¹⁸, as well as in cases of liability of a similar nature, such as accountability before the French banking commission in the *Dubus S.A. v France* judgment of 11 June 2009¹⁹.

III. Formal qualification by the legislators

1. Undertaking’ responsibility in antitrust proceedings as an administrative responsibility

We now turn to our analysis of the criteria for assessment of the criminal character of the responsibility of undertakings in Polish antitrust law. As has been already been pointed out, the first criteria that should be taken into account is the formal qualification of the offence/act under consideration. The liability of an undertaking in Polish antitrust proceedings is formally designated by Polish law as a responsibility of an administrative nature. According to Polish domestic law, criminal responsibility encompasses liability for those crimes and petty offences that are set forth in the Criminal Code and the Code for Petty Offences. With regard to provisions concerning acts which fall outside these codes, their potential criminal character is connected with the type of penalty provided for in the governing provision, and the way of formulating the provision.

¹⁸ See ECtHR judgment of 27 February 1992 *Societe Stenuit*, appl. no. 11598/85 (see ECtHR decision of 11 July 1989); ECtHR judgment of 14 October 2003 *Lilly v France*, appl. no. 53892/00, paras. 22–26; ECtHR decision of 3 June 2004 *Nestee St. Petersburg and others v Russia*, appl. no. 69042/01; ECtHR judgment of 27 September 2011, *Menarini Diagnostics v Italy*, appl. no. 43509/08, paras. 38–45.

¹⁹ ECtHR judgment of 11 June 2009, *Dubus S.A. v France*, appl. no. 5242/04, para. 45.

Thus an assessment of the character of the responsibility in Polish antitrust proceedings from the perspective of the first criterion is not difficult²⁰. According to the Polish Act of 16 February 2007 on Competition and Consumer Protection²¹ (hereafter, the Act), antitrust proceedings are: the anti-monopoly proceedings concerning competition-restricting practices (Title VI, Chapter 2 of the Act) and the anti-monopoly proceedings concerning concentration (Title VI, Chapter 3 of the Act). The responsibility formulated in the Act is formally designated as a responsibility of an administrative nature. This conclusion also follows from the type of authority which is granted to issue a binding decision about such liability. The UOKiK President is competent to impose sanctions on the basis of the Act exclusively²².

The penalties for violation are imposed via an administrative decision, and according to the Article 83 of the Act, matters not regulated by the Act shall be subject to the provisions of the Code of Administrative Procedure. It might be noted that as regards evidentiary matters in proceedings before the UOKiK President, their scope is not regulated in the Act. Therefore Articles 227–315 of the Code of Civil Procedure are applied in evidentiary matters. It also should be mentioned that according to Article 105c(4) of the Act, the provisions of the Criminal Procedure Code relating to searches shall be applied in all matters not provided for in the Act. The applicability of these provisions does not, however, change the formally administrative character of the proceedings under Polish law. The formal administrative nature of the proceedings is also not changed by the fact that the decision taken in the anti-monopoly proceedings before the UOKiK President shall be subject to an appeal to the Court of Consumer and Competition Protection. The proceeding before this Court takes place on the basis of the Code of Civil Procedure²³.

The ultimate conclusion about the nature of the responsibility adjudicated also derives from the character of the authority issuing the decision in a case, the form of the decision, and the kind of procedure applied in proceedings before the authority. In the literature concerning administrative law doctrine and the nature of administrative responsibility one can encounter the

²⁰ M. Bernatt, 'Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku (na tle art. 6 EKPC)' (2012) 1 *Państwo i Prawo* 55.

²¹ Journal of Laws 2007 No. 50, item 331, as amended.

²² M. Błachucki, S. Józwiak, 'Sankcje strukturalne w prawie antymonopolowym jako sankcje administracyjnoprawne', [in:] M. Stahl, R. Lewicka, M. Lewicki (eds.), *Sankcje administracyjne*, Warszawa 2011, p. 450.

²³ M. Szydło, *Nadużywanie pozycji dominującej w prawie ochrony konkurencji*, Warszawa 2010, pp. 269-270; M. Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, Warszawa 2012 (forthcoming, Chapter 4, Section 1.3).

statement that this is an ‘unclear’ concept²⁴. W. Radecki has even noted a tendency to avoid analysis of the concept and to focus instead on the concept of administrative sanction²⁵. J. Boć emphasized that the basic criterion for assigning administrative responsibility seems to be a negative one. By this he means that what does not belong to the scope of civil, criminal or employee liability is designated as an administrative responsibility²⁶. Bearing in mind that the notion of an ‘administrative matter’ is broader than the notion of ‘administrative responsibility’, it has to be underlined that the doctrine very rarely analyzes the administrative nature of a matter. There is even a statement in the doctrine that there is no sphere of matters that are administrative by their very nature²⁷.

2. Decision on responsibility versus decision concerning administrative matters

Not every decision taken by the UOKiK President in antitrust proceedings has the effect of determining the liability of the addressee of the decision. The aforementioned elements concerning the structure of liability have to be proved in order to conclude that the UOKiK is dealing, in a particular instance, with a question of responsibility. Two of the elements are of key importance in distinguishing decisions which have the effect of determining an administrative responsibility from those which result from purely administrative concerns (management). These are: events or states of affairs which are subject to a negative normative qualification; and the imposition of a sanction, i.e. a negative consequence, upon a responsible entity.

Consequently, decisions which have the effect of determining responsibility are those issued by the UOKiK President in anti-monopoly proceedings concerning competition-restrictive practices. This applies to decisions issued in connection with violations of Article 6 of the Act on the prohibition of competition-restrictive agreements, as well as violations of Article 9 of the Act prohibiting abuse of dominant position. In other words, violation of these provisions means that the undertaking’s conduct is contrary to the law, i.e., is

²⁴ W. Radecki, *Odpowiedzialność...*, p. 72; M. Wincenciak, *Sankcje w prawie administracyjnym i procedura ich wymierzania*, Warszawa 2008, pp. 88–93.

²⁵ A broader interest in the issue of ‘administrative responsibility’ can be noted in environmental protection law. Cf W. Radecki, *Odpowiedzialność...*, p. 72; M. Wincenciak, *Sankcje w prawie administracyjnym...*, pp. 88–93; K. Kwaśnicka, *Odpowiedzialność administracyjna w prawie ochrony środowiska*, Warszawa 2011, pp. 48–49.

²⁶ J. Boć [in:]: J. Boć, K. Nowacki, E. Samborska-Boć, *Ochrona środowiska*, Wrocław 2000, p. 323.

²⁷ Z. Kmiecik, *Skuteczność regulacji administracyjnoprawnej*, Łódź 1994, p. 50.

deemed to be an event which is subject to negative normative qualification. If, during anti-monopoly proceedings concerning competition-restricting practices, the UOKiK President affirms that an undertaking's conduct violated the aforementioned provisions, or Articles 101 or 102 of the Treaty on the Functioning of European Union, he or she issues a decision assessing the practice as one restricting competition and ordering the undertaking to refrain from it (Article 10 of the Act). In addition it should be noted that the UOKiK President can also issue a decision assessing the practice as one restricting competition and declaring it discontinued [Article 11(2) of the Act], and a decision imposing an obligation to exercise the commitments undertaken [Article 12(1) of the Act]. The UOKiK President may also impose a fine upon an undertaking [Article 106(1)(1) and (2) of the Act}. The amount of the fine cannot exceed 10% of revenue earned in the fiscal year preceding the year of imposition of a penalty.

Regarding decisions in anti-monopoly proceedings concerning concentration, the UOKiK President can issue, by way of decision, a consent to implement a concentration (Article 18 of the Act), a consent conditioned upon the fulfillment of certain conditions [Article 19(1) of the Act], or a prohibition of the implementation of a concentration because competition in the market will be significantly impeded [Article 20(1) of the Act]. Besides, the UOKiK President may issue, during the proceedings, decisions ordering: division of the merged undertaking under conditions defined in the decision; disposal of the entirety or part of the undertaking's assets; disposal of stocks or shares ensuring control over another undertaking or undertakings, or dissolution of a company over which undertakings have joint control [Article 21(2) and (4) of the Act]. Similarly as in the anti-monopoly proceedings concerning competition-restrictive practices, the UOKiK President may issue a decision imposing a financial penalty for making the merger without their consent, up to 10% of revenue earned in the fiscal year preceding the year of the imposition of the penalty [Article 106(1)(3) of the Act].

As the object of interest in this article concerns the criteria for treating antitrust responsibility as criminal responsibility within the meaning of ECtHR jurisprudence, we need to analyze whether, in a concrete case whereby a decision is issued, the UOKiK President is imposing such responsibility²⁸. Taking into account the aforementioned elements of the responsibility, it is clear that the decisions issued under Art. 18-20 of the Act are not decisions imposing responsibility. In the cases of consent, conditional consent, or prohibition of concentration, there is no negative normative qualification of any behavior. In

²⁸ For an assessment which cases belong to civil cases, cf. the various positions expressed in: M. Bernatt, 'Prawo do rzetelnego procesu...', p. 59, M. Błachucki, *System postępowania...*, (Chapter 4, Section 1.4).

other words, a case where an undertaking applies for a consent to implement a concentration does not constitute a situation whereby a particular behavior is contrary to a norm that contains an order or a prohibition. Consequently, no burden is placed on the undertaking because of an infringement of such a norm²⁹. The decisions on consent or prohibition of concentration are decisions on the process of administration (management), and not decisions on liability³⁰.

All other previously-mentioned decisions issued in concentration cases are, however, decisions attributing responsibility for infringing a prohibition or an order requiring particular behavior. Therefore they need to be further analyzed.

The sanctions provided in Article 21(2) in connection with Article 21(4) of the Act are the consequences of infringing Article 13 of the Act, imposing an obligation to notify the UOKiK of an intention of concentration by fulfilling the conditions set out in this provision, and to duly inform the UOKiK of all the facts necessary for it to issue a decision on the proposed concentration. Similarly a sanction in the form of a pecuniary fine as provided in Article 106(1)(3) of the Act is a consequence of infringing the requirement to notify the UOKiK President of an intention to engage in a concentration.

In addition, the legislators have also provided for the possibility that the UOKiK President may impose, by way of a decision, a fine for not complying with the decision, orders, or court judgments specified in Article 107 of the Act³¹, or for failing to fulfill obligations that an undertaking has agreed to as a party to a proceeding [Article 106(2) of the Act]. However, this does not mean that an undertaking's responsibility is legally imposed in the above-cited instances. In order to simplify further analysis, those cases of responsibility would be called 'secondary responsibility', whereas the examples given in the first instance constitute 'primary responsibility'³². And only this responsibility is an object of our further reflection in this text³³.

²⁹ See the considerations of W. Radecki on the nature of decisions imposing fees for using the environment, increased fees and administrative penalties in environmental law. W. Radecki, *Odpowiedzialność...*, pp. 61–62.

³⁰ Cf. M. Błachucki, S. Józwiak, 'Sankcje strukturalne...', p. 450; A. Michór, *Odpowiedzialność administracyjna w obrocie instrumentami finansowymi*, Warszawa 2009, pp. 39–40.

³¹ In the case of non-compliance with the decision referred to in Article 21(1) or (4), the UOKiK President may, by way of a decision, accomplish a division of the undertaking (Article 99 of the Act).

³² Here I make use of the terminology proposed by M. Błachucki. The author applies these notions to the concentration cases, but they can be applied to anti-monopoly proceedings and more narrowly to anti-monopoly responsibility. Cf. M. Błachucki, *System postępowania...*, (Chapter 4 Section 1.1).

³³ For example, Article 108 of the Act provides for imposing responsibility on a person holding a managerial post or being a member of the managing board of the undertaking.

IV. Criminal nature of the offence

1. Generally applicable norm

Since we have shown that, from a formal point of view, antitrust responsibility under Polish law is an administrative responsibility, the other ECtHR criteria need to be analyzed. As far as the nature of the offence is concerned, it stems from the jurisprudence that this offence needs to be of a ‘criminal’ nature. This criteria however is unusually difficult to grasp and define³⁴. There are hypotheses that it boils down to an assessment if the offence is, by its nature, ‘criminally’ prohibited³⁵.

The ECtHR has distinguished two elements of analysis in connection with the criminal nature of the offence. The first is the scope of addressees of the norm, and the second is the aim of the norm. As far as the addressees of the norm are concerned, the ECtHR has ruled that that a criminal norm imposing a particular burden cannot be addressed only to a limited group of entities³⁶. Thus disciplinary proceedings concerning a particular professional group are not considered of a criminal nature. ECHR commentators, however, have criticized this criteria for assessing the criminal nature of the offence, stating that there are several kinds of offences which are of an individual character, which implies that they can be committed by individuals belonging only to a particular group of persons³⁷. But it needs to be stated that such cases of individual offences are usually formally qualified as criminal matters and thus no need for analyzing their criminal nature occurs. Therefore a statement that they could be committed only by a closed (limited) group of persons does not deprive them of their criminal character as they are so classified under law.

It seems however that this criteria should be understood in a different manner than that used in interpreting generally applicable norms in national law. This stems from the ECtHR’s jurisprudence that, in its analysis of the general character of a norm, it refers not only to the scope of addressees concerned but also to the criteria whether an offence infringes upon a common good³⁸.

Using this criteria for assessing the aforementioned examples of responsibility in anti-monopoly proceedings, one needs to mention the ECtHR judgment specifically involving antimonopoly proceedings. In its judgment of

³⁴ ECtHR judgment of 23 November 2006, *Jussila v Finland*, appl. no. 73053/01, para. 38.

³⁵ ECtHR judgment of 23 July 2002, *Janosevic v Sweden*, appl. no. 34619/97, paras. 67–68.

³⁶ ECtHR judgment of 22 May 1990, *Weber v Switzerland*, appl. no. 11034/84, para. 33.

³⁷ P. Hofmański, A. Wróbel [in:] L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, vol. I, Warszawa 2010, pp. 282–283.

³⁸ ECtHR judgment of 22 May 1990, *Weber v. Switzerland*, appl.no. 11034/84, para. 33.

Menarini Diagnostic v Italy, the ECtHR underlined that the aim of the antitrust law provisions concerned was the protection of freedom of competition. The monitoring (surveillance) of behaviors infringing upon this value serves the general public interest, and its protection belongs usually to criminal law³⁹. The criteria of the general applicability of norms, the infringement of which creates criminal responsibility, has been interpreted by the ECtHR in relation to the nature of the values protected by those norms. Since competition is a value protected in the name of the public interest, the norms prohibiting behaviors that infringe upon that value should be perceived as ‘generally applicable’. Thus, the prohibition of agreements that infringe competition (Article 6 of the Polish Act), the prohibition of abuse of a dominant position (Article 9 of the Act), and the obligation to notify of an intention of concentration (Article 13 of the Act) are norms of such a general character.

While analyzing this criteria, it is instructive to refer to the ECtHR decision of 3 June 2004 in the case *Neste St. Petersburg and others v Russia*⁴⁰. The ECtHR stated in that case that the responsibility in front of the Russian competition authority was not of a criminal character, and thus Article 6 of the Convention was not applicable. In that case the Russian competition authority ordered a confiscation of profits stemming from infringement of the Russian Competition Act. This Act does not provide the possibility of imposing pecuniary sanctions on infringing undertakings, therefore this particular case is often omitted in the legal analyses concerning antitrust responsibility⁴¹. One has to agree with the general conclusion of this decision. It is however worth mentioning that in this case the second criteria – namely the nature of the offence – was also analyzed by ECtHR.

The undertakings involved raised the argument that the aim of antitrust proceedings was the protection of a general interest, which constitutes a typical characteristic of criminal law. But the ECtHR underlined in response to this argument that the provisions of the Act under consideration – the Competition Law in Russia – are applicable only to competition on the commodity markets. Therefore the Act was deemed to have only a limited, not general, application.

The ECtHR stated as well that freedom of competition is a relative value and infringements upon it are ‘not inherently wrong in themselves’. This

³⁹ ECtHR judgment of 27 September 2011, *Menarini Diagnostics v Italy*, appl. no. 43509/08, para. 40; ECtHR judgment of 27 February 1992, *Societe Stenuit v France*, appl. no. 11598/85 (see ECtHR decision of 11 July 1989).

⁴⁰ Appl. no. 69042/01.

⁴¹ Cf. D. Slater, S. Thomas, D. Waelbroeck, ‘Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?’ (2008) 4 *The Global Competition Law Centre Working Papers Series* 17, available at <http://www.gclc.coleurop.be>; M. Bernatt, ‘Prawo do rzetelnego procesu...’, p. 57.

constituted an argument against the criminal character of the responsibility. The arguments used by ECtHR in this case were controversial however, and not only because it didn't consider the fact that the antitrust law serves a public interest; they were also problematic because one can argue that at least some of the behaviors involved constituted an infringement belonging to the 'malum per se' category. Certainly some practices restricting competition may belong to such a category⁴².

Notwithstanding the above, one has to agree with some of the other arguments used in the decision, which referred to the character of responsibility for behaviors categorized above as 'secondary' anti-monopoly matters, and to the character of the sanction imposed on the undertaking. The ECtHR stated that behaviors consisting of 'obstructing the authorities' investigation' do not belong to 'substantive' antimonopoly responsibility⁴³. Even if the ECtHR had stated that the free competition should be protected in the public interest, this assessment would not change the fact that this case concerned behaviors belonging to the "secondary" rung of antimonopoly responsibility. Therefore, as has been pointed out earlier, the criminal character of the pecuniary penalties imposed by the UOKiK President for non-execution of his or her decisions, orders or judgments as stated in Article 107 of the Act, or for infringing upon the obligations of participants of proceedings, are not imposed as derelictions of responsibility stemming from generally applicable norms as they are understood by the ECtHR.

2. The aim of the norm

The second criteria distinguished in the ECtHR jurisprudence is the 'aim of the norm'. This should be understood as the aim of the burden imposed by it. If the aim of the sanction is repression or prevention linked with repression⁴⁴, this would testify to the criminal character of an offence. An example of such a case might be the 'additional charges' imposed by fiscal authorities in tax cases for wrongly referring to the tax base or the custom base⁴⁵. The ECtHR

⁴² See M. Król-Bogomilska, *Kary pieniężne...*, p. 39.

⁴³ This corresponds to the objections raised in Polish doctrine. While analysing the character of such pecuniary fines, M. Król-Bogomilska noticed their relationship with fines being a measure of administrative execution; cf M. Król-Bogomilska, *Kary pieniężne...*, p. 58.

⁴⁴ ECtHR judgment of 24 February 1994, *Bendenoun v France*, para. 47; ECtHR judgment of 21 February 1984, *Özurk v Germany*, para. 53; ECtHR judgment of 2 September 1998, *Lauko v Slovakia*, appl. no. 26138/95, para. 58.

⁴⁵ ECtHR judgment of 24 February 1994, *Bendenoun v France*, paras. 45–47; ECtHR judgment of 29 August 1997, *A.P., M.P. i T.P. v Switzerland*, appl. no. 19958/92, para. 39.

has similarly treated sanctions for traffic offences⁴⁶, and pecuniary fines for participating in an illegal demonstration⁴⁷. If the aim of the measure is prevention only and there is no element of repression, the ECtHR does not treat such a matter as criminal in nature⁴⁸.

If the sanctions imposed by the UOKiK President are analyzed from this perspective, the following sanctions should be perceived as preventive: assessment of a practice as restricting competition and an order to refrain from it or declaration of its discontinuation, or sanctions consisting of obliging the undertaking to exercise or refrain from certain commitments. The aim of such sanctions consists in restoring the state of legality and preventing the repetition of the practices concerned. It must be underlined that this preventive aim is fulfilled without a 'repression element.' Subjectively such sanctions might be perceived as limiting the freedom of action of an undertaking, but apart from restituting a state of events in accordance with the law, they do not place any additional burden on the undertaking concerned.

One has to similarly assess sanctions ordering the division of an undertaking or the disposal of the entirety or part of the assets of an undertaking, disposal of the control over the undertaking or undertakings, or the dissolution of a company over which the undertakings have joint control [Article 21(2) and (4) of the Act]. These actions serve to reestablish the state of competition and to leverage the negative effects of its distortion⁴⁹.

The reasoning of the ECtHR in *Neste St. Petersburg v Russia* should be recalled here. The ECtHR stated in that case that the character of the sanction imposed on the undertaking was not criminal inasmuch as the sanction consisted of confiscation of profits stemming from the infringement of antitrust law. The aim of the sanction was prevention and restoration of the state of affairs to the *status quo ante*.

Sanctions consisting of pecuniary fines based on the provisions contained in Article 106(1)-(3) of the Act should be assessed differently. The aim of these sanctions is not compensation for damages caused by behaviors found to infringe the norms of competition law. The claims of entities harmed by those offences are not remedied from this source⁵⁰. The fines serve to impose such a financial burden on an undertaking that would prevent it, as well as other

⁴⁶ ECtHR judgment of 23 October 1995, *Schmautzer v. Austria*, appl. no. 15523/89, paras. 26–28; ECtHR judgment of 2 September 1998, *Kadubec v Slovakia*, appl. no. 27061/95, paras. 46–47, 50–53; ECtHR judgment of 23 September 1998, *Malige v. France*, appl. no. 27812/95, para. 34, 39.

⁴⁷ ECtHR judgment of 29 April 1988, *Belilos v Switzerland*, appl. no. 10328/83, para. 62.

⁴⁸ Such conclusion could *a contrario* be drawn from the ECtHR judgment of 21 February 1984, *Öztürk v Germany*, para. 53; ECtHR judgment of 2 September 1998 *Lauko v Slovakia*, appl. no. 26138/95, para. 58.

⁴⁹ M. Błachucki, S. Józwiak, 'Sankcje strukturalne...', p. 452.

⁵⁰ M. Bernatt, 'Prawo do rzetelnego procesu...', p. 56.

undertakings, from infringing Articles 6, 9 and 13 of the Act. As the sanction imposed for such offences has both a preventive and repressive function⁵¹, such offences should be deemed to be of a criminal character.

It has to be underlined that when assessing the nature of an offence, the ECtHR does not consider its gravity. This is reflected in the fact that some offences are qualified as criminal even though, from the social point of view and taking into account the value of the public good protected, they are of a 'minor' character. Thus the legislators qualify such acts as 'petty offences'⁵². Similarly, offences consisting of minor order infringements where no negative moral appraisal occurs may be treated by the ECtHR as criminal matters because of the purpose of the sanction imposed⁵³.

The principle, upon which responsibility is imposed, is also not taken into consideration by the ECtHR. In the decisions of ECtHR this element of the structure of responsibility is not determinative in assessing the nature of a particular case as to whether it constitutes a responsibility⁵⁴. The fact that the responsibility is of an objective character does not preclude treating it as a criminal responsibility.

V. Type and severity of penalties

The third criteria for distinguishing a criminal matter is the type and severity of the penalty established by a specific regulation. It should be noted that both the type and the severity of a penalty are relevant. If the penalty involves a imminent deprivation of liberty, this fact alone is sufficient to qualify an offence as criminal. The word 'imminent' is important however, and in the *Engel v Netherlands* judgment⁵⁵ the ECtHR stated that in exceptional

⁵¹ See M. Król-Bogomilska, *Kary pieniężne...*, pp. 184–195; M. Bernatt, 'Prawo do rzetelnego procesu...', p. 56; D. Miąsik, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 1597, cf. A. Andreangelli, *EU Competition Enforcement and Human Rights*, Cheltenham, Northampton 2008, p. 26.

⁵² ECtHR judgment of 25 August 1987, *Lutz v Germany*, appl. no. 9912/82, para. 55; ECtHR judgments of 23 October 1995: *Schmautzer v Austria*, appl. no. 15523/89, para. 26; *Pfarmeier v Austria*, appl. no. 16841/90, para. 31; *Pramstaller v Austria*, appl. no. 16713/90, para. 30; *Umlauf v Austria*, appl. No. 15527/89, para. 29; ECtHR judgment of 2 September 1998, *Kadubec v Slovakia*, appl. No. 27061/95, paras. 46–48, 50–53; ECtHR judgment of 9 October 2003, *Ezeh and Connors v United Kingdom*, appl. No. 39665/98, 40086/98, para. 104.

⁵³ See P. Burzyński, *Ustawowe określenie sankcji karnej*, Warszawa 2008, pp. 52–53.

⁵⁴ Cf ECtHR judgment of 7 October 1988, *Salabiaku v France*, appl. no. 10519/83, paras. 27–28; ECtHR judgment of 23 July 2002, *Janosevic v Sweden*, appl. no. 34619/97, paras. 68, 101.

⁵⁵ ECtHR judgment of 8 June 1976, *Engel v Netherlands*, appl. no. 5100/71, para. 82.

circumstances the time and the manner of executing this penalty might constitute an argument against its criminal character.

As for pecuniary fines, there is no way of establishing a severity level of this sanction *in abstracto* as a test for qualifying a matter as criminal (which would imply the automatic application of the procedural guarantees stemming from Article 6 ECHR). In addition, it has to be noted that for the ECtHR it is the severity of the regulation and not its practical application in a concrete case that matters⁵⁶. In some judgments, a pecuniary fine exceeding 2500 euro was assessed as insufficient for qualifying a matter as criminal⁵⁷, while in others a pecuniary fine corresponding to 400 euro was, in the ECtHR's judgment, sufficient to trigger the application of the procedural guarantees set forth in Article 6 of the Convention⁵⁸.

As for other types of sanctions, the ECtHR has assessed their actual severity. For example, in the *Malige v France* judgment of 23 September 1998 it treated the deprivation of a driving license as so severe that the matter was considered to be criminal⁵⁹. In giving the reasons for its judgment, the ECtHR referred to the fact that the use of a car is so general and prevalent that the deprivation of this right testifies to the severity of the sanction. On the other hand, the deprivation of electoral rights for a year⁶⁰ or the deprivation of a license to sell alcohol⁶¹ were not considered severe enough to constitute criminal sanctions. This shows that the assessment made by the ECtHR concerning the degree of severity of a penalty makes reference to the surrounding conditions in which the penalty is carried out.

In attempting to transfer these reflections to the character of sanctions imposed on undertakings as a result of antitrust proceedings, one has to stress that both types of sanctions – criminal and non-criminal – might be burdensome for an undertaking. Even if a sanction is aimed at the restoration of the lawful state of affairs, it nonetheless constitutes an obligation for an undertaking to refrain from certain practices or to introduce certain changes in the undertaking's structure. Nonetheless if the Act on the protection of competition and consumers provided only for this type of sanctions, the

⁵⁶ ECtHR judgment of 27 February 1992, *Societe Stenuit v France*, appl. no. 11598/85 (see ECtHR decision of 11 July 1989).

⁵⁷ ECtHR judgment of 24 September 1997, *Garyfallou Aebe v Greece*, appl. no. 18996/91, para. 34.

⁵⁸ ECtHR judgment of 22 May 1990, *Weber v. Switzerland*, appl. no. 11034/84, para. 34; ECtHR judgment of 22 February 1996, *Putz v Austria*, appl. no. 18892/91, para. 37, in which a pecuniary fine exceeding 1500 euro was not considered sufficient to classify the matter as criminal.

⁵⁹ ECtHR judgment of 23 September 1998, *Malige v France*, appl. no. 27812/95, para. 39.

⁶⁰ ECtHR judgment of 21 October 1997, *Pierre-Bloch v France*, appl. no. 24194/94, para. 58.

⁶¹ ECtHR judgment of 7 July 1989, *Tre Traktörer Aktiebolag v Sweden*, appl. no. 10873/84, para. 46.

antitrust responsibility would not be considered criminal. They cannot be considered sanctions with a high degree of severity if their consequence consists in no other additional burden than the restitution of the lawful state of affairs. However if the Act provided for a sanction consisting of the prohibition of a certain activity, then despite its preventive function its level of severity would testify to its criminal character.

The analysis of the pecuniary fines provided for in Article 106(1)(1)-(3) of the Act leads to different conclusions. The reasons for this lie in the variations in the character and extent of these sanctions. According to Article 106, the UOKiK President might impose upon an undertaking a maximum pecuniary fine of 10% of the revenue earned in the accounting year preceding the year within which the fine is imposed. This testifies to a high degree of severity, even if one takes into account the fact the fines are imposed on undertakings. The setting of the maximum level of the fine in such a way that it refers to an undertaking's total revenue also means that the legislator has not set an absolute maximum ceiling for such a fine. This is an argument for perceiving the fine as very severe⁶².

The cardinal importance of pecuniary sanctions as instruments serving to protect competition and consumers is underlined in the legal doctrine⁶³. Because they are so burdensome, the threat of their occurrence is a strong preventive instrument in anti-monopoly law⁶⁴. Taking all this in consideration, one has to agree with the ECtHR that the level of fines imposed in antitrust proceedings would also be an argument for treating this type of responsibility as criminal⁶⁵.

VI. Conclusions

What are the consequences of considering the responsibility imposed on undertakings in antitrust proceedings as a criminal responsibility? The ECtHR does not follow a formal rule that a matter must belong to a particular branch of law in order for the protections of Article 6 to apply, because its task is to review whether any regulation is in conformance with or contrary to the

⁶² See M. Bernatt, 'Prawo do rzetelnego procesu...', p. 57; K. Kowalik-Bańczyk, *The issue of the protection of fundamental rights in EU competition proceedings*, z. 39, Centrum Europejskie Natolin, Warszawa 2010, p. 26.

⁶³ A. Stawicki, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2011, p. 1161.

⁶⁴ A. Stawicki, [in:] *Ustawa...*, p. 1161.

⁶⁵ ECtHR judgment of 27 September 2011, *Menarini Diagnostics v Italy*, appl. no. 43509/08, paras. 41–42.

standards set forth in Article 6 of the Convention. The States, Parties to the Convention, cannot by the formal qualification of a particular case avoid their obligation to protect the guarantees stemming from the Convention.

It is useful here to recall the ECtHR judgment in *Malige v France*, where the Court found that the sanction imposed by administrative organs was of a repressive nature⁶⁶. According to the ECtHR, France had not however infringed Article 6 of the Convention inasmuch as, in the process of judicial review of cases involving the deprivation of driving licenses, the guarantees of a fair trial in criminal matters were assured. On the other hand, in the case *Belilos v Switzerland*⁶⁷, concerning a fine for participation in an illegal demonstration, the ECtHR found that such a sanction was of a criminal character. In the meantime it underlined that the practice of letting administrative organs decide cases on sanctions for minor offences is allowable, if there is a possibility of judicial review that guarantees that the provisions of Article 6 of the Convention are complied with.

In order to define the guarantees that have to be protected in antitrust proceedings one has to refer to the ECtHR jurisprudence concerning cases that do not belong to the 'core of criminal law'. In such cases the level of protection can be lower⁶⁸. Such a qualification of antitrust proceedings and its consequences for the protections attendant in antitrust procedures can give rise to considerable doubts⁶⁹. It raises the question of the scope of application of the guarantees contained in Article 6 of the Convention to such proceedings. Following the indications given in the *Menarini Diagnostic v Italy* judgment⁷⁰ it does not mean that any State would be relieved from its obligation to protect the guarantees required in criminal matters. However, it can significantly influence their application. It means, *inter alia*, that the sanction may be imposed by an administrative organ, provided that this decision is subject to a full judicial review.⁷¹ In antitrust proceedings all procedural guarantees for criminal matters contained in Article 6 of the Convention should be safeguarded⁷².

To conclude, the analysis of the nature of undertaking's responsibility in antitrust proceedings in light of the 'criminal charge' criteria established by the ECtHR jurisprudence leads to the conclusion that one cannot apply these

⁶⁶ ECtHR judgment of 23 September 1998, appl. no. 27812/95, para. 50.

⁶⁷ ECtHR judgment of 29 April 1988, *Belilos v. Switzerland*, appl. no. 10328/83, para. 68.

⁶⁸ ECtHR judgment of 23 November 2006, *Jussila v. Finland*, appl. no. 73053/01, para. 43.

⁶⁹ See M. Bernatt, 'Prawo do rzetelnego procesu...', pp. 60–62.

⁷⁰ ECtHR judgment of 27 September 2011, appl. no. 43509/08, para. 62.

⁷¹ ECtHR judgment of 27 September 2011, appl. no. 43509/08, para. 59.

⁷² M. Bernatt, 'Prawo do rzetelnego procesu...', p. 61–62. See also: M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, pp. 70–74.

criteria to those decisions of the UOKiK President that do not attribute any responsibility to an undertaking, i.e. decisions on consent, refusal of consent, or prohibition of a concentration. Decisions imposing sanctions for an undertaking's behavior for breaching orders or prohibitions should be divided into those that concern 'primary' and 'secondary' antitrust responsibility. The second category does not possess a criminal character as it does not consist of responsibility for 'generally prohibited' behaviors within the meaning of ECtHR jurisprudence. As for other examples of responsibility – when they are linked with the imposition of pecuniary fines for antitrust infringements as set forth in Article 106(1)(1)-(3) of the Act – the undertaking's responsibility should be considered a criminal responsibility.

Literature

- Andreangelli A., *EU Competition Enforcement and Human Rights*, Cheltenham, Northampton 2008.
- Bernatt M., *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [*Procedural fairness in the proceedings before the competition authority*], Warszawa 2011.
- Bernatt M., 'Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku (na tle art. 6 EKPC)' ['The Right to a Fair Trial in Proceedings in Cases of Competition Protection and Market Regulation (in light of Article 6 of the ECHR)'] (2012) 1 *Państwo i Prawo*.
- Błachucki M., *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców* [*The System of Anti-monopoly Proceedings Concerning Concentration of Undertakings*], Warszawa 2012 (forthcoming).
- Błachucki M., Józwiak S., 'Sankcje strukturalne w prawie antymonopolowym jako sankcje administracyjnoprawne' ['Structural Sanctions in Anti-monopoly Law as Administrative Sanctions'], [in:] Stahl M., Lewicka R., Lewicki M. (eds.), *Sankcje administracyjne* [*Administrative Sanctions*], Warszawa 2011.
- Boć J., Nowacki K., Samborska-Boć E., *Ochrona środowiska* [*Protection of the Environment*], Wrocław 2000.
- Burzyński P., *Ustawowe określenie sankcji karnej* [*Defining a criminal sanction in law*], Warszawa 2008.
- Garlicki L. (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności* [*The European Convention on Human Rights and Fundamental Freedoms*], vol. I, Warszawa 2010.
- Kmieciak Z., *Skuteczność regulacji administracyjnoprawnej* [*The Efficiency of Administrative Regulation*], Łódź 1994.
- Kowalik-Bańczyk K., *The issue of the protection of fundamental rights in EU competition proceedings*, z. 39, Centrum Europejskie Natolin, Warszawa 2010.
- Król-Bogomilska M., *Kary pieniężne w prawie antymonopolowym* [*Pecuniary fines in antitrust law*], Warszawa 2001.

- Kwaśnicka K., *Odpowiedzialność administracyjna w prawie ochrony środowiska* [*Administrative Responsibility in Environmental Law*], Warszawa 2011.
- Lang W., *Struktura odpowiedzialności prawnej* [*The Structure of Legal Responsibility*] (1968) 31 *Zeszyty Naukowe Uniwersytetu im. Mikołaja Kopernika*.
- Michór A., *Odpowiedzialność administracyjna w obrocie instrumentami finansowymi* [*Administrative Responsibility in Trade in Financial Instruments*], Warszawa 2009.
- Radecki W., *Odpowiedzialność w prawie ochrony środowiska* (Responsibility in Environmental Protection Law), Warszawa 2002
- Skoczny T., Jurkowska A., Miąsik D. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [*Act on Competition and Consumers Protection. Commentary*], Warszawa 2009.
- Skupiński J., *Model polskiego prawa o wykroczeniach* [*Model of Polish law on petty offences*], Wrocław 1974.
- Slater D., Thomas S., Waelbroeck D., 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?' (2008) 4 *The Global Competition Law Centre Working Papers Series*.
- Stawicki A., Stawicki E. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [*Act on Competition and Consumers Protection. Commentary*], Warszawa 2011.
- Szumiło-Kulczycka B., *Prawo administracyjno-karne* [*Administrative-Criminal Law*], Kraków 2004
- Szydło M., *Nadużywanie pozycji dominującej w prawie ochrony konkurencji* [*Abuse of dominant position in competition law*], Warszawa 2011
- Wincenciak M., *Sankcje w prawie administracyjnym i procedura ich wymierzania* [*Imposition of Sanctions under Administrative Law and Procedure*], Warszawa 2008.

Competence of Common Courts in Poland in Competition Matters

by

Aleksander Stawicki*

CONTENTS

- I. Introduction
- II. Mission statement
- III. Specificity of competition proceedings
- IV. Current views on the role of competition courts
- V. Key problems with the current approach
- VI. In search of a ‘third way’
- VII. Proposals for change

Abstract

The main aim of this article is to present current judicial practice, concerning hearing cases stemming from appeals of Polish Competition Authority decisions. The relevant court tends to review the cases only on merits, omitting to address procedural infringements, clearly stated by the parties in appeals. In author’s opinion this common practice does not have a legal leg to stand on. Author analyses relevant laws and precedents pointing out, that full review of the decision is Court’s duty, which could not be neglected. Furthermore, according to ECHR rulings procedural guaranties should be assured on high level, especially in matters, where quasi-criminal fines are concerned. As a legal practitioner Author perceives possible crippling effect on effectiveness, assuming that the Court would have to review all steps of the proceedings before Competition Authority. So in conclusion Author proposes a compromise solution asserting, that the Court should at least address all procedural infringement counts stated in appeal.

* Aleksander Stawicki, LL.M., Partner, WKB Wierciński, Kwieciński, Baehr Law Firm.

Résumé

Cet article vise essentiellement à présenter la pratique judiciaire actuelle pour ce qui est de connaître les affaires résultant d'un recours contre les décisions de l'autorité polonaise de concurrence. Le juge compétent pour ces affaires fait preuve d'une tendance à en connaître exclusivement le fond sans considérer les violations de procédure soulevées expressément dans les recours des parties. L'auteur est d'avis que cette pratique juridictionnelle est dépourvue de fondements juridiques. Il analyse les textes appropriés et l'acquis de la jurisprudence pour montrer qu'un contrôle complet de la décision est une obligation du juge, qui ne saurait être négligée. En plus de cela, conformément à la jurisprudence de la Cour européenne des droits de l'homme, un niveau élevé de garanties procédurales doit être assuré, notamment dans les affaires susceptibles de sanctions quasi-pénales. L'auteur, qui est un praticien, y voit le risque potentiel de compromettre l'efficacité de la procédure, en admettant que le juge soit amené à contrôler toutes les étapes de la procédure avant l'autorité de concurrence. Pour conclure, l'auteur propose une solution de compromis qui admettrait que le juge devrait au moins se prononcer sur les exceptions procédurales soulevées dans le recours.

Classifications and key words: antitrust proceedings; competition; judicial review; National Competition Authority; fines; due course of law; procedural safeguards; procedural infringements.

I. Introduction

The issue of the extent of competence of common courts to hear appeals from decisions of the President of the Office of Competition and Consumer Protection (the Polish National Competition Authority, hereafter alternately the UOKiK President or Competition Authority) has been the subject of widespread debate since passage of the underlying legislation. Despite a number of modifications to the system of court review of the Competition Authority's rulings, solutions that would be commonly accepted as satisfactory have not yet been developed.

Much of the problem lies in the 'hybrid' character of competition proceedings in Poland. At the initial stage a matter is dealt with by a state administrative authority (UOKiK President), largely according to rules of the Code of Administrative Procedure (KPA). An appeal from the Competition Authority's decision, on the other hand, will be heard by a common court (although specially designated in the first instance) according to the rules of civil procedure. These two sets of procedural rules serve substantially different goals in Polish jurisprudence and are different in nature, making it

hard to fit them together to form a consistent whole. Part of the difficulty, too, undoubtedly lies in the fact that the system of common courts, which normally deals with cases between equal parties, has to be 'recast' to fit the role of a reviewing authority for administrative rulings.

This article sets out to propose solutions that would remove one of the fundamental flaws of this 'hybrid' procedure, which is a lack of review of competition proceedings for their compliance with procedural laws. This grows out of an established line of case law supporting what seems to be a mistaken view that the Competition and Consumer Protection Court (or, for that matter, a Court of Appeals or the Supreme Court) has no jurisdiction to hear claims of procedural violations occurring during the stage of administrative proceedings. In practical terms, this means that we are dealing with a state authority (UOKiK President) which may conduct its proceedings unduly (unlawfully) without any negative consequences. What is more, with no judicial review mechanism in place, it is difficult to eliminate the procedural errors as there is no authority to find them and then signal a need to change the *modus operandi*. For the reasons stated below, such a situation is intolerable. Hence, this article attempts to develop and propose certain modifications which could help to extend the competence of common courts to review and remedy procedural violations. Importantly, the proposals would not entail having to amend the current law.

II. Mission statement

Before embarking on my analysis, permit me to make a general remark, a kind of 'mission statement' for this text. The adversarial nature of appeals from Competition Authority's decisions necessarily creates antagonism between the parties involved, that is, the UOKiK President and the undertaking. Each of them is interested in 'winning the case' and obtaining a favourable judgement. One of the points of contention can, and often does, involve procedure. Accordingly, whether making their own argument in the case at hand or arguing in relation to the system as a whole, each party (i.e. the UOKiK President on the one hand, and the undertakings with their lawyers on the other) will tend to push hard for solutions that favour it at the expense of the other. Businesses try to place an ever greater burden on the Competition Authority and the courts which, if shouldered, would in fact cripple the effectiveness of competition enforcement proceedings. On the other hand, guided by the need to ensure an effective case disposition, the UOKiK President sometimes strives to make procedural restrictions as loose and flexible as possible (for example, in waiver of evidence rulings in administrative proceedings).

Such ‘conflicts of interest’ make everyone involved in the issue blind to the procedural specificity of competition matters which, as will be argued further below, are not “ordinary” court cases. One important thing that tends to get forgotten is that procedural safeguards are not in place only to protect the interests of undertakings ‘charged’ with competition infringements (although this undoubtedly is one of their major functions). A due process (e.g. in the area of evidence taking and assessment) will also limit the risk of erroneous decisions on the merits. Indeed, errors made by competition authorities, such as unreasonably banning activities which in fact are not anti-competitive, may have very serious consequences for the economy, including through a chilling effect (e.g. restricting innovation or artificially maintaining inefficient competitors). This is another major reason why the competition enforcement system must be strict not only in its application of substantive rules, but also in its observance of the rules of procedure. Thus, in terms of ‘mission’, this text strives to find solutions which, while ensuring the due protection of the procedural rights of businesses, will not paralyse the competition authority or the reviewing courts by imposing overly onerous tasks which are cumbersome to comply with.

III. Specificity of competition proceedings

Before formulating any proposals, it is necessary to begin with a short discussion concerning the specificity of competition proceedings, as an understanding this issue will undoubtedly shed light on the search for compromise proposals. In considering the specificity of competition enforcement procedure, it is first of all clear that the task of competition courts at all levels differs substantially from responsibilities of a ‘typical’ common court, necessitating departure from a civil-proceedings-based way of thinking. In other words, judicial review proceedings in competition matters, even though conducted before common courts according to the Code of Civil Procedure on commercial matters¹, are not ‘ordinary’ judicial proceedings,

¹ Except that Chapter IVa KPC has been repealed, effective 3 May 2012, by the Act of 16 September 2011 on amendments to the Civil Procedure Code Act and certain other acts (Journal of Laws No. 233, item 1381). Pursuant to Art. 9(7) of the amending act, Articles 479¹–479², 479⁴, 479⁶, 479^{6a}, 479⁸, 479⁹–479^{14b}, 479¹⁶–479^{19a} and 479²² will continue to apply to appeals from decisions of regulatory authorities, including the UOKiK President, that were issued prior to the repeal date (that is on or before 2 May 2012).

just as matters heard by such courts are not ‘ordinary’ civil matters. They are civil matters in form but administrative matters in substance².

Note also that judicial proceedings on appeal from the decisions of the Competition Authority serve a radically different purpose; essentially, their goal is to resolve whether the conduct at issue is or is not anti-competitive. This leads to a conclusion that since all the UOKiK President’s decisions are to be made in the public interest³, so too should the court rulings be guided by the public good. There is no reason why competition court rulings should be made on a different basis than the Competition Authority’s decisions. After all, they have the same content and pertain to the same subject-matter. In other words, when construing Article 479^{31a} of the Code of Civil Procedure (KPC) which lays out the duties of the court, regard must be had also to Article 1(1) of the Competition and Consumer Protection Act (hereafter, Competition Act)⁴, which reads as follows: ‘This Act sets out the framework for the development and protection of competition and the terms upon which the interests of businesses and consumers shall be protected in the public interest’ (emphasis added). As the Supreme Court held in its judgment of 5 June 2008,⁵ ‘[the phrase] ‘in the public interest’ means that **competition is protected in the interests of the state**, notwithstanding any activities of individuals and notwithstanding their interests’. Thus the interests of *the state*, including the interests of all parties to commercial transactions, must be taken into account by courts in their judgments. It follows naturally that a matter adjudged in the public interest may not be dealt with in the same way as an ‘ordinary’ court case between private parties.

These public interest considerations are also important given that the case law of the Competition Authority and common courts serves a special role. The Competition Act is very laconic. Take for example Article 9(2)(1), which prohibits the ‘imposition of overly excessive prices’. This is a very vague term designating an action with very negative social consequences, and conduct which can lead to extremely severe penalties. It is thus imperative that the case law of both the Competition Authority and the common courts hearing appeals from its decisions add precision to and/or construe the specific provisions of competition law. It is not until we have the precedence of case law that we

² Cf. M. Sieradzka, ‘Sądowa weryfikacja decyzji i postanowień wydanych przez Prezesa Urzędu Ochrony Konkurencji i Konsumentów (part I)’ (2007) 10 *Rejent* 105–106.

³ See also: D. Miąsik, T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i Konsumentów. Komentarz*, Warszawa 2009, pp. 45–55; E. Stawicki, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i Konsumentów. Komentarz*, Warszawa 2011, pp. 32–38.

⁴ Act of 16 February 2007 on Competition and Consumers Protection (Journal of Laws No. 50, item 331, as amended).

⁵ Case no. III SK 40/07 (2009) 19–20 *OSNP* 272.

can begin to determine when a price becomes ‘overly excessive’. This is not a typical role for courts in a system based on statutory law, such as the Polish one. Consequently, the common courts are saddled with considerably greater responsibility when hearing appeals from the UOKiK President’s decisions.

There is one other aspect that makes competition enforcement proceedings special in procedural terms. The European Court of Human Rights (ECHR) has held that penalties for anti-competitive practices should be imposed according to a procedure which guarantees that the rights of the undertakings under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, Convention) will be retained⁶. Polish courts (including notably the Supreme Court) have also made a point of noting that, to the extent a business which is a party to the proceedings is to be fined, the rules of judicial review of agency rulings (e.g. those of the UOKiK President) should be similar to those applicable to a court dealing with a criminal case⁷. The Supreme Court ruled along the same lines in relation to the proceedings of the UOKiK President (see the judgement of 21 April 2011)⁸.

Accordingly, proceedings in cases of alleged anti-competitive practices should offer the highest possible protections for the entity ‘charged’ with engaging in such practices. As a consequence, both the proceedings of the Competition Authority and the subsequent judicial proceedings must ensure core standards of procedural justice⁹, including the right to a fair trial under Article 6 of the Convention¹⁰. This right to a fair trial comprises, among others, the right to defend oneself, which contains concomitant rights such

⁶ For more on this topic, see M. Bernatt, ‘Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku’ (2012) 1 *Państwo i Prawo* 55–58; M. Bernatt, ‘Gwarancje proceduralne w sprawach z zakresu ochrony konkurencji i regulacji, mających charakter karny w świetle EKPCz – glosa do wyroku SN z dnia 14.04.2010’ (2011) 6 *Europejski Przegląd Sądowy* 43.

⁷ See, e.g., judgement of the Supreme Court of 14 April 2010, III SK 1/10; Lex no. 579549; judgement of the Supreme Court of 1 June 2010, III SK 5/10, LEX no. 622205; judgement of the Supreme Court of 21 September 2010, III SK 8/10, Lex nr 646358; judgement of the Supreme Court of 21 October 2010, III SK 7/10, Lex no. 686801; judgement of the Supreme Court of 10 November 2010, III SK 27/08, Lex no. 677766. See also M. Bernatt, ‘Gwarancje proceduralne w sprawach...’, pp. 40–45. Importantly, the Convention requirements extend to that stage of administrative proceedings which can be treated as a mandatory preliminary (pre-trial) procedure.

⁸ III SK 45/10, Lex no. 901645; Cf. Z. Kmiecik, ‘Koncepcja zintegrowanego systemu odwoławczego w sprawach administracyjnych’ (2010) 1 *Państwo i Prawo* 29; M. Bernatt, ‘Gwarancje proceduralne w sprawach...’, pp. 42–44.

⁹ The relevance of procedural justice is emphasised by the Constitutional Court in its judgment of 16 January 2006, SK 30/05 (2006) 1 *Orzecznictwo Trybunału Konstytucyjnego-A* item 2.

¹⁰ For more, see M. Bernatt, ‘Prawo do rzetelnego procesu...’, pp. 50–63.

as the right to be heard, the right to an oral hearing (access to hearing), the right to have sufficient time and opportunity to prepare for one's defence, and the right to receive information about the essence of and reasons for the claims made against the business concerned¹¹. Such fundamental rights, which may be inferred from Article 6 of the Convention to comprise the notion of 'procedural justice', are also reflected in the Polish Constitution [Article 2: democratic state rule of law; Article 7: rule of law; Article 42(2): right to defence], the Code of Administrative Procedure (Article 6: rule of law, Article 7: objective truth principle; Article 8: principle of trust in public authority; Article 9: principle of disclosure to parties; Article 10: principle of active involvement of parties in proceedings), and even in the Competition Act (Article 74: principle that the decision concluding the case must be based only on those infringement claims which the party had an opportunity to address).

Certainly, such rights cannot be asserted if the procedures followed at the administrative stage (which is actually a 'pre-trial' stage; see more on this below) are not subject to judicial review.

IV. Current views on the role of competition courts

The discussion above demonstrates that, owing to the specificity of the cases they deal with, neither the Competition and Consumer Protection Court (hereafter, SOKiK) nor the higher-level courts should be treated as 'ordinary' common courts when reviewing competition cases. Before setting out to answer the consequences that accompany this conclusion, it is worthwhile to briefly outline the current interpretation of the rules governing appeals from the decisions of the UOKiK President.

As has been said, competition enforcement is a 'hybrid' system procedurally¹². The first-instance proceedings are conducted before an administrative agency (UOKiK President) pursuant to, primarily, the Code of Administrative Procedure (but also partly under the Code of Civil Procedure and the Code of Criminal Procedure). But the appellate proceedings are conducted before a common court (the SOKiK) solely under the Code of Civil Procedure.

¹¹ M. Bernatt, 'Prawo do rzetelnego procesu...', p. 62. See also M. Bernatt: *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011.

¹² For the notion of hybrid procedure, see Z. Kmiecik, 'Postępowanie w sprawach ochrony konkurencji a koncepcja procedury hybrydowej' (2002) 4 *Państwo i Prawo* 31-47.

In effect, an appeal from a decision of the UOKiK President is considered the doctrinal counterpart of a statement of claim under general civil procedure. The formal requirements for such appeals, as laid down in Article 479²⁸(3) KPC are similar to the requirements of a statement of claim under Article 187 KPC¹³. In fact, an appeal from a decision of the UOKiK President is a special kind of pleading that commences civil proceedings¹⁴. As stated earlier, cases pending on this kind of appeal are civil matters formally and in the broad sense¹⁵, yet they remain administrative matters in terms of substantive law.

Both legal scholars and the courts firmly adhere to the view that the SOKiK is not a formal appellate court, but rather a court of first instance¹⁶. In effect, the filing of an appeal properly commences a legal dispute between the parties (the undertaking¹⁷ affected by the Competition Authority's decision) and the Competition Authority. The conclusion of administrative proceedings and issuance of a decision is merely 'a precondition for the matter to become cognizable by common courts'. There is thus no doubt that, although the judicial proceedings are triggered by an appeal from UOKiK President's decision, they cannot be treated as a typical appellate process in administrative review cases. According to the Supreme Administrative Court, proceedings before the UOKiK President are in essence a 'pre-trial' court stage¹⁸.

Various legal authorities, including the courts, also claim that the proceedings at the judicial stage are adversarial in nature¹⁹, as the court

¹³ J. Gudowski, [in:] T. Ereciński, J. Gudowski, M. Jędrzejowska, *Komentarz do Kodeksu postępowania cywilnego. Część pierwsza. Postępowanie rozpoznawcze*, vol. I, 3rd ed., Warszawa 2001, p. 959.

¹⁴ See also: Ł. Błaszczak, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1351.

¹⁵ This was made clear by the Constitutional Court in its statement of grounds for its judgment of 12 June 2002, P 13/01, Journal of Laws No. 84 item 764; (2002) 4a/42 *Orzecznictwo Trybunału Konstytucyjnego ZU 6*.

¹⁶ Constitutional Court judgment of 31 January 2005, SK 27/03, Journal of Laws No. 22 item 185; (2005) 1a/8 *Orzecznictwo Trybunału Konstytucyjnego ZU 6*.

¹⁷ Within the meaning of Article 4(1) of the Competition Act/

¹⁸ Supreme Administrative Court's order of 11 February 2009, II GSK 749/08, Lex no. 551408.

¹⁹ Judgment of the Supreme Court of 19 August 2009, III SK 5/09 (2011) 9–10 *OSNP* 144; judgment of the Supreme Court of 29 May 1991, III CRN 120/91 (1992) 5 *OSNC* 87. Cf. M. Sieradzka, 'Sądowa weryfikacja decyzji...', p. 107.

It should be noted in passing that the assumption itself is highly controversial. Above all, the claim that we are dealing here with two equal parties is not true to reality. The dispute is in fact between an administrative agency and a business. In course of its competition proceedings, the former has a huge advantage over the latter, having a whole range of measures available to it within its power and authority [e.g. the power under Art. 50(1) of the Competition Act to demand submission of all necessary information and documents].

must comprehensively investigate all relevant circumstances of the case and, importantly, have regard to distribution of the burden of proof and the parties' duties as to evidence (Article 232 KPC)²⁰. Hence, the UOKiK President is required to submit evidence to prove an infringement of the Competition Act and support the agency's treatment of the conduct concerned. The undertaking may (and usually does) offer evidence to prove that no infringement occurred and/or that UOKiK President applied the law erroneously. Evidence offered during these 'quasi-appellate' proceedings need not be the same as that collected in course of the administrative proceedings, because the only limits set by the appeal are those within which the matter is to be adjudicated²¹.

In the context of our topic, which is the issue of court competence, it is important to note a popular view that judicial review should only extend to the merits of the case, and not include a review of the procedural compliance during the administrative stage. In expounding this approach, the courts typically invoke the Supreme Court's judgment of 13 May 2004²², wherein it was held that 'judicial proceedings are not aimed at reviewing the administrative procedure but at adjudicating on the merits of the matter involving a dispute which arose between the parties to the UOKiK President's decision'. Some case law suggests that claims of procedural errors by the Competition Authority in the administrative proceedings should not be affirmed by the reviewing courts unless the undertaking concerned demonstrates that the errors affected the decision on the merits. Importantly, the burden of proof in such cases is on the undertaking affected, a considerable challenge indeed. According to this reasoning, judicial review covers only the outcome of proceedings (administrative decision) and extends solely to the merits.

V. Key problems with the current approach

There is much to be argued against the above construction of the lines of authority. What it means is that we have a state administration authority that is free to make procedural errors in its administrative proceedings because there is in fact no higher-level authority or court with the power of review over this area of its activity. And even if the undertaking does formally raise such errors in its appeal, its claims will not be affirmed; moreover, they will not even be

²⁰ For more, see: T. Kwieciński, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa...*, pp. 835–837.

²¹ Judgement of SOKiK of 14 September 2006, XVII Ama 71/05 (UOKiK Official Journal 2006 No. 4, item 61), Lex no. 222125.

²² III SK 44/04 (2005) 9 *OSNP* 36.

heard (the court will just omit them). In the context of our earlier discussion about the criminal or quasi-criminal aspect of competition enforcement proceedings, such an approach is highly controversial to say the least. It is manifestly at odds with Article 42 of the Constitution (right to defence) and Article 45 of the Constitution (right to court, i.e. to have one's case heard by a competent court). In fact, this controversial treatment substantially limits the right to defence (formal defences alleging procedural violations will not be heard) and impairs the right to court (the right to have one's case heard by a competent court), since there is no court competent to deal with procedural defences²³.

Another direct consequence of this approach is that there are no mechanisms in place to correct the UOKiK President's unlawful acts. If such acts develop into a practice (e.g. in relation to evidence) which, albeit unlawful, is not unlawful enough to consider it capable of affecting the final decisions on their merits, then the practice can continue despite its unlawfulness because no court will ever address it. If this reasoning were pushed to absurdity, one could even argue that the UOKiK President is free to disregard and disapply any law on procedure (e.g. he could stop informing the parties that the proceedings will end after the statutory deadline, or stop giving evidence rulings or other required rulings) and will not face any legal responsibility unless the incriminated undertaking is able to prove that such formal deficiency affected the merits of the final decision. This cannot be reconciled with the fundamental principles of state rule through law.

VI. In search of a “third way”

Ironically, this controversial line of authority stems from what appears to be a mistaken construal of the underlying Supreme Court judgment dated 13 May 2004, where the court stated that ‘in cases on appeal from UOKiK President's decisions, the Competition and Consumer Protection Court may not limit its efforts to **only** reviewing whether the underlying administrative proceedings were conducted correctly’ (emphasis added). The judges clearly held that the SOKiK has two jobs: to review the administrative stage for legal compliance and (without stopping at that) to rule on the merits. It was not the intention of the Supreme Court to rule that the SOKiK may refrain from reviewing procedural compliance. Given the purpose of judicial proceedings, which is to hear and resolve issues, the court is responsible for a full evaluation of the

²³ Cf. Ł. Błaszczak, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, pp. 1346–1347.

decision submitted for review and of the administrative agency's processes and procedures with regard to the requirements of legality, legitimacy and purposefulness of agency decisions²⁴.

This conclusion finds support in the Code of Civil Procedure, too. According to Art. 479^{31a} KPC, the Competition and Consumer Protection Court may (1) dismiss the appeal if there is no basis for affirming it, (2) reject the appeal on formal grounds, or (3) affirm the appeal. In this last instance, the court has two options. It may either amend the decision in whole or in part, or **reverse it**. The SOKiK's power to reverse a decision by the UOKiK President can be seen in the context of Article 386 KPC²⁵. True, Article 386 governs the appellate procedure. But if one assumes that the proceedings in front of the UOKiK President are in the nature of a pre-trial stage, the SOKiK, as the court of first instance, will also operate as a court of 'higher instance' of sorts. According to Article 386(2) KPC: 'If it finds the proceedings invalid, the appellate court shall reverse the appealed judgment, discontinue the proceedings to the extent invalid and remand the case for reconsideration by the trial court'. And according to Article 386(3) KPC: 'If the statement of claim is liable to be rejected or there are grounds for discontinuation of proceedings, the appellate court shall reverse the judgment and reject the statement of claim or discontinue the proceedings'. Finally, under Article 386(4) KPC: 'Except as specified in § 2 and § 3, the appellate court may reverse the appealed judgment and remand the case for reconsideration only if the trial court failed to hear the case on its merits or if the judgement cannot be given without carrying out the entire evidentiary procedure'. In my opinion, the SOKiK could do the same in relation to decisions of the UOKiK President, with the 'judgment' provisions applied by analogy to the UOKiK President's decision and the 'statement of claim' provisions so applied to the appeal.

Therefore, when read in conjunction with Article 386 KPC, Article 479^{31a}(3) KPC does not allow the reviewing court to 'relieve' itself of the duty to evaluate the administrative proceedings for procedural compliance, because such a waiver would constitute a dereliction of duty by ignoring a competence expressly conferred on that court.

The conclusion above becomes obvious if it is kept in mind that the expansion of the SOKiK's powers to include reversal of decisions rendered by the UOKiK President follows from the Constitutional Court's ruling of 31 January 2005²⁶. In that case, the Constitutional Court held that 'The right expressed in

²⁴ Judgment of the Supreme Court of 20 September 2005, III SZP 2/05 (2006) 19–20 *OSNP* 2006 312.

²⁵ T. Kwieciński, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa...*, p. 830.

²⁶ SK 27/03, *Journal of Laws* 2005 No. 22, item 185; (2005) 1A/8 *Orzecznictwo Trybunału Konstytucyjnego* ZU 6.

Article 45(1) of the Constitution should operate to create a substantive and real opportunity to seek protection in a particular case, and not just a formal availability of judicial proceedings. Upon verification for compliance with such requirements, the challenged regulation appears contrary to constitutional requirements as it deprives the party of an opportunity to start a procedure that would ensure full judicial review of the merits of the agency decision. That outcome cannot be sufficiently justified by the above-mentioned fact that proceedings conducted before a public administration authority and then before a court are ‘hybrid’ in nature. Indeed, the constitutional right to court includes, without limitation, the right to a due judicial process that shall guarantee a fair hearing of the case on its merits so as to subsequently enable a just verdict’ (emphasis added).

Finally, the view that the SOKiK’s role also includes reviewing antitrust proceedings for formal compliance is shared by a number of legal scholars. Note, for example, A. Turliniński²⁷, who argues that ‘(...) when an appeal from UOKiK President’s decision is duly filed, the administrative matter will as of that moment be pending as a civil matter according to Code of Civil Procedure. And it is clear that all procedural steps duly made in course of the administrative proceedings will remain in force’. Further, ‘(...) SOKiK’s reversals should be dispensed with prudence and used especially in the event of a gross violation of rules of administrative procedure, a failure to hear the matter on its merits, or material defects in the agency decision itself’ (emphasis added).

If a case on appeal from a decision by the Competition Authority was a ‘classic’ civil matter which is only heard on its merits, then the trial court would give a ruling on the merits (i.e. it would rule that X engaged in some anti-competitive practice and would issue a cease and desist order). Yet, the rulings given by SOKiK are completely different: the court merely dismisses or rejects the appeal (thus sustaining the underlying decision) or amends or reverses the decision. Having such adjudicative powers, the SOKiK clearly fulfils the function and role of a court of appellate jurisdiction (this approach is accepted among legal scholars)²⁸.

Finally, the present issue should not be discussed without referring to the new language of the closing provisions of Article 479^{31a} KPC, which were amended in 2011²⁹. The amendment gives the SOKiK an opportunity to rule on

²⁷ Cf. A. Turliniński, ‘Miejsce Sądu Ochrony Konkurencji i Konsumentów w systemie organów ochrony prawnej’, [in:] C. Banasiński (ed.), *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej*, Warszawa 2005, pp. 63–65.

²⁸ Cf. P. Telenga, [in:] A. Jakubecki (ed.), *Kodeks postępowania cywilnego. Praktyczny komentarz*, Zakamycze 2005, p. 722, stating that ‘its [SOKiK’s] determinations are characteristic of an appellate court’.

²⁹ Journal of Laws No. 34, item 173.

whether or not a decision was issued without a legal basis or in gross violation of the law. In this way, the lawmakers clearly assigned to the SOKiK a duty to verify whether or not the appealed decision was issued 'in gross violation of the law'. Since the amended regulation does not limit such verification to substantive law, it is reasonable to conclude that the phrase 'in gross violation' includes both violations involving the merits of a case as well as those which relate solely to the procedure. A violation can be deemed gross if, according to Code of Administrative Procedure, it would result in trial *de novo* or a finding that the agency decision was invalid. But the legislature does not seem to have restricted the scope of the verification to only those errors which necessitated the reversal or amendment of the decision. No such restriction can be inferred from the KPC regulation in question.

Equally, it seems that where the SOKiK wishes to uphold the UOKiK President's decision and state that the agency did not breach its duties under the regulation concerned, the court could and should hold that the UOKiK President did not commit a gross violation of the law in any respect and that, therefore, there are no grounds for reversing (or partially or wholly amending) the appealed decision. Otherwise we would be facing a rather odd situation whereby the scope of court's review would differ according to how the court resolves the case. This would be absurd because only an in-depth investigation can allow the court to determine if the Competition Authority's decision should be upheld, reversed, or amended.

VII. Proposals for change

So, what should judicial review be like in competition enforcement cases? Theoretically, two solutions are conceivable:

- First, the SOKiK (and the higher-level courts) can be held responsible for making procedural compliance reviews by themselves. In other words, the court(s) must check if a procedural violation has occurred, whether or not the party makes such a claim. Although this outcome would be highly desirable, this postulate is probably too far-reaching to fall within the 'mission statement' of this article. Having the court discharge such extensive duties might engender paralysis.
- So it seems we should rather consider the court to be under a duty to make a procedural compliance review only to the extent the issue is raised by the appealing party, provided the court may always omit claims that are manifestly unfounded (for example, claims which the case law clearly treats as liable to dismissal for being without legal basis). When

resolving a matter, the court would determine if the error raised has indeed occurred and whether it affected the merits of the decision. If the error was ‘neutral’ as regards the merits of the case, the decision would be upheld (absent any other successful challenges). Formal errors would not in and of themselves provide a sufficient basis for reversal. One advantage of this solution is that the UOKiK President would also receive guidance as to whether his action or inaction violated rules of procedure, and the court’s ruling would have a corrective function. If the error was found to have affected the outcome, it would be left for the court to decide whether or not the error can be corrected in course of its judicial proceedings. If so, the court would proceed to rule on the merits. In the event additional proceedings were required, the Competition Authority’s decision would be reversed and remanded back to the Competition Authority so that it could correct its error.

The solution proposed above offers a reasonable compromise between the need to ensure procedural efficiency in competition appeals and the need to ensure that the Competition Authority complies with the applicable rules of procedure, particularly where fundamental rights are involved. Such a conclusion is justified both in the context of the procedural characteristics of competition enforcement cases as well as in the context of the new duties of the SOKiK following the recent statutory amendment to the KPC.

Literature

- Bernatt M., ‘Gwarancje proceduralne w sprawach z zakresu ochrony konkurencji i regulacji, mających charakter karny w świetle EKPCz – glosa do wyroku SN z dnia 14.04.2010’ [‘Procedural safeguards in competition and regulatory matters, treated as penal cases. Case comment to the judgment of the Supreme Court of 14 April 2010’] (2011) 6 *Europejski Przegląd Sądowy*.
- Bernatt M., ‘Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku’ [‘The right to fair trial in competition matters’] (2012) 1 *Państwo i Prawo*.
- Bernatt M., *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [Procedural fairness in the proceedings before the competition authority], Warszawa 2011.
- Ereciński T., Gudowski J., Jędrzejowska M., *Komentarz do Kodeksu postępowania cywilnego. Część pierwsza. Postępowanie rozpoznawcze, vol. I* [Code of Civil Procedure. Part one. Fact-finding procedure], 3rd ed., Warszawa 2001.
- Jakubecki A. (ed.), *Kodeks postępowania cywilnego. Praktyczny komentarz* [Code of Civil Procedure. Practical commentary] Zakamycze 2005.
- Kmieciak Z., ‘Koncepcja zintegrowanego systemu odwoławczego w sprawach administracyjnych’ [‘The idea of the integrated appeal system in administrative matters’] (2010) 1 *Państwo i Prawo*.

- Kmieciak Z., 'Postępowanie w sprawach ochrony konkurencji a koncepcja procedury hybrydowej' ['Proceedings in competition matters and the idea of hybrid procedure'] (2002) 4 *Państwo i Prawo*.
- Sieradzka M., 'Sądowa weryfikacja decyzji i postanowień wydanych przez Prezesa Urzędu Ochrony Konkurencji i Konsumentów' ['Judicial review of the decisions and rulings of the President of the Office of Competition and Consumer Protection'] (part I) (2007) 10 *Rejent*.
- Skoczny T., Jurkowska A., Miąsik D. (eds.), *Ustawa o ochronie konkurencji i Konsumentów. Komentarz* [*Competition and consumers protection act. Commentary*], Warszawa 2009.
- Stawicki A., Stawicki E. (eds.), *Ustawa o ochronie konkurencji i Konsumentów. Komentarz* [*Competition and consumers protection act. Commentary*], Warszawa 2011.
- Turliński A., 'Miejsce Sądu Ochrony Konkurencji i Konsumentów w systemie organów ochrony prawnej' ['The position of the Competition and Consumer Protection Court in the system of legal protection authorities'], [in:] Banasiński C. (ed.), *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej* [*Competition and consumer protection in Poland and European Union*], Warszawa 2005.

The Scope of Application of the Provisions of the Administrative Procedure Code in Competition Enforcement Proceedings

by

Rafał Stankiewicz*

CONTENTS

- I. Opening remarks
- II. Difficulties in the practical application of composite procedural regulations
- III. Protection of businesses' individual rights in antimonopoly proceedings and application of the provisions of the Administrative Procedure Code
- IV. The direct application of the provisions of the Administrative Procedure Code
- V. Application of the provisions of the Administrative Procedure Code, with modifications
- VI. The scope of referrals to the Civil Procedure Code in matters of evidence (Article 84)
- VII. Conclusions

Abstract

The main premise of this article is an attempt to determine the scope of application of the provisions of the Administrative Procedure Code (KPA) in antimonopoly proceedings. The legislator has introduced an extensive system of norm-referenced proceeding provisions for antimonopoly law. In matters not regulated by the legislature, however, it refers primarily to the solutions standardised by the provisions of the KPA. In the opinion of the author of the article, the general reference to the KPA contained in Article 82 is associated with the desire to create strong safeguards to protect the rights of businesses involved. It is also to promote

* Dr. Rafał Stankiewicz, Faculty of Law and Administration, University of Warsaw; legal advisor, cooperating with 'Prof. Marek Wierzbowski & Partners – Advocats & Legal Advisors, Professional Partnership'.

stability, consistency and transparency in the application of the model antimonopoly proceedings. It seems that the legislature came to the conclusion that such a premise might be achieved by establishing the Administrative Procedure Code as the basic procedural instrument for proceedings conducted by the UOKiK President. This rather means that the ‘main burden’ of the creation of a complex mechanism for antimonopoly proceedings rests to a greater degree on the KPA.

Résumé

Le présent article est essentiellement une tentative de définition du champ d’application, à la procédure de concurrence, des dispositions du Code de procédure administrative (KPA). Le législateur a mis en place un système procédural développé, réglementé par les clauses de la loi sur la concurrence. Selon l’auteur du présent article, le renvoi général au Code de procédure administrative en vertu de l’art. 82 de la loi sur la concurrence relève de l’aspiration à créer des garanties solides de protection des droits subjectifs des parties de la procédure. Cela doit contribuer également à la stabilité, la cohésion et la transparence de l’application d’un modèle de procédure de concurrence. Il semble que le législateur se soit convaincu qu’il peut atteindre un tel objectif en instituant le Code de procédure administrative comme un texte procédural fondamental pour la procédure menée par le Président de l’Office polonais de protection de la concurrence et des consommateurs (UOKiK). Cela voudrait dire que le « poids principal » en matière de mise en place d’un mécanisme complexe pour la procédure de concurrence continue de reposer sur le Code de procédure administrative.

Classifications and key words: competition; general principles of the Code of Administrative Procedure; antimonopoly (antitrust) proceedings; protection of business rights.

I. Opening remarks

The Act on the Protection of Competition and Consumers¹ adopted on 16 February 2007 (hereafter usually referred to as the Competition Act, although in some cases the date is attached to distinguish it from other acts discussed in the same context) contains a number of provisions which are procedural in nature. It includes a separate Chapter VI, entitled ‘Proceedings before the President of the Office’ (Articles 47–105)². This broad legal recognition of

¹ Journal of Laws No 50, item 331, as amended.

² *Ipsa facto*, the currently valid antimonopoly regulation contains almost half of the provisions of a procedural nature.

separate procedural regulations had in fact taken place under the predecessor law of 15 December 2000 on the protection of competition and consumers³.

At the same time, pursuant to Article 83 of the Competition Act, in matters not regulated by the Competition Act for proceedings before the President of the Office of Competition and Consumer Protection (the Polish national competition authority, hereafter called the UOKiK President after the Polish acronym), the provisions of the Act of 14 June 1960 – the Administrative Procedure Code (hereafter, KPA) – are applicable⁴. According to Article 84 of the Competition Act (of 16 February 2007), in proceedings before the UOKiK President matters concerning evidence which are not regulated in the Competition Act, Articles 227–315 of the Act of 17 November 1964 – the Civil Procedure Code (hereafter, KPC)⁵ – are applicable. Furthermore, according to Article 82 of the Competition Act, the legal means foreseen in the Code of Administrative Procedure for refuting a decision, and concerning the resumption of proceedings, revocation, change or assessment of the validity of a decision, shall not apply to decisions of the UOKiK President. In addition, in matters concerning searches of premises or belongings not covered in the Competition Act, the Articles of the Criminal Procedure Code⁶ regarding searches (Articles 219 and following) are to be applied⁷.

The specific character of proceedings standardised by the provisions of the Competition Act is also reflected in the different mode of appeal from judgements issued by the UOKiK President. Pursuant to Article 81(1) of the Competition Act, a party is entitled to appeal from a decision of the President of the UOKiK to the Court of Competition and Consumer Protection. Procedures on appeals are governed by the provisions of the KPC⁸.

The Competition Act contains provisions governing the proceedings conducted by the President of the UOKiK, standardising the basic procedural mechanisms and institutions in this respect, which differ in form from their counterparts in the KPA (Articles 47–105). The provisions of the Competition Act are constructed in such a way as to include common provisions for all types of proceedings conducted by the UOKiK President (Articles 47–85), as well as separate provisions for individual spheres of antimonopoly regulation. The

³ Cf. the Act of 15 December 2000 on the protection of competition and consumers (consolidated text: Journal of Laws 2005 No. 244, item 2080, as amended).

⁴ The Act of 14 June 1960 – the Administrative Procedure Code (consolidated text: Journal of Laws 2000 No. 98, item 1071, as amended).

⁵ The Act of 17 November 1964 – the Civil Procedure Code (Journal of Laws No. 43, item 296, as amended).

⁶ The Act of 6 June 1997 – the Criminal Procedure Code (Journal of Laws No. 89, item 555, as amended).

⁷ Article 105c.

⁸ Articles 379(1)–379(35) KPC.

phrase ‘antimonopoly proceedings’ shall be used in this article as a reflection of the overall standardisation of proceedings conducted by the UOKiK President based on the Competition Act. The use of this term is justified by its general acceptance in the literature on the subject, and in colloquial language this term is used for all types of proceedings conducted by the UOKiK President. It should be mentioned that in the proceedings conducted by the UOKiK President, cases of restrictive practices and concentration are the most crucial element of the procedural mechanisms contained in the Competition Act.

It can be seen that the complex structure of proceedings provided for by the Competition Act is thus based on a system of numerous referrals to other acts regulating procedure in various spheres of application of the law⁹. Accepting the administrative classification of the institution of referrals used in the legal system¹⁰ and adopted in the literature, it should be noted that Article 83 of the Act is a referral provision which is conventional and general¹¹, while Article 84 requires the application, in cases unregulated in the Competition Act, of the relevant provisions of evidentiary proceedings from the Civil Procedure Code, which contains detailed numerical referrals¹².

The legislature has therefore introduced an expanded system of proceedings, regulated by the provisions of the Competition Act. In situations unregulated by the Competition Act, the legislation refers in the first instance to the procedural mechanisms contained in the KPA¹³. The legislature’s goal was to give antimonopoly proceedings the characteristics of a specific administrative procedure¹⁴. The main purpose of this report is to analyse the scope of application of the provisions of the Administrative Procedure Code in antimonopoly proceedings. The placing of so many procedural provisions in the Competition Act of 16 February 2007 is one of the elements of the continuing de-codification of the Administrative Procedure Code. Modern doctrine emphasises the need to de-codify administrative procedure in certain

⁹ As regards the legal institution of referrals to other acts see: A. Skoczylas, *Odesłania w postępowaniu sądownoadministracyjnym*, Warszawa 2001, pp. 1–31.

¹⁰ The author presented the above ranking of views based on the entirety of collected doctrine – *Odesłania w postępowaniu...*, pp. 9–22.

¹¹ The legislator applies the method of sending to the group provisions of another legal act – A. Skoczylas, *Odesłania w postępowaniu...*, pp. 11–14.

¹² Numerical and detailed referrals characterized by an itemized account of provisions to which the determined legal act sends for application – A. Skoczylas, *Odesłania w postępowaniu...*, pp. 16–19.

¹³ T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji konsumentów. Komentarz*, Warszawa 2009, p. 1366.

¹⁴ R. Stankiewicz, ‘O istocie postępowania antymonopolowego’ (2008) vol. XLIX *Studia Iuridica* 184; M. Błachucki, ‘Charakter prawny postępowania antymonopolowego’, [in:] J. Boć, A. Chajbrowicz (eds.), *Nowe problemy badawcze w teorii prawa administracyjnego*, Wrocław 2009, p. 790.

areas of administration, as there is a growing necessity to solve many problems that administration has not previously encountered during its operations¹⁵. The opinion that it is necessary to implement specific solutions in antimonopoly proceedings has appeared in the existing Polish literature on the subject by authors such as J. Borkowski¹⁶, M. Bychowska and M. Krasnodębska-Tomkiel¹⁷, among others. It would seem that the differing formation of certain institutions in antimonopoly law in relation to the KPA has its basis in the view that it is necessary for the President of the UOKiK to conduct public tasks on a scale of increasing complexity and difficulty in dealing with the cases which come before the body in practice. The application of this rich structure of referrals to other procedural acts has led, in substance, to the establishment of a structure possessing many characteristics of wholeness. It has, however, lost the attribute of completely autonomous proceedings.

It has already been noted that, in antimonopoly proceedings, pursuant to Article 83 of the Competition Act, in matters not regulated by the Act the provisions of the Administrative Procedure Code apply. This means that, in antimonopoly proceedings, the provisions of the KPA which do not have direct counterparts in the procedural rules of the Act will apply. The solution adopted confirms that the KPA is the primary procedural act for antimonopoly proceedings. This solution is worth comparing to the solution contained in Article 84, according to which the provisions of the Civil Procedure Code for the taking of evidence shall apply 'as appropriate'.

This reference to the Administrative Procedure Code, in the absence of provisions concerning the same procedures in the Competition Act, makes the KPA the basic legal procedural act for proceedings conducted by the UOKiK President. The legislature has introduced an expanded system of detailed procedural institutions in the Competition Act of 16 February 2007, but this is solely due to the need to take into account the specificity of the substantive and legal norms in antimonopoly law, which is not always possible through application of the standard procedural mechanisms and institutions contained in the KPA. The general reference to the KPA contained in Article 83 of the Competition Act is associated with the desire to create strong safeguards to protect the rights of parties involved. It is also designed to promote stability,

¹⁵ Z. Kmiecik, 'Postępowanie w sprawach ochrony konkurencji a koncepcja procedury hybrydowej' (2002) 4 *Państwo i Prawo* 31 and following.

¹⁶ J. Borkowski, 'Od procedury zwalczania praktyk monopolistycznych do postępowania w sprawach ochrony konkurencji i konsumentów', [in:] W. Czaplński (ed.), *Prawo w XXI wieku. Księga pamiątkowa 50-lecia Instytutu Nauk Prawnych PAN*, Warszawa 2006, p.142.

¹⁷ M. Bychowska, M. Krasnodębska-Tomkiel, 'Procedura antymonopolowa jako instrument ochrony konkurencji – refleksje dotyczące ustawy z 15.12.2000 r. o ochronie konkurencji i konsumentów', [in:] C. Banasiński (ed.), *Prawo konkurencji – stan obecny i przewidywane kierunki zmian*, Warszawa 2006, p. 29.

consistency and transparency in the application of the model antimonopoly proceedings. It seems that the legislature came to the conclusion that such a premise might be achieved by establishing the Administrative Procedure Code as the basic procedural instrument for proceedings conducted by the UOKiK President. This means that in practice the ‘main burden’ of the creation of a complex procedural mechanism for antimonopoly proceedings rests to a large degree on the KPA.

II. Difficulties in the practical application of composite procedural regulations

The use of such a complex structure of referrals in antimonopoly proceedings may create a number of difficulties in practice. The overall standards applicable in particular proceedings conducted by the UOKiK President are created in the course of the process of applying the law, by stating the applicable provisions to different legal acts. The need to carry out often complex processes of comparison and matching provisions from different legal spheres may cause increasing doubt as to the actual application of the ‘results’. In the literature on the subject, it is stressed that, in formulating such a system of referrals, the legislature ‘(...) could not avoid many errors and lapses, thus hindering the reconstruction of the existing procedures’¹⁸. Therefore, there is a need for reflection on the possible uses of the referrals indicated by the antimonopoly act in its practical application of by the President of the UOKiK.

The institution of referrals is not uniform, as is clearly indicated in the existing literature on the subject¹⁹. Therefore, its practical application depends in each case on an individual assessment by the administrative body applying the law whether the specific solution listed in a given provision of a the act indicating referral to other acts can be applied directly; whether it can be applied after suitable modification; or even whether, despite the existence of a referral, the legislative provision is not too contradictory, or the institutional mechanism to which specific referral is made is not irrelevant to a particular usage in the case before the administrative body.

Well-reasoned legislative technique should indicate the possibility of using referrals in cases where a defined legal situation provides for the need

¹⁸ Z. Kmiecik, *Postępowanie w sprawach ochrony konkurencji...*, p. 42.

¹⁹ J. Nowacki, ‘„Odpowiednie” stosowanie przepisów prawa’ (1964) 3 *Państwo i Prawo* 376–371. In the subject literature they note the problem of the complexity of applying referrals, especially with regard to procedural provisions – Z. Kmiecik, *Postępowanie administracyjne w świetle standardów europejskich*, Warszawa 2007, p. 100 and following.

to take into account the procedural specificities of a particular subject of proceedings with relation to a separate act. In the (unregulated) remainder there will, however, be a referral to another act governing the procedure. The achievement of this in the Act of 16 February 2007 indicates that the intention of the legislature was to grant antimonopoly proceedings the status of specific administrative proceedings, while using the general principles of the Administrative Procedure Code as a foundation for the application and interpretation of individual procedural mechanisms contained in the Competition Act.

