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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@wz.uw.edu.pl
www.cars.wz.uw.edu.pl; www.yars.wz.uw.edu.pl

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AGATA JURKOWSKA-GOMUŁKA
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Editorial foreword

The Editorial Board is pleased to present the 16th volume of the Yearbook of Antitrust and Regulatory Studies (YARS 2017, 10(16)). This is the only 'regular' volume of YARS to be published in 2017 – a second volume, dedicated to problems related to the implementation of Directive 2014/104/EU, has a status of a 'special' volume. Starting from 2014, despite its formal name, YARS is a semi-annual journal.

This volume of YARS focuses mainly on antitrust issues, although not solely in a legal sense. The starting article, written by Sofia Oliveira Pais, focuses on the tension between competition law and intellectual property rights in cases involving standard essential patents.

Miroslava Marinova and Kremena Yaneva-Ivanova analyze problems related to the abuse of a dominant position on regulated energy markets in Bulgaria. The article by Dalia Višinskienė and Justina Nasutavičienė concerns modifications to concentrations illustrated by a *Gazprom* case before the Lithuanian competition authority and courts. Next, Katarzyna Sadrak writes about interpretation of jurisdiction clauses by the EU courts and the Polish experience of interpreting the scope of arbitration agreements in the field of unfair competition law. Raimundas Moisejevas and Danielius Urbonas present a thorough view upon the single economic unity doctrine under the EU or Lithuanian law and jurisprudence.

Then articles on economic aspects of market competition appear. Zbigniew Jurczyk delivers a paper on efficiency concerns in the application of competition law.

A paper by Marcin Król closes the articles section with a presentation of evidence of head-on open access competition on the market of long-distance passenger rail services in Poland in 2009–2015.

The second section of the Yearbook is devoted to national legal developments and contains two contributions. Srđana Petronijević and Zoran Soljaga write about the commitment procedure in the Serbian antitrust practice. Subsequently, three authors from Slovakia, Matej Horvat, Hana Magurová, Mária Srebalová, present the framework for consumer protection for rail passengers in their home country.

In addition, the current volume of YARS contains two reviews of antitrust case law. Karolis Kacerauskas provides an extensive comment on judgments of EU courts in cases *T-556/08, C-293/15P Slovenská pošta v Commission*. Hanna Stakheyeva and Ertugrul Canbolat presents details of the Turkish competition authority's activities concerning the cement market.

YARS 2017, 10(16) also reviews a book, published by Kluwer International, on the Serbian competition law.

The current volume contains five conference reports from events that took place in 2016 and 2017: Polish conferences on the energy sector and consumer protection in rail transport, a Polish-Portuguese PhD students' antitrust seminar, an antirust aviation seminar, as well as the Annual Conference on European State Aid Law 2016. The current volume also provides a detailed CARS activity report for 2016 as well as a report on the plans and activities of sector-specific laboratories operating within CARS.

The Editorial Board would like to take this opportunity to encourage potential authors interested in competition law and regulatory issues in the CEE countries, the Balkans and the Caucasus to take part in the preparation of the forthcoming volumes of YARS.

A call for papers will be announced shortly on the YARS website.

Warsaw, December 2017

Prof. Agata Jurkowska-Gomułka
Adam Jasser
YARS Volume Editors

List of acronyms

INSTITUTIONS:

BCA – Bulgarian Competition Authority
CFI – Court of First Instance
CJ – Court of Justice
CJEU – Court of Justice of the European Union
EC – European Commission
ECJ – European Court of Justice
ETSI – European Telecommunications Standards Institute
EWRC – Energy and Water Regulation Commission (BG)
GC – General Court
TCA – Turkish Competition Authority
UTK – Office of Rail Transport, Urząd Transportu Kolejowego (Poland)

LEGAL ACTS:

CPA – Competition Protection Act (BG)
EA – Energy Act (BG)
ECA – Electronic Communications Act (BG)
FCTA – Federal Trade Commission Act
TCL – Turkish Competition Law
TFEU – Treaty on the Functioning of the European Union

OTHER ACRONYMS:

BGN – Bulgarian lev
CEE – Central and Eastern Europe(an)
GTC – general terms and conditions
EU – European Union
EUR – Euro
FRAND – fair, reasonable and non-discriminatory terms
LTE – Long Term Evolution
OJ – Official Journal
SEP – standard essential patent
SSO – standard-setting organization

A R T I C L E S

The *Huawei* Case and Its Aftermath: a New Test for a New Type of Abuse

by

Sofia Oliveira Pais*

CONTENTS

I. The *Huawei* case
II. The anti-competitive issues
III. The background: EU and national *praxis*
IV. A new test of abuse?
V. A glimpse at the solutions followed by the US and Japan
VI. The national judgments
VII. Conclusion

Abstract

Competition law sets limits on the exercise of intellectual property rights by dominant companies, namely in cases involving standard essential patents (SEPs). This article will examine the framework for SEP owners' right to seek an injunction, discussing competitive problems that such situations may cause as well as the solutions adopted by the European Institutions, comparing them with the US and Japanese approach, and finally reflecting upon the opportunity for a new test for a new type of abuse. Although the three legal orders – US, EU and Japan – apply different laws establishing a general presumption against injunctions in SEPs encumbered with FRAND commitments, their goal is the same: to protect the interest of the SEP holder to obtain a remuneration without an abusive recourse to injunctions. I will argue that, in the EU, the *Huawei* case created a new test for a new type of abuse, improving the comprehensibility and certainty for the companies involved in

* Professor of Law, Faculty of Law, Universidade Católica Portuguesa, Jean Monnet Chair, Coordinator of the Católica Research Centre for the Future of Law (Porto); sofiaopais@gmail.com. Article received: 27 February 2017; accepted: 26 April 2017.

standardization across Europe and allowing the harmonization of national judicial solutions regarding the seeking of injunctions in the SEPs context. In spite of some uncertainties, the new test clarifies the role that competition rules should play in cases of abuses by SEPs owners.

Resumé

Le droit de la concurrence fixe des limites à l'exercice des droits de propriété intellectuelle par les entreprises dominantes, notamment dans les affaires concernant des brevets essentiels standard (*standard essential patents*, SEPs). Cet article examinera le cadre du droit des propriétaires de SEP de demander une injonction en discutant des problèmes de la concurrence que de telles situations peuvent causer ainsi que des solutions adoptées par les institutions européennes. Ces solutions seront ensuite comparées avec l'approche américaine et japonaise. Enfin, l'auteur réfléchira à l'opportunité d'un nouveau test pour un nouveau type d'abus. Bien que les trois ordres juridiques – les États-Unis, l'UE et le Japon – appliquent des lois différentes établissant une présomption générale contre les injonctions dans des SEP grevés d'engagements FRAND, leur objectif est le même: protéger l'intérêt du titulaire du SEP d'obtenir une rémunération sans recours abusif aux injonctions. Je soutiendrai que, dans l'UE, l'affaire Huawei a créé un nouveau test pour un nouveau type d'abus, améliorant la compréhensibilité et la certitude pour les entreprises impliquées dans la normalisation en Europe et permettant l'harmonisation de solutions judiciaires nationales concernant la recherche d'injonctions dans le contexte des SEP. Malgré quelques incertitudes, le nouveau test clarifie le rôle que les règles de la concurrence devraient jouer dans les cas d'abus par des propriétaires de SEP.

Key words: abuse of dominant position; FRAND commitments; seeking an injunction; standard essential patents; willing licensee.

JEL: K21

I. The *Huawei* case

Competition law sets increasingly stringent limits on the exercise of Intellectual Property Rights by dominant companies in cases involving Standard Essential Patents (SEPs). In this context, the *Huawei v ZTE* case, concerning a patent dispute between two Chinese companies, may become a landmark judgment[1]. It is another case of patent wars in the EU, whereby a SEPs holder seeks an injunction to exclude potential licensees from the market.

[1] CJ judgment of 16.06.2015, Case C-170/13 *Huawei Technologies Co. Ltd. v ZTE*, ECLI:EU:C:2015:477.

Huawei is a Chinese telecommunications company which holds a European patent regarded as essential to the Long Term Evolution (hereinafter, LTE) standard developed by the standard-setting organization – European Telecommunications Standards Institute (hereinafter, ETSI) for fourth generation mobile phones. Huawei is a member of ETSI and had made a commitment to grant licenses to third parties on fair, reasonable and non-discriminatory terms (hereinafter, FRAND). Therefore, Huawei entered into negotiations with ZTE, a multinational mobile phone producer, for the conclusion of a licensing agreement on FRAND terms. However, those negotiations were not successful and Huawei brought an action for a patent infringement before a German court against ZTE, in order to obtain an injunction prohibiting the continuation of the infringement and an order for the rendering of accounts, the recall of products and the assessment of damages. ZTE claimed it was a willing licensee and that its competitor Huawei was abusing its dominant position by seeking injunctions. In the course of this dispute, the German Court referred several questions to the European Court of Justice (hereinafter, CJ) seeking to ascertain whether, and in which circumstances, an action for infringement, brought by a SEP owner encumbered with FRAND commitments against a manufacturer of products complying with that standard, represents an abuse of dominant position under EU competition law.

The CJ tried to clarify the limits of the SEP owner's right to seek an injunction prohibiting the alleged infringement of its patent by the prospective licensee, stating that the pursuit of an injunction against a potential willing licensee may amount to an abuse of a dominant position. The difficulties in reconciling this solution with the previous case law of the CJ regarding unilateral refusal to license raises the question of whether we are facing a new type of abuse and a new test for it.. This article will examine the framework for SEP owner's right to seek an injunction, referring the anti-competitive problems that such situation may raise and the solutions that have been pointed out by the European Commission and the Court of Justice, comparing them with the ones followed by the US and Japan. It will end shedding some light on the opportunity of a new test of abuse, after analysing some relevant national decisions taken after the *Huawei* judgment.

II. The anti-competitive issues

Although nowadays competition law and intellectual property law are considered complementary, as both seek innovation and growth[2], there are

[2] There is a large consensus nowadays between US and European antitrust agencies concerning the goals of competition law. Taking into account the lessons from Schumpeter, it is

still certain areas of tension in which antitrust law should apply. Particularly relevant is the possibility to apply Article 102 TFEU to a SEP holder abusing its dominant position[3], as it is discussed in the *Huawei* case.

In order to fully understand the antitrust concerns involved in SEPs licensing, it is necessary to recall the concepts of SEPs and standards as well as the benefits of standardization.

SEPs are patents that are essential to implement a specific industry standard. For example, it has been estimated (Italianer, 2015) that 100,000 patents are relevant to manufacture smartphones[4]. Therefore, products that comply with a certain standard cannot be manufactured without those patents.

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generally accepted that competition law protects competition in order to promote efficiency and consumer welfare and that technical changes, strengthened by intellectual property rights, also promote efficiency and welfare gains. So the antitrust IP interface should find an equilibrium, allowing antitrust authorities to pursue anti-competitive practices without compromising innovation in the process. On this topic, cf. Lianos and Geradin, 2013, pp. 561–587; Greaves and Nasibyan, 2016, pp. 159–177; Jones and Sufrin, 2016, pp. 826–883; Hovenkamp, 2016, pp. 303–332 and also the US Department of Justice – Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition, 2007. Retrieved from: https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf (1.05.2015).

[3] The interface antitrust-IP can, therefore, raise certain concerns, as it is the case of "patent ambush" or "patent trolls". For the first scenery, see the *Rambus* case – COMP/C-3/38 636 Rambus – concerning intentional deceptive conduct, in the context of the standard-setting process; the company could commit an abuse by not disclosing the existence of the patents and subsequently claiming unreasonable royalties for the use of those relevant patents (although, in the *Rambus* case, Article 102 did not apply, as Rambus had low market power in the beginning of the standardization process); see also the similar case C-457/10 *AstraZaneca v Commission*, judgment of 6.12.2012, in which the Court held that misleading representation made by a dominant firm to patent offices in several Member States, in order to obtain the issue of Supplementary Protection Certificates to which they were not entitled, and deregistration of the (pharmaceutical products) marketing authorizations in several Member States, without justification, to prevent the appearance of competing generic drugs could constitute an abuse. On the other hand, "patent trolls" (also called "Patent Assertion Entities" or "Non Practicing Entities" (hereinafter, NPE) concern companies that do not manufacture products or are not engaged in research and development, but enforce patent rights against infringers; NPE became a source of litigation in the US, because it did not have the loser cost regime until *Octane Fitness, LLC v ICON Health & Fitness, Inc. and Highmark v Allcare Health*, issued in 2014, in which the Supreme Court made the applicability of the loser pay for attorney costs easier if the lawsuit was considered baseless. In this article we will only address seeking an injunction by a SEPs holder under Article 102 TFEU.

[4] The concept of "standard" depends on the context in which the term is used. Nevertheless, similar definitions have been adopted by the World Trade Organization (Technical Barriers to Trade Agreement, Annex 1–2), Standards Organization (ETSI) and European Institutions, such as the European Commission. In the EU, the concept given in Directive 98/34/EC of the European Parliament and the Council of 22 June 1998 (OJ L 2004, 21.7.1998, p. 37), laying down

Standards can be approved by a Standard Setting Organisation or, in more rare situations, result from the market development shaped by consumer choices. Standards, as the former head of the European Commission's Directorate-General for Competition Directorate-General for Competition A. Italianer explains, form the basis of success of technology we take for granted – radio, cable-TV, Wi-Fi, computers, mobile phones, railroads, internet – being important to industry, manufacturers and consumers (Italianer, 2015).

The benefits of standardization are obvious, whether in terms of efficiency – reducing transaction and production costs, increasing efficiencies and reducing the level of uncertainty about the outcome of R&D investment – or interoperability. In other words, compatibility among related products will allow systems and devices to interconnect through the same technology; hence, information, data and services can be exchanged among them and/or their users.

The EU has promoted standardization as a "tool for European competitiveness"[5], as it enables consumers to switch more easily between products from different manufacturers and strengthens the integration of national markets in order to complete the internal market.

Standards may, however, raise antitrust concerns, particularly when competing technologies are eliminated in favour of the selected one. In this context, as Shapiro emphasized, in the beginning of the twenty-first century (Shapiro, 2001, pp. 119–150), involuntary infringement of patents might favour abusive conducts by the SEPs owners. In fact, the dominant firm owner of the patents essential to that standard may hold up manufacturers by imposing excessive royalties, or other abusive conditions, to the potential licensees (given the sunk cost supported by them) or even refuse to license the patent through an injunction against the infringer.

In order to address these concerns, standard-setting organizations (hereinafter, SSO) require SEPs owner to commit to license on FRAND terms. This commitment will assure SEPs holder an adequate remuneration and at the same time prevent the hold-up issue, giving all the market players access to a standard. In practice, FRAND commitments do not always avoid anti-competitive conducts by SEPs owners and competition law intervention might be necessary.

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a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 2006/96/EC of 20.11 and Regulation 1025/2012 of 25.10 is particularly clear: "standard is a technical specification approved by a recognized standardization body for repeated or continuous application, with which compliance is not compulsory" (Article 1(4)); in addition, to these formal standards there are also *de facto standards* that arise in the market as a result of consumer choices or the conduct of a certain undertaking); it can promote interoperability and efficiency.

[5] Commission Decision of 29.04.2014, Case AT.39939 – Samsung – Enforcement of UMTS standard essential patents, Brussels, C (2014) 2891 final, no. 22.

The need for antitrust intervention is not, however, a consensual matter. While some authors (Geradin and Rato, 2007, pp. 101–161; Petrovčič, 2013, pp. 1363–1386) consider that only in rare situations will the standard-setting lead to exploitative abuse, others (Kobayashi and Wright, 2009, pp. 496–515) doubt the ability of competition laws to address this kind of concerns and with others suggest it would be preferable to apply Patent Law or Civil Law (Larouche and Zingales, 2014; Jones, 2014, p. 1 et seqq; Nihoul, 2015, p. 151 et seqq).

Nevertheless, antitrust agencies on both sides of the Atlantic agree that antitrust rules should apply when a dominant SEP owner requests an injunction against infringers of a FRAND-encumbered patent, as it might lead to anti-competitive abuses.

III. The background: EU and national *praxis*

The applicability of Article 102, or its equivalent in the national law, to SEPs holders seeking an injunction against infringers was addressed, in the beginning, by national courts, particularly by German ones. In 2009, the German Federal Court of Justice decided on the anti-competitive concerns of injunctions in the so-called "Orange Book Standard" case, which did not involve FRAND commitments. The Court stated that even before signing an agreement, companies have to behave as a licensee and pay royalties, at least into an escrow account, and provide regular account of those payments. On the other hand, the party seeking the license must make a binding, unconditional and reasonable offer for it. The German court applied the compulsory licence defence in a conservative way as it is considered an exception to the right of patent enforcement.

The test established by the German court was different from the one followed by the European Commission some years later, when the European institution issued decisions concerning seeking injunctions by dominant SEPs owners against infringers of FRAND encumbered patents. On the one hand, the Orange Book Standard test did not apply to SEP cases. On the other hand, the Commission's approach to these cases was more generous than the German Court's decision. For instance, it did not consider, as some lower German courts did, a potential licensee as an *unwilling* licensee if it challenged the validity or essentiality of the patent. It should be noticed, however, that some literature considers that the Commission exaggerated the consumers' marginal benefit of validity challenges to licensed SEPs[6].

[6] In other words, economic analysis would not support the assumption of the European Commission. Therefore, if the outcome of discovering a few invalid patents in a licensed

The first infringement decision adopted by the European Commission was the Motorola decision[7]. In this case, Motorola owned a SEP reading on the General Packet Radio Service (hereinafter, GPRS) standard (part of the 2G mobile telecom standard) and had committed to the ETSI to license it on FRAND terms and conditions. In April 2014, the Commission decided that a SEP owner's request of an injunction was an abuse and ordered Motorola to eliminate the negative effects of its conduct. The Commission found that in the exceptional circumstances of this case (the standard setting process and Motorola's commitment to license the SEP on FRAND terms) and in the absence of any objective justification (Apple was not unwilling to enter in a licence agreement on FRAND terms), Motorola had infringed Article 102 TFEU by seeking and enforcing an injunction against Apple before the Court of the Federal Republic of Germany.

The Commission strengthened the concern, already mentioned in 2012, in the *Google/Motorola Mobility*[8] merger clearance, that the threat or the seeking of injunctions could be used to exclude competing products from the market or to impose burdensome licensing terms.

A fine was not imposed, however, by the Commission in this case as there were no previous decisions of the Commission or case-law of the Court in these matters and national decisions were divergent. Nevertheless, as the former Competition Commissioner Joaquin Almunia mentioned, the EU and the US "share the view that a FRAND commitment given in a standardization context means that the holder of standard-essential patents can no longer issue an injunction if the licensee is willing to negotiate a FRAND license" (Almunia, 2013).

In a similar case, concerning 3G UMT (Universal Mobile Telecommunication System) SEPs, owned by the Samsung company[9], the European Commission enforced the safe harbour test shaped in the Motorola case (outside this safe harbour, however, no more guidance was provided). The Commission in its Statement of Objections (issued in spite of Samsung's withdrawal of its injunction request as this had already caused harm) considered that under the specific circumstances where a commitment to license SEPs on FRAND terms had been given and where a potential licensee (in this case Apple) had shown

portfolio containing hundreds is to reduce royalties or delay, in a opportunistic way, the payment of those royalties, SEP owners' incentives to invest may decrease and harm consumers; see, Sidak, 2016, pp. 191–211.

[7] Commission Decision of 29.04.2014, Case AT.39985 – Motorola – Enforcement of GPRS standard essential patents, Brussels, C(2014) 2892 final. See Angeli, 2015, p. 221 et seqq.

[8] Commission Decision of 13.02.2012, Case No COMP/M.6381 – Google/Motorola Mobility, Brussels, C(2012) 1068.

[9] Case AT.39939 – Samsung – Enforcement of UMTS standard essential patents, Brussels, C (2014) 2891 final.

itself to be willing to negotiate a FRAND licence for the SEPs, recourse to injunctions harms competition, as it can exclude products from the market, harm consumers and hinder innovation.

A SEP holder is entitled to take reasonable steps to protect its interests by seeking preliminary and permanent injunctions against a potential licensee in, for example, the following scenarios: "(1) a potential licensee is in financial distress and unable to pay its debts; (2) a potential licensee's assets are located in jurisdictions that do not provide for adequate means of enforcement of damages; or (3) a potential licensee is unwilling to enter into a license agreement on FRAND terms"[10]. As such conditions were not met in the *Samsung* case (in fact, Apple made six offers including an unconditional licensing offer, deposited funds into an escrow account and agreed to let Motorola define the royalties subject to judicial review by German courts), the Commission informed Samsung that its injunctions could be an abuse of dominant position and Samsung offered commitments under Article 9 (proposed a specific licensing framework, and promised not to seek injunctions).

Several and pertinent doubts were cast by these two European Commission decisions: What is a willing licensee? Is it sufficient that the licensee merely declares its willingness or should the licensee act in accordance? Should the licensee make the first offer or is it enough to request an offer?

Some of these uncertainties were addressed by the Advocate General Melchior Wathelet and the Court of Justice in the *Huawei* case, concerning a Chinese Telecommunication company holding a European standard essential patent that sought injunctions against ZTE in the Dusseldorf Regional Court. The German Court referred to the Court of Justice several questions concerning the applicability of competition law to SEPs holder seeking an injunction against infringers of FRAND encumbered licences.

The Advocate General (hereinafter, AG) in his Opinion proposed a "middle path" and held the need to strike a balance between the right to intellectual property and the SEPowner's right of access to the courts, under Article 47 of the Charter of the Fundamental Rights of the EU and the freedom of companies implementing the standard to conduct business, protected by Article 16 of the Charter[11]. In addition, the AG enhanced the differences between the Orange Book Standard case and Huawei: while in the *Huawei* case a formal standard was adopted and FRAND commitments assumed, the

[10] Cf. Press Release of 21.12.2012: Antitrust: Commission sends Statement of Objections to Samsung on potential misuse of mobile phone standard-essential patents. Retrieved from: http://europa.eu/rapid/press-release_IP-12-1448_en.htm (1.5.2016).

[11] Opinion of Advocate General Wathelet, delivered on 20 November 2014, Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbH*, paras 52, 66.

Orange Book Standard case concerned a *de facto* standard and no FRAND commitments were agreed.

It is an abuse, according to the AG, and it should be considered a solution of last resort, the fact that a holder of a SEP, which has given a commitment to grant third parties a licence on FRAND terms, has required an injunction or corrective measures where it is shown that the SEP holder has not honoured its commitment, even though the alleged infringer has shown itself to be objectively ready, willing and able to conclude such a licensing agreement. Before such last resort action is taken, the SEP holder has to alert the alleged infringer to that fact in writing, giving reasons and presenting a written offer of a license on FRAND terms with all the information and conditions usually established in that sector, particularly the precise amount of the royalty and the way in which that amount is calculated and if necessary request that the FRAND terms be fixed either by a court or by an arbitration tribunal.

In addition, it is legitimate for the SEP holder to ask the infringer either to provide a bank guarantee for the payment of royalties or to deposit a provisional sum at the court or arbitration tribunal in respect of its past and future use of the patent.

On the one hand, the infringer must respond to that offer in a diligent and serious manner: "if it does not accept the SEP holder's offer, it must promptly present to the latter, in writing, a reasonable counter-offer relating to the clauses with which it disagrees"[12]. On the other hand, an infringer's conduct cannot be regarded as dilatory if it can, during or after the negotiations, challenge the validity or essentiality of the patent[13]. With this solution the AG sets aside the rigid patent owner friendly approach by the German Court, which argued that the infringer must, even before concluding a licensing agreement, fulfil the obligations of the future licensing agreement.

IV. A new test of abuse?

In the *Huawei* case, the Court followed the Opinion of the AG as well as the guidelines of the Commission. On July 16, 2015, the CJ issued a landmark judgment, recalling that an abuse of dominance will only exist in exceptional circumstances and that cases, like the *Huawei* case, are different from the ones concerning refusal to supply intellectual property rights[14]. *In casu* the Court considered as exceptional circumstances the fact that the patent was

[12] AG Wathelet's opinion, para. 88.

[13] Ibidem.

[14] C-170/13 *Huawei*, paras 46–48.

essential to a standard and that the SEP holder would have to license in FRAND terms. In these circumstances "a refusal by the proprietor of the SEP to grant a licence on those terms may, in principle, constitute an abuse within the meaning of Article 102 TFEU"[15].

In other words, the Court held that the SEP holder does not abuse its dominant position in seeking an injunction, as long as "specific requirements" are complied with[16]: (1) The SEP holder must "alert the alleged infringer of the infringement complained about by designating that SEP and specifying the way in which it has been infringed"[17], as a party may not be aware of it; (2) The SEP holder must, taking into account the content of other licensing contracts, and guided by the principle of non-discrimination, present "a specific, written offer for a licence on FRAND terms", specifying, in particular, the amount of the royalty and the way in which that royalty is to be calculated[18]; (3) The alleged infringer must "respond to that offer in accordance with recognised commercial practices in the field and in good faith", without "delaying tactics"[19]. On the other hand, the Court also held that the alleged infringer "shall not be banned from challenging the validity, essential nature of the patents and /or their actual use"[20].

Although, some doubts remain concerning the exact meaning of the "willingness test" or whether this decision can also apply to *de facto* standards, in the Huawei case the Court breaks new ground in this field and attempts to find an equilibrium between the interests of the SEP holder and the alleged infringer[21]. At the same time, the Court judgment allows the harmonization of national solutions, recognizing a "new test of abuse", supported by the European Commission *praxis*.

In fact, the European Commission, in both of its decisions – *Motorola* and *Samsung*[22] – relied on the overall framework of "wholly exceptional

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15 C-170/13 *Huawei*, para. 53.

16 C-170/13 *Huawei*, para. 59.

17 C-170/13 *Huawei*, paras 60–62.

18 C-170/13 *Huawei*, paras 63–64. In addition, "parties may, by common agreement, request that the amount of the royalty be determined by an independent third party, by decision without delay" (C-170/13 *Huawei*, para. 68).

19 C-170/13 *Huawei*, para. 65.

20 C-170/13 *Huawei*, para. 69. Pointing out that the ECJ ruling is "much closer to the reality of patent litigation and more practical than the German BGH's *Orange Book-Standard*" decision, see Körber, 2016.

21 Although this ruling achieved, as pointed out by Oliver and Bombois, 2016, a fair balance between the right of property established in article 17 of the Charter of Fundamental Rights of the EU and the right of access to the courts, provided in article 47 of the Charter, it still raises several doubts.

22 Cit. *supra* notes 7 and 12.

circumstances"[23] to apparently introduce a new test of abuse: the willing licensee. Although compulsory licensing and potential abusive litigation tests were both invoked before the European institutions, they were not enforced and the willing licensee test took precedence.

Regarding compulsory licensing, it is a settled case law in the EU, that although a dominant company has "a special responsibility not to allow its conduct to impair competition on the common market"[24], a refusal by a dominant firm to license IPRs cannot in itself constitute an abuse of a dominant position[25]. However, there are several exceptions to that rule, recognized by the CJ. *Magill*[26], *IMS*[27] and *Microsoft*[28] are just the most famous examples. In these cases, the Court held that the refusal to license IPRs to a competitor by a dominant firm is an abuse if it concerns an essential facility, such as copyright over weekly listings necessary to publish a broader television guide (*Magill*), or copyright over the 1860 brick structure, a system for collecting pharmaceutical sales data in Germany (*IM*S) or the interface information (*Microsoft*). In other words, a refusal must concern an input necessary to compete on a downstream market, preventing the appearance of a new product, the refusal is not objectively justified and the result is the elimination of competition.