III. Protection of businesses' individual rights in antimonopoly proceedings and application of the provisions of the Administrative Procedure Code

There is no doubt that the general provisions of administrative procedure, in addition to their catch-all function, also fulfil a protective function. It should indeed be stated that this is the basic value of administrative procedure. The protective function of administrative procedure is expressed in the introduction of specific institutions and mechanisms which are designed to assure that the individual rights of a subject of the proceedings are guaranteed effective protection during the proceedings, including the protection of the rule of law²⁰.

Administrative procedure (including the procedure used by the UOKiK on the basis of the antimonopoly act and referrals to other normative acts) performs the protective function by means of a number of institutions and mechanisms, including in particular:

- 1) guaranteeing to the parties to the proceedings the right to actively participate in the taking of evidence;
- 2) guaranteeing the right to request evidence by a party to the proceedings;
- 3) guaranteeing the right to the protection of information concerning the parties to the proceedings (in antimonopoly proceedings in particular the right to protect trade secrets);
- 4) guaranteeing an effective right of redress.

In the doctrine of administrative proceedings, it is emphasised one role of the institutions and mechanisms indicated above is to fulfil a protective function for the procedural model (emphasis here is on those elements which are primarily designed to meet the general principles for objective truth in

²⁰ B. Adamiak, [in:], B. Adamiak, J. Borkowski, A. Skoczylas, *Prawo procesowe administracyjne*, [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *System prawa administracyjnego*, Vol. 9, Warszawa 2010, p. 21.

the proceedings, which govern all aspects of the course of an investigation); whereas another role is to act in a repressive manner (in particular encompassing those institutions and mechanisms which seek to eliminate malfunctioning procedures from the legal process)²¹. All the above mentioned procedures and institutions should ensure that the parties to antimonopoly proceedings are assured the protection of their individual rights in the pending proceedings; proceeding which may have the consequence of the issuance of an authoritative decision imposing an administrative law obligation on a party to refrain from a specific activity (prohibition of restrictive practices), and also possibly an administrative law penalty payment, aimed at disrupting its continued operation. There is no doubt that these procedural institutions created by the legislature should be so designed as to fulfil their intended tasks in the fullest possible way. Guarantees of the protective function for antimonopoly proceedings are created, above all, by the direct application of the provisions of the Administrative Procedure Code.

It also becomes necessary to find different (from the KPA) ways to regulate certain procedural institutions in view of the specific nature of cases conducted by the UOKiK President. It should be indicated, however, that the specific rules which have been created for antimonopoly proceedings which exclude the use of certain KPA instruments may lead to an infringement of the protection function built into the Competition Act's procedural model. Of primary of interest here is the specific regulation of a party to the proceedings, and to some extent a breach of the principle of transparency in the proceedings as regards the introduction of trade secrets.

This different (as compared to the KPA) system of regulation has undoubtedly required the creation of a system of protection for business secrets (cf. Articles 69–71).²² All these needs are met by the Competition Act, including the specific standardisation of deadlines for dealing with a case [cf. Article 92 and Article 96(1)] and the institution of mechanisms for supervising businesses (not appearing at all in the KPA)²³, and should be considered fully justified, including as well the inclusion of procedural provisions relating to the overlap of antimonopoly procedures by the national authority with investigations carried out by the European Commission, and cooperation with the Commission²⁴ in the course of proceedings conducted by the latter²⁵.

²¹ B. Adamiak, [in:] B. Adamiak, J. Borkowski, *Postępowanie administracyjne i sądowno-administracyjne*, Warszawa 2009, p. 25.

²² Broadly see M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, pp. 240 and following.

²³ Articles 62–68.

²⁴ Article 75(1)(3).

²⁵ Article 73(1)(3) and (4).

Another necessary step has been the introduction of a decision mechanism which allows the UOKiK President to order a business to discontinue certain activities which, in the judgment of the antimonopoly authority, could constitute market-threatening practices that restrict competition²⁶.

IV. The direct application of the provisions of the Administrative Procedure Code

As already mentioned above, the provisions of the KPA shall be applied 'directly' rather than 'accordingly'²⁷. The solution contained in Article 83 of the Competition Act requires the application of all general principles of administrative proceedings. This also includes the general principles of the Administrative Procedure Code (Articles 6-16 of the KPA)²⁸. These are applied directly to the extent that their application is not modified by a specific provision of the Competition Act²⁹. The general principles of the KPA contained in Articles 6-16 of the Administrative Procedure Code constitute the foundation for all proceedings conducted by a public authority, and are used in the interpretation of individual procedural mechanisms. The general principles of the KPA also create safeguards for the parties to the proceedings. The concept of general principles in administrative proceedings has been the subject of wide interest to scholars of the doctrines of administrative law³⁰. In view of the limited space that can be devoted to this issue in this article, let it suffice to stress the possibility of their co-application with the specifically regulated individual mechanisms of procedural law contained in the Competition Act. As A. Wiktorowska has stated, among the functions of

²⁶ Article 89.

²⁷ Cf. K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2008, p. 898.

²⁸ C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 721.

²⁹ T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1369.

³⁰ A. Wiktorowska, *Zasady ogólne kodeksu postępowania administracyjnego*, Warszawa 1985 (doctoral dissertation - library of the Faculty of Law and Administration, University of Warsaw); A. Wiktorowska, 'Rola i znaczenie zasad ogólnych KPA (funkcje zasad)' (1996) vol. 32 *Studia Iuridica*, p. 21; K. Ziemiński, *Zasady ogólne prawa administracyjnego*, Poznań 1989, p. 23 and following; M. Wierzbowski (ed.), *Postępowanie administracyjne – ogólne, podatkowe i egzekucyjne*, Warszawa 2006, p. 14 and following; B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 1998, pp. 34–106; A. Jaroszyński, 'Zasady ogólne KPA w orzecznictwie NSA (1980) 6 *Organizacja, Metody, Technika*, p. 23; S. Rozmaryn, 'O zasadach ogólnych kodeksu postępowania administracyjnego' (1961) 12 *Państwo i Prawo* 44; Z. Janowicz, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 1987, pp. 45-75 and following.

the general principles of the KPA, the following can be specified: ordering of the procedural system, formulation of model proceedings, interpretative function, and research function³¹. It seems that all these also fulfil their significant role in the interpretation of the rules applicable in antimonopoly proceedings. However, in this context a special role should be attributed to the organising and interpretative functions³².

It should also be noted that, in antimonopoly proceedings, the primary principles which are applied are: the principle of legality and the rule of law (Articles 6 and 7 of the KPA); the principle of objective truth (Article 7 of the KPA); and the principle of active participation by the parties to the proceedings (Article 10 KPA). Note however that there are exceptions that indicate an inability to apply a particular general rule in antimonopoly proceedings – as, for example, the inability to apply the principle of conciliatory treatment of administrative matters contained in Article 13 of the KPA. This, however, would seem justified by the nature of the tasks underlying the application of the Competition Act, resulting from its form and the extent of interference in entrepreneurs' subjective rights in the construction of the entire procedural mechanism.

Some modifications concern the application of the rules for the provision of information (Article 9 KPA), owing to the use made during the course of the proceedings of numerous legally protected secrets. Modification of the application of the general principle of active participation by the parties in the proceedings (Article 10 KPA)³³ has been instigated by Article 69(1) and Article 89 of the Competition Act. The first of these provisions relates to the need to safeguard trade secrets during antimonopoly proceedings, while the second relates to restrictions on the possibility of commenting on the collected evidence during the issuance of a provisional decision. Furthermore, there have been modifications to the basic assumptions arising from the principle of continuity of administrative decision (Article 17 KPA), which include restrictions on the possibility of initiating emergency modes at the request a party. In addition there is no possibility to apply the general principle of two levels of instances (Article 12 KPA).

The possibility of direct application of KPA provisions in antimonopoly proceedings also occurs when there are no appropriate procedural mechanisms provided for in the Competition Act. In antimonopoly proceedings, the provisions of Chapters 3, 4 and 5 of Title 1 of the KPA governing issues of the hierarchy of authorities, the properties of authorities (Articles 19–23), and

³¹ R. Stankiewicz, 'O istocie postępowania antymonopolowego...', p. 185.

³² A. Wiktorowska, *Rola i znaczenie zasad ogólnych...*, p. 263

³³ C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 721.

the exclusion of an employee and an authority (Articles 24–27) finding the direct application. Similarly, the KPA's provisions on proceedings on service (Articles 39–49), summons (Articles 50–56) and methods for establishing deadlines (Articles 57–60) apply fully to antimonopoly proceedings. Among the provisions of Title II of the KPA, the provisions on metrics, protocols and annotations (Articles 66a–72) are directly applicable. The introduction of a provision requiring the keeping of metrics in antimonopoly proceedings can play an especially important role in enhancing the transparency of the proceedings. In antimonopoly proceedings there is a direct application of Title VIII of the KPA (proceedings on complaints and applications). Article 31 of the KPA, relating to the share of subjects in the rights of the parties in administrative proceedings, also applies in antimonopoly proceedings, as do Articles 32 and 33 of the KPA relating to choice of agents.

It also seems that Article 108f of the KPA, referring to the possibility of bestowing immediate enforceability on a decision, will also apply in full in antimonopoly proceedings. It is true that, pursuant to Articles 90 and 103 of the Competition Act, an option was created to bestow immediate enforceability on certain antimonopoly decisions; this regulation is, however, of a residual nature. The Competition Act does not specify in what form to bestow immediate enforceability, nor whether a decision taken by the UOKiK President in this regard can be challenged. It seems that Article 108 of the KPA is applicable both to additional grounds for bestowing immediate enforceability and to the format for bestowing immediate enforceability to which it is applied³⁴. In antimonopoly proceedings the provisions of the Administrative Procedure Code to suspend proceedings, both as regards mandatory and optional suspension (Articles 97–103 of the KPA), will also apply.

In this author's opinion, there is direct, full application of Article 105(1) of the KPA in antimonopoly proceedings, which contains the institutional mechanism for compulsory discontinuance of proceedings if they fail to fulfil any purpose³⁵. The premise of lack of purpose in antimonopoly proceedings should therefore be understood in light of the jurisprudence of administrative courts, according to which lack of purpose occurs when there is no legal basis to the merits of the case.³⁶ In the practice of the President of the UOKiK's judgments, decisions to discontinue proceedings due to lack of purpose have

³⁴ T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, Warszawa 2009, p. 1514.

³⁵ Similarly A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, Warszawa 2009, p. 1313; differently T. Kwieciński, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2010, p. 858.

³⁶ Judgment of the Supreme Administration Court of 24 April 2003, III SA 2225/01, unpublished.

occurred. The UOKiK President discontinues proceedings when, during the case, he cannot find any violation of the public interest, or the operator does not occupy a dominant position in the market (absence of a dominant position excludes the possibility of its abuse)³⁷. The catalogue of premises for the discontinuance of proceedings is included in Article 75 of the Competition Act and only extends the catalogue of premises for discontinuing proceedings contained in the KPA. The use in antimonopoly proceedings of Article 105(1) of the KPA may become necessary in order to protect the subjective rights of a party. A decision on the merits in the case of lack of purpose to a proceeding would entail unjustified negative consequences for the businesses, contrary to the nature of the standardising solutions in the Competition Act.

The provisions of the KPA concerning the structure of an administrative decision (Article 107 of the KPA) and its provisions relating to the rectification of a decision (Articles 111-113 of the KPA) are also applicable to antimonopoly proceedings. As already mentioned above, the Competition Act contains regulations and provisions relating to the contestation of decisions which are separate from the KPA. Note that only a few of the President of the UOKiK's rulings may be subject to appeal to the Antimonopoly Court within the mode of Article 81. Rules concerning the appealability of judgments and the submission of appeals (Articles 141-144 of the KPA) can apply only to decisions issued by the President of the UOKiK on the basis of the Administrative Procedure Code. This concerns, *inter alia*, orders concerning the costs of proceedings (Article 264 KPA), and orders to bestow immediate enforceability on administrative decisions [Article 108(3) of the 3 KPA].

Article 82 of the Competition Act excludes the ability of a party to a proceeding before the thr UOKiK President, on the party's initiative, to challenge a decision to resume the proceedings, annul the decision, or amend or repeal a decision. It should be noted, however, that the above provision does not exclude the possible use of the institution of expiry of a decision in antimonopoly proceedings at a party's request³⁸. Pursuant to Article 162(1) (1) of the KPA, the public administration authority which issues a decision in the first instance can confirm its termination if the decision has become purposeless, the revocation of such a decision is required by a provision of law, or when this is in the public interest or in the interest of a party. It should also be noted that the legislature has not set down the expiry of the decision as an excluded mode, which only confirms that this mode can be used.

There is therefore the possibility (or even necessity) for the UOKiK President to commence proceedings on the expiry of a decision, insofar as

³⁷ Decision of the UOKiK President of 25 July 2007, RPZ-40/2007, unpublished.

³⁸ T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, Warszawa 2009, p. 1362.

the premises contained in Article 162(1) of the KPA are fulfilled. The UOKiK President may, in this regard, initiate proceedings *ex officio*, or may also have an obligation to initiate proceedings on the revocation of the decision insofar as a party to the proceedings submits such a request.

V. Application of the provisions of the Administrative Procedure Code, with modifications

It should be noted once again at the outset that where the Competition Act does not contain a procedural institution, it is necessary to apply the relevant provisions of the KPA. However, the situation becomes more complicated concerning the use of those KPA institutions which find their counterparts in the provisions of the Competition Act of 16 February 2007. Firstly, the provisions contained in Articles 28–34 of the KPA relating to the legitimacy of parties in administrative proceedings should be noted. These provisions find ‘appropriate’ use as long as Articles 88, 94 and 101 of the Competition Act do not regulate this matter directly³⁹. Some modifications also occur in the application of the KPA’s provisions relating to Chapter 7 of Title I (‘Case processing’). The provisions of the Competition Act separately specify the deadlines for processing cases, excluding the application of Article 35(3) of the KPA. This does not mean, however, that in antimonopoly proceedings in matters of concentration there is no application of Article 35(2) of the KPA, which requires conduct of the case ‘without delay’ on the basis of evidence provided by a party to the proceedings at the time of their commencement. In antimonopoly proceedings, Article 36 of the KPA, which mandates notification of a party to the proceedings in the event a deadline for handling a case is exceeded, as well as the provisions of Articles 37 and 38 of the KPA, creating countermeasures against inactivity or lengthy processing of proceedings by an administrative authority, are applicable to antimonopoly proceedings.

At the same time, it must be added that the Competition Act does not regulate matters relating to the length of time for processing cases involving the imposition of administrative financial penalties. Accordingly, in establishing a deadline for processing such a case Article 35(3) of the KPA is applied.

Chapter 1 of Title II of the KPA, referring to the institution of proceedings, has limited application to antimonopoly proceedings. In antimonopoly proceedings, Article 61(3) and (3a) of the KPA, referring to the determination of the commencement date for the proceedings, and Articles 63–66 of the

³⁹ Similarly T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, Warszawa 2009, p. 1370.

KPA, are applicable. Note also that Article 64 of the KPA, standardising the effects of formal deficiencies in a submission, may perhaps be applied in full in antimonopoly proceedings in the matter of restrictive practices and practices which run counter to the collective interests of consumers. It does not apply, however, to antimonopoly proceedings in matters of concentration. The effects of formal absences in such notifications are governed by Article 95(1) of the Competition Act.

With appropriate modifications, Chapter 3 of Title II of the KPA on making files available with regard to the protection of trade secrets, may be applied. Access to case files is an expression of the general principle of notifying parties (Article 9 of the KPA) and the general principle of active participation by parties to the proceedings (Article 10 of the KPA). In antimonopoly proceedings, Articles 73 and 74 of the KPA are applicable. The complement to Article 74 is the regulation contained in Article 69 of the KPA on the introduction of limitations on access to a party's case files page to protect trade secrets.

In administrative proceedings, provisions for administrative hearings (Articles 89–96 of the KPA) are also applied, with appropriate modifications resulting from the Article 60 of the Competition Act.

VI. The scope of referrals to the Civil Procedure Code in matters of evidence (Article 84)

Some doubt may be associated with the Competition Act's use of referrals to the KPC of evidentiary matters. It should, however, be recalled that investigations carried out by the UOKiK President remain administrative, although characterised by certain specific differences. As already mentioned, the adoption of general referrals unregulated by the Competition Act to the provisions of the KPA means that the majority of the general principles of the KPA apply to proceedings conducted by the UOKiK President. This model is designed to fulfil the general principles of objective truth and officialisation.

Pursuant to Article 84 of the Competition Act, in cases concerning evidence in proceedings before the UOKiK President, and not regulated in the Competition Act, Articles 227-315 of the Civil Proceedings Code (hereafter, KPC) shall apply. In the opinion of this author, Articles 229-234 of the KPC are not applicable due to the lack of mutuality of contract in the model of antimonopoly proceedings⁴⁰. The commitment to implement the general

⁴⁰ Differently, see T. Kwieciński, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa...*, Warszawa 2010, p. 863.

principle of objective truth contained in Article 7 of the KPA means, however, that in antimonopoly proceedings Article 77 of the KPA, indicating that ‘the burden of proof’ in administrative proceedings lies with the body conducting the proceedings, should also apply⁴¹. In antimonopoly proceedings, however, only the catalogue of evidentiary means contained in the KPC applies.

It is here that the role which the legislator has assigned to referrals to the Civil Procedure Code should be examined. It seems that the only justification for the adoption of such a concept is the above mentioned and quoted opinion of E. Modzelewska-Wąchal, who maintains that this solution was related to a desire to ensure the homogeneity of evidentiary proceedings conducted both before the UOKiK President, as a public authority, and later before the Antimonopoly Court on review⁴².

VII. Conclusions

The characteristics of the model of antimonopoly proceedings is deemed to necessitate the individual procedural institutions and mechanisms prescribed in the Competition Act of 16 February 2007, which includes a complex system of referrals to other procedural acts. The adoption of a general referral to the provisions of the KPA in cases unregulated by the antimonopoly act means that the ‘evolution’ of the majority of specific procedural mechanisms and institutions which are applicable in proceedings before the UOKiK President takes place in conjunction with the application of the general principles of the KPA. The crucial role of the KPA’s general principles, which can contribute to shaping the model of antimonopoly proceedings, in particular their organisation, must be emphasised above all.

Quite apart from the position adopted by the legislature concerning the possible review of a decision by the UOKiK President, it should be noted that antimonopoly proceedings display all the characteristics of administrative proceedings of a specific nature. Thus it may be concluded that these are proceedings which are non-autonomous in nature.

Having regard to the above, it can be concluded that the construction of a procedural mechanism based largely on the regulations contained in the Administrative Procedure Code adopted in the Polish legal system ensures a more effective implementation of the objectives of protecting competition

⁴¹ Similarly, see M. Bernatt seems to claim [in:] M. Bernatt, *Sprawiedliwość proceduralna...*, pp. 124–125.

⁴² E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2002, pp. 279–280.

in Poland. At the same time, it protects the subjective rights of businesses participating in the proceedings.

Literature

- Adamiak B., Borkowski J., *Kodeks postępowania administracyjnego. Komentarz* [Administrative Procedure Code. Commentary], Warszawa 1998.
- Adamiak B., Borkowski J., Skoczylas A., 'Prawo procesowe administracyjne' ['Administrative procedural law'], [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *System prawa administracyjnego* [System of the administrative law], Vol. 9, Warszawa 2010.
- Banasiński C., Piontek E. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [Act on Competition and Consumers Protection, Commentary], Warszawa 2009.
- Bernatt M., *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [Procedural fairness in the proceedings before the competition authority], Warszawa 2011.
- Błachucki M., 'Charakter prawny postępowania antymonopolowego' ['Legal status of the anti-monopolist procedure'], [in:] Boć J., Chajbrowicz A. (eds.), *Nowe problemy badawcze w teorii prawa administracyjnego* [New research problems in theory of administrative law], Wrocław 2009.
- Borkowski J., 'Od procedury zwalczania praktyk monopolistycznych do postępowania w sprawach ochrony konkurencji i konsumentów' ['From the procedure of fighting monopolistic practices to the procedure of the protection of competition and consumers'], [in:] W. Czapliński (ed.), *Prawo w XXI wieku. Księga pamiątkowa 50-lecia Instytutu Nauk Prawnych PAN* ['Law in the 21st century. Memorial book for the 50. Anniversary of the Institute of Legal Sciences of Polish Academy of Sciences'], Warszawa 2006.
- Bychowska M., Krasnodębska-Tomkiel M., 'Procedura antymonopolowa jako instrument ochrony konkurencji – refleksje dotyczące ustawy z 15.12.2000 r. o ochronie konkurencji i konsumentów' ['The anti-monopoly procedure as the instrument of the protection of competition - reflection concerning the act from 15.12.2000 for the protection of competition and consumers'], [in:] Banasiński C. (ed.), *Prawo konkurencji – stan obecny i przewidywane kierunki zmian* [Competition law - the current legislation and predicted directions of changes], Warszawa 2006.
- Janowicz Z., *Kodeks postępowania administracyjnego. Komentarz* [Administrative Procedure Code. Commentary], Warszawa 1987
- Jaroszyński A., 'Zasady ogólne KPA w orzecznictwie NSA' ['General principles of the Administrative Procedural Code in the jurisdiction of the Supreme Administrative Court'] (1980) 6 *Organizacja, Metody, Technika*.
- Kmiecik Z., 'Postępowanie w sprawach ochrony konkurencji a koncepcja procedury hybrydowej' ['Competition enforcement proceedings and the concept of hybrid procedure'] (2002) 4 *Państwo i Prawo*.
- Kmiecik Z., *Postępowanie administracyjne w świetle standardów europejskich* [Administrative proceedings in the light of European standards], Warszawa 2007.
- Kohutek K., Sieradzka M., *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [Act on Competition and Consumers Protection, Commentary], Warszawa 2008.

- Modzelewska-Wąchal E., *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumers Protection, Commentary]*, Warszawa 2002.
- J. Nowacki, '„Odpowiednie” stosowanie przepisów prawa' ['Applying law „accordingly”] (1964) 3 *Państwo i Prawo*.
- Rozmaryn S., 'O zasadach ogólnych kodeksu postępowania administracyjnego' ['About the general principles of the Administrative Procedure Code'], (1961) 12 *Państwo i Prawo*.
- Skoczny T., Jurkowska A., Miąsik D. (ed), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumers Protection, Commentary]*, Warszawa 2009.
- Skoczylas, *Odesłania w postępowaniu sądownoadministracyjnym [Referrals to the administrative tribunal's proceedings]*, Warszawa 2001.
- Stankiewicz R., 'O istocie postępowania antymonopolowego' ['About essence of the anti-monopolist procedure'] (2008) t. XLIX *Studia Iuridica*.
- A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumers Protection. Commentary]*, Warszawa 2010.
- Wierzbowski M. (ed.), *Postępowanie administracyjne – ogólne, podatkowe i egzekucyjne [Administrative proceeding – jurisdiction administrative proceeding, tax administrative proceeding, executive administrative proceeding]*, Warszawa 2006.
- Wiktorowska A., *Zasady ogólne kodeksu postępowania administracyjnego [General principles of the Administrative Procedural Code]*, Warszawa 1985 (doctoral dissertation - library of the Faculty of Law and Administration, University of Warsaw).
- Wiktorowska A., 'Rola i znaczenie zasad ogólnych KPA (funkcje zasad)' ['Role and meaning of the general principles of the Administrative Procedure Code (the function of the principles)'] (1996) 32 *Studia Iuridica*.
- Ziemski K., *Zasady ogólne prawa administracyjnego [General principles of the administrative law]*, Poznań 1989.

Can the Right To Be Heard Be Respected without Access to Information about the Proceedings? Deficiencies of National Competition Procedure

by

Maciej Bernatt*

CONTENTS

- I. Introduction
- II. Procedural framework regulating the right to be heard
 - 1. The general character of Polish competition procedure
 - 2. Regulation of the right to be heard
- III. Access to information about the proceedings
 - 1. General comments
 - 2. Information about the explanatory proceedings
 - 3. Information about objections
 - 3.1. Obligation to pass information about the objections
 - 3.2. Information about the objections in proceedings concerning practices restricting competition
 - 3.3. Information about competition concerns
- IV. Access to evidence
 - 1. Access to evidence in proceedings concerning concentration
 - 2. Access to evidence versus access to case file
 - 3. Justification of the decisions vs. the protection of business secrets
- V. Conclusions

* Maciej Bernatt, Ph.D., assistant professor at the Jean Monnet Chair on European Economic Law, Faculty of Management, University of Warsaw; ordinary member of the Centre for Antitrust and Regulatory Studies; assistant of chief justice in the Polish Constitutional Court. Comments are welcomed at mbernatt@mail.wz.uw.edu.pl

Abstract

This article analyses Polish competition procedure from the perspective of a) the right to be heard, and b) the right to receive information about the proceedings. It points out problems with access to information about competition proceedings which influence the level of protection of the right to be heard in these proceedings. In order to appraise this issue, the article embarks upon an examination of the rules governing the right to be heard in Polish competition enforcement proceedings. It then focuses on the extent of the competition authority's obligation to inform undertakings about the actions addressed to them. The article includes discussion of the rules that circumscribe the parties' right of access to evidence in the proceedings. Finally, proposals for changes in the practice of the competition authority, as well as in the Polish legal framework, are put forth. The new rules governing competition proceedings before the European Commission serve as an example for improvements in Polish competition procedures.

Résumé

Dans cet article, la procédure polonaise de concurrence est analysée dans l'optique du droit d'être entendu et du droit à l'information. Le but en est d'identifier les problèmes en matière d'accès à l'information sur la procédure de concurrence, susceptibles d'impact sur le niveau de protection du droit d'être entendu dont jouissent les entreprises qui sont les parties de la procédure. Les considérations contenues dans l'article se focalisent d'abord sur les dispositions qui règlent le droit d'être entendu pendant la procédure de concurrence. Ensuite, l'attention porte sur l'obligation qu'a l'autorité de concurrence d'informer les entreprises sur les actions intentées contre elles. L'article analyse aussi l'étendue de l'accès des parties de la procédure de concurrence aux éléments de preuve recueillis par l'autorité de concurrence. On formule également dans l'article des propositions de changements législatifs et pratiques en matière d'application du droit. Les règles nouvelles qui régissent les procédures de concurrence devant la Commission européenne sont prises en compte en tant qu'indications utiles à l'évolution de la procédure polonaise.

Classification and key words: competition proceedings; antitrust proceedings; competition authority; right to be heard; due process; right to fair hearing; procedural fairness; fundamental rights

I. Introduction

The right to be heard is universally recognized as one of the most important guarantees of procedural fairness. EU law accepts that the right to be heard is one of its general principles. In the European Convention on Human Rights (hereafter, ECHR) the right to be heard is enshrined in the right to a fair trial

(Article 6 ECHR). The jurisprudence of the EU courts and the European Court of Human Rights confirms that the right to be heard is fully applicable in proceedings conducted by administrative authorities. This is also true in the case of proceedings before the Polish competition authority (known as the President of the Office of Competition and Consumers Protection, hereafter, the President of the UOKiK, following the Polish acronym), where the right to be heard must be respected as a general principle of administrative procedure as well as one of the guarantees of the constitutional principle of procedural fairness enshrined in the democratic state of law clause contained in Article 2 of the Polish Constitution.

Because it is undisputed that the right to be heard must be respected in Polish competition proceedings, this the article does not analyze this issue. Instead it aims to show the problems with access to information in competition proceedings that influence the level of protection of the right to be heard in such proceedings. In order to appraise this, the article embarks upon an examination of the rules governing the right to be heard in Polish competition enforcement proceedings. Thereafter it focuses on the extent of the competition authority's obligation to inform undertakings about the actions addressed to them. The article also discusses the rules and practices that circumscribe the parties' right of access to evidence in the competition proceedings¹.

II. Procedural framework regulating the right to be heard

1. The general character of Polish competition procedure

Polish competition procedure is regulated in the Act on the Protection of Competition and Consumers² adopted on 16 February 2007 (hereafter usually referred to as the Competition Act). Proceedings before the UOKiK President are described therein. They can take the form of explanatory or competition proceedings. The latter are officially called antimonopoly proceedings and are of two types: antimonopoly proceedings in cases of practices restricting competition, and antimonopoly proceedings in cases of concentration.

¹ The problems discussed in this article have been analyzed more deeply in my book (in Polish) concerning procedural fairness in the proceedings before the competition authority, published in 2011, see: M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, pp. 99–152. For the abstract of the book in English visit my SSRN Author page: <http://ssrn.com/author=1183912>

² Journal of Laws No. 50, item 331, as amended.

Appeals against final decisions of the UOKiK President (the Polish national competition authority) terminating the above mentioned proceedings are dealt with by the Court of Competition and Consumer Protection (hereafter, SOKiK). The proceedings before this Court are fully regulated by the Code of Civil Procedure, not by the Competition Act. The procedural regulations of Polish competition proceedings (and their interpretation) are also influenced by the standards deriving from Article 6 ECHR³.

Procedural issues not regulated specifically in the Competition Act are subject to the provisions of the Act of 14 June 1960 – the Code of Administrative Procedure⁴ (see Article 83 of the Competition Act). Based on this referral, the general principles of administrative procedure (i.e. legalism and the principle of the objective truth, the obligation to provide information to the parties, the principle of active participation by a party in the administrative proceedings) are binding in the proceedings before the President of the UOKiK. Additionally the Code of Civil Procedure⁵ (not the Code of Administrative Procedure) regulates *per analogiam* the hearing of evidence before the President of the UOKiK in matters not regulated in the Competition Act. This poses some doubts whether the specific provisions of the Code of Administrative Procedure (especially Articles 75-81) that transpose general principles of administrative procedure into concrete rules and regulate the hearing of evidence in administrative proceedings are applicable in the proceedings before the President of the UOKiK. An analysis conducted from the point of view of procedural fairness and the right to be heard yields a positive answer to this question⁶. General principles of administrative procedure cannot be seen separately from the specific provision of the Code of Administrative

³ On the application of Article 6 ECHR to competition proceedings, see more in my article: 'Prawo do rzetelnego procesu w sprawach konkurencji i regulacji rynku (na tle art. 6 EKPC)' (2012) 1 *Państwo i Prawo* 51-63. See also, in Polish literature: K. Kowalik-Bańczyk, *The issues of the protection of fundamental rights in EU competition proceedings*, Centrum Europejskie Natolin, Warszawa 2010, http://www.natolin.edu.pl/pdf/zeszyty/Natolin_Zeszyty_39.pdf, pp. 95–112; A. Stawicki, *Komentarz do art. 106* [w:] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2010, point 1.1.

⁴ Journal of Laws 2000 No. 98, item 1071.

⁵ Act of 17 November 1964, Journal of Law 1964, No 43, item 296.

⁶ M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu...*, pp. 129–132. Such an approach finds support in the jurisprudence of Antimonopoly Court (predecessor of the SOKiK Court), see the judgment of 9 May 2001, XVII Ama 91/00, LEX no. 55940. For a different opinion, however, expressed by the authors of one of the commentaries to the Competition Act, see: C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 723. The SOKiK, when dealing with the appeals from decisions of the UOKiK President, deliberated over the arguments whether Articles 75–81 of the Code of Administrative Procedure might have been violated in: judgment of 27 December 2007, XVII Ama 90/06, not reported; the resolution of 16 November 2004, XVII Amz 13/05, not reported;

Procedure that guarantee them. Thus, an interpretation of Articles 83 and 84 of the Competition Act that takes into account the perspective of the right to be heard is required. Such an interpretation would seem to yield the conclusion that the simultaneous application of the provisions concerning the hearing of evidence from both the Code of Administrative Procedure and the Code of Civil Procedure should not be excluded⁷. Thus, for example, Article 81 of the Code of Administrative Procedure – which is crucial for the right to be heard⁸ – is in force in competition procedure cases. Consequently, the facts in the proceedings before the President of the UOKiK must be established (only) on the basis of evidence which the party has been given the possibility to comment on.

2. Regulation of the right to be heard

The above description of Polish competition procedure demonstrates its complicated nature. This influences on the degree of precision concerning the regulation of the right to be heard in Polish competition proceedings. When it comes to the first phase of the proceedings before the UOKiK President – explanatory proceedings, the right to be heard is scarcely regulated due to the fact that at this stage there are no parties to the proceedings (the objections against undertakings are not yet raised). The undertakings, even if directly addressed by the actions of competition authority such as inspections or information requests, have no access to the materials collected during the explanatory proceedings and cannot comment on them. As they have limited knowledge about the subject matter and/or focus of the explanatory proceedings, in practice in most cases they will not be able to submit effective explanations concerning the essential circumstances of a given case under Article 50(3) of the Competition Act.

judgment of 7 January 2004, XVII Ama 24/03 (2005) 2 *Wokanda*, item 50; the resolution of 6 February 2006, XVII Amz 28/05, not reported.

⁷ Article 83 of the Competition Act provides that the matters not regulated by the Competition Act, as regards the proceedings before the UOKiK President, shall be subject to the provisions of the Code of Administrative Procedure, subject to Article 84. Article 84 of the Competition Act stipulates that in matters concerning evidence in proceedings before the President of the Office within the scope not regulated in the Competition Act, Articles 227 to 315 of the Code of Civil Procedure, shall apply accordingly.

⁸ B. Adamiak, [in:] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Kraków 2005, commentary to Article 81 of the Code of Administrative Procedure, Nb. 1; R. Kędziora, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2008, commentary to Article 81 of the Code of Administrative Procedure, Nb 1.

Undertakings may exercise their right to be heard during the main phase of the proceedings before the President of the UOKiK – antimonopoly proceedings. Article 10 of the Code of Administrative Procedure stipulates that administrative bodies are required to ensure that the parties are actively involved at each stage of proceedings and that they shall allow the parties to express an opinion on the evidence and materials collected before any decision is issued. However, for the right to be heard to be used effectively, parties to the proceedings must receive exact information concerning the details of the proceedings, including information about the objections raised against undertakings (charges of participating in a practice restricting competition, or competition concerns about a planned concentration). Such an obligation derives from Article 74 of the Competition Act, under which the UOKiK President, when issuing a decision terminating the proceedings, shall take into consideration only the objections which the parties concerned were able to comment on.

Access to the file of the case and the evidence contained therein is crucial to the parties' right to be heard. Article 73(1) of the Code of Administrative Procedure provides that at each stage of the proceedings a public administration body shall allow parties to see the file and to make notes or copies thereof. However, this right may be significantly limited during antimonopoly proceedings as a consequence of the protection of business secrets. Article 69(1) of the Competition Act stipulates that the UOKiK President is entitled to limit access to evidence to the extent indispensable. This rule relates to evidence attached to the case file in situations where rendering such evidence accessible would entail a risk that business secrets, or any other secrets protected by separate legal provisions, might be revealed. Thus, the right to be heard of the undertaking participating in proceedings as a party may be in conflict with the need to protect business secrets of another undertaking⁹.

Another legal institution of critical importance for the right to be heard is the oral hearing, as this gives the parties the possibility to have direct contact with the decision makers. An oral hearing can be organized in the course of the proceedings before the UOKiK President [Article 60(1) of the Competition Act]. However, the decision whether to convene an oral hearing is completely discretionary. Even if the parties submit a request in this respect the UOKiK President is not obliged to organize an oral hearing. In this regard Polish

⁹ For more on this issue, see: M. Bernatt, 'Right to be heard or protection of confidential information? Competing guarantees of procedural fairness in proceedings before the Polish competition authority' (2010) 3(3) *YARS* 53–70, available at: <http://ssrn.com/abstract=1874796>. See also G. Materna, 'Ograniczenie prawa wglądu do materiału dowodowego w postępowaniu przed Prezesem UOKiK' (2008) 4 *Przegląd Prawa Handlowego* 27–33.

procedure differs negatively from its EU counterpart where an oral hearing is obligatory for the Commission to be organized when parties so request¹⁰.

III. Access to information about the proceedings

1. General comments

The use parties may make of their right to be heard is directly connected with their right to receive information on the proceedings conducted against them. The President of the UOKiK has an obligation to inform, derived from Article 9 of the Code of Administrative Procedure. It stipulates that public administrative bodies are obliged to provide the information and explain all factual and legal circumstances of the case that can influence the rights and obligations of the parties. It is undisputed that the obligation to inform should be understood as broadly as possible¹¹. The information delivered by public administrative bodies must be full and appropriate¹².

2. Information about the explanatory proceedings

Under Article 9 of the Code of Administrative Procedure, the obligation to inform refers to the parties to the proceedings. Thus information about the commencement of explanatory proceedings is not delivered to anybody, as there are no parties yet. Taking into account that unannounced inspections directed by the UOKiK President functionaries usually take place during the explanatory proceedings, the undertakings have usually no knowledge - until such inspections begin - about the activity of the state organs that is addressed

¹⁰ The problems surrounding the limited use made of the oral hearing in Polish competition procedure falls outside the scope of this article. For more on this issue, see: M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu...*, pp. 134–144. As to the EU law see also T. Giannakopoulos, 'The Right to be Orally Heard by the Commission in Antitrust, Merger, Anti-dumping/Anti-subsidies and State Aid Community Procedures' (2001) 4 *World Competition*.

¹¹ Judgment of Administrative Supreme Court of 12 April 2000, I SA/Ka 1740/98, available at <http://orzeczenia.nsa.gov.pl>; see also judgment of Administrative Supreme Court of 25 June 1997, SA/Lu 2087/95, LEX no. 30816; the judgment of Supreme Court of 23 July 1992, III ARN 40/92 (1993) 3 *Państwo i Prawo* 110; judgment of Voivodship Administrative Court of Warsaw of 1 December 2004, II SA 4506/03, available at <http://orzeczenia.nsa.gov.pl>.

¹² G. Łaszczycza, Cz. Martysz, A. Matan, *Kodeks postępowania administracyjnego. Komentarz*, Vol. I, *Komentarz do art. 1–103*, Lex, 2007, commentary to Article 9 of the Code of Administrative Procedure, Nb 5–7.

against them. Obviously some explanatory proceedings are of such a nature that there is a clear need to surprise an undertaking with unannounced inspections, as this guarantees the effectiveness of the proceedings. However, the formalistic approach under which information about the institution of explanatory proceedings is never made known to the undertakings concerned should be deemed inappropriate¹³. Rather, the opening of a proceeding should be made publicly known unless there are valid reasons to justify its secret character.

This is the practice of the Commission, recently officially confirmed. The opening of the proceedings is made public, either by press release or an announcement on the DG Competition website, unless such publication may harm or impede the investigation¹⁴. Such an approach is also advisable in the case of Polish competition procedure. The introduction of such a practice could facilitate active cooperation between the undertakings and the President of the UOKiK. It would trigger a higher level of protection of right to be heard, including the antimonopoly proceedings subsequent to the explanatory ones, inasmuch as a party to the antimonopoly proceedings would have a deeper knowledge of the case.

3. Information about objections

3.1. Obligation to pass information about objections

An exhaustive knowledge about the objections is crucial to the parties' right to be heard. For this reason parties should receive, at the beginning of the antimonopoly proceedings in cases of practices restricting competition, a thorough explanation about charges concerning their alleged participation in anticompetitive agreements or abuse of dominant position. As concerns antimonopoly proceedings in cases of concentration, undertakings giving notice of a concentration should be informed about any competition concerns of the planned concentration identified by the UOKiK President in the course of the proceedings.

¹³ For a similar opinion, see: A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów, Komentarz*, Warszawa 2009, commentary to Article 48, Nb 10.

¹⁴ See Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (2011/C 308/06), para. 20. The introduction of such practice was publicly announced by the DG Competition Director in his speech at the OECD Competition Committee Meeting (18 October 2011, Paris) as proof of the growing concern to assure transparency in competition proceedings.

3.2. Information about objections in proceedings concerning practices restricting competition

With respect to the proceedings concerning practices restricting competition, the biggest deficiency is that the undertakings are informed only generally about the charges raised against them. Decisions on the commencement of these proceedings do not contain a thorough, detailed justification. In particular they lack a detailed description of the facts and evidence collected in the case files which led the UOKiK President to the conclusion that the Competition Act may have been infringed. They lack also a description of the legal assumptions made concerning the application of the facts to the relevant legal provisions¹⁵. The parties to the proceedings are not informed about the length of the presumed violation nor the identity of those that participated in the alleged infringement¹⁶. It also happens that undertakings receive decisions on the commencement of proceedings where only the strict legal basis is quoted, and the factual and legal justification is completely missing. For example in the decision of 8 December 2009 the UOKiK President pointed out that the charges were formulated precisely because they reflected the exact wording of the legal provisions¹⁷. This problem exists also when it comes to the proceedings in which Articles 101–102 TFEU (under the Regulation 1/2003¹⁸) is made the legal basis of the decision by the UOKiK President¹⁹.

This may be seen as part of the broader problem of not paying enough attention to procedural issues in the practice of the President of the UOKiK. In the decisions establishing the infringement of competition law it is usually stated only that the parties have the right of access to the case file and the right to make use of it, and that the President of the UOKiK informed the parties about the closure of the evidentiary proceedings and about the parties' right to see the entire evidence collected in the proceedings and the right to express its

¹⁵ It is the obligation of the administrative bodies to inform the parties to the proceedings about legal circumstances that influence the findings in the decision, see J. Borkowski, [in:] J. Borkowski (ed.), *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 1989, pp. 72–73. See also W. Taras, 'Prawny obowiązek informowania obywateli przez organy administracji państwowej' (1986) 1 *Państwo i Prawo* 73.

¹⁶ M. Kolasiński, 'Influence of the General Principles of Community Law on Polish Antitrust Procedure' (2010) 3(3) *YARS* 38.

¹⁷ See the decision of the UOKiK President of 8 December 2009, DOK-7/2009, available at <http://www.uokik.gov.pl>

¹⁸ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

¹⁹ M. Kolasiński, 'Influence of the General Principles...', pp. 38–43.

final opinion in the case²⁰. For example, in the decision of 23 November 2011 the UOKiK President dismissed without specific explanation the complaint of one of the parties that the charges in the case were formulated in an unclear and imprecise fashion, which limited the right of the defense²¹.

Another issue that remains controversial is whether, in the resolution on the institution of antimonopoly proceedings, the relevant market should be preliminarily established or not. The Polish Supreme Court, in its judgment of 7 May 2004, ruled that it is not necessary to do so²². The absence of such a finding lack does not amount, in the opinion of the Court, to a violation of Article 10 of the Code of Administrative Procedure. According to the Court the Competition Act obliges the UOKiK President only to inform the parties about the commencement of the proceedings. In consequence, according to the Court the resolution does not have to contain a description of the relevant market. Such an approach must be critically assessed, as the determination of relevant market is a crucial premise of agreements restricting competition and abuse of dominant position²³. In order for an undertaking to defend itself effectively it is important to have knowledge about the elements of its alleged misbehavior that have brought the UOKiK President to the preliminary conclusion that the competition law had been breached. It must be also borne in mind that the UOKiK President acts on an *ex officio* basis and issues the resolution on the institution of antimonopoly proceedings usually after the completion of explanatory proceedings. As a consequence the President of the UOKiK should be able to show preliminarily why he/she considers that a given undertaking infringed the Competition Act. Thus the practice of describing preliminarily the relevant market in the resolution on the institution of antimonopoly proceedings must be strongly supported²⁴.

²⁰ See decisions of the UOKiK President (published at www.uokik.gov.pl) of: 29 December 2006, DOK-166/06; 20 December 2007, DOK-98/07; 29 August 2008, DAR-15/2006; 29 August 2009, DOK-6/2008; 8 December 2009, DOK-7/2009; 23 November 2011, DOK-8/2011.

²¹ Decision of the UOKiK President of 23 November 2011, DOK-8/2011, p. 95. The UOKiK President stated only that the complaint was ill-founded inasmuch as the party demonstrated, in its written statement filed in the course of the proceedings that it understood the charges raised. This decision is not final yet. Similar arguments were raised unsuccessfully by the parties in the proceedings completed by decision of 8 December 2009, DOK-7/2009.

²² Judgment of the Supreme Court of 7 May 2004, III SK 38/04, UOKiK Official Journal [2004] 4, item 330.

²³ See A. Jurkiewicz, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, Article 74, Nb 7–8 and M. Bernatt, *Sprawiedliwość proceduralna...*, pp. 110–112. The need for providing the parties with information about the relevant market is underlined in the literature in regards with the proceeding before the Commission, C.S. Kerse, N. Khan, *EC Antitrust Procedure*, 5th Edition, London 2005, Nb. 4–020.

²⁴ M. Różewicz-Ładoń points out that in practice information about the relevant market is in principle transmitted to the addressee of the resolution upon the institution of antimonopoly

This tendency to not explaining in detail neither the facts nor the legal reasoning that supports the charge of anticompetitive behavior at the beginning of antimonopoly proceedings is not in line with the purposive and a systematic interpretation of the Competition Act. Rather, it is wrongly based on a strictly textual interpretation. It must be advocated that even if the resolution on the commencement of antimonopoly proceedings (Article 88 of the Competition Act) is not appealable, it nevertheless needs justification in order to protect the parties' right to be heard. The provisions of the Competition Act are possible to be interpret in such a way that takes into account obligation of the UOKiK President to inform the parties thoroughly about the charges raised against them. The UOKiK President is obliged to inform parties about the institution of antimonopoly proceedings [Article 88(2) of the Competition Act]. These proceedings end with a decision which must be based on the charges to which the parties have had an opportunity to comment on (Article 74 of the Competition Act). Therefore in light of the Article 9 of Code of Administrative Procedure (the obligation to inform) it seems clear that in the resolution on the institution of the proceedings it is indispensable for the UOKiK President to identify precisely the charges and justify them, both from a factual and legal perspective²⁵. The information collected during explanatory proceedings should be legally sufficient to formulate a justification for the commencement of antimonopoly proceedings.

The argument for a thorough justification of the resolution on the institution of antimonopoly proceedings is supported by the practice of the Commission. In the EU competition proceedings the statement of objections contains a full factual and legal description of the presumed infringement²⁶. What is more, it has recently been decided that in the statement of objections a section on

proceedings; see K. Różiewicz-Ładoń, *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję*, Warszawa 2011, p. 121.

²⁵ In the past the Competition Court correctly expected the President of the UOKiK to show, in the resolution on the commencement of antimonopoly proceedings, what actions of the undertaking could have violated the competition law and which legal provision(s) was breached; see the judgement of the Competition Court of 7 January 2004, XVII Ama 24/03. See also the judgement of 23 February 2004, XVII Ama 30/03, not reported and of 23 July 2003, XVII Ama 94/02 (2000) *Wokanda* 7–8, item 89.

²⁶ Article 10 of Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ [2004] L 123/18. See C.S. Kerse, N. Khan, *EC Antitrust Procedure*, Nb. 4-020 and cases: C-62/86 *AKZO v Commission*, ECR [1991] I-3359, para. 29; T-10/92 *Cimenteries CBR SA v Commission*, ECR [1992] II-571, para. 33; T-191/98 *Atlantic Container Line AB v Commission*, ECR [2003] II-3275, paras. 113 and 162.

finis is included, where preliminary calculation of the fine is given²⁷. This section indicates the essential facts and matters of law which may result in the imposition of a fine, such as the duration and gravity of the infringement and whether the infringement was committed intentionally or by negligence²⁸. The statement of objections must also mention whether certain facts may give rise to aggravating circumstances and, to the extent possible, to attenuating circumstances²⁹. The Commission underscored that the section on fines is a major novelty, intended to provide greater clarity and to encourage parties to come forward with arguments in this respect early on³⁰.

3.3. Information about the competition concerns

When it comes to antimonopoly proceedings in cases of concentration, a different problem appears. The undertakings that give notice of the planned concentration are not informed during the course of the proceedings about the objections the UOKiK President has against the planned concentration (competition concerns)³¹. This is not in line with the reasonable interpretation of Article 74 of the Competition Act, in the light of Article 10 of the Code of Administrative Procedure. The notion of ‘charge’ used there must be understood broadly and refer not only to proceedings in cases of practices restricting competition, but also to proceedings in cases of concentration. Article 74 is situated in the first chapter of the sixth section of the Competition Act and thus it is applicable to any kind of proceedings before the UOKiK President – including the one in cases of concentration.

The fact that the parties are not informed about the competition concerns may be a consequence of the fact that Polish procedure in cases of concentration has only one phase. The Competition Act does not distinguish any formal moment when the UOKiK President would have to inform the

²⁷ See the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, paragraphs 84–85. Compare also: Joaquín Almunia, ‘Fair process in EU competition enforcement’, European Competition Day, Budapest, 30 May 2011, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/396&format=DOC&aged=0&language=EN&guiLanguage=en>

²⁸ Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, para. 84.

²⁹ *Ibidem*.

³⁰ See the speech by DG Competition Director Alexander Italianer at the OECD Competition Committee Meeting (18 October 2011, Paris), ‘Best Practices for antitrust proceedings and the submission of economic evidence and the enhanced role of Hearing Officer’, available at http://ec.europa.eu/competition/speeches/text/sp2011_12_en.pdf.

³¹ T. Skoczny, ‘Polskie prawo kontroli koncentracji – ewolucja, model, wybrane problemy’ (2010) 5 *Europejski Przegląd Sądowy* 21.

notifying undertaking about any objections he/she might have against the planned concentration. Thus the party may be surprised by the final outcome of the decision and cannot propose remedies before it is issued³². This problem could be resolved by the introduction of two phases in the proceedings in cases of concentration. This would enable the notifying party to be more active and propose the solutions to problems concerning concentration raised by the President of the UOKiK during the course of the proceedings. Thus, the introduction of a two-phase process, which is proposed in the UOKiK President's *Competition Policy 2011–2013* program, must be supported³³.

IV. Access to evidence

1. Access to evidence in the proceedings concerning concentration

As noted above, the right to active participation in the proceedings is a general principle of Polish administrative procedure. The consequence of this is that the parties must have an opportunity to comment on all the evidence collected during the proceedings. Otherwise Article 10 of the Code of Administrative Procedure is violated³⁴. Article 81 of the Code of Administrative Procedure provides that the facts in the administrative proceedings can be established only on the basis of evidence to which the party concerned has been given the possibility to comment on. What is more, in the jurisprudence of administrative courts it is underlined that the right of the parties to express their final opinion in the case on the basis of all the evidence collected is not waived, even when the parties might know the facts established during the proceedings³⁵. Even if

³² In recent two decisions by the UOKiK President prohibiting concentration (the decision of 13 January 2011, DKK-1/2011 and of 3 February 2011, DKK-12/2011, available at <http://www.uokik.gov.pl>) the undertakings that notified concentration were not given a chance to propose remedies in the course of the administrative proceedings. The question arises whether this is possible during first-instance judicial proceedings before the SOKiK.

³³ *Polityka konkurencji na lata 2011-2013*, Urząd Ochrony Konkurencji i Konsumentów, available at <http://www.uokik.gov.pl/download.php?plik=10111>, pp. 66–67.

³⁴ See the judgments of the Supreme Administrative Court of: 10 May 2006, II OSK 810/05, LEX no. 236469; 6 October 2000, V SA 316/00, LEX no. 50116; 5 April 2001, II SA 1095/00, LEX no. 53441. Violation of Article 10 of the Code of Administrative Procedure may be the reason for revocation of the decision by the court, see judgment of the Supreme Administrative Court of 10 January 2002, V SA 1227/01, LEX no. 109326.

³⁵ The judgments of Voivodship Administrative Court of Warsaw of: 8 November 2006, III SA/Wa 1933/06, available at <http://orzeczenia.nsa.gov.pl> and of 22 March 2006, III SA/Wa 3179/05, available at <http://orzeczenia.nsa.gov.pl>.

the parties have such knowledge they still need be informed about the relevance of these facts to the decision making process.³⁶

In cases of practices restricting competition, the President of the UOKiK informs the parties about the termination of antimonopoly proceedings and calls upon the parties to file their final opinion in the case after their study of all the evidence collected. This is reported in the final decision of the UOKiK President. However, an analysis of recent decisions of the UOKiK President issued in the antimonopoly proceedings in cases of concentration suggest (decisions prohibiting the concentration) suggests that this does may not actually take place in these proceedings³⁷. In the decisions of 13 January 2011 and of 3 February 2011 the undertaking giving notice of the concentration was not been given a chance to comment on all the evidence collected during the proceedings before the final decision was issued. Such practice is without legal justification, especially when it concerns decisions prohibiting the concentration. During the proceedings the UOKiK President collects the information and obtains economic analyses which may suggest that the planned concentration - contrary to the opinion of the undertaking giving notice - may have an anticompetitive effect. Not providing the party with the possibility to comment on such information and analyses after all the evidence in the case is collected violates the right to be heard of the parties to the proceedings.

2. Access to evidence vs. access to case file

The other problem relevant for a question to the issue of the right to be heard in the competition enforcement proceedings is whether the parties to the antimonopoly proceedings (both in cases of practices restricting competition and in cases of concentration) always know what evidence collected in the case file will support the decision of the UOKiK President.

There is no proof that confirms that the parties concerned have knowledge of this. In the proceedings concerning practices restricting competition, the resolution on the institution of antimonopoly proceedings does not refer to specific evidence that supports the charges of anticompetitive conduct. Also, the call for the parties to express their final opinion in the case after the termination of the proceedings does not point out what portions of collected data (especially documents) collected in the case file (which can contain massive amounts of information) are considered pertinent by the UOKiK President in his/her decision-making process. Even though the parties to

³⁶ Ibidem.

³⁷ See the decision of 13 January 2011, DKK-1/2011 and of 3 February 2011, DKK-12/2011.

the proceedings have access to the case file, they may have difficulties with identifying which part thereof is considered by the UOKiK President as the proof of an infringement of competition law³⁸. In some cases, especially those complicated ones in which a massive amounts of information is collected, the mere access to the case file may not suffice to enable an effective defense against the charges raised.

For this reason the mere right of access to the case file should not be understood, in the context of the actual practice of the UOKiK President, as a sufficient guarantee of the parties' right to be heard. Rather the parties when exercising their right of access to the case file, should be informed which part thereof is considered to constitute incriminating evidence in the case. Such information should be made available to the parties preliminarily, in the resolution on the institution of antimonopoly proceedings, and finally when the parties are called upon to express their final opinion in the case after the termination of the proceedings. This may be achieved either by a change in the practice of the UOKiK President, or by introduction of specific regulations to the Competition Act that would establish such an obligation on the part of the UOKiK President.

3. Justification of the decisions versus the protection of business secrets

Another problem concerning the right to be heard (and the right to judicial review as well) concerns the way of justifying the final decisions of the UOKiK President, and is connected with the protection of business secrets in the competition proceedings.

It has already been pointed out that Polish legislation and jurisprudence, unlike that of the EU one, does not properly balance the protection of business secrets with the safeguards of the right to be heard³⁹. It fails to stipulate clearly what the limits of the protection of confidential information are in situations when the right to be heard of other parties to proceedings is at stake⁴⁰.

This problem of giving preference to the protection of business secrets over the right to be heard can be observed in the justification of the UOKiK

³⁸ M. Kolasiński underlines that access to the case file before the issuance of a decision does not constitute a sufficient guarantee of the right to a fair hearing. He notes that undertakings frequently review hundreds of pages of case files, without being aware of the relevance of the specific facts or evidence included or knowing how to identify of the issues they should comment on, see M. Kolasiński, 'Influence of the General Principles...', p. 38.

³⁹ M. Bernatt, 'Right to be heard or protection of confidential information?...', pp. 58–62.

⁴⁰ *Ibidem*.

President's decision⁴¹. Under Article 32(3) of the Competition Act the decisions of the UOKiK President published in the Official Journal of the Office of Competition and Consumers Protection are required to be made public, with the omission of information constituting a business secrets and other confidential information protected under separate provisions. This regulation applies only to the public version of the decision and not the one delivered to the parties. In the Competition Act there is no legal basis to limit, in the justification of the decision, the access of the parties to information constituting a business secret which is considered to be the proof of the infringement. Article 69(1) of the Competition Act regulates the limitations on access to evidence access contained in the case file, and should not be interpreted as a ground for protection of business secret that are the proofs of the infringement at the same time.⁴² Additionally it may be noted that Article 71(1) of the Competition Act regulates only the personal obligation of the employees of the Office of Competition and Consumers Protection to maintain the confidentiality of business secrets to which they obtain access to during proceedings⁴³ and thus may not be rather seen applicable to the way the decisions are justified.

From the perspective of the right to be heard and the principle of equality of arms it is crucial for the parties to learn on what evidence the decision is based. Otherwise they may well have difficulties in formulating an effective appeal of such a decision and questioning it in further judicial proceedings. In the light of Articles 81 and 10 of the Code of Administrative Procedure, practices restricting competition or the anticompetitive character of a concentration cannot be proven by evidence to which the parties have no access to or even no knowledge of. The UOKiK President rather faces an alternative: either to prove the infringement (or anticompetitive character of the concentration) with the use of evidence that does not constitute a business secret, or to reveal the business secrets relied on to the parties and explain that such a disclosure was necessary for the right to be heard to be fully protected⁴⁴.

⁴¹ See the decision of 3 February 2011, DKK-12/2011.

⁴² See the proposed solution to this problem: M. Bernatt, 'Right to be heard or protection of confidential information?...', pp. 67–68.

⁴³ Article 71(1) of the Competition Act is relied upon by the UOKiK President as a source of the prohibition against revealing business secrets in the public version of decision; see the decision of 24 February 2011, DOK-1/2011, available at <http://www.uokik.gov.pl>, p. 4; see also the decision of 4 November 2010, DOK-9/2010, available at <http://www.uokik.gov.pl>, p. 2. Such an approach is incorrect in the light of the wording of Article 71(2) *in fine* and the fact that Article 32(3) of the Competition Act provides specific regulation in this respect.

⁴⁴ A similar approach is advised in case of a resolution on the limitation of access to evidence in the course of the proceedings under Article 69(1) of the Competition Act, see M. Bernatt, 'Right to be heard or protection of confidential information?...', pp. 67–68.

For this perspective it is important that in the decision of 3 February 2011 many pages of its operative part contain omissions that are revealed only in the attachment to the decision, which remains unknown to the addressee of the decision (the information contained in this second attachment is known only to the UOKiK President, and afterwards to the SOKiK)⁴⁵. The lack of this information may have impeded, or maybe even rendered impossible, discussion with the UOKiK President about, i.e. the ways in which the relevant market and the anticompetitive effect of the concentration were determined in the decision. The reason for that is that the addressee of the decision had no access to the calculations of the UOKiK President in this respect⁴⁶, because in the opinion of the UOKiK President these calculations contained business secrets.

The above analysis should not be seen as appeal for not protecting business secrets in the justification of these type of the UOKiK President's decisions that are delivered to the parties. It points out that there is a need for properly balancing the protection of business secrets with respect for right to be heard of the parties. In my opinion, the UOKiK President should not try to prove an infringement with the information that are business secrets at the same time.

Comparatively it is important to note that under the Commission notice on the rules for access to the Commission files⁴⁷, the qualification of a piece of information as confidential is not a barrier to its disclosure if such information is necessary to prove an alleged infringement or could be necessary to exonerate a party⁴⁸. The Commission believes that the need to safeguard the rights of defense of the parties, through the provision of the widest possible access to the case file outweighs the concern for the protection of confidential information of others⁴⁹. The preamble to Regulation 773/2004 explicitly states that where business secrets, or other confidential information, are necessary to prove an infringement, the Commission should assess whether the need

⁴⁵ See for example pp. 62–63, 67, 69, 71, 74 of the decision of 3 February 2011, DKK-12/2011. A similar problem probably occurs in the decision of 23 November 2011, DOK-8/2011 as its justification contains information that was not revealed, not only to the public but also to the parties (this information is included in attachments 1–5 to the decision, which are either secret for all parties or for some of them), see pp. 4–5 of the decision.

⁴⁶ Decision of 3 February 2011, DKK-12/2011, pp. 62–63.

⁴⁷ Commission notice of 22 December 2005 on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty; Articles 53, 54 and 57 of the EEA Agreement, and Council Regulation (EC) No. 139/2004, OJ [2205] C 325/07.

⁴⁸ Para. 24 of the Commission notice on the rules for access to the Commission file.

⁴⁹ *Ibidem*. But see the opinion expressed before the CFI judgment of 29 June 1995 in the case T-30/91 *Solvay v Commission*, ECR [1995] II-1775 was delivered – C. Lavoie, 'The Investigative Powers of the Commission with respect to Business Secrets under Community Competition Rules' (1992) 17 *European Law Review* 30.

to disclose each individual document is greater than the harm which might result from it⁵⁰. The Commission is not allowed to use, to the detriment of an undertaking party to the proceedings, those facts, circumstances or documents which it cannot, in its view, disclose. That is so because a refusal to disclose would adversely affect that entity's opportunity to effectively communicate its views on the truth or on the implications of those or other circumstances, based on the documents, or on the conclusions drawn from them by the Commission⁵¹.

V. Conclusions

In his speech in October 2011 DG Competition Director Alexander Italianer, while presenting new EU Best Practices for antitrust proceedings, noted in the name of Commission: 'We hope that our experience will inspire other agencies to further work in improving transparency and accountability, which we can only encourage'⁵². It is strongly advised that this encouragement will be taken seriously by the Polish competition authority. The divergences between the Polish and EU procedures are of a significant nature. This article has demonstrated that there is a need for a large number of improvements so as to guarantee to a greater extent the parties' right to be heard. The approach undertaken by the Commission should be considered exemplary in this respect for Poland. On many occasions the President of the UOKiK has publicly emphasized the importance of transparency in competition proceedings⁵³. Now the task for the UOKiK President is to implement this declaration into practice with regard to the right to be heard. In particular, the undertakings to which the competition proceedings refer to should have broader knowledge about the proceedings as well as better and more precise access to evidence. The UOKiK President should extend works under the mandate of the *Competition Policy 2011-2013* program, so as to propose new legal solutions that would guarantee a fair hearing in Polish competition proceedings to a

⁵⁰ See point 14 of the Preamble to Commission Regulation 773/2004.

⁵¹ The ECJ judgment of 13 February 1979 in case 85/76 *Hoffmann-La Roche v Commission*, ECR [1979] 461, para. 14.

⁵² A. Italianer, *Best Practices for antitrust proceedings...*, p. 8.

⁵³ See in English: M. Krasnodęska-Tomkiel, 'Procedural Fairness' OECD Working Party No. 3 on Cooperation and Enforcement, 16 February 2010, available at <http://www.uokik.gov.pl/download.php?plik=7998>. See also the opinion of M. Krasnodęska-Tomkiel, available at http://www.uokik.gov.pl/aktualnosci.php?news_id=2050 and the speech by J. Król, the President of the UOKiK Deputy, at a conference in Poznań in November 2010, http://www.uokik.gov.pl/aktualnosci.php?news_id=2314.

greater extent than at present. Some improvements may also be achieved by mere change of current practice of the competition authority. It is also the role of the courts (especially the SOKIK) to scrutinize whether the right to be heard is respected during the proceedings before the UOKiK President. The courts should also pay special attention to the issue whether the burden of proof of the infringement of competition law rests on the UOKiK President in the judicial proceedings as well⁵⁴, and whether the appealing undertaking lodging the appeal and the competition authority have equal knowledge about the evidence collected in the case file⁵⁵.

Literature

- Adamiak B., Borkowski J., *Kodeks postępowania administracyjnego. Komentarz* [Code of Administrative Procedure. Commentary], Kraków 2005.
- Almunia J., 'Fair process in EU competition enforcement', European Competition Day, Budapest, 30 May 2011, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/396&format=DOC&aged=0&language=EN&guiLanguage=en>.
- Banasiński C., Piontek E. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, [Act on Competition and Consumers Protection. Commentary], Warszawa 2009.
- Bernatt M., *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [Procedural fairness in the proceedings before the competition authority], Warszawa 2011.
- Bernatt M., 'Prawo do rzetelnego procesu w sprawach konkurencji i regulacji rynku (na tle art. 6 EKPC)' ['Right to a fair hearing in competition and market regulation proceedings (in the context of Article 6 of the ECHR)'] (2012) 1 *Państwo i Prawo*.
- Bernatt M., 'Right to be heard or protection of confidential information? Competing guarantees of procedural fairness in proceedings before the Polish competition authority' (2010) 3(3) *YARS*.
- Borkowski J. (ed.), *Kodeks postępowania administracyjnego. Komentarz* [Code of Administrative Procedure. Commentary], Warszawa 1989.
- Giannakopoulos T., 'The Right to be Orally Heard by the the Commission in Antitrust, Merger, Anti-dumping/Anti-subsidies and State Aid Community Procedures' (2001) 4 *World Competition*.

⁵⁴ See for example the judgment of the Supreme Court of 17 March 2010, III SK 40/09, Lex no. 585839.

⁵⁵ Positive changes in this respect can be achieved if the judgement of the Supreme Court of 7 July 2011 (III SK 52/10, Lex no. 1001322) will be properly implemented by the SOKIK. In the light of this judgment the SOKIK is obliged to hear, in the course of judicial review, the evidence deriving from the administrative proceedings. This evidence cannot be automatically treated as the part of court case file. Consequently both the SOKIK. Court and the appealing undertaking will probably have more specific knowledge about the whole body of relevant evidence in the case before the oral hearing is closed.

- Italianer A., 'Best Practices for antitrust proceedings and the submission of economic evidence and the enhanced role of Hearing Officer', available at http://ec.europa.eu/competition/speeches/text/sp2011_12_en.pdf.
- Kerse C.S., Khan N., *EC Antitrust Procedure*, 5th Edition, London 2005.
- Kędziora R., *Kodeks postępowania administracyjnego. Komentarz [Code of Administrative Procedure. Commentary]*, Warszawa 2008.
- Kolasiński M., 'Influence of the General Principles of Community Law on Polish Antitrust Procedure' (2010) 3(3) *YARS*.
- Kowalik-Bańczyk K., *The issues of the protection of fundamental rights in EU competition proceedings*, Centrum Europejskie Natolin, Warszawa 2010, http://www.natolin.edu.pl/pdf/zeszyty/Natolin_Zeszyty_39.pdf.
- Krasnodębska-Tomkiel M., 'Procedural Fairness', OECD Working Party No. 3 on Cooperation and Enforcement, 16 February 2010, available at www.uokik.gov.pl/download.php?plik=7998.
- Lavoie C., 'The Investigative Powers of the Commission with respect to Business Secrets under Community Competition Rules' (1992) 17 *European Law Review*.
- Łaszczyca G., Martysz Cz., Matan A., *Kodeks postępowania administracyjnego. Komentarz, tom I, Komentarz do art. 1–103 [Code of Administrative Procedure. Commentary, Vol. 1., Commentary to Articles 1–103]*, Lex, 2007.
- Materna G., 'Ograniczenie prawa wglądu do materiału dowodowego w postępowaniu przed Prezesem UOKiK' ['The limitation of evidence access in the proceedings before the President of the UOKiK'] (2008) 4 *Przegląd Prawa Handlowego*.
- Polityka konkurencji na lata 2011–2013 [Competition Policy 2011–2013]*, Office of Competition and Consumers Protection, available at <http://www.uokik.gov.pl/download.php?plik=10111>.
- Różewicz-Ładoń K., *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję [Proceedings before the President of the Office of Competition and Consumers Protection in respect with the practices restricting competition]*, Warszawa 2011.
- Skoczny T., 'Polskie prawo kontroli koncentracji – ewolucja, model, wybrane problemy' ['Polish law on the control of concentrations – evolution, model, selected problems'], (2010) 5 *Europejski Przegląd Sądowy*.
- Skoczny T., Jurkowska A., Miąsik D. (eds.), *Ustawa o ochronie konkurencji i konsumentów, Komentarz [Act on Competition and Consumers Protection. Commentary]*, Warszawa 2009.
- Stawicki A., Stawicki E. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumers Protection. Commentary]*, Warszawa 2011.
- Taras W., 'Prawny obowiązek informowania obywateli przez organy administracji państwowej' ['Legal obligation of administrative bodies to inform citizens'] (1986) 1 *Państwo i Prawo*.

The *ne bis in idem* Principle in Proceedings Related to Anti-Competitive Agreements in EU Competition Law

by

Przemysław Kamil Rosiak*

CONTENTS

- I. Introduction
- II. The *ne bis in idem* as a general principle of EU law
 - 1. The *ne bis in idem* principle in the Convention's system
 - 2. The *ne bis in idem* principle in the constitutions of the EU Member States
- III. The *ne bis in idem* principle in the Charter of Fundamental Rights
- IV. The *ne bis in idem* principle in EU competition law
 - 1. General remarks
 - 2. Role of the European Commission and of NCAs in the application of the *ne bis in idem* principle
 - 3. Collusion in proceedings conducted by the Commission and by national competition authorities and in penalties in EU proceedings and in national proceedings of Member States
 - 4. Evolution in interpretation of the conditions for the application of the *ne bis in idem* principle
 - 4.1. Identity of the legal interest protected
 - 4.2. Identity of events and identity of offenders
 - 4.3. Further evolution in interpretation of the conditions of application of the *ne bis in idem* principle
 - 5. Collusion in proceedings of the Commission and of national competition authorities of non-member States and in penalties in EU proceedings and in proceedings in a non-member State
- V. Conclusions

* Przemysław Rosiak, LL.M., College of Europe Bruges, Attorney-at-Law, Partner in KPMG D. Dobkowski sp.k.

Abstract

The source of the *ne bis in idem* principle in European Union law is found in both the Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) and in the legal systems of many Member States. It is enshrined in the jurisprudence of the EU courts as a general principle of EU law. Furthermore, it has also been introduced into some international agreements concluded by the Member States, i.e. the Convention on the protection of the European Communities' financial interests and the Convention on the fight against corruption, which remain an integral part of EU legislation, as well as in the Convention implementing the Schengen Agreement, which has been progressively integrated into EU legislation.

Following the entry into force of the Treaty of Lisbon, which incorporates the Charter of Fundamental Rights of the European Union (Charter) into EU primary law, the provision on the application of the *ne bis in idem* principle is now applied in the European Union in areas broader than just the scope of the three above-mentioned Conventions. The significance of this principle may also be strengthened following the accession of the EU to the Convention, as has been set forth in the new Article 6(2) TEU.

The *ne bis in idem* principle has found its own, lasting place among the rights and guarantees of undertakings in proceedings conducted by the Commission and the national competition authorities (NCAs) of the Member States aimed at prosecuting and/or sanctioning parties for agreements non-compliant with EU competition law. However, it is still not applied in proceedings against agreements having a scope which transcends EU borders, conducted by the Commission or the NCAs of Member States on the one hand, and by the competition authorities of non-member States on the other. This approach is grounded both in the provisions of the Convention and in the provisions of the Charter.

Résumé

Le principe *ne bis in idem* trouve sa source aussi bien dans le Protocole n° 7 de la Convention européenne des droits de l'homme (Convention) que dans les systèmes juridiques des États membres. Dans le droit de l'Union européenne, il est présent dans la jurisprudence des juges communautaires en tant que règle générale du droit communautaire. Avec l'entrée en vigueur du traité de Lisbonne, qui inclut la Charte des droits fondamentaux (Charte) dans le droit primaire de l'UE, l'Union européenne s'est dotée aussi d'un texte relatif à l'application du principe *ne bis in idem* dans un champ beaucoup plus large que pour les affaires relevant des trois conventions susmentionnées. L'importance de ce principe peut aussi être corroborée par l'adhésion de l'UE à la Convention, ce que prévoit l'art. 6 nouveau, al. 2 du TUE.

Le principe *ne bis in idem* a sa place assurée parmi les droits et garanties reconnus à l'entrepreneur dans le cadre des procédures menées par la Commission et les

autorités nationales de concurrence, soit la poursuite et sanction des accords non conformes au droit communautaire de la concurrence. Cependant, il n'est pas appliqué en cas de procédures relatives à des accords dont la portée dépasse le territoire de l'UE, menées par la Commission ou une autorité nationale de concurrence d'une part et les autorités de concurrence de pays tiers d'autre part. Ceci est motivé aussi bien par les clauses de la Convention que celles de la Charte.

Classifications and key words: EU competition law; anti-competitive agreements; general principles; *ne bis in idem*.

I. Introduction

The *ne bis in idem* principle (*non bis in idem*, double jeopardy) sets forth a prohibition against being tried or punished twice for the same offence, and is applicable mainly in criminal law. It plays a major role in the system of human rights protection, which is founded in Europe on the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, the Convention)¹, signed in Rome, on 4 November 1950. It is also enshrined in Article 14(7) of the International Covenant on Civil and Political Rights². The principle is present as well in the legislation of the Member States of the European Union (EU), including Poland. In a great number of the EU Member States it has been granted the rank of a constitutional provision.

In Community law, the *ne bis in idem* principle has been recognized by the Court of Justice of the European Union (hereafter, the Court of Justice or the ECJ) as a general principle of Community law. As a statutory legal norm, it appeared in Community law in the 1990s when it was inscribed in the Convention implementing the Schengen Agreement³, the Convention on the protection of the European Communities' financial interests⁴, and the Convention on the fight against corruption⁵. Moreover, the *ne bis in idem*

¹ Journal of Laws 1993 No. 61, item 284.

² Journal of Laws 1977 No. 38, item 167.

³ Convention implementing the Schengen Agreement signed on 14 June 1985 on the gradual abolition of checks on common borders, signed on 19 June 1990, OJ [2000] L 239/1. Pursuant to the Protocol no. 2 to the Amsterdam Treaty, the Schengen *acquis* was integrated into EU legislation on 1 May 1999.

⁴ Convention on the protection of the European Communities' financial interests drawn up under Article K.3 of the Treaty on the European Union, OJ [1995] C 316/49.

⁵ Convention of 26 May 1997 drawn up on the basis of Article K.3 of the Treaty on European Union on the fight against corruption involving officials of the European Communities and officials of Member States of the European Union, OJ [1997] C 195/2.

principle found its place, among other justice-related rights, in the Charter of Fundamental Rights of the European Union (hereafter, the Charter)⁶, proclaimed in Nice, on 7 December 2000.

One may notice a growing number of cases in which the European Commission (hereafter, the Commission) and national competition authorities (hereafter, NCAs) impose financial penalties upon parties for their involvement in agreements prohibited under Article 101 of the Treaty on the Functioning of the European Union (hereafter, the TFEU). Some of these agreements cover several Member States and go beyond EU borders. The amounts of such penalties have been also on the increase. This raises the question of the possible applicability of the *ne bis in idem* principle to such cases. As a matter of fact, the principle invests undertakings with an additional protection of their rights in instances in which proceedings alleging a breach of the prohibitions contained in Article 101 or Article 102 TFEU have been initiated by more than one competition authority. This article discusses such cases, and the scope of application of the *ne bis in idem* principle for anti-competitive agreements with legal effects on EU territory.

II. The *ne bis in idem* as a general principle of EU law

Pursuant to Article 6(3) of the Treaty on European Union (hereafter, the TEU) in the wording given by the Treaty of Lisbon (signed on the 13 of December 2007 and applicable since the 1 of December 2009): ‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’. In its case-law, the ECJ has stated that, as a principle stemming from the Convention (Protocol no. 7) and from the constitutional traditions common to the Member States, ‘the principle of *non bis in idem* constitutes a fundamental principle of Community law, the observance of which is guaranteed by the judicature’⁸.

⁶ The most recent unified version of the Charter has been published in OJ [2010] C 83/389.

⁷ OJ [2007] C 306/1.

⁸ C-308/04 P *SGL Carbon v Commission*, ECR [2006] I-5977, para. 26 and the jurisprudence quoted therein.

1. The *ne bis in idem* principle in the Convention's system

The *ne bis in idem* principle is laid down in Protocol no. 7 to the Convention, which prohibits being tried or punished twice for the same offence⁹. This prohibition pertains to repeat proceedings or repeat punishment in proceedings before the court of a given State for an offence for which, in accordance with the law and penal procedure of that State, a given individual has already been convicted or acquitted by a final judgment. In order for Article 4 of Protocol no. 7 to the Convention to be applicable, a threefold requirement has to be met: identity of the facts, unity of the offender, and unity of the legal interest protected. Additionally, the proceedings and the penalty must refer to a situation existing in a given State-Party to the Convention.

In its jurisprudence, the European Court of Human Rights (hereafter, the ECtHR) has issued interpretations of the prohibition against being tried or punished twice, as laid down in Article 4 of Protocol no. 7 to the Convention. The ECtHR first recalled that the purpose of Article 4 of Protocol no. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision. It has observed that the wording of Article 4 of Protocol no. 7 does not refer to 'the same offence', but rather to being tried and punished 'again' for an offence for which the applicant has already been acquitted or convicted by a final decision¹⁰.

As far as the definition of 'criminal proceedings' is concerned, the interpretation given by the ECtHR is broad enough to allow for a wider application of the procedural guarantees enshrined in the Convention. As a result, cases examined under Article 6 of the Convention may be deemed to be criminal even if they are not considered as such under applicable national law. The accusation need only be based on a general norm of a preventive and repressive nature and of universal application¹¹. As for the definition

⁹ Journal of Laws 2003 No. 42, item 364; Article 4 of the Protocol no. 7 to the Convention:

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. (...)'.

It should be noticed that not all Member States have ratified Protocol no. 7 to the Convention.

¹⁰ ECtHR judgment of 29 August 2001 in *Fischer v Austria* case, application no. 37950/97, §§ 22–25.

¹¹ M. Bernatt, 'Gwarancje proceduralne w sprawach z zakresu ochrony konkurencji i regulacji, mających charakter karny w świetle EKPCz – glosa do wyroku SN z 14.04.2010 r.' (2011) 6 *Europejski Przegląd Sądowy* 40.

of the term ‘offence’, the jurisprudence of the ECtHR argues for a wider interpretation, close to the scope of the term of ‘criminal charge’ within the meaning of Article 6 of the Convention¹².

When assessing whether proceedings against a party for some alleged illegal conduct should be qualified as ‘criminal’ or not, the ECtHR takes into account the three so-called ‘Engel criteria’, named after the judgment in which they were formulated for the first time¹³. These criteria include: 1) the legal qualification of the offence under the internal law of a given State; 2) the nature of the act (nature of the offence), together with the repressive and deterring character of the penalty; and 3) the type and the degree of affliction (severity) of the penalty for which a given individual is *a priori* liable. Penalties of imprisonment are essentially presumed to be of a criminal nature, a presumption which may be rebutted only in exceptional cases. It may be claimed that severe financial penalties imposed by administrative authorities, especially in those cases in which failure to pay the penalty may result in imprisonment or in entry into a penal register, or the compulsory execution into liquidation or bankruptcy of the sanctioned undertaking, are essentially tantamount to a criminal nature of proceedings¹⁴.

In the *Engel* judgment, as well as in its subsequent decisions, the ECtHR attributed a greater importance to the second and third criterion, i.e. the nature of offence and the degree of severity of penalty for which a given entity may be held liable (outweighing the first condition, i.e. the formal qualification of the act under national law). In this context, the ECtHR considers as vital whether the penalty is charged under a general principle applicable to all citizens (which testifies to its criminal nature) or to a specific group with a specific status (as in disciplinary provisions), and whether it is intended, first and foremost, either to deter the repetition of a given conduct or rather to constitute a type of compensation for damage caused¹⁵.

The ECtHR has adopted this reasoning in cases pertaining to numerous administrative penalties, including penalties imposed by national competition

¹² In its judgments of 21 February 1984 in the case *Öztürk v Germany* (application no. 8544/79, §§ 50 and 52) and of 25 August 1987 in the case *Lutz v Germany* (application no. 9912/82, § 55), the ECtHR stated that in order to apply Article 6 of the Convention in connection with the ‘accusation of criminal offence’, it suffices that such offence be ‘criminal’ in nature from the point of view of the Convention or gives way to the imposition on a party of a penalty which by its nature and by the degree of its severity belongs to the ‘criminal sphere’.

¹³ ECtHR judgment of 8 June 1976, in the case *Engel and Others v the Netherlands*, application no. 5100/71, § 82.

¹⁴ ECtHR judgment of 31 May 2011, in the case *Žugić v Croatia*, application no. 3699/08, § 68. See also the Polish Supreme Court ruling of 14 April 2010, III SK 1/10.

¹⁵ ECtHR judgment of 23 November 2006 in the case *Jussila v Finland*, application no. 73053/01, §§ 29–39.

authorities¹⁶. Considering the aim of competition law (protection of the economic public order), the nature of penalty (concurrent preventive and repressive effect, with no element of indemnification) and the severity of sanction (high financial penalties), according to the ECtHR competition proceedings should be covered by guarantees laid down in Article 6 of the Convention.

For the purpose of our further reflections, it is of a fundamental importance to take into account the position of the ECtHR declaring that the infringement of the *ne bis in idem* principle cannot be avoided by offsetting from the amount of the second penalty the amount of the first penalty imposed as a result of earlier proceedings, as the principle in question prohibits not only repeated punishment but also repeated trial for the same offence¹⁷.

2. The *ne bis in idem* principle in the constitutions of the EU Member States

Pursuant to Article 6(3) TEU, the second source of normative inspiration for the EU judiciary shall be, apart from the provisions of the Convention, the common constitutional traditions of the Member States. Thus, it is worth underlining that the *ne bis in idem* principle has been inscribed in the constitutional provisions of many EU Member States. The principle may be found, among others, in Article 103 of the German basic law, in Article 29 of the Constitution of Portugal, in Article 40 of the Charter of Fundamental Rights and Freedoms of the Czech Republic, in Article 23 of Estonian Constitution, in Article 12 of Annex D to Part II of the Constitution of Cyprus, in Article 31 of the Lithuanian Constitution, in Article 39 of the Malta Constitution, in Article 31 of the Slovenian Constitution, and in Article 50 of the Slovak Constitution¹⁸.

Even though the Spanish Constitution does not itself contain a provision explicitly stating the *ne bis in idem* principle, the Constitutional Court decided in 1981 that its binding force stemmed directly from the principle of lawfulness of criminal law¹⁹. In other Member States the principle is inscribed in legislative provisions²⁰.

¹⁶ In this context, see the following ECtHR judgments: *Melchers and Co. v Germany*, case of 9 February 1990; *Société Stenuit v France*, case of 30 May 1991; and *Lilly v France*, case of 3 December 2002.

¹⁷ ECtHR judgment in *Fischer v Austria* case, application no. 37950/97, § 30.

¹⁸ Source: http://www.europarl.europa.eu/comparl/libe/elsj/charter/art50/default_en.htm#6.

¹⁹ J. De La Cuesta, 'Concurrent national and international criminal jurisdiction and the principle 'ne bis in idem'. General report' (2002) 73(3/4) *Revue internationale de droit pénal* 707.

²⁰ See, for instance, Articles 368 and 692 of the French Code of Criminal Procedure; Article 649 of the Italian Code of Criminal Procedure. In the United Kingdom, the double

In Poland, the *ne bis in idem* principle is classified as one of the principles of criminal proceedings²¹. The Supreme Court has also held that a decision on criminal liability for committing an offence under a provision of the Polish Code of Criminal Procedure makes it impossible to subsequently initiate proceedings for a minor offence, inasmuch as ‘the wording of the provisions of Article 17 § 1, point 7 of the Code of Criminal Procedure leaves no doubt that the plea of inadmissibility is expressed by the prohibition on repeating criminal proceedings (the *ne bis in idem* principle)’²².

Simultaneously, the Polish Constitutional Court has considered the *ne bis in idem* principle to be a constitutional principle stemming from the rule of law (Article 2 of the Constitution) and from the standard of a fair trial – one of the elements of the right to be heard in court [Article 45(1) of the Constitution]²³.

III. The *ne bis in idem* principle in the Charter of Fundamental Rights

The new Article 6 TEU, in the wording given by the Treaty of Lisbon, incorporates the Charter of Fundamental Rights into EU primary law²⁴. Since the entry into force of the Treaty of Lisbon, the Charter has the same legal value as the treaties. Considering that it codifies the rights ‘as they result, in particular, from the constitutional traditions and international obligations, common to Member States (...) the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice (...) and the European Court of Human Rights’²⁵, its importance will undoubtedly increase.

jeopardy principle as a principle of public law, applicable since the 11th century, was limited by the provision of the tenth part of the Criminal Justice Act of 2003 in cases where new evidence for certain types of crimes has been revealed.

²¹ Article 17 § 1 of the Polish Code of Criminal Procedure provides that:

‘No proceedings shall be initiated, and any initiated proceedings shall be discontinued when:

[...]

7) criminal proceedings related to the same act of the same person have been legally closed or those initiated have been pending (...).’ See also Article 5 § 1 point 8 of the Polish Code of Procedure for Minor Offences, and Article 114 § 3 of the Polish Criminal Code.

²² Decision of the Polish Supreme Court of 2 February 2005, IV KK 399/04.

²³ Judgment of the Polish Constitutional Court of 15 April 2008, P 26/06.

²⁴ Article 6(1), first sentence of the TEU, in the wording given by the Treaty of Lisbon: ‘The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties’.

²⁵ Indent 5 of the Preamble to the Charter.

Pursuant to Article 51(1) of the Charter its provisions ‘are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law’.

The *ne bis in idem* principle, contained in Article 50 of the Charter, covers the prohibition against trying or punishing a given individual in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law. In comparison with the provisions of Article 4 of Protocol no. 7 to the Convention, the proceedings or penalties do not have to refer to a single State-Party to the Convention; the prohibition covered by the *ne bis in idem* principle, when all relevant conditions have been met, is applicable when proceedings or penalties concern any of the EU Member States. In the ‘Explanations related to the Charter of Fundamental Rights’²⁶ (hereafter, the Explanations), which are formally considered as ‘a tool of interpretation intended to clarify the provisions of the Charter’, the comment on Article 50 of the Charter underscores that such a solution not only reflects the EU *acquis* but has also been integrated into the Convention implementing the Schengen Agreement (Articles 54-58), the Convention on the protection of the European Communities’ financial interests (Article 7), and the Convention on the fight against corruption (Article 10).

Moreover, the Explanations specify that any reference to the Convention pertains also to its Protocols (thus also to its Protocol no. 7), and that the meaning and scope of rights guaranteed under the Convention are defined in both the quoted instruments as well as in the case-law of the ECtHR and the Court of Justice of the European Union.

Additionally, pursuant to Article 52(3) of the Charter, it shall contain the rights which correspond to those guaranteed by the Convention (i.e. requirement of homogeneity with the jurisprudence of the ECtHR)²⁷, which does not prevent EU law from providing a more extensive protection. The purpose of this last sentence is to allow the EU to ensure a wider territorial protection (as explicitly stems from the wording of Article 50 of the Charter), and may also serve to extend the subjective and objective protections. What is essential is that in any circumstance, the degree of protection guaranteed under the Charter may not be lower than that ensured by the Convention.

²⁶ OJ [2007] C 303/17.

²⁷ Article 6(1) and indent three of the TEU, and Article 52(3), third sentence of the Charter. See also the Court judgment of 5 October 2010 in the case C-400/10 *PPU McB* (not yet reported), para. 53, and the opinion of the Advocate General J. Kokott in C-17/10 case, *Toshiba Corporation and Others*, para. 120.

IV. The *ne bis in idem* principle in EU competition law

1. General remarks

Similarly to the ECtHR, the Community judicature has assumed that the *ne bis in idem* principle prohibits punishing the same subject twice for the same illegal act and for the same protected legal interest, while underlying that in order for the principle to be applied the three conditions must be met: identity of the facts, unity of offender, and unity of the legal interest protected²⁸.

In Community competition law, the Court of First Instance of the European Communities, operating since the entry into force of the Treaty of Lisbon as the General Court (hereafter, the General Court) has specified that the *ne bis in idem* principle forbids the Commission to sanction or to prosecute an undertaking twice for an anti-competitive conduct for which it has already been penalised or of which it has been exonerated by a previous decision of the Commission that is no longer amenable to challenge²⁹.

The General Court has also proclaimed that the principle *ne bis in idem* does not in itself preclude the resumption of proceedings in respect of the same anti-competitive conduct where the first decision was annulled for procedural reasons, without any ruling having been given on the substance of the facts alleged, since the annulment decision cannot in such circumstances be regarded as an ‘acquittal’ within the meaning given to that expression in penal matters. In such a case, the penalties imposed by the new decision are not added to those imposed by the annulled decision, but replace them³⁰.

Neither the TEU nor the TFEU contains a provision on the nature of penalties imposed for the infringement of EU competition law. However, Article 23 of Regulation 1/2003 (i.e., provisions of secondary legislation) specifies that the decisions on financial penalties taken pursuant to the Article

²⁸ C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission*, ECR [2004] I-123, para. 338; T-322/01 *Roquette Frères v Commission*, ECR [2006] II-3137, para. 278. The need to fulfill the third condition of identity of the legal interest protected has been questioned by Advocate General J. Kokott in her opinion submitted in the case C-17/10 *Toshiba Corporation* (see chapter III.4 of this article, below).

²⁹ T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, ECR [2003] II-2597, paras. 85 and 86, and T-236/01, T-239/01, from T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others v Commission*, ECR [2004] II-1181, paras. 130 and 131.

³⁰ General Court judgment of 1 July 2009, in the case T-24/07 *ThyssenKrupp Stainless v Commission*, para. 190 and the case-law quoted therein. For arguments in favour of using the principle *ne bis in idem* in the scope of closing proceedings with a final decision, see also the arguments of Bolloré SA in the case COMP/36.212 – *Carbonless paper*, presented in the decision of the Commission of 23 June 2010, paras. 396–400.

are not of a criminal law nature³¹. Previously, a similar provision was included in Article 15(4) of Regulation 17³². Considering the wording of both articles, one may at first doubt whether the *ne bis in idem* principle will be applicable to proceedings and penalties imposed under the provisions of Regulation 1/2003. However, in light of the ECtHR jurisprudence discussed above and of the wording of the Preamble to Regulation 1/2003, which declares that: ‘(...) this Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles’, it may be assumed that fines imposed in antitrust proceedings are of a criminal law nature in the broad sense of the term (or that they are at least of a ‘semi-criminal nature’).

Based on the ECtHR case-law, following the application of the abovementioned ‘Engel criteria’, Advocate General Sharpston clearly stated that the procedure whereby a fine is imposed for a breach of the prohibition against anti-competitive agreements set forth in Article 101(1) TFEU falls under the ‘criminal head’ of Article 6 of the Convention, as progressively defined by the European Court of Human Rights³³.

According to the AG Sharpston:

- the prohibition (against ant-competitive conduct) and the possibility of imposing a fine are enshrined in primary and secondary legislation of general application;
- the offence involves engaging in conduct which is generally regarded as underhanded, to the detriment of the public at large, a feature which it shares with criminal offences in general, and which entails a clear stigma;
- a fine of up to 10% of annual turnover is undoubtedly severe, and may even put an undertaking out of business;
- the intention of the fine is explicitly to punish and deter, and contains no element of compensation for damages (Guidelines on the methods of setting fines refer to setting the fine at a level ensuring ‘a deterrent effect’³⁴, without an element of compensation for damages).

³¹ Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

³² Council Regulation no. 17 of 6 February 1962 r – the First Regulation Implementing Articles 81 and 82 of the Treaty, OJ [1962] 13/204.

³³ Opinion of Advocate General E. Sharpston of 10 February 2011, in the case C-272/09 P *KME Germany AG, KME France SAS, KME Italy SpA v Commission*, para. 64. These comments also cover fines imposed by the Commission for the breach of the prohibition against the abuse of dominant position, set forth in Article 102 TFEU.

³⁴ Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation 1/2003, OJ [2006] C 210.

A similar position was taken by Advocate General Bot³⁵. Previously, the convergence between administrative and criminal penalties and the need to apply the *ne bis in idem* principle to penalties imposed by administrative authorities when such penalties were of a severe financial nature had been discussed by Advocate General Colomer³⁶.

Until now, neither the Court of Justice nor the General Court has confirmed *expressis verbis* the opinions expressed above concerning the ‘criminal nature’ of penalties imposed for a breach of the prohibitions of Articles 101 or 102 TFEU. However, these courts regularly examine the possibility of application of the *ne bis in idem* principle to proceedings involving the breach of competition law and for penalties imposed by the Commission in such cases³⁷.

³⁵ Opinion of the Advocate General Y. Bot of 26 October 2010, in the case C-352/09 P *ThyssenKrupp Nirosta v Commission*, paras. 48-52, and the case-law quoted therein.

³⁶ ‘Although administrative penalties are not as severe as penalties in criminal law, the same general principles are applied in both systems. (...) The rigour with which the principles are applied varies, but it is clear that principles such as the presumption of innocence, the *ne bis in idem* rule, lawfulness and culpability are legislative constructs which are applicable to both criminal law and to the penalties implemented by administrative authorities’ (opinion of Advocate General D. Ruiz-Jarabo Colomer of 24 January 2008, in the joined cases C-55/07 and C-56/07 *Othmar Michaeler Subito GmbH*, para. 56). The case concerned a penalty of EUR 233,550 imposed for the failure to declare a series of part-time employment agreements to the German Labour Inspection. By way of comparison, in her opinion of 15 December 2011, in the case C-489/10 *Bonda*, Advocate General J. Kokott excluded the criminal nature of EU-based administrative proceedings resulting in the non-payment to the farmer of ‘area payments’ considering the restricted group of addressees of that type of sanction and their lack of a repressive nature. According to the AG Kokott, this precludes the act of ‘doubling’ in collusion with criminal proceedings and with the penalty imposed on Bonda for the same offence under the Polish Criminal Code.

³⁷ The joint cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission*, ECR [2002] I-8375, para. 59, and T-322/01 *Roquette Frères v Commission*, ECR [2006] II-3137, para. 278, and the case-law quoted therein. As far as the position of national courts on this subject is concerned, the Austrian Supreme Court, for instance, in its judgment of 12 September 2007, stated that fines in antitrust proceedings are penalties of ‘a criminal law nature’ in the broad meaning of the term (case 16 OK 4/07, *Europay*). The Polish Supreme Court, in its judgment of 14 April 2010 r. (III SK 1/10) admitted that under the ECtHR jurisprudence severe financial penalties imposed on entrepreneurs by administrative authorities are sanctions of a criminal nature within the meaning of the provisions of the Convention, but upheld its previous position that the financial penalties imposed by national regulatory authorities and the antitrust body are not sanctions of criminal nature. However, it stressed that in matters in which a financial penalty is imposed on an entrepreneur, the rules of judicial verification of the legality of such a decision should be similar to those applicable for a court ruling in a criminal matter as regards the standards of protection of defendant rights applicable in criminal proceedings. It is worth underlining that in some Member States (e.g. in France, the United Kingdom, the Federal Republic of Germany, in Slovenia and in Lithuania) criminal sanctions for the involvement in an anti-competitive agreement (imprisonment or high fines) may be imposed on members of the management of undertakings who commit a given breach.

2. Role of the European Commission and of NCAs in the application of the *ne bis in idem* principle

Before the entry into force of Regulation 1/2003, penalties in proceedings for the breach of Community competition law had been imposed mainly by the Commission. However, with the entry into force of Regulation 1/2003 (in effect since 1 May 2004) this option was also granted to NCAs³⁸. Under the provisions of Regulation 17, NCAs rarely prosecuted infringements of Article 81 and 82 of the EC Treaty. This was not only due to the fact that solely in the half of Member States on average, national legislation granted those authorities the rights to implement Community law, but also because the power of the Commission to grant derogation was a discouraging factor in initiating proceedings under Article 81(1) of the EC Treaty. When a given NCA initiated proceedings for the breach of Article 81(1) of the Treaty, the undertaking could decide to notify its agreement or conduct to the Commission, which, bound to examine the notification, could be forced to initiate proceedings, thus relieving the national authority of any possibility to conduct previously initiated proceedings.

Considering that Regulation 1/2003 does not exclude the possibility that proceedings concerning a given agreement could be conducted simultaneously by the Commission and the relevant NCA, the number of cases in which it will be advisable to apply the *ne bis in idem* principle will grow both on the 'vertical' level (when proceedings are run simultaneously by the Commission and a relevant NCA) and the 'horizontal' level (when two or more NCAs have initiated proceedings against the same agreement). This is also the case because 'the aim of enforcing the competition rules on the European internal market as uniformly and effectively as possible is achieved in Regulation 1/2003 not by establishing exclusive competences for individual competition authorities, but rather by having the European Commission and the national competition authorities cooperate and coordinate their activities within a network (...) and hence coordinate their mutual actions'³⁹. These actions are coordinated principally within the European Competition Network (hereafter, the ECN)⁴⁰.

³⁸ See Chapter III.3 below. See also W.Wils 'Community report', [in:] D. Cahill, J.D. Cooke (eds.), *The Modernisation of EU Competition Law Enforcement in the EU*, FIDE 2004, Cambridge, p. 679, and E. Gippini Fournier, 'Institutional report', [in:] H.F. Koeck, M.M. Karollus (eds.), *The Modernisation of European Competition Law*, FIDE 2008, Nomos, p. 375.

³⁹ Opinion of Advocate General J. Kokott in case C-17/10 *Toshiba Corporation and Others*, para. 83.

⁴⁰ For more on this subject see: J. Bazylińska, 'Współpraca w ramach Europejskiej Sieci Konkurencji' (2007) 11 *Przegląd Ustawodawstwa Gospodarczego* 2.

3. Collusion in proceedings conducted by the Commission and by national competition authorities and in penalties in EU proceedings and in national proceedings of Member States

In the state of affairs which existed before the entry into force of Regulation 1/2003 and before the adoption of the Charter, Community jurisprudence had accepted the possibility of the collusion between the Community and national authorities in setting penalties, which was a result of the fact that two proceedings were conducted concurrently by the Commission and the NCA. In order to support such position, it was stated that each of those proceedings pursued different ends and that their mutual acceptability followed from the special system of the sharing of jurisdiction with regard to anti-competitive agreements between the Community and the Member States (i.e., lack of identity of the protected legal interest). At the same time, Community courts underlined that, taking into account the non-applicability of the *ne bis in idem* principle, general principles of equity required that, in fixing the amount of a fine, the Commission would take into consideration penalties which had already been borne by the same undertaking for the same action when penalties had been imposed for infringements of the cartel law of a Member State and, consequently, had been committed on Community territory⁴¹.

The abovementioned position was criticised as being non-compliant with the Convention, and in particular with the ECtHR judgment in the *Fischer v Austria* case, in which the Court declared that a breach of the *ne bis in idem* principle could not be avoided by offsetting from the amount of a subsequent penalty the amount of the penalty awarded in earlier proceedings⁴². Community courts motivated their decisions by the fact that the Convention explicitly refers to proceedings conducted in the same State, and that the approximation of the Member States' competition laws and Community competition law was not at a level which would allow for establishment of the identity of the legal interest protected.

This situation changed with the entry into force of Regulation 1/2003, the adoption of the Charter, and the entry into force of the Treaty of Lisbon. Pursuant to Article 3(1) of Regulation 1/2003, when NCAs of Member States or national courts thereof apply national competition law to agreements, decisions by associations of undertakings, or concerted practices which may affect trade between Member States, they shall also apply Article 101

⁴¹ 14/86 *Wilhelm and Others*, ECR [1969] 1, para. 11, and 7/72 *Boehringer v Commission*, ECR [1972] 1281, para. 3, and T-141/89 *Tréfileurope v Commission*, ECR [1995] II-791, para. 191.

⁴² For more on this subject, see E. Paulis, C. Gauer, 'Le règlement n° 1/2003 et le principe du *ne bis in idem*' (2005) 1 *Concurrences – RDLC* 1.

TFEU to such agreements, decisions, or concerted practices⁴³. Thus, on the one hand, the Commission lost its monopoly on the conduct of cases under EU competition law, and, on the other hand NCAs became bound to apply simultaneously national and EU competition law if the agreement had an EU scope. In such situations, the abovementioned obligation would also cover the need to verify whether in a specific case there exist conditions for the application of the *ne bis in idem*, i.e. ‘repeated trial’ and ‘repeated punishment’, criteria. Hence, an undertaking is granted both procedural and substantive protection of its rights in proceedings initiated alleging a breach of the prohibitions set forth in Article 101 or 102 TFEU.

As far as the first of those criteria is concerned, it should be emphasized that the aim of Regulation 1/2003 was to have each case run by a single competition authority⁴⁴. In consequence, it has become necessary to coordinate actions between the Commission and the NCAs as well as between particular NCAs. The provisions of Article 11(1) of Regulation 1/2003 stipulate that the Commission and the competition authorities of the Member States shall apply Community competition rules in close cooperation. The precedence of the Commission in conducting proceedings under Articles 101 and 102 TFEU manifests itself in the fact that the initiation by the Commission of proceedings pre-empts the competition authorities of the Member States of their competence to apply the abovementioned provisions of the Treaty in a given case. The Commission may also initiate proceedings when a given NCA has already initiated a given case, but only after consulting with such NCA⁴⁵. The Commission may also reject a request to initiate proceedings upon corroborating that a Member State NCA is already acting on a given case⁴⁶. In addition, within the framework of coordinating actions between different NCAs, Regulation 1/2003 allows for the

⁴³ Similarly, in cases in which NCAs or national courts apply national competition law against practices of abuse of dominant position which may affect trade between the Member States, they are bound to apply equally Article 102 of the TFEU.

⁴⁴ See Explanatory memorandum COM (2000) 582, p. 6, and para. 18 of the Preamble to Regulation 1/2003, which stresses that in order to ensure that cases are dealt with by the most appropriate authorities within the network, a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority.

⁴⁵ Article 11(6) of Regulation 1/2003; see also paras. 51 and 53 of the Communication on the cooperation within the Network of Competition Authorities, OJ [2004] C 101/43. Pursuant to paragraph 51 of the Communication, NCAs may be relieved of their competence to apply Articles 101 and 102 of the TFEU, which means that they cannot conduct proceedings under the same legal basis. In para. 53 of the Notice, it is added that if the Commission has initiated proceedings, the NCAs can no longer start their own procedure with a view to applying Articles 101 of the TFEU and 102 of the TFEU.

⁴⁶ Article 13(1) second sentence of Regulation 1/2003.

suspension of proceedings pending before such authorities, or for the rejection of the complaint against an agreement, when the case has been already dealt with by one of the NCAs⁴⁷. Similar provisions have been adopted in the national competition laws of the Member States⁴⁸.

In the proceedings in the case C-375/09, *Tele 2*, the Polish NCA has expressly recognized the *ne bis in idem* principle within the framework of Regulation 1/2003 stating that ‘the purpose of (...) the Regulation is to prevent national competition authorities from being able to block any possibility for the Commission to establish infringements of Articles 101 TFEU or 102 TFEU by taking decisions stating that there has been no breach of those provisions, regard being had to the principle of *ne bis in idem*’⁴⁹.

As for the prohibition against repeated punishment for the conclusion and implementation of an agreement infringing upon the provisions of Article 101 TFEU, such prohibition is presumably complied with by the obligation to take into account any penalty already imposed by one of the competition authorities as well as the fact that such authority has acquitted a participant involved in such agreement. Hence, if the Commission or one of the NCAs has issued a decision imposing a financial penalty on participants involved in a given agreement, pursuant to the *ne bis in idem* principle other competition authorities (including the Commission) should refrain from imposing penalties on those participants of such agreement who have already either been fined or acquitted. This is particularly true in light of the opinion of the Advocate General J. Kokott, who stated explicitly that: ‘the prohibition under EU law against (...) punishment for the same cause of action (...) prevents more than one competition authority or court from imposing penalties for the anti-competitive consequences of one and the same cartel in relation to the same territory and the same period of time within the European Economic Area (hereafter, the EEA). On the other hand, the *ne bis in idem* principle does not in any way prohibit more than one competition authority or court from penalising restrictions of competition – by object or by effect – resulting from

⁴⁷ Article 13(1) and (2) of Regulation 1/2003.

⁴⁸ See for instance Article 87 of the Polish Act of 16 February 2007 on competition and consumer protection (Journal of Laws 2007 No. 50, item 331, as amended), which lays down that the President of the Office of Consumer and Competition Protection, pursuant to Article 11(6) of Regulation 1/2003/CE, will not initiate antitrust proceedings if the European Commission is conducting proceedings in the same case or if the case has already been settled by the Commission, and that it may not open antitrust proceedings or suspend its pending proceedings when the competent NCA of another EU Member State has already been conducting proceedings in the same case, if such has already been settled by the latter.

⁴⁹ C-375/09 *Tele 2 Polska* (not yet reported), para. 15. This position has been subsequently confirmed by Advocate General J. Mazak in para. 30 of its opinion delivered on 7 December 2010 in the same case.

one and the same cartel in different territories or during different periods of time within the EEA⁵⁰.

The way in which undertakings may practically apply the *ne bis in idem* principle to the imposition of penalties may be exemplified by the decision of the Commission issued in June 2011 on the alleged abuse by a telecommunications company, Telekomunikacja Polska (hereafter, TP) of its dominant position on the market of broadband Internet in Poland⁵¹. In the course of proceedings conducted by the Commission alleging a breach of the prohibition set forth in Article 102 TFEU, TP claimed that a number of the activities conducted, which were listed by the Commission in its statement of objections, had already been subject to sanctions imposed by national authorities and had subsequently been effectively removed. As a result, TP argued that the imposition of a separate financial penalty by the Commission for the same reasons and conduct would constitute a breach of the *ne bis in idem* principle. Despite the fact that, in the case in question, the Commission found that there existed no identity of the legal interest protected, when imposing its penalty it took into account the penalties previously imposed on TP by a legally binding decision of a national regulator for breaches which partially overlapped with the evidence described in the Commission's decision. It identified two decisions of such a nature and decided to off-set from the final amount of the fine the amount of penalties previously paid by TP, which resulted in decreasing the fine by PLN 33,000,000 (EUR 8,445,806). This example shows that it is well worth raising a breach of *ne bis in idem* principle when previous proceedings against the same alleged conduct are either pending or have been adjudicated and resulted either in the imposition of a penalty or with an acquittal by an NCA vested with the mission to protect competition on the EU market or on a part thereof.

4. Evolution in interpretation of the conditions for the application of the *ne bis in idem* principle

4.1. Identity of the legal interest protected

The EU courts have consistently asserted that in order for the *ne bis in idem* principle to be applied three conditions must be cumulatively met: identity of actual circumstances, identity of the offender, and identify of the legal interest protected⁵². The need for the third condition to be met was

⁵⁰ Opinion of Advocate General J. Kokott in the case C-17/10 *Toshiba Corporation and Others*, para. 131. AG Kokott referred to the judgment of the Court in the *Showa Denko* case, C-289/04, para. 54.

⁵¹ Decision of the Commission of 22 June 2011 in COMP/39.525 case – *Telekomunikacja Polska*.

⁵² See the case-law referred to in footnote no. 28.

questioned by AG J. Kokott in her opinion submitted in September 2011 in case C-17/10 *Toshiba Corporation*. She based her argument on the requirement of homogeneity of the EU legal order (in fact, AG Kokott pointed out that the Court does not use the condition of the identity of the legal interest protected in other types of proceedings, and even rejects such a condition⁵³), and on the requirement of the homogeneity of EU case-law with the ECtHR jurisprudence (the latter, in a 2009 judgment decided to abandon the criterion of the identity of the legal interest protected as a basis for interpretation of the *ne bis in idem* principle⁵⁴). Advocate General J. Kokott concluded that for the *idem* definition, the identity of the legally protected interest is not as essential as the identity of the factual situation, the important elements of which include a specific territory and a specific time frame for the applicability of a given anti-competitive agreement. Although the ECJ maintained recently its earlier position that all three conditions are necessary for the *ne bis in idem* principle to be applied⁵⁵ one cannot exclude that the reasoning presented by AG Kokott will be accepted by the Court in the future, especially if the ECtHR will maintain and develop its *Zolotukhin* interpretation in subsequent judgments.

Simultaneously, it should be kept in mind that the growing approximation of competition laws at the national and European levels has had the effect of bringing about the extension, via the provisions of the Charter, of the territorial scope of the *ne bis in idem* principle to proceedings conducted in any EU Member State, by granting NCAs the right – and the obligation – to apply Article 101 TFEU in situations in which they apply national competition law against agreements which may affect the trade between Member States. This natural extension is further strengthened by the mechanism, introduced by Regulation 1/2003, providing for cooperation both between the Commission and the NCAs as well as between particular NCAs. Taking all this into consideration, it may be assumed that the condition of identity of the legal interest protected will be, in general, met in the case of anti-competitive agreements which cover the entire EU territory or its major part. This will, as a rule, result in the obligatory application of the *ne bis in idem* principle to proceedings previously initiated and closed by NCAs.

⁵³ Opinion of Advocate General J. Kokott in the case C-17/10 *Toshiba Corporation and Others*, paras. 116–118 and the case-law quoted therein. When defining the criterion of the identity of event for the purpose of interpretation of Article 54 of the Convention implementing the Schengen Agreement, the Court decided that it should be understood as the existence of a whole, composed of inseparably interrelated conduct and activities, irrespective of the legal qualification of such conduct or activities or of the protected legal interest.

⁵⁴ ECtHR judgment of 10 February 2009 in the case *Zolotukhin v Russia*, application no. 14939/03, §82.

⁵⁵ C-17/10 *Toshiba Corporation and Others* (not yet reported), para. 97.

Ch. Lemaire, venturing into an assessment of the early years of the application of Regulation 1/2003, stresses that ‘beyond substantive rules, where convergence stems largely from the obligation to apply EU law and from the convergence rule, it is certainly in the area of procedural rules and penalties that developments have been most important and interesting. Such developments were not foreseen during the negotiations relating to Regulation 1/2003, since the Member States rejected the introduction of questions such as leniency or other procedural rules. The principle of institutional and procedural autonomy was intended to play a full role. And yet, apparently, a veritable convergence is taking place⁵⁶.

Finally, one should not undermine the change which has taken place in the very perception of the EU market, which, since the entry into force of the Treaty of Lisbon, is treated as an “internal market.”

4.2. Identity of events and identity of offenders

Discussion of the slippery topic of the identity of the protected legal interest as a prerequisite to the application of the *ne bis in idem* principle in EU competition law cases should not result, however, in leaving aside the two other conditions, i.e. the identity of the events underlying the relevant breach and the identity of the offender.

As regards the former, the events which give rise to proceedings conducted by various competition authorities are, in many cases, identical, as a given agreement usually pertains to a major portion of the EU territory (and often third countries as well).

As regards the identity of the offender, valuable guidelines may be found in the judgment of the General Court in the joined cases T-217/03 and T-245/03, *FNCBV v Commission*⁵⁷. This judgment arose from an anti-competitive agreement concluded in October 2001 between six French federations, some of which represented stock breeders and others slaughterhouses. In the course of the proceedings before the Court, the claimants raised the argument that by virtue of the Commission’s decision the same entities were being punished several times for the same breach, on the basis of the membership of three federations in a fourth one with a larger scope of activity.

In justifying its decision the Commission used the argument of lack of identity of the parties, arguing that separate proceedings had been properly exercised against each of the federations for their separate involvement in the breach, and that the circumstance of some of them being simultaneously

⁵⁶ Ch. Lemaire, ‘Premier bilan de l’application du règlement n° 1/2003’ (2009) 251 *Petites affiches* 38.

⁵⁷ T-217/03 and T-245/03 *FNCBV v Commission*, ECR [2006] II-4987.

members of other federations did not affect the circumstances of the involvement of each of the complainants in the said agreement.

In upholding the position of the Commission on the lack of identity of the offenders, the Court stressed that each of the federations had a separate legal personality, a separate budget, and separate statutory aims, and that each of them led their own collective actions to defend their own specific interests. In consequence, by adopting the decision in question the Commission did not impose repeated penalties on the same entities or on the same persons for the same conduct, and thus did not violate the *ne bis in idem* principle.

This judgment shows that for the condition of identity of offenders to be met, it is necessary that the underlying events pertained directly to the involvement of the same offenders in an agreement which gave rise to a specific breach. In proceedings related to anti-competitive agreements, offenders are usually entrepreneurs with a legal personality separate from their partners, or unions of such entrepreneurs.

4.3. Further evolution in interpretation of the conditions of application of the *ne bis in idem* principle

Taking into consideration the increasing role of the Charter, it is very probable that the *ne bis in idem* principle will be raised and applied more and more often in proceedings alleging breaches of Articles 101 and 102 TFEU. This may occur also due to temporal applicability of the *ne bis in idem* principle in the context of EU law as confirmed recently by the ECJ in *Toshiba* case. According to the Court the applicability of the principle depends not on the date on which the facts being prosecuted were committed, but on that on which the proceeding for the imposition of a penalty was opened⁵⁸.

Thus the efforts of the Commission and of specific NCAs should be focused on a more in-depth coordination of their actions, which will have the effect of a) reducing the risk of ‘forum shopping’, i.e. situations whereby proceedings are steered toward or taken over by a particular NCA with a view toward rendering a more advantageous decision to the participants of an agreement or imposing a lower financial penalty; and b) lowering the likelihood that sanctioned undertakings will appeal from the decisions of the Commission or NCAs on the basis of allegations of breach of the *ne bis in idem* principle.

⁵⁸ C-17/10 *Toshiba Corporation and Others* (not yet reported), para. 95.

5. Collusion in proceedings of the Commission and of national competition authorities of non-member States and in penalties in EU proceedings and in proceedings in a non-member State

In the case of cartels acting at the ‘global level’, it may happen that proceedings against them are conducted concurrently by, for example, American, Canadian or Australian competition authorities and by the Commission. In practice, the Commission may then issue a decision on the breach of Article 101 TFEU and impose financial penalties on the participants of such agreement even though they have already been sanctioned by one of those authorities. Actions undertaken by participants involved in agreements of such nature are not usually confined to one specific territory. On the contrary, they spread over the area of supervision of multiple competition authorities. In such a case, there frequently exists an identity of subjects committing a given breach and an identity of events which give rise to the proceedings conducted by various competition authorities.

Due to these dual identities (of events and entities) involved in an anti-competitive agreement, as well as a certain ‘duplication’ of high financial penalties imposed by subsequent competition authorities, the participants involved in such agreements have begun to claim that the *ne bis in idem* principle should also be applicable for proceedings conducted concurrently or over a short time frame by the Commission and by a competition authority of a third State. In the opinion of undertakings, some intervention is needed, particularly in respect of the amount of penalties imposed on the participants to an agreement, so that the penalties imposed in a third State under its competition law would be taken into consideration by the Commission in setting the amount of its fine. This would constitute a first step towards the future application of the *ne bis in idem* principle to ‘non-EU’ cases.

However, first the Commission, and then the EU courts have so far rejected such claims, stating that the exercise of rights by the competition authorities of third States, is, as far as territorial competence is concerned, subject to the requirements specific to such States.⁵⁹ According to the EU courts, elements which are part of the foundations of the legal system of other countries cover not only specific aims and assumptions, but are also intended to implement specific substantive provisions and, when the authorities of such countries have proven the existence of breaches of competition-related rules, to trigger appropriate legal effects in their administrative, criminal and civil law. When the Commission imposes a fine for the illegal conduct of an undertaking, even

⁵⁹ C-289/04 P *Showa Denko v Commission*, ECR [2006] I-5859, paras. 50–63, and C-308/04 P *SGL Carbon v Commission*, ECR [2006] I-5977, paras. 26–39.

if the source of such conduct is an international cartel, it intends to protect free competition on the EU internal market. In fact, considering the specific nature of the legal interest protected at the EU level, the assessments made by the Commission within the scope of its powers in this area may significantly diverge from those made by the authorities of third States (i.e. resulting from the lack of identity of the legal interest protected).

In response to a claim concerning the possibility of application of Article 50 of the Charter, the General Court stressed that the Charter is clearly intended to apply only within the territory of the Union and that the scope of the right laid down in Article 50 is expressly limited to cases where the first acquittal or conviction was handed down in this territory⁶⁰. This position has recently been strengthened by the argument of AG Kokott, who stressed that: ‘the EU-law principle of *ne bis in idem* certainly does not preclude an international cartel from being prosecuted, on the one hand, by authorities within the EEA and, on the other hand, by the authorities of non-member States in their respective territories. This is also indicated by the wording of Article 50 of the Charter of Fundamental Rights, which refers to persons who have already been finally acquitted or convicted ‘within the Union’⁶¹.

In considering applicable principles of international law, the EU courts have also emphasised that ‘there is no principle of public international law that prevents the public authorities, including the courts, of different States from trying and convicting the same natural or legal person on the basis of the same facts as those for which that person has already been tried in another State. In addition, there is no public international law convention under which the Commission could be obliged, upon setting a fine (...), to take account of fines imposed by the authorities of non-member States pursuant to their competition law powers’⁶².

By way of an additional comment, it is worth pointing out that there have been no cases in which the competition authorities of third States took into consideration penalties imposed by the Commission (which could contribute to a possible application of the *ne bis in idem* principle based on claims of reciprocity).

In conclusion, in accordance with the present case-law the *ne bis in idem* principle will not be applicable in cases in which the legal systems of non-member States are involved, and the competition authorities of such countries

⁶⁰ T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd and Others v Commission*, ECR [2004] II-1181, para. 137.

⁶¹ Opinion in the case C-17/10 *Toshiba Corporation and Others*, para. 132. AG Kokott referred to the judgment of the Court in the case C-397/03 P *Archer Daniels Midland*, ECR [2006] I-4429, paras. 68 and 69.

⁶² C-289/04 P *Showa Denko v Commission*, ECR [2006] I-5859, para. 58.

act upon and within their own powers. Neither the Commission nor Member State NCAs are bound to take into consideration penalties paid as a result of proceedings conducted in third States. Having said that, it should be noted that if, at the end of proceedings, when setting the amount of financial penalties, they wish to consider any penalty previously imposed by the competition authority of a non-member State, they have the right to do so.⁶³ In particular this is relevant to the Agreement on the European Economic Area,⁶⁴ which is binding for the EU and for all the Member States, and especially with regard to Part IV thereof on competition, as well as the close cooperation in the competition law area between the Commission and the EFTA Supervisory Agency⁶⁵ and with competition authorities of the States which are members of the EEA but not members of the EU. In a situation in which the Commission has not conducted proceedings under Article 56 of the EEA Agreement for the whole EEA, it should take into consideration any penalties previously paid as a result of antitrust proceedings conducted in those countries by the EFTA Supervisory Agency or by national competition authorities of the EEA countries.

V. Conclusions

The source of the *ne bis in idem* principle is found in both the Convention's system and in the legal systems of many Member States. It is considered a part of European Union legislation and is enshrined in the jurisprudence of the EU courts as a general principle of EU law. Furthermore, it has been introduced to some international agreements concluded by the Member States which (as the Convention on the protection of the European Communities' financial interests and the Convention on the fight against corruption) remain an integral part of EU legislation or (as regards the Convention implementing the Schengen Agreement) have been progressively integrated into EU legislation.

Following the entry into force of the Treaty of Lisbon, which incorporates the Charter of Fundamental Rights into EU primary law, the application of the *ne bis in idem* under EU law has been extended to areas broader than the scope of the three above-mentioned conventions. The significance of this

⁶³ See T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, ECR [2003] II-2597, paras. 101 and 103.

⁶⁴ OJ [1994] L 1, p. 1.

⁶⁵ See Protocol no. 23 to the EEA Agreement, OJ [2005] L 64/62 and OJ [2008] L 100/99.

principle may also be strengthened following the projected accession of the EU to the Convention, as has been set forth in the new Article 6(2) TEU⁶⁶.

Article 4 of the Protocol no. 7 to the Convention contains the prohibition against trying or punishing an entity twice in judicial proceedings in the same State, while Article 52(3) of the Charter opens the way for granting even broader protections than those guaranteed under the Convention. This is precisely the case as regards Article 50 of the Charter, which extends the scope of application of the *ne bis in idem* principle to proceedings conducted in different Member States of the EU (territorial extension of the protection). Moreover, such extension of the protection may relate to acts which are covered under the term 'offence'. This is vital in the case of proceedings and penalties imposed under competition law, which usually proceeds under the heading of administrative law. One may predict that the criminal aspect of the conduct and proceedings and the nature of the imposed penalty will be examined in an increasingly liberal manner, and that in the future it will also cover penalties imposed in administrative proceedings without the need to corroborate, on a case-by-case basis, that such proceedings and/or penalties are similar in nature to criminal proceedings/penalties.

Simultaneously, the assertion contained in Article 23 of Regulation 1/2003 that the fines imposed under paragraphs 1 and 2 of that Article are not sanctions of a criminal nature may soon lose its *raison d'être*. First, the EU has already been granted explicit competences in some areas of criminal law harmonisation, specified in Article 83 TFEU. Moreover, the ECJ tends to more and more often opt for granting the European Union the possibility to establish criminal sanctions if they are necessary to implement legal obligations binding on the EU (e.g. penalties for environmental pollution). Further developments in EU competition law may lead, in future, to similar conclusions, especially since some Member State are already applying criminal sanctions for breaches of antitrust provisions⁶⁷.

The *ne bis in idem* principle has found its own, permanent place among rights and guarantees of undertakings in proceedings conducted by the Commission and the Member State NCAs to prosecute and impose sanctions on agreements deemed non-compliant with EU competition law. However, it is still not applied in proceedings against agreements of a scope which transcends EU borders, conducted by the Commission or Member State NCAs on the one hand, and by the competition authorities of non-member States on the other. Such approach is grounded in the provisions of the Convention,

⁶⁶ Article 6(2) of the TEU, in the wording given by the Treaty of Lisbon: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties'.

⁶⁷ See the information in footnote no. 37 *in fine*.

which does not oblige its State Parties to extend the application of the *ne bis in idem* principle to third States, and in the provisions of the Charter as well. Until now, both the Commission and the EU courts, when setting and reviewing 'EU' penalties, have rejected any notion that they are obligated to take account of penalties imposed by competition authorities of non-member States. It is worth indicating however that, considering the grant of full protection on EU territory stemming from the prohibitions ingrained in the *ne bis in idem* principles, a decisive refusal on the part of the Commission to consider penalties imposed by outside bodies on the same entities for the same offences is not as manifest as it may seem to be, and warrants further discussion and debate.

Literature

- Bazylińska J., 'Współpraca w ramach Europejskiej Sieci Konkurencji' ['Cooperation in the Framework of the European Competition Network'] (2007) 11 *Przegląd Ustawodawstwa Gospodarczego*.
- Bernatt M., 'Gwarancje proceduralne w sprawach z zakresu ochrony konkurencji i regulacji, mających charakter karny w świetle EKPCz – glosa do wyroku SN z 14.04.2010 r.' ['Procedural guarantees in cases in the field of competition protection of penal nature in the light of ECtHR – gloss to the judgment of the Supreme Court of 14.04.2010'] (2011) 6 *Europejski Przegląd Sądowy*.
- De La Cuesta J., 'Concurrent national and international criminal jurisdiction and the principle 'ne bis in idem. General report' (2002) 73(3/4) *Revue internationale de droit pénal*.
- Gippini Fournier E., 'Institutional report', [in:] Koeck H.F., Karollus M.M. (eds.), *The Modernisation of European Competition Law*, FIDE 2008, Nomos.
- Lemaire Ch., 'Premier bilan de l'application du règlement n° 1/2003' (2009) 251 *Petites affiches*.
- Paulis E., Gauer C., 'Le règlement no 1/2003 et le principe du ne bis in idem' (2005) 1 *Concurrences – RDLC*.
- Wils W. 'Community report', [in:] Cahill D., Cooke J.D. (eds.), *The Modernisation of EU Competition Law Enforcement in the EU*, FIDE 2004, Cambridge.

Exchange of Information and Evidence between Competition Authorities and Entrepreneurs' Rights

by

Mateusz Błachucki* and Sonia Józwiak**

CONTENTS

- I. Introduction
- II. Exchange of information and evidence in merger cases
 - 1. Information exchange in international soft law documents
 - 1.1. ICN (International Competition Network)
 - 1.2. ECA (European Competition Authorities)
 - 1.3. EU (European Union)
 - 2. Waivers
 - 3. Exchange of information in merger cases under Polish law
- III. Exchange of information and evidence in antitrust cases
 - 1. Information exchange in international soft law documents
 - 2. Exchange of information within the European Competition Network
 - 2.1. Legal basis, practical methods and types of information exchanged
 - 2.2. Potential problems with respect to the requirements of due process
- IV. Conclusions

Abstract

This article concentrates on the exchange of information and evidence between competition authorities. The issue is analyzed from the perspective of both antitrust and merger cases. The level, scope and intensity of cooperation between competition authorities differs in respect to these two kinds of cases and, to an extent, the

* Dr. Mateusz Błachucki, Institute of Legal Studies, Polish Academy of Sciences; mateusz.blachucki@inp.pan.pl

** Sonia Józwiak, PhD candidate, Silesian University, LL.M.; sonia_jozwiak@o2.pl

applicable legal framework varies as well. Our analysis is based on EU law, national legislation, and relevant case law, with attention also given to other sources of law such as bilateral and multilateral agreements, best practices, recommendations etc. In addition the problem of exchange of information is examined through the prism of the Polish Competition Act. Regulation 1/2003 and the ECN, created upon its provisions, provide detailed rules applicable for the exchange of evidence and information between competition authorities in antitrust cases at the European level. With respect to mergers, the provisions of Regulation 139/2004 do not have the same high degree of influence, hence considerable attention is given to soft law acts, such as recommendations of OECD and ICN, or best practices and informal agreements adopted by national competition authorities.

Résumé

L'intégration progressive des économies nationales et la mise en place de corporations internationales font que l'activité de tels acteurs peut regarder un nombre important de pays. En particulier, l'activité des corporations transnationales est susceptible d'impacter l'état de la concurrence sur de nombreux marchés nationaux. Cette situation apparaît tant en cas de pratiques anticoncurrentielles que de concentrations d'entreprises. En réponse à ce phénomène, les autorités nationales de concurrence élargissent progressivement leur coopération et des autorités supranationales compétentes pour la concurrence sont mises en place. L'article et l'exposé visent à faire le point sur les fondements juridiques de l'échange d'informations et d'éléments de preuve entre les autorités de concurrence dans les affaires de concurrence. L'analyse portera essentiellement sur les textes de droit communautaires et polonais. Ont été présentées, dans la mesure du nécessaire, d'autres sources du droit qui s'appliquent : accords internationaux, accords entre les autorités, bonnes pratiques et recommandations. L'échange d'informations et d'éléments de preuve peut éveiller des craintes relatives à l'étendue de la protection juridique suffisante des entreprises concernées par les données transférées. Des doutes spécifiques portent sur l'échange d'éléments de preuve dans les affaires relatives aux pratiques restreignant la concurrence. Malgré le cadre législatif et institutionnel existant pour cet échange, des questions se posent de savoir si les entreprises sont conscientes de l'échange, quelle est l'étendue de la protection des secrets commerciaux et de la confidentialité de la correspondance client – mandataire professionnel, dans quel but les informations sont transférées et quelles sont les restrictions de traitement de l'information. Quant aux contrôles des concentrations, l'échange d'informations et d'éléments de preuve concerne d'abord l'information publiquement accessible. De plus, c'est à un degré beaucoup plus sensible qu'il repose sur une coopération volontaire entre les entreprises engagées dans la transaction. En revanche, le transfert d'informations et d'éléments de preuve fournis par des tiers est toujours susceptible de controverses.

Classifications and key words: exchange of information; exchange of evidence; international cooperation; ECN; ICN; ECA; NCAs; waivers; due process; Regulation 1/2003.

I. Introduction

The increasing integration of national economies has brought about the emergence of ever more transnational undertakings (multinationals), the operations of which by definition have effects in many different countries. The activities of such multinationals particularly influence the level of competition on the various national markets. Both (i) anticompetitive practices and (ii) mergers and acquisitions are of relevance in this respect. The competition authorities of various jurisdictions are aware that an adequate reaction to this new situation requires a joint effort and ever tightened cooperation between them. Accordingly, more and more competition authorities are gradually enlarging their scope of cooperation and creating new international bodies, organizations, and networks dealing with competition law issues on the supranational level.

The basic prerequisite for any international cooperation in competition cases is the exchange of information and evidence between the national competition authorities. This lies at the centre of any efficient cooperation, and the level of its implementation may impede or enhance the activities of such authorities. However, even though the exchange of information and evidence between national competition authorities (NCAs) is crucial for international collaboration in competition cases, it also raises questions about the preservation of adequate protections of the procedural rights of the undertakings involved as parties. It should be noted that there are some differences between problems arising from the exchange of information in antitrust cases and in merger cases. This is the result of the particularities of methods of collection of evidence in these two types of competition cases. In antitrust cases, broad investigative methods are a primary source of evidence, whereas in merger cases information and evidence is produced by parties themselves, either voluntarily or upon formal request.¹ Therefore in antitrust cases several specific problems occur during the process of collecting evidence and these controversies determine, to a large extent, the scope and admissibility of evidence exchanges. In spite of the different legal and institutional frameworks at the European and national levels, issues such as undertakings' awareness of the exchanges taking place, protection of confidential information, legal professional privilege, and the means, goals and the limits of the exchange are at the heart of the debate throughout Europe, and Poland as well. In the case of merger control, the exchange of evidence and information mostly concerns data which is available to the public. In addition, more and more frequently the exchange is based on the voluntary involvement of the

¹ It should be stressed that, from the formal legal point of view, in merger cases a competition authority may also use the same police-like investigative methods of evidence collection. In practice however, competition authorities hardly ever employ such methods during merger investigations.

undertakings concerned. Nonetheless, controversies and doubts are still raised regarding the exchange of information and evidence provided by third parties.

This article aims to provide answers about the extent of these doubts and controversies and clarify the issues involved. Moreover, it seeks to determine what appropriate measures are available in order to assure a level playing field, balancing the effective enforcement of competition law by different competition authorities on the one hand, and preservation of procedural safeguards for undertakings on the other.

There is no Polish administrative nor judicial case law directly concerning the subject of the exchange of information in merger and antitrust cases. Furthermore, Polish literature on the analyzed subject is very limited. This is an additional motive to present this interesting and still evolving issue. For this reason the analysis is based on EU and national legislation and relevant case law. Attention is given to other sources of law, such as bilateral and multilateral agreements, best practices, recommendations etc. The issue is tackled from the perspective of both antitrust and merger cases. Because the level, scope and intensity of cooperation differs in respect to these two kinds of enforcement practices, the applicable legal framework also varies to significant extent. In antitrust cases, Regulation 1/2003² and the European Competition Network (ECN) created on its provisions, as well as other EU instruments, provide detailed rules applicable to the exchange of evidence and information between competition authorities at the European level. With respect to mergers, the provisions of Regulation 139/2004³ are not of such a comparably high degree of influence. Therefore, as regards mergers attention is given to international soft law acts, such as the recommendations of the OECD and ICN, or best practices and informal agreements adopted by NCAs. This article is thus divided into two main sections, devoted to information exchanges in merger and antitrust cases respectively.

II. Exchange of information and evidence in merger cases

The significant growth of multi-jurisdictional mergers and national mergers with supranational effects confronts competition authorities with the problem of exchange of evidence and information in such cases. Depending on national barriers the actual scope of cooperation may differ in particular cases. Yet it

² Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

³ Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ [2004] L 24/1.

is undeniable that such cooperation is necessary. Econometric analysis shows that in multi-jurisdictional mergers firms may secretly manipulate the accuracy of the data provided, relying on national differences in leniency towards the merger. In such situations extensive interagency cooperation in the decision making process modifies the firm's payoff structure, which induces it to provide more accurate and comprehensive data to each agency concerned⁴.

Three general issues will be discussed in this context. First, international agreements related to merger cooperation, both formal and informal, will be closely examined. This will provide a good basis for understanding how the international competition community perceives the problem, and what are commonly accepted solutions, recommendations, and best practices in this area. Second, the concept of waivers will be presented. Waivers are crucial for cooperation in merger cases since they serve as a basic and very flexible instrument of supranational cooperation in competition cases. Third, the issue will be scrutinized from the point of view of Polish antimonopoly and administrative law. This analysis will shed light on the extent to which the Polish legislator recognizes the trend toward growing cooperation in competition cases, and the legal grounds for such cooperation.

Those issues will be discussed through the prism of entrepreneurs' rights that might be affected by the information sharing between NCA's in merger cases. First, the exchange of information may have an adverse effect on the party right to protect its business secrets. This right is regulated in the Article 69-73 of the Polish Competition Act⁵. Second, this type of cooperation between NCA's may have an impact on the right of active participation of the party in the administrative proceedings. This right is foreseen in the Article 10 § 1 of Administrative Procedure Code⁶.

1. Information exchange in international soft law documents

There are various means of cooperation in merger cases. During the last decade one may observe that cooperation in merger control cases is flourishing. There are many initiatives and bodies devoted to competition and merger control matters, such as the Organization for Economic Cooperation

⁴ M.T. Martinez, 'Information-Sharing Between Competition Authorities: The Case of Competition Authorities: The Case of a Multinational Merger', available at www.cepr.org/meets/wkcn/.../Troya-Martinez.pdf, p. 23 and 24.

⁵ Act of 16 February 2007 on Competition and Consumer Protection, Journal of Laws 2007 No. 50, item 337 (hereafter, Competition Act).

⁶ Act of 14 June 1960 – Administrative Procedural Code, Journal of Laws of 2000, No. 98.1071, with further amendments.

and Development (OECD), International Competition Network (ICN), European Competition Authorities (ECA), Merger Working Group (MWG (EU)). While each of them has its own character and they differ in methods of cooperation, they all produce soft law documents. These documents serve as expressions of commonly accepted rules and provide an informal framework of cooperation in merger cases. Despite the non-binding character of the rules, they significantly influence the administrative practice of NCAs. Thus it is important to identify these rules and briefly analyze them.

1.1. ICN (International Competition Network)

The International Competition Network is a virtual network of cooperation between competition authorities. The ICN from the very beginning has been involved in encouraging and increasing international cooperation in merger cases. In one of the most important documents adopted by ICN in the merger control area, its Guiding Principles For Merger Notification and Review (hereafter, Guiding Principles)⁷, it is clearly stated in point 6 that ‘jurisdictions reviewing the same transaction should engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs’. However, such coordination must not infringe upon the protection of confidential information, thus ‘the merger review process should provide for the protection of confidential information’ (point 8). Guiding Principles expresses the most general rules that should influence the merger review system in each country. It is worth noting that this document highlights two of the most important factors central to the issue of information exchange. ICN’s Guiding Principles stresses the necessity of cooperation. However, such cooperation must not adversely affect companies’ rights, especially the right to protect business secrets.

Guiding Principles are followed by more specific and detailed rules – Recommended practices for merger notification procedures (hereafter, Recommended practices)⁸. It is interesting to observe that the consideration of confidentiality protection issues precedes the issue of interagency cooperation and information exchange. In our view, this sequence mirrors the axiology of international cooperation in merger cases. Recommended practices underlines the importance of confidentiality protection: ‘Business secrets and other confidential information received from merging parties and third parties in connection with the merger review process should be subject

⁷ Available at http://www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/icnnpworkinggroupguiding.pdf.

⁸ Available at <http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf>.

to appropriate confidentiality protections' (point IX.A). Such protection is necessary to an effective method for collecting evidence and information during an investigation. In the absence of such a guarantee the prospect of potential disclosure may discourage parties from submitting all relevant information to, and fully cooperating with, the reviewing agency. However, confidentiality protection is not an absolute rule. The ICN clearly states that several exceptions may apply: 'Information may also be disclosed outside the competition agency for purposes of its merger review:

1. where authorized pursuant to international treaties, agreements, or protocols where reciprocal confidentiality protections are specified;
2. in response to requests for judicial assistance by other competition agencies pursuant to national legislation that authorizes such disclosure, provided that confidential treatment by the requesting agency is ensured;
3. with the submitting party's consent – for example, disclosure to other competition agencies pursuant to a waiver'.

In practice, exception number 3 plays the most important role. This results primarily from the fact that there are hardly any international agreements providing a legal basis for information exchange in merger cases. Furthermore, national legislators are also quite reluctant to create legal mechanisms for such cooperation.

ICN's Recommended practices encourages competition agencies 'to coordinate their review of mergers that may raise competitive issues of common concern' (point X.A). Such cooperation is especially important when a multinational merger may have adverse competitive effects. Interagency cooperation in merger cases may not violate applicable national laws and other legal instruments and doctrines (point X.B). For this reason it is always preferable to conclude in advance agreements between agencies, providing rules for their cooperation. It is very important for the efficiency of the merger procedure that the entrepreneurs themselves are actively engaged in the process. Therefore 'competition agencies should encourage and facilitate the merging parties' cooperation in the merger coordination process' (point X.D). In order to facilitate interagency cooperation in merger cases, merging parties may issue waivers. The ICN has produced a special document on this issue – Waivers of confidentiality in merger investigations⁹.

ICN documents underline the necessity of interagency cooperation in merger cases. However, due to their general nature and the fact that they are addressed to all ICN members (more than 100 jurisdictions), their practical applicability for information sharing on a wide-spread basis is limited¹⁰.

⁹ Available at <http://www.internationalcompetitionnetwork.org/media/archive0611/NPWaiversFinal.pdf>. The issue of waivers is examined in some detail further in the article.

¹⁰ With the exception of the ICN document on waivers.

1.2. ECA (European Competition Authorities)

European Competition Authorities is a virtual platform of cooperation and discussion between competition authorities from the European Economic Area (EEA)¹¹. ECA is involved in merger control cooperation. In the area of merger control, it has adopted two important documents:

1. Principles on the application, by National Competition Authorities within the ECA, of Articles 4(5) and 22 of the EC Merger Regulation¹².
2. The exchange of information between members on multi-jurisdictional mergers. Procedures guide¹³.

The second document plays a crucial role in administrative cooperation in particular, serving as a basis for exchanging information about notified multi-jurisdictional mergers. This was the first document that expressed commonly accepted rules on exchange of information in merger cases. And what is more important, the framework established by the ECA's Procedure guide has been functioning quite well.

According to Procedure guide, 'when an ECA authority is informed by the notifying parties to a merger that they have also notified or will be notifying the merger to other authorities within the ECA, the relevant official (the case officer or contact person) within that authority will, as soon as possible, send by e-mail an ECA Notice to the relevant officials in the other ECA authorities informing them of the fact of notification, and seeking the names of the relevant officials in those other ECA authorities. Recipients of the parties' notification will confirm its receipt to the relevant ECA officials'. The basic mechanism foreseen by the Guide is the ECA notice. Such notice consists of basic, publicly available information about the notified merger. Below is an example of an ECA notice sent out by the Polish competition authority.

The ECA notice identifies relevant officials in all concerned jurisdictions, which constitutes the first step in establishing efficient interagency cooperation in a given case. It enables them to keep each other informed, as appropriate, of the developments in the case. The ECA Procedure guide does not create any legal basis for exchange of anything other than publicly available information. Therefore, it may not serve as means to share confidential information. However, this does not preclude the relevant officials from exchanging views on the given merger and informing each other on important issues arising from the transaction and merger investigation.

¹¹ The 15 Member States of the European Union, the European Commission, and of the EEA EFTA States and the EFTA Surveillance Authority.

¹² Available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/ECA_Principles.pdf.

¹³ Available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/ECA/ECA_procedures_guide_post_Athens.pdf.

Notified transaction	PSE Operator S.A/Lietuvos Energija AB/LitPol Link Sp. z o.o.
Ultimate parent or group companies of undertakings concerned	N/A
Relevant economic sector(s) (and, where possible, relevant product market(s))	Energy distribution
Relevant geographic area(s) (and, where possible, relevant geographic market(s))	National markets of Poland and Lithuania
Date of notification	03 June 2008
Provisional deadline	03 October 2008
Relevant official(s): E-mail: Telephone:	
Other Member States concerned	Lithuania

The ECA Procedure guide establishes a very flexible, easy-to-implement and not burdensome mechanism for exchanging information about multi-jurisdictional mergers. Information which is exchanged through the ECA notice system, being very basic, does not contain business secrets. These features are critical for its success. Furthermore, the Guide is open to any necessary changes. It clearly states that ‘this note may be developed further and expanded from time to time as the authorities’ experience of these arrangements develops’. Such a development did occur, resulting in creation of a Merger Working Group (MWG).

1.3. EU (European Union)

Cooperation between EU countries in merger cases is based on the legal framework established by the Regulation 139/2004. Although Regulation 139/2004 is a comprehensive and important act, it applies in principle to mergers with a community dimension or mergers that are to be referred to or from the Commission, hence, multi-jurisdictional mergers with a national dimension are in principle outside the application of this Regulation. Therefore, it is the Merger Working Group (MWG) which plays a pivotal role in enhancing interagency cooperation and exchange of information between NCAs. Even though MWG is a newly-established forum, it has already gained in importance as a platform for adopting best practices and enhancing day-to-day administrative cooperation between NCAs. It is also the first body on the EU level devoted solely to mergers¹⁴. In order to facilitate cooperation and

¹⁴ The role of the ECN is often misunderstood, mistakenly treating it as a universal forum of cooperation in all competition cases at the EU level. In fact the ECN was established by Regulation 1/2003 and serves only for antitrust matters.

increase transparency of the process, members of the MWG have adopted the Best practices on cooperation between EU national competition authorities in merger review (hereafter, Best practices)¹⁵. Although Best practices is a non-binding document, members of the MWG have agreed to follow the practices described in their administrative procedures and practice.

According to MWG Best practices, closer cooperation and information exchange may be necessary when:

1. Parallel investigations raise jurisdictional issues.
2. Merger has an impact on competition in more than one Member State.
3. Remedies are necessary in more than one Member State.

In these cases it is important for each NCA concerned to send an ECA notice. This is the first important step in establishing interagency cooperation in the particular case and it involves the exchange of basic non-confidential case information after a notification in such a multi-jurisdictional merger case has been received. The next step depends on the initial evaluation of the case and the first results of the investigation. When it is necessary 'to facilitate cooperation, the NCAs concerned will aim to update the information contained in the ECA notice by informing the other NCAs about any decision to commence second phase proceedings/in-depth investigations, and any final decision, including a decision with remedies'. During this stage of cooperation, exchanges of information may be required.

Best practices pays special attention to the exchange of confidential information. It observes that 'it will often be helpful for the NCAs concerned to be able to exchange and discuss confidential information when reviewing the same merger. Therefore, while a certain degree of cooperation is feasible through the exchange of non-confidential information, waivers of confidentiality executed by merging parties can enable more effective communication between the NCAs concerned regarding evidence that is relevant to the investigation'. This means that Best practices foresees waivers of confidentiality as a basic prerequisite for the effective exchange of information between NCAs.

2. Waivers

As indicated in the ECA Procedural Guide and MWG Best practices, an exchange of information between NCAs might be necessary in investigations into multi-jurisdictional mergers. However, while the exchange of general information about the case is always possible and desirable, the exchange of confidential information depends on national laws. To resolve this problem

¹⁵ Available at http://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf.

the ICN, ECA and MWG offer a good solution i.e. waiver of confidentiality. A waiver of confidentiality allows a competition authority to overcome confidentiality laws limiting the type of information that may be shared with another agency. As ICN observes, ‘the merging and other interested parties may conclude that it is in their interest to waive confidentiality protections because they believe this may increase the likelihood of consistent analyses and compatible enforcement decisions’. This observation is very important since it points out that waivers serve the interests of both the agencies and the merging parties. However, the proper functioning of a waiver system depends on several key elements.

First, waivers are voluntary in nature, hence a decision to waive confidentiality protection must be taken on a purely voluntary basis. No implicit consent should be permitted. Waivers, as an exception to confidentiality protection, should be interpreted strictly. It is important to note that waivers may be provided not only by the merging parties, but by third parties as well. Sometimes it is even more important to get waivers from third parties. The problem is that, contrary to merging parties, third parties do not necessarily have a direct interest in the outcome of the proceedings and therefore are more reluctant to give their consent to have their business secrets transmitted to a foreign competition authority.

Second, a waiver should clearly define its scope, i.e. the information it covers. It may cover all information contained in the files, or just specific pieces of information. As MWG states ‘the scope of the waiver to be provided may be adapted to the specific circumstances of the case, but it is essential that the waiver should fulfill the purpose of allowing for an effective information exchange between the NCAs concerned’.

Third, a waiver should specify its duration. It may indicate a specific date or identify some event as a termination date, i.e. the end of proceedings.

Fourth, a waiver may include conditions. For example, some parties may want to be notified by the sending agency before it shares the party’s information with a recipient agency. However, such conditions are hardly ever acceptable.

Fifth, a waiver should specify guarantees of confidentiality protection and limits for any further transmissions. The party giving a waiver may decide whether it limits jurisdictions to which information may be transferred or grants a waiver to all jurisdictions concerned. Such a decision may not be easy due to different national legislations and different levels of protection of information contained in administrative files (especially with respect to laws on access to public information). What is important to remember is that the transmitting agency is not in a position to guarantee that the recipient agency can and will maintain confidentiality over the information shared. Therefore

the risk is on the entrepreneur.¹⁶ However, the commonly accepted rule is that confidential information exchanged on the basis of a waiver cannot be used for any purpose other than the review of the relevant merger.

3. Exchange of information in merger cases under Polish law

As can be seen from the discussed documents above, all of them encourage competition authorities to exchange information, leaving the decision as to the scope of such information-sharing to the national legislator. An analysis of the Polish Competition Act, allows for the conclusion that President of the Office of Competition and Consumer Protection (Poland's national competition agency, hereafter, the UOKiK, after the Polish acronym) may transmit to foreign NCAs only publicly available information. Under Polish law the UOKiK President has no legal basis for disclosure of documents containing business secrets to other foreign competition authorities. Article 31 of the Competition Act, which defines the tasks of the Polish competition authority, is crucial to such a conclusion. First, Article 31(5) states that the competition authority works with national and international bodies and organizations established to protect competition and consumers. Second, Article 31(6) declares that the UOKiK President fulfills the tasks and competences of a competition authority in a European Union Member State, as defined in Regulation 139/2004. However, neither the general declaration of Article 31(5) nor any provision of Regulation 139/2004 provides a clear legal basis for the transmission of confidential information. These provisions provide purely directional standards which should be detailed in the act. Unfortunately, the Competition Act does not have any provisions related to this issue.

The Competition Act is silent about waivers as well. Therefore the question arises whether they are admissible in Polish law. The answer is negative. The Competition Act obliges the antimonopoly authority to protect confidential information, even *ex officio*. Thus, in the absence of an express provision, even a party to the proceedings may not relieve the authority from this obligation. Moreover, there needs to be a clear provision on the nature, scope, and formulation of waivers in the Competition Act. Furthermore, there should also be a provision recognizing the fact that the Polish competition authority operates in an international context and that there should be a legal basis for cooperation and information sharing¹⁷. Last but not least, there are no

¹⁶ The risk should not be exaggerated however, since confidential information and business secrets are protected under national law in all Member States of the EU.

¹⁷ M. Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, Warszawa 2012 (forthcoming).

additional guarantees available for those companies which would wish to waive their confidentiality in relation the Polish competition authority. Such guarantees should be included in the Competition Act.

In this context it may be asked whether it is possible to apply Article 14(31) of the Competition Act as a basis for information exchange. This provision establishes that one of the tasks of the UOKiK President is to implement international obligations in the Republic of Poland in the area of cooperation and exchange of information in matters of competition and consumer protection and state aid. However, Poland is not a party to any international agreement or convention on cooperation and exchange of information in competition and consumer protection matters which would provide the UOKiK with such a legal basis. Potentially, European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters¹⁸ might apply. This Convention makes it possible to exchange evidence gathered in administrative proceedings between countries which are parties to the Convention. Competition cases are administrative matters within the meaning of Article 1 of the Convention, thus the mechanism provided in this act could be applied. However, Article 7(1)(b) of the Convention limits the possibility of transmission of ‘information held in confidence, which may not be disclosed’. Virtually every merger case which contains trade secrets would fall under this prohibition. Moreover, even these limited information and evidence exchange possibilities are still in the potential realm, because Poland has not yet signed the Convention and there is no piece of information that it may do so in the future¹⁹.

III. Exchange of information and evidence in antitrust cases

The phenomena of internationalization of anticompetitive practices, and especially cartels, as well as the need for best practices sharing, has made cooperation in antitrust cases, and in particular exchange of information between different competition agencies, growing in importance. International co-operation between competition authorities takes place, in different forms, at the bilateral²⁰,

¹⁸ CETS N°100.

¹⁹ M. Błachucki, *‘Postępowanie antymonopolowe w sprawach koncentracji w świetle aktów prawa wtórnego Rady Europy’* [w:] R. Stankiewicz (ed.), *Kierunki rozwoju prawa administracyjnego*, Warszawa 2011, pp. 19-20.

²⁰ See e.g.: Agreement Between the European Communities and the Government of the United States of America Regarding the Application of Positive Comity Principles in the Enforcement of their Competition Laws, OJ [1998] L 173.

regional²¹, or multilateral levels²². Multiple basis for such a cooperation and information exchange (soft law and hard law instruments, instruments specific to competition law matters and instruments of wider, general application)²³, as well as tools of the exchange and types of international cooperation²⁴ create ‘a complex web of differing levels of possible engagements between authorities’²⁵.

Exchange of information in antitrust cases, unlike in merger cases, is specifically provided for by the applicable rules of the European law. Therefore, this part of the article focuses mainly on the ECN members’ experience with respect to information sharing, only in a subsidiary manner touching upon the relevant soft law documents concerning information exchange in antitrust cases on the international level.

First chapter briefly discusses different sources of the main international soft-law provisions constituting a useful basis and practical *savoir-faire* of exchange of information in antitrust cases. Since the guidance for successful cooperation and specifically exchange of information by the competition authorities provided for by these instruments may influence formal exchange taking place within the European Competition Network, some references to the international soft-law instruments will be also included in the following chapter of this section.

Second chapter focuses on the legal basis, practical methods, and types of information exchanged within the European Competition Network. Subsequently, potential problems with respect to the requirements of due process of such an exchange are discussed. The provisions of the Polish act of competition and consumer protection on the information exchange constitute the counterparts of the specific provisions of Regulation 1/2003, therefore, they will be analyzed within the frames of these chapters.

The issue of exchange of information between the competition authorities in antitrust cases will be discussed through the prism of the entrepreneurs’ rights of defense that might be affected by the information sharing

These rights derive from national legislation and case law, as well as European and international legal instruments and case-law.

²¹ The most notorious example of such a cooperation being European Competition Network. See: chapter 2 herein.

²² See: chapter 1 herein.

²³ For specific basis of different international levels of cooperation see: OECD, Competition Committee, Background Note by H. Jennings, *Improving International Co-operation in Cartel Investigations* (DAF/COMP/GF(2012)6), paras. 35–81.

²⁴ See e.g.: The ICN’s 2007 *Co-operation between Competition Agencies in Cartel Investigations Report* summarising the Network members’ experiences of co-operation in cartel investigations

²⁵ OECD, Competition Committee, Background Note by H. Jennings, *Improving International Co-operation in Cartel Investigations* (DAF/COMP/GF(2012)6), para. 34.

The exchange of information may have adverse effect on the parties' 'passive procedural rights', such as right to protection of confidential information – provided for by Article 69–73 of the Polish Competition Act. In this respect, especially business secrets as well as legal professional privilege (LPP) are concerned – upon Polish legislation, LPP being protected on the basis of the provisions of Article 225 of the Code of Criminal Procedure²⁶. Similarly, exchange of information between competition authorities raises the issue of the adequate protection of the 'active procedural rights', such as right of active participation of the party in the proceedings, including right to be heard and access to files – foreseen by Article 10(1) of the Polish Code of Administrative Procedure.

Within the European Union, following the entry into force of the Treaty of Lisbon²⁷ the Charter of Fundamental Rights of the European Union²⁸, based, in particular, on the fundamental rights and freedoms recognized by the European Convention on Human Rights and Fundamental Freedoms²⁹, became legally binding on the EU institutions as well as national authorities applying EU law and thus could constitute the source of such rights of defense. Additionally, the ECHR which applies in the legal systems of all Members States and, based on the provisions of Article 6(2) of the Treaty on the European Union (TFEU)³⁰, will be joined by the EU, could constitute a source of such procedural rights. Finally, the general principles derived from Article 6 TFEU could constitute a 'safety net' to be used for the protection of fundamental rights where no other instrument available is sufficient³¹. It is also stated that the case law of the Court of Justice of the European Union with respect to undertakings' fundamental procedural rights standards should be applicable in the proceedings before NCAs applying Articles 101 and 102 TFEU³².

²⁶ Act of 4 August 1997 – Code of Criminal Procedure (Journal of Laws 1997 No. 89, item 555, as amended). The issue of applicability of the ECHR to competition cases is still a source of controversies. The authors of this article present opposite views on this subject. The same reservation applies to the next paragraph.

²⁷ OJ [2007] C 306.

²⁸ OJ [2010] C 83/1, p. 389.

²⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on the 4th of November, 1950 (Journal of Laws No. 61 of 1993, item 284, as amended), hereafter, ECHR.

³⁰ OJ [2010] C 83/1, p. 13.

³¹ K. Kowalik-Bańczyk, *The issues of the protection of fundamental rights in EU competition proceedings*, Warszawa 2010, p. 118.

³² See: W.P.J. Wils, *Efficiency and Justice in European Antitrust Enforcement*, Oxford-Portland, Oregon 2008, pp. 19–20; A. Andreangeli, *EU Competition Enforcement EU Competition Enforcement and Human Rights*, Edward Elgar 2008, pp. 119–221.

1. Information exchange in international soft law documents

International soft law documents of a widespread use concerning exchange of information by the antitrust authorities, constituting ‘one of the main stimuli to greater co-operation between agencies’³³ are adopted by the Organization of Economic Cooperation and Development. As far as the entrepreneurs’ rights are concerned, these instruments mainly focus on the adequate protection of confidential information.

The most recent OECD 1995 Recommendation³⁴ on cooperation in competition matters sets forth the principles of notification, exchange of information and coordination of action, as well as consultation and conciliation between competition agencies dealing with anticompetitive practices affecting international trade. The document promotes exchange of information in competition law cases and recommends that the Member countries comply with each other’s requests to share information, i.e. ‘supply each other with such relevant information on anticompetitive practices as their legitimate interests permit them to disclose; and should allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of Member countries (...) unless such co-operation or disclosure would be contrary to significant national interests’³⁵. In the absence of specific agreements on cooperation between different competition authorities, the Recommendations themselves rather constitute basis for informal exchange of non-confidential type of information³⁶.

Moreover, the OECD 1998 Council Recommendation Concerning Effective Action against Hard Core Cartels³⁷ provides for international cooperation in hardcore cartel cases. As far as information sharing is concerned, it encourages sharing both non-confidential and confidential information and gathering, on a voluntary basis and when necessary through use of compulsory process, of both non-confidential and confidential information on behalf of a foreign authority³⁸. Three reports on the implementation of the Recommendation have been submitted by the OECD’s Competition Committee’s to the OECD Council to date³⁹. The

³³ International Competition Network, *Co-operation between...*, p. 6.

³⁴ OECD, Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade (C(95)130/FINAL).

³⁵ OECD, Recommendation of the Council Concerning Co-operation..., p. 1.A.3.

³⁶ International Competition Network, *Co-operation between...*, p. 9–13.

³⁷ OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels C(98)35/FINAL.

³⁸ OECD, Recommendation of the Council Concerning Effective..., p. I.B.2.b.

³⁹ See: OECD, *Implementation of the Council Recommendation Concerning Effective Action against Hard Core Cartels: Third Report by the Competition Committee*, Paris2005; OECD, *Implementation of the Council Recommendation Concerning Effective Action against Hard Core*

last report highlighted the obstacles to exchange confidential information as an impediment to cartel investigations.

In the light of the above, in order to overcome some of the concerns over the exchange of confidential information, in 2005 the OECD adopted Best Practices for the formal exchange of information between competition authorities in hard core cartel investigations⁴⁰. Best Practices provide for the procedural safeguards for formal exchange of information, in particular they contain detailed provisions concerning confidentiality, use, and disclosure of the information in the requesting jurisdiction. In this respect, Best Practices specifically mention the legal professional privilege and the privilege against self-incrimination. Regarding legal professional privilege, whichever of the levels of protection is higher – that of the requesting or the requested jurisdiction – should be applied⁴¹. Similarly, upon the provisions of the Best Practices, ‘the requesting jurisdiction should ensure that its privilege against self-incrimination is respected when using the exchanged information in criminal proceedings against individuals’⁴².

2. Exchange of information within the European Competition Network

2.1. Legal basis, practical methods, and types of information exchanged

The European Commission and the national competition authorities of the 27 Member States of the EU form the European Competition Network. The Network was created based on the provisions of the Regulation 1/2003, which entered into force on 1 May 2004 and constitutes the keystone of the modernization of the EU’s antitrust enforcement rules and procedures. The objective of Regulation 1/2003 is to ensure that Articles 101 and 102 of the TFEU⁴³ are applied in a consistent manner within the decentralized model of competition enforcement (by NCAs) throughout the EU. However, while the members of the Network apply the same substantive rules of the Treaty, they are coupled with national, or institution-specific, nonharmonised procedures. Accordingly, the goal of the ECN is to ensure both an efficient division of

Cartels: Second Report by the Competition Committee, Paris 2003; *OECD Implementation of the Council Recommendation Concerning Effective Action against Hard Core Cartels: First Report by the Competition Committee*, Paris 2000.

⁴⁰ OECD Competition Committee, *Best Practices for the Formal exchange of Information between Competition Authorities in Hard Core Cartel Investigations* (2005).

⁴¹ OECD Competition Committee, *Best Practices...*, p. II.C.1-2.

⁴² OECD Competition Committee, *Best Practices...*, p. II.B.4.

⁴³ OJ [2010] C 83/1, p. 1.

work and handling of cases within the Network, as well as an effective and uniform application of EU competition rules.

From the institutional point of view, the ECN constitutes an innovative type of governance⁴⁴ by structurally independent competition authorities, mainly interconnected by the tasks assigned to them on the basis of the substantive rules⁴⁵. Accordingly, the efficient functioning of the ECN relies on the effectiveness of the mechanisms of cooperation, both formal and informal, that the members of the Network employ⁴⁶. Since the establishment of the ECN, this cooperation has surpassed the expectations of its creators and given a more 'structural impetus' to the enforcement of the EU competition rules⁴⁷. Exchange of information between the members of the Network has proven to be the central pillar of this successful cooperation and the cornerstone of the whole modernization package.⁴⁸

Depending on whether it is provided for by legal rules or not, as well as the channel through which it is exercised, the exchange of information within the European Competition Network may concern different types of data which largely falls within three categories⁴⁹: (i) public information – information which is already in the public domain⁵⁰; (ii) agency information – information

⁴⁴ For more on the general characteristics of the types of network-based governance in the European Union see: M. De Visser, *Network-Based Governance in EC law: The Example of EC Competition and EC Communications Law*, Hart Publishing 2009.

⁴⁵ The ECN is not a legal entity, and has no seat nor specific organs. The structure of the ECN embodies a loose web of different fora, such as the annual meeting of *Directors General*, or the *ECN Plenary*, gathering of chiefs of the competition authorities or the highest officials responsible for ECN issues at the competition agencies, where the most important horizontal issues are discussed, and constantly evolving working groups. At present, examples of horizontal working groups include Cartels: Practice & Policy, Vertical Restraints, Competition Chief Economists, Cooperation Issues & Due Process, Forensic IT, Mergers as well as sectoral subgroups: Energy, Environment, Financial Services, Food, Pharmaceutical, Telecom, Transport. See: *ECN Brief — special issue*, p. 4, available at <http://ec.europa.eu/competition/ecn/brief/index.html>; S. Józwiak, *Europejska Sieć Konkurencji – model: struktura i współpraca oraz kompetencje decyzyjne członków*, Warszawa 2011, pp. 5–7.

⁴⁶ The general principle of close cooperation is provided for in Article 11 (1) of Regulation 1/2003.

⁴⁷ See: Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council – *Report on the functioning of Regulation 1/2003 (COM(2009)206 final)*, SEC(2009) 574 final, 29.4.2009, hereafter also referred to as Commission Staff Working Paper), para. 183 and the references given therein.

⁴⁸ Commission Notice on Cooperation within the Network of Competition Authorities, OJ [2004] C 101/43, (hereafter also referred to as Network Notice), paragraphs 26–27; Commission Staff Working Paper, para. 242.

⁴⁹ The classification is based on: International Competition Network, *Co-operation between...*, p. 7 and pp. 20–21.

⁵⁰ Such as market reports, statistics, case-law, information difficult to access due to language constraints, etc.

which is not necessarily in the public domain, and has been generated within the agency itself, rather than provided by parties to the investigation⁵¹; (iii) information obtained from the parties to the proceedings (or the complaints)⁵².

Exchanges of information within the ECN may take place not only in the form of vertical exchanges between the national competition authorities and the European Commission, but it may also be undertaken amongst the NCAs themselves (horizontal exchanges).

However, it is worth noting that no particular procedure for the practical operation of the exchange of information is laid down in Regulation 1/2003, nor in any other EU legal act. Therefore, such cooperation normally takes place on the basis of a practical *modus operandi* which has emerged within the Network⁵³.

This exchange of information within the ECN can take place at different phases of the procedures⁵⁴: (i) at the pre-investigation phase, that is the phase before evidence-gathering, when the agencies typically exchange information regarding markets to be investigated or companies to be targeted; (ii) at the investigation phase, i.e. the phase during which evidence is gathered and analyzed, and the case built up, when the agencies may exchange information in order to co-ordinate investigatory measures (these could include the organization of inspections or dawn-raids); (iii) at the post-investigation phase, which concerns prosecution, adjudication and sanctioning, when agencies usually exchange evidence and other information which they have obtained during earlier stages of the proceedings, and when they engage in general discussions of the case⁵⁵.

Most importantly, Article 12 of Regulation 1/2003 provides the ECN members with a general framework for the exchange and use of information within the Network at all phases of the proceedings. This Article thus constitutes a key element of the functioning of the Network, ensuring the free flow of information within the ECN⁵⁶.

⁵¹ However, this type of information to some extent could be based on the materials supplied by the undertakings/parties to the proceedings.

⁵² This class of material can be further divided into information collected by an agency *a priori* for its own purposes (be it on its own initiative or provided at the undertakings' initiative), and information obtained from the undertakings in the connection with a request for assistance in fact-finding addressed by another NCA.

⁵³ Accordingly it should be also noted that the exchange of information within the ECN takes place on several different levels and is exercised via several different channels, which largely depend on whether the particular type of exchange in question is *expressis verbis* provided for by the provisions of Regulation 1/2003, or whether e.g. an experience sharing is informal.

⁵⁴ This classification is based on: International Competition Network, *Co-operation between...*, p. 7 and pp. 20–21.

⁵⁵ It is of course possible that each of the two authorities, parties to the exchange, participates in the exchange at a different phase of its own proceedings.

⁵⁶ Network Notice, para. 26, A. Andreangeli, *EU Competition Enforcement...*, p. 191; S. Brammer, *Co-operation between National Competition Agencies in the Enforcement of EC*

Article 12(1) empowers the Commission and the NCAs to provide one another with and use any matter of fact or of law, including confidential information, for the purpose of applying Article 101 and 102 TFEU. Thus, information received from another competition agency may be used as intelligence irrespective of its confidential nature, irrespective of the (criminal or administrative) nature of the proceedings, and irrespective of whether sanctions are imposed on individuals, provided that the exchange occurs for the purpose of applying Article 101 and 102⁵⁷.