In the *Huawei* case, the CJ stressed, endorsing the European Commission view in the *Samsung and Motorola* decisions, that the exceptional circumstances in SEPs cases are different from the ones found in the unilateral refusal to license judgments[29]: the patent at stake is a SEP and the holder is prepared to grant licences on FRAND terms.

Furthermore, it has been invoked by Motorola, in the first Commission decision, as well as by certain authors (Vesterdorf, 2013, p. 109), that the abusive litigation test, established in *ITT Promedia*[30] and *Protégé Internationale*[31] cases, concerning proceedings related with unfair commercial practices and trademark oppositions, should also be considered in the SEPs context. In those

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[23] As the Court has highlighted in several cases, the list of exceptional circumstances is not exhaustive See *infra* cases: *Magill*, *IMS* and *Microsoft* cases, notes 26–28.

[24] ECJ judgement of 9.11.1983, Case 322/81 *Michelin*, ECLI:EU:C:1983:313, para. 57.

[25] ECJ judgment of 5.10.1988, Case 238/87 *Volvo v Erik Veng*, ECLI:EU:C:1988:477.

[26] CJ judgment of 6.04.1995, joined cases C-241/91 P & C-242/91 P *Independent Television Publications Ltd (ITP) v Commission (Magill)*, ECLI:EU:C:1995:98.

[27] CJ judgment of 29.04.2004, Case C-418/01 *IMS Health v NDC Health*, ECLI:EU:C:2004:257.

[28] CFI judgment of 17.09.2007, Case T-201/04 *Microsoft v Commission*, ECLI:EU:T:2007:289.

[29] C-170/13 *Huawei*, para. 48.

[30] CFI judgment of 17.07.1998, Case T-111/96 *ITT Promedia v Commission*, ECLI:EU:T:1998:183.

[31] CFI judgment of 13.09.2012, Case T-119/09 *Protégé International v Commission*, ECLI:EU:T:2012:421.

cases, the Court held that bringing a judicial action is a fundamental right and it can only infringe competition rules in wholly exceptional circumstances: the action cannot reasonably be considered an attempt to establish rights and can therefore only serve to "harass the opposite party"; and is "conceived in the framework of a plan whose goal is to eliminate competition"[32]. Those criteria were not followed by the European institutions (European Commission and CJEU) in the SEPs cases. According to those institutions, restrictions on a dominant undertaking's right to enforce its IP in court may be ordered in the application of Article 102 TFEU, irrespective of the criteria used in *ITT Promedia* and *Protégé International*, as the standardization context and SEP holder commitment to license on FRAND terms and conditions would differentiate these cases from the above mentioned cases. The European Commission and the CJEU tend to see SEPs, when FRAND commitments were assumed, as special cases that need a special solution for the reasons outlined above. The willing licensee test would be, therefore, a new test[33] applied to this new type of abuse.

According to the European institutions the willing licensee test will be determined on a case-by-case basis, taking into account specific facts. Certain guidance was provided by the European Commission in *Motorola and Samsung* decisions: willing licensees include "companies which, in case of dispute, are willing to have FRAND terms determined by a court or arbitrators (if agreed between the parties) and to be bound by such a determination"[34]. Outside this safe harbour no more guidance was provided.

The AG and the CJ, on the other hand, added in the *Huawei* case that the SEP holder, before seeking injunction, has to alert the alleged infringer to its intention in writing, giving reasons and presenting a written offer of a licence on FRAND terms with all the information and conditions usually established in that sector. If the infringer does not accept the SEP holder's offer, it must

[32] T-111/96 *ITT Promedia*, para. 30.

[33] This test has, however, been criticized, especially in the beginning, by its ambiguity. See Vesterdorf, 2013, p. 1; Vesterdorf, 2008, p. 109; Petit, 2013, p. 677 (tests of abuse that treat injunctions as a bargaining device "are economically inconsistent, and should thus be disregarded" and it would be problematic if agencies were ever to build theories of antitrust liability "on the basis of fictional economic assumptions"; in addition, the act of seeking an injunction, or the threat of so doing, "can induce potential licensees to accept unfair terms" – Petit, 2013, p. 42). Other authors argue that a "holistic standard", taking into account competition rules, as well as free movement and procedure rules, for limiting injunctions that are incompatible with EU law principles, would be better, see Graf, 2014, pp. 73–87.

[34] Cf., Antitrust decisions on standard essential patents (SEPs) – Motorola Mobility and Samsung Electronics – Frequently asked questions. Retrieved from: http://europa.eu/rapid/press-release_MEMO-14-322_en.htm (1.05.2015).

promptly present to the latter, in writing, a reasonable counter-offer relating to the clauses with which it disagrees.

In spite of the guidelines presented in this case, uncertainties remain, namely concerning the specificity of the licence offer and the timeframe for the potential licensee to request a licence. Is it possible, for example, for a potential licensee to know all the SEPs involved in the manufacturing of the product? Even if the SSO maintain a database of all SEPs, available to the public, is it reasonable to demand the potential licensee to know all the SEPs necessary to manufacture the product when some of the recent studies have shown that there might be billions of them? On the other hand, if we accept that the potential licensee needs to be proactive only after the dispute, as the *Huawei* judgment suggests, are we not burdening the SEPs owner and affecting the difficult equilibrium of the interests involved? Are we not rewarding the infringement of SEPs? What is the reasonable period of time for making the offer and the counter offer? How long can negotiations last before they are considered dilatory? What constitutes a FRAND offer?[35] The Court has not solved those problems and the open solution given by the Advocate General – the time must be assessed in the light of the "commercial window of opportunity" available to the SEP holder for securing a return on its patent – does not favour legal certainty.

V. A glimpse at the solutions followed by the US and Japan

The doubts still remaining in the EU cases justify a quick look at the US and Japan solutions in this field.

In the US, antitrust concerns regarding SEPs can be addressed by Section 2 of the Sherman Act, similar to Article 102 TFEU, Section 5 of the Federal Trade Commission Act (FCTA) and by the Patent Act through an infringement action.

Section 2 of the Sherman Act prohibits "monopolization, attempts to monopolize, as well as conspiracy to monopolize any part of the trade or commerce between several States or with foreign nations". Concerning the SEP owner's market power, neither the EU nor the US establish a presumption

[35] In fact, as pointed out by Grasso, 2016a, p. 213–238: "The ECJ ruling in Huawei and the right to seek injunctions based on FRAND-Encumbered SEPs under EU Competition Law: One step forward", this is a crucial issue and *Huawei*, *Motorola* and *Samsung* cases do not provide any guidance on the methodology that should be followed in order to determine the FRAND royalty rate. Some guidance might be provided by the European Commission's Horizontal Guidelines and practice (Grasso, 2016b, pp. 1–12, 5–12).

of dominance for patent owners (as there is no economic justification for it; in fact, in certain cases the standard was not successful in the market or there were other standards in the market, or other non standardized products that could compete with the standard *in casu*). In certain cases, however, SEP ownership may confer market power, particularly when, in addition to the elimination of intra-standard competition as a consequence of the standardization process, there is also a restriction on the inter-standard competition[36].

Regarding the use of the compulsory licensing test, the approach in the US is, nonetheless, slightly different. In the US context, after the uncertainty caused by apparently divergent solutions concerning refusal to license in *Kodak* (in this case, the Ninth Circuit considered that there was no valid justification for refusal to licence)[37] and *Xerox* (in this case, the Federal Circuit accepted, apparently, a *quasi-per se* legality rule concerning the refusal to license)[38] cases, the Supreme Court clarified the issue in the *Trinko* judgment[39] and *Aspen Skiing*[40]. The Supreme Court held that under certain circumstances there is no duty to license. For example, a refusal to license is unlikely to constitute an act of monopolization when satisfying the request of rivals would require the dominant firm to share an input that is not indispensable, produce an input (or a combination of them) that it does not use, or enter in a new joint venture with its competitors.

Section 5 of FCTA can also apply to SEPs holder conduct. It prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce". While this last prohibition is usually considered a consumer protection statute (for instance, it applies to misleading advertising), the first one may apply to anti-competitive conducts that are not

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[36] As it is well known, the Court defined dominant position, in the *United Brands* judgment, as a "position of economic strength which enables the undertaking to impede effective competition in a relevant market, by allowing it to behave substantially independently of competitors, customers, and consumers" (ECJ judgment of 14.02.1978, Case 27/76, ECLI:EU:C:1978:22, para. 65). In the US, the Supreme Court defined the monopoly power in *U.S. v E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, as the "power to control prices or exclude competition". In spite of the differences (e.g. the acquisition of a dominant position is not prohibited in Article 102, but may be under US antitrust law), both jurisdictions refuse the presumption that the mere possession of a patent right confers market power. The assessment of that power will be made on a case-by-case basis. See the Horizontal Guidelines (HO 2011/C 11/1, 14.1.2011): market power can only be assessed on a case-by-case basis as there is no presumption that holding a SEP means the possession of a dominant position.

[37] US Court of Appeals, *Ninth Circuit*, No. 96-16014, *Image Technical Service Inc CPO v Eastman Kodak Co*, February 27, 1998.

[38] *SCM Corp v Xerox Corp*. 645 F2d. 1195 (2d Cir 1981).

[39] *Verizon Communications, Inc. v Law Offices of Curtis V. Trinko*, LLP 540 US 398, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004).

[40] *Aspen Skiing v Aspen Highlands Skiing*, 472 U.S. 585 (1985).

prohibited by the Sherman Act, such as invitation to collude (usually unilateral solicitations to enter into unlawful horizontal price-fixing or market allocation agreements)[41].

In addition, in the United States, infringement actions are brought under the Patent Act in Federal District Courts. Since the US Supreme Court's decision in *eBay, Inc. v MercExchange, L.L.C*[42], the Federal District Courts have the discretion to grant injunctions to stop patent infringement as long as the balance of traditional equitable factors, including a consideration of the public interest, weigh in favour of granting injunctive relief. Recently, two US Federal District Courts have applied the eBay factors (the plaintiff must demonstrate that it has suffered an irreparable injury; remedies available at law, such as monetary damages, are inadequate to compensate for that injury; considering the balance of hardships between the plaintiff and the defendant, a remedy in equity is warranted; and the public interest would not be disserved by a permanent injunction) to deny injunctive relief to holders of SEPs (Judge Robart in *Microsoft v Motorola*[43] and Judge Posner in *Apple v Motorola*[44]). It means that the patent owner cannot obtain an injunction, but rather must settle for damages only. Both cases are on appeal at the United States Court of Appeals for the Federal Circuit. Another US federal district court, however, came to a different conclusion. Judge Crabb in *Apple v Motorola*[45] concluded that a FRAND commitment to an SSO, like any other contractual arrangement, does not deprive the SEP holder of the right to seek injunctive relief.

An alternative to Federal Court litigation is the filing with the US International Trade Commission (hereinafter, ITC) of a request for an order excluding imports of products that the ITC finds in violation of US patents. The ITC provides a second forum as long as the patentee can assert a patent infringement claim to stop the importation of infringing products. The ITC is required to issue an exclusion order upon the finding of a Section 337 violation (as long as the public interest does not favour another solution, in which case the US Trade Representative overturns the ITC order on public interest).

In this context, it is also important to refer that in January 2013 the US Justice Department (hereinafter, DOJ) and the US Patent and Trademark

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[41] In fact, the FCT considered in the *Rambus* case (*Rambus, Inc.*, No. 9302. FCT August 2, 2006) that the undertaking's conduct (patent ambush) was a standalone violation of section 5 (which was, however, later dismissed by the Court, without clarifying the scope of the provision).

[42] Cf. *eBay, Inc. v MercExchange*, L.L.C, 547 US 388 (2006).

[43] *Microsoft Corp. v Motorola, Inc.* (Case No. 14-35393), US Court of Appeals for the Ninth Circuit (San Francisco).

[44] *Apple v Motorola*, No. 1:11-cv-08540 (N.D. III, June 22, 2012).

[45] *Apple v Motorola*, Fed. Cir. 2013 – 1150-1182.

Office (hereinafter, PTO) jointly issued a Policy Statement on SEPs Subject to Voluntary FRAND Commitments[46] in which the agencies explained that the remedy of an injunction or exclusion order may be inconsistent with the public interest, particularly in cases where an SEP owner has made a FRAND commitment to a standard setting body. The PTO-DOJ Statement noted, however, that an exclusion order may still be an appropriate remedy in some circumstances, such as where the putative licensee is unable or refuses to take a FRAND licence and is acting outside the scope of the patent holder's commitment to license on FRAND terms. In this context, the PTO-DOJ Statement identified a non-exhaustive list of relevant factors when determining whether public interest considerations should prevent the issuance of an exclusion order or when shaping such a remedy.

Finally, in two separate settlement agreements (which will therefore unlikely be used as precedents) in 2012 and 2013, the FTC required Motorola Mobility and Bosch GmbH not to seek injunctions on SEPs, except under limited circumstances enumerated by the FTC. The FTC also indicated that in appropriate circumstances, it might challenge SEP holders' efforts to obtain injunctions as "unfair methods of competition" in violation of Section 5 of the FTC Act[47].

In Japan, antitrust concerns regarding SEPs can be addressed either by the Patent Act or the Civil Code. The Patent Act has provisions concerning compulsory licensing (for example Article 93), which are rarely used. In the case of standard essential patents, it has been argued, however, that the most likely scenario is the grant of compulsory (non-exclusive) licence for public interest (Kimura, 2012)[48] by the Japan Patent Office Commissioner or the Minister of Economy, Trade and Industry.

Concerning the Japanese Civil Code, it is pointed out that Article 1 provides that "No abuse of rights is permitted". Courts "rarely restricted the patentee from exercising a right to seek an injunction by applying this provision on an abuse of rights" (Tonda, 2013). Article 1 can only apply as long as the exercise of the patent right is contrary to the purpose of the Patent Act (contribute to the development of industrial society) and is unacceptable in society in light of the circumstances of the case.

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[46] Retrieved from: http://www.justice.gov/atr/public/guidelines/ 290994.pdf (1.5.2016).

[47] Retrieved from: http://www.ftc.gov/os/caselist/1210081/121126boschanalysis.pdf and from: http://www.ftc.gov/os/caselist/1210120/130103googlemotorolastmtofcomm.pdf. (1.05.2016).

[48] No compulsory license has been granted until now; even when a standard is found necessary for the public interest, the product using the SEP may not be found necessary for the public interest.

On January 23, 2014, the Japanese IP High Court announced that the Japanese *Apple*/*Samsung* FRAND case would be the matter of a Grand Panel and asked, for the first time, for public comments on the question whether there should be any restriction on the right to seek an injunction and damages based on a standard essential patent (SEP) in respect of which a FRAND declaration was made (58 Amicus Briefs were filed in response to the question)[49].

In this case, Samsung had sought a preliminary injunction against the importation and sale of certain models of Apple devices that allegedly infringed a standard-essential patent, subject to a FRAND obligation. In response, Apple filed an action seeking a declaration that its devices did not infringe a SEP, and that Samsung did not have a right to claim damages. In February 2013, the Tokyo District Court held that Samsung could not seek damages from Apple for the infringement of a SEP, due to Samsung's 'abuse of right'. The court rejected Samsung's argument that Apple was not willing to license as its offer reserved the right to contest validity and held: "There are no express provisions regarding the duties of parties at the stage of preparation for contract execution (…) it is reasonable to understand that, in certain cases, parties that have entered into contract negotiations owe a duty to each other under the principle of good faith to provide the other party with important information and to negotiate in good faith"[50].

On May 16, 2014, the Grand Panel of the Intellectual Property High Court ruled that Samsung did not have a right to seek an injunction against Apple Japan concerning the SEP with FRAND commitments and modified the Tokyo District Court regarding damages[51]. It held that the enforcement of a FRAND pledged patent right – with a claim of damages – did not constitute an abuse of right if the amount of damages claimed was within the scope of the licence fee based on the FRAND condition. In other words, it is an abuse of monopoly, if a SEP holder seeks to obtain more damages than the ones that could have been obtained on FRAND terms, unless there are special reasons such as the alleged infringer not having any intent to take a FRAND license[52].

To sum up, although US and Japan apply different laws, the goal is the same: protect the interests of the SEP owner, while avoiding abusive recourse to injunctions.

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[49] Cf. http://www.worldipreview.com/article/japan-the-year-in-review (1.05.2016).

[50] *Apple Japan Limited Liability Company (Plaintiff) v Samsung Electronics Co., Ltd. (Defendant)*, Tokyo District Court/Judgment of Feb. 28, 2013/Case No. 2011 (wa) No. 38969; Case to seek declaration of non-existence of liability, 38 AIPPI J. 174 (2013).

[51] Cf. http://www.ip.courts.go.jp/eng/hanrei/g_panel/index.html (1.05.2015).

[52] Cf. http://www.ip.courts.go.jp/eng/ (1.05.2015).

VI. National judgments

In Europe, after the *Huawei* case, two German courts granted injunctions to SEP holders. On 3 November 2015, the Düsseldorf Regional Court granted injunctive relief to Sisvel, a SEP holder, against Haier, as it distributed UMTS and GPRS compatible mobile devices infringing Sisvel's SEP[53]. The German Court did not assess whether Sisvel's proposal was FRAND because the counteroffer did not meet *Huawei*'s condition. In other words, the national court did not assess the initial offer and rejected the FRAND defence, because Haier did not provide an account and security for the payment of royalties and it had to take place within a month after the rejection of the counteroffer by the patent holder. The Higher Regional Court of Düsseldorf (appeals court) suspended, however, the enforcement of the injunction. It found that the lower court did not apply the *Huawei* standards correctly. The lower court had to decide whether Sisvel's offer was on FRAND terms, so it needed to determine the reasonableness of the royalty rate and other licence terms. It means that the alleged infringer is not required to propose a FRAND counteroffer if the offer received is not FRAND.

On 27 November 2015, the Regional Court Mannheim, in *Saint Lawrence Communications v Deutsche Telekom*[54], granted an injunction against Deutsche Telekom based on a European patent, which was found to be essential for the AMR-WB standard, relevant for wideband audio coding used in HD-Voice transmission. Saint Lawrence Communications, a European subsidiary of Acacia Research Group LLC, was the patentee. The products offered by Deutsche Telekom (DT) included mobile phones supplied by HTC and several other handset manufacturers, therefore, HTC and others participated in the proceedings as interveners in support of DT. The German Court assessed only the counteroffer and rejected the FRAND defence. It considered insufficient the counteroffer made by the HTC (supplier of the accused devices)[55] as it did not specify the royalty rate (the royalties would have to be determined by the

[53] Joined cases 4a O 93/14 and 4a O 144/14, summary retrieved from: www.eplawpatentblog.com/eplaw/2015/11/de-sisvel-v-qingdao-haier-group-first-german-injunction-after-cjeu- frand-decision.html.

[54] Regional Court of Mannheim, case no. 2 O 106/14 – *Saint Lawrence Communications v Deutsche Telekom*, summary retrieved from: eplaw.org/document/de-summary-mannheim-district-court/ (last visited 1.1.2017).

[55] It must also be pointed out that, contrary to the CJ guidelines, Saint Lawrence first filed the action and then put Deutsche Telekom on notice. But, as Deutsche Telekom was unwilling to take a licence (it considered itself merely a distributor) and HTC waited over three months to indicate its willingness to license, that notice of infringement was not given too late.

High Court of England and Wales)[56]. A Mannheim court, like the Düsseldorf Regional Court, required that the counteroffer was made on FRAND terms, even if the potential licensee was not contacted before the action was brought.

Both courts did not review the plaintiff's offer for FRAND compliance; they focused in the counteroffer. Thus, it seems that the burden of making a successful FRAND defence is still mainly on the defendant, according to the lower German courts. Fortunately, the Court of Appeals took into account the *Huawei*'s judgment.

VII. Conclusion

There is a general presumption against injunctions in SEPs encumbered with FRAND commitments, in the US, in the EU and in Japan. Although the laws applied may be different – patent and competition laws in the US, mainly civil law in Japan, and competition law in the EU (and these different approaches reflect different influences provided by different economic schools as well as different antitrust enforcement models) – the goal is the same: to protect the interests of the SEP holder to obtain a remuneration, while avoiding an abusive recourse to injunctions.

In the European context the national approaches to patents and SEPs holders seeking injunctions against infringers can also be quite different. Therefore, the *Huawei* case may have a significant impact, allowing the harmonization of national judicial solutions regarding the seeking of injunctions in the SEPs context. Furthermore, it can improve clarity and certainty for the companies involved (and for the industry in general) in standardization across Europe. In fact, the CJ endorsed the AG proposal as well as the European Commission decisions, setting a new test for a new type of abuse: the willing licensee. In spite of some uncertainties concerning the specificity of the licensing agreement offered by the defendant, or the time frame in which that agreement must be negotiated, the new test clarifies the role that competition rules should play in cases of abuses by SEPs owners.

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Exploitative Abuse of a Dominant Position in the Bulgarian Energy Markets

by

Miroslava Marinova and Kremena Yaneva-Ivanova*

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Abstract

In the last few years the behavior of undertakings operating in the regulated utility markets, such as energy, water and communications, has been in the focus of the Bulgarian Competition Authority (hereinafter, BCA). Typically, these companies are dominant due to their exclusive licenses to operate in a certain territory and thus the contents of their contractual relationships with customers are often defined in general terms and conditions (hereinafter, GTCs) adopted or approved by the respective sector regulator. Most or all aspects of their pricing policy is also subject to sector regulation.

By analysing critically two landmark decisions of the BCA concerning abuses of companies active in the energy markets, this paper raises the following questions: (1) to what extent the BCA is competent to intervene and sanction

* Miroslava Marinova, Ph.D candidate in competition law, School of Law, University of Reading, Reading, UK; m.marinova@pgr.reading.ac.uk; Kremena Yaneva-Ivanova, LL.M, Associate at Spasov & Bratanov Lawyers' Partnership; kremena.yaneva@sbn-law.com. Article received: 2.04.2017; accepted: 30.05.2017.

those undertakings for conduct which is subject of regulatory control by the sector regulator (the Energy and Water Regulation Commission (hereinafter, EWRC)) and (2) whether in its enforcement practice against those undertakings, the BCA is following the legal standards adopted by the EU courts[1].

Resumé

Au cours des dernières années, l'attention de l'Autorité bulgare de la concurrence (ci-après, ABC) s'est concentrée sur le comportement des entreprises opérant sur les marchés réglementés des services publics, tels que l'énergie, l'eau et les communications. Typiquement, ces sociétés sont dominantes en raison de leurs licences exclusives pour opérer dans un certain territoire et donc le contenu de leurs relations contractuelles avec les clients est souvent défini dans des termes et conditions générales (ci-après, CGV) adoptées ou approuvées par le régulateur sectoriel respectif. La plupart ou tous les aspects de leur politique de prix sont également soumis à la réglementation du secteur. Typiquement, ces entreprises sont dominantes en raison de leurs licences exclusives pour opérer dans un certain territoire et donc le contenu de leurs relations contractuelles avec les clients est souvent défini dans des termes et conditions générales (ci-après, TCG) adoptés ou approuvés par le régulateur sectoriel respectif. La plupart ou tous les aspects de leur politique de prix sont également soumis à la réglementation du secteur. En analysant d'une façon critique deux décisions marquantes de l'ABC concernant les abus d'entreprises actives sur les marchés de l'énergie, ce papier soulève les questions suivantes: (1) dans quelle mesure l'ABC est compétente pour intervenir et sanctionner ces entreprises pour des comportements soumis à un contrôle réglementaire de la part de l'autorité de régulation du secteur (Commission de régulation de l'énergie et de l'eau (ci-après, CREE)) et (2) si dans sa pratique d'exécution contre ces entreprises, l'ABC suit les normes légales adoptées par les courts de l'UE.

Key words: abuse of a dominant position; Bulgarian competition authority; exploitative abuses; energy sector; sector specific regulation

JEL: K21

I. Introduction

This article examines the implementation of competition rules in the energy markets in Bulgaria and presents a critical analysis of the decisional practice of the Bulgarian Competition Authority, with focus on two specific decisions.

[1] Refers collectively to the Court of Justice (CJ) and the General Court (GC) throughout the text.

In the past few years, the BCA intervened and sanctioned energy companies. This trend reached its peak in 2015, when five out of seven infringement decisions were directed against companies operating on the energy markets. These companies are considered dominant because they hold exclusive licenses for a certain type of business, which means that they face no competition in the relevant market by virtue of law. Thus, their behaviour is not capable to exclude or foreclose any potential or actual competitors from the markets on which they operate[2]. What remains is to check whether such companies could commit exploitative abuses and in what form.

According to its 2015 Annual Report, the BCA intends to continue to focus primarily on markets where there is a sole service supplier in each territory and whose conduct could directly affects the interests of consumers. The best interpretation of this statement is that the BCA intends to investigate markets where a company is dominant because of its exclusive licenses to operate in a certain territory and where consumers are more likely to be harmed. It clearly means that the BCA refers to practices that directly harm consumers, such as exploitative abuses (excessive pricing or unfair trading conditions). Arguably, some of the infringement decisions adopted by the BCA so far could not fit well into the notion of exploitative abuse. The decisions seem to incriminate the dominant position in the energy sector itself even in the absence of any explicit exploitative abuse.

We will analyse below two decisions adopted in the period 2013–2015, dealing with both regulated and non-regulated activity.

Through its decision 506/08.05.2013, the BCA sanctioned the public supplier of electricity in Bulgaria, Energo-Pro Sales, for terminating supplies to a business customer who failed to pay the price for electricity it consumed. Energo-Pro Sales is a company holding an exclusive license for the sale of electricity at a regulated price in North-Eastern Bulgaria.

[2] However, the situation does not preclude accusations of exclusionary practices in connected relevant markets. For example, in several cases, the BCA sanctioned distribution companies for restricting the entry of new capacities of renewable energy into the upstream market for production of energy by delaying or denying access to their distribution grid. Since renewable energy producers do not face direct competition because the entire volume of energy they produce is mandatorily purchased at a preferential price, higher than the market price, and for some other reasons, including the fact that the distribution company does not operate on the upstream market for production of energy, the BCA decisions establishing these infringements were subsequently cancelled by court. For example, judgement no 8050 of 12.06.2014 under case 2669/2014 of the Supreme Administrative court (three-member panel), upheld by judgement no 11780 of 7.10.2014 under case 10392/2014 of the Supreme Administrative Court (five-member panel).

More recently, through three separate decisions[3], the BCA sanctioned electricity distribution companies operating the electricity network at low and medium voltage (LV and MV) in different exclusively licensed areas in Bulgaria for imposing excessive prices for providing access to the pylons of their grid to companies operating at the retail market of the distribution of television programs and internet through cable (referred to as cable operators).

If the intervention of the BCA amounts to over-enforcement, which means that the practice could be considered abusive when it is not, it could discourage the dominant company's incentive to innovate and to provide better services (Motta and de Streel, 2006)[4] or even may lead some companies to abandon future investments plans or dispose of their current investment in the respective country[5].