However, the placing of information in evidence is subject to additional conditions, which constitute exceptions from the general rule of free flow of information and are aimed at ensuring an adequate level of protection of the undertakings' procedural rights.⁵⁸ Information collected in one system can be submitted into evidence in another system only for the purpose of applying Article 101 or 102 of the Treaty (and the national law applied in parallel in the same case, if it does not lead to a different outcome) and in respect of the 'subject-matter' for which it was collected⁵⁹. Moreover, Article 12(3) of Regulation 1/2003 contains special provisions for the placing into evidence of transferred information with the view of targeting individuals, making it possible only if the transmitting system also allows for fining individuals and provides for sanctions of a similar kind (e.g. financial, custodial or other; independently of the qualification of the sanctions or procedures at the national level as 'administrative' or 'criminal'), in which case it is presumed that the standards of rights of defence are sufficiently equivalent⁶⁰. Where the types of sanctions on individuals are materially different under the transmitting and acquiring systems, information exchanged may only be placed into evidence if it has been collected by the transmitting authority in a way that respects the same level of protection of the rights of defence as provided for under the rules of the receiving authority. However, in this case information

Competition Law, Oxford and Portland Oregon 2009, pp. 232–233. Article 12 of Regulation 1/2003 constituted e.g. basis for the exchange of information in the European Commission's *Flat glass* investigation – the case which 'demonstrated clearly the benefits of enhanced co-operation between the Commission and National Competition Authorities' (European Commission Press Release, *Antitrust: Commission Fines Flat Glass Producers € 486.9 million for Price Fixing Cartel*, IP/07/1781, 28 Nov. 2007). Similarly, Polish Office of Competition and Consumer Protection is making effective use of the powers conferred to it upon the provisions of the Article (see e.g.: http://www.uokik.gov.pl/aktualnosci.php?news_id=459).

⁵⁷ Commission Staff Working Paper, para. 239.

⁵⁸ *Ibidem*.

⁵⁹ In this context, it needs to be stressed that the notion of 'subject-matter' as provided for by Article 12(2) seems of utmost importance for the possibility of transfer and use of information *as evidence*. See: judgment of the ECJ of 17 October 1987 in case 85/87 *Dow Benelux*, ECR [1989] 3137, recitals 17–20 and Network Notice, para. 28(b).

⁶⁰ Commission Staff Working Paper, para. 241.

collected in a jurisdiction that does not provide for sanctions involving physical custody cannot be used in evidence in another jurisdiction to impose custodial sanctions.

In line with the provisions of Article 12 of Regulation 1/2003, upon Article 73(1) and 73(2)(3) of the Polish Competition Act, information collected in the course of the proceedings by the UOKiK President may be used in the proceedings of the European Commission and competition authorities of the European Union Member States when such information is exchanged under Regulation 1/2003. Moreover, Article 73(5) of the Polish Competition Act provides that information received by the Polish NCA in the course of proceedings from a competition authority of a Member State of the European Union may be used in the course of the said proceedings under the terms upon which such information is provided by that authority, inclusive of not availing oneself of the information in order to impose any sanctions upon certain persons. This provision follows the principle of the mutual recognition of the standards of the Network members' procedural systems⁶¹. It could also be argued that this constitutes an exception to the general rule of procedural autonomy, as it obliges the Polish competition authority to obey certain procedural conditions or findings made by the transmitting authority. Moreover, it could be also be argued that the provision goes further than Article 12 of Regulation 1/2003 with respect to the types of proceedings within which information may be exchanged, as it seems to enable the exchange and use of information between the Polish competition authority and other members of the Network in proceedings based solely on national substantive rules⁶².

Moreover, as far as early, pre-investigation cooperation is concerned, there is an information obligation on new proceedings instituted under Article 101 or 102 of the Treaty. Article 11(3) of Regulation 1/2003 lays down an obligation for the national competition authorities to inform the Commission before, or without delay after, commencing the first formal investigative measures⁶³. This information may also be made available to other NCAs. In practice, in most cases the information is made available both to the Commission and other members of the Network by providing a special notice in the European Competition Network's internal database. The purpose of this provision is to enable the prompt detection of parallel proceedings, prevent breach of the *ne*

⁶¹ See also subchapter 2 herein below.

⁶² See: M. Bernatt, [in]: T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów*, Warszawa 2009, p. 1305–1306. See also: M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, p. 149.

⁶³ For instance, in cartel cases involving dawn-raids or inspections this type of information would normally be provided immediately after the inspection.

bis in idem principle, and address possible case re-allocation issues at an early stage of the proceedings⁶⁴.

At the investigation stage the Commission, before conducting an inspection, is obliged to inform the national competition authority or authorities of the Member State(s) in whose territory the inspection is foreseen [Article 20(3) of Regulation 1/2003]⁶⁵. Similarly, for the purposes of fact-finding, according to the provisions of Article 22 of Regulation 1/2003 NCAs may carry out any inspection or other fact-finding measure in their own territory under their national law on behalf of a competition authority of another Member State. Such inspection is compulsory on behalf of the Commission if it so requests. The transfer and use of the information collected under Article 22 are carried out in accordance with Article 12 of Regulation 1/2003.

Moreover, at the post-investigative stage, information is exchanged about the possible outcomes of the cases dealt with by the competition authorities. According to the provisions of Article 11(4) of Regulation 1/2003, no later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, an acceptance of commitments, or withdrawal of the benefit of a block exemption Regulation, the NCAs shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under the Treaty. In practice, designated representatives within a NCA (authorized disclosure officer – ADO)⁶⁶ normally provide the Commission with the case summary in English and the projected decision in all relevant national languages *via* secured e-mail. This information about the envisaged outcome of the case is also made available to other members of the ECN in a special ECN database⁶⁷. This flow of information secures the uniform application of Articles 101 and 102 of the Treaty.

Finally, while each NCA remains responsible for the final outcome of its own proceedings, it is possible for the ECN members to coordinate the post-investigatory case-handling, especially where NCAs deal with cases in parallel actions⁶⁸.

⁶⁴ See: Network Notice, para. 17.

⁶⁵ In turn, officials of the NCA concerned enjoy certain right and hold duties of active assistance to the officials of the Commission during an inspection [Article 20(3–8) of Regulation 1/2003].

⁶⁶ See: DG Competition, *Stakeholder Report – National Competition Authorities*, August 2010, available at http://ec.europa.eu/competition/publications/reports/ncas_en.pdf.

⁶⁷ S. Brammer, *Co-operation between National Competition Agencies...*, pp. 330–334.

⁶⁸ Network Notice, para. 13. International Competition Network, *Co-operation between...*, p. 21.

These general rules applicable for the exchange of information within the ECN are alerted by specific provision with respect to cases where a leniency application has been filed. Where a NCA deals with a case which has been initiated as a result of a leniency application, the information submitted by this NCA to the Network pursuant to Article 11 of Regulation 1/2003 cannot be used by other members of the Network as the basis for starting an investigation on their own behalf under the competition rules of the Treaty or, in the case of NCAs, under their national competition law⁶⁹. Moreover, information voluntarily submitted by a leniency applicant can only be transmitted to another member of the Network pursuant to Article 12 of the Council Regulation with the consent of the applicant⁷⁰. Once such consent was given, it may not be withdrawn. No consent is required where the receiving authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting authority. Moreover, no such consent is required where the receiving authority commits in writing that the information transmitted to it will not be used to impose sanctions: (i) on the leniency applicant; (ii) on any other legal or natural person covered by the application made by the applicant under its leniency programme; (iii) on any employee or former employee of any of the (i) and (ii)⁷¹.

In addition to the above, independently of the stages of the investigations, there is a constant informal exchange of information as well as experience-sharing taking place within the ECN⁷². One tool of such an exchange that has emerged within the Network is comprised of so-called informal requests for information (RFIs), the number of which has grown significantly in recent years. Such exchanges concern public information or agency information *sensu stricto*, e.g. information related to the legislation in force, case law, or economic data. The aim of such exchanges is to enable the sharing of best practices within the ECN.

2.2. Potential problems with respect to the requirements of due process

In the decentralized model of enforcement of the substantive antitrust provisions of the TFEU provided for by Regulation 1/2003, the procedures, especially those governing companies' rights, have not been fully harmonized. Instead, Regulation 1/2003, as well as the Cooperation Notice, provide only

⁶⁹ This is without prejudice to any power of the authority to open an investigation on the basis of information received from other sources. See: Network Notice, para. 39.

⁷⁰ Network Notice, para. 40.

⁷¹ Network Notice, para. 41.

⁷² By this is meant informal exchange of information in the sense of the exchange taking place outside of the framework of specific instruments of cooperation. See: International Competition Network, *Co-operation between...*, p. 7.

that general procedural safeguards for the parties to the proceedings be integrated into the mechanisms for cooperation between the members of the ECN. In this respect, as has already been underscored, Article 12 of Regulation 1/2003, regulating the terms and the conditions of exchange of evidence between the members of the ECN, is the central provision bringing about the efficient free flow of information within the Network. Consequently, it provides a basic procedural framework for use of the information exchanged by the Network members/parties to the exchange, and the basic procedural warranties afforded to the undertakings and individuals who are the subject of such exchanges.

Moreover, it needs to be stressed that the issue of the adequate minimum level of protection of the parties' fundamental rights with respect to the exchange of information within the ECN has recently lost much of its pertinence. This is due to the fact that a vast common set of sources of procedural safeguards applies throughout the entire EU, ensuring a minimum standard of protection of these rights⁷³.

Nevertheless, the ECN, in the way it was conceived and currently functions, presupposes a – somewhat comfortable – assumption of 'sufficient equivalence' of the rights of defense enjoyed by undertakings in the various legal systems of its members⁷⁴. Additionally, according to the principle of 'mutual recognition of national procedural rules'⁷⁵, contained in paragraph 8 of the Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities⁷⁶, Member States accept that their

⁷³ As it was already underlined, following the entry into force of the Treaty of Lisbon the Charter of Fundamental Rights of the European Union,) the European Convention on Human Rights and Fundamental Freedoms ECHR became legally binding on the EU institutions as well as national authorities applying EU law. Insofar as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights is the same as those laid down by the Convention, unless EU law provides more extensive protection. Moreover, the ECHR applies in the legal systems of all national competition authorities and, based on the provisions of Article 6 (2) of the Treaty on the European Union shall be joined by the EU. Finally, the general principles derived from Article 6 of the Treaty on the European Union could be used for the protection of fundamental rights. It is also stated that the case law of the Court of Justice of the European Union with respect to undertakings' fundamental procedural rights standards should be applicable in the proceedings before NCAs applying Articles 101 and 102 of the Treaty (see: considerations in the preliminary part to the Second section of the article here-above).

⁷⁴ Recital 16 of Regulation 1/2003. See: A. Andreangeli, *EU Competition Enforcement...*, p. 189.

⁷⁵ See: A. Andreangeli, *EU Competition Enforcement...*, p. 201.

⁷⁶ Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities 15435/02 ADD 1, available at http://ec.europa.eu/competition/ecn/joint_statement_en.pdf.

enforcement systems differ but nonetheless mutually recognize the standards of each other's system as a basis for cooperation. These rules underlie the principle that each NCA has full responsibility for ensuring due process in the cases it deals with⁷⁷.

The debate concerning the equivalence of the standards of protection of the rights of defense within the EU becomes even more heated as the cooperation amongst the members of the European Competition Network grows and tightens in practice. The debate thus concerns possible divergences in the levels of protection of the individuals' and undertakings' rights provided for by different legal regimes of the NCAs transmitting and receiving information within the ECN⁷⁸.

In this context, the question arises whether indeed uniform due process can be maintained based on domestic rules, where different standards of protection exist with respect to the procedural rights of the parties to the proceedings⁷⁹. These doubts relate to three basic aspects of the transfer of information: (i) the terms and conditions of the exchange itself,⁸⁰ (ii) the collection of the information to be transmitted, and finally (iii) use of the information received. In this respect, the procedural safeguards concern both the parties' 'active' participation in the proceedings (such as access to files or right to be heard), as well as their 'passive' procedural rights (such as right not to incriminate oneself, right to protection of confidential information and especially business secrets and legal professional privilege, as well as right to privacy). As far as the discrepancies between national regimes with respect to the collection and subsequent use of evidence are concerned, the most important examples of such differences typically relate to the standard of the undertakings' and

⁷⁷ Network Notice, para. 4.

⁷⁸ See for example: K. Kowalik-Bańczyk, *The issues of the protection...*; W.P.J. Wils, *Efficiency and Justice...*; C. Smits, D. Waelbroeck, 'Le droit de concurrence et les droits fondamentaux', [in:] M. Candela Soriano (ed.), *Les droits de l'homme dans les politiques de l'Union européenne*, Bruxelles 2006, p. 138; C. Gauer, *Due process in the Face of Divergent National Procedures and Sanctions*, paper presented at the IBA conference, March 9–11 2005 *Antitrust reform in Europe: A year in practice papers*, available at <http://www.ibanet.org>; W.P.J. Wils, *The EU Network of Competition Authorities the European Convention of Human Rights and the Charter of Fundamental Rights of the EU*, EUI 2002.

⁷⁹ However, it needs to be underlined that situations triggering such doubts with respect to fundamental rights as a rule occur only in rare cases where divergences in national procedures translate into two standards of protection out of which the lower one, i.e. that of the authority transmitting information, would necessarily have to be equal to (or higher than) the applicable ECN minimum standard, and the other one, i.e. that of the authority receiving information – would have to be higher than the ECN minimum standard and the standard of the transmitting authority. Similarly, a different scope of investigatory powers could raise due process related doubts (see: examples below).

⁸⁰ See also subchapter 1 herein above.

individuals' rights during inspections/searches, or dawn-raids. Upon paragraph 27 of the Network Notice the question whether information was gathered in a legal manner by the transmitting authority is governed on the basis of the law applicable to this authority. Accordingly, upon the 'country of origin' principle, it is for the transmitting authority carrying out specific fact-finding measure to decide, upon its national rules, which information may be collected and thus subsequently transmitted⁸¹. In this context, it is possible that evidence collected during an inspection performed in a jurisdiction providing for a lower standard of protection of the rights of defense and/or right to privacy, may be transmitted to an NCA which, under its own domestic rules, could not have gained access to such information⁸². Most prominently, a broad reading of Article 12 of Regulation 1/2003 could result in allowing for the transfer of information which under the national rules of the receiving authority would be covered by legal professional privilege⁸³.

Another sensitive area of collection of the information by transmitting authority and subsequent use of the information by the receiving authority concerns the exchange of confidential information. Article 28(2) of Regulation 1/2003 provides for a minimum standard of protection of confidential information within the EU, stating that the Commission and the competition authorities of the Member States shall not disclose information acquired or exchanged by them which is covered by the obligation of professional secrecy. Similarly, upon the provisions of Article 71 of the Polish Competition Act, the Office employees are obliged to protect the business secrets⁸⁴ as well as any other secrets being liable to protection under the relevant separate provisions,

⁸¹ See: S. Brammer, *Co-operation between National Competition Agencies...*, pp. 283–286.

⁸² For instance, while the investigatory powers concerning private premises are covered by the vast majority of national jurisdictions, some NCAs do not have the possibility to inspect non-business premises outside of assistance to the Commission in the context of Article 21 of Regulation 1/2003 (such as, for instance, competition agencies in Bulgaria, Denmark, Italy or Portugal). Similarly, under national jurisdictions there are different approaches towards lawyers' presence during the inspection, and discrepancies with respect to the power to ask questions and take statements during the inspections.

⁸³ Such would be the case, for instance, if information not covered by the LPP under the transmitting system, limiting the scope of the privilege to external legal counsel (as foreseen by the *Akzo* case-law, see: judgment of the Court of 14 September 2010 in case C-550/07 P *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*) was collected and transferred to a jurisdiction where such information would normally be protected by LPP specifically covering, for example, in-house legal counsel (see: A. Andreangeli, *EU Competition Enforcement...*, pp. 202–206).

⁸⁴ According to the provisions of Article 4 (17) of the Competition Act, 'business secret' shall be understood as the 'entrepreneur's technical, technological, organisational or other information having commercial value, which is not disclosed to the public, to which the entrepreneur has taken the necessary steps to maintain confidentiality'.

of which they have become aware in the course of the proceedings. However, upon the ‘country of destination’ principle it is for the country receiving an information containing request of confidential treatment to decide whether the information will be treated as confidential⁸⁵. Along the lines of the principle, it is argued that any assessment of the confidentiality claim made by the transmitting authority is not binding upon the receiving authority, except if it has been taken by the Commission⁸⁶. It could also be argued that the information transmitted by the authority, upon national rules applying higher standard of protection of confidential information, to the authority applying lower standard of protection would not receive equivalent treatment⁸⁷. In this respect, it is worth reminding, that the provisions of Article 73(5) of the Polish Competition Act, providing that information received by the Polish NCA may be used in the course of the proceedings under the terms upon which such information is provided by the transmitting authority, seem to reverse the country of destination principle, by making transmitting authority’s decision on the validity of confidentiality claim binding upon the Polish NCA. Mutual recognition of the confidentiality classification based on Article 28 of Regulation 1/2003 should become the ECN good practice.

Similarly, concerns are raised that, confidential information being exchanged will become accessible from the receiving jurisdiction, due to lack of harmonization of the procedures of access to files in competition cases⁸⁸. The issue of such kind was recently dealt with by the Court of Justice of European Union in the *Pfleiderer* case where access to the leniency files was sought in the private enforcement proceedings before the national court⁸⁹. The CJEU confirmed that it is for the national courts and tribunals, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law.

⁸⁵ S. Brammer, *Co-operation between National Competition Agencies...*, pp. 277–282.

⁸⁶ S. Brammer, *Co-operation between National Competition Agencies...*, p. 278; C. Gauer, *Due process...*, p. 18.

⁸⁷ However, it needs to be underlined that situations triggering such doubts as to the protection of procedural rights as a rule occur only in rare cases where divergences in national procedures translate into two standards of protection out of which the lower one, i.e. that of the authority receiving information, would necessarily have to be equal to (or higher than) the applicable ECN minimum standard, and the other one, i.e. that of the authority transmitting information – would have to be higher than the ECN minimum standard and the standard of the receiving authority.

⁸⁸ OECD, Competition Committee, Background Note by H. Jennings, *Improving International Co-operation in Cartel Investigations* (DAF/COMP/GF(2012)6), para. 95.

⁸⁹ Judgment of the European Court of Justice of 14 June 2011 C-360/09 *Pfleiderer AG v Bundeskartellamt*, not yet reported.

Moreover, it could be argued that the terms and conditions of the exchanges of information within the ECN could jeopardize due process. Regulation 1/2003 contains no obligation to inform the targeted undertakings about the transfer of the information. As long as the information is not being placed into evidence by the receiving authority (in which case the parties to the proceedings would normally have the right of access to files, and thus access to the information exchanged, while not necessarily being aware from where the evidence originated), the undertakings may remain unaware of the exchange taking place and of the information exchanged. In addition, there is no transparency with respect to how in practice the exchange is performed. Moreover, although Article 28 of Regulation 1/2003 extends the uniform EU concept of professional secrecy to all NCAs, it could nonetheless be argued that the ‘country of destination’ principle, coupled with the lack of transparency accompanying the exchange of information, brings about legal uncertainty and may in practice render any procedure dealing with a request for confidential treatment unduly lengthy and complicated⁹⁰.

Many recommendations have been put forward to overcome the potential problems concerning the protection of procedural rights resulting from the discrepancies between the national jurisdictions of the competition authorities, i.e. parties to the exchange of information.

In this respect, following the OECD’s *Best practices for the formal exchange of information between competition authorities in hard core cartel investigations*, acceptance of whichever level of protection of the undertakings’ rights is higher could be promoted⁹¹.

It is also argued that the decision concerning the transmission of information should be challengeable in order to guarantee due process within the ECN and to ensure a level playing field by balancing the effective enforcement of the antitrust rules and the protection of the rights of defense of investigated entities⁹².

Greater transparency of the internal rules governing exchanges of information, in accordance with the principle of participation, is yet another postulate aiming at ensuring that the *modus operandi* of the exchange elaborated within the ECN fully takes account of undertakings’ procedural rights⁹³.

However, such solutions seem either intermediate or impossible to adopt under the current wording of Regulation 1/2003, and some could considerably impair the effectiveness of investigations. Therefore, from a long

⁹⁰ See: S. Brammer, *Co-operation between National Competition Agencies...*, pp. 279–282.

⁹¹ OECD, *Best practices...*, See: chapter 1 here-above.

⁹² A. Andreangeli, *EU Competition Enforcement...*, p. 223.

⁹³ M. De Visser, *Network-Based Governance...*, pp. 270–275.

term perspective, it seems that introducing general procedural changes to Regulation 1/2003 in order to achieve further standardization of the rights of defense would be the best remedy for addressing some of the potential problems with respect to due process that the current state of affairs may bring about⁹⁴. In the meantime, it should be noted that such harmonization is being sought and implemented by the members of the ECN using the 'bottom up' model, whereby the NCAs themselves initiate proposals aimed at achieving some level of procedural convergence, despite the lack of binding EU rules imposing the same.

IV. Conclusions

Comparison of the regulation of information exchanges in antitrust and in merger cases leads to the conclusion that antitrust provisions are fairly well developed, serving as a basis for day-to-day administrative cooperation, whereas the merger provisions are still in their infancy period. Such a situation should not be surprising inasmuch as the merger provisions still remain the domain of national legislation, while antitrust provisions are beginning to form a common European competition legal order. As a consequence of this situation, distinct problems arise with respect to antitrust and merger cases. In merger cases the likelihood of infringement of entrepreneurs' rights is relatively small. As described earlier, in merger cases it is the entrepreneur who decides what confidential information will be disclosed and to whom. Non-confidential information is publicly available, so the transmission of such information will not, in principle, violate a company's rights. Antitrust cases, on the other hand, involve much more complex and far-reaching issues. Especially troublesome is the fact that, under a broad reading of Article 12 of Regulation 1/2003, national rules which are more protective of the rights of defense than the ECN standards could be vitiated in the course of information exchanges within the Network. As far as international soft-law instruments are concerned, they rather provide a guide for informal exchange of non-confidential information.

Cooperation between competition authorities in merger cases is growing with the increasing number of multi-jurisdictional mergers. A very worrying fact is that Polish legislation does not recognize the tendency of growing cooperation in merger cases and there are only rudimentary legal grounds for

⁹⁴ Similarly, stakeholders in the context of the public consultation for the Commission's Report on the functioning of Regulation 1/2003 have also strongly urged the further harmonization of procedures within the ECN. See: Commission Staff Working Paper, para. 206.

such cooperation. The analysis undertaken leads to the conclusion that, under Polish law, the exchange of information in merger cases is limited to publicly available information. Confidential information may only be transmitted by the merging parties themselves directly to foreign NCAs. Therefore legislative changes in the Competition Act are needed in order to create a legal basis for the UOKiK President to transfer confidential information to other competition authorities with the consent of the entrepreneur concerned. Such consent must be given in a transparent manner, i.e. the entrepreneur should voluntarily and unambiguously (any ‘implicit’ means of expressing consent should be ruled out in advance) give its consent to the transfer of such information. Furthermore, the scope of the information provided under a waiver should be closely associated with the nature of the merger case. Finally, such waiver should specify the purpose for which the information is transferred and list any limits on further transmissions.

The ‘internationalization’ of cartels in recent years, crossing the boundaries of jurisdictions, together with the decentralization of the enforcement of Articles 101 and 102 of the TFEU, create a need for ever increasing cooperation and exchange of information on the international level and within the ECN.

Especially given the recent changes brought about by the Lisbon Treaty, it should be underscored that any fears of an ‘erosion of fundamental rights’ due to the information exchange within the network of competition authorities seem unwarranted⁹⁵. Moreover, it should also be stressed that due to the limitations on the possible uses of the exchanged information provided for by Article 12 of Regulation 1/2003, a certain minimum standard of protection of the undertaking’s and individuals’ rights within the Network is further reinforced. Nonetheless, in spite of these common minimum standards, as well as procedural safeguards, the European legal framework for the exchange of information within the network of competition authorities lacks the requisite specific norms governing the use of evidence exchanged, and therefore neglects the consequences of the current lack of convergence of national procedural rules. Consequently, procedural harmonization with respect to the rights of defense, as well as increased transparency of the information exchanges within the ECN, should constitute long-term goals of the ECN.

⁹⁵ See: W.P.J. Wils, *Efficiency and Justice...*, p. 22 and references given therein; C. Gauer, *Due process...*, pp. 13–14.

Literature

- Andreangeli A., *EU Competition Enforcement and Human Rights*, Edward Elgar 2008.
- Van Bael I., *Due Process In EU Competition Proceedings*, Wolters Kluwer 2011.
- Bernatt M., *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [*Procedural fairness in the proceedings before the competition authority*], Warszawa 2011.
- Błachucki M., 'Postępowanie antymonopolowe w sprawach koncentracji w świetle aktów prawa wtórnego Rady Europy' [*Antitrust proceeding in merger cases in the light of secondary law of the Council of Europe*], [in:] R. Stankiewicz (ed.), *Kierunki rozwoju prawa administracyjnego* [*Directions of development of administrative law*], Warszawa 2011.
- Błachucki M., *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców* [*System of antitrust proceeding in merger cases*], Warszawa 2012 (forthcoming).
- Brammer S., *Co-operation between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford and Portland Oregon 2009.
- Gauer C., *Due process in the Face of Divergent National Procedures and Sanctions*, paper presented at the IBA conference, March 9–11 2005 *Antitrust reform in Europe: A year in practice papers* (available at <http://www.ibanet.org>).
- Józwiak S., *Europejska Sieć Konkurencji – model: struktura i współpraca oraz kompetencje decyzyjne członków* [*European Competition Network – model, structure and co-operation and decisional powers of members*], Warszawa 2011.
- Kowalik-Bańczyk K., *The issues of the protection of fundamental rights in EU competition proceedings*, Warszawa 2010.
- Martinez M.T., 'Information-Sharing Between Competition Authorities: The Case of Competition Authorities: The Case of a Multinational Merger', available at <http://www.cepr.org/meets/wkcn/.../Troya-Martinez.pdf>;
- Skoczny T., Jurkowska A., Miąsik D. (eds.), *Ustawa o ochronie konkurencji i konsumentów, Komentarz* [*Act on Competition and Consumers Protection. Commentary*], Warszawa 2009.
- Stawicki A., Stawicki E. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [*Act on Competition and Consumers Protection. Commentary*], Warszawa 2011.
- Smits C., Waelbroeck D., 'Le droit de concurrence et les droits fondamentaux', [in:] M. Candela Soriano (ed.), *Les droits de l'homme dans les politiques de l'Union européenne*, Bruxelles 2006.
- De Visser M., *Network-Based Governance in EC law: The Example of EC Competition and EC Communications Law*, Hart Publishing 2009.
- Wils W.P.J., *Efficiency and Justice in European Antitrust Enforcement*, Oxford-Portland, Oregon 2008.

Rights of an Undertaking in Proceedings Regarding Commitment Decisions under Article 9 of Regulation No. 1/2003

by

Inga Kawka*

CONTENTS

- I. Introduction
- II. Characteristics of commitment decisions
 - 1. Origin of Article 9 of Regulation No. 1/2003
 - 2. Application of Article 9 of Regulation No. 1/2003 by the Commission
 - 3. Types of commitments imposed in commitment decisions
 - 4. Legal consequences of a commitment decision
- III. Rights of an undertaking concerned
 - 1. Status of the ‘undertaking concerned’
 - 2. Right to defend interests and to offer commitments voluntarily
 - 3. Right to a transparent procedure
 - 3.1. Preliminary assessment
 - 3.2. Access to files
 - 4. Rights resulting from principle of legal certainty and legality of the sanction
 - 5. Right to appeal
- IV. Polish perspective
- V. Conclusions

Abstract

The purpose of this article is to present and define the rights of the undertakings concerned, which are parties to commitment decision proceedings, and to discuss whether the rights granted to the undertakings are exercised. As regards commitment decisions the main right of an undertaking/a party to the proceedings is the right to defend its own interests in negotiations with the Commission. Other

* Dr. Inga Kawka, Assistant Professor in the Chair of Law and Administrative Science of the Pedagogical University in Krakow.

rights, such as the right to a transparent procedure, the rights resulting from the principle of legal certainty and legality of sanctions, and the right to appeal, are also analyzed. The article argues that these rights are not adequately enforced in EU competition law. This is a result of a strong negotiating position of the Commission and the fact that it acts both as a prosecutor and decision-renderer. Additionally, the scope of European courts' review is so narrow that it does not guarantee that an undertaking is protected against offering excessive and unreasonable commitments.

Résumé

Le but de cet article est de présenter et définir les droits des entreprises concernées qui sont les parties de la procédure de décision d'engagement, et d'examiner si ces droits sont exercés. En ce qui concerne la décision d'engagement, le droit de défendre ses propres intérêts dans les négociations avec la Commission est le droit principal d'une entreprise/une partie de la procédure. Les autres droits, comme le droit à la procédure transparente, les droits découlant du principe de la sécurité juridique et de la légalité des sanctions et le droit de faire appel, sont également analysés. L'article fait valoir que ces droits ne sont pas correctement appliqués dans le droit de la concurrence de l'UE. Cela résulte de la forte position de négociation de la Commission et du fait qu'elle agit en tant que procureur et organe de décision. De plus, l'étendue du contrôle effectué par des tribunaux européens est si étroite qu'il ne garantit pas à l'entreprise d'être protégée contre des engagements excessifs et déraisonnables.

Classifications and key words: Rights of an undertaking concerned; commitment decisions; EU competition law; Article 9 of Regulation 1/2003.

I. Introduction

The institution of a commitment decision was established in the European competition law by Article 9 of Regulation 1/2003¹. This provision regulates the former practice of reaching unofficial agreements between the Commission and undertakings. In the course of the commitment decision procedure, in the preliminary phase of case examination the companies voluntarily offer commitments taking into consideration the concerns expressed by the Commission. Pursuant to Article 9 of Regulation 1/2003 the Commission is able to adopt decisions which make those commitments binding on the undertakings concerned. In its decisions the Commission then states that there

¹ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

are no grounds for action, without concluding whether or not there has been or still is an infringement. This solution makes it possible to quickly eliminate practices which may disrupt competition and is an effective tool from the point of view of procedural efficiency. According to the Commission 'the main advantages of commitment decisions are a swifter change on the market to the benefit of consumers as well as lower administrative costs for the Commission. For the parties subject to the proceedings, faster proceedings and the absence of a finding of an infringement may be attractive'².

The purpose of this article is to describe and define the rights of the undertakings concerned (who are parties) in commitment decisions proceedings, and also to analyse whether the rights granted to the undertakings are exercised. A characteristic feature of commitment decisions and of other settlement decisions which are officially adopted by the Commission³, is that undertakings voluntarily cooperate with the Commission and give up the possibility of questioning the analyses, arguments, decisions, and actions of the competition authority. i.e. the Commission. For the most part an undertaking does not take advantage of the procedural rights it is entitled to, in return for expected benefits such as, for example, the lack of imposition of a penalty. In the case of commitment decisions the main right of an undertaking/party to the proceedings is the right to defend its own interests in negotiations with the Commission, which should safeguard the possibility to make a voluntary offer of commitments.

II. Characteristics of commitment decisions

1. Origin of Article 9 of Regulation No. 1/2003

EC Regulation No. 17, which regulated the application of Articles 81 and 82 of the TEC (now Articles 101 and 102 TFEU), was in effect from 1962 until it was replaced by Regulation 1/2003 of 1 May 2004. It did not include a provision similar to Article 9 making it possible for the Commission to adopt a settlement decision to close an antitrust case. Despite that, the Commission and undertakings did make unofficial agreements. A number

² European Commission, 'Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU', available at http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf, p. 24.

³ There currently exists a settlement procedure in cartel cases under Article 10a of Commission Regulation 773/2004 and the Commission Notice in the conduct of settlement procedures in cartel cases.

of cases, for example *IBM*⁴, ended with an unofficial settlement, with the undertakings agreeing to a compromise satisfactory to the Commission, and the Commission acting on the assumption that it would not achieve anything significantly different if it pursued the case through the official channels⁵. However, such a situation had two basic flaws. First, because of the lack of an official decision undertakings were afraid to reopen the case, and the Commission had no tool with which would ensure that the commitments offered by the undertaking were fulfilled in accordance with the agreement. Second, the practice of making unofficial agreements was not sufficiently clear for third parties interested in the case/settlement, which stood to benefit from the commitments agreed on and had an interest in monitoring their fulfilment, as well as for those groups of entrepreneurs and lawyers who treated the Commission's decisions as guidelines for competition law. Settlements were usually described in the Commission's annual reports regarding competition policy, but without any details⁶. The inclusion of Article 9 in Regulation 1/2003 is aimed at resolving the aforementioned weaknesses. It grants the Commission the power to officially recognize commitments offered by undertakings as binding and obliges the Commission to publish commitment decisions in the Official Journal of the European Union.

2. Application of Article 9 of Regulation 1/2003 by the Commission

Commitment decisions constitute an alternative to infringement decisions, which are based on Article 7 of Regulation 1/2003. Both kinds of decisions are used by the Commission for the enforcement of European antitrust rules. The record of the Commission's practice demonstrates that since Regulation 1/2003 has come into force, Article 9 of the Regulation has been applied by the Commission with increasing frequency. The Commission adopted two commitment decisions in 2008, five in 2009, six in 2010 and two in 2011⁷. Commitment decisions adopted by the Commission so far refer to a variety of matters and address various concerns regarding the application of Articles 101 and 102 TFEU by undertakings. For instance, the *Coca-Cola*⁸, *De Beers*⁹,

⁴ F. Lomholt, 'The 1984 IBM Undertaking, Commission's monitoring and practical effects' (1998) 3 *Competition Policy Newsletter* 7; Commission's XIVth *Report on Competition Policy* 1984, points 94–95.

⁵ A. Jones, B. Sufrin, *EU Competition Law. Text, cases, and Materials*, Oxford 2011, p. 1084.

⁶ W. P.J. Wils, 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003' (2006) 29(3) *World Competition* 5.

⁷ http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=1

⁸ Case COMP/A.39.116/B2 – *Coca-Cola*.

⁹ Case COMP/38.381/B2 – *De Beers*.

*Distrigaz*¹⁰, and *RWE*¹¹ cases related to concerns over possible exclusionary abuses of dominant position under Article 102 TFEU (previously Article 82 TEC). The two decisions regarding *E.ON*¹² related to concerns over possible exploitative abuses of a dominant position under Article 102 TFEU (previously Article 82 TEC). The Commission has also adopted commitment decisions taking into consideration concerns as to the lack of compliance with Article 102 TFEU, e.g. *DFB*¹³, *FA Premier League*¹⁴, *Cannes Extension Agreement*¹⁵ (horizontal agreements), *Repsol*¹⁶, *Opel*, *Toyota*, *Fiat*, and *Daimler Chrysler*¹⁷ (vertical agreements with exclusivity clauses or conditions of supply to third parties)¹⁸.

Based on an analysis of the commitment decisions adopted by the Commission so far the subject literature¹⁹ has pointed to the sectors in which the Commission's actions, under Article 9 of Regulation 1/2003, could bring about particularly positive effects. These are the sectors of fast-moving technology markets. In such sectors the conditions change so quickly, owing to rapid technological development, that immediate public intervention is often required. Lack of timely intervention could inhibit innovation or be significantly detrimental to consumers and end users. An analysis of the decisions adopted by the Commission so far shows that, in fact, a number of them regard the fast-moving technology markets. The *Microsoft*²⁰, *DRAMs*²¹ and *IBM Maintenance Services*²² cases serve as examples. Additionally, commitment decisions are particularly useful in dealing with market foreclosure issues. This can be

¹⁰ Case COMP/B-1/37966 – *Distrigaz*.

¹¹ Case COMP/39.402 – *RWE Gas Foreclosure*.

¹² Cases COMP/39.388 – *German Electricity Wholesale Market* and COMP/39.389 – *German Electricity Balancing Market*.

¹³ Case COMP/37.214 – *DFB*.

¹⁴ Case COMP/38.173 – *Joint selling of the media rights to the FA Premier League*.

¹⁵ Case COMP/38.681 – *The Cannes Extension Agreement*.

¹⁶ COMP/B1/38.348 – *Repsol CPP*.

¹⁷ Cases Comp/39.140–39.143 – *Daimler Chrysler, Fiat, Toyota and Opel*.

¹⁸ Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council – Report on the functioning of Regulation No. 1/2003, Brussels, 29.4.2009, SEC(2009) 574 final, p. 32; A. Ezrachi, *EU Competition Law. An Analytical Guide to the Leading Cases*, Oxford, Portland, Oregon 2010, p. 441.

¹⁹ M. Dolmans, T. Graf, D.R. Little, 'Microsoft's browser choice commitments and public interoperability undertaking' (2010) 31(7), *European Competition Law Review* 274; P. Cavicchi, 'The European Commission's discretion as to the adoption of Article 9 commitment decisions: Lessons from Alrosa', Discussion Paper No. 3/11, Institute for European Integration, Europa-Kolleg Hamburg 2011, p. 9.

²⁰ Case COMP/39.530 – *Microsoft (Tying)*.

²¹ Case COMP/38.511 – *DRAMs*.

²² Case COMP/C-3/39692 – *IBM Maintenance Services*.

seen in a number of the Commission's decisions regarding the energy sector. Nevertheless, it should be emphasized that the Commission is never obliged to accept the commitments offered by undertakings. It may always adopt an infringement decision under Article 7 of Regulation 1/2003 if it deems that this will ensure more effective application of Articles 101 and 102 TFEU.

3. Types of commitments imposed in commitment decisions

Prevailing doctrine²³ is right to assume that the commitments imposed by the Commission by agreement under Article 9 of Regulation 1/2003 overlap with the remedies provided for in Article 7 of the Regulation. Under Article 7 of the Regulation the Commission may impose upon undertakings remedies which it has characterized as follows: 'the commitments can be either behavioural or structural'²⁴. Pursuant to this Article, 'structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy'. The Commission applies this provision by analogy when it adopts a commitment decision under Article 9 of Regulation 1/2003. This is borne out by an analysis of the commitment decisions adopted by the Commission so far, where the Commission has imposed mainly behavioural remedies. In its report from 2009 on the application of Articles 81 and 82 TEC²⁵, the Commission declared that only two out of thirteen decisions adopted at that time provided for the implementation of structural commitments (*E.ON*²⁶ and *RWE*²⁷). In 2010, of the six²⁸ commitment decisions adopted only in the case of *ENI* power company did the Commission impose structural commitments. In its statement of objections the Commission stated that this undertaking might have abused its dominant position, within the meaning of Article 102 TFEU, by using an alleged systematic strategy of refusing access to their international gas pipelines used to transfer fuels to Italy. *ENI* committed to sell its shares in companies

²³ W.P.J. Wils, 'Settlements...', p. 15.

²⁴ European Commission, 'Commitment decisions (Article 9 of Council Regulation 1/2003 providing for a modernised framework for antitrust scrutiny of company behaviour)', MEMO/04/217, Brussels, 17 September 2004.

²⁵ Commission Staff Working Paper, Report on the functioning of Regulation No. 1/2003, p. 32.

²⁶ Case COMP/B-/39.388 and 39.389.

²⁷ Case COMP/39.402 – *RWE Gas Foreclosure*.

²⁸ Case COMP/39.317 – *E.ON Gas*; Case COMP/39.386 – *Long-term contracts France*, Case COMP/39351 – *Swedish Interconnectors*; Case COMP/39.398 - *Visa MIF*; Case COMP/39.596 – *BA/AA/IB*.

associated with international gas pipelines to a purchaser, independent of ENI and not associated with it, which, at first glance, raises no concerns as regards competition issues²⁹. In its decision the Commission stated that ENI's commitment to sell its shares and assets in international gas pipelines, which constitutes a structural remedy, was necessary because otherwise the stimuli encouraging a vertically integrated gas undertaking to engage in anti-competition behaviour would not be removed, which would be associated with the risk of further alleged infringement. In 2011 the Commission did not impose the structural commitments.

4. Legal consequences of a commitment decision

A major legal consequence of a commitment decision is that a case is ended without a determination that an undertaking infringed competition law. This is an important benefit for a business entity against which the Commission has commenced proceedings, as it minimizes the risk of third parties filing claims for damages and protects the undertaking against the automatic application of rules regarding repeated infringements³⁰. Pursuant to the Guidelines on the method of setting fines³¹, repeated infringements is an aggravating circumstance and leads to the increase of a fine by 100%.

Commitment decisions, unlike unofficial agreements, grant the Commission the possibility 'upon request or on its own initiative, to reopen the proceedings: (a) where there has been a material change in any of the facts on which the decision was based; (b) where the undertakings concerned act contrary to their commitments; or (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties' [Article 9(2) of Regulation 1/2003]. The Commission may also, under Article 23(2)(c), 'by decision impose fines on undertakings and associations of undertakings which, either intentionally or negligently . . . fail to comply with a commitment made binding by a decision pursuant to Article 9'. Additionally, 'the Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them: . . . (c) to comply with a commitment made binding by a decision pursuant to Article 9'.

²⁹ Case COMP/39.315 – *ENI*.

³⁰ I. Van Bael, J.-F. Bellis, *Competition Law of the European Community*, Austin, Boston, Chicago, New York 2010, p. 1166.

³¹ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ [2006] C 210/02.

III. Rights of an undertaking concerned

1. Status of the ‘undertaking concerned’

This paper concerns only the rights of the undertakings concerned which offer commitments (Article 9(1) of the Regulation 1/2003). The article does not analyze rights of a interested third-parties undertakings which are affected by a decision passed under Article 9 of Regulation 1/2003. The problem that an undertaking has the status of the undertaking concerned was the subject of a judgment in the *Arlosa* case³². The Court stated that Alrosa did not have the status of the undertaking concerned because it was not a party to proceedings concerning individual commitments, since those commitments were offered by another entity (*De Beers*). The undertaking concerned by the proceedings under Article 9 of Regulation 1/2003 is, therefore, only the entity offering commitments.

2. Right to defend interests and to offer commitments voluntarily

Assuming that negotiations between the Commission and an undertaking are similar to negotiations conducted under civil law, the voluntariness of an agreement between such subjects would seem to be a sufficient guarantee for the protection of their interests³³. However, we agree with the arguments presented in the literature³⁴, that the position of an undertaking, which is a party to proceedings regarding the adoption of a commitment decision, raises some doubts. Above all, even if an undertaking does not feel that it infringed competition law, fears concerning the possible consequences of an infringement decision may cause the undertaking to offer commitments which are requested by the Commission, but which the undertaking does not feel are appropriate to the circumstances. Such fears may concern long and costly antitrust proceedings, possible imposition of fines, and losses resulting from the

³² Case C-441/07 P *European Commission v Alrosa Company Ltd*, ECR [2010] I-05949, para. 88.

³³ In the *Alrosa* case, the Advocate General’s Opinion most clearly reflects this approach – Opinion of Advocate General Kokott of 17 September 2009, Case C-441/07 P (*Commission v Alrosa Company Ltd*), para. 55; F. Wagner-von Papp, ‘Best and even better practices in commitment procedures after Alrosa: The dangers of abandoning the ‘Struggle for Competition Law’’, available at: <http://ssrn.com/abstract=1956627>, p. 6 and following.

³⁴ D. Waelbroeck, ‘Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?’, The Global Competition Law Centre Working Papers Series 01/08, p. 19.

filing of claims for damages by third parties allegedly harmed by infringement, whose path to successful litigation and/or costly negotiation is made easier by the adoption of an infringement decision finding an infringement of European antitrust law. It is worth noting that the fact that the Commission cannot impose a fine on an undertaking in commitment decisions does not mean that, if it adopted a decision in a given case under Article 7, it would not do so. This is demonstrable by the high discretion granted to the Commission as regards the choice to proceed under Article 7 or Article 9 of Regulation 1/2003, and its freedom to evaluate whether the benefits resulting from settlement of a case are greater than those which would result from the imposition of a fine on an undertaking. As J. Temple Lang³⁵ aptly stated: ‘There is no reason why a commitment decision cannot be adopted in a case in which the Commission intended to impose a fine when it sent the statement of objections, but later decided that a fine was not necessary or justified, and the undertaking offered an adequate commitment’. Additionally, according to the judgments of the European Court of Justice (hereafter, Court of Justice), the ‘Commission has a margin of discretion when setting the amount of fines, since fines constitute an instrument of competition policy’³⁶. That margin of discretion extends, *ipso facto*, to deciding on the appropriateness of imposing a fine at all³⁷.

Thus, the Commission may decide at any stage of proceedings that it does not intend to impose a fine. The *Coca-Cola* case may serve as an example of the use of this ‘strategy’³⁸. In the case of similar infringements, that is, agreements with exclusivity clauses, the Commission imposed very high fines³⁹. In commitment decisions, while the Commission cannot impose a fine it may impose on undertakings commitments which exceed the scope of European competition law, which is certainly connected with its strong negotiating position in discussions with undertakings⁴⁰. The Commission’s strong position results in part from the fact that, despite numerous procedural changes regarding the application of Articles 101 and 102 TFEU, the Commission still acts simultaneously as prosecutor and decision-renderer in a given case, and has at its disposal a number of investigating instruments to use against

³⁵ J. Temple Lang, ‘Commitment decisions under Regulation 1/2003: Legal aspects of a new kind of competition decision’ (2003) 24(8) *European Competition Law Review* 347.

³⁶ T-150/89 *Martinelli v Commission*, ECR [1995] II-1165, para. 59.

³⁷ T-213/95 and T-18/96 *SCK and FNK v Commission*, ECR [1997] II-1739, para. 239; C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others v Commission*, ECR [2009] I-7191, para. 112; T-461/07, *Visa Europe Ltd v European Commission*, not yet reported, para. 212.

³⁸ D. Waelbroeck, ‘Le développement en droit européen...’, p. 20.

³⁹ T-203/01 *Michelin*, ECR [2003] II-4071; C-95/04 P *British Airways*, ECR [2007] I-2331.

⁴⁰ M. Sousa Ferro, ‘Committing to commitment decisions – unanswered questions on Article 9 decisions’ (2005) 26(8) *European Competition Law Review* 445–450.

undertakings which, in its opinion, infringe competition law. This situation is widely criticized in the literature⁴¹, in particular as regards its compliance with the provisions of Article 6 of the ECHR, especially in the context of the increasingly strict fines imposed on undertakings by the Commission. This problem is particularly relevant since the coming into effect of the Treaty of Lisbon, which provides for the accession of the European Union to the ECHR. In any case however, as matters stand there is no authority which could, before adopting a decision, objectively assess the commitments offered by an undertaking and accepted as binding, nor is there a mechanism which could prevent the Commission's actions from exceeding the limits of competition law⁴². W. P. J. Wils⁴³ points to a threat arising from the fact that the 'excessive use of commitment decisions relates to the possible temptation for competition authorities, or their staff, to try to obtain desired results beyond the scope of their legal powers'. The lack of distinct control by the Court of Justice to set limits on the discretion granted to the Commission may lead to a situation whereby the application of competition law becomes unclear and is extended to include goals which are not a part of the competition policy, but lead to the exercise of rights provided for in antitrust law for regulatory purposes⁴⁴.

As examples of decisions which the Commission would not have been able to adopt under Article 7 of Regulation 1/2003, but which were adopted under Article 9 and arguably used to achieve regulatory goals, the above-mentioned *ENI* case and the *Alrosa* case are cited in the literature⁴⁵. The latter case concerned the Russian company Alrosa and the Luxembourg company De Beers, which were active on the worldwide market for the production and supply of rough diamonds. De Beers individually offered commitments to the Commission providing for the definitive cessation of all purchases of rough diamonds from Alrosa, effective from 2009. The Commission accepted those commitments in an official commitment decision⁴⁶. The purpose of this decision was to ensure that the Alrosa diamonds are competitive to

⁴¹ G. Di Federico, 'The Impact of the Lisbon Treaty on EU Antitrust Enforcement: Enhancing procedural Guarantees Through Article 6 TEU' (2010) 4 *Il diritto dell'Unione Europea* 805 and following; J. Temple Lang, 'Three Possibilities for Reform of the Procedure of the Commission in Competition Cases under Regulation 1/2003', [in:] C. Baudenbacher (ed.), *Current Developments in European and International Competition Law*, Basel 2011, p. 219 and following.

⁴² J. Temple Lang, *The Use of Competition Law Powers for Regulatory Purposes*, Oxford 2007, p. 2 and following.

⁴³ W. P. J. Wils, 'Settlements...', p. 9.

⁴⁴ J. Temple Lang, *The Use of Competition Law...* p. 2 and following; C. Banasiński, M. Krasnodębska-Tomkiel, 'Zastosowanie środków prawnych prawa antymonopolowego na szczególnych rynkach regulowanych' (2009) 1 *Przegląd Prawa Handlowego* 18–22.

⁴⁵ J. Temple Lang, *The Use of Competition Law...*, p. 2 and following.

⁴⁶ Case COMP/B-2/38.381 – *De Beers*.

the De Beers diamonds. It was a non-precedential limitation on freedom of agreements, the legal consequences of which affect not only an undertaking which is dominant on the market (De Beers), but also its market partner, Alrosa, which does not have such a position on the rough diamonds market.

The present practice regarding the application of Article 9 of Regulation 1/2003 by the Commission should be assessed critically. Despite the approximation of the sector regulation to competition law and the fact that their objective scopes often overlap⁴⁷, they still constitute two different kinds of public intervention which are designed to complement, not to replace, each other. The essence of antitrust law is to protect existing effective competition against practices by undertakings which may limit or completely eliminate it. Competition rules may thus lead to the maintenance of the level of competition present on the market, and not to widening or deepening its extent⁴⁸. Unlike the case of competition law, the essence of sector regulation is not to maintain competition on the market, because such competition does not exist, but to shape future behaviour of undertakings so that such effective competition is achieved. A basic difference is the fact that market analyses made by regulatory authorities must always take into consideration its future development, and imposing a regulatory remedy does not have to be preceded by a declaration of infringement of antitrust law. Regulatory rights are, thus, much more sweeping in importance than the rights under competition law and should be subject to wider limitations than in the case of competition law⁴⁹. In particular, the implementation of a regulatory policy in a given sector should be preceded by a discussion on the purposes of this policy, and selected regulatory obligations should be imposed only following a detailed economic analysis of the relevant market and a determination of the prospects for its development. This allows for the identification of problems on the relevant market related to the lack of effective competition and the imposition of regulatory commitments which are adequate and proportional to an existing situation.

3. Right to a transparent procedure

3.1. Preliminary assessment

In the current legal state the only guarantee that an undertaking offers an adequate commitment is a transparent procedure. In theory the central element of the procedure is a preliminary assessment submitted by the

⁴⁷ T. Skoczny, 'Ochrona konkurencji a prokonkurencyjna regulacja sektorowa' (2004) 3 *Problemy Zarządzania* 20 and following.

⁴⁸ T. Skoczny, 'Ochrona konkurencji a prokonkurencyjna regulacja...', p. 12.

⁴⁹ J. Temple Lang, *The Use of Competition Law...*, p. 3.

Commission. The preliminary assessment, in which the Commission presents its concerns about an undertaking, should enable the undertaking to formulate and present adequate commitments to meet the concerns⁵⁰. In practice however, commitments are negotiated before a preliminary assessment is submitted by the Commission, and this document is usually issued after closing the negotiations between an undertaking and the Commission. This is what occurred in the *Coca-Cola* case⁵¹. Such a procedure is evident and encouraged in the Commission's document on best practices. In the opinion of the Commission, at the first stage of proceedings regarding adoption of a commitment decision, talks about possible solutions should be ended. Only when the Commission is convinced that an undertaking really wants to offer commitments which may effectively alleviate concerns as regards competition, does it issue a preliminary assessment. Addressing a preliminary assessment to an undertaking when the talks about commitments are already closed would seem to constitute a practice not conducive to transparent solutions, but rather one which would allow the Commission to exert pressure on undertakings to incline them to offer unjustified commitments⁵². In such a case, undertakings should refer to a hearing officer⁵³, who is empowered to ensure that undertakings can exercise their procedural rights.

3.2. Access to files

Pursuant to Article 27(2) of Regulation 1/2003 and Articles 15 and 16 of an executive regulation, only the addressees of a statement of objections are granted access to files of the Commission in order to enable them to effectively express their opinions on the preliminary motions of the Commission presented in the notification. The regulatory provisions do not specifically provide that the addressees of a preliminary assessment, prepared by the Commission in proceedings under Article 9 of Regulation 1/2003, have the right of access to case files. Nor is this right contained in an announcement of the Commission on access to case files⁵⁴. The nature of commitment decisions dispels any

⁵⁰ T. K. Giannakopoulos, *Safeguarding Companies' Rights in Competition and Anti-dumping/Anti-subsidies Proceedings*, The Hague, London, New York 2011, p. 263 and following.

⁵¹ O. Armengol, A. Pascual, 'Some reflections on article 9 Commitment decisions in the light of the Coca-Cola case' (2006) 27 (3) *European Competition Law Review* 124–129.

⁵² D. Waelbroeck, 'Le développement en droit européen...', p. 21.

⁵³ Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ [2011] L 275/29, Article 15(1).

⁵⁴ Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No. 139/2004, OJ [2005] C 325/07.

doubts that the case files are one-sided files of an administration body, designed to pre-determine the commitments of an undertaking. This situation is not changed by the fact that, once commitment decisions are adopted, an undertaking cooperates with the Commission. Thus, such an institution should rightly grant access to files to parties to proceedings regarding the adoption of a commitment decision. This right results both from the decisions of European courts⁵⁵ and from Article 41 of Charter of Fundamental Rights, which guarantees to parties the right to good administration. Exercise of the right of access to case files is a basic condition which must be met in order for a party to effectively exercise and defend its interests in administrative proceedings. Without access to case files it is not possible for an undertaking to express its opinion as to legal and factual circumstances which may affect the result of the case, nor to suggest adequate solutions.

4. Rights resulting from principle of legal certainty and legality of the sanction

Issues concerning whether the *ne bis in idem* principle is applicable to commitment decisions, and whether such decisions are binding and to what extent for the courts of Member States and national competition authorities, has never been the subject of a decision of the Court of Justice and arouses controversy in the subject literature⁵⁶. According to recitals 13 and 22 of the Preamble to Regulation 1/2003 ‘commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case’⁵⁷. Additionally, ‘commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty’⁵⁸.

In the opinion of the Commission, ‘recitals 13 and 22 specify that national authorities may thus in principle adopt a prohibition decision regardless of

⁵⁵ T-30/91 *Solvay SA v Commission*, ECR [1995] II-01775. It is necessary to distinguish between the right of access to the file that relates to the administrative procedures, and the right of access to documents having the character of the rules improving the openness of the process of governance in the EU.

⁵⁶ I. Van Bael, J.-F. Bellis, *Competition Law...*, p. 1166; D. Waelbroeck, ‘Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?’, *The Global Competition Law Centre Working Papers Series 01/08*, p. 10; H. Schweitzer, ‘Commitment Decisions under Article 9 of Regulation 1/2003: The Developing EC Practice and Case Law’ (2008) 22 *EUI Working Papers* 24.

⁵⁷ Regulation 1/2003, recital 13.

⁵⁸ Regulation 1/2003, recital 22.

the Commission's commitment decision concerning the same subject matter. Moreover, Article 16 of Regulation 1/2003, according to which national competition authorities and courts must not adopt decisions that run counter to those adopted by the Commission, does not appear to preclude such a finding. The position could arguably be different where a national competition authority or a national court requires an undertaking to carry out actions that conflict with the commitments made binding by the Commission decision, i.e. where the undertaking could not implement the obligations imposed by national authorities without breaching its commitments'. This opinion of the Commission is shared by some commentators⁵⁹, who believe that national authorities may declare either that there never was, or that there still is, an infringement of competition law by an undertaking, and may award damages. Nevertheless, this does not mean that decisions of national courts and competition authorities may question the binding legal effects of commitment decisions and require undertakings to resort to measures that would infringe upon their commitments offered under Article 9 of Regulation 1/2003. In particular, in a commitment decision the Commission does not conclude whether there has been an infringement or that it has stopped, but only that there is no longer a basis for action, and that a given case does not constitute an enforcement priority for the Commission any more. In the opinion of other authors, the adoption of a commitment decision is a guideline for competition authorities and national courts and a signal that there is no need for further actions. They believe that this is the logical result of Article 16⁶⁰ of Regulation 1/2003, and that the adoption via this Regulation of the decentralized application of European competition law can only be effective in a 'one-stop-shop system'⁶¹. In practice, competition authorities of Member States discontinue proceedings in cases in which the Commission adopts a commitment decision. Nonetheless, an undertaking which is a party to a commitment decision cannot be certain to what extent national authorities take into consideration the commitment decision, e.g. whether proceedings will be discontinued or whether a national competition authority might not decide that an infringement has occurred and impose a fine on an undertaking. This raises doubts as to application of the principle of legality of sanction⁶².

⁵⁹ I. Van Bael, J.-F. Bellis, *Competition Law...*, p. 1166; E. Gippini-Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003', [in:] H. Koeck, M. Karollus (eds.), *The Modernisation of European Competition Law*, FIDE Congress, Linz 2008, pp. 401–404.

⁶⁰ Article 16 codifies the judgment of the Court of Justice in case C-344/98 *Masterfoods*.

⁶¹ H. Schweitzer, 'Commitment...', pp. 24–26; D. Waelbroeck, 'Le développement en droit européen...', p. 10 and following.

⁶² For more on this subject, in the broader context of the decentralized application of EU competition law, see: K. Kowalik-Bańczyk, *Problematyka ochrony praw podstawowych w unijnych*

This principle is closely intertwined with the principle of legal certainty. The latter, according to the decisions of European courts⁶³, has two dimensions. The first refers to the prohibition of retroactive effect⁶³ of law in the European Union. The second is related to the need to ensure that European legislation is transparent. In particular, European legal acts may be binding and enforced if they are published, are clear and intelligible, and the way they are applied is be easy to predict⁶⁴. This requirement that European regulations be precise and their application predictable is emphasized when they impose or authorize an institution to impose penalties or administrative sanctions. In such a case, according to the principle of legality of the sanction, the interested parties must have the possibility to unambiguously identify their rights and obligations in order to undertake adequate actions⁶⁵. As regards proceedings concerning the adoption of a commitment decision, this requirement is not met.

5. Right to appeal

The only decision of the Court of Justice regarding commitment decisions occurred as a result of a complaint lodged not by a party to the proceedings leading to the adoption of the decision, but by an interested third party. Thus, it was not determined if undertakings could appeal against a decision in which the Commission accepted and approved commitments which the undertakings themselves offered. Nevertheless, we cannot reject a solution suggested in the literature⁶⁶, according to which, inasmuch as such decisions constitute public law enforcement, concerned undertakings may appeal them to the Court of Justice. A similar situation occurred in the case of commitments offered by undertakings in return for a consent to a concentration. The Court of Justice clearly declared that such undertakings possessed an active title to appear before the court⁶⁷.

The fact that the commitments offered are voluntary may affect the scope of court review. As is pointed out in the literature⁶⁸, addressees of such decisions find it difficult to appeal against a decision which they accepted,

postępowaniach w sprawach z zakresu ochrony konkurencji, Centrum Europejskie Natolin, Warszawa 2010, p. 62 and following.

⁶³ 84/78 *Tomadini v Amministrazione delle Finanze dello Stato*, ECR [1979] 01801; 325/85 *Ireland v Commission*, ECR [1987] 05041; C-301/97 *Netherlands v Council*, ECR [2001] I-08853.

⁶⁴ D. Chalmers, G. Davies, G. Monti, *The Existing Policy Framework. European Union Law: Cases and Materials*, Cambridge 2010, p. 412.

⁶⁵ T-43/02 *Jungbunzlauer AG v Commission*, ECR [2006] II-03435, paras. 71–73, 75–81.

⁶⁶ H. Schwietzer, 'Commitment...', p. 23.

⁶⁷ C-89/85 *Woodpulp*, ECR [1993] I-01307, para. 181.

⁶⁸ D. Waelbroeck, 'Le développement en droit européen...', p. 23.

as the estoppel principle, confirmed in court decisions⁶⁹, makes it impossible for an undertaking to appeal against solutions which they offered voluntarily (*venire contra factum proprium*), unless a business entity acts under duress. For example, in a case regarding control of concentration, the court of first instance (General Court, or GC) ruled that a complaint of an undertaking may be justified only when ‘the notifying parties were arbitrarily forced by the Commission to propose the corrective measure’⁷⁰. A similar solution may be used by European courts in the case of commitment decisions.

The scope of court control (i.e. review) may also limit the wide discretion at the Commission’s disposal when it adopts decisions in the field of competition law, including commitment decisions, if such decisions involve the Commission making complex economic evaluations. In the *Alrosa* decision⁷¹ the Court of Justice established clear limits to appellate review, revoking the decision of the GC. The Court of Justice concluded that the ‘General Court put forward its own assessment of complex economic circumstances and thus substituted its own assessment for that of the Commission, thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of its assessment’.

In the case of commitment decisions the scope of discretion of the Commission is very broad. In the first place, Regulation 1/2003 does not set forth the cases in which the Commission should adopt commitment decisions. Article 9 of the Regulation provides only that ‘where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings’. The only guideline in this regard is included in recital 13 of the Preamble to Regulation 1/2003, which says that ‘commitment decisions are not appropriate in cases where the Commission intends to impose a fine’. As a result of the wording of this recital the Commission, forthwith after Regulation 1/2003 came into force, decided that ‘this excludes commitment decisions in hardcore cartel cases’⁷². The Commission confirmed its position in 2010 in a document which established best practices as regards application of Articles 101 and 102 TFEU⁷³. This means that in commitment decisions the Commission may

⁶⁹ C-453/99 *Crehan v Courage Ltd.*, ECR [2001] I-06297.

⁷⁰ T-282/02 *Cementbouw Handel & Industrie BV v Commission*, ECR [2006] II-00319, para. 319; confirmed by ECJ in: C-202/06 P *Cementbouw Handel & Industrie BV v Commission*, ECR [2007] I-12129.

⁷¹ C-441/07 P *Alrosa*, para. 67.

⁷² European Commission, ‘Commitment decisions...’.

⁷³ European Commission, ‘Best Practices...’, p. 23

not impose a fine on an undertaking. A fine can be imposed only when the Commission decides that European competition law was infringed⁷⁴. Based on the wording of recital 13 of the Preamble to Regulation 1/2003, we cannot marginalize the meaning of Article 9 of Regulation 1/2003 and conclude that it may be used by the Commission only to decide in matters regarding less serious infringements of competition law. A basic assumption of the decentralized application of Articles 101 and 102 TFEU, as implemented by Regulation 1/2003, is that the Commission is entrusted with the most important matters from the area of competition law. In paragraph 12 of 'Best Practices' the Commission declares that it concentrates 'its enforcement resources on cases in which it appears likely that an infringement could be found, in particular on cases with the most significant impact on the functioning of competition and risk of consumer harm, as well as on cases which are relevant with a view to defining EU competition policy and/or to ensuring coherent application of Articles 101 and/or 102 TFEU'. Still the literature⁷⁵ is right to emphasize that the Commission, when adopting a commitment decision, should take into consideration the fact that, owing to its nature, not all the same goals can be achieved which could be accomplished by an infringement decision. Decisions adopted pursuant to Article 7 of Regulation 1/2003 are not limited to putting an end to the infringement of competition law, but also may lead to the public stigmatizing of an undertaking guilty of infringement, which also has a preventive effect, and/or depriving an undertaking of illegally gained profits. An infringement decision also facilitates later claims for damages filed by entities which suffered losses as a result of such infringement⁷⁶. However, European law does not contain any guidelines as to when the Commission may accept voluntary commitments of undertakings as binding, leaving complete discretion in this regard to the Commission.

Also control over the proportionality of commitment decisions adopted by the Commission is limited. In the *Alrosa* case the Court of Justice, revoking a GC decision of a different opinion, concluded that, pursuant to Article 9 of Regulation 1/2003 'the Commission is not required to make a finding of an infringement, its task being confined to examining, and possibly accepting, the commitments offered by the undertakings (...)'. Application of the principle of proportionality by the Commission in the context of Article 9 of Regulation 1/2003 is confined to verifying that the commitments in question address the concerns the Commission expressed to the undertakings involved and that

⁷⁴ I. Van Bael, J.-F. Bellis, *Competition Law...*, p. 1160.

⁷⁵ W. P. J. Wils, 'Settlements...', p. 349.

⁷⁶ W.P. J. Wils, 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 31(3) *World Competition* 10, available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=456087.

they have not offered less onerous commitments that also address those concerns adequately⁷⁷. The burden of formulating proportional commitments is thus transferred to undertakings, and the Commission's decision accepting those commitments as binding may be challenged only if the 'Commission's assessment is manifestly incorrect'⁷⁸. This surface solution does not address the underlying reality, mainly that the pressures to which undertakings may be subjected during the commitment procedure may induce them to offer disproportionate and too far-reaching commitments⁷⁹. The decision adopted by the GC (court of first instance) in the *Arosa* case seems more justified. According to it, the proportionality of commitment decisions should be examined the same as in the case of decisions adopted under Article 7 of Regulation 1/2003. This means 'that the burdens imposed on undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed'⁸⁰. In the opinion of the GC it does not matter that, in the case of proceedings under Article 9 of Regulation 1/2003, the case concerns only a potential infringement, which was not proved by the Commission. Commitment decisions should be adopted by the Commission only in order to bring the potential infringement of Article 101 or 102 TFEU to an end and use only such means as are proportional and necessary to end the potentiality of such an infringement. A situation, accepted by the Court of Justice, which allows for acceptance by the Commission of commitments more severe for an undertaking, should be viewed critically. Burdensome commitments may lead to unnecessary interference in the market and may affect not only an undertaking, which may well have committed an infringement, but also its competition, thus affecting the market structure. It may lead, for example, to strengthening of competition on the market in the short run, but may inhibit it in the long run or, when an obligation to provide access to a network is imposed, may lead to considerable slowing of an investment in infrastructure or in innovative technological solutions, which in the end may bring negative consequences to consumers and end users. Commitments accepted in a decision may even lead to limiting competition on a given market, if they prohibit undertakings from conducting activities which are permissible under competition law and constitute legitimate business conduct⁸¹.

⁷⁷ C-441/07 P *Arosa*, paras. 40 and 41.

⁷⁸ C-441/07 P *Arosa*, para. 42.

⁷⁹ W.P.J. Wils, 'Settlements...', p. 10.

⁸⁰ T-170/06 *Arosa Company Ltd v Commission*, ECR [2007] II-02601, para. 102.

⁸¹ F. Wagner-von Papp, 'Best and even better'..., p. 19.

IV. Polish perspective

The institution similar to the one established by Article 9 of Regulation 1/2003 was introduced into Polish competition law and has been in force since 1 May 2004⁸². Nowadays it is regulated by Article 12 of the Act of 16 February 2007 on competition and consumer protection⁸³. As follows from the argumentation to the draft of amendments to the competition and consumer protection law⁸⁴, the institution of commitment decisions was introduced into Polish law in order to ‘make actions of the Office more effective – its main task is to protect competition, not to punish undertakings. The President of the Office of Competition and Consumer Protection (UOKiK) may accept commitments of undertakings (at the same time abandoning further proceedings, passing a decision which would declare existence of certain practice, and imposing a penalty) if it is beneficial for competition (in other words, if a certain practice ceases immediately, it is more beneficial for competition than going through proceedings and imposing a penalty on an undertaking)’. The introduction of commitment decision to the Polish legislation also allows to align procedural position of the undertakings before the Polish competition authority and before the Commission⁸⁵.

The literature⁸⁶ describes four stages of the proceedings regarding adoption of a commitment decision. At the first stage antitrust proceedings are instigated and conducted. Some authors⁸⁷ suggest that the initiation of the proceedings makes the existence of the infringement of Polish or European competition rules plausible. Article 12 of the Act on competition and consumer protection provides that an infringement does not have to be proved, its existence must nevertheless be seen as more probable than any other alternative solution⁸⁸. At the second stage of the proceedings the UOKiK President notifies an undertaking of plausibility of the infringement. At the

⁸² Article 11a of the Act on Competition and Consumer protection of 15 December 2000 (Journal of Laws 2000 No. 122, item 1319) as amended by the modification Act of 16 April 2004 (Journal of Laws 2004 No. 93, item 891).

⁸³ Journal of Laws 2007, No. 50, item 331, as amended.

⁸⁴ Diet paper No. 2561 of 20 February 2004.

⁸⁵ T. Koziel, ‘Commitment Decisions under the Polish Competition Act – Enforcement Practice and Future Perspectives’ (2010) 3(3) *YARS* 76.

⁸⁶ K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2008, p. 432 and following.

⁸⁷ C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 311.

⁸⁸ A. Gill, M. Swora, ‘Decyzja zobowiązująca jako metoda rozwiązywania sporów w postępowaniu przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów’ (2005) 3 *Kwartalnik Prawa Publicznego* 128.

third stage an undertaking prepares a commitment offer. At the fourth stage of the application of Article 12 of the competition and consumer protection law the UOKiK President passes a commitment decision which obliges an undertaking to fulfil the commitments offered. Thus, basic assumptions of the Polish regulation are clearly modelled on European law solutions. In this regard the doctrine⁸⁹ points out Europeanization of the Polish competition and consumer protection law.

Whereas, as regards rights of undertakings which are parties to proceedings regarding adoption of a commitment decision there are several differences between European and Polish law. Most of all, Polish law does not provide for an undertaking to be notified of possible infringement, or for any form of such a notification. Preliminary assessment was not introduced into Polish law. It does not seem appropriate as lack of a good knowledge of reservations of the UOKiK President about an undertaking makes it impossible for an undertaking to prepare adequate commitments. Additionally, Polish legislation, unlike the European one, does not provide that the competition authority should not issue commitment decisions in hard-core cartel cases. Thus, the UOKiK President has complete discretion as to what types of cases can be closed by passing a commitment decision⁹⁰. Polish law also does not clearly provide what significance a commitment decision of the Polish competition authority has for the competition authorities operating in other Member States and for the Commission. It is clear from the resolution of the Supreme Court that for common courts a commitment decision does not constitute a prejudication. It means that a common court may make its own independent arrangements as regards declaration that a certain practice is limiting for competition⁹¹. This is due to the fact that the decision indicated in Article 12 of the competition and consumer protection law is based on plausibility of the infringement of the competition and consumer protection law, but not on proof. Thus, Polish law, like European law, does not correspond to standards as regards application of the principle of legal certainty, and, in particular, legality of sanctions.

A party to commitment decision proceedings has the possibility to appeal against a decision of the UOKiK President to the Court of Competition and Consumer Protection (SOKiK). The Court has a wide range of possibilities at its disposal as regards control over decisions of the UOKiK President. It has

⁸⁹ K. Mrzygłód, 'Commitment decisions: A Polish perspective' (2010) 3 *Global Antitrust Review* 103.

⁹⁰ D. Miąsik, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, s. 740.

⁹¹ M. Sieradzka, 'Dochodzenie roszczeń za naruszenie unijnych i krajowych reguł konkurencji a kwestie prejudycjalności rozstrzygnięć organów ochrony konkurencji' (2010) 12 *Przegląd Prawa Handlowego* 47; T. Kozieł, 'Commitment Decisions'..., p. 87.

the same possibilities to resolve a matter as first instance civil courts under the Code of Civil Procedure⁹². Therefore, it may decide as to the essence of the matter and change the decision appealed against in whole or in part. Decisions of the Court may be appealed against as any other civil decision (appeal, complaint, and cassation of decisions passed by a second instance court)⁹³. Proceedings before the Court are conducted pursuant to the Code of Civil Procedure in business lawsuits. Apart from appeals against decisions of the UOKiK President, the Court examines complaints against certain regulatory decisions [of the President of Office of Electronic Communications (UKE), President of Energy Regulatory Office (URE), and President of Railway Transport Office (UTK)]⁹⁴. The solution adopted in Polish law should be assessed positively. Firstly, because the Court of Competition and Consumer Protection is able to decide as to the essence of the matter. It means that it is able not only to revoke a decision appealed against, but also to make changes if it deems it appropriate. Secondly, the Court is a specialist authority, which may draw on its decision-making experience. This is particularly important when passing decisions in cases regarding competition protection, which requires specialist knowledge.

V. Conclusions

In the course of proceedings leading to the adoption of a commitment decision, undertakings are not able to exercise their appropriate rights in order to ensure protection of their interests in negotiations with the European Commission. This is the result of the strong negotiating position of the Commission and the fact that it acts both as a prosecutor and decision-renderer. Additionally, despite the fact that an undertaking concerned has the right to appeal against this decision to the European courts, the scope of such review is so narrow that it does not guarantee that an undertaking is protected against offering too many commitments. As a result, a change in the jurisdictional approach is called for, which would enable effective control (review) by the EU courts as regards the proportionality of commitments imposed by the

⁹² Code of Civil Procedure of 17 November 1964 (Journal of Laws 1964 No. 43, item 296, as amended).

⁹³ The change in the Code of Civil Procedure in this regard was introduced following a decision of the Constitutional Tribunal on incomppliance of Article 479³¹ with the Constitution in the judgment of 12 June 2002 (Journal of Laws 2002 No. 84, item 764); T. Woś, 'Wstęp', [in:] T. Woś (ed.), *Postępowanie sądownoadministracyjne*, Warszawa 2004, p. 23.

⁹⁴ T. Skoczny, *Ochrona konkurencji...*, p. 26.

Commission under Article 9 of Regulation 1/2003. The approach adopted in the Polish antitrust law requiring the UOKiK President to demonstrate the existence of the infringement plausible allows to be more specific about possible infringement. This makes easier to assess the proportionality of the remedies imposed. Moreover, when adopting commitment decisions the Commission, in order to avoid allegations of abuse of discretion, should very carefully, in a self-limiting manner, take into consideration procedural efficiency and legality and in particular it should issue guidelines for the application of Article 9 of Regulation 1/2003. Also, an increase in transparency of procedures is called for (for example, the Commission should not demand from an undertaking to present, even preliminarily, commitments, before it submits a preliminary assessment), as well as an increase in transparency of legal consequences of a commitment decision. Commitment decisions should lead to the unambiguous determination of the rights and obligations of an undertaking. In this connection, the issue to what extent they are binding for national competition authorities and courts should be clearly provided for by European legislation.

The best solution, which would guarantee protection of an undertaking's rights and interests in antitrust proceedings, and not only under Article 9 of Regulation 1/2003, would be to grant the Commission the powers as regards explanatory proceedings concerning facts and law, but not vest it with the power to adopt final decisions. Cases would be brought to the court by the Commission, and the court would issue the first binding decision⁹⁵. In the case of commitment decisions, the Commission would conduct negotiations, but a decision which would make negotiated commitments binding would have to be approved by an independent court, making an objective assessment. Another possible solution, that functions in the Polish competition law, is to create a specialized European court which has broad competences to review decisions of the Commission and to rule on the merits. However, these far-reaching proposed changes would not be possible without amending the Treaties.

Literature

- Armengol O., Pascual A., 'Some reflections on article 9 Commitment decisions in the light of the Coca-Cola case' (2006) 27(3) *European Competition Law Review*.
- Banasiński C., Krasnodębska-Tomkiel M., 'Zastosowanie środków prawnych prawa antymonopolowego na szczególnych rynkach regulowanych' [Application of antimonopoly law remedies in particular regulated markets] (2009) 1 *Przegląd Prawa Handlowego*.

⁹⁵ J. Schwarze, 'Europäische Kartellbussgelder im Lichte übergeordneter Vertrags und Verfassungsgrundsätze' (2009) 44 *Europarecht* 171–199.

- Banasiński C., Piontek E. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2009.
- Cavicchi P., 'The European Commission's discretion as to the adoption of Article 9 commitment decisions: Lessons from Alrosa', Discussion Paper No. 3/11, Institute for European Integration, Europa-Kolleg Hamburg 2011.
- Chalmers D., Davies G., Monti G., *The Existing Policy Framework. European Union Law: Cases and Materials*, Cambridge 2010.
- Commission's XIVth *Report on Competition Policy* 1984.
- Dolmans M., Graf T. and Little D.R., 'Microsoft's browser choice commitments and public interoperability undertaking' (2010) 31(7) *European Competition Law Review*.
- Ezrachi A., *EU Competition Law. An Analytical Guide to the Leading Cases*, Oxford, Portland, Oregon 2010.
- Federico Di G., 'The Impact of the Lisbon Treaty on EU Antitrust Enforcement: Enhancing procedural Guarantees Through Article 6 TEU' (2010) 4 *Il diritto dell'Unione Europea*.
- Giannakopoulos T. K., *Safeguarding Companies' Rights in Competition and Anti-dumping/ Anti-subsidies Proceedings*, The Hague, London, New York 2011.
- Gill A., Swora M., 'Decyzja zobowiązująca jako metoda rozwiązywania sporów w postępowaniu przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów' ['Commitment decision as a mean of resolution of disputes before the President of the Office of Competition and Consumer Protection'] (2005) 3 *Kwartalnik Prawa Publicznego*.
- Gippini-Fournier E., 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003', [in:] Koeck H., Karollus M. (eds.), *The Modernisation of European Competition Law*, FIDE Congress, Linz 2008.
- Jones A., Sufirin B., *EU Competition Law. Text, cases, and Materials*, Oxford 2011.
- Kohutek K., Sieradzka M., *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2008.
- Kowalik-Bańczyk K., *Problematyka ochrony praw podstawowych w unijnych postępowaniach w sprawach z zakresu ochrony konkurencji [The issues of the protection of fundamental rights in EU competition proceedings]*, Centrum Europejskie Natolin, Warszawa 2010.
- Kozieł T., 'Commitment Decisions under the Polish Competition Act– Enforcement Practice and Future Perspectives' (2010) 3(3) *YARS*.
- Lomholt F., 'The 1984 IBM Undertaking, Commission's monitoring and practical effects' (1998) 3 *Competition Policy Newsletter* 7.
- Miąsik D., [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2009.
- Mrzygłód K., 'Commitment decisions: A Polish perspective' (2010) 3 *Global Antitrust Review*.
- Schwarze J., 'Europäische Kartellbussgelder im Lichte übergeordneter Vertrags und Verfassungsgrundsätze' (2009) 44 *Europarecht*.
- Schweitzer H., 'Commitment Decisions under Article 9 of Regulation 1/2003: The Developing EC Practice and Case Law' (2008) 22 *EUI Working Papers*.
- Sieradzka M., 'Dochodzenie roszczeń za naruszenie unijnych i krajowych reguł konkurencji a kwestie prejudycjalności rozstrzygnięć organów ochrony konkurencji' ['Pursuing Claims as Regards Infringement of European and Polish Competition Rules v Prejudiciality of Competition Authorities' Decisions'] (2010) 12 *Przegląd Prawa Handlowego*.
- Skoczny T., 'Ochrona konkurencji a prokonkurencyjna regulacja sektorowa' [Competition protection and procompetitive sector-specific regulation'] (2004) 3 *Problemy Zarządzania*.

- Sousa Ferro M., 'Committing to commitment decisions – unanswered questions on Article 9 decisions' (2005) 26(8) *European Competition Law Review*.
- Temple Lang J., 'Commitment decisions under Regulation 1/2003: Legal aspects of a new kind of competition decision' (2003) 24(8) *European Competition Law Review*.
- Temple Lang J., *The Use of Competition Law Powers for Regulatory Purposes*, Regulatory Policy Institute, Oxford 2007.
- Temple Lang J., 'Three Possibilities for Reform of the Procedure of the Commission in Competition Cases under Regulation 1/2003', [in:] Baudenbacher C. (ed.), *Current Developments in European and International Competition Law*, Basel 2011.
- Van Bael I., Bellis J.-F., *Competition Law of the European Community*, Austin, Boston, Chicago, New York 2010.
- Waelbroeck D., 'Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?' (2008) 1 *The Global Competition Law Centre Working Papers Series*.
- Wils W. P. J., 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation 1/2003' (2006) 29(3) *World Competition*.
- Wils W.P. J. 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 31(3) *World Competition* 10, available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=456087 .
- Woś T., 'Wstęp' ['Introduction'], [in:] Woś T. (ed.), *Postępowanie sądownoadministracyjne [Judicial Administrative Proceedings]*, Warszawa 2004.

Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?

by

Bartosz Turno* and Agata Zawłocka-Turno**

CONTENTS

- I. Introduction
- II. Current scope of LPP and PASI
- III. The approach of EU Institutions to criticism of the current scope of LPP and PASI (prior to the Lisbon Treaty)
- IV. Impact of Charter and EU's prospective accession to Convention on level of protection with respect to LPP and PASI
- V. Proposals for significant changes regarding LPP and PASI – full compliance with ECtHR standards
- VI. Proposals for minor improvements to LPP and PASI
- VII. Conclusions

Abstract

Is there, in the context of the recent developments related to the Lisbon Treaty, a need for substantial change with respect to the scope and application of legal professional privilege (LPP) and the privilege against self-incrimination (PASI) in competition law proceedings before the European Commission? To answer this question this article first briefly describes the current scope of LPP and PASI in EU competition law enforcement proceedings. This is followed by a presentation

* Bartosz Turno, LL.M. (King's College London), PhD candidate at the Faculty of Law and Administration, Adam Mickiewicz University in Poznań, senior associate at WKB Wierciński, Kwieciński, Baehr.

** Agata Zawłocka-Turno, legal advisor, LL.M. (King's College London), head of Industry, Energy and Services Unit of Competition Protection Department at Office of Competition and Consumer Protection. The views expressed in this article are the author's personal views and should not be attributed to the Office of Competition and Consumer Protection.

of the impact that the binding effect of the Charter of Fundamental Rights of the European Union (Charter) and the EU's prospective accession to the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) may have on LPP and PASI. This analysis includes reasons why it may be necessary for the Commission and the EU Courts to reconsider the current scope of the privileges, and examines what could be considered as significant changes in this respect. In the event arguments for radical reform do not find the requisite political support, the article elaborates some nuanced improvements which could be implemented.

Résumé

Dans le contexte des changements récents liés au traité de Lisbonne, est-il nécessaire de procéder à des modifications substantielles par rapport au champ d'application du principe de confidentialité des communications entre avocats et clients (LPP) et du droit de ne pas contribuer à sa propre incrimination (PASI) dans les procédures de concurrence menées par la Commission européenne ? Pour répondre à cette question, le présent article donne d'abord une définition sommaire du champ actuel d'application du principe de confidentialité des communications entre avocats et clients et du droit de ne pas contribuer à sa propre incrimination lors d'une procédure communautaire de concurrence. On présente ensuite l'impact possible que peuvent avoir sur les principes LPP et PASI le caractère juridiquement obligatoire de la Charte des droits fondamentaux de l'Union européenne ainsi que l'adhésion prochaine de l'Union européenne à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales. L'analyse tient compte des causes pour lesquelles il peut se montrer nécessaire que la Commission et les juges communautaires révisent le champ actuel d'application des principes susmentionnés et qu'ils étudient ce qui pourrait être considéré comme une modification substantielle en la matière. Dans une situation où les arguments à l'appui d'un changement radical quant à l'approche de ces principes ne trouveraient pas le soutien politique nécessaire, l'article propose certaines « améliorations » susceptibles de mise en œuvre.

Classifications and key words: undertaking's rights of defence; legal professional privilege; privilege against self-incrimination; fundamental rights in EU competition proceedings.

I. Introduction

The entry into force on December 1, 2009 of the Lisbon Treaty¹ made the Charter of Fundamental Rights of the European Union² (hereafter, the Charter) legally binding in accordance with Article 6(1) of the Treaty on European

¹ OJ [2007] C 306/50/1.

² OJ [2010] C 83/02.

Union³ (hereafter, TEU). Article 6(2) TEU also opened up the possibility for the European Union's prospective accession to the Convention for the Protection of Human Rights and Fundamental Freedoms⁴ (hereafter, the Convention). This paper attempts to answer the question whether these developments justify a substantial change in the approach of the European Commission and EU Courts to the rights of defence of undertakings charged with violations of EU competition law, particularly their rights to claim legal professional privilege (hereafter, LPP) and the privilege against self-incrimination (hereafter, PASI).

Enforcement of the EU competition rules, as established in Articles 101 and 102 of the Treaty on the Functioning of the European Union⁵ (hereafter, TFEU), and in particular the effective enforcement of the provisions of EU competition law prohibiting cartels, requires that enforcement organs be equipped with extensive investigative powers⁶. However these wide investigative powers, as established in Regulation 1/2003⁷, are limited by the fundamental rights of the undertakings charged with violations, which now stem from the Charter and previously formed part of the general principles of EU law⁸. One category of such fundamental rights are an undertaking's rights of defence which derive from Article 6 of the Convention (right to a fair trial, also expressly recognised as a general principle of EU law⁹), as well as from Article 48(2) of the Charter. These rights of defence include LPP and PASI¹⁰, which play an especially important role in the investigative phase of the Commission's enforcement proceedings and must be respected already at the preliminary inquiry stage¹¹.

³ OJ [2010] C 83/01.

⁴ Moreover, the EU's accession is foreseen by Article 59 of the Convention, as amended by Protocol no. 14. The latter was recently ratified by all Contracting States (including Russia). On July 7, 2010 official talks started on the EU's accession to the Convention – see press release-545(2010), available at <http://www.coe.int/>.

⁵ OJ [2010] C83/47.

⁶ See, e.g., C.S. Kerse, N. Khan, *EC Antitrust Procedure*, 5th ed., London 2005, paras. 3.005–3.070.

⁷ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

⁸ W.J.P. Wils, 'EU Anti-trust Enforcement and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter on Fundamental Rights of the EU and the European Convention on Human Right' (2011) 34(2) *World Competition* 207; see also cases e.g., 29/69 *Erich Stauder v City of Ulm*, ECR [1969] 419, para. 7; C-4/73 *Nold*, ECR [1974] 491, para. 13 and C-7/98 *Krombach*, ECR [2000] I-1935, paras. 25–26.

⁹ See, e.g., case C-185/95 P *Baustahlgewebe*, ECR [1998] I-8417, paras. 20–21.

¹⁰ See, e.g., K. Dekeyser, C. Gauer, 'The New Enforcement System For Articles 81 And 82 And The Rights Of Defence', [in:] B.E. Hawk (ed.) *Annual Proceedings of the Fordham Corporate Law Institute*, New York 2005, pp. 550–552.

¹¹ Joined cases 46/87 and 227/88 *Hoechst*, ECR [1989] 02859.

II. Current scope of LPP and PASI

In short, LPP amounts to a rule that the Commission cannot exercise its powers to take by force, or compel the production of, lawyer-client communications which: (1) are made for the purpose and in the interest of the undertaking's rights of defence, (2) were exchanged in relation to the subject-matter of the Commission's proceedings under Article 101 or 102 TFEU, (3) emanate from a qualified lawyer (being a member of a Bar or Law Society) who is entitled to practise his or her profession in one of the EU Member States, regardless of the country in which the client operates, and (4) emanate from an external, independent lawyer (not bound to his or her client by a relationship of employment)¹². If these conditions are met the communication remains confidential and the Commission has no access to it. However, under existing rules, in-house lawyers are explicitly excluded from claiming LPP, irrespective of whether they are members of a Bar or Law Society or whether they are subject to professional discipline and Codes of Ethics under national law.

The scope of PASI was defined by the European Court of Justice (hereafter, ECJ) in *Orkem*¹³. The ECJ denied the existence of an absolute right to remain silent; however, it held that Article 6 of the Convention may be invoked by undertakings investigated by the Commission and ruled that an undertaking cannot be compelled by the Commission to admit involvement in an infringement

¹² For the exact scope of the 'EU version of LPP' and the relevant procedures that apply during dawn raids (including 'the sealed envelope procedure') see cases: 155/79 *AM&S*, ECR [1982] 1575, paras. 21–28; T-30/89 *Hilti*, ECR [1990] II-163, paras. 13–16 and 18; T-125/03 and T-253/03 *Akzo and Akcros*, [2007] ECR II-03523, paras. 80–86, 120–123; C-550/07 P *Akzo and Akcros* (not yet reported), paras. 40–50. See also: Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ [2011] C 308/06, paras. 51–58; E. Gippini-Fournier, 'Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the cursory Glance', [in:] B.E.Hawk (ed.) *Annual Proceedings...*, pp. 587–658; G. Di Federico, 'Case C-550/07P, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission, Judgement of the European Court of Justice (Grand Chamber) of 14 September 2010' (2011) 48(2) *Common Market Law Review* 581–602. As regards discussion on LPP in Poland see: B. Turno, 'Zagadnienie tajemnicy adwokackiej na gruncie prawa konkurencji', [in:] C. Banasiński, M. Kępiński, B. Popowska, T. Rabska (eds.), *Aktualne problemy polskiego i europejskiego prawa ochrony konkurencji*, Warszawa 2006, pp. 172–189; B. Turno, 'Ciąg dalszy sporu o zakres zasady legal professional privilege – glosa do wyroku SPI z 17.09.2007 r. w połączonych sprawach: T-125/03 oraz T-253/03 *Akzo Nobel Chemicals Ltd i Akcros Chemicals Ltd przeciwko Komisji WE*' (2008) 6 *Europejski Przegląd Sądowy* 43–47; B. Turno, 'Prawnik prawnikowi nierówny?' *Rzeczpospolita* of 24 November 2010; M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, pp. 229–235.

¹³ 374/87 *Orkem*, ECR [1989] 3283.

of EU competition rules, as it is incumbent on the Commission to prove that. Nevertheless, the Commission 'is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and if necessary such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or against another undertaking, the existence of anticompetitive conduct'¹⁴. The *Orkem* principle, encompassing not an absolute right to remain silent but a 'restricted' right not to incriminate oneself, has been upheld and subsequently developed by the ECJ¹⁵ and by the General Court of the EU (hereafter, GC)¹⁶. The present state of PASI is summed up in recital 23 of Regulation 1/2003¹⁷.

III. The approach of EU institutions to criticism of the current scope of LPP and PASI (prior to Lisbon Treaty)

For the last few years, the Commission and the EU Courts have been facing mounting criticism regarding the alleged lack of compliance, in the institutional and procedural framework in which fines are imposed, with the Convention and the standards set forth by the European Court of Human Rights (ECtHR)¹⁸. In response, EU institutions have consistently claimed that, regardless of one's

¹⁴ 374/87 *Orkem*, paras. 26-41. See also W.P.J. Wils, 'Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26(4) *World Competition* 574-578; B. Turno, 'Prawo odmowy przekazania informacji służącej wykryciu naruszenia reguł konkurencji w orzecznictwie Europejskiego Trybunału Sprawiedliwości' (2009) 3 *Ruch Prawniczy Ekonomiczny i Socjologiczny* 31-48; M. Bernatt, *Sprawiedliwość proceduralna...*, pp. 187-191.

¹⁵ Cases: 27/88 *Solvay&Cie*, ECR [1989] 3355, paras. 23-37; C-60/92 *Otto BV v Postbank NV*, ECR [1993] I-05683, paras. 11-12; C-301/04P *SGL Carbon*, ECR [2006] I-5915, paras. 42-49.

¹⁶ Cases: T-34/93 *Société Générale*, ECR [1993] II-545, para. 74; T-305/94 *Limburgse Vinyl Maatschappij*, ECR [1999] II-931, para. 448; T-112/98 *Mannesmannröhren-Werke*, ECR [2001] II-729, paras. 65-67, 77-78; T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01, T-252/01 *Tokai Carbon*, ECR [2004] II-1181, para. 403.

¹⁷ Although the *Orkem* principle seems to be straightforward, its practical application is always extremely problematic - F. Arbault, E. Sakkers, 'Cartels', [in:] J. Faull, A. Nikpay (eds.), *The EC Law of Competition*, 2nd ed., 2007, pp. 865-866.

¹⁸ See, e.g., D. Slater, S. Tomas, D. Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?' (2009) 5(1) *European Competition Journal* 97-143; I.S. Forrester, 'Due process in EC competition cases: a distinguished institution with flawed procedures' (2009) 34(6) *European Law Review* 817-843; J. Schwarze, R. Bechtold, W. Bosch, 'Deficiencies in European Community Competition Law. Critical analysis of the current practice and proposals for change' September 2008, available at <http://www.gleisslutz.com/en/publications/byyear.html?year=2008&offset=1>; A. Riley, 'The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?' CEPS Special Report/January 2010, available at <http://www.ceps.eu>.

views on the development of EU competition law over the last 30 years and the developments in the substantial and largely consistent ECtHR case-law¹⁹, the protection of an undertakings' rights of defence, including the scope of LPP and PASI within EU competition proceedings (which according to EU institutions are administrative in nature, not criminal²⁰), is in compliance with these standards²¹. Thus, so far they have denied that there is a need for any modifications. Moreover, both the Commission and the EU Courts have expressed fears that if a broader scope were granted to these two rights, the Commission's powers of investigation would be jeopardised, making antitrust enforcement at the EU level inefficient²². In addition, the ECtHR in *Bosphorus*²³ concluded that the EU system of protection can be considered

¹⁹ See, e.g., cases: *Engel*, App. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, para. 82 and *Öztürk*, App. no. 8544/79, para 53, which established an autonomous meaning of criminal charges; *Niemitz*, App. no. 13710/88, para 29 and *Société Colas Est*, App. no. 37971/97, paras. 40–41, which held that the Convention is applicable not only to natural persons but also to undertakings; *S v Switzerland*, App. no. 12629/87, para. 48, *Campbell*, App. no. 13590/88, para. 46 and *AB v The Netherlands*, App. no. 37328/97, paras. 53, 55, 86, *Nikula v Finland*, App. no. 31611/96, para. 45, in which the ECtHR favoured an extensive scope of protection as regards lawyer-client communications; *Funke*, App. no. 10828/84, paras. 41–44 and *Saunders*, App. no. 43/1994/490/572, paras. 68–69, 71, 74, which allow for an almost absolute (unrestricted) right to remain silent.

²⁰ This issue is central to the dispute between the Commission and undertakings and their counsels. The latter characterise the Commission's competition proceedings as having a criminal law character leading directly to the imposition of criminal sanctions (within the autonomous meaning for the purpose of application of the Convention) – see M. Król-Bogomilska, 'Kary pieniężne w polskim prawie antymonopolowym na tle europejskiego prawa wspólnotowego' (1998) 7 *Państwo i Prawo* 50–53; K. Kowalik-Bańczyk, *The issues of the protection of fundamental rights in EU competition proceedings*, z. 39, Centrum Europejskie Natolin, Warszawa 2010, pp. 98–114; M. Bernatt, 'Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku (na tle art. 6 EKPC)' (2012) 1 *Państwo i Prawo* 51–59.

²¹ See, e.g., cases: C-301/04 P *SGL Carbon*; T-99/04 *AC-Treuhand* ECR [2008] II-1501, para 113. See also N. Kroes, 'Antitrust and State Aid Control – The Lessons Learned', SPEECH/09/408, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/408&format=HTML&aged=0&language=EN&guiLanguage=en>, pp. 2–5.

²² See, e.g., cases T-305/94 *Limburgse Vinyl Maatschappij*, para. 274; T-112/98 *Mannesmannröhren-Werke*, para. 78, in which the GC held that 'the Convention is not part of the Community law'; T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01, T-252/01 *Tokai Carbon*, para. 406. Analysis of these decisions gave rise to arguments that the lack of clarity as to whether EU courts consider themselves bound by ECtHR interpretations is one of the major drawbacks of the status of the Convention in EU law (at that time). It is argued that EU Courts are inconsistent and their application of the Convention and ECtHR case-law has differed: sometimes the test applied regarding the rights of defence is that established by the ECtHR, other times a more specific EU standard is used – O.J. Einarsson, 'EC Competition Law and the Right to a Fair Trial', [in:] P. Eeckhout, T. Tridimas (eds.), *Yearbook of European Law*, OUP 2006, pp. 558–559; J. Callewaert, 'The European Convention on Human Rights and European Union: a long way to harmony' (2009) 6 *European Human Rights Law Review* 775.

²³ App. no. 45036/98, paras. 159, 165.

equivalent to that provided for in the Convention²⁴. In *Jussila*²⁵ the ECtHR held that ‘there are clearly criminal charges of different weight’, and that competition law does not belong to ‘traditional categories of criminal law’ but falls outside ‘the hard core of criminal law’. Consequently, it is claimed that ‘criminal-head guarantees will not necessarily apply with their full stringency’ in relation to the protection of rights of defence in the course of the Commission’s competition law enforcement proceedings²⁶. Finally, although the ECtHR has recently confirmed that competition law could be considered penal and subject to the protections afforded by Article 6 of the Convention (with the proviso however that the application of protections may be different than in hard core criminal procedures), it also held that a sufficiently extensive review by an independent court of an administrative competition enforcement system – such as that in operation at EU level – may satisfy the requirements of Article 6 of the Convention²⁷.

IV. Impact of the Charter and the EU’s prospective accession to the Convention on the level of protection with respect to LPP and PASI

Having in mind the above mentioned arguments and case-law, note that the Charter has recently become legally binding in its entirety, and its status has been raised to equal to the Treaties. Also, as a result of the EU’s prospective accession to the Convention, ECtHR case-law will soon become directly applicable by the EU institutions and the Convention will also become part of EU law (and not just part of the general principles of EU law as is now considered)²⁸. Therefore it becomes debatable whether, in this new post-Lisbon legal order, the Commission’s enforcement procedures, and in particular

²⁴ However, it was rightly pointed out that ‘equivalent protection’ to the ECtHR means ‘protection comparable to that which the Convention provides, but not necessarily identical protection’ – J.P. Costa, ‘The Relationship between the European Convention on Human Rights and European Union Law – A Jurisprudence Dialogue between the European Court of Human Rights and the European Court of Justice’, Lecture at KCL, 7th October 2008, available at http://www.ECtHR.coe.int/NR/rdonlyres/DA4C4A2E-0CBE-482A-A205-9EA0AA6E31F6/0/2008_Londres_King_s_College_7_10.pdf, p. 6.

²⁵ App. no. 73053/01, paras. 30, 43. See also *Kammerer v Austria* App. no. 32435/06, para. 27.

²⁶ W.P.J. Wils, ‘The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights’ (2010) 33(1) *World Competition* 5–29; F. Castillo de la Torre, ‘Evidence, Proof and Judicial Review in Cartel Cases’ (2009) 32(4) *World Competition* 567–578, but contra, see A. Riley, ‘The Modernisation...’, pp. 11–16.

²⁷ *Menarini v. Italy*, App. no. 43509/08, see also: M. Bernatt, ‘Prawo do rzetelnego...’, p. 61.

²⁸ See J.P. Costa, ‘The Relationship...’, p. 4.

its approach towards LPP and PASI, comply with the fundamental rights enshrined in Article 48(2) of the Charter and in Article 6 of the Convention.

Nonetheless, comments can be found that nothing has actually changed²⁹ and that the ‘fines that are imposed by the Commission are no more criminal than they were in 1969 when a fine on the first cartel was imposed’³⁰. Moreover, since 2002 Article 6(2) of the TEU³¹ has declared that the Union shall respect the fundamental rights guaranteed by the Convention. Furthermore, although the Charter – prior to the Lisbon Treaty – was not a legally binding instrument, the EU legislature did acknowledge its significance. Its influential role in and impact on both legislation and case-law should not be underestimated inasmuch as it was considered as more than of a purely symbolic value³². As a result, there are a number of legislative acts that refer to the Charter³³ (for instance recital 37 of Regulation 1/2003). Therefore it is claimed that there is nothing new at present which requires substantial improvements with respect to the level of protection of the LPP and the PASI. Moreover, the expectation that the new status of the Charter and the EU’s prospective accession to the Convention will resolve any existing problems with regard to LPP’s and PASI’s compliance with ECtHR standards is rather in the nature of a ‘conventional wisdom’.

In contrast, other commentators point out the changes law-makers and the courts are faced with in light of the entry into force of the Lisbon Treaty. It is argued that many issues now have a different dimension as fundamental rights – for the first time “codified” in EU law – gain a new strength *vis-à-vis* incompatible secondary EU law. Although it is true that before the Lisbon Treaty one could see a correspondence between Community law and the Charter, the Charter had a mere declaratory value from an enforcement perspective. Under the current legal order the Charter has the full status of primary law³⁴ and is legally binding (i.e. of mandatory force) not only on

²⁹ W.P.J. Wils, ‘EU Anti-trust Enforcement...’, p. 202.

³⁰ W.P.J. Wils, ‘The Increased Level...’, p. 18.

³¹ Treaty on the European Union (consolidated text), OJ [2002] C 325/5.

³² See case C-540/03 *Parliament v Council*, ECR [2006] I-5769, para. 38. On the other hand, the GC in cases: T-219/02 and T-337/02 *Lutz Herrera*, ECR [2004] II-1407, para. 88 and T-256/01 *Pyres*, ECR [2005] II-25, para. 66, stressed that the Charter, prior to Lisbon Treaty, was deprived of legal binding force.

³³ R.C.A. White, ‘The Strasburg Perspective and its Effect on the Court of Justice: Is mutual Respect Enough?’, p. 148 and J. Dutheil de la Rochere, ‘The EU Charter of Fundamental Rights, Not Binding but Influential: the Example of Good Administration’, pp. 157–168, both [in:] A. Arnall, P. Eeckhout, T. Tridimas (eds.), *Continuity and Change in EU Law*, OUP 2008.

³⁴ M. Jaeger (the president of the GC) – from a speech during the conference ‘EU Litigation 2010’ held in Brussels on March 5, 2010 – L. Crofts, ‘EU court’s Jaeger predicts tussle over fundamental rights, leniency policy under new EU treaty’, *MLex*, 5th March 2010, available at <http://www.mlex.com>.

EU institutions, bodies and agencies, but also on Member States when they implement (i.e. transpose, apply, or enforce) EU law (except with respect to those countries which have 'opted out')³⁵. Member States now have to fulfil all the obligations arising from fundamental rights under EU law³⁶. This means that the Charter may be invoked to demand the annulment of acts of EU institutions as well as those of Member States which are deemed to violate fundamental rights³⁷.

Inasmuch as the EU's prospective accession to the Convention entails a further step forward in the protection of fundamental rights³⁸ and the Charter is now set on a par with other EU law, 'this may open up the path to 'revisiting established case law' or 'revisiting old concepts under the new statutes of the Charter. . . the new status of the Charter truly demands a change of perspective'³⁹ also with respect to the relationship between the Convention and the EU, as the Charter goes considerably further than Article 6(2) TEU by referring explicitly to the substantive provisions of the Convention⁴⁰. According to Article 52(3) of the Charter, as regards those rights elaborated in the Charter which correspond to rights guaranteed by the Convention, the meaning and scope of said rights shall be the same as those laid down by the Convention and ECtHR case-law. Moreover, under Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general public interest recognised by the EU, or the need to protect the rights and freedoms of others⁴¹.

³⁵ However, it is claimed that Protocol No. 30 to the EU Treaties on the application of the Charter to the UK, Poland and the Czech Republic is an interpretative protocol rather than opt-out, and should not lead to a different application of the Charter in those Member States than in the remaining Member States – W.P.J. Wils, 'EU Anti-trust Enforcement...', p. 209.

³⁶ A. Egger, 'EU-Fundamental Rights in the National Legal order: The Obligations of Member States Revisited', [in:] P. Eeckhout, T. Tridimas (eds.), *Yearbook of European Law*, OUP 2006, pp. 547–550.

³⁷ L.S. Rossi, 'How fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon', [in:] P. Eeckhout, T. Tridimas (eds.), *Yearbook...*, p. 78.

³⁸ This results from the obligation of observance, at the EU level, of at least the same standards of protection of fundamental rights as those secured by the Convention – L.S. Rossi, 'How fundamental...', [in:] P. Eeckhout, T. Tridimas (eds.), *Yearbook...*, p. 78.

³⁹ L. Crofts, 'EU court's Jaeger...'

⁴⁰ J.P. Costa, 'The Relationship...', p. 4.

⁴¹ It is being claimed that effective enforcement of Articles 101 and 102 TFEU constitutes an objective of general interest recognized by the EU. Thus it justifies the limitations on the exercise of the rights and freedoms enshrined in the Charter – W.P.J. Wils, 'EU Anti-trust Enforcement...', p. 202. On the other hand, it is also argued that as regards the conflict between

In addition, although the scope of fundamental rights will remain unchanged, the Charter reduces the discretionary power of the ECJ in deciding what rights are fundamental and raises the level of protection for all fundamental rights by defining the Convention as a minimum standard⁴². Thus, the ECJ ‘may choose to adopt a higher level of protection than the minimum established by the ECtHR in Strasbourg’⁴³. Importantly, inasmuch as EU law is free to offer more extensive protection, ‘it’s very likely that this higher level of protection continues to be adopted in many areas’ and ‘it may be natural that a consensus on a higher level of protection may be more easily reached in Luxembourg than in Strasbourg’⁴⁴. Therefore it is believed that the Charter, having far-reaching consequences for existing rules and in current standards of protection of due process rights, can provide ‘the way forward to the establishment of a new ‘due process’ clause applicable to competition proceedings’⁴⁵. It is submitted that this new due process rule could result in the re-examination or reformulation of the current rules on LPP and PASI, and may call for significant modifications. Finally, it is suggested that the entry into force of the Lisbon Treaty will ensure consistency between EU concepts of LPP and PASI and the Convention standards (mirrored in the Charter), while also contributing to a change in the ECJ’s adamant restrictive stance with respect to the scope of LPP and PASI⁴⁶.

The prospective accession of the EU to the Convention, while reinforcing its status, will also place the EU under the scrutiny of the ECtHR, which is acknowledged as an indication of the EU’s genuine commitment to the protection of fundamental rights within its territory⁴⁷. As a result, all of the Commission’s and National Competition Authorities’ (hereinafter NCA) actions based on EU law, in the context of individual proceedings or cooperation within the European Competition Network⁴⁸, will become amenable to review by the

efficiency and justice in the enforcement system – the former is desirable, the latter is vital – J. Flattery, ‘Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the right to a Fair Hearing’ (2010) 7(1) *The Competition Law Review* 67. Moreover, the ECJ in case C-32/95P *Commission v Lisrestal*, ECR [1996] I-5373, paras. 35–37, held that administrative or practical efficiency cannot justify the infringement of a fundamental principle such as the observance of the rights of defence.

⁴² L.S. Rossi, ‘How fundamental...’, p. 78.

⁴³ L. Crofts, ‘EU court’s Jaeger...’.

⁴⁴ L. Crofts, ‘EU court’s Jaeger...’. See also J. Callewaert, ‘The European Convention...’, p. 777 and J.P. Costa, ‘The Relationship...’, p. 4.

⁴⁵ A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham, UK/Northampton, MA, USA, 2008, pp. 227.

⁴⁶ A. Andreangeli, *EU Competition...*, pp. 226–231.

⁴⁷ R.C.A. White, ‘The Strasbourg Perspective...’, pp. 152–153.

⁴⁸ It is rightly observed that regardless of the EU’s accession to the Convention, full compliance with its Article 6 in the course of competition proceedings is required both at national – Polish – level (as the Convention is since year 1993 directly applicable in Poland) and at the

ECtHR against the standards set out in the Convention⁴⁹. It is believed that the ECtHR will ensure the application of the administrative due process rules enshrined in Article 6 of the Convention. Thus, the existing conflicts within the case-law should cease to be of significance, as those undertakings subject to the Commission's enforcement proceedings which consider the standards of protection of fundamental rights to be lower than the Convention's minimum will have an opportunity to bring their case before the ECtHR⁵⁰.

Currently, the lack of external supervision of the EU's interpretation of fundamental rights enshrined in the Convention – which in many instances is narrower than that accepted in certain Member States⁵¹ – creates difficulties for the uniform application and supremacy of EU law, thus reducing protection for undertakings⁵². It is rightly noted that if the protection granted by the ECJ to fundamental rights does not follow that which the Member States have individually undertaken in their commitments under the Convention, then EU-mandated action will be in conflict with Member States' obligations. This may push national judiciary bodies to decide 'that EU law must be 'disapplied' to the extent that compliance with these human rights obligations is required'⁵³. Additionally, in order to comply with EU law obligations Member States may be forced to ignore the obligations imposed by the Convention⁵⁴. As a consequence, if the EU does not replicate the level of protection of fundamental rights that is enshrined in the Convention (e.g. as regards LPP and PASI), a Member State will inevitably come into conflict with its EU obligations when giving effect to Convention standards⁵⁵.

Finally, the binding effect of the Charter and the EU's prospective accession to the Convention requires the EU Courts, Commission, and Member States to acknowledge that obligations related to fundamental rights are not only

European level (according to the EU jurisprudence) – B. Turno, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2011, pp. 982–990, 1064–1065, 1084–1088; M. Bernatt, *Sprawiedliwość proceduralna...*, p. 332.

⁴⁹ A. Andreangeli, *EU Competition Enforcement...*, p. 229.

⁵⁰ O.J. Einarsson, 'EC Competition Law...', p. 566.

⁵¹ Such is the case in the UK regarding LPP and PASI as, in comparison to EU law, English law provides for a different technical definition of LPP and for a broader scope of LPP and PASI – see E. O'Neill, E. Sanders, *UK Competition Procedure. The Modernised Regime*, consultant eds. A.Howard & M.Bloom, OUP 2007), pp. 202–212 and 304–305.

⁵² I.de Jesús Butler, O.de Schutter, 'Binding the EU to International Human Rights Law', [in:] P. Eeckhout, T. Tridimas (eds.), *Yearbook...*, p. 279.

⁵³ In this context it is noteworthy to mention case C-402/05 P and C-415/05 P *Kadi*, ECR [2008] I-6351, paras. 301-308, in which the ECJ admitted that there is a possibility that obligations stemming from the UN Charter cannot take precedence over primary law, but might take precedence over secondary legislation.

⁵⁴ I. de Jesús Butler, O. De Schutter, 'Binding the EU...', pp. 287–288.

⁵⁵ I. de Jesús Butler, O. De Schutter, 'Binding the EU...', p. 292.

negative, but also positive in nature. In other words, both EU institutions and Member States (when implementing or applying EU law) will not only have the duty to refrain from violating fundamental rights, but also their actions will need to promote respect for such rights. The positive nature of fundamental rights requires the EU and Member States to take affirmative and effective actions to protect, facilitate, and promote the standards enshrined in the Charter and in the Convention, by, e.g., inserting relevant safeguards into legislation to prevent the risk of violation of fundamental rights. Such actions and acknowledgments would certainly have the consequence of promoting a greater level of protection of fundamental rights in the EU legal order⁵⁶.

V. Proposals for significant changes regarding LPP and PASI – full compliance with ECtHR standards

Having in mind the current deficiencies, i.e. with regard to failure to respect as well failure to protect and promote LPP and PASI at the EU level, as well as the impact that the binding status of the Charter and EU's accession to the Convention may have on the Commission's practice and ECJ's case-law, one can argue that the existing guaranties that undertakings enjoy with respect to LPP and PASI need to be further developed and extended. This view is supported by the suggestion that in the new post-Lisbon legal order relating to protection of fundamental rights, the ECJ should generally follow the ECtHR. It is being said that what is considered a good law in Strasbourg should be taken into account in Luxembourg, especially in the light of the ECtHR's requirement that the EU protects human rights in a manner equivalent to the ECtHR (see *Bosphorus*)⁵⁷. As a result of the irresistible pressure stemming from the above-mentioned developments and requirements, a radical reform of LPP and PASI may be necessary. These proposals for major changes are aimed at bringing the 'EU versions' of LPP and PASI fully in line with ECtHR standards, as the pervasive influence of the latter creates a 'leeway for evolution'. Moreover, it is rightly noted that there is no reason to believe that even if the scope of LPP and PASI is set, it need remain cast in stone forever. Account must be taken of the evolutionary nature of the rights in question, inherent in the EU legal system⁵⁸. It should be also noted that the Commission rules recently adopted with respect

⁵⁶ I. de Jesús Butler, O. De Schutter, 'Binding the EU...', pp. 280–281, 293–294, 296–197, 313–314, 319; A. Egger, 'EU-Fundamental Rights...', pp. 532–533.

⁵⁷ A. Egger, 'EU-Fundamental Rights...', pp. 533 and 552.

⁵⁸ B. Vesterdorf, 'Legal Professional Privilege and The Privilege Against Self-incrimination in EC Law: Recent Developments and Current Issues', [in:] B.E. Hawk (ed.), *Annual Proceedings...*, p. 709.

to hearing officer⁵⁹ do not bring EU rules on LPP and PASI in line with ECtHR standards, as they are neither novel nor profound in their importance. They largely confirm the existing practice and do not bring about any radical change.

With respect to LPP, full compliance with the Convention and ECtHR standards would mean the establishment of an extensive and more generous degree of protection of the confidentiality of lawyer-client communications, as seems to be favoured by ECtHR case law⁶⁰. The major or significant changes would involve, first, expanding the scope of the 'EU version of LPP' at least to include in-house lawyers who, while being members of the Bar or the Law Society and being bound by the ethical obligations (the same as external lawyers), are employed by the undertakings⁶¹. Another significant change would be to expand LPP to include communications prepared, exchanged, or originated within competition law compliance programmes. Thirdly, LPP could be granted to lawyers who are members of the Bar in countries outside the EU (e.g. in the US), since the limitation of the 'EU version of LPP' only to EU lawyers is widely viewed as 'overtly discriminatory'⁶². Thus, communications with in-house lawyers, communications related not only to exercising rights of defence but also for the purpose of compliance programmes, and communications with non-EU lawyers would be covered by the protective scope of LPP⁶³.

However there is a strong opposition, particularly to the first proposal for reform, arising from the existence of conflicting policy objectives, namely the effectiveness of the Commission's powers of investigation vs. undertakings' fundamental right to consult with a lawyer of their choice⁶⁴. The argument against expanding the scope of LPP to in-house counsel is that such a lawyer 'does not

⁵⁹ Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ [2011] L 275/29.

⁶⁰ See A. Andreangeli, *EU Competition Enforcement...*, pp. 115–120 and cited case-law.

⁶¹ See A. Andreangeli, 'The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: One Step Forward, Two Steps Back' (2005) 2(1) *Competition Law Review* 48, 53–54. Even far-reaching proposals regarding the personal scope of LPP are expressed. Some suggest that the EU should accept the 'functional, utilitarian approach', according to which the criterion of membership in the Bar is not decisive for the scope of LPP. Thus all in-house lawyers, irrespective of their membership in the Bar, should be covered by the LPP rule – A. Andreangeli, *EU Competition Enforcement...*, pp. 103–109.

⁶² R. Whish, *Competition Law*, 6th ed., OUP 2009, p. 268.

⁶³ Note that all these changes can be achieved by modifying the Commission's approach to the LPP (in order to bring it in line with ECtHR standards). Otherwise it is very probable that cases related to the scope of LPP will be re-submitted to the EU Courts every two or three years.

⁶⁴ The Commission's opposition to such proposal is at odds with cases: T-610/97 *Carlsen*, ECR [1998] II-00485 and T-92/98 *Interporc*, ECR [1999] II-3521 in which the GC held that the Commission's own in-house legal advice should be protected – P. Boylan, 'Privilege and in-house lawyers' (2007) *Competition Law Insight*, 23rd October 2007, p. 16.

enjoy the same degree of independence from his employer, as a lawyer working in an external law firm does in relation to his client', and is often required to follow work-related instructions issued by his employer. Thus an in-house lawyer cannot deal so effectively with a potential conflict of interest between his professional ethical obligations and the aims and wishes of his employer, on whom the lawyer is financially dependent. Moreover, even if the ethical rules and the provisions of national law do contain safeguards for the independence of in-house counsel, these provisions are not necessarily effective in practice⁶⁵. However, there are counter-arguments to these objections. First, there is no reason for the presumption that the guarantees of independence provided by Member State laws for in-house lawyers do not work in practice. Second, the degree of independence of an in-house lawyer *vis-à-vis* his employer and the independence of an external lawyer working for the employer as his client, or the client of his law firm, is very similar. Both lawyers are dependent economically on the undertaking. It could even be claimed that, where the relationship is with a key client of the firm, the external lawyer is even less independent than the in-house lawyer in relation to his employer. Even if an in-house lawyer followed suggestions by his or her employer, what would really matter are the facts included in the opinion and not necessarily the suggested conclusion, which is to be drawn from the facts by the Commission. It is true that facts can be manipulated, however in the long-term perspective it is not in the interest of an in-house lawyer to manipulate the facts, as such behaviour violates ethical obligations and can subject the lawyer to severe fines or disciplinary procedures by the Bar or Law Society. Lawyers are generally conformists. Thus, instead of following an employer's suggestions, it is much more likely they would prefer to stay on the safe side and indicate all the legal risks associated with an undertaking's behaviour. Thus, arguments related to lack of independence of in-house counsel seem tenuous. Finally, fears that cartel-related documents will be hidden under the LPP label at the premises of an in-house lawyer are ill-founded⁶⁶, as the Commission has enough legal instruments (*e.g.*, financial sanctions under Article 23 of Regulation 1/2003, or referral of disputed documents to the GC or Hearing Officer) to prevent or penalise such 'obstruction of justice'. In light of the foregoing, a less formalistic

⁶⁵ See cases: 155/79 *AM&S*, paras. 21-24 and 27; T-125/03 and T-253/03 *Akzo and Akros*, paras. 166-168; C-550/07 P *Akzo and Akros*, and AG Kokott's opinion of April 29, 2010 delivered in case C-550/07P *Akzo and Akros*, paras. 55-74. As a result of such a narrow approach to LPP, the GC (citing case C-550/07P) has recently dismissed a case on grounds of inadmissibility due to the fact that two Polish legal advisors (members of the Bar) representing the Polish Telecom Authority before the Court were in an employment relationship with this authority thus they were not independent – GC's order of 23 May 2011, case T-226/10 *Prezes UKE v Commission*, available at <http://curia.europa.eu/>.

⁶⁶ See also: J.-F. Bellis, 'Legal professional privilege: An overview of EU and national case law' (2011) No. 39467 *e-Competitions*.

and more flexible case-by-case approach to the question of the independence of an in-house lawyer is recommended.

The second proposal for radical reform is based on the increasing importance and usage of competition law compliance programmes and the Commission's support for such efforts⁶⁷. Given the fact that compliance programmes are not always general in nature and are sometimes connected with a current or future exercise of rights of defence, there is a reason to believe that the Commission should extend LPP to cover communications originating from, or exchanged in relation with, such programmes.

The third proposal for significant change stems from the fact that in the age of globalisation there is no reason for the Commission to assume that a lawyer's independence in countries such as the USA, Canada, Australia or Japan is substantially lower than in the EU. The extension of LPP to include non-EU lawyers could be achieved by bilateral or multilateral agreements between the Commission and the relevant states. Additionally, it should be kept in mind that the Commission does not operate in vacuum. If it refuses to grant the EU version of LPP to documents exchanged with, for example, a US lawyer, especially where such documents would be privileged in the US under US law, then the surrender of the documents may result in loss of the privilege in the US⁶⁸. Moreover, if competition agencies can coordinate their enforcement actions with those of other jurisdictions, why should companies not be allowed to coordinate their defence actions by seeking legal opinions from lawyers from various non-EU jurisdictions? It is rightly pointed out that 'defence rights can no longer be viewed through an entirely Eurocentric lens'⁶⁹. Furthermore, during dawn raids the Commission in practice usually takes a pragmatic view and equates non-EU external lawyers with EU lawyers⁷⁰. This proposal should also be seen in the context of the growing importance of legal advice given by non-EU patent lawyers, who play an important role in patent settlements which are currently under the Commission's scrutiny.

⁶⁷ Commission brochure 'Compliance Matters' issued on 23 November 2011, available at http://ec.europa.eu/competition/antitrust/compliance/compliance_matters_en.pdf. Also some Member States support in-house corporate programmes designed to detect breaches of competition law. For instance, France in its recently issued settlements guidelines rewards compliance programmes stating that these programmes might mitigate the fine – see L. Crofts, 'New settlement guidelines to reward compliance programmes, says France's Lasserre' *MLex*, 10th February 2012, available at <http://www.mlex.com>.

⁶⁸ J.S. Venit, 'Modernization and Enforcement – The Need for Convergence: On Procedure and Substance', [in:] C.D. Ehlermann, I. Atanasiu (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Oxford/Portland, Oregon 2006, p. 338.

⁶⁹ J. Joshua, 'It's a privilege. Managing legal privilege in multijurisdictional antitrust investigations' (2007) *Competition Law Insight*, 11th December 2007, p. 16.

⁷⁰ J. Joshua, 'It's a privilege...', p. 14.

With respect to PASI, the most significant step toward assuring consistency between the ECtHR and ECJ would undoubtedly involve abandonment of the *Orkem* principle, and expansion of PASI's scope to the extent of a right to remain silent⁷¹. The latter is generally recognised as an international standard which lies at the heart of the notion of fair procedure under Article 6 of the Convention, and which applies to all types of criminal offences, without distinction, from the most simple to the most complex⁷². It should be noted however that even under the Convention the right to remain silent, as observed in *Saunders*, is not absolute or unlimited. An individual can be compelled to hand over documents if they are requested under a court warrant⁷³. A right to remain silent during the course of the Commission's enforcement proceedings is justified by the fact that the "distinction between 'factual questions' and 'admissions'" of wrongdoing is illusory⁷⁴. Moreover, there may be situations in which an employed individual may, as a result of the undertaking's compelled testimony (e.g., under Article 20(2e) of Regulation 1/2003) be exposed (irrespective of Article 12 of the Regulation) to criminal sanctions in another jurisdiction⁷⁵. On the other hand, there are reasonable fears that in the highly complex, globalised commercial environment an expanded right to remain silent might leave society defenceless in cases of corporate fraud,⁷⁶ including violations of EU competition law. Therefore, to prevent such risks there are proposals to grant the Commission broader investigative powers, e.g., wiretapping or other sophisticated electronic surveillance against the suspect undertaking (the proposed expansion of the scope of LPP could be also accompanied by these modifications). These powers, however, should be subject to an ECJ warrant. High fines and effective leniency programmes can also contribute to overcoming the fears associated with expansion

⁷¹ See, e.g., A. Andreangeli, *EU Competition Enforcement...*, pp. 146–151; A.D. MacCulloch, 'The Privilege against Self-Incrimination in Competition Investigations: Theoretical Foundations and Practical Implications' (2006) 26(2) *Legal Studies* 232–237; G. Hogan, 'The use of compelled evidence in European competition law cases', in B.E. Hawk (ed.), *Annual proceedings...*, pp. 669–673, who indicates that 'cases such as *Saunders* suggest that the drafters of Regulation 1/2003 will have to think again'.

⁷² *Saunders*, App. no. 43/1994/490/572, paras. 68, 75.

⁷³ I. Aslam, M. Ramsden, 'EC Dawn Raids: A Human Rights Violation?' (2008) 5(1) *The Competition Law Review* 70; A. Riley, 'Saunders and the power to obtain information in Community and United Kingdom competition law' (2000) 25(3) *European Law Review* 272–281.

⁷⁴ A.D. MacCulloch, 'The Privilege against...', p. 237.

⁷⁵ J.S. Venit, T. Louko, 'The Commission's New Power to Question and Its Implications on Human Rights', [in:] B.E. Hawk (ed.), *Annual Proceedings...*, pp. 679–683.

⁷⁶ See dissenting opinion of Judge N. Valticos, joined by Judge F. Gölcüklü, in *Saunders*, App. no. 43/1994/490/572; P. Davies, 'Self-Incrimination, Fair Trials and the Pursuit of Corporate and Financial Wrongdoing', [in:] B. Markesinis (ed.), *The Impact of the Human Rights Bill on the English Law*, Oxford/Clarendon 1998, p. 34.

of the right to remain silent⁷⁷. Furthermore, a ‘middle ground’ approach with respect to PASI is also available, as the more expansive case-law of the ECtHR (*vis-à-vis* the right to remain silent) could to be applied only to cases involving ‘an undertaking consisting of an unincorporated business’, whereas the EU version of limited, not absolute, PASI would continue to apply in cases regarding legal undertakings⁷⁸. This more expansive PASI would seldom be applied in Commission proceedings anyhow, as its enforcement proceedings mainly concern large, corporate entities. However, it may apply more often with respect to NCA’s proceedings in the course of which Articles 101 or 102 TFEU are applied simultaneously with the relevant provisions of national competition law.

VI. Proposals for minor improvements to LPP and PASI

The ECtHR’s judgments in *Bosphorus*, *Jussila* and more recently in *Menarini* may suggest that proposals for major, significant changes might not be adopted by the Commission in near future. Therefore, one should also consider a more nuanced approach and minor improvements to LPP and PASI.

First, EU rules regarding waiver of both privileges should be clarified and developed. It is clear that PASI is waived in the case of leniency applications⁷⁹. However, providing a statement to the Commission would rather not be deemed a waiver of the privilege under the 5th Amendment, in the US⁸⁰. It is less clear whether LPP is waived as well. It may be argued whether legal opinions should be submitted to the Commission at all within the leniency process, as they do not constitute direct evidence of anticompetitive behaviour⁸¹. Answering this question may be crucial, as disclosure of documents covered by LPP to the Commission may also result in a waiver of any LPP in the US⁸².

⁷⁷ A. Riley, ‘Saunders...’, pp. 278–281.

⁷⁸ W.P.J. Wils, ‘Self-incrimination...’, p. 577. For criticism of this proposal, see A. Andreangeli, *EU Competition Enforcement...*, pp. 145–149.

⁷⁹ F. Arbault, E. Sakkers, ‘Cartels’, [in:] J. Faull, A. Nikpay (eds.), *The EC Law of Competition*, pp. 835–836.

⁸⁰ J.J. Curtis, D.S. Savrin, B.L. Bigelow, ‘Collateral Consequences of Expanded European Antitrust Investigative Authority For Defendants in U.S. Proceedings’, [in:] B.E. Hawk (ed.), *Annual Proceedings...*, p. 537.

⁸¹ In the US, amnesty applicants are not required to provide the DOJ with legal opinions covered by LPP – S.D. Hammond, ‘Recent Developments Relating to the Antitrust Division’s Corporate Leniency Program’, speech at the 23rd Annual National Institute on White Collar Crime, San Francisco, CA (5th March 2009), available at <http://www.justice.gov/atr/public/speeches/244840.pdf>, p. 5.

⁸² J.J. Curtis, D.S. Savrin, B.L. Bigelow, ‘Collateral Consequences...’, p. 539.

Second, with respect to LPP, it is worth clarifying issues related to the obstruction of justice and the document retention policy in the EU. An important question is: does the EU version of LPP shield lawyer-client communications which involve the destruction of documents being in a client's possession? In the US the 'crime-fraud' exemption applies in such a case, which nullifies the LPP because the lawyer (even if non US-based) and the client engaged in illegal conduct. As a result, LPP is waived⁸³.

Third, in the context of the global activity of many undertakings and the growing internationalisation of competition law, the EU version of LPP should also cover communications exchanged in relation to the subject matter of NCAs' or other competition agencies' (e.g., US Department of Justice) proceedings. Facts assessed in a memorandum may be subject to multiple investigations in many jurisdictions. Therefore, it is not clear why these facts, if assessed (e.g. by mistake) only under UK competition law (and not also under Article 101 or 102 TFEU), would not be covered by the EU version of LPP, as they might in theory lead to the instigation of proceedings by the Commission.

Fourth, it is worth considering whether Regulation 1/2003 should not be amended to indicate that, when carrying out an investigation simultaneously under Article 101 or 102 TFEU and under their national equivalent, the NCAs should follow the EU rules regarding LPP and PASI. As a result of such harmonisation the equal protection of these rights, both at EU and national levels, could be achieved. This proposal has arisen as some NCAs, e.g., Polish Competition Authority, may seem to misunderstand the notion of procedural autonomy⁸⁴ and invoke it to refuse to apply EU rules on LPP and PASI, claiming that these privileges are 'not implemented' in their territories⁸⁵. As a result, the level of LPP and PASI protection substantially differs according to the particular investigating NCA. Note that there is no dispute about an NCA's legal obligation to follow the EU rules regarding the rights of defence in cases involving the application of EU law⁸⁶.

Finally, as the appeal in the *Akzo and Akcros* case⁸⁷ was dismissed, it may be time to stop calling the EU legal privilege 'LPP' as it is not LPP according

⁸³ J.J. Curtis, D.S. Savrin, B.L. Bigelow, 'Collateral Consequences...', pp. 544–545.

⁸⁴ On the right understanding of the notion of procedural autonomy see: P. Craig, G. de Búrca, *EU Law. Text, cases and materials*, 4th ed., OUP 2008, p. 307.

⁸⁵ *Prawo konkurencji. Podstawowe pojęcia*, Warszawa 2007, p. 15. However, it is noteworthy that the Court of Competition and Consumer Protection by order of April 4, 2007 (case XVII Amo 8/06) sent the sealed envelope containing legally privileged documents (seized during inspection) back to the undertaking thus denying the authority's right to include these documents into the case file.

⁸⁶ See, e.g. W.P.J. Wils, 'Powers of Investigation and Procedural Rights and Guaranties' (2006) 29(1) *World Competition* 22–23.

⁸⁷ C-550/07 P.

to the classic English formulation. Thus, LPP should be rebranded in order to avoid confusion. Providing for a new terminology, e.g., ‘independent EU-qualified lawyer-client privilege’, will contribute to an increased awareness and better understanding of the scope of the EU version of LPP⁸⁸.

VII. Conclusions

Fundamental rights in competition law, including defence rights, which limit the Commission’s powers of investigation have always been shaped ‘by a complex and intricate set of mutual influences’⁸⁹. In the post-Lisbon legal order this process may be even more complex. This article demonstrates that the legally binding effect of the Charter, as well as the EU’s prospective accession to the Convention, will inevitably add to the complexity of this process. As a result of these developments, the Commission and ECJ should re-consider their current approach to LPP and PASI. Significant changes regarding the scope of the privileges may seem to be necessary in order to put the current practice in line with ECtHR standards. This means that in-house lawyers who belong to the Bar or the Law Society should not be denied LPP protection, and in the course of the Commission’s enforcement proceedings undertakings should enjoy a right to remain silent. In order to balance the conflict between effective competition enforcement and the protection of fundamental rights, these alternatives could be accompanied by granting the Commission wider powers of investigation. Moreover, if proposals for radical reforms are not welcomed, there are also possibilities to improve defence rights in relation to LPP and PASI by making lesser changes within the existing framework.

Literature

Andreangeli A., *EU Competition Enforcement and Human Rights*, Edward Elgar, Cheltenham, UK/Northampton, MA, USA, 2008.

Andreangeli A., ‘The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: One Step Forward, Two Steps Back’ (2005) 2(1) *Competition Law Review*.

⁸⁸ G. Murphy, ‘Is it time to rebrand legal professional privilege in EC competition law? An updated look’ (2009) 35(3) *Commonwealth Law Bulletin* 459–460.

⁸⁹ B. Vesterdorf, ‘Legal Professional Privilege...’, p. 718.

- Arbault F., Sakkers E., 'Cartels', [in:] Faull J., Nikpay A. (eds.), *The EC Law of Competition*, 2nd ed., Oxford University Press 2007.
- Aslam I., Ramsden M., 'EC Dawn Raids: A Human Rights Violation?' (2008) 5(1) *Competition Law Review*.
- Bellis J.-F., 'Legal professional privilege: An overview of EU and national case law' (2011) No. 39467 *e-Competitions*.
- Bernatt M., 'Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku (na tle art. 6 EKPC)' ['Right to a fair trial in competition and regulatory cases (as compared to Art. 6 ECHR)'] (2012) 1 *Państwo i Prawo*.
- Bernatt M., *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [*Procedural fairness in the proceedings before the competition authority*], Warszawa 2011.
- Boylan P., 'Privilege and in-house lawyers' (2007) 23rd October 2007.
- Callewaert J., 'The European Convention on Human Rights and European Union: a long way to harmony' (2009) 6 *European Human Rights Law Review*.
- Castillo de la Torre F., 'Evidence, Proof and Judicial Review in Cartel Cases' (2009) 32(4) *World Competition*.
- Costa J.P., 'The Relationship between the European Convention on Human Rights and European Union Law – A Jurisprudence Dialogue between the European Court of Human Rights and the European Court of Justice', Lecture at King's College London, 7th October 2008, available at http://www.ECtHR.coe.int/NR/rdonlyres/DA4C4A2E-0CBE-482A-A205-9EA0AA6E31F6/0/2008_Londres_King_s_College_7_10.pdf.
- Craig P., de Búrca G., *EU Law. Text, cases and materials*, 4th ed., Oxford University Press 2008.
- Crofts L., 'EU court's Jaeger predicts tussle over fundamental rights, leniency policy under new EU treaty', MLex, 5th March 2010, available at <http://www.mlex.com>.
- Crofts L., 'New settlement guidelines to reward compliance programmes, says France's Lasserre', MLex, 10th February 2012, available at <http://www.mlex.com>.
- Curtis J.J., Savrin D.S., Bigelow B.L., 'Collateral Consequences of Expanded European Antitrust Investigative Authority For Defendants in U.S. Proceedings', [in:] Hawk B.E. (ed.), *Annual Proceedings of the Fordham Corporate Law Institute*, New York 2005.
- Davies P., 'Self-Incrimination, Fair Trials and the Pursuit of Corporate and Financial Wrongdoing', [in:] Markesinis B. (ed.), *The Impact of the Human Rights Bill on the English Law*, Oxford/Clarendon 1998.
- De Jesús Butler I, De Schutter O., 'Binding the EU to International Human Rights Law', [in:] Eeckhout P., Tridimas T. (eds.), *Yearbook of European Law*, Oxford University Press 2008.
- Di Federico G., 'Case C-550/07P, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission, Judgement of the European Court of Justice (Grand Chamber) of 14 September 2010' (2011) 48 *Common Market Law Review*.
- Dutheil de la Rochere J., 'The EU Charter of Fundamental Rights, Not Binding but Influential: the Example of Good Administration', [in:] Arnulf A., Eeckhout P., Tridimas T. (eds.), *Continuity and Change in EU Law*, Oxford University Press 2008.
- Egger A., 'EU-Fundamental Rights in the National Legal order: The Obligations of Member States Revisited', [in:] Eeckhout P., Tridimas T. (eds.), *Yearbook of European Law*, Oxford University Press 2006.
- Einarsson O.J., 'EC Competition Law and the Right to a Fair Trial', [in:] Eeckhout P., Tridimas T. (eds.), *Yearbook of European Law*, Oxford University Press 2006.

- Flattery J., 'Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the right to a Fair Hearing' (2010) 7(1) *Competition Law Review*.
- Forrester I.S., 'Due process in EC competition cases: a distinguished institution with flawed procedures' (2009) 34(6) *European Law Review*.
- Gippini-Fournier E., 'Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the cursory Glance', [in:] Hawk B.E. (ed.), *Annual Proceedings of the Fordham Corporate Law Institute*, New York 2005.
- Hammond S.D., 'Recent Developments Relating to the Antitrust Division's Corporate Leniency Program', speech at the 23rd Annual National Institute on White Collar Crime, San Francisco, CA (5th March 2009), available at <http://www.justice.gov/atr/public/speeches/244840.pdf>.
- Hogan G., 'The use of compelled evidence in European competition law cases', [in:] Hawk B.E. (ed.), *Annual Proceedings of the Fordham Corporate Law Institute*, New York 2005.
- Joshua J., 'It's a privilege. Managing legal privilege in multijurisdictional antitrust investigations' (2007) *Competition Law Insight*, 11th December 2007.
- Kowalik-Bañczyk K., *The issues of the protection of fundamental rights in EU competition proceedings*, z. 39, Centrum Europejskie Natolin, Warszawa 2010.
- Kroes N., 'Antitrust and State Aid Control – The Lessons Learned', speech at the 36th Annual Conference on International Antitrust Law and Policy, Fordham University, New York, 24th September 2009, SPEECH/09/408, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/408&format=HTML&aged=0&language=EN&guiLanguage=en>.
- Król-Bogomilska M., 'Kary pieniężne w polskim prawie antymonopolowym na tle europejskiego prawa wspólnotowego' ['Fines in Polish anti-trust law in the context of the European Community law'] (1998) 7 *Państwo i Prawo*.
- MacCulloch A.D., 'The Privilege against Self-Incrimination in Competition Investigations: Theoretical Foundations and Practical Implications' (2006) 26(2) *Legal Studies*.
- Murphy G., 'Is it time to rebrand legal professional privilege in EC competition law? An updated look' (2009) 35(3) *Commonwealth Law Bulletin*.
- O'Neill E., Sanders E., *UK Competition Procedure. The Modernised Regime*, Oxford University Press 2007.
- Prawo konkurencji. Podstawowe pojęcia [Competition Law. Glossary of basic terms]*, Warszawa 2007.
- Riley A., 'Saunders and the power to obtain information in Community and United Kingdom competition law' (2000) 25(3) *European Law Review*.
- Riley A., 'The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?', CEPS Special Report/January 2010, available at <http://www.ceps.eu>.
- Rossi L.S., 'How fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon' [in:] Eeckhout P., Tridimas T. (eds.), *Yearbook of European Law*, Oxford University Press 2008.
- Schwarze J., Bechtold R., Bosch W., 'Deficiencies in European Community Competition Law. Critical analysis of the current practice and proposals for change', September 2008, available at <http://www.gleisslutz.com/en/publications/byyear.html?year=2008&offset=1>.
- Slater D., Tomas S., Waelbroeck D., 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?' (2009) 5(1) *European Competition Journal*.

- Stawicki A., Stawicki E. (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, [The act on competition and consumer protection. The Commentary], Warszawa 2011.
- Turno B., 'Prawo odmowy przekazania informacji służącej wykryciu naruszenia reguł konkurencji w orzecznictwie Europejskiego Trybunału Sprawiedliwości' ['Privilege against self-incrimination with respect to the EC competition law in the jurisprudence of the European Court of Justice'] (2009) 3 *Ruch Prawniczy, Ekonomiczny i Socjologiczny*.
- Turno B., 'Zagadnienie tajemnicy adwokackiej na gruncie prawa konkurencji' ['Legal Professional Privilege in competition law'], [in:] Banasiński C., Kępiński M., Popowska B., Rabska T. (eds), *Aktualne problemy polskiego i europejskiego prawa ochrony konkurencji* [Current issues of Polish and European competition law], Warszawa 2006).
- Turno B. 'Prawnik prawnikowi nierówny?' ['Are lawyers not equal?'] *Rzeczpospolita*, 24 November 2010.
- Turno B., 'Ciąg dalszy sporu o zakres zasady legal professional privilege – glosa do wyroku SPI z 17.09.2007 r. w połączonych sprawach: T-125/03 oraz T-253/03 Akzo Nobel Chemicals Ltd i Akros Chemicals Ltd przeciwko Komisji WE' ['Further dispute on the scope of the principle of the legal professional privilege – commentary on CFI judgment of 17.09.2007 in joined cases: T-125/03 and T-253/03 Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. Commission'] (2008) 6 *Europejski Przegląd Sądowy*.
- Venit J.S., 'Modernization and Enforcement – The Need for Convergence: On Procedure and Substance', [in:] Ehlermann C.D., Atanasiu I. (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Oxford/Portland, Oregon 2006.
- Venit J.S., Louko T., 'The Commission's New Power to Question and Its Implications on Human Rights', [in:] Hawk B.E. (ed.), *Annual Proceedings of the Fordham Corporate Law Institute*, New York 2005.
- Vesterdorf B., 'Legal Professional Privilege and The Privilege Against Self-incrimination in The EC Law: Recent Developments and Current Issues'[in:] Hawk B.E. (ed.), *Annual Proceedings of the Fordham Corporate Law Institute*, New York 2005.
- Wils W.P.J., 'EU Anti-trust Enforcement and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter on Fundamental Rights of the EU and the European Convention on Human Rights' (2011) 34(2) *World Competition*.
- Wils W.P.J., 'The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights' (2010) 33(1) *World Competition*.
- Wils W.P.J., 'Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26(4) *World Competition*.
- Wils W.P.J., 'Powers of Investigation and Procedural Rights and Guaranties' (2006) 29(1) *World Competition*.
- White R.C.A., 'The Strasburg Perspective and its Effect on the Court of Justice: Is mutual Respect Enough?', [in:] Arnall A., Eeckhout P., Tridimas T. (eds), *Continuity and Change in EU Law*, Oxford University Press 2008.

Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings

by

Krystyna Kowalik-Bańczyk*

CONTENTS

- I. Introduction
- II. Procedural autonomy
- III. Procedural autonomy in national antitrust proceedings where EU law is applied (decentralised EU proceedings)
- IV. Rights of defence in EU antitrust proceedings before the European Commission (centralised EU proceedings)
- V. Application of the *acquis* ‘rights of defence’ in decentralised EU antitrust proceedings
 1. Arguments for application of the *acquis* ‘rights of defence’ in national proceedings with an EU element
 2. Arguments against application of the *acquis* ‘rights of defence’ in national proceedings with an EU element
- VI. Should the *acquis* on ‘rights of defence’ be respected in purely national proceedings?
- VII. Conclusions

Abstract

The general rule concerning the application of EU law in the Member States is that, unless the procedural issues are directly regulated in EU primary or secondary law, the Member States possess a so-called ‘procedural autonomy’. This rule applies fully to national antitrust proceedings, where the presumed infringement may affect trade between EU Member States (decentralised EU antitrust proceedings).

* Krystyna Kowalik-Bańczyk, Doctor of Law (PhD), Competition Law Chair, Institute of Legal Studies, Polish Academy of Sciences; Faculty of Management and Economy, Technical University of Gdańsk.

However, the procedural guarantees offered to undertakings in EU antitrust proceedings before the European Commission, often referred to the undertakings' 'rights of defence', also form a part of the procedural *acquis* of EU law. This article examines the question whether that procedural *acquis*, stemming mainly from EU courts' jurisprudence and formulated with regard to the proceedings before the European Commission, should be applied as a standard in national (i.e. Polish) antitrust proceedings where EU law applies.

Résumé

L'application du droit de l'Union européenne requiert la mise en oeuvre du principe de l'autonomie procédurale. Celui-ci signifie qu'à supposer qu'un problème procédural n'ait pas été réglé par le droit communautaire originaire ou dérivé, les États membres sont compétents pour le régler. Ce principe s'applique pleinement aux procédures de concurrence dans lesquelles la violation présumée est susceptible de produire des effets sur les échanges commerciaux entre les États membres («procédure communautaire décentralisée en matière de concurrence»). Cependant, les garanties procédurales dont les entreprises disposent en cours de procédures de concurrence se déroulant devant la Commission européenne et qu'on définit généralement comme «droits à la défense», constituent également une partie de l'acquis procédural communautaire. Le présent texte tâche de répondre à la question de savoir si cet acquis procédural, résultant de la jurisprudence des juges communautaires et concernant les procédures qui se déroulent devant la Commission européenne, doit être un standard pour les procédures de concurrence internes où l'on applique les textes juridiques de l'UE.

Classifications and keywords: rights of defence in EU competition proceedings; procedural autonomy in EU law; harmonization of procedural rules; fundamental rights in EU competition proceedings.

I. Introduction

Regulation 1/2003¹ provides that the application of Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) constitutes a joint responsibility of the European Commission and the national competition authorities². A proceeding for infringement of Article 101 or 102 TFEU can

¹ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

² Articles 4 and 5 of Regulation 1/2003. M. Bernatt treats the EU and national law (regardless whether substantive or procedural) as 'one legal system' – see M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, p. 25. Cf

be conducted either by the European Commission (known as a 'centralized EU antitrust proceeding'), or by a national competition authority (known as a 'decentralized EU antitrust proceeding'³). In both proceedings, the European Commission and the national competition authorities would apply the same norms of substantive EU competition law, using however different procedural rules, different catalogues of sanctions, and differing standards of legal protection for undertakings. The decentralization of the application of EU competition law thus links the application of a variety of national procedures (currently twenty-seven). It is uncertain if this decentralization should be accompanied by a legislative or judicial harmonization of the standards of legal protection of undertakings involved in proceedings, both centralized and decentralized, concerning infringements of EU competition law⁴.

The aim of this article is to analyse the scope of the principle of national procedural autonomy insofar as it is applicable to undertakings' EU rights of defence in decentralised EU competition proceedings, without however dwelling extensively on the underlying jurisprudence and doctrine of the rights of defence, as that would require a much broader analysis than the scope of this text allows⁵. The main issue addressed in this article is whether the procedural

also: K. Kohutek, 'Stosunek między art. 81 i 82 Traktatu a krajowym prawem konkurencji (reguły konwergencji)' (2006) 4 *Przegląd Ustawodawstwa Gospodarczego* 14–20; M. Kolasiński, 'Influence of the General Principles of Community Law on Polish Antitrust Procedure' (2010) 3(3) *YARS* 29–51; K. Róziewicz-Ładoń, *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję*, Warszawa 2011, p. 107. Polish antitrust rules can be applied in parallel: M. Krasnodębska-Tomkiel, 'Przeciwdziałanie praktykom ograniczającym konkurencję – art. 81 i 82 TWE a krajowe prawo antymonopolowe' (2005) 7 *Przegląd Prawa Handlowego* 27.

³ In Poland the competent authority is the President of the Polish Competition and Consumer Protection Office (UOKiK President), acting on the basis of the Act of 16 February 2007 on the protection of competition and consumers (Journal of Laws 2007 No. 50, item 331, as amended; hereafter, UOKiK Act). According to Article 3 of Regulation 1/2003, the UOKiK President would apply Article 101 or 102 TFEU if a presumed infringement of either of those provisions affects trade between Member States; cf. A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 1173; K. Róziewicz-Ładoń, *Postępowanie przed Prezesem...*, p. 72; K. Kowalik-Bańczyk, 'Pojęcie wpływu na handel w decyzjach Prezesa UOKiK' (2010) 5 *Europejski Przegląd Sądowy* 42.

⁴ M. Kolasiński is of the opinion that national competition authorities should refer to the jurisprudence of the ECJ concerning the application of EU competition law, rather than to national law – M. Kolasiński, 'Influence of the General Principles of Community Law on Polish Antitrust Procedure' (2010) 3(3) *YARS* 33. A. Jurkowska states that the present UOKiK Act reflects the EU standards of procedure [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, pp. 1165–1166, 1178.

⁵ For an overview of the broad problems concerned with this issue, see: I. Van Bael, *Due Process in EU Competition Proceedings*, 2011; A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham, Northampton 2008.

acquis formulated by the Court of Justice of the European Union (ECJ)⁶ with regard to proceedings before the European Commission, should be included as a standard in national antitrust proceedings where EU law applies. As will be shown, one can find arguments both for and against alignment of the procedural requirements in both EU and national antitrust proceedings, when the national proceedings deal with the application of EU law. The preliminary assumption would be that the alignment of national procedural rules, as far as rights of defence standards is concerned, seems unavoidable, as the lack of such alignment might be contrary to both the constitutional principle of non-discrimination and to the EU principle of *effet utile*. However, the practice of the last seven years, during which the decentralised system of application of EU antitrust law has been functioning, does not confirm this hypothesis.

II. Procedural autonomy

The notion of procedural autonomy appeared in the doctrine of European Community law in the 1970s⁷. While it was and is rarely referred to by the ECJ under this name, the broad application of this principle has been visible in its jurisprudence ever since⁸. The principle of procedural autonomy implies that unless the procedural issues are directly regulated in the EU primary

⁶ According to Article 19(1) of the Treaty establishing the European Union (TEU) ‘The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts’. The jurisprudence cited in this text covers the judgments of the Court of Justice and of the General Court. Those courts are referred to as ‘ECJ’ or ‘EU Courts’.

⁷ The first to use this designation was: J. Rideau, ‘Le rôle des États membres dans l’application du droit communautaire’ (1972) *Annuaire Français de Droit International* 884 ; as noted by: V. Couronne, ‘L’autonomie procédurale des États Membres de l’Union européenne à l’épreuve du temps’ (2010) 3–4 *Cahiers de droit européen* 273, 282. The judgments almost always invoked to illustrate the state of autonomy are: 33/76 *Rewe*, ECR [1976] 1989, para. 5; 45/76 *Comet*, ECR [1976] 2043, para. 13. Cf the broader comments on ECJ jurisprudence in: M. Bobek, ‘Why There is No Principle of “Procedural Autonomy” of the Member States’, [in:] B. de Witte, H. Micklitz (eds.), *The European Court of Justice and Autonomy of the Member States*, Intersentia 2011, p. 306. There are various definitions of this principle – cf. the broad presentation of different approaches in: N. Póltorak, *Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych*, Warszawa 2010, pp. 62–73; M. Domańska, ‘Zasada autonomii proceduralnej państw członkowskich i jej ograniczenia wynikające z zasady efektywności’, [in:] A. Wróbel, M. Szwarc-Kuczer, K. Kowalik-Bañczyk (eds.), *Stosowanie prawa Unii Europejskiej przez sądy. Tom II. Zasady-orzecznictwo-piśmiennictwo*, Warszawa 2007, pp. 326–357.

⁸ Its first use in a judgment was C-201/02 *Delena Wells*, ECR [2004] I-723. The Advocates General, however, started to use it quite regularly since 1994. For an overview cf. V. Couronne, ‘Autonomie procédurale...’, p. 284.

or secondary law, the Member States possess this so-called ‘procedural autonomy’⁹. Put differently, the Member States remain competent to independently legislate on procedural issues so long as this possibility has not been pre-empted by the European Union¹⁰. This gives each Member State the freedom to use its own solutions in applying EU law in the absence of specific EU procedural rules pre-empting this discretion¹¹. Procedural autonomy is as well a direct consequence of the fact that the EU legal order is an incomplete legal order, in that it does not contain exhaustive legislation on procedural issues. Nina Póltorak refers to this situation as a ‘delegated enforcement’ model, stating that the EU law is mainly enforced in the Member States in accordance with the national rules of enforcement¹². Andrzej Wróbel stated in 2005 that the principle of procedural autonomy is a concept concerned with the creation of law (legislation), not its application¹³. If one maintains this position, it would mean that the ECJ’s jurisprudential *acquis* concerning the procedural standards applied in EU competition proceedings are not directly binding on the Member States, as that *acquis* stems mainly from ECJ judgments and is only partly codified in either primary or secondary EU law.

A procedural autonomy so defined is both conditional and limited. It is conditional because it depends on the ‘lack of exercise of competences’ by the EU¹⁴. This raises the question whether EU judicial activity (i.e. the decisions of the ECJ) would constitute an ‘exercise of competence,’ i.e. whether the requirement of ‘EU activity’ is strictly limited to legislative activity. The existing jurisprudence would rather indicate that the steps to be taken by the EU must be legislative and not judicial only¹⁵. However the two sources of law cannot be so easily separated, and the national competition authorities,

⁹ Cf D. Miąsik, ‘Zasada efektywności’, [in:] A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy. Tom I*, Warszawa 2010, p. 240.

¹⁰ In this respect there is a concept referring to this principle a ‘procedural competence’. The notion was first used by: W. van Gerwen, ‘Of Rights, Remedies and Procedures’ (2000) 37 *Common Market Law Review* 501; M. Domańska, ‘Miejsce zasady autonomii proceduralnej państw członkowskich wśród zasad ogólnych prawa wspólnotowego’, [in:] C. Mik (ed.), *Zasady ogólne prawa wspólnotowego*, Toruń 2007, p. 124; N. Póltorak, *Ochrona uprawnień...*, p. 73.

¹¹ V. Couronne, ‘L’autonomie procedurale...’, p. 276.

¹² N. Póltorak, *Ochrona uprawnień...*, p. 38.

¹³ A. Wróbel, ‘Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej’ (2005) 1 *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 41.

¹⁴ M. Domańska, ‘Miejsce zasady autonomii proceduralnej państw członkowskich wśród zasad ogólnych prawa wspólnotowego’, [in:] C. Mik (ed.), *Zasady ogólne...*, pp. 111, 115; A. Wróbel, ‘Autonomia proceduralna...’, p. 36; M. Kaszubski, ‘Dochodzenie roszczeń opartych na prawie wspólnotowym a autonomia proceduralna państw członkowskich – przegląd orzecznictwa’ (2004) *Studia Prawno-Europejskie* 282.

¹⁵ 35/76 *Simmenthal*, ECR [1976] 1871.

looking to follow EU law, should not ‘drift around’ the whole judicial *acquis* on the rights of defence. This, for the time being, seems to be the case in practise.

In addition to being conditional, the procedural autonomy is also by definition limited. The solutions adopted by the Member State have to be in alignment with two principles: the national provisions cannot render the EU norms obsolete (principle of effectiveness), and they cannot place national claims in a better position than the EU ones (principle of equivalence)¹⁶. This, in turn, implies (or may imply) an obligation on the part of the Member State to undertake some legislative activity to harmonise its national law provisions with at least these two principles¹⁷. Many commentators underscore the fact that it is mainly the principle of effectiveness that is invoked in the ECJ’s jurisprudence; equivalence is much less exploited¹⁸. The ECJ’s application of these two limiting principles to procedural autonomy demonstrates yet again that the jurisprudential activity of the European Court of Justice itself introduces uncertainty in the (seemingly) clear-cut definition, based in part on the lack of legislative activity by the EU.

III. Procedural autonomy in national antitrust proceedings where EU law is applied (decentralised EU proceedings)

The modernization of EU competition law has rendered the application by national authorities of Articles 101 and 102 TFEU much more common than before the entry into force of Regulation 1/2003. However, Regulation 1/2003 contains very few procedural rules for the national authorities. It is mainly concerned with the procedures for proceedings in front of the European Commission. It thus covers the centralized proceedings in some detail, while leaving it to the national legislators to decide questions of procedure in decentralized EU antitrust proceedings (when the national competition authorities apply Article 101 or 102 TFEU).

¹⁶ P. Oliver, ‘Le règlement 1/2003 et les principes d’efficacité et d’équivalence’ (2005) 3–4 *Cahiers de droit européen* 351–394, M. Domańska, ‘Miejsce zasady autonomii...’, p. 115. Some authors question the reasonability of those principles as self-excluding – M. Bobek, ‘Why there is no principle...’, p. 305 – and see under their application a struggle to find a balance between the legitimate interests of the EU and those of a Member State, p. 312.

¹⁷ Even though those principles were mainly directed towards the national courts and other national organs applying EU law. In the longer term, however, a state of breach of EU law would have to be amended by legislative activity. The limitations on procedural autonomy can concern a proceeding of administrative nature: C-453/00 *Kühne & Heitz*, ECR [2004] I-837; C-392/04 *i-21 Germany*, ECR [2006] I-8559.

¹⁸ V. Couronne, ‘L’autonomie procédurale...’, p. 278.

There are, however, a few important exceptions to this ‘silence’ in Regulation 1/2003: Article 5 (containing the list of decisions to be taken in the application of Article 101 or 102 TFEU); Article 11 (concerning cooperation between the European Commission and the national competition authorities); and Article 12 (concerning the exchange of information between the European Commission and the national competition authorities). All three of these articles contained in the Regulation have recently been the object of interpretation by the ECJ in light of the procedural autonomy principle. In the ECJ’s preliminary judgment in case *C-375/09 Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA*.¹⁹, the Court stated that the Article 5 of Regulation 1/2003 contains an exhaustive list of decisions that a national competition authority might issue in the application of Article 101 or 102 TFEU, and thus it precludes the possibility of a national competition authority issuing decisions stating ‘non-infringement’ of Article 102 TFEU. While the ECJ refers to procedural autonomy as the concept by which the independent actions of national competition authorities should be assessed, such autonomy ends at the point where the uniform application of Article 101 or 102 TFEU is endangered²⁰. In the case *C-17/10 Toshiba*, both Advocate General Kokott and the ECJ have stated, *inter alia*, that Article 11(6) of Regulation 1/2003 contains a rule of procedure such that the national competition authorities are automatically deprived of their competences to apply Article 101 or 102 TFEU as soon as the European Commission initiates proceedings for the adoption of a decision under the Regulation 1/2003²¹. This does not, however, definitively preclude further proceedings in the application of national competition law²². In the case *C-360/09 Pfeleiderer v Bundeskartellamt*, the ECJ interpreted Articles 11 and 12 of Regulation 1/2003 in the context of national proceedings concerning access to the file of a proceeding on the imposition of a fine (including the leniency procedure documents) which was sought in order to prepare a civil action for damages in front of a German court. The ECJ stated that such access might be granted to ‘a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages’ but on

¹⁹ Not yet reported, available at www.curia.eu. As to Article 5 of Regulation 1/2003, cf A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1175.

²⁰ Paras. 27–28 of the judgment. Cf. K. Kowalik-Bańczyk, ‘Jednolite stosowanie unijnego prawa konkurencji jako ograniczenie dla autonomii proceduralnej krajowych organów ochrony konkurencji – glosa do wyroku C-375/09 Prezes UOKiK p. Tele 2 (obecnie Netia)’ (2012) 2 *Europejski Przegląd Sądowy* 39–45.

²¹ Para. 74 of the opinion. *C-17/10 Toshiba Corporation e.a. v Úřad pro ochranu hospodářské soutěže* of 14 February 2012, not yet reported, para. 91. Article 75(1) of the UOKiK Act regulates this hypothesis; cf A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1323.

²² Para. 79 of the opinion.

the basis of national law, with due consideration for the ‘interests protected by European Union law’²³. This last judgment is of particular interest for the problem analysed in this article, as it clearly allows the EU Member States **to retain their procedural provisions** when applying Regulation 1/2003, even if it implies a different level of protection of the undertakings concerned²⁴.

With the exception of the provisions mentioned above (Articles 5, 11, and 12 of the Regulation), Regulation 1/2003 does not regulate the procedural solutions in **decentralised** EU antitrust proceedings. In particular, the important problem of procedural guarantees for the undertakings taking part in the decentralized EU antitrust proceedings is left untouched by Regulation 1/2003²⁵. The only exception is contained in Article 12(3), which excludes the use of certain information obtained from a national competition authority or from the European Commission if it might lead to criminal sanctions for an individual, unless the methods of gathering such information are equivalent in both authorities (the one transmitting and the one obtaining the information)²⁶. This provision has not yet been an object of judicial interpretation.

²³ Para. 32 of the judgment.

²⁴ For instance, in Poland information obtained in the course of a leniency application is not revealed to the other parties of the antitrust proceeding, whereas they are revealed in the EU: cf. the broader analyses in: M. Bernatt, *Sprawiedliwość proceduralna...*, p. 170; K. Różiewicz-Ładoń, *Postępowanie przed Prezesem...*, p. 206.

²⁵ One exception might be seen in point 5 of the preamble to Regulation 1/2003, which states: ‘In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. It should be for the party or the authority alleging an infringement of Article 81(1) and Article 82 of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied. This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law’. In fact this fragment of the preamble confirms *in fine* the principle of procedural autonomy. Due regard should be taken of the fact that the burden of proof is an issue of substantive, not procedural, law.

²⁶ Article 12(3) provides: ‘Information exchanged pursuant to para. 1 can only be used in evidence to impose sanctions on natural persons where: - the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 [101] or Article 82 [102] of the Treaty or, in the absence thereof,- the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions’. As to this provision, cf. P. Oliver, ‘Le règlement...’, p. 370; A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1176; M. Bernatt, [in:] T. Skoczny, T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, pp. 1305–1306; K. Różiewicz-Ładoń, *Postępowanie przed Prezesem...*, p. 181.

IV. Rights of defence in EU antitrust proceedings before the European Commission (centralised EU proceedings)

The notion of rights of defence is initially a jurisprudential concept, defined mainly in proceedings connected with judicial control of the legality of European Commission decisions, led by the ECJ (Article 263 TFEU). It was developed by the ECJ as a 'general principle of law', stemming from the common constitutional traditions of Member States and from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In the jurisprudence of the ECJ, the rights of defence were to be protected in all proceedings in which the European Commission directs towards an individual allegations which, if confirmed, might lead to negative legal consequences for this individual²⁷. In brief the main elements of this notion, having special regard to competition enforcement proceedings, include: 1) right to be heard²⁸; 2) right to know the allegations directed against an undertaking from the outset of the proceedings; 3) legal professional privilege protecting communications with an 'outside lawyer'²⁹; 4) privilege against self-incrimination³⁰; 5) right to legal aid³¹; 6) protection of

²⁷ E. Barbier de la Serre, 'Procedural Justice in the European Community Case-law concerning the Rights of Defence: Essentialist and Instrumental Trends' (2006) 2 *European Public Law* 233; K. Lenaerts, J. Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) 34(3) *Common Market Law Review* 544.

²⁸ 17/74 *Transocean Marine Paint v Commission of the European Communities*, ECR [1974] 1063; 85/76 *Hoffmann-La Roche v Commission of the European Communities*, ECR [1979] 461; 136/79 *National Panasonic v Commission of the European Communities*, ECR [1980] 2033, para. 21; T-352/94 *Mooch Domsjo v Commission of the European Communities*, ECR [1998] II-1989, paras. 63, 73-74; C-65/02 P *ThyssenKrupp v Commission of the European Communities*, ECR [2005] I-6773, para. 92; C-407/04 P *Dalmine v Commission of the European Communities*, ECR [2007] I-829, para. 44. For a broader treatment of this right as a right separate from the right of defence, see: M. Kolasinski, 'Influence of the General Principles...', pp. 36-39; M. Bernatt, *Sprawiedliwość proceduralna...*, pp. 99-150.

²⁹ 155/79 *AM &S Europe Limited v Commission of the European Communities*, ECR [1982] 1575, para. 27; T-125/03 *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission of the European Communities*, ECR [2007] II-3523.

³⁰ 374/87 *Orkem v Commission of the European Communities*, ECR [1989] 3283, paras. 28-31; T-34/93 *Societe Generale v Commission of the European Communities*, ECR [1995] II-545, paras. 73-74; T-305/94, T-306/94, T-307/94, T-313/94 a T-16/94, T-318/94, T-325/94, T-328/94, T-329/94 i T-335/94 *LVM v Commission of the European Communities*, ECR [1999] II-931, paras. 445-447, 449; C-407/04 P *Dalmine v Commission of the European Communities*, ECR [2007] I-829, paras. 34-35; C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland e.a. v Commission of the European Communities*, ECR [2004] I-123, paras. 65, 207-208; cf. also point 23 of the preamble to the Regulation 1/2003.

³¹ 46/87 and 227/88 *Hoechst v Commission of the European Communities*, ECR [1989] 2859, para. 16; 85/87 *Dow Benelux v Commission of the European Communities*, ECR [1989] 3137, para. 27.

confidential information³²; 7) right to privacy; 8) access to the file³³; 9) right to use one's own language in the relations with the European Commission. This set of procedural guarantees granted to an undertaking in EU antitrust proceedings is designated by the EU courts as 'rights of defence'. Though they mainly stem from the EU courts' jurisprudence, they have also been partly codified in the EU secondary law or in non-binding documents (such as Guidelines), but only for the centralised EU competition proceedings. Since 1 December 2009, a new element of the puzzle has appeared – the Charter of Fundamental Rights of the European Union (Charter)³⁴ has acquired legally binding force as part of EU primary law. Article 48(2) of the Charter includes the right of defence as one of the specifically protected guarantees. This provision is very short and gives no hints as to what would be its actual scope. The 'explanations to the Charter'³⁵ state only that it 'is the same as Article 6(2) and (3) of the ECHR'. This line of construction would imply that it is reserved for 'judicial' proceedings and not strictly enforceable in a proceeding in front of the European Commission as a non-judicial, administrative body. The use of the notion 'anyone who has been charged' in Article 48(2), could also be interpreted as limiting the scope of application of this guarantee to proceedings that would qualify as 'criminal'. So one might wonder if it will be fully applied to antitrust proceedings, which are perceived in EU law mainly as 'administrative' proceedings. However the European Court of Human Rights (hereafter, ECtHR), in its *Menarini v. Italy* judgment³⁶, has recently qualified a national antitrust proceeding, even in its administrative part taking place in front of the Italian Competition Authority, as 'criminal'³⁷ for the purposes of applying Article 6 ECHR. This implies that

³² C-407/04 P *Dalmine v Commission of the European Communities*, ECR [2007] I-829, paras. 46–48; C-411/04 P *Salzgitter Mannesmann v Commission of the European Communities*, ECR[2007] I-959, paras. 40–44; T-474/04 *PerganHilfsstoffe fur industrielleProzesse v Commission of the European Communities*, ECR [2007] II-4225, para. 78.

³³ C-194/99 P *Thyssen Stahl v Commission of the European Communities*, ECR [2003] I-10821, paras. 30-31; T-25/95 *Cimenteries CBR i in. v Commission of the European Communities*, ECR [2000] II-508, para. 142.

³⁴ Charter of Fundamental Rights of the European Union, OJ [2010] C 83/389.

³⁵ Explanations relating to the Charter of Fundamental Rights, OJ [2007] C 303/2. According to Article 6(1) TEU '(...) The rights, freedoms and principles in the Charter shall be interpreted (...) with due regard to the explanations referred to in the Charter, that set out the sources of those provisions'.