The aim of this article is to evaluate critically the BCA's enforcement practices in the energy markets in Bulgaria and to provoke a discussion on the need some of these practices to be reconsidered. The structure of this article is organised as follows. Section 2 discusses briefly the competition rules on abuses of dominant position in Bulgaria. The other provisions of competition law in Bulgaria are beyond the scope of this article because the undertakings operating in some energy markets are considered dominant due to the exclusive licenses to operate in a certain territory and they are predominantly investigated under the abuse framework. This section also reviews the specific sector regulation in the energy sector in order to clarify the interplay between competition law rules and the regulatory instruments. Section 3 reviews the decisional practice of the BCA in the energy markets with focus on two decisions. Subsequently, it evaluates briefly the standards developed by the EU courts.

On the basis of the findings of the previous sections, the article concludes that the dominant undertakings operating in regulated markets should not be investigated for alleged exploitative pricing or exclusionary abuse based on the price of goods or services or any other trading conditions when these price or terms are not freely determined by those undertakings but subject to a specific sector regulation (set or approved by a sector regulator). Further, the BCA should put some limits on its interventionist appetite to control

[3] Decisions 449, 450 and 451 dated 23.05.2015 under file no 501/2013.

[4] Motta and de Streel claim that: "Excessive price actions may also undermine the investment incentives of the dominant firms. High prices and profits should be seen in general as the reward for a firm's efforts, innovations and investments, and firms indeed invest and innovate precisely because they are able to appropriate the benefits from their risky investments". See Fletcher and Jardine, 2008; Motta, 2004.

[5] According to the publicly available information, the majority shareholders in those three distributing firms commenced international investment arbitration against the Republic of Bulgaria for the lack of adequate protection of their investments at ICSID at the World Bank.

those markets regardless of the fact that similar competences are granted to the sector regulator. However, although this argument has no legal support at EU level, it has support at the scholarly literature (Motta and de Streel, 2006; Röller, 2008).

II. Legal background

1. Competition law in Bulgaria

At the end of 2008, the Bulgarian Parliament adopted the new Competition Protection Act (hereinafter, CPA), which ensured full coherence of the national legislation with the European *acquis* for efficient enforcement of competition rules, including Articles 101 and 102 TFEU[6]. Pursuant to Article 19 CPA, a monopolistic position of an undertaking is a position, according to which the company has the exclusive right to perform a certain type of economic activity by virtue of the law. The term "dominant position" is defined in Article 20 CPA as a position of an entity which, because of its market share, financial resources, opportunities for market access, technology level and business relations with other undertakings, may hinder competition in the relevant market since it is independent from its competitors, suppliers or clients. The possession of a dominant or monopolistic position is not itself prohibited. The CPA prohibits any conduct of undertakings enjoying monopoly or dominant position, as well as the conduct of two or more undertakings enjoying a collective dominant position on the relevant market, that may prevent, restrict or distort competition, such as:

1. Impose directly or indirectly purchase or sale prices or other unfair trading conditions;
2. Limit production, trade and technical development to the detriment of the consumers;
3. Apply dissimilar conditions for equivalent transactions to certain partners thereby placing them at a competitive disadvantage;
4. Make the conclusion of contracts subject to acceptance by the other party of supplementary obligations or to the conclusion of additional contracts, which, by their nature or according to common commercial usage, have no connection with the object of the main contract or with its performance;

[6] The new CPA replaced the Law on Protection of Competition of 1998 (repealed).

5. Unjustified refusal to supply goods or to provide services to actual or potential customers in order to impede their economic activity.

The listing of the possible forms of abuse is not exhaustive[7] but even if the list is illustrative, an abusive behavior of a dominant company should be capable to distort or harm competition in a market and the potential or actual anti-competitive effect should be capable to harm consumers (Monti, 2009, p. 161).

When the dominant undertaking is engaged in practices that impose unfair prices, consumers can be harmed directly (exploitative abuse). If there is sufficient competition on the market, the dominant company cannot charge supra-competitive prices to its customers. In those cases, the dominant company's behaviour could be focused on foreclosing its competitors (exclusionary abuse). Having foreclosed its competitors, the dominant undertaking can then start charging excessive prices because the competitive constraint imposed by its competitors is removed (van der Wounde, 2008, p. 617, 640). In this vein, exclusionary abuses harm consumers indirectly through their anti-competitive effect on the competitive structure (Marinova, 2016, p. 387–408). This position was made clear yet in *Continental Can* where the ECJ established that consumers may be harmed – either directly, when prices are raised above the competitive level (exploitative abuse), or indirectly, when the competitive structure of the market is damaged (exclusionary/anti-competitive abuse, which reduces competition)[8].

While exclusionary abuses can be accomplished through various strategies and conduct (predatory pricing, margin squeeze, fidelity rebates, tying, bundling, refusal to deal), exploitative abuses are predominantly abusive pricing[9], which means imposing of "prices set by a dominant undertaking excessively above the competitive level in order to exploit its customers" (Hou, 2011, pp. 47–70).

The distinction between exploitative and exclusionary behaviour is manifest in the practice of the BCA.

The BCA ascertained previously that in cases of exclusionary abuses, the dominant company operates in two vertically related markets and its behavior is directed to foreclose of actual or potential competitors on the downstream market. The BCA argues that the presence of anti-competitive effects of the conduct of the dominant undertaking is associated with foreclosure of actual

[7] ECJ judgement of 21.06.1972, Case 6/72 *Europemballage Corporation and Continental Can Company Inc v Commission*, ECLI:EU:C:1973:22, para 26.

[8] Ibidem.

[9] Exploitative conduct may raise 'other' than pricing condition but most recent contributions focus on the pricing aspect. For that reason, it is accepted that exploitative conduct is usually called excessive pricing (Paulis, 2008, p. 515).

or potential competitors in the downstream market. Respectively, in the case of exploitative abuse, the dominant undertaking operates only in the upstream market and its conduct is against the interests of its customers operating in the downstream market, creating a risk of harm to effective competition between them[10].

From the decision of the BCA it appears that the criteria distinguishing between exploitative and exclusionary abuses depend mainly on the level of the market in which the dominant undertaking operates – whether it operates in both vertically related markets or just in the upstream market. This view is subject to criticism because the markets in which the dominant undertaking operates are not relevant to determine the type of abuse. Exclusionary abuses could occur when the dominant company forecloses its competitors in the same market[11]. A typical example is so-called "predatory pricing". An approach of the BCA that exploitative abuses create a risk of harming effective competition between its customers operating in the downstream market is also not acceptable. Exploitative abuses create direct harm to the customers of the dominant undertaking and the question of how those non-end customers[12] compete with each other in the downstream market is irrelevant. Such novel theory introduced by the BCA associating the exclusionary effects (in the downstream market in which the dominant undertaking does not participate) with exploitative behaviour (at the up-stream market) will be further criticized in the below analysis.

In another decision of the BCA, an exploitative abuse is defined as a unilateral behavior of a dominant company, which obtains benefits that it would not be able to achieve if the market in which it operates was competitive.[13] This definition is closer to the essence of exploitative abuses, which, as we shall see below, is aimed at directly harming consumers.

When the dominant company is engaged in exploitative abuse, it takes advantage of its position to impose on its customers prices that are unreasonably high in view of the economic value of the product or service and prices would not be at that level if the market were competitive. In those situations, the

[10] BCA Decision no 843/2013.

[11] If a dominant company is active in two or more related markets it may also use its position in one market to abuse on a related market, the so-called 'leveraging' abuses. In those cases a dominant company might foreclose its competitors on the related vertical market. See e.g. CFI judgement of 25.10.2002, Case T-5/02 *Tetra Laval v Commission*, ECLI:EU:T:2002:264; Commission Decision 88/138/EEC of 22.12.1987, *Eurofix-Bauco v Hilti* (OJ L 65, 11.3.1988, p. 19).

[12] We refer to companies, which purchase goods or services from the dominant undertaking in order to provide their own services to the end consumers. In the analyzed case the cable operators were in such position of non-end "customers".

[13] BCA Decision CPC-617/2010.

dominant company can raise prices unreasonably, and the consumers cannot switch to an alternative supplier (because of the lack of competitors or because an existing alternative supplier is not able to fully satisfy demand, for example due to the lack of capacity). This form of abuse is qualified as exploitative because it results in a direct loss of consumer welfare (O'Donoghue and Padilla, 2014). This is the difference between exploitative and exclusionary abuse in which consumer welfare is damaged indirectly by damaging the competitive structure. It seems that the BCA has difficulties in making this differentiation, which is crucial for the appropriate implementation of the rules of the law of protection of competition in Bulgaria.

Exclusionary and exploitative abuses are identified in the Guidelines of the European Commission's priorities in the application of Article 82 EC (now Article 102 TFEU)[14]. The European Commission recognised that exclusionary conduct harms the competitive process in the internal market and a company holding a dominant position excludes their competitors by means other than competing on the merits of the products or services they provide[15]. Respectively, conduct which is directly exploitative to consumers, for example charging excessively high prices or certain behaviour that undermines the efforts to achieve an integrated internal market, is classified as exploitative abuse[16]. However, there have been very few excessive pricing cases under Article 102 probably due to the European Commission's unwillingness to act as a price regulator[17].

From the above it is safe to conclude that the competition rules as regards abuse of dominant position in Bulgaria comply with the rules existing in European competition law. The same conclusion cannot be expressed with regards to the BCA's interpretations mentioned above.

2. Sector specific regulation in Bulgaria

The Bulgarian Energy and Water Regulatory Commission (EWRC) was established in 1999, based on Article 11(2) of the Energy and Energy Efficiency Act (EEEA) in Bulgaria. The EWRC's main tasks are to regulate the activities in the energy sector, pursuant to Article 21 of Energy Act. The most important powers of the EWRC relate to the licensing of companies

[14] Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ C 45, 24.2.2009, p. 7–20); hereinafter, Guidance Paper.

[15] Guidance Paper, para. 6.

[16] Guidance Paper, para. 7.

[17] XXVIIth Report on Competition Policy (1997), para. 77.

active in the energy sector (public suppliers, distribution network operators, traders, the transmission network operator, producers above certain level of installed capacity, etc.), price and costs regulation, approval of GTCs regulating access to the transmission and distribution network and commercial relations with customers, etc. A detailed listing[18] of all competences is not necessary for the purpose of the present article but what is obvious is that the regulator has a really broad scope of powers to intervene in the energy sector.

The annual report by the EWRC is required to include a statement about preventing distortion and restrictions on competition in energy markets as well as their efficient functioning. This report has to be forwarded to the Agency for the Cooperation of Energy Regulators (ACER) and the European Commission.

From the above it is clear that the activities and pricing policies of the companies operating in the energy market are subject to special sectoral regulation. Therefore, sector regulators have a certain competence to analyze and support the development of competition in those markets. Moreover, according to Article 71 of the Bulgarian Energy Act, the dominant companies charged with the provision of public interest service consisting of transmission or distribution of electricity, heating and natural gas shall be subject to the CPA's provisions to the extent they do not impede *de facto* or *de jure* the discharge of their duties. From this provision, one may conclude that the efficient fulfilment of their licensing obligations should have priority over the rules of the CPA.

Additionally, the European Commission in its Guidelines for the Commission's priorities in applying Article 82 of the EC Treaty in the area of abusive exclusionary conduct by dominant undertakings, pays particular attention to the conduct of the companies on the regulated markets. It indicates that in the application of the general principles of enforcement, the Commission will consider the specific facts and circumstances of each case. For example, in the case of regulated markets, conducting its assessment, the Commission will consider the specific regulatory environment[19].

In one of the very few publications regarding competition law in Bulgaria (whose authors were members and officers of the BCA at that time), presents an interpretation according to which the BCA, in its capacity of a general regulator, is not competent to investigate whether prices of goods or services are "unreasonably high" when such prices are regulated by an independent regulator (e.g. EWRC) (Nikolov et al., 2009). Otherwise, it could lead to the duplication of powers of sector-specific regulators. This understanding is also supported by the authors of this paper.

[18] For detailed listing, please refer to: http://www.dker.bg/pageen.php?P=417 (30.05.2017).
[19] Guidance Paper, para. 9.

The provider of regulated services is not free to determine the price for these services and therefore cannot influence the revenues generated by the provision of such services or their cost. In services with regulated prices it is not only the final price of the service, but also the cost of implementation and the calculated profit (margin) as well as the rate of return, which has to be taken into account. We believe that prices which are not set freely by dominant undertakings should not be investigated as an exploitative abuse, since the setting of such regulated price is not an unilateral action of the dominant undertaking but of a state-mandated third party – the sector regulator. Sector regulation is introduced mainly in areas where the consumers need to be protected and there is no sufficient level of competition (otherwise, competition would be expected to promote consumer welfare). If any sector regulator, in principle a government agency, acts in a manner which may be considered anti-competitive, it is the state and not the dominant undertaking which shall be held liable for violation of competition rules.

III. Case law

1. Jurisprudence of the EU courts

Exploitative abuses have been examined in a limited number of cases, the most prominent of which are *United Brands*[20], *General Motors*[21], *British Leyland*[22] and *Port of Helsingborg*[23]. The *General Motors* case was the first in which the European Commission sanctioned a dominant undertaking for imposing excessive pricing[24]. The Commission considered that General Motors' prices were excessive in relation to the economic value of the service. In the subsequent judicial review, the Court of Justice considered whether the prices charged by General Motors was excessive in comparison with prices of competitors and with prices charged by the company in the past. Taking account of the dominant company's explanations, the ECJ annulled the Commission's decision due to lack of sufficient evidence.

[20] ECJ judgment of 14.02.1978, Case 27/76 *United Brands Company and United Brands Continental BV v Commission*, ECLI:EU:C:1978:22.

[21] ECJ judgment of 13.11.1975, Case 26/75 *General Motors Continental NV v Commission*, ECLI:EU:C:1975:150.

[22] ECJ judgment of 11.11.1986, Case 226/84 *British Leyland Plc. v Commission*, ECLI:EU:C:1986:421.

[23] Commission Decision of 23.07.2004, Case COMP/A.36.568/D3, *Scandlines Sverige AB v Port of Helsingborg*.

[24] 26/75 *General Motors Continental NV*.

In *United Brands*, the European Commission reached the conclusion that the price of bananas in Germany was too high, comparing it to the price of bananas of the same supplier in other countries, and the price of bananas from other brands.[25] The Commission concluded that if the supplier can sell the same product at a lower price in one country with profit, then it follows that charging a higher price on the same product in another country is unfair. Reversing the European Commission's decision, the Court of Justice adopted a standard according to which the Commission had to demonstrate that the price is high not only compared to the price of the product in a neighbouring geographic market but also to establish that the price increased by itself over a specific time period. Thus, the Court raised the question about the comparison between the cost and price of the product as part of the assessment of whether the price is unreasonably high. The Commission's decision was annulled by the Court of Justice due to lack of sufficient evidence supporting the Commission's allegations.

In the most recent decision – *Port of Helsingborg*, in considering whether prices were excessive in relation to the economic value of the service, the Commission developed a standard of proof explicitly referring to non-cost related factors such as consumer preferences, which bring additional value to the service. The Commission rejected complaints of ferry operators that the port, a dominant operator, charged excessive prices, clarifying the legal standard applicable for excessive pricing[26].

The standard of proof developed by the Court of Justice may be summarized as follows:

(1) Considering whether the price is excessive by comparison between prices and costs incurred;
Comparing prices and costs to determine excessive pricing is problematic because it might be difficult, if not impossible, to establish costs, especially if the dominant company produces many different products and operates in different markets, since there are no rules on how the businesses should allocate common costs of producing various products. Moreover, difficulties might arise in finding an appropriate benchmark (the most widely applicable is the use of long-run average avoidable cost (LRAIC)). Practical difficulties might occur in establishing a reasonable margin of profit. Finally, this test might not be appropriate in the industries in which the imposition of excessive prices is needed to recover higher initial costs or costs for research and innovation. For that reason, the Court of Justice considered that establishing the

[25] 27/76 *United Brands Company*.
[26] Case COMP/A.36.568/D3 *Port of Helsingborg*, paras 147, 149.

economic value of the product/service is essential as a second step of the legal standard.

(2) Considering whether the imposed price is unfair per se or compared to the price of competing products;

These judgements clearly show that the application of excessive pricing may constitute an abuse of a dominant position but also that the standard adopted by the Court is very high.

The next section of this paper will analyze the decisional practice of the BCA to clarify whether it has the attribution to intervene and sanction undertakings for conduct, which is subject of regulatory control by the sector regulator, and whether the BCA is following the standard of the EU courts.

2. Decisional practice of Bulgarian competition authority

In Decision no 506 of 08.05.2013, the BCA sanctioned a public electricity supplier for the termination of the supply of electricity due to the failure of a commercial customer to pay the price. The customer was the only supplier of water and sewerage services in the relevant market – the district of Dobrich[27]. Hence, its services were of great importance for the local consumers. Pursuant to Article 98a of the Energy Act (EA), the suppliers of electricity, including the defendant, sell electricity under publicly announced GTCs approved by the regulator. The GTCs in question governing the relationship between the parties for the relevant period were approved by the sectoral regulator in its Decision no OU-061/07.11.2007.

According to Article 123 of the EA, the dominant supplier of electricity has the right to suspend the supply of electricity if the client breaches its duties under the contract for sale of electricity, including failing to timely make outstanding payments.

The water and sewage operator in Dobrich (a state-owned company) had permanent difficulties in paying its bills for the supply of electricity on time. Throughout the years the parties signed several agreements that aimed to reschedule the payments. However, the outstanding debt of this client was still exceeding BGN 3 million (approx. EUR 1.5 million). Moreover, the client breached the last rescheduling agreement by not only delaying its monthly installment payments covering old debt, but also by not paying on time the obligations under current invoices.

As a result, the electricity supplier initiated an interruption of its services according to the GTCs. The dominant supplier of electricity fulfilled its

[27] The territory of Bulgaria is divided into 28 districts.

obligations under Article 20 of its GTCs, and made the required written notice to the client containing a warning that if the accumulated debt is not paid within a specified period, electricity supply will be suspended.

In this case the BCA examined whether and to what extent the public supplier had followed the procedure for the suspension of the electricity supply established by the Energy Act and the GTCs to assess whether Article 21 CPA was breached. In our view, in this case, the BCA was trying to appropriate the powers of the sector regulator, which is the competent authority to monitor compliance with the Energy Act and the GTCs. Moreover, there are specific penalties under the Energy Act, which the sector regulator is entitled to impose on the license holder for breach of this procedure. The approach of the BCA is objectionable since it entails at least two risks: it allows one and the same behavior to be assessed for compliance with a certain rule but by different regulators and be found to constitute an infringement of both competition rules and the rules of specific sector regulation, theoretically exposing the dominant company to be sanctioned twice. Such potential accumulation of liability could infringe the basic legal principle *non bis in idem*.

Another criticism which can be made is in the treatment of a company's exercise of a legal right under a special law as an offense under another law. The underlying position of the BCA was that regardless of the fact that the special sector regulation provides for such a possibility, the suspension of supplies by the dominant company might constitute an abuse in the light of the particular facts of the case. Moreover, according to the BCA, the dominant company should have taken into account the high social importance of the services provided by the client (supply of fresh water) and should have considered a recourse to other methods of debt collection (for example through civil enforcement). The BCA ignored the objection that the special sector regulation and the GTCs did not distinguish between different categories of clients exposed to the possibility of having their supplies suspended based on the nature of their business.

Furthermore, in its decision the BCA placed additional requirements as part of the procedure for implementing the suspension of supply on top of those provided for in the EA and the GTCs. According to the BCA, the public supplier abused its dominant position by failing to provide certain information to the client in advance. This was information about the exact time when the suspension would start/end and about the particular points of supply to which supplies would be suspended[28]. Surprisingly, the BCA's "requirements"

[28] The client has more than one site and connection points to the network. In our view, a requirement to indicate in advance the specific points of supply to which the supplies will be suspended has no sense, since the supplier is entitled to suspend the supplies to all sites simultaneously.

cannot be found either in the EA or the GTCs of the energy company, which govern the procedure in question. Such interpretation of the law which in fact creates new rules rather than assesses implementation, in our view, constitutes inadmissible attempt for appropriation of the powers of the sector regulator by the BCA. The BCA is entitled neither to enact rules in the sphere of energy regulation, nor to extend the scope of the existing rules.

The dominant company argued that the cessation of electricity supply in the case of overdue unpaid bills which is subject to the statutory right cannot constitute an abuse of a dominant position. If there were any violations of the procedure, they could serve as a basis for engaging the administrative liability of the company under the EA but cannot be penalized as a competition infringement. It should be noted that in the analyzed case, the BCA did not indicate which type of abuse had taken place. From The analysis of arguments in the BCA decision allows to conclude that the authority viewed it as an exploitative abuse. However, it was not clear what benefits the dominant company could obtain by suspending the supply to a customer who did not pay for services, except to limit the damages it incurred.

According to the EU case law, refusal of supply has never been classified as an exploitative abuse because as a result of such refusal, the dominant undertaking could not obtain an unfair advantage. This refusal would have anticompetitive effects only if the dominant undertaking on the upstream market and the customer which was refused delivery were competitors in the downstream market. In such a case, the customer cannot operate in this market (the effect is to exclude a competitor). Apparently, due to the impossibility of to justifying an exclusionary abuse due to the absence of competition on the downstream market (not only between the parties, but in general), the BCA did not define the type of abuse. From the above considerations it is obvious that the abuse cannot be defined as either exclusionary or exploitative. The energy supplier suspended supply to the customer because the latter did not fulfill its obligations to pay the bills. The objection of non-performed contract is a fundamental principle in civil legal relations under which each party may refuse to perform its obligation under the contract if the counterparty fails to perform its own[29]. It is a measure self-prescribed by the law, which aimed to limit the damages and to protect the commercial interests of every economic operator (regardless dominant or not).

The main shortcoming of the BCA's decision is that it fails to demonstrate the likely or actual anti-competitive effect of the behavior in question.

The BCA's decision was challenged by the sanctioned company before the Supreme Administrative Court on several grounds, some of which were

[29] A form of the Roman *exception non adimpleti contractus*.

discussed above[30]. Courts of both the first and second instance ruled in favor of the dominant company and repealed the BCA decision.[31] The Courts found that the market on which a company is dominant may be different from the market on which the abuse has effect, but disagreed with the BCA that the public supplier had not followed the procedure for supply suspension as provided by the EA and the GTCs. The Court analyzed each of the requirements for suspension and how it was complied with, and reached the conclusion that the dominant company exercised its statutory right to suspension "in conformity with the law". Thus, the behavior of the company could not be qualified as abusive. Further, the judgement of the five-member panel said that the behavior of the dominant company had objective justification – the fact that the client was in breach of obligations. It was also noted that the BCA had not explained why the investigated conduct was not qualified under Article 21(5) CPA as refusal to supply, but under the general prohibition.

In the authors' opinion, regardless of this outcome, the judgements in this case have a serious defect in that they did not rule out the possibility of duplication of liability under both energy sector regulation and the general competition regulation. The issue of BCA's competence was not touched upon by the courts and thus the judgments seem to be implying that the BCA is competent to examine compliance of a company's behavior with specific sector regulation. Arguably, there are examples (although not regarding excessive pricing) of the European Commission intervening in national regulated markets where the regulator did not intervene or when it endorsed anticompetitive behavior of a dominant undertaking (Paulis, 2008, p. 520)[32]. However, many prominent commentators believe that intervention in exploitative cases under Article 102 should be limited only to very special circumstances such as significant barriers to entry, markets unlikely to self-correct and where there is no regulation (Paulis, 2008, p. 530; Motta and de Steel, 2008). Others suggested that there is less risk of errors "if the matter is entrusted to a sector-specific regulator" rather than to competition authorities which are "ill-equipped" to intervene in controversial price-related remedies (Forester, 2008).

[30] Supreme Administrative Court is the Bulgarian court which reviews appeals against the decisions of CPC in two court instances. The court acts as first court instance in a three-member panel and as second and last court instance sitting in a five-member panel.

[31] The final decision of the five-member panel was announced on 13.10. 2016.

[32] See Commission Decisions: 2003/707/EC of 21.05.2003, Case COMP/C-1/37.451, 37.578, 37.579 *Deutsche Telekom AG v Commission* (OJ L 263, 14.10.2003, p. 9–41); of 4.07.2007, Case COMP/38.784 *Wanadoo España v Telefónica* (OJ C 83, 2.4.2008, p. 6–9); of 16.07.2003, Case COMP/38.233 *Wanadoo Interactive*.

One of the main issues raised by the sanctioned company, namely the question of the relevant market on which competition was allegedly hindered by its behavior, was not explored at all and thus left out of the scope of the judgments. If it was an exploitative abuse, why then the BCA justified the anti-competitiveness as negative impact on the interests of the final consumers of the water supplier who were left without water supplies for a day? Shall the dominant company be held liable for the interests of the consumers of a client in breach of its obligations and is it possible to have such indirect exploitation? Such interpretation would put too many responsibilities on the companies acting in the energy sector, including foreseeing and caring about how the relations with their clients may affect the relations between those clients and their consumers.

In very similar decisions issued in May 2015, the BCA sanctioned three regional operators of the electricity distribution network – the local subsidiaries of CEZ, E.ON and Energo-Pro – for imposing unjustified high prices for providing access to the pillars of their distribution grids. The pillars are used by cable operators build networks and provide their services in the retail market of distribution of television programs and internet access.

The Electronic Communications Act (ECA) and the Ordinance No 35 of 03.11.2012 regulates the relations regarding electronic communications and rules and standards for design, construction and commissioning of cable electronic communications networks and related infrastructure. According to Article 281 ECA, the establishment of the electronic communications networks and the facilities infrastructure associated with them is carried out under the Act and under the Territory Development Act. According to section 5 of the same article, the operators have the right to build electronic communications equipment related to the infrastructure on the basis of a written contract with the owner (which in this case is the operator of the distribution network). The operators of the distribution network provide access to their infrastructure on the basis of a rental contract.

According to the EA, only one license for distribution of electricity is granted for a given territory[33]. Thus, each of the three companies had a monopoly for the license activity in the geographic area in which it operated the Medium and Low Voltage network. However, none of those companies operated on the TV and internet retail market. Hence, there is no competition between them and cable operators as far as they operate in different relevant markets.

On the other hand, the BCA correctly observed that low voltage (LV) pillars are built and maintained for the main license activity of the companies, namely

[33] For that purpose the territory of the country is divided into three license areas, each consisting of several districts. There is also a fourth distribution company which operates only in a single touristic village.

the distribution of electricity, while providing cable operators with access to the pillars network was an additional business activity outside of the scope of their license. Being non-regulated, the rental price for access to the pillars was assessed by the BCA in the light of the abuse of dominance prohibition under Article 21 CPA.

In terms of market definition, the BCA held that the pillars of each of the three distribution companies constituted a separate relevant market. Such finding is objectionable since there were other methods and infrastructures for building electronic communication networks, including the underground channel network operated by the national telecommunication incumbent. Moreover, the ECA prohibits building of cable networks in the air in cities of more than 10,000 people and the underground channel is the only legal alternative in such places. The telecommunication incumbent was qualified by the Electronic communication regulator as a company having a significant impact on the market and thus its price for access to the underground channels was regulated. The BCA compared the non – regulated price of the distribution companies and the regulated price of the telecommunication incumbent for building a cable network on a 100 m. distance and held that the difference (within the range of circa 20%) was enough to justify that those services constitute a separate market. In addition, the BCA argued that there were small villages where the underground network was not available at all. However, the BCA extended the dominant position of the sanctioned company to the entire licensed territory, without distinguishing between the cities where the underground network had parallel coverage and places where it had not.

In the authors' opinion, this approach is objectionable. The price difference was not large enough to justify defining two separate relevant markets. Further, there had been a migration of operators from the underground network to the pillars in the past due to the lower rental price of the pillars, which undoubtedly signaled interchangeability between them. Most operators used both pillars and underground networks and some of them have stopped to use pillars after having invested in construction of private local underground networks. These networks were totally ignored by the BCA as a possible alternative to the pillars. Thus, the narrow market definition based on qualitative analysis only (ignoring quantitative criteria), led the BCA to the conclusion that each of the three distribution companies had a dominant position regarding the pillars of its grid.

Providing access to the grid was based on lease contracts between the owner of the network and the cable operators. The terms and conditions of the contract were standard, with identical content for different tenants and the price was determined unilaterally by the dominant company. According to the BCA's findings, the price had not been changed since 2008 (2009 for one of the

accused companies) until the date of the BCA decisions in 2015. Nevertheless, the BCA held that the investigated price was unreasonably high during the whole period of more than 6 years.

In analyzing the costs and methods for setting the rental price, the BCA found that the dominant companies had no internal rules or methods for accounting separately the additional costs associated with this ancillary activity. The BCA found that the dominant company did not maintain accounting of the costs and revenues from the licensed activity separately from those associated with the ancillary non-regulated services they provide, including providing paid access to their pillars. The conclusion of the BCA that the price was unreasonably high was based entirely on the lack of separate accounting. The BCA went further to state that there were no proved costs for the investigated service and thus there were no prices that could be justified in such circumstances. Thus, the competition authority felt free from the burden of proof that the prices were not reasonably related to the costs of the service. On the contrary, the BCA based its conclusions on the inability of the dominant companies to justify their prices.

The approach of the BCA in this case conflicts with its own stance in similar cases in the past and with cases handled by the European Commission and the EU courts.

Firstly, the BCA did not even try to evaluate the economic value of the service in question, regardless of the strong preference the cable operators had for the pillars. Such client preferences are important factor for calculating the economic value according to the *Port of Helsingborg* case[34].

The BCA rejected an expert opinion provided by one of the sanctioned companies, which calculated the economically justified price to be higher than the one under investigation. The reason was that according to the BCA, the lack of separate accounting made the conclusions flawed.

Secondly, the BCA ignored the fact that the costs acknowledged for regulatory purposes were quite below the actual costs of the companies, including the costs for operating and the maintenance of the distribution grid. It is a common practice for the sector regulator to approve costs for the licensed activity below the full requested amount in order to keep the regulated prices of the electricity in a socially accepted range. Only those costs which the sector regulator had acknowledged as costs for the licensed activity were covered by the regulated prices. However, the BCA disagreed with the approach of experts who used for their calculations only this uncovered part of the actual costs to avoid double counting and applied to them a percentage representing that part of each pillar which can be used by the cable operators

[34] Case COMP/A.36.568/D3 *Port of Helsingborg*.

(ca. 17%). The BCA insisted that it was not important what costs were approved by the regulator as costs for the licensed activity but what costs the companies accounted as costs for the licensed activity.

In one of the three decisions, the BCA indicated that the experts' model could be applied in the future but not for the past. In this sense, it suggested that the dominant company could apply in the future prices which are higher than the prices under investigation, provided that those practices are supported by the relevant calculations and proper cost allocation. This statement actually showed that the problem was not in the level of the price *per se*, i.e. its nominal value, but in the method of accounting the costs and calculating the price. Following this approach, it would mean that even a price which is low as a nominal level can be held anticompetitive if an adequate reasoning is absent. This seems to be a too wide interpretation of the notion of excessive pricing.

Finally, the BCA did not conduct the assessment with a view to the settled case law of the EU courts discussed above in section II of this paper.

In the recent case law of the European Commission and the CJ, the infringement in the form of excessive prices is demonstrated not by an isolated analysis of the cost but through a two-step test that includes, first, comparing the price with economic value of the good or service, the so-called 'economic value'. This benchmark is established in the judgment in *General Motors*, and confirmed in *Deutsche Post AG*[35]. It is held that the economic value differs from the cost of production and cost[36]. When there are not enough details in accounting to determine the economic value of the service, as was the case in *Deutsche Post AG*, the European Commission used an alternative benchmark but it did not reach automatically the conclusion that the price was unfair. Despite the lack of transparency and separate accounting for the different services, the Commission determined the economic value of the service analyzed as a percentage of the price of other similar services provided by the same company. In the case of *Deutsche Post AG*, the European Commission found that the analyzed price is too high because it exceeded by 25% the economic value of the analyzed service. It was found that excessive or disproportionate costs are also not considered when assessing whether the price is too high, which the BCA also disregarded because its main argument was the distribution of costs between different activities – those that are covered by the license and the additional ones that are not regulated.

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[35] Commission Decision 2001/892/EC of 25.07.2001, Case COMP/C-1/36.915 *Deutsche Post AG v Commission* (OJ L 331, 15.12.2001, p. 40–78).

[36] In the decision in case *Port of Helsingborg*, the European Commission has determined that the method "cost-plus" is not sufficient to determine whether enterprise abusing the price, so the European Commission is looking for what is the economic value of the service provided.

The BCA refused to compare the price of the dominant company with those of other electricity distribution companies in the country operating in adjacent geographic markets, although this approach was applied by the European Commission in its decision in Case 110/88 *Lucazeau v SACEM*. In our view, this comparison is an appropriate method, given that the three electricity distribution companies operate in identical socio-economic environments, regulatory framework, social standards and purchasing power of the population. The explanation that these are different geographic markets, and therefore not appropriate to carry out this test, is questionable because this was the position accepted by the CJ in the cases mentioned above. A price comparison with the regulated price for usage of the underground channels was also refused by the BCA.

In its decision, BCA relied on isolated quotes from the *United Brands'* judgment, stating that "any other means by which it can be demonstrated excessive pricing" were allowed, but omitting to mention that what stood behind this quote were the methods developed later in the practice, namely: (1) comparing price with the costs; (2) comparison between competitors' prices or in neighboring markets; (3) comparison between the prices for same product in other geographic markets; and (4) a comparison of prices over time.

It should be emphasized that the European Commission did not analyze in any of the cited precedents whether the revenue that the undertaking under investigation realized by the production of other goods or services is sufficient to cover all its costs, including those to produce the investigated service.

From the above it appears that in this case, the BCA failed to prove sufficiently any of the elements of the two-step test developed by the EU Court and therefore its final conclusions cannot be supported. In practice, the BCA justified the breach of Article 21 CPA in a way that is completely unknown in the European practice.

All three decisions were challenged by the sanctioned companies before the competent court. The first judgement was announced in December 2016 and it concerned the CEZ decision. Although it shared the BCA's conclusions on the definition of the relevant market and the dominant position, the Bulgarian Supreme Administrative Court cancelled the BCA's decision on the merits, mainly because an opinion of experts engaged by the Court demonstrated that the price was not excessive – on the contrary, it was below the price suggested by them as fair. The court held that the BCA had transferred the burden of proof to the accused companies by requiring each of them to prove particular costs justifying the prices. This was particularly difficult, since the pillars were the main asset for the companies' licensed activity and thus all costs associated with their maintenance and operation were accounted accordingly.

The court put forward two additional arguments – there was an independent expert assessment obtained before the investigation, showing similar results and the BCA failed to analyze the market price of the service and to compare it with the prices applied by other companies performing the same service in different geographic markets. The comparison made by the experts showed that the prices of all three distribution companies were quite similar. Moreover, the price in the case at stake was not updated since 2008.

The Court emphasized that the obligation for separate accounting of the licensed activity, which the company had under Article 37 EA, was subject to control of the sector regulator. The judgment suggests that even if this obligation was breached, this could be a violation of the EA or the tax law but not a competition infringement. This is a very important conclusion, which the authors wish the Court to have expressed more definitely.

At the time of writing, there is a final judgement[37] in one of the three cases and an appealable judgment of the court of first instance in another one[38]. The main question on which the court should decide is whether the improper accounting may constitute sufficient evidence for the BCA to conclude that given price is unreasonably excessive and thus abusive, or whether even in those cases, the BCA is under the duty to define the economic value of the service and to compare the price with such value. Although not final, the last judgment seems to support the second view. It was held that even if the accounting of regulated activities had not been properly separated from the accounting of the non-regulated activities, it does not mean that the price is *per se* excessive.

IV. Conclusions

Regulated energy markets are vulnerable in terms of competition because some of them are still monopolistic. There is an obvious trend of increased competition enforcement towards undertakings operating in those markets which can be explained by the lack of difficulties for the competition authorities to establish a dominant position. The practice of the BCA clearly shows that it finds itself in a good position to investigate and sanction monopolies for all aspects of their commercial activity – both regulated and non-regulated -- and such an approach has not been explicitly rejected by the Bulgarian courts yet.

[37] The final judgement in *CEZ* case was given under case no. 1693/2017, announced on 12.04.2017.

[38] Judgement no. 6579 under administrative case no.7616/2015 announced on 29.052017.

In our view, the attempts to qualify the dominant position as abusive by itself are fundamentally wrong. Further, the dominant undertakings should not be investigated for exploitative pricing or exclusionary abuse based on the price of goods or services or any other trading conditions to the extent those prices or conditions are predetermined or approved by a specific sector regulator.

Even when the companies are investigated for their ancillary non-regulated activities, the competition authorities should pay attention to the specific regulatory context in which such companies operate. The competition authorities should not take the place of the sector regulator and investigate compliance of those companies with the specific rules applicable to their regulated business. Competition law protects different kind of public interests and therefore any overlapping is undesirable and should be avoided. To the extent that there is still scope for intervention, especially when it comes to the non-regulated aspects of the business, the competition authorities of the member states from the last waves of EU expansion, including the BCA, should be guided by the experience of the European Commission in the competition enforcement in regulated market, as well as by the case law of the EU courts.

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The *Gazprom* Case: Lessons of the Past For the Future

by

Dalia Višinskienė and Justina Nasutavičienė*

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Abstract

Under the EU Merger Regulation, if the Commission has concerns that a merger may significantly affect competition in the European Union, the merging companies may propose modifications to the project that would guarantee continued competition on the market. The Commission may declare a concentration compatible with the common market following such a modification by the parties and attach to its decision conditions and obligations intended to ensure that the undertakings comply with the commitments. In other words, commitments have to be offered by the parties but the Commission may introduce conditions and obligations if they are required to ensure the enforceability of commitments.
Meanwhile the scope to propose merger modifications and the level of discretion of the competition authority are quite different under the Law on Competition of the Republic of Lithuania, adopted almost two decades ago. The goal of this paper is to reveal those differences and, with the help of the jurisprudence of the

* Dalia Višinskienė, The Supreme Administrative Court of Lithuania, d.visinskiene@lvat.lt; Justina Nasutavičienė, The Supreme Administrative Court of Lithuania, j.nasutaviciene@lvat.lt. Article received: 30.05.2017, accepted: 21.08.2017.

Supreme Administrative Court of Lithuania in the *Gazprom* case, to explain how this may impact future cases.

Resumé

En vertu du Règlement de l'UE sur les Concentrations, si la Commission craint qu'une fusion puisse affecter considérablement la concurrence dans l'Union Européenne, les sociétés qui fusionnent peuvent proposer des modifications qui garantiraient une concurrence continue sur le marché. La Commission peut déclarer une concentration compatible avec le marché commun à la suite d'une telle modification par les parties et joindre à sa décision les conditions et les obligations destinées à assurer le respect des engagements par les entreprises. En d'autres termes, les engagements doivent être proposés par les parties, mais la Commission peut introduire des conditions et des obligations si elles sont requises pour garantir le caractère exécutoire des engagements. Pendant ce temps la possibilité de proposer des modifications de fusion et le niveau de pouvoir discrétionnaire de l'autorité de la concurrence sont très différents en vertu de la Loi sur la Concurrence de la République de Lituanie, adoptée il y a près de vingt ans. L'objectif de ce papier est de révéler ces différences et, avec l'aide de la jurisprudence de la Cour Administrative Suprême de Lituanie dans l'affaire Gazprom, d'expliquer comment cela pourrait affecter les affaires futures.

Key words: commitments; concentrations; EU competition law; Law on Competition of the Republic of Lithuania; Merger Regulation; the *Gazprom* case.

JEL: K21

I. Introduction

On May 1, 2004 Lithuania became a member of the European Union. From this date undertakings of the Republic of Lithuania, of other Member States or of the third countries, seeking to carry out a concentration in Lithuania, are subject to either the EU or national approval process, depending on whether the concentration is regarded as having a European or local dimension. Merger control was introduced in Lithuania in 1992, when the Law on Competition was adopted[1]. It was revised over time to keep track of European trends of merger regulation. In March 1999, a new revision of that law was

[1] Lietuvos Respublikos konkurencijos įstatymas (1992 m. rugsėjo 15 d. įstatymo redakcija Nr. I-2878) // TAR. Retrieved from: https://www.e-tar.lt/portal/lt/legalAct/TAR.1FACCFC52985 (5.04.2017).

adopted[2]. It defined the concepts of undertaking, concentration, acquisition of control of an undertaking, etc. and also detailed procedures to be followed by undertakings seeking to carry out a merger, established the rights and duties of the Competition Council regarding the examination of submissions and the adoption of decisions, either authorizing concentrations or imposing conditions and obligations. It also made provisions for sanctions for violating such conditions and obligations imposed by the Competition Council. The provisions of the law were modified at later stages, too, but the essential ones regarding the regulation of concentrations remain intact.

The practice of the administrative courts of Lithuania reveals that the most controversial issues in the enforcement of the provisions of the Law on Competition regulating concentrations arise in examining and assessing decisions of the Competition Council which impose sanctions on undertakings for the implementation of the concentration without notification or when the authorization of the Competition Council is not granted[3].

At the end of 2016, the Supreme Administrative Court of Lithuania adopted the final procedural decision resolving a dispute over the resolution of the Competition Council to impose a sanction on Gazprom, a public joint-stock company from the Russian Federation (hereinafter, OAO Gazprom) for the violation of a concentration condition imposed by the resolution of the Competition Council authorising Gazprom's concentration in 2004.

The circumstances of the case relating to the determination of the conditions and/or obligations of the concentration reveal differences of the regulation of this aspect of competition enforcement in Lithuanian and European Union law, which, in the opinion of the authors of this paper, are worth to be presented for legal professionals, academic society as well as undertakings participating in concentrations in the Republic of Lithuania.

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[2] Lietuvos Respublikos konkurencijos įstatymas (1999 m. kovo 23 d. įstatymo redakcija Nr. VIII-1099) // TAR. Retrieved from: https://www.e-tar.lt/portal/lt/legalAct/TAR.B8B6AFC2BFF1 (5.04.2017); hereinafter, Lithuanian Competition Act 1999.

[3] See for instance orders of the Supreme Administrative Court of Lithuania: case No A-520-634-13 of 25.04.2013, retrieved from: https://www.e-tar.lt/portal/lt/legalAct/efe4ccf05cc911e68827af6e444cca37; case No A-1699-822/2015 of 17.12.2015, retrieved from: https://www.e-tar.lt/portal/lt/legalAct/a5891160ad8411e5b12fbb7dc920ee2c; case No A-899-858/2017 of 18.04.2017, retrieved from: https://www.e-tar.lt/portal/lt/legalAct/d90062c02b6211e78397ae072f58c508.

II. Modifications to concentrations under the EU competition law

As noted in the doctrine, while mergers can generate a range of pro-competitive effects, they may also negatively affect competition on a variety of markets (Layne–Farrar, Geradin and Petit, 2012, p. 498). Thus, the European Commission has an important role to inspect and, if necessary, prohibit concentrations linked to a lasting change in the structure of competition within the common market, thereby drawing on the powers conferred by Article 101 and 102 TFEU (Cook and Kerse, 2000).

According to the Council Regulation (EC) No 139/2004[4], the Commission has to appraise concentrations within the scope of the Merger Regulation with a view to establishing whether or not they are compatible with the common market. For that purpose, the Commission must assess, pursuant to Article 2(2) and (3), whether or not a concentration would significantly impede effective competition, in particular by creating or strengthening a dominant position in the common market or a substantial part of it[5].

If the Commission has concerns that a merger may significantly affect competition, the merging companies may offer remedies ("commitments"), i.e. propose certain modifications to the project that would guarantee continued competition on the market[6]. It is important to stress that it is the responsibility of the parties to present commitments to address the Commission's concerns and thereby seek a conditional clearance of their merger. The Commission is "not in a position to impose unilaterally any conditions to an authorisation decision, but only on the basis of the parties' commitments"[7]. If, however, the parties do not validly propose commitments viewed as adequate to eliminate competition concerns, the only option for the Commission is to adopt a prohibition decision[8]. Moreover, as it was concluded from the practice of this institution, the Commission has a fairly restrictive approach towards accepting commitments after the expiry of deadlines for offering them. In such cases it is also inclined to prohibit the concentration or require the parties

[4] Council Regulation (EC) No 139/2004 of 20.01.2004 on the control of concentrations between undertakings (OJ L 24, 29.01.2004, p. 1), hereinafter, the EU Merger Regulation.

[5] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OL C 31, 5.02.2004, p. 5), para. 1.

[6] European Commission, Merger control procedures, retrived from: http://ec. europa.eu/competition/mergers/procedures_en.html (5.04.2017).

[7] Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ C 267, 22.10.2008, p. 1) (hereinafter, Remedies Notice), para. 6.

[8] Ibidem.

to make a fresh notification of the proposed concentration to encompass the proposed commitments (Tosato and Bellodi, 2006, p. 315).

Modifications to concentrations are more commonly described as "remedies" since their object is to eliminate competition concerns identified by the Commission[9]. Remedies are conventionally classified as either structural or non-structural[10]. Structural remedies are explained as generally one-time remedies intended to maintain or restore the competitive structure of the market. They typically involve the sale of one or more businesses, physical assets or other rights to address concerns about competitive harm by strengthening an existing player, creating a new source of competition or a mix of both[11]. A structural remedy needs some monitoring and – where necessary – enforcement until a divestiture is completed but this concerns only a limited period of time (usually several months) (Maier-Rigaud and Frank, 2016). By contrast to structural remedies, non-structural ones, often referred to as "conduct" or "behavioural" remedies, are ongoing remedies that are designed to modify or constrain the future conduct of merging firms[12]. They do not restructure firms or asset ownership but only permit integration subject to specific operating rules aimed to alter marketplace behaviour of the merging parties to prevent them from undermining competition[13]. Non-structural remedies are less common than structural ones in merger cases, but more common in collusion or abuse of dominance cases, and require ongoing or at least periodic monitoring. Therefore the main theoretical attraction of structural remedies is that they create the need to intervene only once: after the issue of excessive market power is resolved, the newly created competitive structure can be left to its own devices and does not require supervision which would be needed if a behavioural remedy was imposed instead (Niels, Jenkins and Kavanagh, 2011, p. 445, 446, 453, 454).

Nevertheless an effective package of remedies may contain a combination or "hybrid" of both structural and non-structural elements[14]. Hybrid measures are measures that do not affect the allocation of ownership rights but instead modify the structure of the market by, for instance, allowing the entry of a new player, mandating the merged entity to grant a technology licence to a potential competitor or to terminate exclusivity agreements, etc. (Layne-Farrar, Geradin and Petit, 2012, p. 534).

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[9] Remedies Notice, para.2.

[10] ICN Merger Working Group, International Competition Network, Merger Remedies Guide 2016, retrieved from: http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf (5.04.2017).

[11] Ibidem.

[12] ICN Merger Working Group, Merger Remedies Guide 2016.

[13] Ibidem.

[14] ICN Merger Working Group, Merger Remedies Guide 2016.

The importance of remedies in the EU merger regulation is shown *inter alia* via the Commission's effort to provide guidance (Notice on Remedies) on the types and forms of remedial actions acceptable under the EU Merger Regulation, as well as the establishment of a specialised enforcement unit, which gives internal advice on the acceptability and implementation of remedies, in this way developing a consistent application of remedies in merger cases (Bael, 2001, p. 492). One aspect showing the significance of remedies is that they all may be considered more or less burdensome in terms of fundamental rights: while structural remedies may have a bearing on property rights if, for instance, a sale of assets is required, behavioural remedies bear upon the freedom to conduct business, including the freedom to contract (Hellstrom, Maier-Rigaud and Wenzel Bulst, 2009, p. 47).

Merger Regulation in Article 6(2) and 8(2) expressly provides that the Commission may decide to declare a concentration compatible with the common market following modification by the parties, both before and after the initiation of proceedings and to that end, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market[15]. So, whilst commitments have to be offered by the parties, it is for the Commission to introduce conditions and obligations if they are required to ensure the enforceability of commitments.

As it is emphasized, a distinction must be made between conditions and obligations[16]. From the practice of the Commission it has been concluded that the way in which this institution imposes conditions and obligations has generally been clear, transparent and consistent: the fulfilment of the measure that gives rise to a structural change of the market is considered a condition, whereas the implementing steps necessary to achieve this result are considered obligations (Hoeg, 2014).

But a more important aspect are the legal consequences of a violation of remedies imposed by the Commission. If the undertakings concerned commit a breach of an obligation attached to the decision, according to articles 6(3) or 8(6) of the Merger Regulation, the Commission may revoke the decision it took pursuant to Article 6(1)(a)[17] or (b)[18]. Besides, the Commission may

[15] Remedies Notice, para. 1.

[16] Remedies Notice, para. 19.

[17] The provision states that „Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision".

[18] The provision states that "Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with

impose fines for failing to comply with an obligation[19] as well as periodic penalty payments in order to compel parties to comply[20].

When a condition attached to an approval decision is being breached, the situation rendering the concentration compatible with the common market does not materialize and the concentration, as implemented, is therefore not authorized by the Commission[21]. In that case the Commission may take appropriate interim measures to restore or maintain conditions of effective competition[22]. Moreover, if certain conditions set in Article 8.4(b) are met, the Commission may require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration. It may order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision. Also, parties may be subject to fines[23].

This regulation reveals that the violation of conditions and the violation of obligations attached to a Commission decision cause different legal consequences under the Merger Regulation. Therefore the Commission must be precise and clear identifying both when it sets remedies to ensure that the undertakings comply with the commitments they have proposed. This aspect is also important from the undertaking's point of view since it must be able to foresee the legal consequences of behaviour which might constitute a violation. Therefore the Commission usually concludes in its decision authorising a concentration that the finding of compatibility is conditional upon full compliance with the conditions and obligations of the commitments as set out in the annex, which forms an integral part of the decision. The annex specifies which provisions in the parties' commitments are considered conditions and which obligations (Hoeg, 2014). Regarding the question if the Commission can formally impose obligations which the parties have not proposed as commitments, it has been suggested that as far as the purpose of an obligation is to ensure that the conditions are fully implemented, it can be argued that it would be appropriate and proportionate and even beneficial to the parties if the Commission could impose certain additional obligations, as the alternative would mean having to dismiss the commitments proposal

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the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market".

[19] Article 14.2(d) of the EU Merger Regulation.

[20] Article 15.1 (c) of the EU Merger Regulation.

[21] Recition 31 of the preamble of the EU Merger Regulation.

[22] Article 8.5(b) of the EU Merger Regulation.

[23] Article 14.2(d) of the EU Merger Regulation.

altogether. Nevertheless, such changes should only relate to modalities of remedies and not the nature or scope of the assets to be divested, as such additions would clearly qualify as new commitments[24].

To sum up, under the EU competition law, merging companies may propose certain modifications to the merger project that would guarantee continued competition on the market and it is for the Commission to assess whether the proposed remedies, once implemented, would eliminate the competition concerns identified. The Commission may decide to declare a concentration compatible with the common market following modification by the parties, attaching to its decision conditions and obligations. But the Commission cannot impose unilaterally any conditions which are not based on the parties' own commitments. Moreover a distinction must be made between conditions and obligations because a violation of one or the other determines completely different legal consequences.

The mechanism for modifying concentrations under the Law on Competition of the Republic of Lithuania shows significant differences with the model described above.

III. Modifications to concentrations in the Republic of Lithuania

Merger control in the Republic of Lithuania began in 1992, when the first Law on Competition was adopted. As part of the later effort to join the European Union, it was considered appropriate to regulate concentrations in the way they would be regulated by the Commission if they exceeded the threshold of the turnover (Banevičienė, 2005, p. 73). Therefore, in 1999 a revision of the Law on Competition was adopted and it was considered to be including all developments and trends in the regulation of concentrations in the (then) European Community.

The Supreme Administrative Court of Lithuania bearing in mind the necessity and importance of concentration regulation stated that the aim of such regulation *inter alia* is to preserve the market's structure, allowing effective competition in the market, because in certain cases merger may change the market's structure so as to reduce competition[25]. In a broader

[24] Ibidem.

[25] Order of the Supreme Administrative Court of Lithuania of 1.03.2012, A[502]-1668/2012, retrieved from: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=1c3c81b0-5e09-4c8a-8da9-6bc619f6f921 (5.04.2017); order of the Supreme Administrative Court of Lithuania of 22.12.2016, eA-2330-520/2016, retrieved from: https://www.e-tar.lt/portal/lt/legalAct/62cc9eb0cde911e68d5e8b3a36d1fab2 (5.04.2017).

sense undertakings are prohibited from performing any acts which restrict or may restrict competition, regardless of the character of their economic activity, except in cases where the Law on Competition or laws governing individual areas of economic activity provide for exemptions[26]. It is worth mentioning that the Law on Competition is also applied to activities of undertakings registered outside the territory of the Republic of Lithuania if the said activities restrict competition on the domestic market of the Republic of Lithuania[27].

1. The aspect of commitments, conditions and obligations under the regulation of concentrations in the Republic of Lithuania

The Law on Competition No VIII-1099 defined concentration as: 1) a merger, when one or more undertakings which terminate their activity as independent undertakings are joined to the undertaking which continues its operations, or when a new undertaking is established from two or more undertakings which terminate their activity as independent undertakings; 2) acquisition of control, when the same natural person or natural persons already controlling one or more undertakings, or one or more undertakings, by agreement, jointly set up a new undertaking or gain control over another undertaking by acquiring an enterprise or part thereof, all or part of the assets of the undertaking, shares or other securities, voting rights, by contract or by any other means[28].

An intended concentration must be notified to the Competition Council and its permission must be obtained where the combined aggregate income of the undertakings concerned in the business year preceding the concentration was more than 30 million litas (8.7 million euro) and the aggregate income of each of at least two undertakings concerned in the business year preceding the concentration was more than 5 million litas[29]. A notification of concentration must be submitted to the Competition Council no later than 7 days after the proposal to conclude a contract or purchase shares or assets, the order to

[26] Lietuvos Respublikos konkurencijos įstatymas (2017 m. vasario 1 d. įstatymo redakcija Nr. XIII-193) // TAR, retrieved from: https://www.e-tar.lt/portal/lt/legalAct/TAR.B8B6AFC2BFF1/qqjSwVVuUG (5.04.2017) – Article 2(1).

[27] Article 2(2) of the above Act. It should also be noted that economic activity means any type of manufacturing, commercial, financial or professional activities associated with the purchase or sale of goods, except for acquisitions by natural persons intended for personal and household needs (Article 3(1)). Restriction of competition is defined as any actions which constitute an obstacle to compete in a relevant market or may weaken, distort or otherwise have a negative effect on competition (Article 3(3)).

[28] Article 3(14)(1)-(2) of the Lithuanian Competition Act 1999.