³⁶ ECtHR judgment of 11 September 2011, *Menarini Diagnostics S.R.L. v. Italy*; cf. M. Bernatt, 'Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku (na tle art. 6 EKPC)' (2012) 1 *Państwo i Prawo* 57.

³⁷ The discussion concerning the character of antitrust proceedings and sanctions is not new. Cf. M. Król-Bogomilska, *Kary pieniężne w prawie antymonopolowym*, Warszawa 2001, pp. 188–202. See also M. Król-Bogomilska and A. Błachnio-Parzych in this issue.

Article 48(2) of the Charter could be construed as covering all EU antitrust proceedings, regardless of whether they take place at the centralised or decentralised level.

One additional factor should be mentioned which magnifies the significance of interpreting Article 48(2) in light of the ECHR. According to Article 6 TEU, the European Union attained the legal competence to join the European Convention on Human Rights and Fundamental Freedoms. Negotiations are currently underway and it seems realistic to assume that sooner rather than later the EU will become a party to the Convention. Thus, the ECJ jurisprudential *acquis* on rights of defence would have to be, so it seems, complemented by the guarantees stemming from Article 6 ECHR. This would even further extend the scope of protection of undertakings in antitrust proceedings, as Article 6 ECHR covers, *inter alia*: the right of being informed on the essence and merits of the accusation, right to obtain time to prepare one's defence, right to defend oneself personally or by a representative, connected with the right to legal aid; right to hear the evidence of defence witnesses on the same footing as the accusation witnesses; use of free translation and/or interpretation services in cases where the accused does not understand or does not speak the language of the court.

In addition, the Charter contains a fairly new right known as the 'right to good administration' (Article 41 of the Charter)³⁸, which corresponds partly to the ECJ's procedural *acquis* on the rights of defence, as it covers, e.g. the right to be heard, the right of access to one's file, and the right to obtain reasons for a decision. The right to good administration can be perceived as the equivalent of the right of defence in administrative proceedings³⁹.

The as-yet open scope of application of Articles 41 and 48(2) of the Charter can only increase the impact of the existing jurisprudence on the rights of defence on the definition of individual guarantees within the context of fundamental rights.

³⁸ K.-D. Classen, *Gute Verwaltung im Recht der Europäischen Union. Eine Untersuchung zu Herkunft, Entstehung und Bedeutung des Art. 41 Abs. 1 und 2 der Europäischen Grundrechtscharta*, Berlin 2008; A. Dauter-Kozłowska, 'Prawo do dobrej administracji w Karcie Praw Podstawowych Unii Europejskiej i w świetle Europejskiego Kodeksu Dobrej Administracji', [in:] C. Mik, K. Gałka (eds.), *Prawa podstawowe w prawie i praktyce Unii Europejskiej*, Toruń 2009, p. 337; A.I. Jackiewicz, *Prawo do dobrej administracji jako standard europejski*, Toruń 2008.

³⁹ AG Kokott sees in Article 41(2) and 48(2) of the Charter two complementary parts of the right of defence in EU law, cf AG Opinion in the case C-109/10 P *Solvay v Commission of the European Union*, para. 152.

V. Application of the *acquis* ‘rights of defence’ in decentralised EU antitrust proceedings

If one fully applies the principle of procedural autonomy as defined at the outset of this text, it should be presumed that the national competition authorities **apply their own procedural rules in decentralised EU antitrust proceedings**⁴⁰. There is no direct obligation to apply the ECJ jurisprudential *acquis* on the rights of defence, which has been developed in the context of centralised EU antitrust proceedings (for instance, as far as legal professional privilege is concerned). This position seems to be confirmed by the recent *Pfleiderer* judgment, where the German procedural rules were less protective for the undertakings involved in a leniency procedure than the EU rules.

However, such a lack of harmonization of procedural issues at the EU and national levels might give rise to two important consequences for undertakings in Poland. First, it carries the risk of inconsistent application of EU substantive competition law provisions. Secondly, it makes the protective guarantees for undertakings different depending on the level of proceedings (national or European). As to this latter point, it will be seen that the level of protection at the national level might be either higher or lower in comparison to the EU standards. This divergence allows some to argue that the need for alignment of procedural rules is not self-evident.

1. Arguments for application of the *acquis* ‘rights of defence’ in national proceedings with an EU element

Despite the procedural autonomy principle, there are arguments which would support the application of the *acquis* rights of defence in national proceedings with an EU element. The main argument for application of the procedural *acquis* rights of defence in EU decentralised proceedings is that it secures the coherence and transparency of the procedural rules applied towards undertakings, regardless of the level (national or European) of application of EU competition law. Otherwise an undertaking would enjoy a different level of protection depending on which organ (the European Commission or a national competition authority) initiates proceedings against it. Application of the jurisprudence of EU courts regarding the rights of defence might also be motivated by reference to Article 4(3) TEU (ex. Article 10 TEC) – the so-called ‘loyalty clause’ of Member States towards the European Union,

⁴⁰ C-550/07 P *Akzo Nobel v Commission*, not yet reported, available at: www.curia.eu, para.113.

which implies the broadest possible obligation to assure the efficiency of EU norms.

Article 6 TEU would also seem to support the argument for the application of this ECJ judicial *acquis*. The rights of defence form part of the general principles of EU law which should be protected both by the EU and the Member States applying EU law. Similarly, Article 51 of the Charter provides that ‘the provisions of this Charter are addressed (...) to the Member States only when they are implementing Union law’. This is arguably the strongest textual argument for the application of the ECJ *acquis* on rights of defence in decentralised EU antitrust proceedings. The purely internal situations would be left outside of this obligation. Maciej Bernatt argues that the procedural standards developed as general principles of EU law by the European Courts should also be applied in national proceedings, because they also stem from Article 6 ECHR⁴¹. It seems however that the scope of the judicial *acquis* on rights of defence and Article 6 ECHR are not completely identical and analogous, as Article 6 ECHR is applicable only to ‘criminal’ proceedings, even if construed in a broad manner (as in the *Mennarini* judgment).

One might also argue that such alignment is the only solution consistent with the principles of the Polish Constitution. As already indicated, any different solution would imply the possibility of different treatment of undertakings depending only on the presence or lack of a ‘Union’ element in the proceedings – thus clashing with the principle of non-discrimination. Dawid Miąsik points out also that such a divergence in the treatment of Polish undertakings in European and national proceedings might lead to a breach of the constitutional principle of freedom of entrepreneurship (Article 22 of the Polish Constitution)⁴².

From the perspective of a Polish undertaking, the application of the EU *acquis* on rights of defence would be particularly useful in those instances where such a solution would grant Polish undertakings a higher level of protection than that stemming from the Polish rules. Several examples may serve to illustrate this. For instance, an undertaking participating in Polish antitrust proceedings can only demand confidentiality of the business information it submits, and not of other potentially confidential information⁴³.

⁴¹ M. Bernatt, *Sprawiedliwość proceduralna...*, p. 81. Similarly: B. Turno, [in:] A. Stawicki, E. Stawicki (eds.), *Komentarz do ustawy o ochronie konkurencji i konsumentów*, Warszawa 2010, p. 1064.

⁴² D. Miąsik, ‘Solvents to the Rescue – a Historical Outline of the Impact of EU Law on the Application of Polish Competition Law by Polish Courts’ (2010) 3(3) *YARS* 15.

⁴³ M. Bernatt, ‘Right to be Heard or Protection of Confidential Information? Competing Guarantees of Procedural Fairness in Proceedings Before the Polish Competition Authority’ (2010) 3(3) *YARS* 65; G. Materna, ‘Ograniczenie prawa wglądu do materiału dowodowego w postępowaniu przed Prezesem UOKiK’ (2008) 4 *Przegląd Prawa Handlowego* 32.

If one were to apply the solutions stemming from EU law, this additional category of documents would be protected, since all documents containing ‘confidential information’ are protected. Secondly, the Polish provisions do not contain regulations on the privilege against self-incrimination⁴⁴ or on the legal professional privilege⁴⁵ similar to those stemming from ECJ’s *acquis*. Evidence gathered in breach of those privileges, and protected according to EU law, may still be used in Polish antitrust proceedings, including those which can be qualified as decentralized EU proceedings. Thirdly, no procedural protection is given to undertakings in explanatory proceedings (in Polish: *postępowania wyjaśniające*)⁴⁶, whereas according to the ECJ’s jurisprudence at least some of the rights of defence should be protected even before the formal commencement of an official proceeding against a concrete undertaking⁴⁷. Fourthly, according to Article 73(2) of the 2007 Polish act on the protection of competition and consumers, the information gathered in one proceeding conducted by the President of the Polish Competition Authority (UOKiK President) might be used in other proceedings in front of this same organ⁴⁸. Even though Article 73(6) of the same Act obliges the UOKiK President to inform the undertaking on the use of such documents gathered elsewhere, this is still a much less protective solution than the one applied in EU law, where such evidence would need to be gathered in each case individually. Fifthly, in Polish antitrust proceedings the Order initiating the proceeding (in Polish: *postanowienie*) does not have to contain either factual or legal reasons⁴⁹. It only indicates the initial presumptions or objections of the UOKiK President. This is thus a much less protective and less informative instrument for the

K. Różewicz-Ładoń, [in:] *Postępowanie przed Prezesem...*, pp. 174–175, 196, lists all other information that could be protected in the proceedings in front of the UOKiK President, i.e. banking information or insurance information.

⁴⁴ Broader: M. Bernatt, *Sprawiedliwość proceduralna...*, p. 232; cf. Article 50(1) of the UOKiK Act. However a witness in a proceeding conducted by the UOKiK President might invoke Article 265 § 1 of the Code of Civil Procedure and refuse to testify on the grounds indicated in this provision.

⁴⁵ For the definition and scope of both those privileges in EU law, cf. B. Turno, A. Zawłocka-Turno in this issue.

⁴⁶ K. Różewicz-Ładoń, *Postępowanie przed Prezesem...*, p. 97, states that this lack of an obligation to grant to the undertakings concerned any access to the documents etc. greatly enhances the efficacy of the proceeding.

⁴⁷ 46/87 *Hoechst AG v Commission of the European Communities*, ECR [1987] 1549.

⁴⁸ M. Bernatt, *Sprawiedliwość proceduralna...*, p. 145; K. Różewicz-Ładoń, *Postępowanie przed Prezesem...*, pp. 123–124.

⁴⁹ K. Różewicz-Ładoń, *Postępowanie przed Prezesem...*, p. 117, 120–121 citing *a contrario* Article 124 § 2 of the Code of Administrative Procedure.

parties against whom proceedings are commenced than the ‘statement of objections’ required in the EU centralised proceedings⁵⁰.

On the other hand, as is pointed out mainly in the following section, the degree of protection of undertakings in EU antitrust proceedings might in some aspects be *lower* than the protection granted to them by Polish law. Such examples constitute an argument for retaining the national procedural autonomy rather than implementing a strict alignment of procedures.

2. Arguments *against* application of the *acquis* ‘rights of defence’ in national proceedings with an EU element

Despite the soundness of the arguments presented above, there are also arguments against the alignment of national procedures with the EU model. First of all, there is no legal basis for this type of harmonization. Even if Article 105 TFEU is viewed as the natural legal basis for the few procedural solutions enumerated in Regulation 1/2003 (see section III above), it is generally excluded that the EU would impose a unique procedural framework for national antitrust proceedings.

Secondly, the procedural *acquis* concerning the rights of defence has been developed by the EU Courts in proceedings under Article 263 TFEU on the control of legality of decisions issued by the European Commission. Unlike the cases based on Article 267 TFEU (preliminary questions), the statements of the ECJ do not constitute a ‘binding inspiration’ aimed at the administrative agencies and courts of the EU Member States. Rather, they are directed to the European Commission and indeed forced it to change its administrative practise.

Thirdly, as already mentioned, some national rules might be more favourable for undertakings than the procedural solutions of EU law, such as, for instance, the question of judicial authorisation for inspections (searches). In EU proceedings such judicial authorisation is not required unless the inspections take place in private premises. Also the Polish model of access to the case file might be perceived as more advantageous to undertakings than the European one, inasmuch as there is no general exception of access to the internal documents of the institution⁵¹.

⁵⁰ Broader and critically on Polish practice: M. Kolasiński, ‘Influence of General Principles...’, p. 36.

⁵¹ M. Bernatt, *Sprawiedliwość proceduralna...*, p. 121.

3. Should the *acquis* on ‘rights of defence’ be respected in purely national proceedings?

It seems logical that if, as prescribed in Article 3(1) of Regulation 1/2003, the substantive EU norms are applied in national proceedings, the procedural solutions applied should also be aligned to European standards. The more controversial issue is whether such alignment should take place in purely internal situations. As Dawid Miąsik indicates, such internal situations are becoming more and more ‘unionized’, but in a selective manner⁵². This practice of haphazard application or non-application of European solutions does not enhance the legal security of undertakings. Therefore some authors, like Maciej Bernatt, are of the opinion that the similarity of the substantive competition rules should also imply an alignment of procedural standards at both the European and national levels. He argues that when the UOKiK President (Polish national competition authority) applies Article 101 and/or Article 102 TFEU, he should also apply the European procedural standards⁵³. This opinion has not, however, been fully confirmed by the Polish jurisprudence, even to the extent of requiring identical interpretation or application of substantive EU competition norms. The Polish Supreme Court stated in 2006 that even where the material norms are identical in their appearance, in purely internal cases the EU antitrust law serves only as ‘a source of intellectual inspiration, example of legal reasoning and understanding of certain legal institutions, which might be helpful in interpreting the provisions of Polish law’⁵⁴. Yet on the other hand the same Supreme Court recognised a ‘factual harmonisation’ of purely internal rules and stated that the Polish courts are obliged to fully recognise the *acquis communautaire* in the application of analogous provisions of national law⁵⁵. Thus one might state that the Supreme Court is vacillating on the existence and scope of its potential obligation to apply EU norms to purely internal situations.

⁵² D. Miąsik, ‘Solvents to the Rescue...’, p. 25.

⁵³ M. Bernatt, *Sprawiedliwość proceduralna...*, p. 331; in the same way: B. Turno, [in:] A. Stawicki, E. Stawicki (eds.), *Komentarz...*, Warszawa 2010, p. 982.

⁵⁴ Judgment of the Supreme Court of 9 August 2006, III SK 6/06; setting forth a position repeated in: judgment of the Supreme Court of 6 December 2007, III SK 16/07; judgment of the Supreme Court of 3 September 2009, III SK 9/09 (cited by: D. Miąsik, ‘Solvents to the Rescue...’, p. 14).

⁵⁵ Resolution of the Supreme Court of 23 July 2008, III CZP 52/081; see D. Miąsik, ‘Solvents to the Rescue...’, p. 15; A. Jurkowska-Gomułka, ‘Głosa do uchwały SN z dnia 23 lipca 2008 r., III CZP 52/08. W stronę umocnienia prywatnoprawnego wdrażania zakazów praktyk ograniczających konkurencję’ (2010) 5 *Europejski Przegląd Sądowy* 43; M. Sieradzka, ‘Głosa do uchwały SN z dnia 23 lipca 2008 r., III CZP 52/08’, LEX/el., 2008.

VI. Conclusions

The question whether the procedural *acquis*, formulated with regard to the proceedings before the European Commission, should be applied as a standard in national (i.e. Polish) antitrust proceedings where EU law applies, cannot be answered in a clear-cut manner. First, it seems that there is no need for legislative harmonisation of the Polish procedural norms with the standards set in the jurisprudence or the binding norms of EU primary or secondary law if that *acquis* concerns proceedings in front of the European Commission only. An analogous application of certain solutions is in principle possible, but not necessary. The *Tele 2* case gives a clear indication **where** such a freedom of a Member States ends: the EU standard should be applied **if the uniform application of EU norms is endangered**. Thus, it is not the legal protection of undertakings in antitrust proceedings, but the interest of European Union in the consistent and uniform application of EU law that requires Member States to back away from the procedural autonomy rule. In order to understand this rather surprising conclusion, one has to understand also that the rights of defence, being based on general principles of EU law, have been defined on a case-by case basis and are sometimes quite vague⁵⁶. They were ‘created’ or ‘extracted’ to resolve recurrent problems with the fairness of procedures in front of the European Commission. They were woven from the general principles of law extracted from the legal traditions of the EU Member States, adapted as it seemed fit for the resolution of a concrete dispute before the EU Courts. They were not perceived as forming a coherent general system of procedure to be followed in every EU proceeding regardless of its level (national or European).

This moderate response to the problem posed in this article – distinguishing between the *possibility* to apply EU standards *generally*, and the *obligation* to apply them if *the uniformity of EU law is at stake*, might however be undergoing critical re-examination due to the changes introduced by the Treaty of Lisbon. The direct application of the provisions of the Charter of Fundamental Rights, together with the EU’s likely accession to the European Convention on Human Rights, might shed a different light on the issue of the Member States’ procedural autonomy in national antitrust proceedings where EU law applies. The Member States might be forced to adapt their antitrust procedures to the requirements of both the ECJ and ECtHR jurisprudence,

⁵⁶ T. Koopmans, [in:] ‘Judicial activism and procedural law’ (1993) 1 *European Review of Private Law* 74, while analyzing the growing importance of supreme or constitutional courts in the different legal systems, underlines that such courts are asked to find workable solutions to the problems given to them. This is why they refer to principles of law, which leave them with a ‘considerable amount of freedom’.

because the notions used in the Articles of the Charter that reflect the rights of defence [Articles 41(2) and 48(2) of the Charter] are construed in light of the existing jurisprudence. National authorities would almost certainly have to follow the European standards where the EU law is applied. In my opinion the procedural autonomy should never prevail in cases where the application of ECJ's *acquis* might grant a higher level of protection to undertakings.

One should also consider that the procedural autonomy of the European Union itself might be limited by its accession to the more universal European Convention on Human Rights and Fundamental Freedoms. Paradoxically this accession might lead to an approximation of the provisions on procedural guarantees to the requirements of Article 6 ECHR, which all the Parties to the Convention have to respect in their national law, and which concerns criminal proceedings. This would quite likely reopen the long-lasting debate on the character of antitrust proceedings as such. Both the European Court of Human Rights⁵⁷ and the Polish Supreme Court⁵⁸ seem to take the opinion that such proceedings should be seen as criminal proceedings, with higher procedural guarantees for the parties than in 'traditionally administrative' proceedings. This position is also increasingly taken by the Advocates General in their recent opinions in EU antitrust cases⁵⁹.

Literature

Andreangeli A., *EU Competition Enforcement and Human Rights*, Cheltenham Northampton 2008.

Barbier de la Serre E., 'Procedural Justice in the European Community Case-law concerning the Rights of Defence: Essentialist and Instrumental Trends' (2006) 2 *European Public Law*.

Bernatt M., *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji [Procedural fairness in the proceedings before the competition authority]*, Warszawa 2011.

⁵⁷ M. Bernatt, 'Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku (na tle art. 6 EKPC)' (2012) 1 *Państwo i Prawo* 50.

⁵⁸ M. Bernatt, 'Glosa do wyroku SN z dnia 14 kwietnia 2010 r., III SK 1/10. Gwarancje proceduralne w sprawach z zakresu ochrony konkurencji i regulacji, mających charakter karny w świetle EKPCz' (2011) 6 *Europejski Przegląd Sądowy* 40.

⁵⁹ Opinion of AG Kokott of 8 September 2011 in case C-17/10 *Toshiba Corporation*, para. 48; Opinion of AG Mengozzi of 17 February 2011 in case C-521/09 P *Elf Aquitaine SA v Commission of the European Union*, para. 31; Opinion of AG Bot of 26 October 2011 in case C-201/09 P i C-216/09 P *Arcelor Mittal Luxembourg SA v Commission of the European Union*, para. 41; Opinion of AG Bot of 26 October 2011 in case C-352/09 P *ThyssenKrupp Nirosta GmbH v Commission of the European Union*, para. 49; Opinion of AG Sharpston of 10 February 2011 in case C-272/09 P *KME Germany v Commission of the European Union*, para. 64.

- Bernatt M., 'Glosa do wyroku SN z dnia 14 kwietnia 2010 r., III SK 1/10. Gwarancje proceduralne w sprawach z zakresu ochrony konkurencji i regulacji, mających charakter karny w świetle EKPCz' ['Commentary to the Supreme Court Judgment of 14 April 2010, III SK 1/10. Procedural guarantees in matters of antitrust and regulation that are of „criminal character” according to ECHR'] (2011) 6 *Europejski Przegląd Sądowy*.
- Bernatt M., 'Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku (na tle art. 6 EKPCz)' ['Right to a fair hearing in competition and market regulation proceedings (in the context of Article 6 of the ECHR)'] (2012) 1 *Państwo i Prawo*.
- Bobek M., 'Why There is No Principle of “Procedural Autonomy” of the Member States', [in:] de Witte B., Micklitz H. (eds.), *The European Court of Justice and Autonomy of the Member States*, Intersentia 2011.
- Classen K.-D., *Gute Verwaltung im Recht der Europäischen Union. Eine Untersuchung zu Herkunft, Entstehung und Bedeutung des Art.41 Abs. 1 und 2 der Europäischen Grundrechtscharta*, Duncker&Humblot, Berlin 2008.
- Couronne V., 'L'autonomie procedurale des États Membres de l'Union européenne à l'épreuve du temps' (2010) 3–4 *Cahiers de droit européen*.
- Dauter-Kozłowska A., 'Prawo do dobrej administracji w Karcie Praw Podstawowych Unii Europejskiej i w świetle Europejskiego Kodeksu Dobrej Administracji' ['The right to good administration in the Charter of Fundamental Rights and in the European Code of Good Administrative Practice'], [in:] Mik C., Gałka K. (eds.), *Prawa podstawowe w prawie i praktyce Unii Europejskiej [Fundamental rights in EU law and practice]*, Toruń 2009.
- Domańska M., 'Miejsce zasady autonomii proceduralnej państw członkowskich wśród zasad ogólnych prawa wspólnotowego' ['The principle of procedural autonomy of Member States among other general principles of Community Law'], [in:] Mik C. (ed.), *Zasady ogólne prawa wspólnotowego [General rules of Community law]*, Toruń 2007.
- Domańska M., 'Zasada autonomii proceduralnej państw członkowskich i jej ograniczenia wynikające z zasady efektywności' ['The principle of procedural autonomy of Member States and its limitations stemming from the principle of effectiveness'], [in:] Wróbel A., Szwarc-Kuczer M., Kowalik-Bańczyk K. (eds.), *Stosowanie prawa Unii Europejskiej przez sądy. Tom II. Zasady-orzecznictwo-piśmiennictwo [Judicial application of EU law. Volume II. Principles-judicature-jurisprudence]*, Warszawa 2007.
- Jackiewicz A.I., *Prawo do dobrej administracji jako standard europejski [Right to good administration as an European standard]*, Toruń 2008.
- Kolasiński M., 'Influence of the General Principles of Community Law on Polish Antitrust Procedure', (2010) 3(3) *YARS*.
- Krasnodębska-Tomkiel M., 'Przeciwdziałanie praktykom ograniczającym konkurencję – art. 81 i 82 TWE a krajowe prawo antymonopolowe' ['Fighting with practices infringing competition – Art. 81 and 82 TEC and the national antitrust law'] (2005) 7 *Przegląd Prawa Handlowego*.
- Król-Bogomilska M., *Kary pieniężne w prawie antymonopolowym [Pecuniary fines in antitrust law]*, Warszawa 2001.
- Lenaerts K., Vanhamme J., 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) 34(3) *Common Market Law Review*.
- Materna G., 'Ograniczenie prawa wglądu do materiału dowodowego w postępowaniu przed Prezesem UOKiK' ['The limitation of evidence access in the proceedings before the President of the UOKiK'] (2008) 4 *Przegląd Prawa Handlowego*.

- Miąsik D., 'Sprawa wspólnotowa przed sądem krajowym' [A 'Community matter' in a national court'] (2008) 9 *Europejski Przegląd Sądowy*.
- Miąsik D., 'Solvents to the Rescue – a Historical Outline of the Impact of EU Law on the Application of Polish Competition Law by Polish Courts' (2010) 3(3) *YARS*.
- Miąsik D., 'Zasada efektywności' ['Principle of effectiveness'], [in:] Wróbel A. (ed.), *Stosowanie prawa Unii Europejskiej przez sądy. Tom I [Judicial application of EU law. Volume I]*, Warszawa 2010.
- Póltorak N., *Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych [Protection of rights stemming from EU Law in national proceedings]*, Warszawa 2010.
- Różewicz-Ładoń K., *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję [Proceedings before the President of the Office of Competition and Consumers Protection in respect with the practices restricting competition]*, Warszawa 2011.
- Skoczny T., Jurkowska A., Miąsik D. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumers Protection. Commentary]*, Warszawa 2009.
- Stawicki A., Stawicki E. (eds.), *Komentarz do ustawy o ochronie konkurencji i konsumentów [Act on Competition and Consumers Protection. Commentary]*, Warszawa 2010.
- Van Bael I., *Due Process in EU Competition Proceedings*, Kluwer Law International The Hague 2011.
- Wróbel A., 'Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej' ['Procedural autonomy of Member States. Principle of effectiveness and of effective judicial protection in the law of European Union'] (2005) 1 *Ruch Prawniczy, Ekonomiczny i Socjologiczny*.
- Wróbel A. (ed.), *Stosowanie prawa Unii Europejskiej przez sądy. Tom I [The judicial application of EU Law. Volume I]*, Warszawa 2010.

EU Courts' Jurisdiction over and Review of Decisions Imposing Fines in EU Competition Law

by

Mariusz Baran* and Adam Doniec**

CONTENTS

- I. Introduction
- II. Judicial control under Article 263 TFEU (i.e. 'plea of illegality') and under 261 TFEU (i.e. 'plea of unlimited control')
- III. Pre-Guidelines era on control of Commission's decisions imposing fines
- IV. Adoption the Guidelines by the European Commission – consequences for the jurisdiction of the EU Courts
- V. Unlimited jurisdiction: what does it mean?
- VI. Breach of fundamental rights – is there a threat?
 1. Fundamental rights in EU competition law proceedings – a brief overview
 2. Multiple sources of fundamental rights in competition law proceedings
 3. The character of the competition law proceedings – the invocation and applicability of particular rights
 4. Meeting ECHR standards: the Court of Justice of the European Union – a judicial body with 'full jurisdiction'?
 5. Another criterion of control: the principle of proportionality between criminal offences and penalties
- VII. Final remarks

Abstract

The aim of this article is to analyse the extent of judicial review exercised by the EU courts over the European Commission's decision imposing fines in EU competition

* Mariusz Baran, legal advisor trainee and PhD candidate at Chair of European Law, Jagiellonian University.

** Adam Doniec, legal advisor trainee and PhD candidate at Chair of European Law, Jagiellonian University.

law. When considering appeals against fines in competition law, the position of the EU courts are limited to a review of imposed fines in respect of the European Commission's Guidelines instead of an exercise of a more comprehensive appellate review. The review should not only be a control of legality but it has to be an unlimited merits control. An appeal control should be directed to review fully the facts and to control proportionality of the imposed fines. The article analyses also the question of the protection of fundamental rights in the scope of the review over decisions imposing fines. For that purpose, the article provides also a comparative analysis of the selected judgments of the EU courts and the European Court of Human Rights.

Résumé

Le but de cet article est d'analyser l'étendue du contrôle juridictionnel exercé par les Cours de l'Union européenne sur les décisions de la Commission européenne imposant des amendes. En examinant les pourvois formés contre les décisions imposant des amendes les juges vérifient seulement si les amendes ont été infligées conformément aux lignes directrices de la Commission européenne au lieu d'effectuer un contrôle juridictionnel plus complet. Ledit contrôle ne peut pas être seulement un contrôle de légalité mais il faut que ce soit un contrôle de plein juridiction. De plus, l'article comporte une analyse du problème du contrôle des décisions imposant des amendes à la lumière de protection des droits fondamentaux. Dans ce but, l'article aussi comporte l'analyse comparative des jugements sélectionnés des cours de l'Union européenne et de la Cour Européenne des Droits de l'Homme.

Classifications and keywords: fines; antitrust proceedings; unlimited jurisdiction; appeals; principle of the proportionality; right to fair trial.

I. Introduction

The unlimited jurisdiction granted to European Courts¹ under Article 31 of the Regulation 1/2003² and Article 261 of the Treaty on the Functioning of the European Union (TFEU)³ allows them, in theory, to perform an exacting

¹ The European Courts, i.e: the Court of Justice (hereafter, the Court) and the General Court (hereafter, GC; until 30 October 2009 known as the Court of First Instance, hereafter, CFI).

² Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1; see Article 31 of Regulation 1/2003: 'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed'; previously this was Article 15 of Regulation 17.

³ See Article 261 TFEU: 'Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of

review/assessment of the legality of the European Commission's decisions. Many authors have noted that in recent years the judicial review of the imposition of fines has changed⁴. In conducting reviews of fines imposed, the EU courts have become more focused on the competences ascribed to the European Commission (i.e. substantial margin of discretion/unrestricted rights, and absence of manifest/obvious error of assessment) than on review of the proportionality and accuracy of the fines. The former focus can be characterised as a **narrow or limited review** of imposed fines (granting wider discretion to the European Commission), while the latter would constitute a more **comprehensive appellate review**. In the latter approach the real character of the fines (for cartels and also abuses of dominant position⁵) imposed is reviewed, as compared to the former approach which concentrates on the absence of obvious error. This variance in standards of review requires an examination into, and clarification of, the extent of judicial review exercised by the EU courts over the discretionary/unrestricted rights held by the European Commission (hereafter, the Commission).

In our opinion the EU courts (especially the GC) do not sufficiently use their power of the full review of decision imposing fines for infringements of EU competition law. This article begins with a brief presentation of the issue of the intensity of the supervision exercised by the EU courts, relying on examples from past (i.e. pre-Guidelines era on control of Commission's decisions) and present judgments (i.e. the Commission's Guidelines and its consequences for jurisdiction of the EU Courts). It then goes on to explain the meaning of 'unlimited jurisdiction' under Article 261 TFEU and Article 31 of Regulation 1/2003 and practice of EU courts in exercising the relevant control. Next the practice of EU courts shall be also analysed from the perspective of a potential breach of fundamental rights [e.g. a right to an effective remedy and to a fair trial (Article 47 of the Charter of Fundamental Rights of the European Union, hereafter, CFR, and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, hereafter,

Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations'.

⁴ I. Forrester, 'A challenge for Europe's judges: the review of fines in competition cases' (2011) 36(2) *European Law Review* 186; F. Castillo de la Torre, 'Evidence, Proof and Judicial Review in Cartel Case', [in:] C. D. Ehlermann, M. Marquis (eds.), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases*, London 2011; W.P.J. Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review and the European Convention on Human Rights' (2010) 33(1) *World Competition* 12; also I. Forrester, 'A Bush in Need of Pruning: the Luxuriant Growth of 'Light Judicial Review'', [in:] C. D. Ehlermann, M. Marquis (eds.), *European Competition Law Annual 2009...*'.

⁵ Regulation 1/2003 covers infringements of Article 101 and 102 TFEU.

ECHR) and the principle of proportionality in criminal offences and penalties]. The article concludes with a summary and some reflections for the future.

II. Judicial control under Article 263 TFEU (i.e. plea of ‘illegality’) and under 261 TFEU (i.e. plea for ‘unlimited jurisdiction’)

The EU Courts have jurisdiction in two respects over contestations of Commission decisions imposing fines on undertakings for infringement of the EU competition rules. First, it has the task of reviewing the legality of those decisions within the context of the jurisdiction granted under Article 263 TFEU⁶. The judicial scrutiny exercised under a plea of illegality is limited to four grounds of annulment, to wit: lack of competence, infringement of an essential procedural requirement, of the Treaty, or of any rule of law related to its application⁷, and misuse of powers. EU courts cannot substitute their own assessment for the economic appraisal contained in contested Commission decision⁸. The degree of control in the review exercised by the EU courts is limited to checking whether the Commission did not overstep the limits of its rights/discretion, and did not commit any error of law or of fact in the assessment of the evidence before it⁹. Review of issues of law by the EU courts entails the power to ‘interpret the law and then check whether the Commission has applied the correct legal principles’¹⁰ in the case before it. Oppositely, when the applicants seek to challenge the ‘complex economic assessments’ conducted by the EC, the extent of judicial control appears to be far less intense¹¹. Secondly, the GC has power to assess, in the context of the unlimited

⁶ A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham 2008, pp. 164–168.

⁷ In these contexts, it must in particular review the Commission’s compliance with the duty to state reasons laid down in accordance with Article 296 of the Treaty, infringement of which renders a decision liable to annulment.

⁸ E.g. see 74/74 *CNTA SA*, ECR [1975] 533, paras. 8-17, and also recently T-155/04 *SELEX*, [2006] ECR 4797, para. 28.

⁹ A. Andreangeli, *EU Competition Enforcement...*, p. 165, and also C.S. Kerse, N. Khan, *EC Antitrust Procedure*, 5th ed. London 2004, pp. 467-468.

¹⁰ B. Vesterdorf, ‘The Court of Justice and Unlimited Jurisdiction: What does it mean in practice’ (2009) 2 *Global Competition Policy* 2-3, available at <https://www.competitionpolicyinternational.com/the-court-of-justice-and-unlimited-jurisdiction-what-does-it-mean-in-practice/>

¹¹ 42/84 *Remia*, ECR [1985] 2585, para. 26; also T-68, 77–78/89 *Società ItalianaVetro*, ECR [1992] II-1403, para. 320; and more recently T-168/01 *Glaxosmithkline*, ECR [2006] II-2969, para. 57: ‘the Court hearing an application for annulment of a decision applying Article 81(1) EC must undertake a comprehensive review of the examination carried out by the Commission

jurisdiction accorded to it by Article 261 TFEU and Article 31 of Regulation 1/2003 (previously Article 15 of Regulation 17), the appropriateness of the amount of fines imposed. By virtue of the Commission's duty, under Article 296 of the Treaty, to set out its reasons in its decision¹², that assessment may justify taking into account additional information which is not *senso stricto* required. The full jurisdiction regarding penalties requires that the EU courts must 'be able to not only control fully the objective legality of an act, but at least to review fully the facts upon which a decision is based'¹³. This unlimited judicial review/control over decisions fixing fines endows the courts, in consequence, with the power to 'cancel, reduce or increase' their amount.

III. Pre-Guidelines era on control of Commission's decisions imposing fines

It should be noted that the European Commission adopted its own set of Guidelines in 1998. The Guidelines cannot be regarded as limiting the Commission's discretion in imposing/fixing fines, but must rather be viewed as an instrument allowing undertakings access to more precise information on EU competition policy¹⁴. Originally, the Guidelines ensured the transparency and objectivity of the Commission's decisions on fines. The Guidelines constitute an instrument intended to define, while complying with higher-ranking law, the criteria which the Commission proposes to apply in the exercise of its discretion. As a consequence they constitute a self-limitation of the Commission's power¹⁵, insofar as the Commission must comply with a set of guidelines which it has itself laid down¹⁶.

unless that examination entails a complex economic assessment, in which case review by the Court is confined to ascertaining that there has been no misuse of powers, that the rules on procedure and the statement of reasons have been complied with, that the facts have been accurately stated, and that there has been no manifest error of assessment of those facts'.

¹² As regards review of the Commission's compliance with the duty to state reasons, the second subparagraph of Article 23(3) of Regulation 1/2003 provides that 'in fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement'.

¹³ D. Waelbroeck, D. Fosselard, 'Should the decision-making power in EC antitrust procedures be left to an independent judge? – the impact of the European Convention on Human Rights on EC Antitrust procedures'

(1994) 14 *Yearbook European Law* 111.

¹⁴ E.g. T-236/01, T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others v Commission*, ECR [2004] II-1181, para. 157.

¹⁵ T-214/95 *Vlaams Gewest v Commission*, ECR [1998] II-717, para. 89.

¹⁶ T-380/94 *AIUFFASS and AKT v Commission*, ECR [1996] II-2169, para. 57.

The independent approaches of the control of Commission's decisions imposing fines were manifested in early judgments of the Court of Justice. In the *Quinine* case¹⁷, the Court underscored that:

- (i) the object of imposed fines was to suppress illegal activities and to prevent any reference, and such object could not be adequately attained if the imposition of a penalty were to be restricted to current infringements alone¹⁸;
- (ii) for the purpose of fixing the amount of the fine, the gravity of the infringement was to be appraised by taking into account, in particular, the nature of the restriction on competition, the number and size of the undertakings concerned, the respective proportions of the market controlled by them within the Community, and the situation of the market when the infringement had been committed¹⁹.

In the context of the *Quinine* case it should be noted that the Court, after having conducted its review of the factual circumstances which constituted the underlying reason for the Commission's decision on fines (i.e. duration of the infringement), held that a shorter (than that in the contested decision) period of infringement 'does not appreciably alter the gravity of the restrictions on competition arising from the agreement, it justifies only a slight reduction in the fine'²⁰.

In another case – *Pioneer*²¹ – the Court carried out a similarly wide review of the Commission's contested decision on fines. As regards its assessment of the size of the imposed fines, the Court declared that it was permissible, for the purpose of fixing the fine, to have regard to both (i) the total turnover, which gave an indication of the size of the undertaking and of its economic power; and (ii) the proportion of that turnover accounted for by the goods with respect to which the infringement had been committed, which gave an indication of the scale of the contravention²². The Court, in reviewing the compliance of the levied fines with the principle of proportionality, stated that it was important not to confer on one or on the other undertaking fines which are disproportionate in relation to the other factors, and that the imposition of an appropriate fine could not be the result or effect of a simple calculation based on the total turnover of a perpetrator²³.

The Court, reviewing the legality (and also proportionality) of imposed fines, by virtue of its powers of unlimited jurisdiction, also has to bear in

¹⁷ 41/69 *Quinine*, ECR [1970] 661.

¹⁸ 41/69 *Quinine*, paras. 173 and 174.

¹⁹ 41/69 *Quinine*, para. 176.

²⁰ 41/69 *Quinine*, para. 187 and also the opinion of AG Ganda in 41/69 *Quinine*.

²¹ In the literature, this judgment often is referred to as '*Musique Diffusion Francaise*'.

²² 100–103/80 *Pioneer*, ECR [1983] 1825, para. 121.

²³ 100–103/80 *Pioneer*, para. 121 *in fine*.

mind other factors which, as shown in an example below, it may point to in its assessment of the gravity of the infringements in the decision under review. The duration of an infringement (prohibited practice) enters into both the general assessment of the Court as well as within the framework of its unlimited jurisdiction.²⁴ If a period of infringement is shorter than indicated in a contested decision, that should consequently result in a reduction of the fine imposed²⁵. In the event that more than one undertaking is involved in the same infringement, for the purpose of determining the proportions between the fines to be fixed the period of infringement which should be taken into account must be ascertained in such a way that the basic turnovers will be as comparable as possible²⁶.

In such a context the *Dunlop Slazenger* case is worthy of brief mention. On the basis of the factual circumstances in this case the CFI considered that in the event a court, within the framework of its powers of unlimited jurisdiction, reduced a finding *vis-à-vis* the duration of an infringement, this did not necessarily have to translate into a reduction of the fine in proportion to the reduced period of infringement²⁷. The gravity and the cumulative nature of the infringements while they were being actually committed are however factors which might justify a limited reduction of fines.

In the next judgment, in the *Tetra Pak v Commission* case, the CFI expressed a view that 'in order to enable the undertakings concerned to assess whether the fine is of a proper amount (...) and the Court to exercise its power of review, the Commission is not bound (...) to break down the amount of the fine between the various aspects of the abuse. In particular, such a breakdown is impossible where, as here, all the infringements found are part of a coherent overall strategy and must accordingly be dealt with globally for the purposes both of applying Article 86 of the Treaty and of setting the fine'. In exercising its control over the amount of a fine imposed, it is sufficient for the reviewing CFI that the Commission specifies in its decision its criteria for setting the general level of the fine imposed on an undertaking. It is not required to state specifically how it took into account each factor included among the criteria which contributed to establishing the general level of the fine²⁸.

²⁴ 100-103/80 *Pioneer*, para. 124.

²⁵ 100-103/80 *Pioneer*, sentence in which the Court declared void a contested decision to the extent to which it found a longer period of concerted practices; see similarly the opinion of AG Slynn in 100-103/80 *Pioneer*.

²⁶ 100-103/80 *Pioneer*, para. 122.

²⁷ T-43/92 *Dunlop Slazenger*; ECR [1994] 441, para. 178.

²⁸ See, by analogy, in particular T-1/89 *Rhône-Poulenc v Commission*, ECR [1991] II-867, para. 166; T-2/89 *Petrofina v Commission*, ECR [1991] II-1087 and 41/69 *ACF Chemiefarma v Commission*, ECR [1970] 661 and 40-48, 50, 54-56, 11, 113 and 114/73 *SuikerUnie and Others v Commission*, ECR [1975] 1663.

To recapitulate, it can be seen that in the pre-Guidelines period the intensity level of judicial review and scrutiny of the legality and the amount of imposed fines may be described as the extensive model of the jurisdiction held by the EU courts. In the period following the adoption of the Guidelines, the standard model of review exercised by EU courts over fixed fines began to evolve in the direction of limited review, which comes down to a mere assessment whether the Commission did or did not commit an obvious/manifest error. Even though the judges are not legally bound by the Guidelines concerning fines, they usually merely verify compliance with them the decision imposing fines.

IV. Adoption the Guidelines by the European Commission – consequences for the jurisdiction of the EU Courts

After the European Commission adopted the Guidelines²⁹ in 1998, the position of the EU courts began to alter, evolving towards a more limited exercise of jurisdiction over decisions imposing fines. Although the Court has on occasion engaged in an extensive review of fines in cases brought after the adoption of the Guidelines (e.g. the T-236/01, T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon* and T-8/02 *Groupe Danone* cases), it nowadays often takes a more formal and limited approach with regard to the intensity of its assessment of imposed fines. In the early fine cases – during the pre-Guidelines period – the decisions usually contained a review of the strengths and weaknesses of the evidence and a prudent consideration of all pertinent factors, without exception examining the seriousness of an infringement (gravity and duration). In the cases decided by the Commission on the basis of application of the Guidelines, the judicial inquiry conducted on review addresses principally whether the Commission had the discretion (unrestricted right) to impose the fine, rather than whether the fine was appropriate (proportional).

On the one end of the scale one may note numerous judgments which do no more than accurately record that the fine imposed lies within the range of discretion attributable to the European Commission (as in the cases T-241/01 *Scandinavian Airlines*, T-15/02 *Vitamins*, or T-116/04 *Wieland-Werke*). At the other end of the scale, one may find judgments where the EC courts substitute their own assessment for the Commission's (for example T-38/02 and the appeal C-3/06 P *Groupe Danone v Commission* or, and T-217/06 *Arkema v*

²⁹ Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) Regulation 17, OJ [1998] C 9/3; these Guidelines were replaced in 2003 by new Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, OJ [2006] C 210/2, now in effect (hereafter, the Guidelines).

Commission). To this effect, the case C-534/07 P *Wiliam Prym* needs to be mentioned. In that case the Court, referring to its earlier case-law, emphasized the view that the unlimited jurisdiction conferred on EU courts authorized them, by taking into account all of the factual circumstances, to vary the contested measure/decision, even without annulling it, so as to amend, for example, the amount of the fine³⁰.

First, the judgments of EU courts in which the courts carried on the line of the case-law directed at extensive review of a Commission decision was analysed. Although the Commission has discretion when determining the amount of fine, and is not required to apply a precise mathematical formula³¹, nonetheless the EC courts have unlimited jurisdiction within the meaning of Article 261 TFEU in actions contesting decisions whereby the Commission has fixed a fine, and accordingly may cancel, reduce or increase the fine imposed. In that context, in *Tokai Carbon* the Court stressed that its assessment of the appropriateness of the fine might, independently of any manifest errors made by the Commission in its own assessment, justify the production of and taking into account additional information which was not mentioned in the Commission's decision³².

According to the case-law (in most instances relying on judgments passed before the adoption of the Guidelines), the amount of a fine must at least be proportionate in relation to the factors taken into account in its assessment, such as the gravity and the duration of the infringement³³. Consequently, where the Commission divides the undertakings concerned into categories for the purpose of setting the amount of the fines, the thresholds for each of the categories thus identified must be coherent and objectively justified³⁴. In the *Groupe Danone* case the CFI stated that, as concerns setting the amount of the fine, it had unlimited jurisdiction and might in particular cancel or reduce the fine pursuant to Article 17 of Regulation 17³⁵. When exercising its unlimited jurisdiction, the EU courts must consider whether the amount of the fine imposed is proportionate to the gravity and duration of the infringement³⁶

³⁰ C-534/07 P *Wiliam Prym*, ECR [2009] I-07415, para. 86.

³¹ T-150/89 *Martinelli v Commission*, ECR [1995] II-1165, para. 59.

³² This same position was taken by Court of Justice in C-297/98 P *SCA Holding v Commission*, ECR [2000] I-10101, para. 55.

³³ T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others v Commission*, ECR [2001] II-2035, para. 106.

³⁴ T-213/00 *CMA CGM and Others v Commission*, ECR [2003] II-913, and T-23/99 *LR AF 1998 v Commission*, ECR [2002] II-1705, para. 298.

³⁵ T-38/02 *Groupe Danone*, ECR [2005] II-4407, para. 51; see also the earlier case-law, for example: T-83/91 *Tetra Pak Commission*, ECR [1994] II-755, para. 235, and to the same effect *Tokai Carbon*, para. 79.

³⁶ To that effect see, for example, T-229/94 *Deutsche Bahn v Commission*, ECR [1997] II-1689, paras. 125 and 127, and T-222/00 *Cheil Jedang v Commission*, ECR [2003] II-2473, para. 93.

and must weigh the seriousness of the infringement taking into account the circumstances invoked by the applicant³⁷. As the Court stressed in the appeal case *Groupe Danone* ‘**in setting the new amount of the fine, the Court of First Instance acted not within the framework of Article 263 TFEU, but in the exercise of its unlimited jurisdiction under Article 261 TFEU and Article 31 of the regulation no. 1/2003**’ [emphasis added]³⁸.

The EU courts are therefore empowered, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for that of the Commission and, consequently, to cancel, reduce or increase the fine or penalty payment imposed³⁹. It follows that the EU courts are empowered to exercise their unlimited jurisdiction where the question of the amount of the fine is before them, and that this jurisdiction may be exercised to reduce that amount as well as to increase it.⁴⁰ According to AG P. Maduro the Court, in describing the extent of jurisdiction of EU courts, expressed the opinion that ‘the distinguishing characteristic of the jurisdiction of the Community Courts under this provision [unlimited jurisdiction within the meaning of Article 261 TFEU – M.B.] is that it allows them not only to review the legality of the sanction, but also to vary the sanction, even in the absence of a material error of fact or law on the part of the Commission’⁴¹.

Finally, the more recent judgments of the EU courts, which refer to the limited extent of review currently exercised over measures fixing fines, need to be analysed. According to this line of the case-law, the review of a decision fixing fines is limited to an assessment of the range of discretion attributable to the Commission. There are many examples in the recent jurisprudence where the EU courts have limited their review to the legality of the fine imposed by the European Commission (e.g.: T-241/01 *Scandinavian Airlines System*; T-16/04 *Wieland-Werke*). The first case in which the CFI used this concept of reduced scrutiny was the judgment in *Scandinavian Airlines*. Examination of the seriousness of the infringement was limited to reviewing whether the Commission’s **assessment was not vitiated by an obvious error**⁴². Similarly in case T-116/04 *Wieland-Werke*, the CFI ruled that ‘where the Commission has a discretion, for example, as regards the amount of increase for the purposes of deterrence, review of the legality of those assessments is limited to determining

³⁷ To that effect see, for example, C-333/94 P *Tetra Pak v Commission*, ECR [1996] I-5951, para. 48: ‘the manifest nature and particular gravity of the restrictions on competition resulting from the abuses in question justified upholding the fine’.

³⁸ C-3/06 P *Groupe Danon*, ECR [2007] I-01331, para. 53.

³⁹ C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission*, ECR [2002] I-8375, para. 692.

⁴⁰ C-3/06 P *Groupe Danon*, paras. 61 and 62.

⁴¹ AG P. Maduro’s opinion in case C-3/06 P *Groupe Danon*, para. 45.

⁴² T-241/01 *Scandinavian Airlines*, ECR [2005] II-2917, para. 79.

the absence of manifest error of assessment. (...) Nor, in principle, does the discretion enjoyed by the Commission and the limits which it has imposed in that regard preclude the exercise by the Court of its unlimited jurisdiction⁴³. Bo Vesterdorf, commenting on this new approach, reflecting a lesser intensity of scrutiny, pointed out that 'the reality is that, almost without exception, the Court limits itself to performing a control of the legality of the fine or, rather, to verifying whether the Commission has applied the Guidelines for the calculation of fines correctly. In doing so, it will normally apply the manifest error test, as can be seen in the recent judgment in the Wieland-Werke case'⁴⁴By contrast in T-101/05 and T-111/05 *BASF and UCB*, the CFI employed a comprehensive concept of review of fixed fines. The EU courts are empowered to carry out a mere review of the lawfulness of the penalty, or to substitute its own appraisal for that of the Commission and, consequently, to cancel, reduce or increase the fine or penalty payment imposed where the question of the amount of the fine is before them. What is essential is that the Court underlined that, in such context, it had to be borne in mind that the Guidelines were without prejudice to the assessment of the fine by the Community judicature when it exercises its unlimited jurisdiction⁴⁵. On the basis of the facts in the case *BASF and UCB*, the CFI, exercising its unlimited jurisdiction, reduced the amount of the fine⁴⁶.

V. Unlimited jurisdiction: what does it mean?

Having regard to the issues surrounding the intensity of judicial control over the Commission's decisions, it seems reasonable to ask: what does the legal expression 'unlimited jurisdiction' mean? The term 'unlimited jurisdiction' does not in itself contain an explanation of its consequences. Does such a formulation of the EU court's jurisdiction suggest that it enjoys a wider scope

⁴³ T-116/04 *Wieland-Werke*, para. 33.

⁴⁴ Analogical position has been expressed by I. Forrester, 'Due Process in EC Competition Cases: A distinguished Institution with Flawed Procedures' (2009) 34(6) *European Law Review* 817; and see also Working Paper and a Report of the Global Competition Law Centre (GCLC) of the College of Europe: D. Slater, S. Tomas, D. Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?' (2008) 4 *Global Competition Law Centre Working Papers Series*, available at <http://www.coleurope.eu/content/gclc/documents/GCLC-WP-04-08.pdf>, also published in (2009) 5(1) *European Competition Journal* 97.

⁴⁵ T-49/02 to T-51/02 *Brasserie nationale and Others v Commission*, ECR [2005] II-3033, para. 169.

⁴⁶ T-101/05 and T-111/05 *BASF and UCB*, ECR [2007] II-04949, paras. 213–223.

of discretion than the Commission? Does it suggest that the EC courts have less scope to alter the amount of the fine, i.e. that there are areas where the Commission has discretion to which the reviewing EU courts must defer? Or does it mean that the EU courts may choose to defer?

Another issue which should be born in mind is the relation between the formula ‘unlimited jurisdiction’ and the *non ultra petita* rule. The *non ultra petita* rule has the effect of limiting a court’s jurisdiction to questions which have been formally raised by a party to the proceedings before the court. The question has arisen what implications the *non ultra petita* rule has in connection with the concept of unlimited jurisdiction within the meaning of Article 261 TFEU. The notion of unlimited jurisdiction concerns that very aspect – the demarcation between the powers of the judiciary and those of the administrative authorities. Article 261 TFEU and Article 31 of Regulation 1/2003 (previously Article 17 of Regulation 17) grant the EU courts the possibility to replace the assessment of the administrative authority with their own, and thus to decide in place of the Commission. This clearly creates a significant, i.e. extensive, exception to the normal jurisdiction of the EU courts, albeit in a limited area⁴⁷.

Accordingly, within this area, the *non ultra petita* rule, properly understood as a restriction on the exercise of judicial power, has only a limited role to play. Advocate General P. Maduro expressed the view that it merely implied that the EU courts must not exercise their unlimited jurisdiction without having been seized of the matter of the fine⁴⁸. Once the issue of the amount of the fine has been submitted for reassessment, the jurisdiction under the Article 261 TFEU is indeed unlimited, in the sense that it may be exercised both in order to reduce and in order to increase the fine. By implication, the GC may apply a different method of calculation when it reassesses the fine, even if that method is less favourable for the undertaking concerned. It should be underlined that the review carried out by the EU courts in respect of the Commission’s decisions on competition matters is more than a simple review of legality, which would permit only dismissal of an action for annulment or an annulment of the contested measure. The unlimited jurisdiction conferred on the GC by Article 31 of Regulation 1/2003, in accordance with Article 261 TFEU, authorises the court to change the contested measure, even without

⁴⁷ For the same view, see the opinion of AG V. van Themaat in 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigaretten industrie v Commission*, [1985] ECR 3831, at 3851. One should also note that in 8/56 *ALMA* the Court of Justice stated: ‘Even in the absence of any formal submission, the Court is authorised to reduce the amount of an excessive fine since such a result would not have an effect *ultra petita*, but would on the contrary amount to a partial acceptance of the application’, ECR [1957 and 1958] 95, para 100.

⁴⁸ See AG P. Maduro’s opinion in C-3/06 P *Groupe Danone*, para. 46 and following.

annulling it, by taking into account all of the factual circumstances, so as to amend, for example, the amount of the fine⁴⁹.

First of all, a review of the legality with which the EU courts are vested means in practice application of the criteria used in an appraisal by the Commission to determine the gravity of an infringement of competition law for the purposes of calculating the fine, namely the criterion of the actual impact of the infringement on the market. In the exercise of its unlimited jurisdiction, the GC took into account the defects identified, and considered whether it had any effect on the amount of the fine and whether it was necessary, accordingly, to adjust the amount. In the course of that examination, the Court held that it was not appropriate to amend the starting amount of the fine set in the decision at issue. The bringing of an action does not entail the definitive transfer to the EU courts of the power to impose penalties. The Commission finally loses its power only if the court has actually exercised its unlimited jurisdiction. **In other words, where the EU courts simply annul a decision on the ground of illegality without themselves ruling on the substance of the infringement or on the penalty, the institution which adopted the annulled measure may re-open the procedure at the stage at which the illegality was found to have occurred, and exercise once again its power to impose penalties.** In consequence, the EU courts are not competent to substitute themselves for the Commission in re-opening an administrative procedure which has been entirely or partially annulled.

In contrast, in the case T-15/02 *Vitamins* the CFI expressed the view that was possible for the EU courts to exercise its unlimited jurisdiction under Article 261 TFEU and Article 31 of Regulation 1/2003 only where it had made a finding of illegality affecting the decision about which the undertaking concerned had complained in its action, and in order to remedy the consequences which that illegality had for determination of the amount of the fine imposed, by annulling or, if necessary, adjusting the fine⁵⁰. In that regard the review which the GC is required to exercise in respect of a Commission decision finding an infringement of competition rules and imposing fines is confined to a review of the legality of that decision, and only if it holds void some aspect of a contested decision may the GC exercise unlimited jurisdiction, which includes the possibility of amending or annulling the fine imposed.

In this context it is worth pointing out the principle enunciated by the Court that, in adjudicating in the context of an appeal from a decision of the GC, the Court is limited to verifying whether, by confirming the criteria employed by the Commission to fix the fines and checking or even correcting the way in

⁴⁹ C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission*, ECR [2002] I-8375, para. 692.

⁵⁰ T-15/02 *Vitamins*, ECR [2006] II-497, para. 582.

which they were applied, the GC committed a manifest error, and whether it respected the principles of proportionality and equal treatment which govern the imposition of fines⁵¹. In *Dansk Rørindustri* the Court ruled that it was not for it, 'when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law'⁵².

The jurisdiction exercised by the Court, which is limited to a manifest/obvious error committed by the GC, is understandable when the Court adjudicates in an appeal, but it should be rejected for being too formal and narrow when its reasoning is extended by analogy to the control exercised by the GC in the context of complaints brought in the first instance by undertakings against the Commission's decisions. The crucial arguments in favour of rejecting such a standard are the requirements flowing from the principle of effective judicial protection and the role of fundamental rights in EU competition law.

It should be underlined that the position taken by EU courts, when they examine a Commission's decision on fines, seems to be too restrained. The Commission's broad margin of discretion in assessment of the facts is confirmed in relation to the many elements involved in the calculation of fines: duration, deterrence, recidivism, mitigating circumstances etc. According to the EU courts' case-law, the nature of competition enforcement, which involves the necessity of making 'complex economic assessments,' justifies the exercise by the EU courts of a 'limited' review in its examination into the evidence reviewed and assessed by the Commission⁵³. One may ask whether the standard applied by EU courts to pleas raised under Article 263 of the TFEU, i.e. to review whether the 'complex economic appraisals' conducted by the Commission justify annulment of a decision, may be suited not only to the objective nature of the conditions laid down in Articles 101 and 102 TFEU, but also to the 'criminal' nature of antitrust proceedings, and whether the aforementioned standard might not also be applicable to the unlimited

⁵¹ Such a position was expressed by the Court of Justice in C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission*, ECR [2004] I-123, para 365; and also by AG A. Tizzano's conclusion in C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri*, ECR [2005] I-05425, para. 100.

⁵² C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri*, para. 245.

⁵³ T-65/98 *Van den Bergh v Commission*, ECR [2003] II-4653, para. 136, and T-17/93 *Matra Hachette SA v Commission*, ECR [1994] II-595, para. 104; C-194/99 P *Thyssen Stahl v Commission*, para. 73. See also D. Geradin, 'The EU competition law fining system: a reassessment' (2011) 052 *Tilburg Law and Economics Center (TILEC) Discussion Paper* available at <http://ssrn.com/abstract=1937582> or <http://dx.doi.org/10.2139/ssrn.1937582>, p. 43 and following.

jurisdiction accorded to EU courts by Article 261 TFEU and Article 31 of Regulation 1/2003. In our opinion, **using the standard of review elaborated for cases brought on ‘the plea of illegality’ under Article 263 TFEU, as a framework for determining the extent of the jurisdiction exercised by the EU Courts in their review of the legality of decisions imposing fines under Article 261 TFEU (unlimited jurisdiction), leads to unjustified confusion between the two separate grants of power to EU courts. *Ex definitione* the extent of jurisdiction of the EU courts under Article 261 TFEU (i.e. the plea of unlimited jurisdiction) is wider than the power of EU courts exercised solely under the plea of illegality from Article 263 TFEU, because Article 31 of Regulation 1/2003 (i.e. ‘the plea of unlimited review’) endows EU courts with full jurisdiction over ‘decisions whereby the Commission has fixed a fine or a periodic penalty payment’ and consequently with the power to ‘cancel, reduce or increase’ their amount⁵⁴.**

VI. Breach of fundamental rights – is there a threat?

The aforementioned practice of EU courts should be also analysed from the perspective of a potential breach of fundamental rights⁵⁵. In this section of our article, we examine the right to an effective remedy and to a fair trial (Article 47 CFR and Article 6 ECHR) and the principle of proportionality in criminal offences and penalties⁵⁶. Even at first glance it can be seen that these particular rights may be threatened by the aforementioned practices of the EU courts.

The right of undertakings to invoke fundamental rights⁵⁷ before the European Commission or the EU courts during competition law proceedings is not so obvious on its face, and thus requires a short discussion in this article.

⁵⁴ A. Andreangeli, *EU Competition Enforcement...*, pp. 162–164

⁵⁵ The terms ‘fundamental rights’ and ‘human rights’ shall be used alternatively.

⁵⁶ The right to obtain an effective remedy in a competent court has been recognized by the ECJ as a general principle of law. See, for instance, 222/84 *Johnston*, ECR [1986] 1651, para. 61.

⁵⁷ ‘Undertakings’ fined by the Commission for an infringement of competition rules are in most cases legal entities, which raises the question whether they can invoke the same rights and freedoms that are regarded as fundamental to individual human beings. Both, the European Court of Human Rights and the EU Court of Justice have acknowledged undertakings as entities entitled to invoke human/fundamental rights, regardless of whether the undertaking in question is a legal or natural person. The only difference lies in the character of the right invoked. Legal entities are not enabled to invoke rights which are strictly linked with the faculties of a natural person, i.e. human dignity, right to life, right to the integrity of the person, prohibition of slavery etc. See M. Emberland, *The Human Rights of Companies: Exploring the*

1. Fundamental rights in EU competition law proceedings – a brief overview

The adoption of the Treaty of Lisbon has signalled a clear intent to strengthen the protection of fundamental rights in the EU. The major change envisaged by this treaty *vis-à-vis* fundamental rights is encompassed in the change in the legal status of the CFR, which now has become a binding legal instrument of primary law, having the same legal status as the Treaties themselves⁵⁸. Another important change concerns the EU itself, which is obligated to accede to the ECHR⁵⁹. This new situation raises two issues which should be identified and briefly described in this short section of our article: (i) the problem of multiple sources of fundamental rights in competition law proceedings, and (ii) the question of the character of the competition law proceedings, which impacts on the right to invoke particular rights, as well as their applicability.

2. Multiple sources of fundamental rights in competition law proceedings

There are three main sources of fundamental rights that may be invoked by undertakings in competition enforcement proceedings before EU bodies – the general principles of EU law, the ECHR, and, since the taking effect of the Treaty of Lisbon, the CFR. Most often the parties invoke all three sources. Article 6(3) TEU provides that fundamental rights, as guaranteed in the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law. The content of these general principles is mostly supplied by the EU courts. The EU courts, when specifying the content of a general principle, which in this case means one of the fundamental rights, have referred to constitutional traditions common to the Member States, and (mainly) to the ECHR. It should be pointed out that the ECHR is no more than a point of reference and not yet a legally binding source of law of for the EU bodies⁶⁰. Until December 2009 the status of the CFR was even weaker than that of the ECHR. The ECJ did not refer to the CFR at all. It was mentioned only by the General Advocates and, rather seldom, by the GC⁶¹. Lately however a change in the ECJ's reasoning can be observed. In two recent

Structure of ECHR Protection, Oxford 2006, K. Kowalik-Bańczyk, *The issue of the protection of fundamental rights in EU competition proceedings*, z. 39, Centrum Europejskie Natolin, Warszawa 2010, pp. 90–95.

⁵⁸ Article 6(1) TEU.

⁵⁹ Article 6(2) TEU.

⁶⁰ See K. Kowalik-Bańczyk, *The issue of the protection...*, p. 118 and following, and the decisions cited therein.

⁶¹ K. Kowalik-Bańczyk, *The issue of the protection...*, p. 123.

cases, *KME*⁶² and *Chalkor*⁶³ the judges referred to the provisions of the CFR exclusively. The Court stated that: 'The principle of effective judicial protection is a general principle of European Union law to which expression is now given by Article 47 of the Charter . . . {which} . . . implements in European Union law the protection afforded by Article 6(1) ECHR. It is necessary, therefore, to refer only to Article 47'. So it can be seen that the CFR has gained significantly in importance, and that as a result the ECHR has been disadvantaged in a way. Unfortunately, this does not mean that it will be any easier for the parties to establish the precise scope of the right that they wish to invoke. The EU courts tend to vaguely describe the scope and the meaning of the principles they incorporate, in part because of the multiple sources that they themselves refer to⁶⁴. Even though the ECJ invoked the CFR in the aforementioned cases, this does make the scope and the meaning of the fundamental rights in question clear and precise. The EU courts nearly always refer to their earlier judgments, and, depending on the principle in question, they might have referred in such judgments to various sources. It should be stressed that a great step forward in the clarification of EU fundamental rights would occur if the EU courts explicitly recognised the jurisprudence of the European Court of Human Rights (hereafter, ECtHR), i.e. its decisions defining the meaning and the scope of a human right provided for in the ECHR⁶⁵. In our opinion this should be a consequence of Article 52(3)⁶⁶ CFR and the Recital 37 of Regulation 1/2003, which is also affirmed in the ECJ's jurisprudence⁶⁷.

3. The character of the competition law proceedings – the invocation and applicability of particular rights

Even if an undertaking establishes the scope of the fundamental right that it wishes to invoke, there remain issues surrounding the invocation and application of the right in competition law proceedings. The specific character of competition enforcement proceedings affects which right may be invoked,

⁶² See C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission*, not yet reported.

⁶³ See C-386/10 P *Chalkor AE Epexergias Metallon v European Commission*, not yet reported.

⁶⁴ See K. Kowalik-Bañczyk, 'The issue of the protection...', p. 116.

⁶⁵ See I. Forrester, 'A challenge for Europe's judges...', p. 201.

⁶⁶ This is the only way to guarantee that 'the meaning and scope of those rights (...) be the same as those laid down by the [ECHR]'. See 'Explanation on Article 52 – Scope and interpretation of rights and principles', Explanations relating to the Charter of Fundamental Rights, OJ [2007] C 303/02.

⁶⁷ See W.P.J. Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights' (2010) 33(1) *World Competition* 9.

since some fundamental rights can be invoked by any entity in any official proceeding⁶⁸, others may be invoked only in relation to criminal proceedings⁶⁹, and some only to a certain extent in proceedings other than criminal⁷⁰. Formally the Commission is, in the context of competition law proceedings, an administrative body applying administrative law, and when it imposes fines by decisions, they are not invested with a criminal law nature *per se*⁷¹. Some authors⁷² argue however that, due to their severity and their increasing level, the antitrust fines imposed by the Commission are criminal in nature. This is also consistent with the *Engel* criteria⁷³, established by the ECtHR in the *Engel* case in 1976⁷⁴.

There are also some scholars who go further and argue that, due to the ‘criminal-like characteristics: criminal-like investigations; severe moral stigma; huge penalties; possible national imprisonment; and public disgrace (...) the application of the competition rules by the European Commission is a matter of hard core criminal law enforcement within the meaning of the ECHR’⁷⁵. Others assert that competition law proceedings fall outside the scope of hard core criminal law⁷⁶. While we do not take a position on this dispute, because it exceeds the scope of this article, it is worth noting that if it were agreed that competition proceedings fall within the scope of hard core criminal

⁶⁸ E.g. Article 47 CFR.

⁶⁹ E.g. Article 49(3) CFR, based on its wording.

⁷⁰ E.g. Article 6 ECHR, see W.P.J. Wils, ‘The Increased Level...’, 14

⁷¹ Article 23(5) of the Regulation 1/2003.

⁷² See for e.g. D. Slater, S. Thomas, D. Waelbroeck, ‘Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?’ (2009) 5(1) *European Competition Journal* 97–143; I. S. Forrester, ‘Due Process in EC Competition Cases...’, p. 817; and by the same author – ‘A challenge for Europe’s judges...’, pp.185–207; also F. Dethmers, H. Engelen, ‘Fines under Article 102 of the Treaty on the Functioning of the European Union’ (2011) 32(2) *European Competition Law Review* 86-99; D. Geradin, ‘The EU Competition Law Fining...’.

⁷³ See the ECtHR judgment of 8 June 1976 *Engel and Others v the Netherlands*, Series A no 22, Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72. The ECtHR said that in order to determine if Article 6 ECHR is applicable the following three *alternative* criteria had to be taken under consideration when assessing the criminal nature of an imposed penalty: (i) the domestic classification; (ii) the nature of the offence; (iii) the severity of the potential penalty which the person concerned risks incurring.

⁷⁴ W.P.J. Wils points out that the increasing level of antitrust fines has nothing to do with the fact that those fines are criminal in nature. He argues that the *Engel* criteria have been met for a long time now by the antitrust proceedings and it is obvious that the fines in question are criminal in nature, but they fall outside of the ‘hard core of criminal law’, which means that Article 6 ECHR may be invoked only to some extent. See W.P.J. Wils, ‘The Increased Level...’, p.13.

⁷⁵ See I. S. Forrester, ‘A challenge for...’, pp. 201–202.

⁷⁶ See W.P.J. Wils, ‘The Increased Level...’, p. 18 and following

proceedings, then by virtue of Article 6 ECHR it would be impossible for the Commission in its present shape to impose fines on undertakings, because it is an administrative body which combines administrative and decision-making functions, and not an independent and impartial tribunal. The ECtHR has never ruled on the compatibility of EU competition law enforcement procedures with Article 6 ECHR, but its decisions in national cases seem to confirm that competition law proceedings **are criminal in nature, but fall outside of the hard core of criminal law**⁷⁷, i.e., that an administrative body (non-judicial) which combines administrative and decision-making functions (like the Commission), can impose fines which are criminal in nature, provided that there is a possibility of appeal to a **judicial body with full jurisdiction**. 'Full jurisdiction' means, among other things, that the judicial body reviewing the decision has the power to change in all respects, on questions of both fact and law, the decision taken by the inferior body⁷⁸. Furthermore, it should be emphasized while that the EU courts have never agreed that these proceedings are criminal in nature, they have acknowledged that some rights which can be invoked in criminal proceedings also apply in competition law proceedings⁷⁹.

4. Meeting ECHR standards: the Court of Justice of the European Union – a judicial body with 'full jurisdiction'?

It can be seen that the EU competition law enforcement procedure formally meets the Article 6 ECHR standards. 'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed'⁸⁰. In other words, the EU courts have the possibility to change in all respects, on questions of fact and law, the decision taken by the Commission and they do not have to limit themselves to a simple control of its legality. The wording of Article 31 of Regulation 1/2003 is even mentioned by the Portuguese judge Pinto de Albuquerque in his dissenting opinion to the ECtHR's ruling in the *Menarini* case⁸¹ as an example of a 'strong' ('fort') model of judicial review, as opposed to a 'weak' ('faible') judicial control, in the latter of which **the court cannot, among other things,**

⁷⁷ Regarding national procedures, see ECtHR judgment of 27 September 2011 in the case *Menarini Diagnostics S.R.L. c. Italie*, Application No 43509/08 (only in French), para. 57 and following

⁷⁸ See *Menarini*, para. 59.

⁷⁹ See K. Kowalik-Bańczyk, *The issue of the protection...*, p.108 and following

⁸⁰ Article 31 of the Regulation 1/2003.

⁸¹ See *Menarini*, para. 8 of the Dissenting Opinion of judge P.S.Pinto de Albuquerque.

replace the technical evaluations made by the administrative body with its own findings.

Unfortunately, as has already been shown, the EU courts' practice does not comport with the strong model referred to by judge de Albuquerque above. In practice the EU courts perform only a limited/narrow, or, as judge de Albuquerque would put it, 'weak' judicial review of the Commission's decisions. In taking the position that the Commission has a large margin of discretion and adopting the practice of confirming the Commission's decisions in the absence of manifest error, the EU courts are only controlling legality within the meaning of Article 263 TFEU. Not only must the EU courts have the power of full jurisdiction, but in order to meet the standards of Article 6 ECHR they must use it⁸², i.e. they should review whether the Commission has used its competences appropriately, examine whether the Commission's sanctions are proportional and well-founded, and analyse its technical evaluations. Moreover they should perform a detailed analysis to assure that any fines imposed correspond to the pertinent parameters, including the proportionality of the imposed fine⁸³, and if necessary change (cancel, reduce, increase) the imposed fine **drawing on their own evaluations.**

Recently, a glimmer of hope has emerged for at least a slight change in the way that judicial review is being performed by the EU courts. The ECJ has lately been asked, in the *Chalkor* case⁸⁴, for its opinion on this practice as implemented by the GC. Naturally it refused to answer, because the role of an appeal court is not to examine the lower court's or even its own practice, but to decide on the correctness of a particular decision taken by the lower court. A similar problem occurred in the *KME* case⁸⁵, cited above. Nonetheless, the Court's judges had to review these two judgments of the GC, which can be viewed as representative examples of the aforementioned practice⁸⁶. In both cases the Court seemed not to discern the problem. In general its judges, having analysed the powers of the GC, declare that 'the review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect

⁸² See *Menarini*, para. 63.

⁸³ See *Menarini*, para. 64 and following

⁸⁴ C-386/10 P *Chalkor*, para. 34 and following. and para. 49. It is noteworthy that the person asking the ECJ for the opinion was none other than I. S. Forrester, who represented *Chalkor* in the case.

⁸⁵ See the opinion of AG E. Sharpston in the case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission*, not yet reported, para. 81.

⁸⁶ T-21/05 *Chalkor AE Epexergias Metallon v European Commission*, ECR [2010] II-01895, para. 58 and following. and the judgment of the GC of 6 May 2009 in case T-127/04 *KME Germany AG, KME France SAS and KME Italy SpA v Commission of the European Communities*, ECR [2009] II-01167, para. 31 and following

of the amount of the fine, provided for under Article 31 of Regulation 1/2003, is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter⁸⁷. This may be seen as positive in that the Court underscores the power of the GC to review the Commission's decisions, even in areas giving rise to complex economic assessments⁸⁸. In addition, the Court examined whether the GC actually performed the full review, thoroughly analysing all the pleas of illegality submitted to it by the applicants⁸⁹. It found that the GC did fulfil its duties. It may be that in these cases the applicants' arguments were weak and the GC did actually perform a full review. However, in our opinion the problem raised was not directly addressed. AG Sharpston suggests in her opinion in the *KME* case that the problem with the review conducted by the GC lies in the language which it used, rather than in the degree of scrutiny it exercised⁹⁰. This view may be true in these two cases, but it can hardly be true in general. The GC should start by changing its language, because if it uses the manifest error standard and refers to the Commission's discretion there will always be voices claiming that it does not perform a full review. In other words, the GC cannot declare that it is not required to perform a full review, but then go ahead and do just that. Unfortunately, the Court was not severe enough *vis-à-vis* the GC. The ECJ did not comment on the manifest error standard applied by the GC, even though the applicants pointed it out. Thus the Court's decision contained no clear signal to change the existing practice. Hopefully, these two judgments will have the effect of causing the GC to reconsider its scrutiny of Commission decisions, but without a clear signal from the Courts the practice may well remain the same. It should be born in mind that the GC is the only court entitled to review the Commission's decisions based on findings of fact – the General Court's decisions are subject to a right of appeal to the Courts on points of law only⁹¹. This is a compelling reason for a thorough review in the first instance. The GC should not be reluctant to use the full review powers granted to it. This is especially important in the area of competition law, because of the criminal/quasi-criminal character of the fines imposed by the Commission, as well as the controversial issue that the administrative body imposing those fines combines the roles of both prosecutor and adjudicator.

⁸⁷ C-386/10 P *Chalkor*, para. 67.

⁸⁸ C-386/10 P *Chalkor*, para. 54.

⁸⁹ It should be pointed the ECJ underlines that 'the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that proceedings before the Courts of the European Union are *inter partes*'. So it is the job of the applicant to formulate its demands precisely. See C-386/10 P *Chalkor*, para. 64.

⁹⁰ See the opinion of AG in case C-272/09 P *KME*, para. 73.

⁹¹ See Article 256 TFEU.

5. Another criterion of control: the principle of proportionality between criminal offences and penalties

As one critic rightly points out⁹², another reason why the aforementioned practice would seem not to satisfy the standards of fundamental rights' protection is the lack of review of proportionality. As we can see in the *Chalkor* and *KME* cases cited above, the fact that competition law fines have a criminal character loses its significance when it comes to the application of Article 47 CFR, because this provision provides that **everyone** has the right to an effective remedy and to a fair trial **regardless of the character of the proceedings**. The situation was different on the basis of the Article 6 ECHR. However, the criminal character of competition law proceedings is important when it comes to applying those rights reserved for criminal proceedings, such as, among others, the principle of proportionality between criminal offences and penalties, as provided in Article 49(3) CFR, which declares that: 'The severity of penalties must not be disproportionate to the criminal offence'.

The review of proportionality is essential in competition law cases, especially now that the level of the fines has increased so dramatically⁹³. This is another reason why the GC cannot limit itself to a review of manifest error only. In the past there have been some cases in which the GC explicitly refused to review proportionality⁹⁴. Now that the CFR is legally binding, this state of affairs is unacceptable.

The calculation of the fine assessed must 'personalise' the fine in relation to the individual characteristics of undertakings and proportion the fine assessed on an undertaking in relation to the other undertakings involved in the illegal conduct. The principle of proportionality is applied not in absolute terms, but rather in relative terms. This means that the principle is designed to ensure that the penalty is personalised and proportionate to the gravity of the infringement and to the other circumstances, both subjective and objective, of each case. From that standpoint, the proportionality and non-discriminatory character of the fine cannot derive from a simple correlation with the overall turnover for the previous business year, but rather from the entire set of factors involved and referred to. As the Court itself has observed 'the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect

⁹² See I. S. Forrester, 'A challenge for...', pp. 206–207.

⁹³ See D. Geradin, 'The EU Competition Law Fining...', pp. 13–15; D. Slater, S. Thomas, D. Waelbroeck, *Competition law proceedings...*, pp. 128–129; F. Dethmers, H. Engelen, 'Fines under article 102...', pp. 86–93.

⁹⁴ See I. S. Forrester, 'A challenge for...', footnote 115 and the decision cited therein.

of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up⁹⁵.

The relative/ambivalent aspect of the test of proportionality is especially observable in cases of collective infringements. Where an infringement has been committed by a number of undertakings, the requirement of proportionality means that, when the fine is fixed, it is necessary to examine the relative gravity of the participation of each undertaking. That same requirement is imposed by the principle of equal treatment which, according to settled case-law, is violated when similar situations are treated differently or different situations are treated in the same way, unless such treatment can be objectively justified⁹⁶. It thus follows that the fine must be equal for all undertakings which are in the same situation, and as well that differing conduct cannot be punished by the blanket application of a single penalty. Proportionality must be considered as one of the important factors to be taken under consideration by the EU courts when performing a full review which would meet all the standards of fundamental rights' protection.

VII. Final remarks

In our opinion there are no satisfactory arguments for imposing limitations on the review of the legality of Commission decisions by EU courts in competition enforcement proceedings, and only the exercise an unlimited jurisdiction can guarantee the principle of effective judicial protection. Full judicial review means that the Commission's decisions imposing fines should be assessed more precisely and in-depth, particularly with respect to proportionality and adequacy. The line of the case-law which has been developed after the adoption of the Guidelines by the Commission, i.e. the introduction of a limited standard of review, restricted to manifest error *vis-à-vis* the assessments made by the Commission in the course of deciding the competition law cases before it, cannot be considered adequate. In the context of its unlimited power to

⁹⁵ 'Among those numerous factors for appraisal of the infringement may be included the volume and the value of the products involved in the infringement, the size and economic strength of the undertakings which committed the infringement and the influence they are able to exercise on the market, the conduct of each undertaking, the role played by each in committing the infringement, the benefit which they have obtained from such anti-competitive practices, and the economic context of the infringement, and so forth' – a conclusion provided for by AG A. Tizzano in C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri*, ECR [2005] I-05425, especially para. 69 and the judgments cited therein.

⁹⁶ See, for example, 106/83 *Sermide*, ECR [1984] 4209, para. 28, and C-174/89 *Hoche*, ECR [1990] I-2681, para. 25.

review discretionary acts, the General Court should assess the seriousness of the infringement and the amount of the fine in accordance with the same criteria as used by the Commission. The General Court should not limit its power to exercise a comprehensive review of discretionary measures. Instead it ought to make frequent use of the proportionality principle and adequacy when it reviews challenges to decisions imposing fines.

When the EU courts simply annul a decision on the ground of illegality (i.e. based on a plea of illegality alleged pursuant to Article 263 TFEU), without ruling on the substance of the infringement or on the penalty, the institution which adopted the annulled measure should re-open the procedure at the stage at which the illegality was found to have occurred and re-exercise its power, including the power to impose penalties. By contrast, when an applicant challenges a decision imposing fines under a 'plea of unlimited jurisdiction' based on Article 261 TFEU in connection with the Article 31 of Regulation 1/2003, the extent of the jurisdiction exercised by the EU courts reviewing such decision should not be restricted to the criterion of manifest/obvious error in the assessment performed by the Commission. The different, and wider, character of the 'the plea of unlimited jurisdiction' contesting a Commission decision imposing a fine, exercised under Article 261 TFEU and Article 31 of Regulation 1/2003, in comparison with 'the plea of illegality' brought solely under Article 263 TFEU, justifies the application of a comprehensive 'full jurisdiction'.

This full review is also indispensable from the point of view of protecting fundamental rights. Formally, the EU courts have all the tools necessary to perform a full review, so it is hardly comprehensible why they would limit themselves and perform only the limited/narrow review. In order to comply with the standards contained in Article 6 ECHR, the EU courts should ensure that the 'strong' model is applied without exception. A good starting point would be a change in the language used by the GC, so that applicants would know when and if this court really performed a full review. There is also a great need for continuity in the case-law. Furthermore, particularly since the CFR has become a binding instrument since the effective date of the Lisbon Treaty, the EU courts should put a much greater emphasis on review of the proportionality between the incriminated practice and the level of fine. The fines should be more 'personalized'. On the other hand, applicants should bear in mind that it is their responsibility to raise issues and pleas under the law when appealing a decision, and it is their obligation to adduce evidence in support of their pleas. The judicial review exercised by the EU courts is limited to those claims duly raised and presented by the applicants.

Literature

- Andreangeli A., *EU Competition Enforcement and Human Rights*, Cheltenham 2008.
- Castillo de la Torre F., 'Evidence, Proof and Judicial Review in Cartel Case', [in:] Ehlermann C. D., Marquis M. (eds.), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases*, London 2011.
- Dethmers F., Engelen H., 'Fines under article 102 of the Treaty on the Functioning of the European Union' (2011) 32(2) *European Competition Law Review* 86.
- Emberland M., *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, Oxford 2006.
- Forrester I., 'A challenge for Europe's judges: the review of fines in competition cases' (2011) 36(2) *European Law Review*.
- Forrester I., 'A Bush in Need of Pruning: the Luxuriant Growth of Light Judicial Review', [in:] Ehlermann C. D., Marquis M. (eds.), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases*, London 2011.
- Forrester I., 'Due Process in EC Competition Cases: A distinguished Institution with Flawed Procedures' (2009) 34(6) *European Law Review*.
- Geradin D., 'The EU competition law fining system: a reassessment' (2011) 052 Tilburg University – Tilburg Law and Economics Center (TILEC) Discussion Paper.
- Kerse C.S., Khan N., *EC Antitrust Procedure*, 5th ed. London 2004.
- Kowalik-Bańczyk K., *The issue of the protection of fundamental rights in EU competition proceedings*, z. 39, Centrum Europejskie Natolin, Warszawa 2010.
- Slater D., Tomas S., D. Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?' (2008) 04 *Global Competition Law Centre Working Papers Series* (also published in (2009) 5(1) *European Competition Journal*).
- Vesterdorf B., 'The Court of Justice and Unlimited Jurisdiction: What does it mean in practice' (2009) 2 *Global Competition Policy*.
- Waelbroeck D., D. Fosselard, 'Should the decision-making power in EC antitrust procedures be left to an independent judge? – the impact of the European Convention on Human Rights on EC Antitrust procedures' (1994) 14 *Yearbook European Law*.
- Wils W.P.J., 'The Increased Level of EU Antitrust Fines, Judicial Review and the European Convention on Human Rights' (2010) 33(1) *World Competition*.