[29] Article 10(1) of the Lithuanian Competition Act 1999.

conclude a contract, conclusion of a contract, acquisition of property rights or the right to dispose of certain assets[30].

Upon completing the examination of the notification of concentration, the Competition Council can adopt a resolution to authorize the concentration in accordance with the submitted notification[31] or to refuse authorisation when the concentration would result in the creation or strengthening of a dominant position and this would substantially restrict competition on the relevant market[32].

Under the law, the Competition Council could also authorize a concentration subject to the conditions and obligations established by the Council for the concerned undertakings or controlling persons to prevent the creation or strengthening of a dominant position[33]. However, neither the Lithuanian Competition Act 1999 (Law on Competition No VIII-1099), nor any other legal act of the Republic of Lithuania gives undertakings the specific right and possibility to offer modification commitments.

Therefore judging from the letter of the law, the parties are able to submit only the notification of concentration to the Competition Council, without the ability to offer commitments to address any competition concerns raised by the merger as notified.

Unlike the Commission, which in the absence of valid commitments from the parties addressing the authority's competition concerns must adopt a prohibition decision, the Lithuanian Competition Council can therefore authorise a concentration subject to conditions and/or obligations established by itself. Moreover, without the parties' commitments as the basis for conditions and obligations for the merger, the Competition Council has the authority to unilaterally impose any remedy which in its opinion was necessary to prevent the creation or strengthening of a dominant position[34]. For instance, in one decision regarding a beer market concentration, the Competition Council obliged the notifying parties to sell one of the companies participating in the concentration to a third party while at the same time ordering them to maintain the company's separate identity until the sale was completed by a confidential deadline set by itself. Parties were also obliged to inform the Competition Council about all ongoing activities pertaining to the sale of the company,

[30] Article 11(2) of the Lithuanian Competition Act 1999.

[31] Article 14(1)(1) of the Lithuanian Competition Act 1999.

[32] Article 14(1)(3) of the Lithuanian Competition Act 1999.

[33] Article 14(1)(2) of the Lithuanian Competition Act 1999.

[34] Amendment No XI-216 of the Lithuanian Competition Act, dated from 9.04.2009, widened the notion providing that the Competition Council could establish conditions and obligations also necessary to prevent a substantial restriction of competition in a relevant market.

including naming potential buyers, describing the potential deal structure etc., with the aim of being able to assess and approve the disposal. The decision also obliged parties to seek permission of the Competition Council to perform any action they planned as implementation of the obligations and conditions set in the approval[35]. In other words, an exhaustive list of conditions and obligations was imposed by the Competition Council without any commitments being presented by the merging parties.

Another important difference from the EU merger control law is the aspect of legal consequences when merger conditions or obligations are being violated. As it was discussed in chapter II, a violation of conditions and a violation of obligations set by the Commission cause different legal consequences under the EU competition law. But the Lithuanian Competition Act 1999 simply stated that the Competition Council would have the right to amend or repeal its resolution on a concentration where the undertakings or controlling persons violated the conditions and obligations of the implementation[36]. It could also impose a fine for an infringement of concentration conditions or mandatory obligations it established[37].

Hence, neither the Lithuanian Competition Act 1999, nor any other national legal act[38] has differentiated this aspect of legal consequences of a violation of conditions or obligations. This implies that the Competition Council is not obliged to determine exactly what constituted a condition or an obligation in its decisions because any legal consequences were the same.

Accordingly, the analysis of the Competition Council practice shows that when only one or two remedies were imposed, they were usually regarded as conditions[39] and contained a prohibition to reorganize the undertaking in a specific way, as well as an order to set prices and other conditions

[35] Resolution No 123 of the Competition Council of the Republic of Lithuania, dated from 9.11.2000: „Regarding Carlsberg A/S notification on concentration acquiring the control of Kalnapilis AB, UAB Utenos alus, Jungtinis alaus centras“, retrieved from: http://kt.gov.lt/lt/dokumentai/del-carlsberg-a-s-pranesimo-apie-koncentracija-isigyjant-ab-kalnapilis-uab-utenos-alus-uab-jungtinis-alaus-centras-kontrole (5.04.2017).

[36] Article 15(2) of the Lithuanian Competition Act 1999.

[37] Article 41(1) of the Lithuanian Competition Act 1999.

[38] For instance, The Rules concerning the setting of the amount of a fine imposed for the infringement of the Law on Competition of the Republic of Lithuania, approved by the resolution of the Government of the Republic of Lithuania, No. 1591, 6.12.2004 or subsequent Procedure for the fixing of the amount of fines imposed for infringements of the Lithuanian Law on Competition, approved by the by the resolution of the Government of the Republic of Lithuania, No 64, 18.01.2012.

[39] See, for instance, resolutions of the Competition Council: No 21 of 28 February 2002, No 82 of 18.07.2002, No 1S-88 of 3.09.2003, No 1S-101 of 25.09.2003, No 1S-38 of 18.03.2004, No 1S-119 of 18.09.2008.

for transactions between certain undertakings in the same way as similar transactions with other economic entities. But when a more extensive list of remedies was deemed necessary, the Competition Council usually stated that it decided to authorise a concentration according to the submitted notification with the following obligations and conditions (after what the list of all remedies was presented)[40].

Given such a broad discretion of the Competition Council, it is very important to stress the possibility for the undertakings to turn to the Competition Council for clarification of the imposed conditions and obligations if they seem to be too abstract or vague or to challenge them in court during the term set for appeals. A Resolution of the Competition Council authorising a concentration subject to certain conditions and obligations has been considered an administrative act which causes legal consequences for the undertakings concerned. Therefore those undertakings have the right to appeal to administrative courts and challenge the substance and legitimacy of such administrative acts within a certain period of time[41], after which the resolution would become effective. In this respect, it should be stressed that when the Competition Council adopts a resolution declaring a violation of the conditions and obligations attached to an earlier authorization of concentration, it is too late to raise questions of legitimacy or clarity of such conditions or obligations. Such questions do not concern the object of the contested infringement resolution but the object of an older resolution authorizing the concentration, for which the term of appeal had already expired.

To sum up, the Law on Competition No VIII-1099 is silent on the ability of undertakings to propose commitments while giving the Competition Council discretion to unilaterally impose conditions and obligations it sees necessary to prevent the creation or strengthening of a dominant position, without even separating those remedies according to legal consequences of their violation. On the other hand, despite this broad discretion of the Competition Council, there was always a way for the undertaking participating in a concentration to seek clarification of the adopted resolution or to challenge its substance and legitimacy in court.

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[40] See, for instance, Resolutions of the Competition Council: No 123 of 9.11.2000, No 1S-107 of 2.10.2003, No 1S-140 of 11.12.2003, No 1S-80 and of 27.05.2004, No No 1S-121 and 1S-122 of 27.10.2005, No 1S-190 of 29.12.2007, No 1S-118 of 18.09.2008, etc.

[41] Article 38(2) of the Lithuanian Competition Act 1999 established a 20 day period after the receipt of the resolution of the Competition Council or the date of publication of operative part of the resolution in the "Official Gazette".

2. The concentration condition in the *Gazprom* case

In 2002, an international tender was announced for the selection of a gas supplier and acquirer of a 34% stake in Joint-Stock Company Lietuvos dujos. It was won by OAO Gazprom – an undertaking established in the Russian Federation. In 2003 OAO Gazprom initialled the share purchase and signed a sales agreement on January 23, 2004. On the same day, OAO Gazprom submitted a notification of the concentration to the Competition Council[42].

On March 18, 2004 the Competition Council adopted the resolution No 1S-38 "Regarding the authorisation of OAO Gazprom to acquire 34% of Joint-Stock Company Lietuvos dujos and jointly with SE Valstybės turto fondas, Ruhrgas Energie Beteiligungs AG and E.ON Energie AG acquire control over Joint-Stock Company Lietuvos dujos" (hereinafter, the Resolution No 1S-38). In considering the notification, the Competition Council took into account *inter alia* the following facts: i) Lietuvos dujos was holing a dominant position in the relevant markets of natural gas transmission and distribution, ii) the networks of Lietuvos dujos were not connected to the gas networks and the gas supply system of other EU member states and iii) that OAO Gazprom was the sole supplier of natural gas to Lithuania, with no other alternative suppliers present because other gas extraction companies in the Russian Federation had to use OAO Gazprom's network for delivery.

Therefore the Competition Council decided to authorise the concentration with the condition that the participating undertakings *would not create obstacles* for other gas supply companies which contracted with commercial buyers in Lithuania, for consumers wishing to enter natural gas purchase contracts with other gas production or supply companies and for other undertakings extracting natural gas wishing to supply buyers in Lithuania. Hence, it was a future-oriented, behavioural condition requiring certain behaviour of the undertakings participating in the concentration for an unspecified period of time (effectively meaning at least 2015, the final year of an earlier gas supply contract between Lietuvos dujos and OAO Gazprom[43]).

[42] Resolution No 1S-38 of the Competition Council of the Republic of Lithuania, dated from 18.03.2004: "Regarding the authorisation of OAO Gazprom to acquire a 34% of AB Lietuvos dujos and jointly with SE Valstybės turto fondas, Ruhrgas Energie Beteiligungs AG and E.ON Energie AG acquire control over AB Lietuvos dujos", retrieved from: http://kt.gov.lt/lt/dokumentai/del-leidimo-oao-gazprom-vykdyti-koncentracija-isigyjant-34-ab-lietuvos-dujos-akciju-paketa-ir-igyjant-kartu-su-vi-valstybes-turto-fondas-ruhrgas-energie-beteiligungs-ag-ir-e-on-energie-ag-bendra-ab-lietuvos-dujos-kontrole (5.04.2017).

[43] This deadline was enshrined in the Resolution of the Government of the Republic of Lithuania No 22 "On Assenting to a Draft Agreement on Sale and Purchase of 34 Percent of the Shares (Which Belong to the State by Right of Ownership) of the Joint-Stock Company 'Lietuvos Dujos', Annexes to This Agreement, as Well as to a Draft Agreement of Shareholders"

Ten years later, the Competition Council adopted the resolution No 2S-3/2014 declaring that OAO Gazprom, by refusing to negotiate with Joint-Stock Company Lietuvos energijos gamyba over a gas swap agreement for the period 2013-2015, created an obstacle for this undertaking to conclude a natural gas purchase contract for its own needs with a gas supply company and in this way violated provisions of the Resolution No 1S-38[44]. The Competition Council found that OAO Gazprom had engaged in such gas swap agreements for the supply of natural gas to the United States and therefore this undertaking was familiar with agreements of such nature.

In the subsequent appeal case before the Supreme Administrative Court of Lithuania, OAO Gazprom argued that: i) the concentration condition was interpreted in an expanded way by the Competition Council; ii) a representative of the Competition Council had acknowledged that the concentration condition, i.e. the prohibition "not to create obstacles" was not really a condition but an obligation to take all necessary measures to ensure that Lithuanian consumers can purchase gas from other suppliers; iii) it was incorrect to assume that the phrase "not to create obstacles" was synonymous with the phrase "take all necessary measures" so that "Lithuanian consumers will be able to buy natural gas from other natural gas suppliers than the applicant". The analysis of the wording of some resolutions of the Competition Council, according to OAO Gazprom, indicated that the concentration condition was a prohibition of certain acts, but in no way was an obligation to take active action in favour of competitors. Finally, the abstractness of the concentration condition testified that this was a "condition" or "prohibition", but not an "obligation" to take active and very concrete actions[45].

Since OAO Gazprom in its appeal relied also on the provisions of EU competition law and the practice of the European Commission, the Supreme Administrative Court of Lithuania (hereinafter, the Court) reviewed not only the discretion of the Competition Council under national law, but also the regulation of modifications to concentrations under the EU law. After assessing the essential regulatory differences relevant to the issue under

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of 9.01.2004, para. 3, retrieved from: https://www.e-tar.lt/portal/lt/legalAct/TAR.92E9739F47FE (5.04.2017).

[44] Resolution No 2S-3/2014 of the Competition Council of the Republic of Lithuania, dated from 10.06.2014, "Regarding the compliance of the actions of OAO Gazprom with the 18 March 2004 Resolution No 1S-38 of the Competition Council of the Republic of Lithuania", retrieved from: http://kt.gov.lt/lt/dokumentai/del-em-oao-gazprom-em-veiksmu-atitikties-lietuvos-respublikos-konkurencijos-tarybos-2004-m-kovo-18-d-nutarimo-nr-1s-38-nuostatoms (5.04.2017).

[45] Order of the Supreme Administrative Court of Lithuania of 22.12.2016, paras. 72, 77, 78, 86; hereinafter, Order of the Court.

consideration (as discussed in previous chapters of this paper), the Court rejected the arguments of OAO Gazprom.

First, the Court emphasised that the fact that a violation of a condition and a violation of an obligation cause different legal consequences under the EU law did not apply to the assessment of concentrations at national level because the Law on Competition No VIII-1099 did not differentiate legal consequences in this respect. That is to say that conditions and obligations (qualifying them together and assessing them in the national context) are being understood as determination of certain forms of behaviour, which would help ensure that the concentration would not result in creation or strengthening of a dominant position.[46]. According to the Court, in each case it is being looked into the question whether a remedy and, more specifically which type of remedy, is suitable to solve the identified competition concerns[47]. Assessing the concentration condition in the context of Article 14(1) paragraph 2 of the Law on Competition No VIII-1099 (which established the discretion of the Competition Council to adopt a resolution to authorise a concentration subject to conditions and obligations), the Court concluded that the condition under consideration was imposed in order to prevent negative consequences that could arise because of the concentration, taking into account the dominant position of Lietuvos dujos and, most importantly, the dominant position of OAO Gazprom, which at the time was the only supplier of gas to Lithuania. It also controlled trunk pipelines by which gas could enter Lithuania. Therefore in the Court's opinion, by restricting the ability of the undertakings participating in the concentration to cause negative consequences for competition, the Competition Council was preventing those entities from taking advantage of their dominant position or strengthening it. The Court concluded that by imposing such a condition, the Competition Council sought to counterbalance the ability of the concentrating parties with a dominant position to exercise decisive influence on natural gas consumers in Lithuania, and as such, this aim was considered by the Court as intended to prevent a strengthening of a dominant position[48].

Secondly, the Court regarded the concentration condition as a broad one but pointed out that the law did not restrict the discretion of the Competition Council to choose conditions and obligations which it would judge appropriate to achieve specified purposes (to prevent the creation or strengthening of a dominant position)[49]. It was acknowledged that when determining the modification to the concentration, the Competition Council did not separately

[46] Order of the Court, para. 217.
[47] Order of the Court, para. 218.
[48] Order of the Court, para. 220.
[49] Order of the Court, para. 224.

define conditions and obligations. However, in the Court's view, it had no legal significance in resolving the dispute over the validity of the resolution No 2S-3/2014 (by which a violation of the concentration condition was declared). The Court emphasised that if OAO Gazprom disagreed with the imposed condition and considered that it did not comply with the provisions of the Law on Competition, or did not understand it, it had the opportunity to appeal the resolution No 1S-38 to demand that this condition be terminated and/or explained by the Competition Council. Rejecting the arguments of OAO Gazprom that the concentration decision was abstract and uncertain, the Court noted that the said undertaking carried out the concentration and did not apply to the Competition Council for clarification of this condition. The complaint regarding uncertainty of the condition was raised only when the Competition Council declared a violation of this condition[50].

Thirdly, the Court ruled that the law allowed the Competition Council to determine necessary conditions and obligations according to its own view. In this respect, the Competition Council had the competence to choose not necessarily only one kind of competition remedies. Consequently, the Competition Council was not obliged to choose between the imposition of conditions or imposition of obligations. On the other hand, the Competition Council was not obliged to impose conditions necessarily together with obligations[51]. Thus as far as the Law on Competition No VIII-1099 did not differentiate between legal consequences of a violation of a condition and a violation of an obligation, the Court repeated that there was no essential difference whether the requirement established by the Competition Council "not to create obstacles" for the development of a competitive gas market should be considered a condition or an obligation[52].

Fourthly, according to the Court, every condition (as well as obligation) should be assessed in the light of the circumstances and objectives of its determination rather than by interpreting separate linguistic phrases – a method, which used in isolation from the context of certain legal relation, may produce conclusions totally inconsistent with that legal relation[53]. Bearing in mind the aim of the concentration condition, which was to prevent OAO Gazprom from using its dominant position and restricting choice for Lithuanian natural gas consumers, the requirement "not to create obstacles", in the Court's opinion, not only obliged the company to refrain from certain actions but established an obligation to take all measures that may be required for the implementation of the concentration condition. Obstacles can be

[50] Order of the Court, para. 225.
[51] Order of the Court, para. 227.
[52] Order of the Court, para. 227–228.
[53] Order of the Court, para. 229.

created even without taking any action, therefore the requirement "not to create obstacles" had to be understood not only as an inherent passivity of the action, but as a general obligation to act in a way that the concentration condition established by the Council would be implemented. In other words, the concentration condition set in the resolution authorizing concentration, *ipso facto* comprised both active and passive actions, obliging OAO Gazprom to behave in such a way that the relevant conduct would not prevent Lithuanian gas consumers from purchasing natural gas for their own needs from other suppliers[54].

This led the Court to argue that OAO Gazprom should have assessed its conduct on a case-by-case basis, taking into account the influence of each behaviour on the concentration condition established by the Competition Council. In this respect, the Court drew attention to the higher standards of care and diligence which apply to entrepreneurs, since the status of an entrepreneur strengthens the requirement to pay attention to circumstances which are important in a contract to acquire assets, and to follow the principles of attention, carefulness, reasonableness and business logic. Consequently, being a non-natural person and not a representative of a small business but having a dominant position on the market, in the Court's view, OAO Gazprom had the necessary means and resources to ascertain the content of the legal obligations applicable to it if they were somehow uncertain or unclear[55].

In summary, the Court concluded that according to the concentration condition OAO Gazprom had not only to refrain from certain actions, but also had the obligation to take all the measures necessary to fulfil the obligations set in the concentration condition. Such an interpretation could not be considered expanded and was consistent with the circumstances and objectives of the concentration condition, i.e. to ensure the possibility for Lithuanian natural gas consumers to purchase natural gas for their own needs from other suppliers[56].

IV. Final remarks

The EU Merger Regulation, under which the Commission is not in a position to impose unilaterally any conditions to an authorisation decision but only on the basis of the parties' commitments, is to be assessed positively: it produces greater clarity of the conditions and obligations that are being imposed by

[54] Order of the Court, para. 229.
[55] Order of the Court, para. 233.
[56] Order of the Court, para. 234.

the Commission. An undertaking which proposes specific commitments presumably has the best understanding of what they entail. If conditions and obligations are imposed by the competent authority on the basis of such a proposal, the notifying party is able to understand and implement them better than when the conditions and obligations are designed unilaterally by the authority. Therefore this regulation is likely to reduce the possibility of disputes over the enforcement of remedies. This is particularly important in the case of non-structural ("conduct" or "behavioural") remedies, which are considered as ongoing and are designed to modify or constrain *future conduct* of merging firms (as was the case with the concentration condition imposed by the Competition Council on OAO Gazprom).

In comparison, the Law on Competition No VIII-1099 does not provide the possibility for undertakings participating in the concentration to propose specific commitments, which would form the basis for conditions or obligations set by the Competition Council. Additionally, the law does not differentiate between remedies by any criteria and therefore, the terms "conditions" and "obligations" are generally regarded as determination of certain forms of behaviour which would help ensure that the concentration would not result in the creation or strengthening of a dominant position. In other words, when it comes to resolving the issue of the legality of a decision of the Competition Council declaring a violation of the remedies of a concentration, it has no legal value if such a remedy is regarded as a condition or an obligation.

The *Gazprom* case revealed that all this might lead to assumptions for the undertakings to argue the interpretation of the remedies in various aspects. On the other hand, as it has been constituted by the Supreme Administrative Court of Lithuania, higher standards of care and diligence are applied for entrepreneurs and it has all the necessary means and resources to clarify the content of the concentration conditions and obligations applicable to it if they are somehow uncertain or unclear, and/or to challenge its legality in court. Such higher standards of care and diligence give rise to the obligation of an undertaking to be active and show maximum interest in legal nuances relevant to its status and situation, to assess its conduct on a case-by-case basis in view of its possible impact on the conditions and obligations established by the Council, and by all means to challenge them within the time limit, provided in law, and not when a violation of such remedies is being detected.

At the same time it should be noted that in resolution No 1S-4 of 13.01.2005 (i.e. later than concentration condition for OAO Gazprom was imposed) the Competition Council mentioned a possibility for undertakings participating in the concentration to submit commitments, saying that "the Competition Council, after examining the material of the concentration file, may adopt a resolution to authorize the concentration following para. 2 of Article 14 of

the Lithuanian Competition Act 1999 if the persons submitting the notification have submitted written commitments necessary to prevent the creation or strengthening of a dominant position or substantial restriction of competition, and there are no written objections from the parties concerned"[57]. This resolution was amended in 2015 to detail general requirements applicable to commitments as well as establishing a procedure for their submission to the Competition Council[58]. Moreover, an obligation to present a non-confidential version of the commitments on the website of the Competition Council was envisaged, making it possible for third parties to become familiar with the content of the commitments and to assess the feasibility and effectiveness of remedies to resolve competition problems[59].

Judging from the practice of the Competition Council it seems that undertakings participating in concentrations willingly use this new possibility to propose commitments: from its introduction in the resolution No 1S-4 of 13.01.2005, 10 resolutions allowing concentrations according to the conditions and obligations imposed by the Competition Council were adopted, of which seven contained commitments proposed by the parties[60]. This surely

[57] Resolution No 1S-4 of the Competition Council of the Republic of Lithuania, dated from 13.01.2005, which had amended Resolution No. 45 "On approval of the procedure for submission and examination of notification on concentration and of calculation of aggregate turnover", paragraph 12 //TAR, retrieved from: https://e-tar.lt/acc/legalAct.html?documentId=TAR.C3676D989D98&lang=lt (5.04.2017).

[58] Resolution No 1S-82/2015 of the Competition Council of the Republic of Lithuania, dated from 11.08.2015, "On the approval of merger notification and examination procedure", para. 48-50, //TAR, retrieved from: https://www.e-tar.lt/portal/lt/legalAct/c4004ca040f411e58568ed613eb39a73 (5.04.2017).

[59] Resolution No 1S-82/2015, para. 51.

[60] In particular, Resolution No 1S-121 of 27.10.2005, retrieved from: http://kt.gov.lt/lt/dokumentai/del-leidimo-em-rautakirja-oy-em-vykdyti-koncentracija-isigyjant-100-proc-uab-lietuvos-spaudos-vilniaus-agentura-akciju; Resolution No 1S-190 of 29.12.2007, retrieved from: http://kt.gov.lt/lt/dokumentai/del-leidimo-vykdyti-koncentracija-em-rautakirja-oy-em-isigyjant-100-proc-uab-impress-teva-akciju; Resolution 1S-118 of 18.09.2008, retrieved from: http://kt.gov.lt/lt/dokumentai/del-leidimo-maxima-lt-uab-vykdyti-koncentracija-issinuomojant-komercines-paskirties-patalpas-esancias-adresu-naikupes-g-18-klaipedoje-sporto-g-16-marijampoleje-savanoriu-pr-375-kaune-pramones-pr-16-kaune-gedvydziu-g-17-vilniuje-vytauto-g-98-senojo-turgaus; Resolution No 1S-208 of 7.10.2011, retrieved from: http://kt.gov.lt/lt/dokumentai/del-leidimo-uab-gintarine-vaistine-vykdyti-koncentracija-isigyjant-100-proc-uab-saulegrazu-vaistine-akciju-ir-100-proc-uab-thymus-vaistine-akciju; Resolution No 1S-160/2014 of 9.10.2014, retrieved from: http://kt.gov.lt/lt/dokumentai/del-leidimo-vykdyti-koncentracija-em-powszechny-zakuad-ubezpieczen-spouka-akcyjna-em-isigyjant-iki-100-proc-akcines-bendroves-lietuvos-draudimas-akciju; Resolution No 1S-190/2014 of 5.12.2014, retrieved from: http://kt.gov.lt/uploads/docs/docs/13701_imp_50488944ddd8e1c0e8474992ac2ec8e5.pdf, Resolution No 1S- 97 (2016) of 18.08.2016, retrieved from: http://kt.gov.lt/uploads/docs/docs/2674_8a6d5756e013fdba42375c792f65f752.pdf.

implies a progress in the regulation of concentrations in Lithuania. It has to be stressed that regarding the problematic aspects discussed in this paper, the Lithuanian Competition Act has not been changed since 1999, therefore this modification is based on the Competition Council's self-regulation rather than hard law. However, even this self-regulation does not restrict the Competition Council from issuing conditions unilaterally. Therefore, it seems that the discretion of the Competition Council has not changed allowing it to formulate concentration conditions and obligations in a manner chosen by this institution, potentially fully separating them from commitments proposed by the undertakings. Thus, in terms of assumptions for undertakings to argue for interpretation and clarity of those remedies in court, the lessons of the *Gazprom* case remain to be learned for the future.

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Arbitration Agreements and Actions for Antitrust Damages After the *CDC Hydrogen Peroxide* Judgment

by

Katarzyna Sadrak*

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* PhD candidate, University of Heidelberg; k.sadrak@gmail.com. Article received: 8.03.2017, accepted: 19.05.2017.

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Abstract

On May 21st 2015, the Court of Justice of the European Union in *CDC Hydrogen Peroxide* decided whether the application of jurisdiction clauses in actions for damages impedes the effective enforcement of EU competition law. The CJ stayed silent, however, on how to treat arbitration clauses, which similarly to jurisdiction clauses, exclude a default court jurisdiction. The question of how to interpret arbitration agreements in the event of an antitrust violation and subsequent actions for damages remains thus unanswered. In light of the foreseen increase in private enforcement of EU competition law, this problem gains significance. This is because arbitration agreements may be frequently used to govern commercial relationships between antitrust infringers and their injured direct contractors.

Against this background, the paper aims to analyse the consequences brought about by the existence of arbitration clauses in the event of actions for antitrust damages. It seeks to answer two questions: whether the claims for antitrust damages can be *per se* arbitrated, and whether the general arbitration clauses used by the parties to regulate their commercial relations cover the actions for antitrust damages. In order to address these problems, the papers draws attention to the CJ's interpretation of jurisdiction clauses and the Polish experience of interpreting the scope of arbitration agreements in the field of unfair competition law. The paper reaches the conclusion that neither the arbitration nor EU law prevent arbitrating actions for antitrust damages. Whether a specific arbitration agreement covers actions for antitrust damages or not can be analyzed only with reference to the will of the parties interpreted under applicable national law. It is believed, however, that there are many reasons to adopt an arbitration-friendly interpretation of vague arbitration agreements.