Standard of Judicial Review of Merger Decisions Concerning Oligopolistic Markets

by

Jan Szczodrowski*

CONTENTS

- I. Introduction
- II. Standard of judicial control – a definition and theoretical framework
- III. Standard of judicial review in EU jurisprudence on mergers in oligopolistic markets
 1. *Kali & Salz*: errors of fact and errors of law in its early form
 2. *Airtours*
 3. *Sony/BMG – Impala*
 - 3.1. The judgment of the General Court
 - 3.2. The judgment of the European Court of Justice
- IV. Polish perspective
- V. Conclusions

Abstract

This article analyses the way in which standard of judicial review of the European Commission's (EC) decisions concerning oligopolistic markets was exercised by EU judiciary. In the recent years we could observe an increasing role played by the GC and the ECJ in shaping the legal framework in which mergers are assessed. In fact, the EU judiciary has not only extended the previously narrow scope of the original merger regulation but it has also contributed significantly towards increasing the legal certainty by elaborating a reliable set of legal criteria for the assessment of oligopolistic markets, which also reflected the economic theory. The EU judiciary has also very often acted as a 'filter' to the novel theories introduced in the EC

* Jan Szczodrowski, PhD candidate, Adam Mickiewicz University, Department of Law and Administrative Science, Chair of European Law; LL. M. in European legal studies (College of Europe, Bruges).

decisions. All of the aforementioned developments would not be possible without the high standard of judicial review exercised by EU courts and ‘special judicial techniques’ used by them.

Résumé

Cet article porte sur la manière dont le contrôle juridictionnel des décisions de la Commission Européenne relatives aux concentrations des entreprises sur les marchés oligopolistiques a été effectué par les juridictions européennes. Dans les dernières années, on pouvait observer l’accroissement de rôle du Tribunal et de la Cour dans le développement du cadre juridique dans lequel les concentrations sont évaluées. En réalité, la branche judiciaire de l’UE a élargi le champ d’application du règlement sur les concentrations. Ainsi, elle a également contribué considérablement à l’augmentation de la certitude juridique grâce aux développements des critères qui servent à évaluer les marchés oligopolistiques, ce qui reflète également les théories économiques. Les cours européennes ont fréquemment agi en tant qu’un ‘filtre’ des nouvelles théories qui ont été avancées par la Commission Européenne. Tous les développements en question ne seraient pas possible sans le niveau élevé de contrôle juridictionnel ainsi que ‘les techniques judiciaires spécifiques’ employées par les cours.

Classifications and key words: judicial review; merger control; mergers; oligopolies; oligopolistic markets; Poland; Polish merger control; standard of judicial review; co – coordinated effects; non – coordinated effects.

I. Introduction

Standard of judicial review is a concept which has been discussed back and forth in recent years, following a series of landmark judgments of both the European General Court (GC) and the European Court of Justice (ECJ). Although most commentators would contend that the issue of the standard of proof/standard of judicial review of merger decisions has come to the fore only with the *Airtours*¹/*Schneider*²/*Tetra Laval*³ puzzle, in fact we may trace back first ‘symptoms’ of the Court’s willingness to develop that particular issue as early as 1998, in its *Kali & Salz*⁴ judgment.

¹ T-342/99 *Airtours plc v Commission of the European Communities*, ECR [2002] II-2585.

² T-310/01 *Schneider Electric SA v Commission of the European Communities*, ECR [2002] II-4071.

³ T-5/02 *Tetra Laval BV v Commission of the European Communities*, ECR [2002] II-4381.

⁴ C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l’azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities*, ECR [1998] I-1375.

It is commonly observed that the overwhelming majority of EU court decisions laying out their jurisprudence pertaining to the standard of judicial control of merger decisions is related to oligopolistic markets, to which the concept of collective dominance/coordinated effects was applied, namely: *Kali & Salz*⁵, *Airtours*⁶ as well as *Sony/BMG (Impala)*⁷ litigation. Indeed oligopolistic markets have very peculiar characteristics, which has made them difficult to control under EU competition law for a long time. The tools for the effective scrutiny of the behavior of undertakings on such markets were developed incrementally. Apart from stretching the limits of the application of Articles 101 TFEU⁸ and 102 TFEU⁹, the European Commission (EC) alongside with the GC and the ECJ, were trying to overcome the apparent *lacunae* in the wording of Regulation 4064/89¹⁰, which consisted of the lack of application of the latter Regulation to variety of anticompetitive situations which may occur on oligopolistic markets. Thus, in several merger decisions¹¹ – some of which were followed GC and ECJ judgments¹² – the concept of collective dominance (‘coordinated effects’) was developed. It allowed mergers leading to an oligopolistic market structure to be the subject of the Commission’s scrutiny.

⁵ C-68/94 and C-30/95 *SCPA and EMC v Commission (Kali & Salz)*.

⁶ T-342/99 *Airtours plc v Commission*.

⁷ T-464/04 *Independent Music Publishers and Labels Association (Impala, association internationale) v Commission of the European Communities*, ECR [2006] II-02289 (hereafter, *Impala*).

⁸ The European Commission was trying to apply Article 101(1) TFEU to parallel courses of behaviour typical for oligopolies in, *inter alia*, its *Aniline Dyes Cartel Decision*, OJ [1969] L 195/11, *Sugar Cartel Decision* COM (72) 1600. IV/26.918, OJ [1972] L 140/17 and *Woodpulp Decision* 85/202/EEC, OJ [1985] L 85/1. Although the Court of Justice seemed at first instance receptive to the Commission’s arguments confirming in 48/69 *Imperial Chemical Industries Ltd. judgment (Dyestuffs)*, ECR [1972] 00619 that the term ‘concerted practice’ could extend also to oligopolistic interdependence, it finally refused to apply this provision of the Treaty to purely parallel behaviour in the judgment in joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 i C-125/85 to C-129/85 *Ahlstrom Osakeyhtio and others v the Commission (Woodpulp)*, ECR [1994] I-00099.

⁹ Decisions of the Commission in cases: IV/M165 *Alcatel/AEG Kabel*, OJ [1992] C 6/23 and *Societa Italiana Vetro* IV/31.906, OJ [1989] L 33/44. In review of the latter decision the Court recognized the applicability of Article 102 TFEU to collective dominance T-68/89, T-77/89 and T-78/89 *Societa Italiana Vetro SpA, Fabbrica Pisana and PPG Vernante Pennitalia SpA v the Commission*, ECR [1992] II-01403.

¹⁰ Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ [1989] L 395/1.

¹¹ *Inter alia* decisions in mergers: IV/M165 *Alcatel/AEG Kabel*, OJ [1992] L 6/23, IV/M.190 *Nestle/Perrier*, OJ [1992] L 356/1, IV/M.308 – *Kali + Salz/MdK/Treuhand*, OJ [1994] L 186/38, IV/M.619 *Gencor/Lonrho*, OJ [1996] L 11/30, IV/M.1524 *Airtours/First Choice*, OJ [2000] L 93/1, M.3333 – *SONY/BMG*, OJ [2005] L 62/30.

¹² In particular: C-68/94 and C-30/95 *SCPA and EMC v Commission (Kali & Salz)*; T-342/99 *Airtours plc v Commission*; T-464/04 *Impala*.

Furthermore, some attempts were also made by the Commission to enhance the application of the 'old' Merger Regulation (Regulation 4064/89) to oligopolistic but non-coordinated markets (so-called non-collusive oligopoly)¹³. At the later stage, the GC also tried to facilitate the proof of the collective dominance existing on the oligopolistic market prior to notification of the merger¹⁴.

In parallel, in the course of judicial review of the aforementioned decisions a set of criteria for the assessment of oligopolistic markets in the context of merger control were developed by EU judiciary. Through approving, rejecting, modifying or substituting Commission's analysis, the EU courts set a comprehensive legal framework which contributed significantly to the clarification of law in this particular area of merger control.

This contribution's main focus will be to present the manner in which the judicial review of the most important of the aforementioned decisions was exercised. In particular, it will be argued that the development of a clear legal framework within which oligopolistic markets can be controlled in the context of merger control, was mainly possible thanks to pro-active, interventionist and creative role played by the EU judiciary in its exercise of judicial review. After a short introduction to the concept of judicial review in EU competition law and a presentation of the theoretical framework within which it is handled by EU Courts, the major judicial decisions in the field of merger control will be presented as examples of judicial review of EC merger decisions relating to oligopolistic markets. In a similar vein, the theoretical framework of judicial control of merger decisions in Poland will be presented. Furthermore, some recent examples of merger decisions reviewed by the Court will be discussed. Finally, an attempt will be made to assess the way in which the EU judicial branch has applied the standard of judicial review to oligopolistic markets in the context of merger control.

II. Standard of judicial control – a definition and theoretical framework

The definition of the standard of judicial control (also referred to as 'standard of judicial review') in the context of EU merger control starts from a simple premise; i.e. that it encompasses the intensity of the review by EU Courts of the decisions of the European Commission. Thus, under the tenet of the standard of judicial review we should not only understand the

¹³ *Airtours* decision (IV/M.1524 *Airtours/First Choice*). This problem was ultimately solved by the new substantial test introduced in Regulation 139/2004 in Articles 2(2) and 2(3).

¹⁴ T-464/04 *Impala*.

intensity employed by the GC in its review of the decisions of the European Commission (EC) based on appeals pursuant to Article 263 TFEU¹⁵, but also the standard of the subsequent judicial control exercised by the ECJ, limited to points of law, following an appeal from the judgments of the GC¹⁶. According to predominant opinion, the initial review by the GC could be described as a *sensu stricto* judicial review, whereas the review exercised by the ECJ is an appeal on points of law only¹⁷.

In reality however, the distinction between errors of fact (which the ECJ is not entitled to review) and errors of law (which the ECJ is empowered to scrutinize) is sometimes a very fine, if not a fuzzy one. Indeed if the General Court, instead of verifying the fact-finding of the Commission, substitutes it with its own analysis, the question of fact becomes a question of law and thus becomes subject to ECJ's scrutiny¹⁸. Put simply: failure by the GC to properly apply the rules on evidence raises question(s) of law, which ultimately become subject to ECJ review¹⁹.

The Treaty on the Functioning of the European Union (TFEU) indicates the following four grounds for review: lack of competence; infringement of an essential procedural requirement; infringement of the Treaties or of any rule of law relating to their application; or misuse of powers. In practice however, only some of these grounds are used in the context of EU competition law.

The Court of Justice has summarized the grounds for review as follows: 'Examination by the Community judicature of the complex economic assessments made by the Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been

¹⁵ According to Article 256(1) TFEU: 'The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court [...] and those reserved in the Statute for the Court of Justice'.

¹⁶ Following the same Article 256 TFEU: 'Decisions given by the General Court [...] under this paragraph. may be subject to a right of appeal to the Court of Justice on points of law only...?'

¹⁷ T. Reeves, N. Dodoo, 'Standard of Proof and Standards of Judicial Review in European Commission Merger Law' (2006) 29 *Fordham International Law Journal* 1056; in a similar vein: B. Vesterdorf, 'Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts' (2005) 1(1) *European Competition Journal* 11; M. Nicholson, S. Cardell, B. McKenna, 'The Scope of Review of Merger Decisions under Community Law' (2005) 1(1) *European Competition Journal* 125-126. See Opinion of Advocate General Tizzano in Case 12/03 P *Tetra Laval*.

¹⁸ T. Reeves, N. Dodoo, 'Standard of Proof...', p. 1060.

¹⁹ J. Ruiz Calzado, E. Barbier De La Serre, 'Judicial Review of Merger Control Decisions After the Impala Saga: Time for Policy Choices?' (2009) *The Antitrust Review – Global Competition Review* 22.

complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers²⁰.

Consequently, the following grounds for review in competition law cases have been distilled by academic commentators: procedural irregularities, errors of substantive law, and errors of assessment²¹. Other authors have referred to errors of law, errors of fact, and errors of appreciation²², which seems to follow closer the language used by the Court. Last but not least, an alternative demarcation was offered by Hubert Legal, who distinguished between judicial control of the external legality i.e. potential violations of rules of competence and procedure, and the internal legality, i.e. potential violation of substantive rules of law or if a rule is placed higher in the hierarchy of norms²³.

It is beyond any doubt that the questions of law²⁴ will be subject to full court control. As far the questions of fact are concerned²⁵, the GC will be entitled to review the accuracy and correctness of the EC findings. With respect to the errors of assessment, the scope of the Court's review will be severely limited and qualified in several respects²⁶. In fact, the Court will be limited in its scrutiny only to situations of a manifest error of assessment, which is the least onerous and the lowest standard of review employed in administrative law²⁷. The reason for these constraints is a constitutional one: the judiciary branch shall not interfere too much with the activities of the administrative branch²⁸. What is problematic, however, is where to draw a clear distinction between pure fact-finding and the legal interpretation of these facts²⁹. In the case of

²⁰ C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission*, ECR [2004] I-123, Para. 279.

²¹ M. Nicholson, S. Cardell, B. McKenna, B., 'The Scope of Review of Merger Decisions...', p. 124. In a similar vein: D. Bailey, 'Standard of Proof in EC Merger Proceedings: A Common Law Perspective', (2003) 40(4) *Common Market Law Review* 850 discusses: procedural propriety, factual and legal correctness and merits of a particular case.

²² T. Reeves, N. Dodoo, 'Standard of Proof...', pp. 1056–1057.

²³ H. Legal, 'Standards of proof and standards of judicial review in EU competition law', [in:] B. Hawk (ed.), *Annual Proceedings of the Fordham Corporate Law Institute* 2006, vol. 32, p. 2.

²⁴ 'It is the Courts' prerogative to Interpret Community Law [...]. As regards matters of law, the Community courts exercise full jurisdictional control': B. Vesterdorf, 'Standard of Proof in Merger Cases...', pp. 12–13.

²⁵ B. Vesterdorf, 'Standard of Proof...', p. 15 observes: 'Control of facts by the CFI is intensive and, again, in this field there is no room for discretion on the part of the Commission'. However the aforementioned author equally notes the difficulties related to drawing a proper distinction between assessment of facts and the conclusions drawn from these facts – see more below.

²⁶ H. Legal, 'Standards of proof...', p. 4.

²⁷ D. Bailey, 'Standard of Proof in EC Merger Proceedings...', pp. 852–853.

²⁸ H. Legal, 'Standards of proof...', p. 4.

²⁹ B. Vesterdorf, 'Standard of Proof...', pp. 14–15; the aforementioned author notes that 'a distinction exists between facts, and assessment of facts [...]. It is a distinction that is not

the former, the Commission should enjoy, at least potentially, a wide margin of discretion and the EU courts are, in principle, precluded from interfering with the Commission's margin of appreciation³⁰. This issue was specifically addressed in the *Airtours* judgment³¹ and will be further discussed below.

As far as the judicial control of errors of assessment is concerned, Court's approach towards the complex economic assessment in the prospective analysis of mergers was first expressed in the landmark *Kali & Salz* judgment³²: 'The basic provision of the [Merger] regulation, in particular Article 2 thereof, confers on the Commission a certain discretion, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentration, must take account of the discretionary margin implicit on the provisions of an economic nature which form part of the rules on concentrations'³³.

This view was later confirmed in a number of judgments³⁴. It is therefore beyond any doubt that the Commission enjoys a wide margin of discretion in its prospective economic assessment and that the EU judicature will not, in principle, question its analyses. However, the scope of the potential intervention by the Courts is not clear³⁵. The Court of Justice's statement in *Tetra Laval* shed some new light in this respect: 'Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it....'³⁶.

On one hand, the Court seems to recognize the wide discretion enjoyed by the Commission. On the other, however, it allows, within the framework of

always easy to make... [...] Whenever an issue involves complex assessment which may lead two reasonable persons disagree [...] we are not in the realm of pure fact but in the realm of appreciation of fact'. For a more categorical approach to the impossibility to distinguish between facts and assessment of facts: T. Reeves, N. Dodoo, 'Standard of Proof...', p. 1058.

³⁰ T. Reeves, N. Dodoo, 'Standard of Proof...', p. 1060.

³¹ T – 342/99 *Airtours*.

³² The Court was addressing the issue of error of appraisal (assessment).

³³ C-68/94 and 30/95 *Kali & Salz*, paras. 223–224.

³⁴ *Inter alia*: T-102/96 *Gencor v Commission*, T-221/1995 *Endemol*, T-342/99 *Airtours*, C-12/03 P *Tetra Laval*, T-444/06 *Sony/BMG*.

³⁵ M. Nicholson, S. Cardell, B. McKenna, B., 'The Scope of Review of Merger Decisions...', p. 131.

³⁶ C-12/03 P *Commission v Tetra Laval BV*, ECR [2005] I-987, para. 39.

the review of facts, for verification of the assessment (interpretation) thereof³⁷. Where the European Commission enjoys a true freedom is in its choice of the economic methodology, provided that the latter will be instrumental in building its case³⁸.

Last but not least, it should be noted that in spite of all the aforementioned divergences, most academics today would agree that the scope of judicial review in merger cases is intricately linked with the standard of proof. In fact, in the light of the most recent jurisprudence³⁹ it is argued that whatever the Commission is able to prove, the GC should be entitled to verify⁴⁰. Furthermore, the stricter the standard of judicial review is, the higher the standard of proof that is applied (i.e. more convincing and compelling evidence is required from the European Commission)⁴¹.

III. Standard of judicial review in EU jurisprudence on mergers in oligopolistic markets

In the light of the foregoing considerations, the practical application of the standard of judicial review relating to merger decisions concerned with oligopolistic markets will now be discussed. For this purpose three cases scrutinized by EU judiciary will be analysed: *Kali & Salz*, *Airtours* as well as *Sony/BMG (Impala)*.

1. *Kali & Salz*: errors of fact and errors of law in its early form

The *Kali & Salz* litigation was initiated by the decision of the Commission⁴² conditionally authorising a merger between Kali & Salz and Mitteldeutsche Kali AG (MdK). The Commission found that the merger would result in the creation of a dominant duopoly composed of the merged entity (Kali&Salz/MdK) and of Société Commerciale des Potasses et de l'Azote (SCPA), and

³⁷ H. Legal, 'Standards of proof...', p. 7.

³⁸ H. Legal, 'Standards of proof...', pp. 7–8.

³⁹ C-12/03 P *Tetra Laval*.

⁴⁰ H. Legal, 'Standards of proof...', pp. 5–6.

⁴¹ D. Bailey, 'Standard of Proof in EC Merger Proceedings...', p. 850. T. Reeves, N. Dodoo, 'Standard of Proof...', pp. 1037–1038 claim that: '... the more rigorous the standard of review, the more likely it is that the standard of proof will be high as well [...] the level of sophistication and accuracy which the Commission must reach [...] needs to be such as to ensure that its decisions will withstand the Courts' scrutiny.'

⁴² Decision of the European Commission No. 94/449/EC from 14 December 1993 in case IV/M.308 – *Kali + Salz/MdK/Treuhand*, OJ [1994] L 186/38.

therefore made its authorising decision subject to compliance with certain conditions. The decision was appealed⁴³ by a third party. The judgment of the ECJ⁴⁴ became one of the milestones of EU competition law for several reasons. Not only did the Court confirm for the first time the applicability of Regulation 4064/89 to collective dominance⁴⁵, but it also affirmed the existence of the ‘failing company defence’ in EU competition law, and developed the criteria for the assessment of the existence of the former and the latter. Thus, while deciding on the points of law, the Court had no hesitation in upholding two completely new concepts introduced by the European Commission. Firstly, in relation to the ‘failing company defence’, the Court recognized the EC’s freedom to invoke new concepts and determine the criteria used in their application. Where the Court was ready to intervene, however, was in instances where the new concepts and the criteria introduced by the Commission were not capable of satisfying the basic *legal* criterion for declaring the concentration compatible with the market *i.e.* absence of the possibility that a concentration might be a cause of the deterioration in the competitive structure of the market⁴⁶. Secondly, as far the applicability of the concept of collective dominance in the context of merger control is concerned, the Court undertook a very expansive, teleological interpretation of Regulation 4064/89, in particular with reference to the latter instrument’s purpose and general structure⁴⁷.

It can therefore be observed that in its review of the alleged errors of law, the Court can and sometimes will interpret the existing legal framework in a very proactive way. In the case in question the Court, reacting to an argument put forward by one of the parties⁴⁸, extended *inter alia* the scope of application of Regulation 4064/89 to include collective dominant position⁴⁹. This development was particularly welcome in the academic world, as it put an end to a long period of uncertainty in this area⁵⁰.

⁴³ The case was dealt with by the Court of Justice due to the presence of the MS as interveners.

⁴⁴ C-68/94 i C-30/95 *Kali & Salz*.

⁴⁵ C-68/94 i C-30/95 *Kali & Salz*, paras. 152–178.

⁴⁶ C-68/94 i C-30/95 *Kali & Salz*, para. 112.

⁴⁷ In particular C-68/94 i C-30/95 *Kali & Salz* paras. 167-168.

⁴⁸ In this case it was the European Commission who introduced new concepts in EU merger control.

⁴⁹ M. Nicholson, S. Cardell, B. McKenna, ‘The Scope of Review of Merger Decisions...’, p. 128.

⁵⁰ J. Venit, ‘Two Steps Forward and No Steps Back: Economic Analysis and Oligopolistic Dominance After Kali & Salz’ (1998) 35(5) *Common Market Law Review* 1104–1105; M. Garcia Perez, ‘Collective Dominance Under the Merger Regulation’ (1998) 23(5) *European Law Review* 477; S. Stroux, ‘Is EC Oligopoly Control Outgrowing Its Infancy?’ (2000) 23(3) *World*

Notwithstanding the progress made in relation to the assessment of errors of law, the Court also laid down and significantly clarified its own standards of judicial review of alleged errors of assessment, in particular, in relation to complex economic analyses⁵¹. As previously mentioned⁵² the ECJ for the first time declared its position on the scope of Commission's discretion in carrying on a complex, economic analysis. It said that 'Review by the Community judicature, of the exercise of [Commission's] discretion [...] must take account of the discretionary margin implicit on the provisions of an economic nature which form part of the rules on concentrations'⁵³.

Having said that, the ECJ went on to review the Commission's analysis of the concentration and its effects on the market, to the extent to which they could affect the economic assessment of the concentration⁵⁴. In this connection, it observed *inter alia* that the market shares did not point conclusively to the existence of a collective dominance⁵⁵. Furthermore, the Court called into question the correctness of the assessment of the 'structural links'⁵⁶, the existence of which was, according to the Commission, a prerequisite for the existence of a collective dominant position. At the same time, while asserting that the concentration would indeed strengthen Kali & Salz's industrial capacity⁵⁷, the Court criticized the Commission's assertions concerning falling demand which could, in this particular sector, lead to intensive competition⁵⁸. Lastly, it was observed that the Commission did not sufficiently take into

Competition 30–31; B. Etter, 'The Assessment of Mergers in the EC under the Concept of Collective Dominance' (2000) 23(3) *Journal of World Competition* 107.

⁵¹ T. Reeves, N. Dodoo, 'Standard of Proof...', p. 1060.

⁵² See point II of this paper.

⁵³ C-68/94 and C-30/95 *Kali & Salz*, para. 224.

⁵⁴ C-68/94 and C-30/95 *Kali & Salz*, para. 226.

⁵⁵ The Commission found that the market shares were 37% and 23% (together 60%), which of itself was not sufficient for a duopoly to automatically enjoy a collective dominant position on the market.

⁵⁶ The concept of 'structural links' itself was highly contested in this case. It was not clear whether the existence of such links was necessary at all for a collective dominance to exist; in fact, the Court analyzed the existence of 'structural links' only because it was required to do so by the parties (*inter partes* principle). In its earlier *obiter dictum* statement in para. 221 the Court said: 'In the case of an alleged collective dominant position, the Commission is therefore obliged to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of correlative factors which exist between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers'.

⁵⁷ C-68/94 and C-30/95 *Kali & Salz*, para. 236.

⁵⁸ C-68/94 and C-30/95 *Kali & Salz*, para. 238. Normally, declining demand is a factor which would encourage companies to cooperate with each other.

account the degree of competitive pressure which rivals could exert on the alleged collectively dominant entity⁵⁹.

The aforementioned analysis demonstrates and confirms that, as it was best formulated by Vesterdorf, the Commission's discretion is not completely unfettered. In reality 'Where the evidence, which the CFI [GC] must scrutinise closely, does not reasonably support the conclusions drawn from it, the CFI [GC] must find that the Commission has committed a manifest error of appreciation'⁶⁰.

It is apparent from the preceding analysis that the Court will not turn a deaf ear to economic arguments: in fact all it seemed to be doing in *Kali & Salz* was to take more into account the underlying economic theory⁶¹.

2. *Airtours*

Another example of the way the standard of judicial review is applied in practice is the judgment of the GC in *Airtours*⁶². This case started with the European Commission decision⁶³ prohibiting a merger between two British tour operators. The Commission alleged that the concentration would result in a collective dominance of three companies. It based its findings, *inter alia*, on factors such as: very high aggregated market share, high level of transparency of the market, slow demand growth, product homogeneity, high barriers of entry, and a similar cost structure of the main tour operators. Furthermore, the Commission discovered that there were structural links between the undertakings and alleged that they favoured the existence of a collective dominance⁶⁴. The Commission also made an attempt to address the issue of non-coordinated effects of mergers on oligopolistic markets, by asserting that the merger would make it rational for oligopolists to adapt themselves to market conditions by acting *individually* in ways which could substantially reduce competition⁶⁵.

The Commission's decision was appealed on several grounds. Two particular grounds of review invoked by the applicants are of interest for the purpose of

⁵⁹ C-68/94 and C-30/95 *Kali & Salz*, para. 248.

⁶⁰ B. Vesterdorf, 'Standard of Proof...', p. 18.

⁶¹ Which does not mean the Court was completely correct: in fact it was vehemently criticised for its approach towards the conditions of the collective dominance, in particular the requirement of 'correlative factors' as a precondition for a finding of a collective entity does not seem to be fully in line with the economic theory of tacit collusion.

⁶² T-342/99 *Airtours*.

⁶³ Decision IV/M.1524 *Airtours/First Choice*, OJ [2000] L 93/1.

⁶⁴ Decision IV/M.1524 *Airtours/First Choice*, paras. 87–127.

⁶⁵ Decision IV/M.1524 *Airtours/First Choice*, para. 54.

this analysis. This was firstly an alleged error of law through infringement of Article 2 of the Regulation, Article 296 TFEU (duty to state reasons)⁶⁶, and the principle of legal certainty. The alleged error of law consisted in application of a new and incorrect definition of collective dominance in the assessment of the case. The second interesting plea was that the finding that the transaction created a collective dominant position infringed Article 2 of the Regulation⁶⁷. Not surprisingly, the Court refused to deal with the first of the aforementioned pleas on the ground that it was not concerned with the way in which the law was applied to the facts at stake⁶⁸. In fact the allegedly wrongful definition of the collective dominance was contained in the introductory part of the Commission's decision, 'merely sketch[ing] the broad outlines of its findings on the effects of the merger'⁶⁹. The Court was ready to intervene, however, in relation to the second of the aforementioned pleas, which was predominantly concerned with an alleged error of assessment, which consisted of not proving to the requisite legal standard that the outcome of the transaction at stake would be the creation of collective dominant position⁷⁰. This alleged error allowed the Court to undertake a detailed review of the accuracy and relevance of the Commission's fact-finding and evaluation processes. In its scrutiny, the Court took into account both legal and economic principles applicable to collective dominance in oligopolistic markets⁷¹.

Interestingly enough, before embarking on its analysis of the merits of the plea alleging error of assessment, the Court, in an extensive obiter dictum, first identified the applicable legal principles⁷² and only subsequently analyzed the application of that law to the facts in issue. The GC has established three conditions, the existence of which is necessary for a successful finding of a collective dominant position. These are essentially: sufficient transparency of the market, which allows firms to monitor each other's behaviour; existence of a deterrent mechanism; and independence of the oligopolists from other (smaller and potential) competitors, clients and consumers' reactions⁷³. Through the application of what could be called a specific judicial technique⁷⁴, the Court in practice significantly clarified and perhaps even revisited its

⁶⁶ Previously Article 253 of the EC Treaty.

⁶⁷ Together with infringement of Article 296 TFEU.

⁶⁸ T-342/99 *Airtours*, para. 53.

⁶⁹ T-342/99 *Airtours*, para. 51.

⁷⁰ T-342/99 *Airtours*, para. 55.

⁷¹ M. Nicholson, S. Cardell, B. McKenna, 'The Scope of Review of Merger Decisions...', p. 142.

⁷² Which are predominantly based on the economic theory of tacit collusion.

⁷³ T-342/99 *Airtours*, para. 62.

⁷⁴ M. Nicholson, S. Cardell, B. McKenna, 'The Scope of Review of Merger Decisions...', p. 140.

previous case-law⁷⁵. Furthermore, the judicial steps taken by the General Court in its obiter dictum contained in the *Airtours* judgment were meant to introduce more economic principles to the legal framework for assessment of collective dominance in the context of merger control⁷⁶. The latter approach clearly demonstrates that, as far as the interpretation of law is concerned, the Court exercises full jurisdictional control⁷⁷. What is the more, it also shows that while exercising judicial control of the Commission's assessment, the GC will not hesitate to lay down new legal principles and assess the Commission's actions in their light.

When reviewing the merits of the plea alleging error of assessment, the GC looked in the first instance at the Commission's analysis of the competition prior to the notification⁷⁸. It observed that, in the absence of proof to the contrary, it was assumed that there was a healthy competition on the market prior to the planned merger, and the sole circumstance of cautious capacity planning was not sufficient to conclude that 'there was already a tendency to collective dominance in the industry'⁷⁹. The Court also concluded that the EC overestimated the level of horizontal and vertical integration⁸⁰. The aforementioned errors, and the fact that the market shares of the main tour operators were volatile in the past⁸¹, allowed the Court to conclude that the Commission wrongfully assessed the competition on the market prior to the merger⁸².

⁷⁵ In particular in para. 276 of the judgment in case T-102/96 *Gencor* the Court has for the first time in the history said that: 'there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly [...]. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others (...)'.
⁷⁶ This evolution in the case-law was widely acknowledged in the academic world: A. Nikpay, F. Houwen, 'Tour de Force or a Little Local Turbulence? A Heretical View on the *Airtours* Judgment' (2003) 24(5) *European Competition Law Review* 197; H. Haupt, 'Collective Dominance Under Article 82 E.C. and E.C. Merger Control in the light of the *Airtours* Judgment' (2002) 23(9) *European Competition Law Review* 443-444; R. O'Donoghue, C. Feddersen, 'Case T-342/99, *Airtours* plc v. Commission, Judgment of the Court of First Instance of 6 June 2002, nyr.' (2002) 39(5) *Common Market Law Review* 1176; J. Langer, 'The *Airtours* Judgment: A Welcome Lecture on Oligopolies, Economics and Joint Dominance' (2003) 10 *Columbia Journal of European Law* 110; I. Kokkoris, *Merger Control in Europe. The Gap in the ECMR and National Merger Legislation*, Routledge 2011, pp. 24-25.

⁷⁶ This evolution in the case-law was widely acknowledged in the academic world:

A. Nikpay, F. Houwen, 'Tour de Force or a Little Local Turbulence? A Heretical View on the *Airtours* Judgment' (2003) 24(5) *European Competition Law Review* 197; H. Haupt, 'Collective Dominance Under Article 82 E.C. and E.C. Merger Control in the light of the *Airtours* Judgment' (2002) 23(9) *European Competition Law Review* 443-444; R. O'Donoghue, C. Feddersen, 'Case T-342/99, *Airtours* plc v. Commission, Judgment of the Court of First Instance of 6 June 2002, nyr.' (2002) 39(5) *Common Market Law Review* 1176; J. Langer, 'The *Airtours* Judgment: A Welcome Lecture on Oligopolies, Economics and Joint Dominance' (2003) 10 *Columbia Journal of European Law* 110; I. Kokkoris, *Merger Control in Europe. The Gap in the ECMR and National Merger Legislation*, Routledge 2011, pp. 24-25.

⁷⁷ B. Vesterdorf, 'Standard of Proof...', p. 15.

⁷⁸ According to the economic theory, the risk of tacit coordination is higher if there is proof of a cooperation in the past and if the market players are integrated (interdependent).

⁷⁹ T-342/99 *Airtours*, para. 92.

⁸⁰ T-342/99 *Airtours*, para. 108.

⁸¹ Volatility of market shares can indeed constitute a proof that the companies were competing intensively one with another.

⁸² T-342/99 *Airtours*, para. 120.

Secondly, the Court reviewed the Commission's analysis of demand (in particular its growth and volatility) and the transparency of the market. In this context, the GC accused the Commission of not having taken into account all the data which was at its disposal. In relation to a special study to which the Commission referred, the Court observed that 'it is apparent from a cursory examination of that document that the Commission's reading of it was inaccurate. [...] [T]he Commission construed that document without having regard to its actual wording and overall purpose, even though it decided to include it as a document crucial to its finding that the rate of market growth was moderate in the 1990s and would continue to be so'⁸³.

Consequently, the GC concluded that with respect to characteristics of demand the Commission 'was not entitled to conclude that market development was characterised by low growth'⁸⁴. It is not difficult to observe in this statement that the Court has actually carried out its own assessment of the data available to the Commission. This points out once again how difficult is the precise delimitation between the review of the alleged errors of assessment and review of errors of fact⁸⁵. In relation to the assessment of the transparency of the market, the GC again disagreed with the Commission, this time on the ground that the data collected was insufficient to prove conclusively that there was indeed a high level of market transparency⁸⁶. Due to the variety of services offered and a very complex process of planning, the competitors were not able to monitor the developments of each other's capacity. What is interesting in this context is that the Court not only again carried out its own investigation, but this time did so by distributing a special detailed questionnaire to the applicant, and it was on the basis of its response that it was able to conclude that the Commission's assessment of market transparency was wrongful. Again, the re-examination of facts undertaken by the Court in order to check the viability of the economic assessment, makes the Court's review of the assessment a borderline one between assessment of error of fact and error of assessment⁸⁷.

Thirdly, the GC looked at the deterrent mechanism identified by the Commission. It observed, *inter alia*, that the Commission was not required to prove that there was a specific retaliation mechanism, but rather it would be sufficient if it could demonstrate the mere existence of deterrents which prevented oligopolists from departing from a common course of conduct. In this context, the GC concluded that in view of the characteristics of the

⁸³ T-342/99 *Airtours*, para. 130.

⁸⁴ T-342/99 *Airtours*, para. 133.

⁸⁵ B. Vesterdorf, 'Standard of Proof...', pp. 16-17.

⁸⁶ T-342/99 *Airtours*, para. 180.

⁸⁷ In fact, the analysis which the Court undertook was carried on in relation to a plea on alleged error of assessment.

relevant market and the way it operated, the deterrents which the Commission identified were not capable of being used in practice⁸⁸.

Finally, the Court reviewed the Commission's assessment of the likely reaction of smaller and potential competitors, as well as consumers. As with the previously discussed alleged errors, it first of all laid down its legal principles and only after looked at what the Commission actually did. As far as the reaction of smaller competitors is concerned, the GC observed that it was not necessary to establish whether small competitors could become sufficiently big to compete effectively with the members of the alleged oligopoly. The Commission should have rather established whether hundreds of small operators, taken as a whole, could respond effectively to the behaviour of oligopolists⁸⁹. The Court also concluded that the potential entry onto the market of new entities was completely underestimated by the Commission⁹⁰. And finally, as far as the reaction of consumers was concerned the GC opined that the Commission did not sufficiently take it into account. In the Court's view, the Commission was not expected to assess in this context the existence of significant buyer power, but rather it should have looked at whether they would be able to react to a price rise instigated by the members of the alleged oligopoly⁹¹.

In conclusion, the Court observed that 'The Decision, far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created. It follows that the Commission prohibited the transaction without having proved to the requisite legal standard that the concentration would give rise to a collective dominant position of the three major tour operators'⁹².

The Court's language in the above excerpt demonstrates a certain 'cruelty' in its quashing of the Commission's decision. Indeed, the brutality of the GC's language attracted attention among academics⁹³ and was, in itself, a novelty. It was also argued that the amount of criticism directed by the GC against an

⁸⁸ T-342/99 *Airtours*, para. 207. The very fact that the deterrent mechanism identified by the Commission was based on capacity was questioned in the academic world; R. O'Donoghue, C. Feddersen, 'Case T-342/99...' 1178.

⁸⁹ T-342/99 *Airtours*, para. 213.

⁹⁰ T-342/99 *Airtours*, para. 260.

⁹¹ T-342/99 *Airtours*, para. 275.

⁹² T-342/99 *Airtours*, para. 294.

⁹³ T. Skoczny, 'Wyrok Sądu Pierwszej Instancji z dnia 6 czerwca 2002 r. w sprawie T-42/99 *Airtours* plc. przeciwko Komisji Wspólnot Europejskich', [in:] A. Jurkowska, T. Skoczny (eds.), *Orzecznictwo sądów wspólnotowych w sprawach konkurencji w latach 1964-2004*, Warszawa 2007, p. 439. In a similar vein: H. Haupt, 'Collective Dominance...', p. 441; S. Stroux, 'Collective dominance under the Merger Regulation: a serious evidentiary reprimand for the Commission'(2002) 27(6) *European Law Review* 736; A. Nikpay and F. Houwen, 'Tour de Force...' 196-197.

assessment of an economic nature carried on by the Commission constituted one of the sources of the subsequent internal reform of the European Commission (including introduction of the post of Chief Economist)⁹⁴.

In the end, it is also worth stressing that in its judicial review of the *Airtours* decision, the GC remained silent on one particular point: the unilateral effects of merger, the existence of which was suggested by the Commission⁹⁵. In fact, the Court seemed to focus more on the conditions for establishing collective dominance and completely ignored the criticism addressed at what seemed to be the Commission's attempt to enlarge the scope of application of Regulation 4064/89 to non-coordinated effects of mergers on oligopolistic markets⁹⁶. The Courts silence on this issue was capable of varying interpretations, as it neither excluded the application of merger regulation to non-collusive oligopoly nor confirmed it. It may be surmised that the Court might have intended to leave that issue to the EU legislator⁹⁷. Again, it demonstrates that the way the judicial review is carried on, impacts the development of law. The Court's give and take approach is clearly guided by the complexity of oligopolistic markets. However, it has to have limits. By its omissions, the GC might be willing to put a brake to too expansionist interpretation of the 'old' merger regulation. The latter approach may be further motivated by the Court's unwillingness to diminish legally certainty that would have otherwise resulted from an expansion in the scope of application of the merger regulation.

3. *Sony/BMG – Impala*

The most recent example the EU judiciary's attitude towards the standard of judicial review in the context of mergers in oligopolistic markets can be found in *Sony/BMG* judgment⁹⁸ of the GC and the *Impala* decision of the ECJ⁹⁹. In

⁹⁴ T. Skoczny, 'Wyrok Sądu Pierwszej Instancji...', p. 444; H. Haupt, 'Collective Dominance...', p. 444.

⁹⁵ Decision IV/M.1524 *Airtours/First Choice*, para. 51.

⁹⁶ The so-called 'non-collusive oligopoly gap', the existence of which was observed in a number of comments. Its recognition ultimately led to the amendment of Regulation 4064/89, introduction of the SIEC test and recital 25 of Regulation 139/2004, which specifically addresses the issue of non-coordinated effects of mergers.

⁹⁷ This approach turned out very quickly to be assessed as the correct one. The *Airtours* judgment was rendered on the 6 of February 2002 and the Regulation 139/2004 was adopted some 18 months later, i.e. 20 January 2004, which, as for EU practice, is certainly not a long period.

⁹⁸ T-464/04 *Independent Music Publishers and Labels Association (Impala, association internationale) against The European Commission*, ECR [2006] II-02289.

⁹⁹ C-413/06 P *Bertelsmann AG i Sony Corporation of America against Independent Music Publishers and Labels Association (Impala)*, ECR [2008] I-04951.

particular the latter will be of great interest for the purposes of this analysis, since the ECJ has not only pronounced itself on the standard of judicial review in general, but also laid down the principles of its own review of GC judicial decisions.

3.1 The judgment of the General Court

The case was initiated by the Commission's decision authorising the creation of a joint venture between Sony and Bertelsmann (Sony BMG)¹⁰⁰. It was opposed by Impala, an association of independent music production companies, who appealed to the GC. The Court reviewed, in particular, what it considered to be the necessary elements for the existence of a collective dominant position. In this respect, it looked, *inter alia*, at market transparency and concluded that the Commission's assessment was vitiated by manifest error. In particular, its analysis of campaign discounts (the existence and opacity of which could have meant indeed that the market was not transparent) turned out to be 'imprecise, unsupported, and indeed contradicted by other observations in the Decision'¹⁰¹. Consequently, the evidence submitted by the Commission was not 'sufficiently reliable, relevant or cogent to establish the opacity of campaign discounts'¹⁰² and therefore the Court concluded that 'the Commission did not examine or, at the very least, did not establish to the requisite legal standard the relevance of campaign discounts . . .'¹⁰³.

As far as the retaliatory mechanism was concerned, the GC again concluded that the Commission erred in its assessment. In this connection, it observed that it would be sufficient for the Commission to prove – following *Airtours* – the mere existence of effective deterrent mechanisms¹⁰⁴. It was therefore not necessary to demonstrate that the retaliatory mechanism existed, but was not used. According to the GC, if such a proof was to be accepted, it would also be required to demonstrate that there was a deviation from the common course of conduct, which was not followed by retaliatory measures¹⁰⁵.

Last but not least, the General Court examined the assessment of the risk of creation of a collective dominant position¹⁰⁶ as a result of the concentration. In

¹⁰⁰ Commission Decision 2005/188/EC of 19 July 2004 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case No. Comp/M.3333 — *Sony/BMG*), OJ [2004] L 62/30.

¹⁰¹ T-464/04 *Impala*, para. 320.

¹⁰² T-464/04 *Impala*, para. 320.

¹⁰³ T-464/04 *Impala*, para. 449.

¹⁰⁴ T-464/04 *Impala*, para. 466.

¹⁰⁵ T-464/04 *Impala*, para. 469.

¹⁰⁶ As opposed to the assessment of the risks of strengthening the existing collective dominant position, which was the main preoccupation of the Commission.

this connection, the Court observed that the analysis was ‘superficial, indeed purely formal’ and could not ‘satisfy the Commission’s obligation to carry out a prospective analysis and to examine carefully circumstances which [...] may prove relevant for the purposes of assessing the effects of the concentration on competition’¹⁰⁷.

The Court nevertheless carried out its own analysis of transparency and retaliatory measures. It concluded that the Commission’s observations relating to the transparency of the market did not support the analysis, according to which the concentration was not likely to create a collective dominant position¹⁰⁸. As far as the latter factor (retaliatory measures) was concerned, the GC opined that the Commission made an error in using evidence relating to a lack of retaliatory measures in the past¹⁰⁹.

The careful and diligent scrutiny of the assessment contained in Commission’s decision described above demonstrates that the General Court took very seriously the standard of judicial review set by the ECJ in the *Tetra Laval* judgment¹¹⁰. The ECJ did indeed recommend to EU courts not to refrain from reviewing the Commission’s interpretations of an economic nature. According to the ECJ ‘Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information which must be taken into account in order to assess a complex analysis and whether it is capable of substantiating the conclusions drawn from it’¹¹¹.

The preceding excerpt and the GC’s attitude in both *Airtours* and *Sony/BMG* demonstrates that the Court will maintain a very high standard of judicial review, and that in spite of its limited nature in relation to economic assessments, it will not hesitate to scrutinize the viability and logical implications of the economic theories chosen by the Commission.

3.2 The judgment of the ECJ

In its review of the GC’s decision, the ECJ made a number of interesting observations. Most importantly, drawing inspiration from the judgment in *Tetra Laval*, the ECJ repeated that while the GC must not substitute its own economic assessment for that of the Commission, this does not mean that it must refrain from reviewing the Commission’s interpretation of information

¹⁰⁷ T-464/04 *Impala*, para. 528.

¹⁰⁸ T-464/04 *Impala*, para. 533.

¹⁰⁹ T-464/04 *Impala*, para. 539.

¹¹⁰ C-12/03 P *Tetra Laval*.

¹¹¹ C-12/03 P *Tetra Laval*, para. 39.

of an economic nature¹¹². Furthermore, it reiterated its earlier requirements imposed on the GC regarding assessment of the accuracy, reliability and consistency of the evidence, as well as its capability of substantiating the conclusions drawn from it¹¹³. In the light of foregoing, the ECJ concluded that in carrying on an 'in-depth examination of the evidence underlying the contested decision when considering the arguments raised before it', the GC 'acted in conformity with the requirements of the case-law'¹¹⁴. The ECJ therefore confirmed not only that the GC was allowed, but perhaps even obliged, to perform its own analysis of the facts and the evidence in order to verify whether the Commission had not exceeded the limits of the margin of discretion conferred on it¹¹⁵.

Finally, it is worth stressing that the Court of Justice also confirmed its wide prerogatives in relation to its judicial control of the GC's activity. While recognizing that appeals to the ECJ can rely on points of law only and that the ECJ thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the GC accepted in support of those facts¹¹⁶, it also stressed that the 'question of whether the [GC] applied the correct legal standard when examining the evidence is a question of law, which is amenable, as such, to judicial review on appeal'¹¹⁷. According to this statement, the Court of Justice is therefore entitled to review the legal characterisation of facts made by the GC as well as the legal conclusions it drew there from¹¹⁸.

It is clear from the foregoing discussion that, as was previously observed, the distinction between questions of facts and questions of law is not an easy one to make, in particular when a complex economic analysis is at stake¹¹⁹. Notwithstanding this difficulty, the ECJ's stance in *Impala* suggests that there is still a wide scope for its strict control of the GC assessment. The latter organ's failure to correctly apply rules of evidence applicable during the administrative as well as judicial proceedings will therefore be reviewable by the ECJ¹²⁰. Last

¹¹² T. Skoczny, 'Glosa do wyroku w sprawie C-413/06 P Bertelsmann AG i Sony Corporation of America (sprawa Impala II)', [in:] A. Jurkowska-Gomułka (ed.), *Orzecznictwo sądów wspólnotowych w sprawach konkurencji w latach 2004-2009*, Warszawa 2010, p. 151.

¹¹³ C-413/06 P *Impala*, para. 145.

¹¹⁴ C-413/06 P *Impala*, para. 146.

¹¹⁵ J. Ruiz Calzado, E. Barbier De La Serre, 'Judicial Review of Merger Control Decisions...', p. 22.

¹¹⁶ C-413/06 P *Impala*, para. 29.

¹¹⁷ C-413/06 P *Impala*, para. 117.

¹¹⁸ This is what should be understood by the term 'correct legal standard'; C-413/06 P *Impala*, para. 29.

¹¹⁹ J. Ruiz Calzado, E. Barbier De La Serre, 'Judicial Review of Merger Control Decisions...', p. 22.

¹²⁰ J. Ruiz Calzado, E. Barbier De La Serre, 'Judicial Review of Merger Control Decisions...', p. 22.

but not least, as Ruiz Calzado and Barbier De La Serre put it: the ECJ's attitude suggests that it reserves to itself the right to remain 'the final arbiter of EC law in spite of the spectacular rise of the [GC] on the competition law scene'¹²¹. Indeed, this argument seems to be a very strong one in light of what the ECJ actually did in its *Impala* ruling, which includes, *inter alia*, assessing the *Airtours* conditions in the light of its own understanding of economic theory of oligopoly¹²², and essentially upholding them; as well as rejecting implicitly¹²³ the 'indirect test' for collective dominance existing before the merger, formulated by the GC¹²⁴. Again, these developments could be considered as a confirmation of EU judiciary's (in this case the ECJ) active role in shaping the approach towards oligopolistic markets in the context of merger control. On one hand, the confirmation of *Airtours* criteria as a basic framework for the assessment of collective dominance certainly contributed towards increasing of legal certainty. On the other hand, the ECJ's firm refusal to uphold the 'indirect test' for market transparency proposed by the GC could be seen as its unwillingness to relax certain well established legal criteria and in broader perspective, it could also mean its reluctance to decrease legal certainty¹²⁵.

¹²¹ J. Ruiz Calzado, E. Barbier De La Serre, 'Judicial Review of Merger Control Decisions...' p. 23.

¹²² C-413/06 P *Impala*, paras. 119-124.

¹²³ In para. 251 of the *Sony/BMG* judgment, the GC said that the *Airtours* conditions 'may, however, in the appropriate circumstances, be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position'. The Court observed in para. 128 of the *Impala* Judgment that this new, indirect test 'constitutes a general statement which reflects the Court of First Instance's liberty of assessment of different items of evidence'.

¹²⁴ The view that the 'indirect test' was rejected could be supported by the fact that the Court of Justice referred to it very briefly in *obiter dictum*, and in the operative part of the judgment it applied 'classical' *Airtours* test for the existence of collective dominance. The view that the 'indirect test' was implicitly rejected was shared by, *inter alia*: T. Kaseberg, 'Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v. Independent Music Publishers and Labels Association (Impala)*, Judgment of the Court of Justice (Grand Chamber) of 10 July 2008, nyr.' (2009) 46(1) *Common Market Law Review* 260; J. Golding, 'The *Impala* case: a quiet conclusion but a lasting legacy' (2010) 47(7) *European Competition Law Review* 261-267; T. Skoczny, 'Głosa do wyroku w sprawie C – 413/06 P...', p. 154; B. Van Rompuy, 'The Standard of Proof in EC Merger Control. Conclusions from the Sony BMG Saga', IES Working Paper 4/2008, p. 17.

¹²⁵ In fact it was argued that the acceptance of the 'indirect test' could mean that the burden of proof for the existence of the collective dominant position prior to the merger, was reversed. See more: M. Będkowski-Koziół, 'Głosa do wyroku Sądu Pierwszej Instancji z 13.7.2006 r. w sprawie T-464/04 *IMPALA v. Komisja*, O.J. 2006 Nr C 224 z 16.9.2006 r., p. 35' (2006) 4 *Kwartalnik Prawa Publicznego* 238. In a similar vein: I. Kokkoris, 'Assessment of Mergers Inducing Coordinated Effects in the Presence of Explicit Collusion' (2008) 31(4) *World Competition* 499-522.

IV. Polish perspective

In the context of competition law proceedings, the specificity of the Polish judicial system makes it on one hand very easy for the courts to develop some new criteria for the assessment of mergers in oligopolistic markets and relatively difficult to use those criteria in subsequent case law of both the competition authority (the President of the Office of Competition and Consumers Protection; hereafter, UOKiK) and the competition courts on the other.

Indeed, the position of the Polish Court of Competition and Consumer Protection (in Polish: *Sąd Ochrony Konkurencji i Konsumenta*; hereafter, SOKiK) occupies in Polish judicial system makes it relatively easy for that judicial body to develop its own criteria for the assessment of mergers on oligopolistic markets¹²⁶. This might be so notably due to the fact that the procedure in front of that Court, which is initiated by an appeal from the administrative decision of the UOKiK President is adversarial in its nature¹²⁷. The parties to the proceeding are allowed to use any new evidence or legal theories they judge instrumental for defending their case in front of the Court. This means that the Court is not bound by findings of the competition authority in the administrative procedure. Of course, the latter organ – as one of the parties to the proceedings – can submit evidence and legal interpretation used in the course of the administrative procedure in front of it, but the Court is expected to decide the case freely on the basis of both parties' submissions, and its own assessment thereof. The only limitation is the scope of the appeal – the Court should not be in principle allowed to go beyond it. In practical terms this does not exclude the Court from changing the legal qualification of the alleged infringement¹²⁸ as long as this change is based on the facts and circumstances proved by the parties to the proceedings¹²⁹. Another consequence of the adversarial nature of the proceedings in front of SOKiK is that the Court will never be allowed to extend the scope of the alleged anti-competitive behaviour. However, nothing will prevent the Courts adjudicating on appeal from the UOKiK President decision from limiting the scope of

¹²⁶ Within the limits laid down in Article 21(3) of the Regulation 139/2004.

¹²⁷ T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 1810.

¹²⁸ Judgment of the Supreme Court of 18 February 2010, III SK 28/09. For more see: A. Jurkowska-Gomułka, 'Polish Antitrust Legislation and Case Law Review 2010' (2011) 4(5) *YARS* 174–175. A. Jurkowska-Gomułka, 'Polish Antitrust Legislation...', p. 1812.

¹²⁹ *Inter alia* judgments of the Supreme Court: of 20 July 2007, I CSK 144/07; of 19 January 2000, II CKN 686/98; of 9 November 2004, IV CK 194/04; of 6 December 2006, IV CSK 269/06, of 12 January 2007, IV CSK 286/06.

this alleged anticompetitive behaviour of undertaking¹³⁰. Furthermore, the Court ‘cannot limit itself to pointing out the incorrectness of the decision, but it is entitled, if this is justified by facts and law, to eliminate mistakes in that decision’¹³¹. The scope of the Court’s review should not be limited to the potential errors which the UOKiK President’s decision may contain. In fact, the Court is entitled to decide the case on its merits¹³². The scope of review is therefore not limited to the control of legality of the administrative proceedings in front of the UOKiK President, because – as it was previously observed – it is for the Court to apply the relevant norm of national law, on the basis of the factual background which includes its own assessment of all the factual elements required by that norm¹³³.

As a result of the proceedings, the Court of Competition and Consumer Protection can uphold the decision, modify it or annul it. In case the decision of the competition authority is modified (in part or in its entirety), the Court will in fact substitute the UOKiK President’s decision (or parts of it) with its own judgment¹³⁴.

This brings us to the second problem, i.e. the fact that the UOKiK President is not bound by the court’s judgment. In fact, in case the decision is being annulled (in part or in its entirety)¹³⁵, the case is not formally sent back to the President of UOKiK¹³⁶. It is true that after the annulment, administrative procedure can be initiated again by the competition authority¹³⁷. It is however entirely within its discretion to do so¹³⁸. This means in turn, that the UOKiK President is not bound in any way by the assessment of facts and interpretation of law made by the Court. In fact, the latter and the former are limited only to the particular case adjudicated by that court and cannot produce any legal effects for anybody but to that court¹³⁹. It implies that it will be entirely within the UOKiK President’s discretion to use that interpretation¹⁴⁰. In a similar

¹³⁰ Judgment of the Supreme Court of 18 February 2010, III SK 28/09.

¹³¹ Judgment of the Supreme Court of 18 February 2010, III SK 28/09, see in particular the judgment of the Court of Appeal in Warsaw of 21 September 2006, VI ACa 142/06, LEX no. 272753. For more see: A. Jurkowska-Gomułka, ‘Polish Antitrust Legislation and Case Law Review 2010’ (2011) 4(5) *YARS* 174–175.

¹³² T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1812.

¹³³ Judgment of the Supreme Court of 12 May 2004, III SK 44/04, (2005) 9 *Orzecznictwo Sądu Najwyższego – Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*.

¹³⁴ T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1829.

¹³⁵ M. Manowska (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom 1*, Warszawa 2011, p. 1089.

¹³⁶ T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1828–1829.

¹³⁷ M. Manowska (ed.), *Kodeks postępowania cywilnego...*, p. 1090.

¹³⁸ T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1829.

¹³⁹ Or any other court adjudicating particular case (i.e. the Court of Appeal).

¹⁴⁰ T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1829.

vein, it is left to the competition authority's and court's discretion to apply earlier interpretation of law in their future decisions and judgments. In other words no matter how good the interpretation of the existing law in a given case would be, there is neither a guarantee that it will be applied by the UOKiK President in the case at stake (in case of annulment of the decision and its subsequent re-examination), nor that it will be used in future cases. The situation might be only slightly different with respect to the case law of the Polish Supreme Court, which enjoys special authority and esteem in the Polish judicial system.

Having set the theoretical framework, let us have a look at the way the standard of judicial review of merger decisions concerning oligopolistic markets is exercised in practice. In this connection, the *Cogifer/Koltram* merger decision of the UOKiK President¹⁴¹ as well as the subsequent judgment of SOKiK in which the Court upheld this decision in its entirety¹⁴² could be very instrumental. It is probably one of the first (if not the first) cases in which UOKiK President's decision concerning a merger on oligopolistic market, was reviewed by the Court¹⁴³.

In its decision, the competition authority blocked a merger between Cogifer and Koltram – two out of three companies active on the Polish market for the production of railroad switches (and the aftermarket consisting of spare parts). In its decision, the competition authority established *inter alia* that the merging parties would have held together a substantial share in the market, significantly exceeding 40%¹⁴⁴. The UOKiK President has furthermore established on the basis of the HHI and in particular its delta increase, that in case the concentration is approved, the market will be a highly concentrated one. The fourth market player – VAE's market share was marginal and – according to the UOKiK President – there were no genuine chances that it will increase in near future – mainly due to high legal barriers¹⁴⁵. In this context, the UOKiK President alleged the existence of two possible scenarios of the situation on the market following the merger. On one hand it claimed that there was a risk of non – coordinated effects, in particular due to elimination of the third operator (KZN Biezanów), being the only real competitor to

¹⁴¹ Decision of the UOKiK President of 8 October 2009, DKK-67/09.

¹⁴² Judgment of Warsaw District Court – the Court of Competition and Consumer Protection of 5 April 2011, XVII AmA 213/09.

¹⁴³ The importance of this case was stressed notably by E. Stawicki, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2010, p. ???.

¹⁴⁴ Decision DKK-67/09, para. 113.

¹⁴⁵ VAE was importing railtrack switches and other related products; it had no production facilities within the Polish territory. The UOKiK President contended that it will not expand its activities mainly due to high legal barriers for expansion.

the merged entity. On the other hand, in the second scenario, the UOKiK President envisaged risks of coordinated effects of the merger. In particular it observed that the only competitor of the merged entity would be deprived of all incentives to compete aggressively with the market leader and would not therefore be able to constitute any countervailing power to Cogifer/Koltram¹⁴⁶. To substantiate its claims concerning non – coordinated effects of concentration, the competition authority pointed out *inter alia* to the cooperation agreement which one of the merging parties (Koltram) concluded with the only competitor (KZN Biezanów). The terms of this agreement made the latter undertaking's market success highly dependent on the former. There was thus a risk that this cooperation agreement would be terminated following the merger, which would in turn practically eliminate KZN Biezanów from the market¹⁴⁷. Furthermore, the UOKiK President also indicated high barriers to entry (legal, technical and economic) in support of the non – coordinated effects theory. As far as the co – ordinated effects of the merger were concerned, the competition authority indicated the aforementioned co – operation agreement as a potential source of concern. It made KZN Biezanów highly dependent on the merged entity and thus, it significantly decreased its motivation to compete on the market¹⁴⁸. In this connection, while assessing the likelihood of cooperation post – merger, the UOKiK President made a reference to 'Airtours' conditions, analyzing: the transparency of the market, the existence of an effective retaliatory mechanism as well as lack of the countervailing power on the part of competitors¹⁴⁹ and buyers¹⁵⁰.

Against this background it should be observed that the judgment of the Court of Competition and Consumer Protection upholding the decision in its entirety seems relatively succinct in its analysis of the risks of anti-competitive results of the merger. In fact, the Court has simply reiterated the UOKiK President's findings. In particular, on the basis of the submissions of the UOKiK President, it confirmed that the merging parties would indeed gain an 'excessively' high market share following the merger and that the market would be highly concentrated. Furthermore the Court pointed to the high barriers of entry and expansion for potential competitors. It also observed that, as a result of the concentration, the third market operator and the only competitor of the merged entity – KZN Biezanów – would be either forced to engage into cooperation with Cogifer/Koltram or it would have been driven out of the market. Last but not least, with respect to other elements of the

¹⁴⁶ Decision DKK-67/09, para. 116.

¹⁴⁷ Decision DKK-67/09, para. 117.

¹⁴⁸ Decision DKK-67/09, para. 121.

¹⁴⁹ Decision DKK-67/09, para. 121

¹⁵⁰ Decision DKK-67/09, para. 123.

decision contested by the applicant, the Court observed vaguely that ‘the assessment made by the UOKiK President of the collected information should be considered as correct and giving grounds to the decision at stake’¹⁵¹.

This approach of the SOKiK is fully in line with the theoretical framework as well as with the previous case – law. In fact, the Court will annul a decision of the UOKiK President only when it finds that it was adopted without an appropriate legal basis, with a manifest violation of the provisions of substantive law, in case when the addressee was incorrectly determined or if the case was already subject to an earlier decision¹⁵². All in all, the latter approach indicates that – as a matter of fact – the review exercised by Polish courts is not a very intensive one as far as the legal theories applied are concerned. In so far as the UOKiK President is heavily inspired by the guidance offered by the European Commission as well as the case – law of European courts¹⁵³, it will enjoy a fair margin of discretion and the Court’s intervention will be limited only to the most serious errors.

With respect to the particular field of decisions on mergers concerning oligopolistic markets, again it seems that the Court does not try to encroach upon the UOKiK President’s competences. The latter seems to be free to apply legal theories it finds instrumental and the Court’s review will be limited only to most obvious cases of violation of substantive law. In particular, the Court does not try to question the theories of competitive harm applied by the competition authority. It remains to be seen whether this approach will remain a good law since the aforementioned judgment is subject of an appeal to the Court of Appeals in Warsaw.

V. Conclusions

There is little doubt that both levels of EU judicial review of the European Commission’s merger decisions have contributed in several important respects to the development of EU law on mergers in oligopolistic markets.

Firstly, the extremely proactive approach of the ECJ in its early case-law on mergers in oligopolistic markets made it possible to enlarge the scope of application of Regulation 4064/89 to include collective dominant

¹⁵¹ XVII AmA 213/09.

¹⁵² T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1828.

¹⁵³ The competition authority makes a firm statement about its willingness to align its interpretation of Polish law with the one offered by the Commission and EU judiciary: see in particular decision DKK-67/09, para. 108.

position ('coordinated effects')¹⁵⁴, which was already known in the context of application of Article 102 TFEU. In a similar vein, the EU courts took a stance on the applicability of the 'old' merger regulation to non-coordinated effects of mergers¹⁵⁵, as well as on the new tools proposed by the EC to control oligopolistic markets, such as the 'indirect test' for market transparency¹⁵⁶.

Secondly, the GC and ECJ have continuously contributed – through their high standard of judicial review of Commission's decisions – to developing the legal criteria for the assessment of mergers in oligopolistic markets. In this connection, the review exercised by the EU judiciary in *Kali & Salz*, *Airtours* or *Sony/BMG (Impala)*, although formally limited, as far as errors of assessment are concerned, by the Commission's discretion with respect to assessments of an economic nature, did not fail to respond to the need for a more economic approach in merger cases. In this connection, the GC has in principle developed a whole new set of criteria for the assessment of the existence of collective dominance on the oligopolistic market following a merger¹⁵⁷. This was possible thanks to a very specific judicial technique, whereby in reviewing the Commission's assessment the Court first laid down what it considered to be legal principles, and only subsequently analyzed the European Commission's application of that law to the facts at hand.

Thirdly, in its review of the Commission's assessment the EU courts have applied a very high standard, which allows them to scrutinize carefully the analysis of the Commission. The Court did not limit itself to looking solely at the pure mechanics of assessment (i.e. application of law to the facts by the Commission), but it was ready to verify whether the evidence relied was factually accurate, reliable and consistent and whether it 'contained all the information which must be taken into account in order to assess a complex analysis and whether it is capable of substantiating the conclusions drawn from it'. This approach allowed the Court to clarify its case-law in relation to the substantive elements which are indispensable for a finding of collective dominant position on oligopolistic markets; such as market transparency, deterrent mechanism, or the reaction of other competitors, clients, and consumers.

Finally, the ECJ's case-law suggests¹⁵⁸ that it considers itself to be the final arbiter and will step in whenever it considers the GC's scrutiny of a

¹⁵⁴ In this respect: see section III.1. of this paper, notably the ECJ judgment in C-68/94 and C-30/95 *Kali & Salz*.

¹⁵⁵ Notably the GC judgment in T-342/99 *Airtours*. In this respect, see section III.2. of this paper.

¹⁵⁶ C- 413/06 P *Impala*.

¹⁵⁷ The so-called '*Airtours*' criteria are described in more detail in section III.2. of this paper.

¹⁵⁸ In particular, C-413/06 P *Impala*; see section III.3.2 of this paper.

European Commission decision to be insufficient or incorrect. Although formally limited to points of law, the ECJ will nevertheless check if the GC applied a correct legal standard, which will allow it in practice to review the legal characterisation of facts by the GC and the legal conclusions it drew from them. No matter how limited this scope of review might look in principle, the aforementioned case-law demonstrates that in practice it has allowed the ECJ to clarify several obscure issues in EU competition law. Insofar as mergers in oligopolistic markets are concerned, the Court of Justice has also significantly contributed towards confirming a well-established legal framework, as well as developing the criteria instrumental for the assessment of mergers.

Last but not least, looking at the standard of judicial review of merger decisions concerning oligopolistic markets from the Polish perspective, it should be observed that the theoretical framework gives to the Court relatively wide scope for intervention. By the same token, it could be imagined that the Polish court by taking a pro – active and interventionist stance in the exercise of judicial review, could develop its own set of criteria for the assessment of mergers on oligopolistic markets. However, the procedural limitations in subsequent application of these development as well as a scarce practical experience, point so far to the contrary direction.

Literature

- Bailey D., 'Standard of Proof in EC Merger Proceedings: A Common Law Perspective' (2003) 40(4) *Common Market Law Review*.
- Będkowski – Koziół M., 'Głosa do wyroku Sądu Pierwszej Instancji z 13.7.2006 r. w sprawie T-464/04 IMPALA v. Komisja, O.J. 2006 Nr C 224 z 16.9.2006 r., s. 35 (Comment on the judgment of the CFI of 13.7.2006 in T – 464/04 Impala)' (2006) 4 *Kwartalnik Prawa Publicznego*.
- Calzado Ruiz J., Barbier De La Serre E., 'Judicial Review of Merger Control Decisions After the Impala Saga: Time for Policy Choices?' (2009) *The Antitrust Review – Global Competition Review*.
- Etter B., 'The Assessment of Mergers in the EC under the Concept of Collective Dominance' (2000) 23(3) *Journal of World Competition*.
- Garcia Perez M., 'Collective Dominance Under the Merger Regulation' (1998) 23(5) *European Law Review*.
- Golding J., 'The Impala case: a quiet conclusion but a lasting legacy' (2010) 31(7) *European Competition Law Review*.
- Haupt H., 'Collective Dominance Under Article 82 E.C. and E.C. Merger Control in the light of the Airtours Judgment' (2002) 23(9) *European Competition Law Review*.
- Jurkowska – Gomułka A., 'Polish Antitrust Legislation and Case Law Review 2010' (2011) 4(5) *YARS*.

- Kaseberg T., 'Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v. Independent Music Publishers and Labels Association (Impala)*, Judgment of the Court of Justice (Grand Chamber) of 10 July 2008, nyr.' (2009) 46(1) *Common Market Law Review*.
- Kokkoris I., *Merger Control in Europe. The Gap in the ECMR and National Merger Legislation*, Routledge 2011.
- Kokkoris I., 'Assessment of Mergers Inducing Coordinated Effects in the Presence of Explicit Collusion' (2008) 31(4) *World Competition*.
- Langer J., 'The Airtours Judgment: A Welcome Lecture on Oligopolies, Economics and Joint Dominance' (2003) 10 *Columbia Journal of European Law*.
- Legal H., 'Standards of proof and standards of judicial review in EU competition law', [in:] Hawk B. (ed.), *Annual Proceedings of the Fordham Corporate Law Institute 2006*, vol. 32.
- Manowska M. (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom 1 [Code of Civil Procedure. Commentary. Vol. 1]*, Warszawa 2011.
- Nicholson M., Cardell S., McKenna B., 'The Scope of Review of Merger Decisions under Community Law' (2005) 1(1) *European Competition Journal*.
- Nikpay A., Houwen F., 'Tour de Force or a Little Local Turbulence? A Heretical View on the Airtours Judgment' (2003) 24(5) *European Competition Law Review*.
- O'Donoghue R., Feddersen C., 'Case T – 342/99, *Airtours plc v. Commission*, Judgment of the Court of First Instance of 6 June 2002, nyr.' (2002) 39(5) *Common Market Law Review*.
- Reeves T., Dadoo N., 'Standard of Proof and Standards of Judicial Review in European Commission Merger Law' (2006) 29 *Fordham International Law Journal*.
- Skoczny T., 'Wyrok Sądu Pierwszej Instancji z dnia 6 czerwca 2002 r. w sprawie T-342/99 *Airtours plc. przeciwko Komisji Wspólnot Europejskich*', [in:] Jurkowska A., Skoczny T. (eds.), *Orzecznictwo sądów wspólnotowych w sprawach konkurencji w latach 1964–2004 [Case – law of the Community Courts in competition casus 1964–2004]*, Warszawa 2007.
- Skoczny T., 'Glosa do wyroku w sprawie C – 413/06 P *Bertelsmann AG i Sony Corporation of America (sprawa Impala II)*' [in:] Jurkowska–Gomułka A. (ed.), *Orzecznictwo sądów wspólnotowych w sprawach konkurencji w latach 2004–2009 [Case – law of the Community Courts in competition cases 2004–2009]*, Warszawa 2010.
- Skoczny T., Jurkowska A., Miąsik D. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2009.
- Stawicki A., Stawicki E. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2010.
- Stroux S., 'Is EC Oligopoly Control Outgrowing Its Infancy?' (2000) 23(3) *World Competition*.
- Stroux S., 'Collective dominance under the Merger Regulation : a serious evidentiary reprimand for the Commission' (2002) 27(6) *European Law Review*.
- Van Rompuy B., 'The Standard of Proof in EC Merger Control. Conclusions from the Sony BMG Saga', IES Working Paper 4/2008.
- Venit J., 'Two Steps Forward and No Steps Back: Economic Analysis and Oligopolistic Dominance After *Kali & Salz*' (1998) 35(5) *Common Market Law Review*.
- Vesterdorf B., 'Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts' (2005) 1(1) *European Competition Journal*.

C A S E C O M M E N T S

Concurrence of wills – a necessary ingredient of an agreement restricting competition.

Case comment to the judgment of Court of Competition and Consumer Protection of 8 February 2011 – *ZST Gamrat S.A. v President of the Office of Competition and Consumer Protection* (Ref. No. XVII Ama 16/10)

Introduction

The case in question represents just one of several legal actions that ZTS Gamrat and its distributors undertook against the decision of the Polish national competition agency, the President of the Office of Competition and Consumer Protection (hereafter, UOKiK President, after the Polish acronym). This legal battle commenced in 2005 and still has not been resolved, as the judgment of the Court of Competition and Consumer Protection (hereafter, the SOKiK) discussed in this comment has been appealed by the UOKiK President. The Court of Appeals, in its judgment of 20th October 2011 (ref. no. VI ACa 564/11), referred the case back to the SOKiK due to the invalidity of the trial before that Court. Hence, the pronounced judgment was set aside and the proceeding before the SOKiK will be repeated. Nonetheless, while keeping in mind that the judgment is under reconsideration, it is worth taking a closer look at the judgment originally issued as it tackles the interesting question of the legal prerequisites of an agreement restricting competition contrary to competition law.

Facts

In 2005, the UOKiK President launched an investigation with regard to an agreement allegedly restricting competition concluded by the following entities: ZTS Gamrat SA, PPHUS Gamrat SA, Śląskie Centrum Handlowe PVC Gamrat sp. z o.o., Budmech WT, Polskie Składy Budowlane S.A. It was alleged that named entities entered into a price-fixing agreement.

ZTS Gamrat S.A. (hereafter, ZTS Gamrat) is a producer of drainage systems for construction purposes. ZTS Gamrat's products are distributed in Poland through a network of authorized distributors. It was established that ZTS Gamrat concluded individual cooperation agreements with the above-mentioned entities. A few years

into their cooperation, each authorized distributor signed an annex to the cooperation contract which governed relations between the producer and the dealer. In particular these annexes included provisions on rebates granted by the producer to the dealer, as well as fixing the amount of rebates on further re-sales of the drainage system in question. In other words, the annexes indicated the maximum amount of the rebate a distributor could grant on further re-sale.

In the hearing in front of the UOKiK President, key proof that an agreement contrary to competition law was entered into was deemed to be a letter addressed to ZTS Gamrat indicating that ZTS Gamrat controlled the other parties to the agreement by verifying whether the fixed rebate/discount for resale was complied with.

The UOKiK President found that by fixing the maximum discount, ZTS Gamrat in fact influenced the market price of the drainage system. According to the UOKiK President, the fact that the contract with distributors included provisions on the resale price of the drainage system resulted in a reduction of competition between distributors in terms of price on the market. The agreement thus had a direct impact on the level of competition in the relevant market i.e. the market for the domestic distribution of the drainage system. It was also stated that the agreement, whose object was to determine the resale price of the drainage system in question, affected the situation of the consumer.

As a result of the above, ZTS Gamrat was found to have concluded an unlawful agreement by virtue of which it fixed prices on the resale of a drainage system¹. It follows from the case-law that agreements relating to rebates and discounts, which directly or indirectly influence or fix the resale price of goods, shall be deemed unlawful price-fixing agreements under competition law. The UOKiK President's decision stated that determination of the maximum rebate that a distributor could apply when selling the drainage system was in fact indirect price fixing, inasmuch as it specified a minimum price for sales of the system, under which distributors could not sell the product.

It must be underlined that agreements which, directly or indirectly, alone or in combination with other factors, dependent on the parties, have as their object the restriction of a sale price, by imposing a minimum or a specified amount of (fixed) prices for goods covered by the agreement, are generally regarded as among the most severe restrictions on competition.

The decision was appealed by ZTS Gamrat S.A. to the Court of Competition and Consumer Protection.

¹ The decision was issued on the basis of the Act of 15 December 2000 on competition and consumer protection (consolidated version: Journal of Laws 2005 No. 244, item 2080). This Act was replaced by the Act of 16 February 2007 on competition and consumer protection (Journal of Laws 2007 No. 50, item 331), the latter of which is hereafter referred to as the Competition Act.

Key findings of the Court of Competition and Consumer Protection

ZTS Gamrat claimed on appeal that there was no breach of competition law. It denied the existence of agreements with distributors, stating that the rebate policy was justified by the desire to adapt to the competitive level on the relevant market. It was indicated that the amount of rebates granted was determined and negotiated individually with distributors. ZTS Gamrat identified companies that were chosen as the leading distributors and presented criteria for the selection of such distributors. It also explained that the purpose of indicating a rebate on re-sale was to determine the appropriate level of profit for the distributor. It should be underlined that not all distributors were required to comply with discounts for resale. Moreover, the distributors themselves strongly opposed the concept that they were a part of an agreement on price fixing.

The SOKiK found that when issuing his decision the UOKiK President relied mainly on the wording of annexes concluded by ZTS Gamrat with its distributors, and the fact that all of the annexes except one were concluded on the same date. The UOKiK President was of an opinion that (i) the distributors knew that ZTS Garmat included identical provisions in contracts relating to maximum rebates on resale of the drainage system, and (ii) while having this knowledge, the distributors voluntarily agreed to sign uniform agreements and reduce their autonomy in pricing the drainage system for resale, which violated the interests of consumers and free competition. In the opinion of the SOKiK, the conclusions reached by the UOKiK President were wrong. While the evidence gathered by the President could have created the impression that the entities in question took part in the prohibited agreement, in its analysis of the evidence the SOKiK found numerous discrepancies between the wording of the annexes and the conclusions reached by the UOKiK President. In particular, the SOKiK stated that the rebates on resale were – contrary to what was claimed by the UOKiK President – not binding on the distributors, as they applied various rebates to resale of the drainage system. Nor was there a system of control set up by ZTS Gamrat SA to verify whether the distributors complied with the annexes.

The SOKiK also found that the letter addressed to ZTS Gamrat did not provide sufficient proof that the named distributors had information about arrangements for maximum resale discounts made by ZTS Gamrat with other distributors. The distributors in question not only did not cooperate with each other, but competed intensely against each other in order to gain new clients. In the light of foregoing, the SOKiK found that ZTS Gamrat did not breach competition law.

Commentary

The SOKiK judgment refers to a very important area of competition law, i.e. agreements restricting competition. The Polish Act on competition and consumer protection prohibits agreements between undertakings which have as their object or effect the elimination, restriction or any other infringement of competition in the relevant market which leads, amongst other effects, to price fixing, market sharing,

limiting access to the market, or eliminating from the market undertakings which are not parties to the agreement².

However, it must be underlined that agreements between undertakings form a part of day-to-day business activity. Therefore, it is crucial to ascertain which agreements distort competition and which should be deemed neutral or even beneficial for the competition process³.

First of all, it is crucial to ascertain the legal meaning of the notions ‘undertaking’ and ‘agreement’. The Polish Competition Act states that:

‘1) ‘undertaking’ shall mean an undertaking in the meaning of the provisions on freedom of business activity, including⁴:

- a) natural and legal persons as well as an organisational unit without a legal status to which legislation grants legal capacity, organising or rendering public utility services, which do not constitute a business activity in the meaning of the provisions on freedom of business activity;
- b) natural persons exercising a profession on their own behalf and account or carrying out an activity as part of exercising such a profession;
- c) natural persons having control, in the meaning of subparagraph 4 herein, over at least one undertaking, even if the person does not carry out a business activity in the meaning of the provisions on freedom of business activity, if this person undertakes further actions subject to the control of concentrations;
- d) associations of undertakings – for the purposes of the provisions on competition-restricting practices and practices infringing collective consumer interests.

2) ‘agreements’ shall mean⁵:

- a) agreements concluded between undertakings, between associations thereof and between undertakings and their associations, or certain provisions of such agreements;
- b) concerted practices undertaken in any form by two or more undertakings or associations thereof;
- c) resolutions or other acts of associations of undertakings or their statutory organs.’

A distinction must be made between the unilateral conduct of an undertaking and co-ordination of behavior or collusion between undertakings. The type of co-ordination of behavior or collusion between undertakings falling within the scope of competition law is that where at least one undertaking undertakes, *vis-à-vis* another undertaking, to adopt a certain conduct on the market that, as a result of contacts between them, eliminate or at least substantially reduce uncertainty as to their conduct on the market⁶.

² Article 6 of the Competition Act.

³ A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on competition and consumers protection. Commentary]*, Warszawa 2011, p. 211

⁴ Article 4(1) of the Competition Act.

⁵ Article 4(5) of the Competition Act.

⁶ Joined cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95,

Under competition law an agreement does not necessarily have to be in writing. It has been held on numerous occasions that a ‘gentleman’s agreement’ and simple ‘understandings’ are to be regarded as agreements, even though neither is legally binding nor in writing. Guidelines issued by one person that are adhered to by another can amount to an agreement, and circulars and warnings sent by a manufacturer to its dealers may be treated as part of a general agreement existing between them⁷. The same is true of an agreement which has expired or lapsed in time, but the effects of which continue to be felt on the market⁸. The challenge for the competition authorities is to uncover the operation of such cartels⁹.

Moreover, it must also be noted that the prohibition of agreements restricting competition applies to both horizontal and vertical agreements. Therefore, an agreement between a producer and its independent distributors may be found anti-competitive. Agreements between undertakings which might distort competition within a relevant market fall under the scrutiny of the competition authorities regardless of whether such agreements are concluded between a producer and his distributors or between two or more undertakings operating at the same level on the market chain.

An agreement also need not necessarily be express. It can be tacit. For an agreement to be capable of being regarded as having been concluded by tacit acceptance there must be an invitation from one undertaking to another undertaking, whether express or implied, to fulfill a goal jointly¹⁰.

In certain circumstances an agreement may be inferred from and imputed to an ongoing commercial relationship between the parties. However, the mere fact that a measure adopted by an undertaking falls within the context of on-going business relations is not in and of itself sufficient¹¹. In each case it is necessary to examine the facts underlying the agreement and the specific circumstances in which it operates¹².

An important factor constituting an agreement is the existence of a concurrence of wills, sometimes also called ‘meeting of minds’, between the parties to an agreement. As A. Jones and B. Sufrin indicate: ‘proof of an agreement must be founded upon the existence of the subjective element that characterizes the very concept of the agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct

T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and others v Commission of the European Communities*, ECR [2000] II-491, paras. 1849 and 1852; joined cases T-202/98, T-204/98 and T-207/98 *British Sugar and others v Commission of the European Communities*, ECR [2001] II-2035, paras. 58 to 60

⁷ *Anheuser-Busch Incorporated-Scottish & Newcastle*, OJ [2000] L 49/37; *Volkswagen*, OJ [2001] L 262/14.

⁸ R. Whish, *Competition Law*, London 2004, pp. 92–93.

⁹ A. Jones, B. Sufrin, *EC Competition Law, Text, Cases, and Materials*, Oxford 2004, p. 127.

¹⁰ See, in this respect, joined Cases C-2/01 and C-3/01P, *Bundesverband der Arzneimittel-Importeure EV and Commission v. Bayer AG*, [2004] ECR I-00023; [2004] 4 CMLR 653, pp. 141–145;

¹¹ Guidelines on the application of Article 81(3) of the Treaty, OJ [2004] C 101/97. p. 15.