Résumé

Le 21 mai 2015, la Cour de justice de l'Union européenne dans l'arrêt *CDC Hydrogen Peroxide* a statué sur la question de savoir si l'application d'une clause de juridiction lors d'action en dommages et intérêts empêchait une application effective du droit européen de la concurrence. Néanmoins, la Cour de justice est restée muette sur le sort des clauses d'arbitrage qui, à l'instar des clauses de juridiction, excluent la désignation d'une juridiction par défaut. La Cour n'a donc pas tranché sur la manière d'interpréter les accords d'arbitrage dans le cas

d'une violation du droit de la concurrence et d'actions en dommages intérêts en découlant. Dans l'optique d'une augmentation à prévoir du contentieux du private enforcement, cette question gagne en importance du fait de l'utilisation récurrente des accords d'arbitrage pour régir les relations entre les contrevenants au droit de la concurrence et les parties contractantes lésées.
Dans un tel contexte, cette contribution cherche à analyser les conséquences découlant de l'existence d'une clause d'arbitrage lors d'une action en dommages et intérêts pour violation du droit de la concurrence. Elle cherche à répondre à deux questions: savoir si une action en dommages et intérêts pour violation du droit de la concurrence peut faire l'objet d'une procédure d'arbitrage et déterminer si le recours à la clause général d'arbitrage dans un contrat régulant les relations commerciales entre les parties englobe de telles actions. En vue de résoudre ces problématiques, le présent document attire l'attention du lecteur sur l'interprétation des clauses de juridiction par la CJUE et sur l'interprétation faite par les juridictions polonaises du champ d'application des accords d'arbitrage en matière la concurrence déloyale. Cet article aboutit à la conclusion que ni l'arbitrage ni le droit de l'UE n'empêche le recours à l'arbitrage dans les actions en dommages et intérêts pour infraction aux règles de concurrence. Le fait qu'un accord d'arbitrage spécifique s'applique ou non à ces actions ne peut s'analyser qu'au regard de la volonté des parties interprété en référence au droit national. Cependant, il y a lieu de penser qu'il y a de nombreuses raisons d'adopter une interprétation favorable à l'arbitrage dans les hypothèses d'accords d'arbitrage imprécis.

Key words: arbitrability; arbitration; arbitration agreement; antitrust; competition law; damages; unfair competition.

JEL: K21, K39, K41, K42, K49

I. Introduction

Competition law and international arbitration have been seen for many years as being worlds apArticle Arbitration has its origins in private law and materialises the will of parties to depart from the public court jurisdiction to benefit from the adjudication by a mutually agreed arbitrator. In contrast, EU competition law has strong public law features. Its objective is to protect the public good – maintain effective market competition – and its predominant enforcer is a public body, the European Commission. As a result, for many years it was rarely thought to adjudicate competition law matters by means of arbitration (Komninos, 2011, p. 11).

This picture has changed significantly with the development of private competition law enforcement. The milestone was the *BRT v SABAM* judgment

of the ECJ. It confirmed that competition law rules included in the EU Treaties confer on individuals' subjective rights, which national courts must protect[1]. This was confirmed by Article 6 of Regulation 1/2003, providing that national courts have the powers to apply the antitrust law provisions of the Treaty[2]. In particular, national courts have the competence to decide on civil law consequences of antitrust violations (Ritter and Braun, 2005, p. 81–83; Boskowitz, 2009, p. 105–106). In *Courage v Crehan*, the CJ stated that unjust enrichment and damages may be claimed from those that profited from the violation of antitrust laws[3]. This was developed further in the Directive 2014/104/EU, which created a framework for the facilitated enforcement of actions for damages resulting from the infringement of EU competition law[4].

The increased private enforcement of EU competition law also challenges arbitrators, since they may face problems of whether and how they should apply competition law in the course of arbitral proceedings. The interplay between EU competition and arbitration law may already have an effect at the very beginning of a dispute. Let us take as an example the recent Commission decision in the truck cartel (2016). The cartel influenced the price of 9 out of every 10 medium and heavy trucks manufactured in Europe for 14 years. There are around 30 million such trucks on European roads. It is expected that a massive amount of claims will be made by truck purchasers for antitrust damages. However, the sales contracts between truck manufacturers and purchasers may contain various jurisdiction and arbitration clauses. Shall then a claim for damages be dealt with before national courts, or before a forum chosen by parties?

The controversy about how to treat arbitration agreements[5] when actions for antitrust damages are taken has already reached the CJEU. In *CDC Hydrogen Peroxide*[6] the Landesgericht Dortmund asked the CJ whether the derogation

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[1] ECJ judgment of 27.03.1974, Case C-127/73, *Belgische Radio en Televisie*, ECLI:EU:C:1974:25.

[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 L 1, 4.1.2003, p. 1–25.

[3] CJ judgment of 20.09.2001, Case C-453/99, *Courage and Crehan*, ECLI:EU:C:2001:465, para. 30-31.

[4] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.

[5] Arbitration agreement is an agreement to designate a particular private arbitrator to resolve the dispute arising out of particular business relationship. Arbitration clause is an expression of such an agreement, usually in the form of a clause in the commercial contract. The paper uses these two terms depending on the context.

[6] CJ judgment of 21.05.2015, Case C-352/13 *CDC Hydrogen Peroxide*, ECLI:EU:C:2015:335.

to the jurisdiction rules of Regulation 44/2001,[7] by means of jurisdiction and arbitration clauses, has a negative impact on the actions for antitrust damages, and whether it impedes the effectiveness of EU competition law. Although the CJ analysed private international law aspects of the case, it remained silent regarding arbitration clauses. This has only enhanced doubts about how to treat arbitration agreements and whether to apply the reasoning of the CJ by analogy to arbitration clauses.

Against this background, the paper aims to shed more light on the interpretation of arbitration agreements in the event of actions taken for antitrust damages. It seeks to answer two questions: whether the claims for antitrust damages can be *per se* arbitrated (i) and whether the general arbitration clauses used by the parties to regulate their commercial relations[8] cover the actions for antitrust damages (ii). In order to address these questions the paper draws attention to the CJ's interpretation of jurisdiction clauses and the Polish experience of interpreting the scope of arbitration agreements in the field of unfair competition law. The paper reaches the conclusion that neither the arbitration nor EU law prevent arbitrating actions for antitrust damages (i). However, the question of whether a specific arbitration agreement covers actions for antitrust damages or not can only be analysed with reference to the will of the parties interpreted under applicable national law (ii).

The article contributes to the current debate on the arbitrability of EU competition law (Driessen-Reilly, 2015; Geradin & Villano, 2016; Komninos, 2011; Mourre, 2011; Nazzini, 2008) by rebutting some misconceptions about arbitrating the actions for antitrust damages. It demonstrates that neither the parties' unawareness of anticompetitive behaviour, nor the tort origin of the claim, make it impossible for them to subject the claims for antitrust damages to adjudication of arbitrators. The paper proposes adopting an arbitration-friendly interpretation of the scope of arbitration agreements with respect to actions for antitrust damages.

To that end, the paper first asks whether actions for antitrust damages are arbitrable (Part II). Second, it discusses whether the principle of effectiveness in EU competition law prevents the arbitrators from dealing with the claims for antitrust damages (Part III). The paper then proceeds to analyse the problem of interpreting the scope of arbitration agreements. It asks what lessons can be drawn from the *CDC* case before the CJEU, as well as from the Polish experience of dealing with the problem of interpreting the scope of arbitration agreements (Part IV). This leads me to address some common

[7] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1–23.

[8] For instance, standard arbitration clauses or other broadly formulated arbitration clauses.

misconceptions on the arbitration of claims for antitrust damages (Part V). Finally, the paper concludes and gives some guidance on how to construct arbitration clauses (Part VI).

II. Arbitrability of EU competition law

A discussion of the problem of arbitrating the claims for antitrust damages needs to be commenced with the general problem of the arbitrability of EU competition law. According to UNCITRAL Model Law, arbitrability means that the given subject matter of a dispute is "capable of settlement by means of arbitration"[9]. If the claims for antitrust damages are not arbitrable, they cannot be handled by arbitrators and they are *per se* excluded from the scope of an arbitration agreement.

1. Development of arbitrability

Initially, arbitration was considered as a means to avoid the regular jurisdiction of national courts and the State monopoly to provide justice. It was thus treated with a certain degree of distrust. This applied in particular to requesting arbitrators to resolve disputes relating to the rules of public policy. Among such rules was antitrust law, as expressed by the US Second Circuit in *American Safety*:

> "A claim under the antitrust laws is not merely a private matter. Antitrust violation can affect hundreds of thousands, perhaps millions, of people and inflict staggering economic damage. We do not believe Congress intended such claims to be resolved elsewhere than Courts"[10].

Nevertheless, the scope of arbitrable matters has expanded gradually and nowadays encompasses many matters of public interest, e.g. bankruptcy, security, embargo regulations (Mourre, 2011, paras 1-020-024). Under many national laws, arbitrability is linked with the pecuniary or dispositive character of rights, regardless of their qualification as rules of public policy. For instance, in Switzerland, any dispute of a patrimonial character can be subjected to

[9] Article 34(b)(i) and 36(b)(i) of UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 ("UNCITRAL Model Law").

[10] *American Safety Equipment Corp. v. J. P. Maguire & Co., Inc*., 391 F.2d 821 (2d Cir. 1968).

arbitration[11]. In other countries, arbitrability is attributed to rights with respect to which the parties can settle[12] or can freely dispose[13].

2. Competition law arbitrability

Currently, it cannot be doubted that competition law is arbitrable. First, antitrust laws relate to the sphere of commercial activity. Anticompetitive behaviour results in damages that are easily expressed in financial terms. Second, the rights granted to individuals by EU competition rules are dispositive. An injured party can claim compensation for damages sustained as a result of a competition law breach. However, there is nothing preventing the parties to settle the dispute and terminate the conflict without going to court. Indeed, arbitrability of competition law is commonly accepted. The first to adopt it was the US Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*.:[14]

> "As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity; yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to shake off the old judicial hostility to arbitration, and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal"[15].

The *Mitsubishi* judgment was the turning point. A number of national courts followed this interpretation and explicitly or implicitly accepted the use of arbitration with respect to competition law[16]. Among them was also the

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[11] E.g. Switzerland (Article 1771 of the Law on Private International Law). Mourre, 2011, para. 1-011.

[12] E.g. Belgium (Article 1676 of the Judicial Code and Article 2045 of the Belgian Civil Code), Sweden (Section 1 of the Swedish Arbitration Act), Netherlands (Article 1020-3 of the Dutch Code of Civil Procedure). Mourre, 2011, para. 1-014.

[13] E.g. Poland (Article 1557 of the Polish Code of Civil Procedure), Spain (Article 2–1 of the 23 December 2003 Statue), France (Article 2059 of the French Civil Code; not applicable in the context of international arbitration). Mourre, 2011, para. 1-015.

[14] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

[15] Ibidem.

[16] Germany: BGH, *Schweißbolzen*, KZR 7/65; BGH, *Spar*, BGHZ 37, 194, 198; BGH *Basaltlava*, GRUR 1963, 331, 333; BGH, *Flußspat*, NJW 64, 2343; France: Cour d'appel de Paris, 19 May 1993, *Société Labinal v Société Mors & Westland Aerospace*. Italy: Corte d'Appello di Milano, 13 September 2002, *Istituto Biochimico Italiano Giovanni Lorenzetti S.p.A. v. Madaus*

CJEU. In *Eco Swiss*, the judges engaged in a profound analysis of whether the disregard of EU competition provisions should lead to the annulment or refusal to enforce an arbitral award as with a breach of public policy, which already assumes that EU competition law is arbitrable[17].

3. Limitations to arbitrability

The acceptance of the arbitrability of EU competition law has some limits nonetheless. One needs to remember that the adjudicative powers of arbitrators are different to those of competition law enforcers[18] (Mourre, 2011, paras 1-029, 1-035; Nowaczyk and Syp, 2013, p. 87–88; Bagdziński, 2015, p. 74; Syp, 2015, pp. 74–77). While arbitrators can withdraw civil consequences from antitrust infringement, they cannot use the remedies specific to competition authorities, such as setting fines or declaring state-aid as compatible with an internal market. The role of arbitrators can thus be compared only to the role of national judges.

4. Conclusions

The arbitrability of EU competition law holds true for claims for antitrust damages. First, claims for the compensation of antitrust harm concern the application of Article 101 and 102 TFEU, whose arbitrability is undisputed. Second, withdrawing civil consequences from the violation of EU competition law lies certainly within the powers of national judges and arbitrators. From the standpoint of arbitration, there is nothing impeding the handling of claims for antitrust damages.

III. Directive 2014/104/EU and principle of effectiveness of EU law

It remains to be analysed whether the claims for antitrust damages can be arbitrated from the perspective of EU competition law. To that aim, this

A.G., n. 2090. Spain: Audiencia Provincial de Madrid, 324/2004, *Combustibles del Cantabrico S.L. v. Total*; England and Wales: EWHC, *ET Plus SA & Ors v Welter & Ors*, [2005] EWHC 2115 (Comm). See Geradin and Villano, 2016, p. 7–9; Mourre, 2011, para. 1-116-133.

[17] CJ judgment of 1.06.1999, Case C-126/97 *Eco Swiss*, ECLI:EU:C:1999:269.

[18] Cour d'appel de Paris, 14 October 1993, *Aplix v. Velcro*.

section investigates the objectives of Directive 2014/104/EU and the principle of effectiveness of EU law.

1. Directive 2014/104/EU

Directive 2014/104/EU gives strong arguments that the claims for antitrust damages can be arbitrated. The Directive expressly appreciates alternative methods of dispute resolution and supports their use in claiming compensation for antitrust damages. Under Recital 5 the Directive 2014/104/EU states:

"Actions for damages are only one element of an effective system of private enforcement of infringements of competition law and are complemented by *alternative avenues of redress*, such as consensual dispute resolution and public enforcement decisions that give parties an incentive to provide compensation".

Under Recital 48 the Directive continues:

> "Achieving a 'once-and-for-all' settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties. Therefore, infringers and injured parties should be encouraged to agree on compensating for the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements (including those where a judge can declare a settlement binding), *arbitration*, mediation or conciliation. Such consensual dispute resolution should cover as many injured parties and infringers as legally possible. The provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness".

The intention of the Commission was clearly to support the use of arbitration, mediation, and other consensual dispute resolution methods to deal with actions for antitrust damages. Consequently, the newly established framework for the private enforcement of EU competition law does not negate the use of arbitration to enforce competition law remedies.

Oddly, the wording of the Directive 2014/104/EU lacks clarity. Recital 48 lists all the methods of alternative dispute resolution in one line. This does not allow one to clearly establish the role of arbitration in handling claims for antitrust damages. For instance, it is difficult to see how arbitration could help lots of parties to raise their claims in the same arbitral proceeding. Arbitration is a creation of the contract, and is based on an arbitration agreement between the parties that have concluded it. The engagement of any other entities in an arbitral proceeding may bring serious difficulties (Hanotiau, 2016). Thus, antitrust class actions are not likely to be dealt with ease in arbitral proceedings. This leads me to question whether the use of arbitration to resolve antitrust damages is desirable, inasmuch as it ensures the effectiveness of EU law.

2. Principle of effectiveness of EU Law

The principle of effectiveness has been used by the CJEU for a long time to ensure that the remedies existing in national law ensure the execution of rights derived from EU law. The definition of its content presents some difficulties since the CJEU has used it on multiple occasions with the aim of achieving various objectives.

It can be observed that the principle of effectiveness is used as an elimination rule, allowing one to disregard national provisions that make the enforcement of EU rights practically impossible or excessively difficult. This function is reflected in Article 4 of Directive 2014/104/EU:

> "all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law".

The principle of effectiveness is, however, also used to provide for a minimal content of the remedies that ensure the protection of EU law. In *Manfredi*, the CJ specified that a claim for antitrust damages shall encompass *damnum emergens*, *lucrum cessans* and the interests[19]. Such an understanding of the principle of effectiveness presupposes that sufficient remedies shall be available to provide for the effective protection of EU law. According to Reich, this allows for the creation of hybrid EU remedies, which combine the elements of national law with the changes required to ensure effective protection of EU rights (Reich, 2013, p. 309).

In light of this historic development, Lianos is right to state that the main function of the principle of effectiveness is to maximise the sufficient attainment of the ends pursued by the primary right by providing the 'adequate' content to the secondary right of claiming antitrust damages, and not to sculpt the essence of the primary right (Lianos, 2014, p. 8).

In order to verify whether the principle of effectiveness impedes the use of arbitration to enforce the claims for antitrust damages, it needs to be asked what the content of the claim for antitrust damages is (i) and whether its enforcement in arbitral proceedings sufficiently ensures the enforcement of EU provisions in competition law (ii).

2.1. Content of the claim for antitrust damages

The claim for antitrust damages was given a core content by the CJ in the *Manfredi* case:

[19] CJ judgment of 13.06.2006, Case C-295/04 *Manfredi*, ECLI:EU:C:2006:461.

> "it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest"[20].

The claim for antitrust damages has thus been defined in terms of substantive law. The CJ included minimal elements that the national laws of EU Member States must ensure when dealing with claims for compensation in the context of competition law.

The content of the claim for antitrust damages has been further developed by the Directive 2014/104/EU. The Directive includes some further elements of substantive law: it guarantees the right of full compensation, introduces joint and several liability of infringers, regulates the status of indirect purchasers[21]. It also contains some procedural rules concerning, for instance, the disclosure of evidence, effects of the decisions of competition authorities, limitation periods[22].

The traditional claim for compensation as regulated under national tort laws, together with the modifications ensured by the Directive 2014/104/EU, constitute the content of the claim for antitrust damages that adequately ensures the protection of EU law. It remains to be verified whether such a claim can be enforced in arbitral proceedings.

2.2. Enforcement of the claims for antitrust damages in arbitral proceedings

There is little doubt that arbitral proceedings apply the same laws and rights as national judges. Arbitrators apply *substantive law* that is relevant to the dispute[23]. This means that they are bound to apply national provisions transposing Directive 2014/104/EU in a given national legal order. Consequently, they enforce the same claim for antitrust damages as national judges of a relevant EU Member State.

The potential misapplication of the right to compensation in the context of competition law is not only a problem of a potential error of law, but it may also amount to a breach of public policy. EU competition rules are mandatory norms and the CJ in the *Eco Swiss* case stated that they belong to the rules

[20] C-295/04 *Manfredi*, para. 100.

[21] See respectively Article 3, 11, 14 of Directive 2014/104/EU.

[22] See respectively Article 5 to 8, 9, 10 of Directive 2014/104/EU.

[23] This is apart from the possibility of parties to choose the adjudication according to the rules of *ex aequo et bono* or as *amiable compositeur*. See Lew, Mistelis and Kröll, 2003, paras 18-1–7, 18-86-92.

of *ordre public*[24]. Consequently, EU competition law needs to be applied even if the adjudication is made on the basis of *ex aequo et bono* or non-EU law (Landolt, 2011). Furthermore, at the stage of recognition and enforcement of arbitral awards, national courts of EU Member States retain control of whether EU competition law has been addressed by arbitrators adequately (Geradin, 2016). Such competence guarantees that the claims for antitrust damages are sufficiently enforced by arbitrators.

It is thus puzzling why Advocate General Jääskinen states in the *CDC* case[25] that the execution of arbitration clauses concluded before the competition dispute has arisen does not guarantee the effectiveness of EU law. The problem, it seems to him, is the fact that the seat of arbitration may be outside the EU:

> "Nevertheless, a clause conferring jurisdiction in accordance with Article 23 of the Brussels I Regulation may confer jurisdiction only on the courts of Member States of the European Union and by extension, under the Lugano Convention, on the courts of the Parties to that Convention, whereas an arbitration clause may provide that arbitration is to take place in any third State whatsoever. The likelihood of provisions of EU competition law not being applied, even by way of public policy rules, is much greater when jurisdiction is conferred on arbitrators or courts of States not bound by the Lugano Convention"[26].

Such a conclusion demonstrates the AG's misconception of arbitration law. First, the seat of arbitration matters to a limited extent. Its influence is predominantly limited to the relations with local courts, conflict of laws rules and proceedings for the annulment of arbitral awards (Born, 2011). A seat that is outside the EU does not allow the arbitrators applying one of the EU laws to disregard EU competition law. Furthermore, the rules of public policy ensure that the application of EU competition law is of the utmost priority to every arbitrator, even one proceeding from outside the EU. Its disregard may lead to rendering a defective award and would be a breach of the arbitrator's obligation to render a valid and enforceable award. Such an award cannot be enforced or recognized in the EU (Geradin, 2016).

AG Jääskinen continues that his view does not rule out the possibility that victims of competition law infringements could not obtain full compensation in other forums. However, exercising such a right is likely to be more difficult:

> "It is true that the application of jurisdiction or arbitration clauses is not in itself an obstacle to the effectiveness of Article 101 TFEU within the meaning of the

[24] C-126/97 *Eco Swiss*, para. 39.

[25] Opinion of Advocate General Jääskinen, delivered on 11.12.2014, Case C-352/13 *CDC Hydrogen Peroxide*, ECLI:EU:C:2014:2443.

[26] Ibidem, para. 100.

case-law cited (…) given that [the individuals] are not prevented from bringing actions before each of the appointed national or arbitration courts, even though, given the wide variety of clauses relied upon in this case, their application would certainly be likely to render such a course of action more difficult"[27].

AG Jääskinen does not specify what the difficulties are that the parties may face when enforcing the claim for antitrust damages before arbitrators. It is, however, worth mentioning that the modifications introduced by Directive 2014/104/EU in the field of *procedural* laws are also indirectly applied in arbitral procedures. Arbitral procedure is a complex field and cannot be addressed in detail here. However, the flexibility of it allows for reaching similar solutions as those present in Directive 2014/104/EU.

For instance, most of the procedural rules provide arbitrators with a wide scope of power concerning the disclosure of evidence[28]. IBA Rules on the Taking of Evidence set a very detailed mechanism to deal with the requests for disclosure and the production of evidence. The arbitrators can order the disclosure of evidence. However, the parties' should request only a narrow and specific category of documents that they believe to exist; determine how such documents are relevant to the case; give reasons why they cannot obtain the evidence themselves, as well as why they believe the evidence to be in the possession of another party[29]. The arbitrators also enjoy a large degree of discretion in allowing for certain categories of evidence, and should refuse the documents protected by the Directive 2014/104/EU, such as leniency applications[30]. Even though, arbitrators cannot impose fines on those avoiding the delivery of evidence, they can attach adverse consequences to their arguments[31], impose on them the costs and legal fees (Salomon and Friedrich, 2013) or ask local courts for the imposition of fines pursuant to national provisions implementing Directive 2014/104/EU[32]. This demonstrates that procedural solutions present in Directive 2014/104/EU are also likely to be applied in arbitral proceedings.

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[27] AG Jääskinen's opinion, para. 143.

[28] See, e.g. Article 25(1) and 25(5) of ICC Arbitration Rules; Article 27(3) of UNCITRAL Arbitration Rules; Article 27(3) of LCIA Arbitration Rules.

[29] Article 3 of IBA Rules on the Taking of Evidence in International Arbitration.

[30] Article 9(f) of the IBA Rules on the Taking of Evidence in International Arbitration guarantee that arbitrators shall excluded the evidence or production of evidence on "grounds of special political or institutional sensitivity."

[31] See, e.g. Article 9(5) and 9(6) of IBA Rules on Taking of Evidence in International Arbitration, Article 25(c) of UNCITRAL Model Law. See also, Driessen-Reilly, 2015, p. 578.

[32] Article 27 UNCITRAL Model Law, Article 1693-1694 of Belgian Arbitration Law, Sections 33-34 of English Arbitration Act, Article 1460-1461 of French New Code of Civil Procedure (NCPC), Sections 1042, 1049-1050 of German Code of Civil Procedure (ZPO), Articles 1036, 1039-1044 of Dutch Code of Civil Procedure (CCP).

AG Jääskinen's opinion in the *CDC* case was not followed by the CJ, which did not express its views on arbitration agreements[33]. This additionally supports the fact that arbitrating claims for antitrust damages does not *per se* impede the effectiveness of EU law[34]. If the CJ was of the view that the effectiveness of EU competition law is endangered by the application of arbitration clauses, it had a perfect opportunity to express it.

2.3. Conclusions

Claims for antitrust damages are enforced by arbitrators and by national judges in a similar way. There is little risk that the substantive and procedural content of a claim for antitrust damage will not be respected and enforced in arbitral proceedings. Additionally, the principle of public policy poses a further safeguard, in that every arbitral proceeding will enforce the rights derived from EU competition law provisions of the Treaties. Finally, Directive 2014/104/EU expressly promotes handling the actions for damages by means of alternative methods of dispute resolution[35]. This demonstrates the general compatibility of arbitrating claims for antitrust damages with the principle of effectiveness in EU competition law.

IV. Interpreting the scope of arbitration agreements

After having observed that the actions for antitrust damages are arbitrable and their handling by arbitrators is in line with the principle of effectiveness, the ultimate question remains whether actions for antitrust damages are within the scope of an arbitration agreement.

This problem is likely to arise frequently in practice. Parties that stay in direct contractual relations may conclude agreements containing arbitration clauses. It is likely that they will use model arbitration clauses that cover all the disputes arising out of or in connection with the contract.[36] Should one of the parties commit a breach of EU competition law and damage its direct contractor, it will be asked whether the claims for antitrust damages fall within the scope of such an arbitration agreement.

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[33] C-352/13 *CDC Hydrogen Peroxide*, para. 58.

[34] The term *per se* is used to express the general suitability of arbitration as a means to deal with the claims for antitrust damages.

[35] See section IV. of this paper.

[36] Every arbitration institution provides for a recommended model arbitration clause; herewith the example of the ICC Standard Arbitration Clause.

1. Impact of the *CDC* case

In the *CDC* case the CJ dealt mainly with the question of whether the execution of different arbitration and jurisdiction clauses was in line with the principle of effectiveness in EU law. On this occasion, the CJ expressed yet some interesting opinions on the interpretation of the scope of the clauses in question.

1.1. Opinion of Advocate General Jääskinen

As shown in the previous section, AG Jääskinen's opinion features a certain distrust of using arbitral proceeding to deal with the actions for antitrust damages. He does not preclude that arbitration agreements in themselves upset the principle of the full effectiveness of EU competition law. Nevertheless, he requires that they are agreed with the awareness of a cartel agreement in order to cover the claims for antitrust damages.

> "In consequence, I consider that Article 101 TFEU must be interpreted as meaning that, in the context of an action for compensation for damage caused by an agreement declared to be contrary to that article, the implementation of jurisdiction and/or arbitration clauses does not in itself compromise the principle of the full effectiveness of the prohibition of agreements, decisions and concerted practices. In so far as a clause of one or other of those categories could be declared applicable, pursuant to the law of a Member State, in a dispute concerning liability in matters of tort, delict or quasi-delict that might follow from such an agreement, that principle, in my view, precludes jurisdiction over that dispute being attributed under a clause of a contract whose content had been agreed when the party against whom that clause is relied on was unaware of the cartel agreement in question and of its unlawful nature, and could not, therefore, have foreseen that the clause could apply to the damages sought on that basis"[37].

The reason why AG requests that arbitration and some jurisdiction agreements be concluded after the dispute has arisen is the fact that the parties could not have foreseen the violation of EU competition law and the damages arising on such a basis. Along the same lines, AG Jääskinen believes that arbitration and jurisdiction clauses cannot encompass tort claims since they are not sufficiently connected with the contract concluded by the parties:

> "In my opinion, the rights relied upon in this case derive (…) from the tort consisting of the cartel agreement arranged and put in hand, covertly, by the defendants in the main proceedings. The issue in the case in the main proceedings is the pecuniary

[37] AG Jääskinen's opinion, para. 132.

consequences of that fraudulent conduct, which is inherently different from the supply contracts invoked"[38].

Such reasoning clearly contradict the principle that individuals have autonomy in exercising their disposable rights. This autonomy also encompasses the determination of the forum to resolve disputes relating to such rights and shall be respected (Nygh, 1999). The fact that claims may have their basis in tort law does not preclude the parties from subjecting future disputes relating to them to the adjudication of arbitrators. It is only the interpretation of an arbitration clause that allows stating whether the parties had a will to cover a given dispute within the scope of arbitration agreement (Mistelis & Kröll, 2003). The reconstruction of the parties' intentions is subjected to the rules on the interpretation of will expressions under applicable national laws (Ereciński, Weitz, 2008, para. III.3.5). AG Jääskinen does not refer to any of such laws. As a result, the abstract statement that it is unlikely that arbitration agreements cover tort claims is groundless.

1.2. Judgment of the Court

The *CDC* judgment covers only jurisdiction clauses falling under the scope of Regulation 44/2001. The Court expressed that it did not have sufficient information to decide whether the execution of arbitration clauses was consistent with the effectiveness of EU competition law[39].

With respect to jurisdiction clauses covered by Article 23 of Regulation 444/2001, the Court stated that the effectiveness of EU competition law cannot be called into question by the execution of jurisdiction clauses related to actions for antitrust damages[40]. However, the central question was whether the investigated jurisdiction clauses covered actions for antitrust damages. Following its case law relating to Regulation 44/2001, the CJ observed that:

"(…) a jurisdiction clause can concern only disputes which have arisen or which may arise in connection with a particular legal relationship, which limits the scope of an agreement conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into. The purpose of that requirement is to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum as regards all disputes which may arise out of its relationship with the other party to the contract and stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made"[41].

[38] Ibidem, para. 130.
[39] C-352/13 *CDC Hydrogen Peroxide*, para. 58.
[40] Ibidem, paras 62-63.
[41] Ibidem, para. 68.

According to the CJ, the execution of jurisdiction clauses as described in Article 23 of Regulation 44/2001, does not impede the effectiveness of EU law. However, abstract jurisdiction clauses are not likely to encompass actions for antitrust damages.

1.3. Reactions to the *CDC* case

The silence of the CJ with respect to arbitration clauses only enhanced doubts about how to treat them, and whether to apply the reasoning of the CJ by analogy also to arbitration clauses.

The Amsterdam Court of Appeal was of the opinion that the reasoning of the CJ with respect to jurisdiction clauses should be extended to the assessment of arbitration clauses. In dealing with the CDC's actions for antitrust damages in the Netherlands, it observed that:

> "(…) there are no reasons to rule differently with respect to the arbitration clauses. With regard to these clauses, it is necessary to conclude that the undertaking harmed by the competition law did not agree on the arbitration clause that covers the claims resulting from infringements of competition law"[42].

The equal treatment of arbitration and jurisdiction clauses has also found support in academic writing. For instance, Ch. Harler is of the opinion that model arbitration clauses typically do not cover disputes over cartel damages claims. With regard to jurisdiction clauses, the ECJ holds that in the absence of an explicit inclusion, standard jurisdiction clauses do not reach cartel damages claims. There is no indication that the CJEU would not also apply this interpretation to arbitration clauses (Harler, 2015, p. 121–123).

Such reasoning cannot be accepted. The reference to the *CDC* judgment is mistaken since the Court left arbitration clauses beyond the scope of its assessment. Furthermore, contrary to what is claimed by the Amsterdam Court of Appeal and Harler, there are strong reasons for not extending the CJ's reasoning to the interpretation of arbitration agreements.

Regulation 44/2001 is an instrument of private international law, whose objective is to determine the jurisdiction of disputes that have an international element. Article 23 of the Regulation provides for a definition of a jurisdiction agreement, which produces effects under the Regulation. According to Article 23 of Regulation 44/2001, jurisdiction agreements cover "any disputes which have arisen or which may arise in connection with a particular legal

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[42] Gerichshof Amsterdam, 21.07.2015, *CDC v. Akzo Nobel*, 200.156.295/01, para. 2.16. Similarly, arbitration clauses were not executed in a follow-on claim against elevator and escalator manufacturers adjudicated by Utrecht District Court. See Utrecht District Court, 27.11.2013*, East West Debt v United Technologies Corporation c.s.*

relationship". The role of CJEU is to interpret this provision, as was done so in the *CDC* case.

On the contrary, under Article 1(2)(d) of Regulation 44/2001, arbitration is outside the scope of the Regulation. The aim of arbitration is to provide for a private forum of adjudication when parties are willing to derogate from the national court jurisdiction. The transfer of jurisdiction is made on the basis of an arbitration agreement, which is determined by the parties. It has no pre-defined scope and it expresses the will of specific parties to subject specific disputes to the adjudication of arbitrators (Lew, Mistelis & Kröll, 2003, paras 6-1-2). As a result, the scope of an arbitration agreement needs to be interpreted in light of national provisions on the interpretation of expressions of will, and with reference to the national case law on the interpretation of arbitral agreements. The CJ expressed that it did not have sufficient information to conduct such an analysis, and limited its assessment only to the problems arising in the field of private international law. Such limitation of the *CDC* judgment shall be respected.

It can be raised that it is the principle of effectiveness of EU law that requires the application of the *CDC* judgment by analogy to the assessment of arbitration clauses. The previous part has demonstrated however that the use of arbitration to deal with the claims antitrust damages does not *per se* impede the effectiveness of EU law. If the CJ was of the view that the effectiveness of EU competition law is endangered by the application of arbitration clauses, it would not hesitate to express it. The suitability of arbitration as a means to deal with claims for antitrust damages is a general problem and could have been addressed by the CJ without the need to refer specifically to the given arbitration clause.

Consequently, if the national courts feel the risk that the principle of effectiveness is endangered by the execution of a given arbitration clause they shall not apply the *CDC* judgment by analogy, but rather analyse the principle of effectiveness *in concreto*, namely by assessing the effects of execution of the specific arbitration clause with its specific characteristics. Such an assessment is separate to the question of the scope of arbitration agreement and shall be undertaken only if the arbitration clause covers claims for antitrust damages.

2. Polish experience in interpreting arbitration clauses

The scope of arbitration agreements needs to be determined with reference to the parties' expressions of will interpreted according to the applicable national laws. There can be situations when parties expressly agree on how to treat the actions for antitrust damages. However, it is more common for

parties to conclude arbitration clauses that refer vaguely to disputes that could arise between them as it is not known to them, which specific disputes will occur. The interpretation of such clauses is crucial to identify the relevant forum for specific disputes.

In order to show how arbitration clauses may be interpreted in the event of commenced claims for antitrust damages, the paper draws on the jurisprudence of Polish courts concerning the attempts to arbitrate private disputes resulting from infringements of Polish Law on Unfair Competition with respect to slotting fees[43].

The choice of case law from the field of unfair competition results from the fact that it has a few shared characteristics with competition law[44]. Firstly, the problem of slotting fees is of importance for both the competition and unfair competition law. Under Polish law, they are considered as an act of unfair competition, yet at the same time they create barriers for market entry, which can be perceived as anti-competitive under competition law (Wright, 2006). Second, civil consequences that are triggered by acts of unfair competition are, to a large extent, similar to the ones that result from violations of EU competition law. Both fields provide as remedies claims for the recovery of unjust enrichment and compensation[45]. The claims arise from the others' misconduct and aim at restoring a situation that existed before the breach of law, by compensating the victim for sustained losses (Fézer, 2013, pp. p. 7–11). In both areas, such claims have a distinctive and independent character from other claims that may exist between the parties, in particular contractual claims. As a result, the arguments for and against the inclusion of actions for damages within the scope of arbitration agreements are likely to be similar in both fields.

2.1. Legal framework

Slotting fees are the charges imposed by supermarket distributors on their suppliers for having their products placed on supermarket shelves. Such fees may create a barrier, stopping small businesses that do not have enough financial resources to create their own distribution systems and compete with

[43] Act of 16 April 1993 on Combating Unfair Competition (Journal of Laws 2003 No 153, item 1503).

[44] Even thought, the aims of EU competition law an law on unfair competition are not the same as expressed under Recital 9 of Regulation 1/2003, the reference to such case law may be helpful for the reasons specified.

[45] With respect to competition law see C-295/04 *Manfredi*, para. 100 and CJ judgment of 16.12.2008, Case C-47/07 P *Masdar (UK) Ltd v Commission of the European Communities*, ECLI:EU:C:2008:726, paras 44-47. With respect to Polish Law on Combating Unfair Competition see Article 18 of the Law.

large companies, from entering the market. Under Polish law, slotting fees are considered an act of unfair competition and are declared illegal:

> "It is an act of unfair competition to restrict access to the market for other undertakings, in particular by (…) requesting charges other than the trade margin for receipting a good for the purpose of sale"[46].

The violation of the interests of fellow entrepreneurs or clients by the acts of unfair competition triggers civil consequences. According to Article 18(1) of the Law on Combating Unfair Competition:

> "In the event of an act of unfair competition, an entrepreneur, whose interests have been threatened or damaged may request:
> 1) abandonment of illicit activities;
> 2) removal of the effects of illicit activities;
> 3) single or multiple statement of an appropriate content and form;
> 4) compensation for damages according to general rules;
> 5) recovery of unjust enrichment according to general rules;
> 6) awarding an adequate sum for a specific social purpose related to the promotion of Polish culture or protection of national heritage – if an act of unfair competition was committed culpably".

Against this framework, it is plausible that an act of unfair competition would occur when the infringer and the person damaged stay in contractual relations. For instance, the parties may have concluded a supply or distribution agreement. Such agreements may also entail an arbitration clause. The question arises whether an arbitration agreement also covers, apart from contractual claims, the claims under Article 18 of the Law on Combating Unfair Competition, in particular claims for damages and unjust enrichment. This problem was subjected multiple times to the analysis of the Polish Supreme Court.

2.2. Jurisprudence Relating to Polish Law on Unfair Competition

2.2.1. Judgment of the Supreme Court of 2 December 2009

The present case[47] concerns a dispute between a supplier of construction products and a company operating an OBI store, the largest "do-it-yourself" retailer in Europe. The supplier claimed the recovery of unjust enrichment under Article 18(1)(5) of the Law on Combating Unfair Competition as a result of being forced to pay slotting fees.

[46] Article 15(4) of Polish Law on Combating Unfair Competition. Specifically regarding slotting fees: judgement of the Supreme Court of 26.01.2006, II CK 378/05.

[47] Judgement of the Supreme Court of 2.12.2009, I CSK 120/09.

The dispute was, however, mainly focused on the problem of jurisdiction, in which the claims for recovery of unjust enrichment are enforced. The source of controversy was the fact that the parties concluded a series of agreements with arbitration clauses. The agreement on commercial cooperation, agreement on the provision of services and the agreement on bonuses resulting from increased volumes of sale included the following arbitration clause:

> "The Parties will endeavor to resolve consensually *any disputes resulting from the agreement or connected with it*. Should a dispute be impossible to resolve within a month, its resolution shall be subjected to the adjudication of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, and shall be governed by its Rules applicable on the day of commencing the proceeding"[48].

The question was whether the claim for unjustified enrichment under Article 18(1)(5) of the Law on Combating Unfair Competition was within the scope of the arbitration agreement. The Supreme Court stated that such a claim had a distinctive character and it was independent from the contractual and tort liability of the infringer. The Supreme Court concluded that, even though such a claim was arbitrable, it was not covered by the arbitration agreement. According to the judges:

> "The reason for such a conclusion was that the agreements concluded between the parties were aimed at regulating the cooperation of the parties with respect to the sale of products. Slotting fees can neither be considered as the execution of the agreements, nor as being in connection with them, but they were charged only *on a mere occasion of execution of the agreements*. As a result, the claim in question does not have a contractual character and is not in connection with the agreements. To the contrary it concerns the act of unfair competition that was undertaken by one of the parties"[49].

Furthermore, the Court expressed that it is unlikely that the parties had foreseen the occurrence of acts of unfair competition, and could not have intended to cover them by the arbitration agreement. In conclusion, the Court rejected the claim that lower instances lacked jurisdiction to deal with the claims under Article 18(1)(5) of the Law on Unfair Competition[50].

2.2.2. Judgement of the Supreme Court of 5 February 2009

The Supreme Court endorsed different view regarding the interpretation of arbitration agreements in another case relating to slotting fees[51]. The

[48] Ibidem.
[49] Ibidem.
[50] Similar conclusions: judgement of the Supreme Court of 4 April 2012, I CSK 354/11.
[51] Judgement of the Supreme Court of 5 February 2009, I CSK 311/08.

dispute occurred between parties that concluded a framework agreement for commercial cooperation. It included a two-tier arbitration clause, summarized by the Court as follows:

> "With respect to the disputes relating to *the interpretation of the framework agreement* for commercial cooperation, *the general terms and conditions for the purchase and delivery* or *the execution of the orders* the parties will follow a two-step procedure of dispute resolution: a) consensual resolution by means of negotiation conducted by two authorized representatives of the Parties; b) 30 days after the initiation of the negotiation each of the Parties is entitled to commence an action before the Court of Arbitration at the Polish Chamber of Commerce in Warsaw"[52].

The Supreme Court was of the opinion that slotting fees were charged *by means* of marketing and advertising charges, and that the dispute related thereby to the interpretation of the agreements concluded by the Parties. Such a conclusion was not influenced by the fact that the Court qualified the imposition of such charges as an act of unfair competition. The Court also referred to the following:

> "(…) according to the views represented in legal literature, submitting disputes resulting from contractual relations to an arbitral tribunal means that the arbitral tribunal has the power to rule on claims for the execution of the contract, claims caused by non-performance or undue performance of the contract, claims for unjust enrichment resulting from the invalidity or termination of the contract *and tort claims*, *which are caused by an event that is at the same time a non-performance or an undue performance of the contract*"[53].

After having stated that the claims under Article 18 of the Law on Combating Unfair Competition are in sufficient connection with the agreement, the Court sided with the party claiming that the action for recovery of unjust enrichment falls within the scope of the arbitration agreement and shall be resolved by the arbitrators.

2.2.3. Judgement of the Supreme Court of 24 October 2012

The Supreme Court dealt once again with the interpretation of arbitration clauses regarding claims for unjust enrichment resulting from slotting fees on 24 October 2012[54]. Since disputing parties relied on previous case law in their submissions, the Court conducted a profound analysis of the nature of claims resulting from violations of the Law on Combating Unfair Competition.

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[52] Ibidem.
[53] Ibidem.
[54] Judgment of the Supreme Court of 24 October 2012, I CSK 354/11.

In the present case, an arbitration clause was included in both a sales contract and a contract for the provision of promotional services. It was worded as follows:

> "The arbitration tribunal is exclusively competent to resolve *all the disputes arising from the legal relationship between the parties*, regardless of the dates of their occurrence, including, in particular, disputes relating to claims for the execution of the sales contract and the contract for provision of promotional services, claims arising in the event of a non-performance or undue performance of the contracts, claims for the recovery of an unjustified provision of services in the event of the invalidity of the contracts or their parts or withdrawal from the contracts, as well as any tortious claims, if they arise from an event related to the execution of the contracts or which are simultaneously a non-performance or undue performance of the contracts"[55].

The claimant put forward the notion that the courts had the jurisdiction to deal with the dispute. According to him, the claim for unjust enrichment under Article 18(1)(5) of the Law on Combating Unfair Competition has a distinctive character and is independent from the contractual and tortious liability of the infringer. As a result, it cannot fall under the arbitration clause included in the contracts.

Although the Supreme Court agreed with this statement, it stated, however, that it is not the nature of the claim that decides on its qualification within the scope of arbitration claims. Rather, it is the content of the arbitration agreement that is essential.

Consequently, the Court analysed whether the claim for unjustified infringement under Article 18(1)(5) of the Law on Combating Unfair Competition falls within one of the classes of claims listed in the arbitration clause. To that end, the Court wondered whether the imposition of unlawful charges was made *by the sales contract itself* or whether the charges were imposed *next to the* agreement for sales. Ultimately, the Court left these questions open since the arbitration clause covered many types of claims[56].

2.3. Critics

The review of the Supreme Court's case law allows one to state that there is no uniform tendency concerning the interpretation of arbitration clauses in the field of law for unfair competition in Poland[57].

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[55] Ibidem.

[56] Ibidem.

[57] See also the case law of appeal courts: judgment of the Court of Appeals in Poznań of 10.01.2013, I ACz 2239/12; judgment of the Court of Appeals in Poznań of 11.04.2013, I ACz 592/13.

On the one hand, there is a trend to interpret arbitration clauses widely, as expressed by the Supreme Court in the judgement of 5 February 2009. If an arbitration clause stipulates that it covers the disputes relating to a contract, such clauses are meant to cover: claims for the execution of a contract (i), claims caused by its non-performance or undue performance (ii), claims for unjust enrichment resulting from the invalidity or termination of a contract (iii) and tort claims, which are caused by an event that means also non-performance or undue performance of a contract (iv). The claims resulting from the violation of the Law on Combating Unfair Competition are likely to be encompassed by them.

On the other hand, the judgement of 2 December 2009 indicates that the arbitration clauses are required to be specific, and describe in detail the disputes that are encompassed thereby. Since the claims resulting from the breach of Law on Combating Unfair Competition have a distinctive character and are enforced independently from other claims, they shall be specifically referred to by an arbitration clause.

Even though Polish courts do not give an ultimate answer as to which of these approaches shall be chosen, they have commenced an interesting discussion about the relation between the contract existing between the parties and claims resulting from the violation of the Law on Combating Unfair Competition.

The courts state that the sole nature of the claim cannot decide whether the parties aimed at covering it by the arbitration agreement. Instead of analysing the nature of the claim, the judges put more emphasis on the connection, which is between the misconduct and the contract. The judges ask multiple times whether the infringement was made by the contract itself, next to the contract, or on a mere occasion of executing the contract. Such classification seems to be vital for deciding whether there is a sufficient nexus of claims under the Act of Combating Unfair Competition with the arbitration clause regulating usually legal relations covered by the contract.

This discussion is essential also from the standpoint of actions for antitrust damages. In order to assess whether the claims resulting from the violation of EU competition law are covered by an arbitration agreement relating to the contractual relations between the parties, the key may be to ask whether the claims for antitrust damages have a sufficient connection with the contract.

V. Addressing Misconceptions Concerning the Arbitration of Antitrust Damages

Both the Polish case law related to slotting fees and the analysis of the *CDC* case by the EU Courts reveal some misconceptions that concern the arbitration of claims for antitrust damages. One of them was the so-called distinct character of the claims resulting from the violation of EU competition law and Polish Law on Combating Unfair Competition, which makes the claims difficult to foresee and thus to include in the scope of an arbitration agreement. Another doubt was the non-contractual origins of such claims, which make them unlikely to be covered by arbitration agreements related to the contract. This section aims at addressing these problems.

1. No awareness of future violation

One of the arguments raised by AG Jääskinen and the Polish Supreme Court on 2 December 2009 was that the investigated claim could not be covered by an arbitration agreement since the parties to the agreement were unaware of the breach of law giving rise to the claim in the moment of concluding it.

Such an argument seems to be dubious. Arbitration agreements concluded before any dispute has arisen always involve some element of the parties' unawareness of future conflicts. It is thus difficult to request from the parties an awareness of any future events giving rise to specific claims (Wiśniewski, 2011). For instance, an arbitration clause that speaks of contractual disputes arising out of the contract shall cover disputes relating to the fact that a purchased product is different from the one described in the agreement, as well as disputes concerning a sudden termination of the contract. This is regardless of the parties' awareness of such problems in the moment of concluding the arbitration agreement.

Even though some claims may be believed to have a distinctive character from other claims stipulated by an arbitration clause, it shall not exclude them automatically from the scope of the arbitration agreement. This problem needs to be decided in reference to the will of parties to the arbitration agreement. In the case of difficulties of reconstructing the actual intent of the parties, most of jurisdictions support the approach of interpreting arbitration clauses in favour of arbitration[58]. As expressed by Lord Hoffman:

[58] England & Wales, see Herbst, 2012; United States, see Celik, 2014; Austria see Welser & Moltioris, 2012; Germany, see Koller, 2012, para. 3.259. For a comparative overview see Poudret and Besson, 2007, p. 304–326, Lew, Mistelis and Kröll, 2003, paras 7-61-62.

> "In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction"[59].

If an interpretation in favour of arbitration is a dominant in the given jurisdiction, it shall also be applied when deciding about the claims for antitrust damages. The unawareness of the parties of a future breach of antitrust law shall not justify departing from the principle of an arbitration-friendly interpretation of arbitration agreements.

2. Tort Origin of the Claim

Another argument against the inclusion of actions for antitrust damages within the scope of an arbitration agreement is that tort claims are not related to the contract containing an arbitration clause. As described by the Polish Supreme Court on 2 December 2009, the violation can be believed to be not realised by the contract but to exist merely *next to* it. This classification is vital when the arbitration clause speaks only about contractual claims, or in a certain way limits the catalogue of tort claims to the ones related only to the contract.

The problem of whether non-contractual claims fall within the scope of arbitration agreements when their wording is unclear is decided under national arbitration laws and case law (Sadowski and Wętrys, 2014, p. 6–8). As a solution, some countries propose a distinction between the wording of "disputes arising out of the contract" and "disputes arising under the contract", so to delimit whether tort claims fall within the scope of arbitration agreements (e.g. United States; see Celik, 2014). However, in many other countries such a distinction has been abandoned in favour of including tort claims in the scope of arbitration agreements (e.g. England & Wales, see Herbst, 2012; Austria and Switzerland, see Sadowski and Wętrys, 2014, p. 12–16). It is supported by the view that most frequently parties prefer to subject all the disputes between them to a single forum (one-stop-adjudication) (Sadowski and Wętrys, 2014, p. 11; Landolt, 2011, para. 12-105-107).

The problem of whether to follow the principle of one-stop-adjudication with respect to claims for antitrust damages is controversial (for the inclusion – see e.g. Basedow, 2007; against the inclusion – see e.g. Nazzini, 2008).

[59] Lord Hoffman in *Fiona Trust & Holding Corp. v. Privalov*, [2008] 1 Lloyd's Rep. 254 (H.L.), para. 13.

However, it shall not be doubted that the infringement of competition law has significant effects on the agreement concluded by the parties. For instance, cartels lead frequently to an overcharged price, which is an essential part of a contract.

In some instances, the entire decision to conclude an agreement can be influenced by the violation of competition law. Take bid rigging as an example. If the collusion between the bidders had not occurred, the organizer of the tender would not have concluded the agreement with a given bidder and would have chosen another contractor. As a result, it cannot be denied that competition law infringements are linked with the contract. It is thus not excluded that the violation of the competition law is made by the contract itself, as is expressed in the judgment of the Polish Supreme Court of 24 October 2012.

The question of whether the violation of competition law is made by the contract, next to the contract or on a mere occasion of its execution will always depend on the circumstances of the case. In situations in which the contract already materializes the infringement, it may be difficult to separate antitrust violation from a commercial contract between an infringer and a victim of antitrust violation. Under such circumstances it shall not be questioned that the claims resulting from competition law have a sufficient connection to the arbitration agreement related to the contract. Such a close nexus calls for dealing with both contractual claims and the claims for antitrust damages in one forum.

VI. Conclusions

The question of whether arbitration agreements governing a general commercial relationship between the parties also cover the actions for antitrust damages cannot be answered in the abstract. There is always a given arbitration agreement and the context in which it has been concluded is of the utmost importance. The role of national law is to give guidelines for the interpretation of such agreements.

The CJEU has not given much guidance on how to treat arbitration agreements in the event of compensation claims for antitrust damages. Polish case law in the field of unfair competition law also does not provide for a coherent trend in interpreting arbitration clauses. Nonetheless, the courts raise many vital questions for dealing with the arbitration of claims of antitrust damages. This article aimed to analyse some of them, such as: the meaning of the parties' awareness of competition law concern in the moment

of concluding an arbitration agreement; the impact of the tort origin of actions of antitrust damages or the need for a sufficient nexus between the violation of competition law and the contract to which the arbitration clause relates.

I believe that in principle there is nothing preventing the arbitration of antitrust damages. They are arbitrable in principle and the efficiency of EU competition law is not endangered. I propose an adoption of an arbitration-friendly interpretation of the scope of arbitration clauses because in many situations the infringements of competition law will have significant repercussions on the contractual relationship between the parties. Under such circumstances, the actions for antitrust damages shall be dealt together in the same forum with the claims resulting from contractual violations.

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Problems Related to Determining of a Single Economic Entity under Competition Law

by

Raimundas Moisejevas and Danielius Urbonas*

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Abstract

The article explores the problems related to the determination of a single economic unit under competition law. The first part of the article addresses the concept of a single economic entity. It is presumed that companies belonging to a group are separate undertakings, but under certain circumstances the group might constitute a single economic entity. The second part refers to the analysis of the concept of 'control', which is the main criterion describing the relationship inside a group of companies. The third part refers to the analysis of the cases when *de jure* separate undertakings are recognized as a single economic entity. When a company exercises decisive influence over another company, they form a single economic

* Dr. Raimundas Moisejevas – Attorney at law, Arbitrator, ICSID Conciliator and Professor in Business Law Department, Faculty of Law, Mykolas Romeris University, Lithuania; raimundas.moisejevas@vilgerts.com; Danielius Urbonas – Attorney at law, Master of Laws at Mykolas Romeris University (Lithuania), danielius.urbonas@gmail.com. Article received: 9.08.2017; accepted: 30.09.2017.

entity and, hence, are part of the same undertaking. Decisive influence is the most important criterion for recognizing that *de jure* separate undertakings constitute a single economic unit. Finally, the fourth part refers to problems concerning the presumption of the decisive influence. It is presumed that a parent company exercises a decisive influence over a subsidiary where it holds 100 percent of capital. Thus, separate companies are recognized as a single economic unit, if 100 percent of a company's capital is owned by the controlling entity.

Resumé

L'article explore les problèmes liés à la détermination d'une entité économique unique en vertu du droit de la concurrence. La première partie de l'article aborde le concept d'une entité économique unique. Il est présumé que les sociétés appartenant à un groupe sont des entreprises distinctes, mais dans certaines circonstances, le groupe pourrait constituer une entité économique unique. La seconde partie se réfère à l'analyse du concept de «contrôle», qui est le critère principal décrivant la relation au sein d'un groupe de sociétés. La troisième partie se réfère à l'analyse des affaires où des entreprises distinctes *de jure* sont reconnues comme une entité économique unique. Enfin, la quatrième partie se réfère à des problèmes concernant la présomption de l'influence décisive. Il est présumé qu'une société mère exerce une influence décisive sur une filiale dans laquelle elle détient 100% du capital. Ainsi, des sociétés distinctes sont reconnues comme une seule unité économique si 100% du capital d'une société appartient à l'entité qui la contrôle.

Key words: competition law; concept of the control; decisive influence; one economic unit; parent company; single economic entity; subsidiary; undertaking.

JEL: K21

I. Introduction

The concept of a single economic entity is one of key topics of competition law. Every time when a competition authority intends to apply the provisions of competition law towards some entity, at first it is necessary to evaluate whether such entity constitutes an undertaking. For example, when the competition council starts investigation concerning an alleged bid-rigging agreement, it firstly should evaluate whether the entities, which are allegedly in breach of the competition law, are meeting the criteria of an undertaking. To be described as an undertaking, the entity must satisfy two criteria. First, an entity should perform economic activity. Second, it must be independent and autonomous. The concept of an undertaking encompasses every entity

engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed[1]. Such approach towards an undertaking is described as functional (Odudu, 2004–2005, pp. 211–242), in that it focuses on the type of activity performed rather than on the characteristics of the actors which perform it[2].