¹² Guidelines on the application of Article 81(3) of the Treaty, OJ [2004] C 101/97. p. 6.

on the market¹³. R. Whish points out that even a protocol which reflects a genuine concurrence of wills between the parties is sufficient to constitute an agreement¹⁴.

In other words for there to be an agreement within the meaning of competition law it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way¹⁵. Therefore, in order to find a price-fixing agreement, the competition authority must establish that the parties to such an agreement have acted intentionally¹⁶.

In this regard it is instructive to note that the SOKiK overruled the decision of the UOKiK President on the basis that the UOKiK President did not establish sufficient proof that there were intentionally committed actions between the entities in question. In the opinion of the SOKiK, the UOKiK President did not show that distributors of ZTS Gamrat's drainage system knew about the fact that rebates were coordinated. The Court concluded that an examination of the attitude and actual conduct of the distributors showed that the UOKiK President had no factual basis for claiming that entities in question aligned themselves to any policy by ZTS Gamrat to observe fixed rebates and therefore influence the resale price and maintain the price at a similar level.

Bearing in mind the fact that the concept of an agreement centers around the existence of a concurrence of wills¹⁷, the SOKiK's stance seems to be in line with the judgments of the European Union courts (both the Court of Justice and the General Court), which have stressed that the competition authority may not decide that unilateral conduct by a manufacturer, in the context of its contractual relations with its retailers, forms the factual basis of an anticompetitive agreement unless it establishes express or implied acquiescence by the retailers in the attitude adopted by the manufacturer¹⁸.

The SOKiK's judgment is also in line with certain concepts highlighted in the judgment in *Bayer AG v Commission*, issued by the EU General Court (formerly Court of First Instance)¹⁹. In that case the Commission dealt with the issue whether the concept of an agreement contrary to competition law may be read into unilateral conduct. It follows from that judgment that a distinction has to be drawn between cases in which a genuinely unilateral measure has been adopted (without the express or implied participation of others) and those in which a unilateral measure receives at least a tacit acquiescence²⁰. In its judgment, the Court in *Bayer AG v Commission* underlined

¹³ A. Jones, B. Sufrin, *EC Competition Law...*, p. 127.

¹⁴ R. Whish, *Competition Law...*, p. 92.

¹⁵ Case 41/69 *ACF Chemiefarma v Commission of the European Communities*, ECR [1970] 661.

¹⁶ A. Stawicki, E. Stawicki (eds.), *Ustawa...*, p. 122.

¹⁷ Case T-41/96 *Bayer AG v Commission of the European Communities*, ECR [2000] II-3383, [2001] 4 CMLR 126; p. 69.

¹⁸ Case T-208/01 *Volkswagen A.G. v Commission of the European Communities*, ECR [2003] II-5141; Joined Cases C-2/01 and C-3/01P *Bundesverband der Arzneimittel-Importeure EV and Commission v Bayer AG*, [2004] 4 CMLR 653, pp. 141–145.

¹⁹ Case T-41/96 *Bayer AG v Commission of the European Communities*, ECR [2000] II-3383, [2001] 4 CMLR 126; p. 69.

²⁰ A. Jones, B. Sufrin, *EC Competition Law...*, p. 138.

that the concept of an agreement ‘centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties’ intention²¹.

It is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party to fulfill that goal jointly. Proof of the agreement has to be based on a finding (direct or indirect) of a meeting of minds between the operators. It is accepted that the mere signature of the dealership agreement cannot in and of itself be regarded as implied acceptance, given in advance, of anticompetitive initiatives²².

The SOKiK found that in this particular case there was no concurrence of wills, as the distributors had no knowledge about the rebate scheme employed by ZTS Gamrat within its distribution network, nor about the fact that they were as a group supposed to follow this rebate scheme initiated by ZTS Gamrat. Moreover, it was apparent to the SOKiK that the distributors not only did not abide by or obey the rules indicated by ZTS Gamrat regarding the maximum resale rebates, but employed different rebates in order to attract new contracting parties. The UOKiK President did not prove any factual acquiescence by the dealers. It follows from the case-law that in the absence of unequivocal evidence establishing the fixing of or a strict set of rules regarding retail prices and discounts, the infringement is not sufficiently established in law²³.

On the basis of evidence gathered in the case the SOKiK concluded that the decision of the UOKiK President should be dismissed.

Conclusions

The analysis conducted by the Court of Competition and Consumer Protection places great importance on whether a concurrence of wills was reached within the framework of an agreement contrary to competition law. Such an approach seems to be in line with the concepts of ‘agreement’ under the competition law of the European Union, which requires a consensus of the parties in order to form an agreement contrary to competition law.

However, it must also be noted that the burden of proof placed on the competition authority to establish the intention of the parties to form an unlawful agreement may turn out to be, in certain cases, so burdensome as to be close to impossible to meet.

Monika A. Górska

LL.M, PhD candidate at the Adam Mickiewicz University Faculty of Law, Poznań.

Legal advisor at Sojka & Maciak – Adwokaci sp. k., Poznań

²¹ Case T-41/96 *Bayer AG v. Commission of the European Communities*, ECR [2000] II-3383, [2001] 4 CMLR 126; p. 69.

²² Case T-208/01 *Volkswagen A.G. v Commission of the European Communities*, ECR [2003] II-5141, p. 68.

²³ Case T-67/01 *JCB Service v Commission of the European Communities*, ECR [2004] II-00049, pp. 121-133.

**The *EMPiK* and *Merlin* concentration prohibition:
Would the European Commission reach a similar verdict?
Case comment to the decision of the President of the Office for
Competition and Consumer Protection of 3 February 2011 –
Merlin.pl S.A. and NFI EMPiK Media & Fashion S.A (DKK-12/2011)**

CONTENTS

- I. Introduction
- II. Relevant markets
 - 1. UOKiK's definition of the relevant markets
 - 2. Allegations that the relevant markets were wrongly defined
 - 2.1. The purchasing process via traditional distribution channels and via the Internet
 - 2.2. Consumers' characteristics
- III. Assessment of the concentration's effect on competition
 - 1. Market shares
 - 2. Time factor in relation to the market of electronic trade
- IV. Breaches of procedural rules
- V. Conclusions

I. Introduction

On 3 February 2011, the President of the Office of Competition and Consumer Protection (the Polish national competition agency, hereafter referred to as the UOKiK, after the Polish acronym), pursuant to Article 20(1) of the Act of 16 February 2007 on competition and consumer protection¹ (hereafter referred to as the Competition Act) and in relation to Articles 13(1) and 13(2)(2) of said Act, issued Decision number DKK-12/11 (hereafter, the Decision). It ruled against the takeover of Merlin.pl S.A. by NFI EMPiK Media & Fashion S.A.² on the basis that 'the concentration will result in a significant impediment to competition'³.

¹ Journal of Laws of 2007 No. 50, item 331, as amended.

² UOKiK's press release 'NFI Empik/Merlin – UOKiK prohibits the concentration', 4 February 2011. It was the sixth UOKiK decision prohibiting concentration since 2004.

³ The Decision, p. 78.

On 15 February 2011 EMPiK announced that it would appeal the decision of the President of the UOKiK to the Court of Competition and Consumer protection⁴ (the Regional Court in Warsaw, hereafter sometimes referred to as the Court) on the basis of Article 479(28)(1) of the Polish Civil Procedure Code⁵. This appeal is based on two grounds. Firstly, although the decision of the UOKiK President unequivocally states that neither EMPiK, nor Merlin.pl, nor the new company which would arise as a result of the merger of EMPiK and Merlin.pl would have a dominant position, the UOKiK still prohibited the merger. Secondly, even though the merger would have a possible effect on competition on the markets, the evaluation made by the UOKiK President of the scope of the actual effect on competition, as well as the evaluation of development phases and market dynamics, the barriers to entering the market, and other material factors, was conducted completely erroneously and insubstantially. The outcome of the case before the Court of Competition and Consumer protection is still pending at time of publication of this commentary.

The decision of the UOKiK President is especially interesting and significant for three reasons. Firstly, the UOKiK conducted the most thorough market research in its history among undertakings operating on the culture-related products' market. More than 1110 competitors of EMPiK and Merlin.pl, such as publishing houses, distributors, and on-line stores, were requested to present their opinion on the merger. Secondly, the decision was handed down recently, and thus there are no legal comments or articles on the case so far. Thirdly, the e-commerce and non-traditional channels of distribution in Poland are rapidly growing, therefore the appropriate determination of the relevant market in this case may have a significant impact on future decisions of the UOKiK as well as the future market.

For the purposes of this commentary, in order to investigate the decision of the President of the UOKiK it will be assumed that the proposed concentration between EMPiK and Merlin.pl has a Community dimension. As a result, the decision will be examined hypothetically from the perspective of the European Commission, but in accordance with Polish merger regulations. This commentary constitutes, in the end, an attempt to demonstrate that the European Commission would not have issued a prohibition decision against the concentration between the undertakings. There are three main deficiencies in the decision which support this conclusion:

⁴ EMF, 'Presentation of results for 4Q 2010. Development plans. The appeal by NFI Empik Media & Fashion S.A. of the decision of the President of the Office of Competition and Consumer Protection (UOKiK)', available at <http://www.emf-group.eu/?jezyk=en&id=288>. This information was also confirmed in a number of interviews given by Empik's management, for example in: T. Gryniewicz, 'EMPiK powalczy o Merlina i wniesie odwołanie od decyzji UOKiK' ['Empik will fight over Merlin and appeal the decision of the UOKiK'], *Wyborcza.biz* where Maciej Szymański, the CEO, stated: „We will appeal”.

⁵ Article 479(28)(1) of the Polish Civil Procedure Code (consolidated version: *Journal of Laws 2010 No. 155, item 1037*) states that: 'The Regional Court in Warsaw – the Court of Competition and Consumer Protection – shall have jurisdiction over appeals from decisions of the President of the Office of Competition and Consumer Protection, referred to in this Chapter 'President of the Office'.

- 1) significant errors in determining the relevant market;
- 2) deficiencies in proving that the concentration would result in a significant impediment to effective competition, together with disregard of the time factor;
- 3) substantial procedural errors.

II. Relevant markets

1. UOKiK's definition of the relevant markets

The decision of the UOKiK President was made on the basis that the intended concentration would result in a limitation of competition on the Polish market in the following sectors:

- 1) the domestic retail market for sale of on-line non-specialised books;
- 2) the domestic retail market for sale of on-line music CDs recorded on traditional media;
- 3) the domestic market for purchasing non-specialised books;
- 4) the domestic market for purchasing music CDs recorded on traditional media.

It was stated unequivocally that neither *EMPiK*, nor *Merlin.pl*, nor the entity that would arise as a result of the concentration would have a dominant position on any of the above-mentioned markets.

2. Allegations that the relevant markets were wrongly defined

The domestic retail market for sale of on-line non-specialised books was defined erroneously. According to the UOKiK President, despite the partial substitution of the traditional and online sales channels their mutual interaction still cannot be regarded as substitutable enough to form a market on its own. Consequently, the competition authority decided to separate internet sales of each product and consider them as separate markets. Such an approach appears entirely inconsistent with the European Commission's case law⁶.

The landmark decision where the European Commission conducted a detailed analysis of the book market is *Lagardere/Natexis/VUP*⁷. It was highlighted that books follow a so-called 'book chain,' which involves various players at its different stages: the publisher, the distributor, the marketer, the wholesaler, and the dealer. There were a number of product markets recognized in this chain, such as the market for

⁶ However, it should be noted that the print media market does not play a significant role in EC competition law, and there are a limited number of cases in this respect: Commission Decision, Case IV/M.1377, *Bertelsmann/Wissenschaftsverlag Springer*; Commission Decision, Case IV/M.1275, *Havas/Bertelsmann/Doyma*; Commission Decision, Case COMP/JV.39, *Bertelsmann/Planeta/NEB*; Commission Decision, Case IV/M.1455, *Gruner/Jahr/Financial Times*; Commission Decision, Case IV/M.1401, *Recoletos/Unidesa*.

⁷ Case COMP/M.2978.

publishing rights, the market for marketing and distribution service, and others. Moreover, two additional markets were identified, i.e. the market for sales of books at the wholesale level and the market for sales of books at the retail level. Most importantly, the European Commission unequivocally stated that the retail sales of books in all channels form a single product market. Consequently, according to the *Lagardere/Natexis/VUP* decision it can be argued that the traditional and the online markets should be treated as a single product market⁸.

The definition of the relevant market has a decisive bearing on the evaluation of a competition law case. If the consumer is not able to purchase a specific item using the traditional channel, (s)he can still benefit from a possible purchase on the alternative channel, i.e. via the Internet. Hence, on the basis of the above considerations, it can be argued that if the European Commission evaluated the present case it is highly probable that both the traditional and the online channels would be treated as substitutable markets.

There were a number of arguments given by the UOKiK in support of its definition of the relevant market, and as a result its prohibition of the concentration. For the purposes of this commentary, they may be assembled into the following two groupings: arguments related to the purchasing process, and arguments related to consumers' characteristics.

2.1. The purchasing process via traditional distribution channels and via the Internet

The UOKiK President provided a number of arguments related to the purchasing process which require, according to the UOKiK, that the two markets should be regarded as separate.

Firstly, it was argued that in the internet channel the customer does not have any contact with the product and its seller, because the buyer cannot see the product, verify whether there are any defects in workmanship, or determine whether the product fully meets his/her needs. The Commission would not raise such an argument, as it can be assumed that it would be fully aware of the Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts, which provides a number of elementary legal rights to consumers that ensure a certain level of consumer protection throughout the EU with respect to contracts entered into via the Internet. The Commission would particularly rely on Article 4, i.e. 'Prior information' and Article 6, i.e. 'Right of withdrawal.' Moreover, Recital 11 of the Directive states that '(...) the use of means of distance communication must not lead to a reduction in the information provided to the consumer (...).' Consequently, the arguments raised by the UOKiK appear to be irrelevant.

⁸ Such a division of the market was also followed in another leading European Commission decision, *Egmont/Bonnier*, Case COMP/M.4611; see para. 13 and 19. See also: C. Boeshertz, T. Kleiner, G. Nouet, L. Petit, U. von Koppenfels, V. Rabassa, V., 'Lagardère/Natexis/VUP: big deal in a small world' (2004) 1 *EC Competition Policy Newsletter* 8-14.

Secondly, it was stated that a customer of an online store cannot purchase the product 'right away', but he/she usually needs to wait for it for a few days. Moreover, for books or CDs which are regarded as niche products, the waiting period may even amount to a few weeks. Consequently, such conditions prevent or impede the realization of certain 'shopping missions,' such as buying in an emergency or purchasing a last-minute gift. Again, for the Commission this argument would appear immaterial, taking into consideration that if a niche book or CD is not on stock in a traditional store, the customer similarly needs to wait for a certain period of time. The notion of 'buying in an emergency' also remains obscure. The UOKiK President also stated that an additional obstruction in this area is that the ordered products can only be received in pick-up locations operated by a limited number of stores. It can be assumed that the European Commission would conduct a more detailed research, which would indicate that *EMPiK* currently operates 166 pick-up locations while *Merlin.pl* currently offers 1,234 pick-up locations. Moreover, the competition authority claimed that if pick-up services are not used, the client is 'forced' to rely on services provided by the Polish Post or courier companies. The UOKiK did not, however, provide examples of other possible (i.e. less forcible) methods of delivery, simply presuming they do not exist.

Thirdly, it was claimed that for a number of consumers the process of making payments on the internet remains a major problem. The difficulty is, however, that the Polish competition authority did not provide any relevant research relating to this issue. It is doubtful that the Commission would issue such a bald statement in any competition law case, let alone one of this gravity, without presenting a valid analysis of consumer preferences.

Fourthly, it was stated that online stores 'prefer' cashless transactions, while there is still a 'significant percentage' of customers who do not use cashless transactions in traditional channels. Once again, no relevant research was given to support either statement and the assumed percentage was not defined. In addition, according to Polish legislation if an online store serves consumers, it must enable them to pay upon the delivery of goods.⁹ While consumers may also pay for products in online shops prior to delivery, this method of payment is based on their choice, which indicates that they also have the ability to pay upon receipt.

Lastly, the UOKiK described other characteristics of purchasing via the internet which it also considered relevant. Interestingly, two out of its five short observations contradict each other. According to the first, the internet stores have lower costs of acquiring and maintaining pick-up points, paying the staff responsible for customer service, and maintaining storage of goods. On the other hand, the fifth observation stated that internet sales incur increased expenditures on efficient and effective operating systems, logistics, and IT¹⁰.

⁹ A. Janowski, 'Czy sklepy internetowe muszą umożliwiać płatność przy odbiorze?' ['Do Internet stores have to allow payment upon receipt?'], 25.05.2009, 42(561) *Gazeta Podatkowa* 16.

¹⁰ The Decision, pp. 20–21.

2.2. Consumers' characteristics

The second group of arguments relates to the characteristics of consumers purchasing books. The UOKiK considered the demographic profile of consumers as an important difference between traditional and internet commerce. The UOKiK President concluded that the vast majority of people who are over 45 years old do not use internet commerce, a finding which was not supported by any research. Moreover, statistical data was provided to indicate that the number of people between 55 and 64 and 65 and 74 years old who purchase online remains completely irrelevant inasmuch as that percentage is changing quite quickly according to the competition authority itself. Undoubtedly, the European Commission would verify whether persons below the age of 45 who use online stores also use traditional stores. Furthermore, such research would probably indicate that such persons use both channels, therefore, the division into online and traditional sales channels is artificially drawn.

It was claimed that 'the majority' of consumers shopping on the internet incur the costs of delivery of products and that, as a consequence, they 'try to' construct their orders in such a way that the cost of delivery is the lowest, which means they order a number of products simultaneously. Even though the notions of 'the majority' and 'try to' were not defined, it appears that UOKiK President omitted the fact that if a customer purchases multiple books in a traditional store there is also the possibility of a discount. Moreover, it is probable that the Commission would also take into account the financial and/or time costs of obtaining a product.

The UOKiK President also stated that one element that significantly differentiates traditional commerce from online commerce is the importance of 'customer confidence' in the vendor. Personal contact with the seller (even unknown) and the product is assumed to foster a situation whereby the consumer is willing to buy products. It is alleged that in such situations the risks inherently connected with online transactions are absent. These risks apparently concern the situation when the seller does not fulfil the contract or the product does not comply with its advertised specifications. It was also claimed that in traditional channels the customer would obtain a guarantee that the vendor would ensure the possibility of return. Once again, it appears that the UOKiK President completely disregarded Polish and European legislation relating to consumer protection with respect to distance contracts, while relying on an alleged 'special bond' between the customer and the vendor which is not proven. The Commission certainly would be aware of the legislation and would not invoke such artificial concepts.

III. Assessment of the concentration's effect on competition

With regard to the potential impact of the concentration on competition, the UOKiK President stated that competition on the domestic retail market for sale of on-line non-specialised books would be significantly reduced if the concentration were allowed. None of the other market participants would be a competitive counterweight

to the new entity. A number of arguments in support of this thesis were provided and are summarized below¹¹.

Firstly, the data taken into account while estimating market shares assumed that all entities in the market are competitors to *EMPiK* and *Merlin*, while in fact they are not, because they will not exert competitive pressure on the merged entity.

Secondly, *EMPiK* and *Merlin* are close competitors in the relevant market. Their brands are equally recognisable and they offer similar products, therefore customers can make complex purchases. For their clients, *EMPiK* and *Merlin* are close substitutes and the concentration would have a negative effect on the market.

Thirdly, according to the intended concentration the market leader would be taken over by the entity in second place in the market. Consequently, not only are the parties to the concentration close competitors competing against each other, but they also dominate over other entities in the market. Therefore, direct market rivalry will be hampered by the large market share of the new entity.

Fourthly, it was noted that there are often no alternatives other than *EMPiK* and *Merlin* for a significant number of wholesalers, therefore they are destined to contract with one or the other.

In the following sections, the *UOKiK*'s arguments are examined.

1. Market shares

The *UOKiK*'s conclusions were based on its own research. Its investigation focused on the participants in the concentration in relation to their main competitors in the domestic online retail market of non-specialist books (as evidenced in Table 9 of the Decision). According to the study, the market share of the 44 competitors of *EMPiK* and *Merlin.pl* amounted to approximately 85% in 2009. Accordingly, *EMPiK*'s and *Merlin.pl*'s share in the market amounted to approximately 15%. Consequently, it can be argued that the proportion of market shares, as determined by the *UOKiK*'s own research, does not present an independent basis for the prohibition of the concentration. Moreover, *EMPiK* claimed that the *UOKiK* President did not address, firstly, the evidence presented by the company and, secondly, the available analyses and studies¹² which provided evidence that its actual share on the market is much lower than that presented by the competition authority.

Furthermore, according to the *UOKiK* President, if the concentration was allowed, the degree of concentration, measured by the Herfindahl-Hirschman Index (HHI)¹³, would increase between 166 and 239 points and would significantly limit competition on the relevant markets. Strangely enough, it was only the *increase* of the HHI and

¹¹ See the Decision, pp. 62-74.

¹² NFI Group, press release 'Presentation of results for 4Q 2010, Development plans, the appeal by NFI Empik Media & Fashion S.A. of the decision of the President of the Office of Competition and Consumer Protection (*UOKiK*)', 15 February 2011, p. 9.

¹³ The HHI Index is the sum of the squares of the market shares of every firm in the market before and after the proposed merger.

not the *actual* post-merger HHI which was identified. According to the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings¹⁴, the Commission is unlikely to identify horizontal competition concerns in a market with a post-merger HHI below 1000¹⁵, or even between 1000 and 2000¹⁶. It appears therefore that the HHI on the relevant markets was not taken into account by the President of the UOKiK, and it cannot be concluded that the planned concentration would significantly limit competition based on the HHI data provided.

At this point it may be noted that there is also an argument raised by Hovenkamp according to which the HHI is over-relied upon in merger review cases¹⁷. Hovenkamp claims that the Index adds a appearance of great analytical rigor in the merger analysis, because it ‘gives superficially precise ‘readabouts’ of market concentration’¹⁸ while in fact the analysis is based on ‘assumption, conjecture, and even speculation’¹⁹. Hovenkamp’s criticism appears to be especially relevant in the current case where, according to UOKiK, the companies merger would increase the HHI *precisely* between 166 and 239 points. By providing such exact numbers the UOKiK’s research gives an illusion of extreme accuracy and flawlessness. This analysis assumes however that all firms on the markets indicated by the competition authority behave in the same way and that their performance can be predicted strictly from the structure of such markets. The question arises whether the behaviour of companies on a market that is expanding approximately 30% per year can be predicted with such precision. Lastly, taking into consideration that the market definition in the current scenario was defined too narrowly, by squaring the HHI numbers the error may becomes even more prominent, assuming that the HHI regime was rigorously applied.

Additionally, in its justification the competition authority declared that it is practically impossible to calculate the exact value of the national purchase market. Instead, it relied on the highly subjective statements of surveyed companies – competitors of EMPiK and Merlin.pl.

It ignored the fact that, although EMPiK’s online sales have been developing and growing since 2005, Merlin.pl remains an extremely strong and ambitious market player. The status quo of two strong companies on the same market could lead to a devastating price war, i.e. a situation when competitive rivalry is accompanied by an excessive use of price instruments which successfully decrease both prices and profit margins²⁰. Although such a price war would be initially good for consumers, who would benefit from lower

¹⁴ OJ [2004] C 31.

¹⁵ Para 19.

¹⁶ Para 20.

¹⁷ H. Hovenkamp, *The Antitrust Enterprise: Principle and Execution*, Cambridge: Harvard University Press, 2005, pp. 212-214.

¹⁸ H. Hovenkamp, *The Antitrust Enterprise...*, p. 213.

¹⁹ H. Hovenkamp, *The Antitrust Enterprise...*, p. 213.

²⁰ A similar situation occurred in the late 1990s/early 2000s in the United States, where the three biggest online booksellers, Amazon, barnesandnoble.com. and borders.com, immediately matched the 60 percent off on all New York Times best sellers announced by Amazon.

prices, in the long run it would threaten the companies involved. Furthermore, analysts indicate that the “cut-throat” competition eventually reduces the expected margins and revenues, and thus jeopardizes the long-term prospects for the online bookselling business in general.²¹ The competition among booksellers is still dominated by building brand-name recognition through advertising, supported by high-quality customer service and marketing, developing user-friendly website designs, tailoring content to individual tastes and expanding the range of products, offering e-mail updates on book categories specified by readers, and delivering better reviews. However, a price war on Polish market can already be observed, reflected in the fact that, for example, both competitors regularly offer significant discounts on bestsellers. Merlin.pl has already introduced a ‘buy one, get one free’ scheme, ‘buy one, get a gift free’ scheme, ‘buy a book, get a discount on CD’ scheme, and reductions on products of particular publishing houses²².

The UOKiK also did not take into account that it has been relatively difficult for both Merlin.pl and *EMPiK.com* to further expand in the last few years. The companies face competition not only from small e-bookstores (such as *wysylkowa.pl*, *lideria.pl*), but also from individual sellers on *Allegro.pl*, the Polish equivalent of eBay, which has forced the companies to constantly decrease their prices, leading to a decrease in profits. Attracting buyers has been increasingly difficult, despite broadening their offers to electronics, toys, cosmetics, even gardening tools & equipment and ‘do it yourself’ tools (which, however, completely failed). Moreover, the companies are aware that within a short period of time they will need to invest in digitalization, introduce e-books, and start selling digital music and movies and compete with Amazon’s Kindle and Apple’s iPad.

To conclude, even if the size and amount of market share established was regarded as decisive, it still did not constitute an impartial basis for prohibition of the transaction. From the research conducted by the UOKiK President, it appears clear that the merged entity would not reach a dominant position. Furthermore, the UOKiK’s analysis provided a very static vision of firms and their market shares, ignoring the possibility of a “price war” and mathematically assuming that the market shares of other firms will remain unchanged. Such an approach seems entirely erroneous considering that Amazon, the world’s largest online retailer, is expected to launch its services in Poland in March or April 2012,²³ and when Amazon enters a market, ‘the market must change’²⁴.

²¹ G. Gately, ‘Online Book Price War Worries Wall Street’, 18 May 1999, available at <http://www.ecommercetimes.com/story/51.html>.

²² For more information on price wars in the book industry see, K. Clay, R. Krishnan, E. Wolff, D. Fernandes, ‘Retail Strategies on the web: price and non-price competition in the online book industry’ (2002) 3 *Journal of Industrial Economics* 351-392.

²³ M. Fura, ‘Za pół roku Amazon będzie w Polsce. Czy gigant rozjedzie nasz rynek?’ [‘Amazon will be in Poland in a half-year. Will the giant roll over our market?’] *Gazeta Prawna*, 24.10.2011; S. Czubkowska, ‘Amazona jeszcze w Polsce nie ma, ale wojna już trwa’ [‘Amazon’s not in Poland yet, but the war is already started’] available at http://biznes.gazetaprawna.pl/artykuly/595414,amazona_jeszcze_w_polsce_nie_ma_ale_wojna_juz_trwa.html.

²⁴ *Ibid*, a quote by a novelist K. Gessen.

2. Time factor in relation to the market of electronic trade

Control of concentrations between undertakings verifies potential dominance in the future, in contrast to, for example, abuse of a dominant position, which relates to past behaviour. Therefore control of concentrations is inherently forward looking. As a result the variation over time factor may have a substantial impact on the intended concentration, particularly on markets where market conditions are changing swiftly in an unexpected manner.

While the European Commission recognises the so-called ‘time factor’ in merger control, it can be claimed that the Polish competition authority, in its analysis of the competitive assessment of this proposed concentration, did not recognize the time factor at all, or that even if it did, did not adequately take it into consideration.

The reference point for the UOKiK President was the situation in 2009. The research conducted was based mainly on 2009 reports, such as the ‘Report on the telecommunications market in Poland’, ‘Polish e-commerce market,’ and ‘Information society in Poland,’ as well as on the 2010 ‘Report on the telecommunications market in Poland – individual clients.’ Statistical results from 2006-2010 compilations, even if known later, were not taken into account. The 2009 data related to, *inter alia*, the average value of a completed order/internet sales purchase, the share of online sales of books through pick-up points in relation to the total amount of revenue from online sales, the number of pick-up points, the national market for non-specialized retail sale of books²⁵ and CDs²⁶, the percentage of EU citizens purchasing books over the internet, the number of households which have access to broadband internet and its increase in comparison to 2008, the availability of fixed broadband, and internet access via cellular networks and its increase in comparison to 2008.

Moreover, in its questionnaires to third parties, the UOKiK asked for 2009 data related to, for example, their financial results or the position of their suppliers and clients. In addition, the market expansion period of EMPiK on the Polish market was verified for the period between 2006 and 2009.

The time factor appears to be a central aspect in this scenario, especially taking into consideration the nature of the businesses, the fact that Poland is a fast growing post-transition economy, and the rapid and dynamic changes on the e-market. The online market position in Poland cannot be characterized as established and permanent, as the internet remains a very active distribution channel. This statement can be supported by the May 2011 Boston Consulting Group report ‘Polska Internetowa. Jak Internet dokonuje transformacji polskiej gospodarki’ [‘Internet Poland. How the Internet is transforming the Polish economy’] where it was declared that ‘the internet economy has a huge growth potential. In the next five years, it will expand at a rate twice the size of GDP growth (14% per year, nominal GDP growth rate). As a result,

²⁵ Interestingly, the UOKiK noted that since between 2006 and 2009, its value has increased by approximately 130% and it is *very dynamic* (emphasis added), p. 33 of the Decision.

²⁶ Similarly, the UOKiK noted that between 2006 and 2009 the market value increased from PLN 23 million to PLN 51 million.

in 2015 the value of this sector will reach PLN 75 billion, i.e. 4.1% of the Polish GDP. Using optimistic assumptions, an even greater growth of the internet economy can be expected in relation to the GDP, up to 4.9% in 2015²⁷. Moreover, Grzegorz Cimochoowski, the director of the Warsaw Boston Consulting Group bureau, claimed that: 'The Poles are the most active users of the Internet, and we are in the forefront when it comes to searching information on the Internet'²⁸. According to Euromonitor International, Polish e-commerce increased 35% in value in 2010 and 33% in 2011²⁹.

It can be assumed, therefore, that the European Commission would not only review the 2006-2009 period and the current situation of e-commerce, but also the projections regarding the situation in the foreseeable future. It is highly probable that there are a number of factors which should be scrutinized, such as the entrance of new competitors into the market (together with potential barriers to entry), and the market position of both companies taking into account three opposing scenarios, i.e. their possible decreased, increased. or unchanged position on the market.

It can be assumed that in defining the relevant markets in the current case the European Commission would not rely on the above-mentioned reports, because the data that they present is largely irrelevant. Undoubtedly, the Commission would not see how the data concerning the number of people who possess a computer and how they connect to the Internet bears on the number of people who purchase the relevant products online. The appropriate research on which the Commission would rely would rather define the number of people who possess a computer and at the same time use traditional channels, i.e. bookstores, or online sales channels, i.e. websites.

Moreover, even if the UOKiK's assumption that the traditional and the internet channels of distribution should be regarded as separate may still be of some relevance, there is strong evidence that in the foreseeable future these two distribution channels will become mutually substitutable. Research into this issue should have been conducted by the UOKiK, but it was not. It can be stated with confidence that the European Commission would recognise the time factor in its research and take into account future market forecasts.

III. Breaches of procedural rules

Procedural justice can be viewed as one of the most fundamental concepts in EU law. Although it is not directly referred to in the Treaty on the Functioning of the European Union³⁰, the case law of the Court of Justice of the European Union has identified general principles of administrative justice, among which one of the most

²⁷ Boston Consulting Group, 'Polska Internetowa. Jak internet dokonuje transformacji polskiej gospodarki', May 2011, p. 37, available at http://polskainternetowa.pl/pdf/raport_BCG_polska_internetowa.pdf.

²⁸ Grzegorz Cimochoowski, quoted in E. Bendyk, 'Złoto z Internetu' ["Gold from the Internet"] (2011) 20 *Polityka* 2807, p. 35.

²⁹ Quoted in <http://www.internetstandard.pl/news/366877/Czas.na.e.commerce.w.Polsce.html>.

³⁰ OJ [2010] C 83.

important is the right to be heard. These principles are not restricted to civil rights and criminal charges, but also apply to administrative procedures. The concentration notification procedure before the UOKiK is of an administrative nature³¹.

According to Article 96(1) of the Competition Act, in cases of concentration the antimonopoly proceedings should be completed no later than two months from the date of their institution. The proceedings in the within case commenced in July 2010 and the decision was issued in February 2011, therefore the decision was taken after seven months. Article 96(2) states that it is possible for the UOKiK to prolong the final date of termination of proceedings by an additional 14 days provided that the conditions set forth in Article 19 are satisfied, but these conditions were not present in the case in issue. Therefore, the length of the proceedings must be considered as contrary to the applicable law and unjustified. It was also claimed by EMPiK that during the course of proceedings the UOKiK delivered eighteen forms to EMPiK to complete, containing additional questions which were drafted in advance (hence only the date was inserted on a form), which were sent separately and with no relation to the previous ones³². The company is arguing that the aim of such 'procedure' by the competition authority could only be to delay the date of the issuance of the decision³³.

If the European Commission dealt with this case, Phase I proceedings which determine whether the transaction can be qualified as a concentration and has a Community dimension, are dealt with within 25 working days. Phase II of the investigation occurs when there are substantial suspicions of compatibility of a notified concentration with the common market, as in the current scenario. In Phase II proceedings, as a rule there are 90 working days for the Commission to complete its investigation, however this period can be extended to a maximum of 125 working days. Moreover, it needs to be noted that the Merger Regulation and decisions made by the Commission are based on four main principles, one of them being the provision of legal certainty through timely decision-making. EMPiK should have been given a swift reply in order for the company and its shareholders verify their market strategy. It appears, therefore, that the timing of the decision issued was totally unacceptable.

³¹ K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów, Komentarz [The Act on protection of competition and consumer. Commentary]*, LEX, 2008.

³² NFI Group, press release 'Presentation of results for 4Q 2010, Development plans, the appeal by NFI Empik Media & Fashion S.A. of the decision of the President of the Office of Competition and Consumer Protection (UOKiK), 15 February 2011.

³³ *Ibid.* Prof. Skoczny notes that the UOKiK President should be required to notify the parties about the proceedings in such a way that the intentions of the competition authority are known. This would guarantee proper communication between the parties and the UOKiK and would give the UOKiK the possibility to notify the parties about competition concerns as soon as they arise during the proceedings. See T. Skoczny, 'Polskie prawo kontroli koncentracji – ewolucja, model, wybrane problemy' ['Polish law on the control of concentrations – evolution, models, and selected issues'] (2010) 5 *Europejski Przegląd Sądowy* 21. If such an approach was adopted in the current case it is probable that the parties to the concentration would have reached a commitment decision and avoided the prohibition of the concentration.

There are other procedural objections of a substantive nature being argued by EMPiK, such as the breach of the right of EMPiK to actively participate in the proceedings and to be duly informed of the course of the proceedings. In particular, the company claims that:

- 1) the UOKiK did not undertake any dialogue with it concerning any different possible assessments of the market;
- 2) the UOKiK did not provide any information regarding the potential competition concerns which were included in its decision;
- 3) the UOKiK did not provide any information related to the material factual and legal circumstances which could or did influence its determination of the rights and duties of EMPiK, and deprived the company of the opportunity to conduct any discussion with the authority, particularly about a possible conditional decision;
- 4) the UOKiK President was not available for the companies and they were also not able to contact competent representatives and/or employees of the UOKiK, as evidenced by the fact that several weeks were needed in order to designate a date for a meeting regarding the course of the proceedings;
- 5) the UOKiK delivered its decision concerning the incorporation of supplementary materials to the evidentiary proceedings and supplied its answers to a letter submitted by the company during the proceedings a week *after* the issuance of the decision³⁴.

The right to a hearing is one of the most fundamental rights recognised by EU law. In *Air Inter SA v Commission*³⁵ the European Court of Justice stated that the right to be heard should be interpreted sufficiently broadly as to take account all facts, circumstances or documents whereby the administrative act may have an adverse effect (especially economic) on a party to the proceedings³⁶. If the European Commission examined the concentration request, access to files, reports and research would be have been open to EMPiK and Merlin as the parties directly involved³⁷. Furthermore, the Commission would not base its decision on information which EMPiK and Merlin did not have access to, especially considering the potentially detrimental character of such information to the companies.

Moreover, it is argued that there is no provision in the Competition Act that releases the UOKiK President from the duty to summon the parties to familiarise themselves with

³⁴ Ibid.

³⁵ Case T-260/94 *Air Inter SA v Commission*, [1997] ECR II-997.

³⁶ Similarly in *Hoffman-La Roche v Commission*, [1979] ECR 461, at para. 14: '(...) it does not nevertheless allow it to use (...) facts, circumstances or documents which it cannot in its view disclose if such refusal of disclosure adversely affect the undertaking's opportunity to make known effectively its views on the truth or implications of those circumstances, on those documents, or on the conclusions drawn by the Commission from them'.

³⁷ *SA Hercules Chemicals NV v Commission*, ECR [1991] II-171, at para. 54: 'It follows that the Commission has an obligation to make available to the undertakings involved in Article 85(1) proceedings all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved'.

the full body of evidence³⁸. There are no indications in the Decision that the parties were summoned to get acquainted with the entire body of evidence. Deprivation of a party to antimonopoly proceedings of access to the full body of evidence, or not informing a party that certain data is regarded as evidence, is contrary to Articles 9 and 10(1) of the Code of Administrative Procedure³⁹. Furthermore, Article 9 states that the UOKiK is obliged to notify the parties not only with regard to the initiation of antimonopoly proceedings, but also to any objections that the UOKiK might have during the course of the proceedings. EMPiK was not duly informed of the course of the proceedings.

There are other procedural objections claimed by EMPiK which relate to violation of the rules of evidentiary procedure on the basis of the surveys used. EMPiK claims, *inter alia*, that:

- 1) the surveys should not be used as principal evidence, as their representativeness was obscure; the developed methodology was incorrect; and the chosen questions and the data from the surveys was biased;
- 2) the surveys could only be used in examining public opinion, but not in determining the market value or the market shares of particular entities;
- 3) the surveys were not verified on the basis of financial statements, accounting books, or experts' opinions;
- 4) although 1100 surveys were received by the UOKiK, only several dozen were included in the files of the proceedings; and the decision was made based on this small sampling.

If the European Commission examined the concentration, it can be assumed with certainty that the rights of the defence would be fully respected during the proceeding. At every stage the Commission would have given EMPiK and Merlin the opportunity to present their views on the objections against them included in the surveys. Moreover, the Commission would base its decision only on objections to which the parties were given the full opportunity to respond to and submit their observations⁴⁰.

Lastly, the Decision of the UOKiK President indicated the possibility of raising the failing firm defence. Surprisingly, this is not the first time the UOKiK has mentioned such a possibility; rather it seems to have become a standard argumentation, or even assertion, on its part when issuing a negative decision regarding a concentration⁴¹. This appears to be an erroneous application of the defence, especially taking into account that neither Merlin.pl nor EMPiK raised the defence in their application⁴². The legal concept of defence in every legal system is based on the principle that it

³⁸ M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [*Procedural fairness in proceedings before competition authorities*], Warsaw 2011, pp. 105-106.

³⁹ See, judgment of the Supreme Administrative Court of 31.05.2006, II OSK 810/05.

⁴⁰ See Articles 18(1) and 18(3) of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ [2004] L 24/1.

⁴¹ See, e.g. Decision DKK-421-/71/10/MAB *PGE Polska Grupa Energetyczna S.A./Energia S.A.*

⁴² Similarly, none of the parties raised the defence in Decision DKK-421-/71/10/MAB *PGE Polska Grupa Energetyczna S.A./Energia S.A.*

is the defendant, and not his or her adversary, who has the right to raise it⁴³. The reasons why the UOKiK referred to the possibility of raising this defence remain, at best, unanticipated and obscure.

Finally, it should be noted that the above-mentioned procedural objections were published in a press release issued by EMPiK to its shareholders shortly after the UOKiK's decision prohibiting the transaction was announced. Their validity cannot yet be verified. Taking into account the decision prohibiting the transaction and the prompt issuance of a press release, it is possible that such arguments are designed primarily to reassure current and potential shareholders. The press release is not of a legal nature, and only if EMPiK can adequately back up and support its statements by providing satisfactory evidence and documentation during the appeal will the arguments become credible.

V. Conclusions

Based on the above evidence, the hypothesis should be accepted that the European Commission would not have issued a prohibition decision against the concentration between EMPiK and Merlin.pl. Consequently, the appeal filed by EMPiK is not a surprise. In its Decision the UOKiK seems to have made a number of significant errors.

The purchasing process via the traditional distribution channels and via the internet were wrongly treated as non-substitutable channels. The UOKiK did not present a comprehensive market analysis. The research conducted by it in relation to consumers' characteristics was incoherent, chaotic, and confusing from both the legal and logical points of view. Arguments presented with regard to the competitive assessment of the concentration were incorrect and their overall nature did not point towards prohibition. The UOKiK wrongly determined the market shares of the parties to the concentration. It also completely ignored the time factor in relation to the rapidly expanding market of online trade.

Furthermore, a number of substantive procedural rules appear to have been breached, and the fundamental right of defence was ignored in such a prejudicial manner that the Court of Competition and Consumer Protection should annul the entire concentration proceeding.

Mateusz Radomyski

LLB (Law), LL.M (International Business Law)

⁴³ In competition law proceedings before the Commission, the right of defence can be found in Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, which replaced Council Regulation (EEC) No 17 of 6 February 1962, as well as in unwritten rules that the Commission needs to respect, see R. H. Lauwaars, 'Rights of Defence in Competition Cases', [in:] D. Curtin et al. (eds.), *Institutional Dynamics of European Integration*, Leiden 1994, p. 497.

B O O K R E V I E W

Maciej Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [*Procedural fairness in the proceedings before the competition authority*], Wydawnictwo Naukowe Wydziału Zarządzania, Warszawa 2011, 373 p.

Dr. Maciej Bernatt's book – *Procedural fairness in the proceedings before the competition authority* was published in 2011 by the Scientific Publishing Office of the Faculty of Management of the University of Warsaw, being a part of the highly-assessed series 'Textbooks and Monographs' Bernatt's book consists of 373 pages, divided into seven chapters, and includes a summary, an abstract in English, a list of court decisions and opinions as well as relevant legal acts, and a bibliography.

Fragments of positive reviews adorn the cover of the book to encourage and inform potential readers. In these fragments, we discover that Professor dr. hab. Janusz Borkowski is of the opinion that the author's book is a 'thorough and wide-ranging analysis, sometimes quite detailed, of the legal bases and elements underlying the procedures of national competition agencies, taking into particular account those particular elements which are recognized as guarantees of the important values of procedural justice (. . .) The author demonstrates his high degree of professional competence in presenting, in a well-formulated and balanced fashion, assessments of the legal status and practical application of these procedural guarantees'. Professor Małgorzata Król-Bogomilska of the University of Warsaw, Polish Academy of Sciences, and Institute of Legal Science asserts that 'this work contains clearly-formulated aims and research issues, focused on extremely well-selected questions and problems, which allow the author to concentrate on those scholarly issues which are of particular importance in practical application'. Any reader who undertakes a thorough reading of Dr. Bernatt's work will undoubtedly agree with the above scholarly assessments.

The author is a Doctor of Legal Science and an adjunct at the Department of European Economic Law of the Faculty of Management of the University of Warsaw, as well as an active member of the University's Centre for Anti-monopoly and Regulatory Studies. His areas of special interest and expertise include Competition and Consumer Protection Law, administrative procedural law, and human rights' law. Dr. Bernatt's professional engagement beyond academia is strongly reflected in his book. He has worked for the Helsinki Human Rights Foundation and is presently Assistant President of the Polish Constitutional Court.

Chapter I is of an introductory nature. The author presents the axiology of competition protection and defines the scope and subject of his research. His

preliminary remarks concerning the system of values underlying anti-monopoly doctrine set the tone for his explication of the corollaries which flow from his analysis. He conducts an invaluable examination, rarely undertaken in anti-monopoly scholarship, into the connection between the values underlying anti-monopoly doctrine and basic human rights. Making reference to the jurisprudence of the Polish Constitutional Court, he stresses the freedom to conduct economic activities and points out that the ‘interpretation of the law *in dubio pro libertate* means that, in doubtful situations, the law should be interpreted in the fashion most advantageous for entrepreneurs, favoring the freedom to conduct economic activities, and not its restriction’. (p. 23). He also points out that ‘the need to respect the legal rights of entrepreneurs, in the case of administrative proceedings conducted by competition enforcement agencies, is also based on and found in the jurisprudence of the European Court of Human Rights relating to the rights of entrepreneurs to due process under Article 6 of the European Convention of Human Rights (hereafter, ECHR) and the right to privacy contained in Article 8 ECHR’ (p. 23).

Dr. Bernatt’s omission of a thorough economic analysis may be viewed as a certain gap in his axiological reflections. It seems an oversimplification for him to assert that ‘the direct aim of competition law is (. . .) is the protection of competition (and competition mechanisms) on the market – and its overriding aim is the prosperity (economic interests) of consumers’ (p. 22). In certain instances there is tension, even conflict, between the aim to assure the competitive structure of the market and the optimalization of efficiency. Not in every case does the sharpening of competition serve the best interests of consumers¹. Having mentioned this point, it should also be pointed out that the absence of an economic analysis in the discussed axiology underlying anti-monopoly law does not detract from the further reflections contained in the work.

In defining the scope of his research, Dr. Bernatt focuses in the first instance on the proceedings in front of the Polish national competition agency (the President of the Office of Competition and Consumer Protection – hereafter the UOKiK President), adding that his research also encompasses ‘an analysis of the procedural rules applied before the European Union Competition Protection Agency, i.e. the European Commission’ (p. 25). The author also states that his book examines whether the evidentiary, remedial, and execution measures used in competition enforcement proceedings are applied in a manner which ‘does not violate the values inherent in procedural justice’ (p. 27).

Chapter II is entitled ‘The Principles of Procedural Justice’. In this chapter the author examines the next issue: the legal-theoretical sources of procedural justice, including the supra-legislative roots of procedural justice and procedural justice in administrative proceedings in Poland. He also presents his own views on the concept of procedural justice. Noteworthy is his assertion that, to a certain extent ‘it is completely

¹ See R. Van den Bergh, ‘The difficult reception of economic analysis in European competition law’, [in:] A. Cucinotta, R. Pardolesi, R. Van den Bergh, *Post-Chicago Developments in Antitrust Law*, Cheltenham, Northampton 2002, p. 44.

justifiable to apply the legal right to access to a court to proceedings in front of the UOKiK President' (p. 63). This view is supported by his analysis of the jurisprudence of the Polish Constitutional Court. In Chapter II Dr. Bernatt identifies five specific 'values inherent in procedural justice which should be guaranteed in proceedings in front of the UOKiK President: right to a hearing; equality of the parties; opportunity to present a defense; confidentiality; and appealability' (p. 94). These five identified values determine the further structure of the book, with each chapter devoted to a separate analysis of each value in terms of its application to proceedings in front of competition protection agencies in general and the Polish national competition agency in particular.

Thus Chapter III examines the right to a hearing in proceedings in front of the competition protection agency. In particular the author examines the right of access to information and the documents contained in the case file, issues connecting with evidentiary proceedings, and the scope of hearings in specific administrative phases of a case. Dr. Bernatt quite successfully presents a synthesis of the complicated issue of cooperation and transfer of information between various national competition agencies, particularly focusing on cooperation within the European Competition Network.

Chapter IV examines the critically important issue – both in terms of the application of competition law and the formulation of legislation with regard thereto – of the right to equal participation in proceedings in front of competition enforcement agencies. Dr. Bernatt's research concerning this issue and Poland's practical application of the theoretical constructs leads him to criticize the existing Polish norms. He notes disapprovingly the fact that entrepreneurs who file petitions and request the institution of proceedings have a very limited right to active participation therein, consisting mainly of the possibility to present required information concerning the violation of competition law (p. 157). He also calls attention to the fact that Polish legal solutions are at variance '*in minus* – from the solutions applied in the European Commission's competition enforcement proceedings, resulting in (...) significant substantive restrictions on the right to a court trial, such as in the provisions providing for a right of appeal from the decisions of the UOKiK President to the specially-established Court of Competition and Consumer Protection' (p. 158).

At this point it should be noted that one of the most significant changes in Polish competition law brought about by the 2007 Act on Protection of Competition and Consumers²

Was that it deprived interested parties of the right to file legally operative petitions on the commencement of anti-monopoly proceedings before the UOKiK President. The only path open to parties interested in the commencement of litigation was to inform the President of the UOKiK in writing of their concerns over the competition-restrictive effects of a particular practice [Article 86(1) of the Act]. It is agreed in the legal doctrine that since the date the 2007 Act went into effect, 'petitioners no

² Act of 16 February 2007 on the Protection of Competition and Consumers (Journal of Law No. 50, item 331, as amended).

longer possess the status of ‘parties’ to proceedings instigated on the basis of their petitions, since the Act provides that only undertakings against which anti-monopoly proceedings alleging competition-restrictive practices are commenced will be granted the status of parties³. The justification given for this procedural change was that ‘in the public law tribunal (proceedings in front of the UOKiK President) only the most serious cases of competition-restrictive practices, those which have a significant negative influence on competition on the market, should be reviewed. Individual complaints by entrepreneurs and/or consumers who claim to have been damaged in connection with a particular anti-competitive practice should press their claim for a remedy (voidance of a contract, a cease and desist order, or money damages) in the civil courts’⁴.

Dr. Bernatt considers that the scope of the change introduced is too far-reaching. He states that ‘it would have been sufficient (...) to restrict the legally operative character of a petition lodged to those complaints acted upon by the UOKiK President. But depriving the party alleging to have been damaged by the practice involved from the right to equally participate in the proceedings must be critically assessed’ (p. 159).

Dr. Bernatt goes on to quite competently compare Polish legal solutions with EU standards. He states that ‘unlike Polish regulatory solutions, EU law envisions the possibility that a Commission decision refusing to institute an action may be appealed to the EU courts by the initiating party’ (p. 162). He goes on to note that ‘EU law also provides that a third party may appeal the final decision of the Commission to the EU courts and demand its annulment’ (p. 163). Dr. Bernatt concludes that ‘*de lege ferenda* it is necessary to widen the scope of entities entitled to file an appeal from a decision of the UOKiK President and to participate in such an appeal as parties to the proceedings’ (p. 163).

Dr. Bernatt also engages in a critical analysis of the issues surrounding the protection and/or distribution of information submitted in support of leniency claims. He notes that ‘the institutions and mechanisms aimed at protecting the confidentiality of information provided by parties to the proceedings are justified by legislators on the grounds that the protection of confidentiality will encourage undertakings to participate in such proceedings’ but he points out that the application of the solutions adopted by the Polish legislators ‘may lead to an unjustifiable discrimination in the procedural rights of parties to a proceeding in front of the UOKiK President, particularly with regard to the right to be heard’ (p. 170).

³ A. Jurkowska, D. Miąsik, T. Skoczny, M. Szydło, ‘Nowa uokik z 2007 r. – kolejny krok w kierunku doskonalenia podstaw publicznoprawnej ochrony konkurencji w Polsce’ [‘A new UOKiK in 2007 – another step toward improving the public law protections of competition in Poland’] (2007) 4 *Przegląd Ustawodawstwa Gospodarczego* 5. Art. 88(1) establishes that the parties to a proceeding are those undertakings against which allegations of anti-competitive practices are commenced..

⁴ Justification for the government project on the law on the Protection of Competition and Consumers, Sejm publication nr 1110 of 26 October 2006, available at [http://orka.sejm.gov.pl/Druki5ka.nsf/0/06AED0325C1F3B3FC125722600445A4A/\\$file/1110.pdf](http://orka.sejm.gov.pl/Druki5ka.nsf/0/06AED0325C1F3B3FC125722600445A4A/$file/1110.pdf), pp. 18, 19.

The author also points out that grants of confidentiality to information submitted in leniency proceedings raises issues in later private civil suits brought by parties aggrieved by the practices at the core of the leniency proceedings. This part of the author's work would have been enriched had he engaged in a comparative analysis, in particular taking into account the antitrust law of the United States, in which the position of the 'repentant' undertaking is better in subsequent civil proceedings for damages than the position of the other members of the cartel. However, in the American system this effect was able to be obtained without infringing upon the rights of third parties damaged by an undertaking's actions to obtain compensation. The legal solution applied in the US is to limit the liability of the 'repentant' party for its actions only to those situations whereby the party damaged by an antitrust infringement would be otherwise entitled to treble damages⁵.

In Chapter V Dr. Bernatt criticizes 'the lack of clear legal regulations guaranteeing to undertakings the right against self-incrimination in proceedings before the UOKiK President' (p. 327), and also expresses doubts concerning 'scope of the privilege guaranteeing the confidentiality of legal advice' (p. 327). He also cites with disapproval the assumption contained in the jurisprudence of the Polish Supreme Court that 'the Court of Protection of Competition and Consumers need not respond in detail to each and every complaint concerning procedural issues raised on appeal from a decision of the UOKiK President' (p. 329, Chapter VII). On the other hand, the author is of the opinion that an undertaking's trade secrets and/or confidential business information is protected to a satisfactory degree in proceedings before both the UOKiK President as well as the Court of Protection of Competition and Consumers (Chapter VI).

One excellent feature of the book under review is the way it summarizes the author's conclusions. Each chapter concludes with a sub-chapter entitled 'Conclusions'. It should also be pointed out that the author formulates his conclusions in a bold yet at the same time responsible manner. Even if the reader does not agree with all of them, they undoubtedly contribute to sharpening and enhancing the discussion concerning proceedings before competition enforcement agencies. Much use may be had in particular of the author's criticisms of solutions adopted into the Polish law concerning the access, or rather lack thereof, to proceedings in front of the UOKiK President by all parties affected by a particular practice under review.

In summary, it may be said that this excellent work by Dr. Bernatt should be found in the library of every Polish lawyer interested in or engaged in competition law.

Dr. hab. Marek Krzysztof Kolasiński

Chair of European Law, Faculty of Law and Administration, Mikołaj Kopernik University, Toruń.

⁵ Por. J. Pheasant, 'Damages Actions for Breach of the EC Antitrust Rules: The European Commission's Green Paper' (2006) 27(7) *European Competition Law Review* 368.

B I B L I O G R A P H Y*

- Banasiński C., Piontek E. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [Act on competition and consumer protection. Commentary], LexisNexis, Warszawa 2009.
- Banasiński C., Bychowska M., 'Kontrola przedsiębiorcy w świetle ustawy o swobodzie działalności gospodarczej' ['Controlling entrepreneurs in the light of the act on economic activity'] (2010) 1 *Przegląd Prawa Handlowego*.
- Bernatt M., Jurkowska A., Skoczny T., *Ochrona konkurencji i konsumentów* [Competition and consumer protection], Wydawnictwo Naukowe Wydziału Zarządzania UW, Warszawa 2007.
- Bernatt M., 'Prywatny model ochrony konkurencji oraz jego realizacja w postępowaniu przed sądem krajowym' ['Private model of competition protection and its implementation in a proceeding before a national court'] [in:] Piontek E. (ed.), *Nowe tendencje w prawie konkurencji UE* [New tendencies in EU competition law], Wolters Kluwer, Warszawa 2008.
- Bernatt M., 'Ochrona tajemnicy przedsiębiorstwa' ['Protection of entrepreneur's secrets'] [in:] Brodecki Z. (ed.), *Europa Urzędników* [Europe of Officials], Warszawa 2009.
- Bernatt M., 'Right to be heard or protection of confidential information? Competing guarantees of procedural fairness in proceedings before the Polish competition authority' (2010) 3(3) *Yearbook of Antitrust and Regulatory Studies*.
- Bernatt M., 'The control of Polish courts over the infringements of procedural rules by the national competition authority. Case comment to the judgement of the Supreme Court of 19 August 2009 – Marquard Media Polska (No. III SK 5/09)' (2010) 3(3) *Yearbook of Antitrust and Regulatory Studies*.
- Bernatt M., 'Glosa do wyroku SN z dnia 14 kwietnia 2010 r., III SK 1/10. Gwarancje proceduralne w sprawach z zakresu ochrony konkurencji i regulacji, mających charakter karny w świetle EKPCz' ['Commentary to the Supreme Court Judgment of 14 April 2010, III SK 1/10. Procedural guarantees in matters of antitrust and regulation that are of „criminal character” according to ECHR'] (2011) 6 *Europejski Przegląd Sądowy*.
- Bernatt M., 'Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku (na tle art. 6 EKPC)' ['Right to a fair hearing in competition and market regulation proceedings (in the context of Article 6 of the ECHR)'] (2012) 1 *Państwo i Prawo*.
- Bernatt M., *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [Procedural fairness in the proceedings before the competition authority], Wydawnictwo Naukowe Wydziału Zarządzania UW, Warszawa 2011.
- Bernatt M., 'The powers of inspection of Polish competition authority. The question of proportionality' (2011) 4(5) *Yearbook of Antitrust and Regulatory Studies*.
- Bernatt M., Skoczny T., 'Publicznoprawne wdrażanie reguł konkurencji w Polsce. Czas na zmiany?' ['Public enforcement of competition law in Poland. Time for changes?']

* Bibliography covers Polish literature (by Polish authors) related to entrepreneurs' rights in antitrust proceedings.

- [in:] Gronkiewicz-Waltz H., Jaroszyński K. (eds.), *Europeizacja publicznego prawa gospodarczego [Europeanization of public economic law]*, C.H. Beck, Warszawa 2011.
- Błachucki M., 'Postępowanie antymonopolowe w sprawach koncentracji w świetle aktów prawa wtórnego Rady Europy' ['Antitrust proceeding in merger cases in the light of secondary law of the Council of Europe'], [in:] R. Stankiewicz (ed.), *Kierunki rozwoju prawa administracyjnego [Directions of development of administrative law]*, Warszawa 2011.
- Błachucki M., 'Właściwość sądów administracyjnych i sądów powszechnych w sprawach antymonopolowych' ['Jurisdiction of administrative courts and common courts in antitrust cases'] [in:] Błachucki M., Górczyńska T. (eds.) *Aktualne problemy rozgraniczenia właściwości sądów administracyjnych i powszechnych [Current problems of delimitating jurisdiction of administrative and common courts]*, Naczelny Sąd Administracyjny, Warszawa 2011.
- Erciński T., 'Postępowanie w sprawach przeciwdziałania praktykom monopolistycznym' ['Proceeding in antitrust cases'] (1991) 1 *Państwo i Prawo*.
- Gronowski S., 'Sądownictwo z zakresu ochrony konkurencji w Polsce (wybrane problemy)' ['Judicial system in competition cases in Poland (selected problems)'] [in:] Banasiński C. (ed.), *Prawo konkurencji – stan obecny oraz przewidywane kierunki zmian, [Competition law – current state and prospected directions of changes]*, Urząd Ochrony Konkurencji i Konsumentów, Warszawa 2006.
- Gronowski S., 'Sądownictwo antymonopolowe w Polsce' ['Judicial system for antitrust cases in Poland'] [in:] Krasnodębska-Tomkiel M. (ed.), *Zmiany w polityce konkurencji na przestrzeni ostatnich dwóch dekad [Changes in competition policy in last two decades]*, Urząd Ochrony Konkurencji i Konsumentów, Warszawa 2010.
- Harla A.G., 'Postępowanie sądowe w sprawach antymonopolowych' ['Court proceeding in antitrust cases'] (1991) 5–7 *Palestra*.
- Janusz R., 'Dostosowywanie prawa polskiego do prawa wspólnotowego w zakresie instytucji, procedur i sankcji antymonopolowych' ['Harmonization of Polish and EC law for antitrust institutions, procedures and sanctions'] [in:] Saganek P., Skoczny T., *Wybrane problemy i obszary dostosowania prawa polskiego do prawa Unii Europejskiej [Selected problems and areas of harmonization of Polish and EU law]*, Centrum Europejskie Uniwersytetu Warszawskiego, Warszawa 1999.
- Janusz R., Sachajko R., Skoczny T., 'Nowa ustawa o ochronie konkurencji i konsumentów' ['New act on competition and consumer protection'] (2001) 3 *Kwartalnik Prawa Publicznego*.
- Janusz R., Skoczny T., 'Postępowanie antymonopolowe jako szczególne postępowanie administracyjne' ['Antitrust proceeding as a special administrative proceeding'] [in:] *Instytucje współczesnego prawa administracyjnego, Księga Jubileuszowa Profesora zw. dra. Józefa Filipka [Institutions of modern administrative law. Commemorating book for Prof. Józef Filippek]*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2001.
- Jelenkowska-Luca E., 'Komisja na tropie. Inspekcje w postępowaniach kartelowych' ['Commission on a way. Inspections in cartel proceedings'] [in:] Kurcz B. (ed.), *Prawo i ekonomia konkurencji [Law and economics of competition]*, Wolters Kluwer Polska – LEX, Warszawa 2010.
- Jurkowska A., Miąsik D., Skoczny T., Szydło M., 'Nowa uokik z 2007 r. – kolejny krok w kierunku doskonalenia podstaw publicznoprawnej ochrony konkurencji w Polsce' ['New Competition and Consumer Protection Act of 2007 – a further step towards improving

- grounds for public competition protection in Poland'] (2007) 4 *Przegląd Ustawodawstwa Gospodarczego*.
- Kańska K., *Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights* 2004 (10) *European Law Journal*.
- Kmieciak Z., 'Postępowanie w sprawach ochrony konkurencji a koncepcja procedury hybrydowej' ['Competition enforcement proceedings and the concept of hybrid procedure'] (2002) 4 *Państwo i Prawo*.
- Kmieciak Z., 'Koncepcja zintegrowanego systemu odwoławczego w sprawach administracyjnych' ['Concept of integrated appeal system in administrative cases'] (2010) 1 *Państwo i Prawo*.
- Kmieciak Z., *Odwołania w postępowaniu administracyjnym [Appeals in administrative proceeding]* Wolters Kluwer Polska, Warszawa 2011
- Kohutek K., *Komentarz do rozporządzenia Rady (WE) nr 1/2003 z dnia 16 grudnia 2002 r. w sprawie wprowadzenia w życie reguł konkurencji ustanowionych w art. 81 i 82 Traktatu (Dz.U.U.E.L.03.1.1)* [Commentary to Council Regulation 1/2003 of 16 December 2002 on the application of Art. 81 and 82 of the Treaty], LEX/el. 2006.
- Kohutek K., Sieradzka M., *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on competition and consumer protection. Commentary]*, Warszawa 2008.
- Kolasiński M., 'Influence of the General Principles of Community Law on Polish Antitrust Procedure' (2010) 3(3) *Yearbook of Antitrust and Regulatory Studies*.
- Koncewicz T.T., 'Gwarancje rzetelnego postępowania' ['Guarantees of due process'] [in:] Brodecki Z. (ed.), *Europa sędziów [Europe of Judges]*, Lexis Nexis, Warszawa 2007.
- Koncewicz T.T., *Poszukując modelu sprawiedliwości proceduralnej w prawie wspólnotowym. Mit czy rzeczywistość? [Searching for a model of procedural justice in Community law. Myth or reality?]* Natolin Working Papers, z. 30, Centrum Europejskie Natolin, Warszawa 2009, available at http://www.natolin.edu.pl/pdf/zeszyty/Natolin_Zeszyty_30.pdf
- Koncewicz T.T., 'Prawo do bycia wysłuchanym' ['Right to be heard'] [in:] Brodecki Z. (ed.), *Europa Urzędników [Europe of Officials]*, Warszawa 2009.
- Koncewicz T.T., *Aksjologia unijnego kodeksu proceduralnego [Axiology of EU procedural code]*, C.H. Beck, Warszawa 2010.
- Kowalik-Bañczyk K., *The issues of the protection of fundamental rights in EU competition proceedings*, Centrum Europejskie Natolin, Warszawa 2010, available at http://www.natolin.edu.pl/pdf/zeszyty/Natolin_Zeszyty_39.pdf.
- Krasnodębska-Tomkiel M., 'Perspektywy polityki konkurencji w Polsce w 20. rocznicę powstania UOKiK' ['Perspectives of competition policy in Poland in the 20th anniversary of the Office for Competition and Consumer Protection'] [in:] Krasnodębska-Tomkiel M. (ed.), *Zmiany w polityce konkurencji na przestrzeni ostatnich dwóch dekad [Changes in competition policy in last two decades]*, Urząd Ochrony Konkurencji i Konsumentów, Warszawa 2010.
- Król-Bogomińska M., 'Zasady procedury cywilnej w postępowaniu przed Urzędem Antymonopolowym (cz. I)' ['Principles of civil procedure in a proceeding before Antimonopoly Office'] (1995) 8 *Glosa*.
- Król-Bogomińska M., [*Penalty payments in antimonopoly law*], KiK Konieczny i Kruszewski, Warszawa 2001.
- Król-Bogomińska M., 'Kierunki najnowszych zmian polskiego prawa antymonopolowego' ['The directions of the newest changes in the Polish antimonopoly law'] (2009) 6 *Europejski Przegląd Sądowy*.

- Materna G., 'Ograniczenie prawa wglądu do materiału dowodowego w postępowaniu przed Prezesem UOKiK' ['The limitation of evidence access in the proceedings before the President of the UOKiK'] (2008) 4 *Przegląd Prawa Handlowego*.
- Modzelewska-Wąchal E., *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [Act on competition and consumer protection. Commentary], Twigger, Warszawa 2002.
- Niziołek M., Famirska S., 'Procedura hybrydowa w sprawach ochrony konkurencji a ostateczność i wykonalność decyzji Prezesa UOKiK' ['Hybrid procedure in competition cases and final character and implementation of the UOKiK President'] (2008) 4 *Przegląd Prawa Handlowego*.
- Pęczalska B., *Ochrona konkurencji* [Competition protection], C.H. Beck, Warszawa 2007.
- Przybylska M., 'Zasada dwuinstancyjności w postępowaniu przed organami administracji regulacyjnej' ['Rule of two instances in proceeding before regulatory administration bodies'] (2008) 1 *Przegląd Prawa Publicznego*.
- Póltorak N., *Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych* [Protection of rights resulting from EU law in national proceedings], Wolters Kluwer Polska, Warszawa 2010.
- Różewicz-Ładoń K., *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję* [Proceedings before the President of the Office of Competition and Consumers Protection in respect with the practices restricting competition], Wolters Kluwer Polska, Warszawa 2011.
- Rumak E., Sitarek P., 'Polish Leniency Programme and its Intersection with Private Enforcement of Competition Law' (2009) 2(2) *Yearbook of Antitrust and Regulatory Studies*.
- Scheuring K., *Ochrona praw jednostki w postępowaniu przed sądami wspólnotowymi* [Protection of individual's rights in proceedings before Community courts], Wolters Kluwer Polska, Warszawa 2007.
- Skoczny T., 'Polish Competition Law in the 1990s – on the Way to Higher Effectiveness and Deeper Conformity with EC Competition Rules' [w:] 'Spontaneous Order, Organization and the Law. Roads to a European Civil Society' (2001) (2:3–2:4) *European Business Organization Law Review*.
- Skoczny T., Jurkowska A., Miąsik D. (eds.), *Ustawa o ochronie konkurencji i konsumentów, Komentarz* [Act on Competition and Consumers Protection. Commentary], Warszawa 2009.
- Skoczny T., 'Polskie prawo kontroli koncentracji – ewolucja, model, wybrane problemy' ['Polish law of merger control – evolution, model, selected problems'] (2010) 5 *Europejski Przegląd Sądowy*.
- Skoczny T., 'Modele instytucjonalne ochrony konkurencji na świecie – wnioski dla Polski' ['Institutional models of competition protection in the world – conclusions for Poland'] (2011) 2 *Ruch Prawniczy, Ekonomiczny i Socjologiczny*.
- Stankiewicz R., 'Likwidacja procedur hybrydowych – krok w dobrym kierunku czy szkodliwy dogmatyzm?' ['Eliminating hybrid procedures – a step in a right direction or dangerous dogmatism'] [w:] *Aktualne problemy rozgraniczenia właściwości sądów administracyjnych i powszechnych*, Błachucki M., Górzyńska T. (eds.) *Aktualne problemy rozgraniczenia właściwości sądów administracyjnych i powszechnych* [Current problems of delimitating jurisdiction of administrative and common courts], Naczelny Sąd Administracyjny, Warszawa 2011.

- Stawicki A., Stawicki E. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [Act on competition and consumer protection. Commentary], Warszawa 2011.
- Steinborn S., 'Zasada ne bis in idem' ['Ne bis in idem rule'] [in:] Brodecki Z. (ed.), *Europa sędziów* [Europe of Judges], Lexis Nexis, Warszawa 2007.
- Suwaj P.J., *Gwarancje bezstronności organów administracji publicznej w postępowaniu administracyjnym* [Guarantees of independence of public administration bodies in administrative proceeding], Kolonia Limited 2004, Wrocław 2004.
- Turliński A., 'Miejsce Sądu Ochrony Konkurencji i Konsumentów w systemie organów ochrony prawnej' ['Place of the Court of Competition and Consumer Protection in a system of legal protection'] [in:] Banasiński C. (ed.), *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej (studium prawnno-ekonomiczne)* [Competition and consumer protection in Poland and the European Union (legal and economic studies)], Urząd Ochrony Konkurencji i Konsumentów, Warszawa 2005.
- Turno B., 'Zagadnienie tajemnicy adwokackiej na gruncie prawa konkurencji' ['Issue of professional legal privilege in competition law'] [in:] Banasiński C., Kepiński M., Popowska B. (eds.), *Aktualne problemy polskiego i europejskiego prawa ochrony konkurencji* [Current problems of Polish and European competition law], UOKiK, Warszawa 2006.
- Turno B., 'Termin na wniesienie odwołania od decyzji Prezesa UOKiK' ['Time for appealing against a decision of the UOKiK President'] (2008) 6 *Przegląd Prawa Handlowego*.
- Turno B., 'Ciąg dalszy sporu o zakres zasady legal professional privilege – glosa do wyroku SPI z 17.09.2007 w połączonych sprawach: T-125/03 i T-253/03 Akzo Nobel Chemicals Ltd i Akros Chemicals Ltd przeciwko Komisji WE' ['Continuation of discussion on a scope of legal professional privilege – a comment to a CFI case of 17.09.2007 in joined cases T-125/03 i T-253/03 Akzo Nobel Chemicals Ltd i Akros Chemicals Ltd v Commission'] (2008) 6 *Europejski Przegląd Sądowy*.
- Turno B., 'Prawo odmowy przekazania informacji służącej wykryciu naruszenia reguł konkurencji w orzecznictwie Europejskiego Trybunału Sprawiedliwości' ['Right to refuse a transfer of information in order to find an infringement of competition rules in the caselaw of ECJ'] (2009) 3(LXXI) *Ruch Prawniczy, Ekonomiczny i Socjologiczny*.
- Wróbel A., 'Regulacyjna kara pieniężna – sankcja karna czy administracyjna?' ['Regulatory fine – a criminal or administrative sanction?'] (2010) 5 *Europejski Przegląd Sądowy*.

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES

VOL. 2011, 4(5)

ARTICLES

ANNA FORNALCZYK, Competition Protection and Philip Kotler's Strategic Recommendations

ANTONI BOLECKI, Polish Antitrust Experience with Hub-and-Spoke Conspiracies

MACIEJ BERNATT, The Powers of Inspection of Polish Competition Authority. The Question of Proportionality

KONRAD STOLARSKI, Fines for Failure to Cooperate within Antitrust Proceedings – the Ultimate Weapon for Antitrust Authorities?67

ŁUKASZ GRZEJZDZIAK, Mr Hoefner, Mr Elser, Please Welcome to Poland. Some Comments on the Polish Healthcare System Reform from the Perspective of State Aid Law

MARLENA WACH, Polish Telecom Regulator's Decisions Regarding Mobile Termination Rates and the Standpoint of the European Commission

MICHAŁ WOLAŃSKI, Estimation of Losses Due to the Existence of Monopolies in Urban Bus Transport in Poland

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES

VOL. 2011, 4(4)

ARTICLES

BARTŁOMIEJ NOWAK, PAWEŁ GRZEJSZCZAK, Poland's Energy Security in the Context of the EU's Common Energy Policy. The Case of the Gas Sector

ALEKSANDER STAWICKI, The Autonomy of Sector-Specific Regulation – Is It Still Worth Protecting? Further Thoughts on the Parallel Application of Competition Law and Regulatory Instruments

FILIP M. ELŻANOWSKI, The Duties of the President of the Polish Energy Regulatory Office in the Context of the Implementing the Third Energy Package

MARZENA CZARNECKA, TOMASZ OGLÓDEK, The Energy Tariff System and Development of Competition in the Scope of Polish Energy Law

MARIA MORDWA, The Obligation of Strategic Gas Storage Introduced in Poland as an Example of a Public Service Obligation Relating to Supply Security: A Question of Compliance with European Law

MARCIN STOCZKIEWICZ, The Emission Trading Scheme in Polish law. Selected Problems Related to the Scope of Derogation from the Auctioning General Rule in Poland

JANUSZ LEWANDOWSKI, Cutting Emissions in the Energy Sector: a Technological and Regulatory Perspective

ANDRZEJ T. SZABLEWSKI, The Need for Revaluation of the Model Structure for Electricity Liberalization

TADEUSZ SKOCZNY, Consolidation of the Polish Electricity Sector. Perspective of Preventive Control of Concentrations

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES

VOL. 2010, 3(3)

ARTICLES

DAWID MIĄSIK, *Solvents to the Rescue – a Historical Outline of the Impact of EU Law on the Application of Polish Competition Law by Polish Courts*

MARCIN KOLASIŃSKI, *Influence of General Principles of Community Law on the Polish Antitrust Procedure*

MACIEJ BERNATT, *Right to Be Heard or Protection of Confidential Information? Competing Guarantees of Procedural Fairness in Proceedings Before the Polish Competition Authority*

TOMASZ KOZIEŁ, *Commitments decisions under the Polish Competition Act – Enforcement Practice and Future Perspectives*

KONRAD KOHUTEK, *Impact of the New Approach to Article 102 TFEU on the Enforcement of the Polish Prohibition of Dominant Position Abuse*

JAROSŁAW SROCYŃSKI, *Permissibility of Exclusive Transactions: Few Remarks in the Context of Media Rights Exploitation*

EWELINA D. SAGE, *Who Controls Polish Transmission Masts? At the Intersection of Antitrust and Regulation*

MARCIN KRÓL, *Liberalization without a Regulator. The Rail Freight Transport Market in Poland in the Years 1996–2009*

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES

VOL. 2009, 2(2)

ARTICLES

OLES ANDRIYCHUK, *Does Competition Matter? An Attempt of Analytical ‘Unbundling’ of Competition from Consumer Welfare*

ANNA FORNALCZYK, *Economic Approach to Counteracting Cartels*

RAJMUND MOLSKI, *Polish Antitrust Law in its Fight Against Cartels – Awaiting a Breakthrough*

PAWEŁ PODRECKI, *Civil Law Actions in the Context of Competition Restricting Practices under Polish Law*

EWELINA RUMAK, PIOTR SITAREK, *Polish Leniency Programme and its Intersection with Private Enforcement of Competition Law*

KATARZYNA TOSZA, *Payment Card Systems as an Example of Two-sided Markets – a Challenge for Antitrust Authorities*

BARTŁOMIEJ NOWAK, *Challenges of Liberalisation. The Case of Polish Electricity and Gas Sectors*

MARCIN KRÓL, *Benefits and Costs of Vertical Separation in Network Industries. The Case of Railway Transport in the European Environment*

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
VOL. 2008, 1(1)

ARTICLES

IAN S. FORRESTER, QC, ANTHONY DAWES, **Parallel Trade in prescription medicines in the European Union: The age of reasons?**

DAWID MIĄSIK, **US protects competition, EU competitors. What or who we protect? A study of the goals of Polish antitrust law**

AGATA JURKOWSKA, **Antitrust Private Enforcement – case Poland**

TOMASZ JURCZYK, **The EC competition law in the light of the European Convention on Human Rights**

SŁAWOMIR DUDZIK, **Enforceability of regulatory decisions and protection of rights of telecommunications undertakings**

STANISŁAW PIĄTEK, **Investment and regulation in telecommunications**

KRYSTYNA BOBIŃSKA, **The defense of monopoly as a determinant of the process of transformation of state owned infrastructure sectors in Poland**

ADRIANNA ZABŁOCKA, **Antitrust and copyright collectives – an economic analysis**

**UNIVERSITY OF WARSAW
FACULTY OF MANAGEMENT PRESS**



University of Warsaw, Faculty of Management Press was established in 2003 following the idea of the Faculty's present Dean, Professor Alojzy Z. Nowak. Since its creation, the economist, sociologist and journalist Jerzy Jagodziński has been its Editor-in-Chief.

The publishing house primarily aims to ensure proper use of the many strengths of the Faculty of Management, in particular, its teaching staff which includes as many as 35 Professors and higher-degree Doctors many of whom are internationally respected scholars with considerable academic records. At the same time, the Faculty has many foreign students originating from: the United Kingdom, Austria, France, Finland, Russia, Belarus, USA, Canada, India, Iran, Saudi Arabia, Nigeria, Georgia, Azerbaijan, Armenia, Taiwan and China. The number of students applying for the International Business Program has been increasing over recent years. This fact alone makes the market for foreign language publications grow with each year, even within the Faculty itself.

The Faculty of Management Press is encouraged therefore, quite understandably, to primarily publish books written by members of the Faculty's academic staff including: monographs, textbooks, periodicals and working papers. It is worth noting in particular the quarterly entitled "Problemy Zarządzania" ("Problems of Management") which has been published since 2003 and which enjoys a high status among academic periodicals.

The number of publications in foreign languages (mainly in English) has also been constantly growing. We would like to recommend to the Readers of the YARS some of the most recent releases in English of the Faculty of Management Press:

Management in Poland after accession to the EU – selected aspects. Edited by A. Z. Nowak, Beata Glinka, Przemysław Hensel

Management: Qualitative and Quantitative research, edited by Alojzy Z. Nowak, Beata Glinka

Selected problems of Information Technology Development, by Witold Chmielarz

Knowledge Management: Development, Diffusion and Rejection, by Krzysztof Klincewicz

The Essential of Financial Markets, by Andrzej Sopoćko

European Economic Integration: Chances and Challenges, by Alojzy Z. Nowak

The EU through the eyes of Asia, edited by Martin Holland, Peter Ryan, Alojzy Z. Nowak and Natalia Chaban.

Global Economy: In search for solutions to stabilize the global economy. The role of infrastructure, culture and international education. Volume 5, edited by Mina Balamoune-Lutz, Alojzy Z. Nowak, Jeff Steagell, annual publication, prepared in cooperation with Coggin College of Business, University of North Florida, USA.

Interdisciplinary Journal of Economics and Law. Editor Ruth Taplin, University of Leicester, Associate Editor Alojzy Z. Nowak, University of Warsaw, CJEAS, 2011, Issue 1 and 2.

European Integration Process in the Regional and Global Settings. Irena E. Kotowska, Ewa Latoszek, Alojzy Z. Nowak, Andrzej Stepniak (editors), Warsaw, 2011.

DISTRIBUTION

Economic Bookstore

PL – 02-094 Warsaw, 67 Grójecka St.

Tel. (+48-22) 822-90-42; Fax. (+48-22) 823-64-67

E-mail: info@ksiegarnia-ekonomiczna.com.pl

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES

VOL. 2012, 5(6)

ARTICLES

- MAŁGORZATA KRÓL-BOGOMILSKA, Standards of Entrepreneur Rights in Competition Proceedings – a Matter of Administrative or Criminal Law?**
- ANNA BŁACHNIO-PARZYCH, The Nature of Responsibility of an Undertaking in Antitrust Proceedings and the Concept of ‘Criminal Charge’ in the Jurisprudence of the European Court of Human Rights**
- ALEKSANDER STAWICKI, Competence of Common Courts in Poland in Competition Matters**
- RAFAŁ STANKIEWICZ, The Scope of Application of the Provisions of the Administrative Procedure Code in Competition Enforcement Proceedings**
- MACIEJ BERNATT, Can the Right To Be Heard Be Respected without Access to Information about the Proceedings? Deficiencies of National Competition Procedure**
- PRZEMYSŁAW ROSIAK, The ne bis in idem Principle in Proceedings Related to Anti-Competitive Agreements in EU Competition Law**
- MATEUSZ BŁACHUCKI, SONIA JÓŹWIAK, Exchange of Information and Evidence between Competition Authorities and Entrepreneurs’ Rights**
- INGA KAWKA, Rights of an Undertaking in Proceedings Regarding Commitment Decisions under Article 9 of Regulation No. 1/2003**
- BARTOSZ TURNO, AGATA ZAWŁOCKA-TURNO, Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?**
- KRYSTYNA KOWALIK-BANČZYK, Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings**
- MARIUSZ BARAN, ADAM DONIEC, EU Courts’ Jurisdiction over and Review of Decisions Imposing Fines in EU Competition Law**
- JAN SZCZODROWSKI, Standard of Judicial Review of Merger Decisions Concerning Oligopolistic Markets**

CENTRE FOR ANTITRUST AND REGULATORY STUDIES (CARS)

www.cars.wz.uw.edu.pl

CARS came into being by the order of the Council of the Faculty of Management of the University of Warsaw of 21 February 2007. It was founded in accordance with para. 20 of the University of Warsaw Statute of 21 June 2006 as an ‘other unit, listed in the faculty rule book, necessary to achieve the faculty’s objectives’. CARS conducts cross- and inter-disciplinary academic research and development as well as implementation projects concerning competition protection and sector-specific regulation in the market economy. It also prepares one-off and periodical publications, organises or participates in the organisation of conferences, seminars, work-shops and training courses. In the future CARS will also act as a patron of post-graduate studies.

CARS consists of Ordinary Members (academic staff of the Faculty of Management of the University of Warsaw), Associated Members (academic staff of other faculties of the University of Warsaw, mostly the Faculty of Law and Administration and the Faculty of Economics as well as other Polish and foreign universities and research institutes) and Permanent Co-operators (including employees of Polish and foreign companies and public and private institutions).