While describing an entity as an undertaking, the economic criteria are more important than the legal status of the entity (Lasok, 2004, p. 383). The Law on Competition of the Republic of Lithuania provides that an undertaking shall mean an enterprise, or other legal or natural persons, which perform or may perform economic activities[3]. The concept of an undertaking is not identical with the question of legal personality for the purposes of company law or fiscal law. This term may refer to any entity engaged in commercial activities and to a parent or to a subsidiary or to the unit formed by the parent and subsidiaries together[4].

The concept of an undertaking designates an economic unit (single economic entity) for the subject-matter of the agreement in question, even if in law the unit consists of several persons, natural or legal[5]. An undertaking is independent, if it is not influenced and controlled by another entity. Subsidiaries usually are not treated as separate undertakings in relation to the parent company. If a subsidiary has a separate legal personality but does not enjoy real autonomy in determining its course of action, the behavior of such subsidiary may be imputed to the parent company[6]. Therefore, an agreement to coordinate prices between the parent company and the subsidiary in most cases will not be treated as anticompetitive, since it is not concluded between

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[1] CJ judgment of 23.04.1991, Case C-41/90 *Höfner and Elser v Macroton GmbH*, ECLI:EU:C:1991:161, para. 21. Such definition is also found [in:] Whish, 2001.

[2] Opinion of Advocate General Jacobs delivered on 22.05.2003, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), Bundesverband der Innungskrankenkassen, Bundesverband der landwirtschaftlichen Krankenkassen, Verband der Angestelltenkrankenkassen eV, Verband der Arbeiter-Ersatzkassen, Bundesknappschaft, See-Krankenkasse and Ichthyol-Gesellschaft Cordes, Hermani & Co., Mundipharma GmbH* (C-306/01), *Gödecke GmbH* (C-354/01), *Intersan, Institut für pharmazeutische und klinische Forschung GmbH* (C-355/01), ECLI:EU:C:2003:304, para. 25.

[3] Law on Competition of the Republic of Lithuania, Official Gazette (1999. No. VIII-1099).

[4] Commission Decision of 23.04.1986, IV/31.149 – *Polypropylene* (OJ L 230, 18.8.1986, p. 1), para. 99.

[5] CFI judgment of 15.09.2005, Case T-325/01, *DaimlerChrysler AG v Commission* ECLI:EU:T:2005:322, para. 85; ECJ judgment of 12.07.1984, Case 170/83 *Hydrotherm*, ECLI:EU:C:1984:271, para. 11; GC judgment of 3.03.2011, Joined cases T-325/01 and T-234/95 *DSG v Commission*, ECLI:EU:T:2011:69, para. 124; CJ judgment of 14.12.2006, Case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio*, ECLI:EU:C:2006:784, para. 40.

[6] ECJ judgment of 14.07.1972, Case C-48/69, *Imperial Chemical Industries v Commission*, ECLI:EU:C:1972:70, para. 133.

two independent undertakings. The parent and subsidiary companies are often treated as a single economic entity under the competition law. We may conclude that determination of a single economic entity has a huge practical importance in disputes with the Competition Council.

The court practice in Lithuania is not clear enough on the application of the criteria concerning determination of a single economic entity. In most disputes with the Competition Council when the parties aimed to prove that separate entities constitute a single economic entity, they failed to do so. One of the reasons is a lack of a clear-cut theoretical and practical approach towards proving of a single economic entity under the Lithuanian competition law. We hope that this article will help understand better the criteria under which related companies might be recognized as a single economic unit.

The aim of this article is to identify the key principles used for the establishment whether separate entities constitute a single economic entity.

II. The concept of a single economic entity

It is presumed that companies belonging to a group are separate undertakings (Ferran, 1999, p. 31). However, under certain circumstances a group of companies may constitute a single economic entity according to competition law. If one undertaking *de jure* or *de facto* exercises decisive influence over another company's commercial policy, such separate companies are not competitors since competing companies usually are not pursuing a common goal. The main criteria for determining whether the undertakings form a single economic entity is the ability of the subsidiary (a controlled entity) to determine its course of action in the market[7]. Different companies belonging to the same group who do not determine independently their own conduct on the market might be recognized as one undertaking within the meaning of Article 101 TFEU and 102 TFEU[8]. For the purpose of applying the competition rules, formal separation of two companies resulting from their having distinct legal identity is not decisive. The test is whether there is unity in their conduct on the market.[9] Therefore, when the controlling entity

[7] Case C-48/69, *Imperial Chemical Industries*, para. 134.

[8] CFI judgment of 30.09.2003, Case T-203/01 *Michelin* v *Commission*, ECLI:EU:T:2003:250, para. 290; CJ judgment of 10.09.2009, Case C-97/08 P *Akzo Nobel NV v Commission*, ECLI:EU:C:2009:536, para. 58.

[9] CFI judgment of 11 December 2003, Case T-66/99 *Minoan Lines SA v Commission*, ECLI:EU:T:2003:337, para. 123; 24.10.1996, CJ judgment, Case C-73/95 P *Viho Europe BV v Commission*, ECLI:EU:C:1996:405.

can influence pricing policy, production activities, sales objectives, cash flow, stocks and marketing of the other company, it is usually concluded that these companies are closely related and constitute a single economic entity[10].

However, the EU competition law does not provide an unequivocal definition of the term 'single economic entity'. This means that when dealing with some practical cases, attorneys need to engage in a thorough discussion with competition authorities on whether a group of companies should be treated as a single economic entity. According to Nada Ina Pauer (2014) the concept 'single economic entity' had been established to characterize the level of integration allowing for a distinguished treatment of corporate groups. The concept might be described as a blanket term, derived from other areas of law (tax law), which was modified by the Court of Justice for the purposes of competition law. This way the EU institutions developed a common concept for the treatment of corporate groups under competition law.

The single economic entity doctrine was developed in the jurisprudence of the Court, when the Court paid attention to the main criteria for determination of the breach of Article 101 TFEU. The first criterion – the existence of an agreement or concerted practice. Second criterion – distortion of competition in the respective market. Through the doctrine of a 'single economic entity', an agreement (or concerted practices) between the parent company and subsidiary (when the subsidiary cannot independently determine its course of action) should be viewed as an exception from the prohibition of Article 101 (Ward, 1985, p. 377). The agreement concluded between the parent and subsidiary usually refers to the internal distribution of tasks and not to an agreement between independent competing undertakings.

The decision of the European Commission in the *Christiani and Nielsen* case[11] is regarded as the first one in the development of the 'single economic entity doctrine' in EU competition law (Pauer, 2014). The Commission held that an agreement concerning the division of the market concluded between the parent and subsidiary companies should be viewed as allocation of work inside the undertaking[12]. The Commission recognized that the agreement on the division of the market concluded between the parent and its 100-percent controlled subsidiary is legal. It was found that the respective companies are not competitors and hence competition between them cannot be distorted[13].

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[10] Case C-97/08 P *Akzo Nobel NV*, para. 58-59.

[11] Commission Decision of 18.6.1969, IV/22.548, *Christiani and Nielsen* (OJ L 165, 5.7.1969, p. 12).

[12] Ibidem.

[13] The European Commission further developed doctrine in *Kodak* case (Commission Decision of 30.6.1970, 70/332/CEE, *Kodak* (OJ L 147, 7.7.1970, p. 24), by claiming that the instructions, which parent company provides to subsidiaries are different from the concept

The Commission in *Ernst & Young France/Andersen France* case recognized that five *de jure* separate legal entities that are part of Ernst & Young international network constitute a single economic unit[14]. There was no central distribution of revenues between the individual member firms, but strong common financial interest was established by the systematic referral of clients across the network. In the Ernst & Young structure, a clear permanent economic centralized management was established, supplemented by centrally formulated policies and centrally provided services. The member firms rely on the common brand name and its reputation, the worldwide network and the centrally developed and monitored professional standards and common client relationships. These links are reinforced by the central co-ordination and facilitation of standards, strategies and initiatives and the provision of common services. These elements indicate a decisive degree of common economic management and common financial interest. This led to the conclusion that Ernst & Young is a single economic entity[15]. In this decision, the Commission recognized *de jure* separate legal entities as a single economic unit based on different features and analyzed factual relationships between entities forming the international network. However, in practical cases it is very difficult to evaluate whether *de jure* separate legal entities are so closely related to be recognized as a single economic entity. For example, in one of the disputes with the competition council, decisions of shareholders and boards of two companies were presented to prove that a certain shareholder had controlling stakes in both companies.

Bearing in mind that the competition law has developed from the US legal practice (Moisejevas, 2007, p. 63), we should also pay attention to the US court decisions relating to the 'single economic entity'. The Supreme Court of the United States in *Cooperweld Corp. v Independence Tube Corp.*

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of the 'agreement' under competition law. At the same time the Commission decided that competition is possible between the undertakings belonging to the group of the companies. In *Beguelin Import co v S.A.G.L Import Export* the Court for the first time had an opportunity to comment on the agreements concluded inside the group of the companies. The Court held that although a subsidiary has separate legal personality, it still enjoys no economic independence (ECJ judgment of 25.11.1971, Case 22/71, *Beguelin Import co. v S.A.G.L Import Export*, ECLI:EU:C:1971:113, para. 8). Further on the Court has been developing the doctrine of a single economic entity in several the other cases (ECJ judgments of: 31.10.1974, Case 15/74, *Centrafarm B.V. & Adriaan De Peijper v Sterling Drug Inc*, ECLI:EU:C:1974:114; 31.10.1974, Case 16/74, *Centrafarm BV & Adriaan De Peijper v Winthrop BV.*, ECLI:EU:C:1974:115; 12.07.1984, Case 170/83, *Hydrotherm v Compact*, ECLI:EU:C:1984:271; 4.04.1988, Case 30/87, *Corinne Bodson v SA Pompes funebres des regions liberees*, ECLI:EU:C:1988:225; CJ judgment of 23.04.1991, Case C-41/90, *Hofner and Elser v Macroton*, ECLI:EU:C:1991:161; CFI judgment of 10.03.1991, Case T-11/89, *Shell v Commission*, ECLI:EU:T:1992:33).

[14] Commission Decision of 5.09.2002, COMP/M.2816 *Ernst & Young France/Andersen France*.

[15] COMP/M.2816 *Ernst & Young France*, para. 17.

raised the question of why does the competition law prohibit undertakings from coordination of their actions in the market[16]. The US Supreme Court answered that after the conclusion of an anticompetitive agreement the market loses independent decision-making centers, which should be protected by the competition law. In case of conspiracy, a couple of entities that previously pursued their interests separately are acting as one for their common benefit. This only reduces the diverse directions in which economic power is aimed and increases the economic power moving in one direction[17]. The Court held that an internal 'agreement' concluded within a group of companies to implement single, unitary policies does not raise antitrust dangers. Such conclusion is based on several arguments: 1) Employees of a single economic entity do not pursue separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals; 2) Actions within a single economic entity might be coordinated to compete effectively in the market; 3) Cooperation within a group might be necessary to compete effectively with competing entities[18].

The US Supreme Court claimed that the agreements between a subsidiary and its parent company were not prohibited under competition law, since they are pursuing common interests. Their general corporate actions are guided or determined not by separate corporate consciousness, but one[19]. A group of companies is like a multiple team of horses drawing a vehicle under the control of a single driver. Even without a formal agreement, the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent agrees with its subsidiary to pursue a course of action, there is no sudden joining of economic resources that had previously served different interests[20]. We could enjoy the way the US Supreme court structures arguments and provides clear and reasonable explanation of the concept.

It is clear that the reasoning of the CJEU and the US Supreme Court concerning the single economic entity doctrine coincides. Courts from the EU and the US are using the same criteria for a recognition of a single economic entity. It is recognized that the agreement between the subsidiary and parent company should be treated as an internal agreement and not distorting competition.

[16] Decision of the Supreme Court of the United States of 19.06.1984, *Cooperweld Corp. V. Independence Tube Corp.* 467 U.S. 752 (1984).

[17] Ibidem, para. 768-769.

[18] Ibidem.

[19] Ibidem, para. 771.

[20] Ibidem, para. 771. The US Supreme Court took another important decision in *American Needle, Inc. v National Football League* case developing single economic entity doctrine. Decision of the Supreme Court of the United States of 24.05.2010, *American Needle, Inc. v National Football League*, Case No. 130 S.Ct.2201.

III. The meaning of 'control' under competition law

1. Group of companies and a single economic entity

We have referred many times to the term 'group of companies' while discussing the 'single economic entity' concept. Although these concepts are quite similar, they also should be clearly separated. A group of companies not necessarily constitutes a single economic entity. EU competition law does not provide a clear-cut definition of a group of companies. For clarification, we might refer to the Merger Regulation[21]. The Merger Regulation does not delineate the concept of a group in a single abstract definition, but sets out in Article 5(4)(b) certain rights or powers. If an undertaking concerned directly or indirectly has such links with other companies, those are to be regarded as a part of its group for purposes of turnover calculation under the Merger Regulation[22]. An undertaking which has in another undertaking the rights and powers mentioned in Article (5)(4)(b), it will be referred to as the 'parent' of the latter, whereas the latter is referred to as a 'subsidiary' of the former. The concept of a group of companies provided in Article 5(4)(b) is based on the existence of a formal control (Broberg, 2006, p. 68).

In accordance with Article 5(4)(b) of the Merger Regulation, such control exists when: the undertaking concerned owns more than half of the capital or business assets of other undertakings, has more than half of the voting rights, has legally the power to appoint more than half of the board members in other undertakings, or has the right to manage the undertaking's affairs.

The Lithuanian Law on Competition established the concept of a 'group of associated undertakings' to identify which undertakings, due to their mutual control or interdependence and possible concerted actions, are considered as one undertaking when calculating joint income and market share. Article 3(14) of the Lithuanian Law on Competition provides several criteria which should be established to presume the existence of a group of associated undertakings. The criteria under the Lithuanian Law on Competition[23] are similar to the requirements of the Merger Regulation.

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[21] Council Regulation (EC) No. 139/2004 of 20.01.2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.01.2004, p. 1).

[22] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, 2008/C 95/01 (OJ C 95, 16.4.2008, p. 1), para. 176.

[23] Law on Competition of the Republic of Lithuania, Official Gazette, 1999. No. VIII-1099.

The existence of a formal control does not necessarily mean that the controlling undertaking might exercise such decisive influence, which would deprive the controlled undertaking from the freedom to determine its course of action in the market. The Court of Justice held in *Corinne Bodson v SA Pompes funèbres des régions libérées* that the fact that holders of concessions belong to the same group of undertakings is not decisive for evaluating whether the undertakings form an economic unit.[24] Account must be taken of the nature of the relationship between the undertakings belonging to that group. We may conclude that to establish the existence of a group of companies, it is sufficient to establish the existence of formal control. However, the existence of a formal *de jure* control is not sufficient for the identification of a single economic entity. This means that in a practical situation we must analyze the details related to the nature of the control.

2. The meaning of a 'control'

Although we came to the conclusion that the term 'group of companies' is different from 'single economic entity', both terms describe a specific relationship between *de jure* separate undertakings. Therefore, while disclosing the features of a single economic entity, we may refer to the criteria used for defining a group of companies. The main criterion which describes the relationship inside a group of companies is 'control' (Kirilevičiūtė, 2012, p. 99; Banevičienė, 2009, pp. 65–73). For example, UNCITRAL 'Legislative guide on Insolvency Law' describes an enterprise group as two or more enterprises that are interconnected by control or significant ownership.[25] At this point we should note that control might have positive and negative meanings. In a positive sense, control is understood as an opportunity to make decisions concerning operational issues of the undertaking. In the negative sense, control is understood as an opportunity to block adoption of appropriate decisions. There might also be sole and collective types of control. For example, collective control may take place when parties conclude a shareholders agreement, which foresees the joint use of voting rights or entitles to control the undertaking through other means. There are cases when control is indirect. For example, an investment company might gain indirect control of the undertaking in case the undertaking is financed by a fund managed by the investment company. Every situation with indirect control should be evaluated based on existing

[24] Case C-30/87, *Corinne Bodson*.

[25] UNCITRAL (2012). Legislative guide on Insolvency Law. Part three: Treatment of enterprise groups in insolvency, 2.

circumstances. It should be emphasized that acquisition of control might be recognized even if the undertakings claim they did not seek to gain control[26].

De jure and *de facto* control are distinguished. Generally, *de jure* control exists in case the controlling undertaking directly or indirectly owns more than 50 percent of the shares of the controlled undertaking. At the same time the existence of a specific number of shares does not necessarily mean that the party shall have the same number of votes. *De facto* control is more problematic, since it may take different shapes. It is not necessary to conclude any type of formal agreement for *de facto* control to appear. Such control should be evaluated through an analysis of decisions relating to the management of the company, structural links, existing agreements, loans, common interests of shareholders and other conditions. For example, a main shareholder may depend on a minority shareholder, if this minority shareholder has the necessary know-how and the main shareholder acts only as an investor. There is no exhaustive list how *de facto* control may reveal itself.

Article 3(2) of the Merger Regulation defines control as the rights, contracts or any other means which confer the possibility of exercising decisive influence on an undertaking, by ownership or the right to use all or part of the assets of an undertaking, as well as rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking. Article 3(8) of the Lithuanian Law on Competition describes control as any rights which entitle a person to exert a decisive influence on the activity of an undertaking, including the right of ownership to all of part of the assets of the undertaking, as well as other rights which permit exertion of a decisive influence on the decisions of the bodies of the undertaking or the composition of its personnel (Butkevičius and Civilka, 2012, p. 9). Such control is described as certain rights, agreements or other means, which together or separately enable the exercising of a decisive influence over the undertaking, irrespectively whether such rights are gained based on the ownership of shares, voting or other agreements on the management of the undertaking or any other way (Goyder, 2003, p. 347).

We may conclude that an undertaking exercising *de jure* control is not necessarily empowered to exercise such level of influence that might restrict freedom of the controlled undertaking to determine its behavior in the market. The influence should carry a certain 'weight' (Broberg, 2004, p. 742). Such influence in the competition law is referred to as 'decisive influence'[27]. In a practical case, it is quite difficult to determine whether the exact influence

[26] Commission Decision of 5.10.1992, Case No IV/M.157 – *Air France/Sabena* (Non-opposition to a notified concentration) (OJ C 272, 21.10.1992, p. 5).

[27] Article 3(10) of the Law on Competition of the Republic of Lithuania provides that decisive influence means the situation when the controlling undertaking implements or can

should be viewed as 'decisive', since it depends on quite a big number of criteria. Even after a detailed evaluation of influence is conducted, it may still be not completely clear.

The Commission held in the *Arjomari/Wiggins Teape* case that 39% percent of shares were sufficient for the exercise of sole control[28]. It was decided that Arjomari would be able to exercise decisive influence on WTA because the remainder of WTA's shares were held by about 107,000 other shareholders, none of whom owns more than 4% and with only three shareholders having over 3% of the issued share capital. After an analysis of decisions of the Commission and the Article 3(2) of the Merger Regulation it becomes clear that 'decisive influence' means less than legal control. The Merger Regulation aims to regulate mergers of independent companies which do not change their respective status to 'parent' and 'subsidiary' (Banevičienė, 2009). It also follows that it is not necessary for the controlling undertaking to acquire 'legal control' to exercise decisive influence over the controlled undertaking. It might be possible to have much less than 50 percent of the shares to exercise decisive influence[29].

IV. The criteria for the determination whether *de jure* separate undertakings constitute a single economic entity

The Communication – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements provides that companies which form part of the same 'undertaking' within the meaning of Article 101(1) are not considered to be competitors for the purposes of these guidelines. When a company exercises decisive influence over another company, they form a single economic entity and, hence, are part

implement his decisions in relation to the economic activity of the controlled undertaking, the decisions of its bodies or the composition of its personnel.

[28] Commission Decision of 10.12.1990, IV/M25 *Arjomari/Wiggins Teape* (OJ C 321, 21.12.1990, p. 1).

[29] In *Renault / Volvo* merger the Commission established that in relation to the markets of the trucks and busses Renault and Volvo acquired respectively 45% of the shareholdings of the other party and these share acquisitions were substantial interests resulting in an almost equal sharing of losses and profits. Moreover, the economic interests involved created a strong situation of common interests which, together with the other factors mentioned hereafter, lead to a de facto permanent common control situation and thus established a single economic entity between the two parties – Commission Decision of 7.11.1990 declaring a concentration to be compatible with the common market (Case No IV/M.0004 – *RENAULT / VOLVO*) according to Council Regulation (EEC) No 4064/89 (OJ C 281, 9.11.1990, p. 2).

of the same undertaking. The same is true for sister companies, over which decisive influence is exercised by the same parent company. They are not considered to be competitors even if they are both active in the same relevant markets[30]. Therefore, decisive influence is the most important criterion for recognizing that *de jure* separate undertakings constitute a single economic unit. In case of decisive influence, the controlled undertaking is not able to freely determine its economic behavior. On the other hand, it is difficult to establish decisive influence because of many different forms it may take.

Bearing in mind some contradictions that relate to the establishment of a single entity, it does not come by surprise that some scholars and officials believe there should be more legal clarity in the field. The Commission Regulation 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid provides that for the sake of legal certainty and reduction of the administrative burden, it should provide a list of criteria for determining when two or more enterprises are to be considered single undertaking[31]. The present Regulation provides that a 'single undertaking' includes all enterprises having at least one of the following relationships with each other: a) one enterprise has a majority of the shareholders' or members' voting rights in another enterprise; (b) one enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise; (c) one enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association; (d) one enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise[32].

In our opinion, the above-mentioned criteria might be used universally for the determination of a 'single undertaking'.

In real court disputes it is very difficult to establish whether a group of companies constitutes a 'single undertaking'. Moreover, sometimes companies investigated by the competition authorities in cartel cases try to justify their behavior based on the 'single undertaking' concept. While determining whether

[30] Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ 2011 C 11, 14.1.2011, p. 1), para. 11.

[31] Commission Regulation (EU) No 1407/2013 of 18.12.2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (OJ L L 352, 24.12.2013, p. 1).

[32] Article 2(2) Regulation 1407/2013.

a group of companies amount to a 'single undertaking' it is necessary to pay attention to several factors (Goyder, 2003, p. 347; Švirinas, 2004, p. 27). It is important to evaluate all the evidence related to organizational, economic and legal ties between the undertakings, which may differ in specific cases[33]. Defining 'decisive influence' constitutes a big problem in many cases, since real control and 'decisive influence' may occur in many ways (Goyder, 2003, p. 347).

The European Commission established the existence of control in the *Anglo American Corporation/Lonrho* case[34] on the basis that the Anglo American Corporation acquired 27 percent in Lonrho. The disparity of the other shareholders meant that AAC could gain *de facto* control over Lonrho. The Commission reviewed polls held at Lonrho shareholders' meetings in previous years to ascertain whether the Anglo American Corporation level of holding would suffice to establish control, thus classifying the operation as a concentration (Ezrachi and Gilo, 2006, pp. 327–349). Usually the share of voting rights held by the shareholders is not the only criterion. Even without special voting and veto rights, collective choice problems could produce a decisive influence with even smaller amount of shareholding than in the *Anglo American Corporation/Lonrho* case (Easterbrook and Fischel, 1991). Moreover, it may even be important how the undertakings treat themselves while evaluating the existence of a single economic entity. The Competition Council of Lithuania has also analyzed the above-mentioned criteria[35]. The Competition Council analyzed correspondence between undertakings, publicly available information concerning a particular group of companies and other circumstances. The Competition Council concluded that the actions of the companies show that they view themselves as a single economic entity aiming to achieve common goals.

An undertaking will be treated as having a decisive influence in relation to the other undertaking even if, while having the ability to exercise decisive influence, it will not exercise its power. The European Commission established in the *McCormic/CPC Rabobank/Osmann* case that the participation of all the shareholders is necessary to pass decisions concerning management of the joint company or commercial policy[36]. The low capital share of a shareholder and the agreement on a fixed return could not rebut the fact that the shareholder had the legal right to exert a decisive influence on the joint venture. The

[33] Case C-97/08 P *Akzo Nobel NV*.

[34] Commission Decision of 23.04.1997, 98/335/EC, declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (IV/M.754 – *Anglo American Corporation/Lonrho*).

[35] Decision No. 2S-16 of the Competition Council of the Republic of Lithuania of 10.07.2008.

[36] Commission Decision of 29.10.1993, IV/M.330 – *McCormick/CPC/Rabobank/Ostmann*, para. 17.

mere possibility of exercising a decisive influence was sufficient, unless clearly undermined by factual evidence.

As the world economy becomes global, quite often we must deal with international groups of companies. To determine whether an undertaking that belongs to the international group is empowered to influence another undertaking, we may need to analyze different national laws. National laws establish rules for passing economically important decisions, the composition of the management, competence of the board and supervisory organs, as well as other key elements. National laws determine the real legal and economic impact of the rights acquired on the contractual and similar basis. For example, minority shareholders have more rights in certain jurisdictions and this is very important for the existence of decisive influence. National legal acts also might provide that certain entities, for example trade unions, may have a certain level of control in relation to the undertaking, although they are neither managers, nor shareholders in the company. The structure of a group of companies, the existing hierarchy between undertakings, influence of the representatives of one undertaking on the management of another, exchange of information inside the group are also significant factors.

According to the Court of Justice, even if undertakings are closely related and may be viewed as associated, it does not follow that one of them has a decisive influence towards another and that a 'single economic entity' might be established. The Supreme Administrative Court of the Republic of Lithuania also provides that the existence of common shareholders and employees does not allow to claim that such undertakings should not be viewed as competitors[37]. Sometimes even a majority shareholding will not ensure the ability to exercise decisive influence in relation to the controlled undertaking. Usually the most important is not the amount of the shares, but the number of votes that allows influencing an undertakings' business strategy and decisions of the management. Moreover, the rights granted to the minority shareholders under national law are not sufficient for the recognition of decisive influence (Hawk and Huser, 1993). In order to establish the decisive influence the main attention should be given to the business strategy of the undertakings and *de facto* actions. The mere fact that the share capital of two separate undertakings belongs to the same person or family, is not sufficient to recognize that those undertakings constitute an economic unit[38].

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[37] Decision of the Supreme administrative court of the Republic of Lithuania of 21.07.2011, No. A502-2256/2011, *UAB „Prof-T" v Competition Council*; decision of the Supreme Administrative Court of the Republic of Lithuania of 21.06.2012, No. A552-2016/2012, *UAB „Specialus montažas-NTP" v Competition Council*.

[38] CJ judgment of 2.10.2003, Case C-196/99 P, *Siderúrgica Aristrain Madrid SL v Commission*, ECLI:EU:C:2003:529, para. 99.

Scholars of competition law provide a non-exhaustive list of the criteria for the determination of the decisive influence of the controlling undertaking: ability to appoint/dismiss management, board members; influence of changes in the shareholding; influence of the dividend policy; influence on business plans; influence of investments policy; influence on financial planning; influence on production. As mentioned, the list is non-exhaustive and every situation should be evaluated separately (Banevičienė, 2009, p. 56–66; Pauer, 2014). Therefore, it is almost impossible to formulate universal rules for the determination of the existence of a single economic entity. However, there are certain exceptions, when the demonstration of decisive influence is not so complicated. In some cases, decisive influence is presumed. In the following section, we will analyze the presumption of decisive influence.

V. Presumption of decisive influence

In some cases, existence of decisive influence is determined in accordance with the presumptions established in the practice of the Court of Justice. It is presumed that a parent company exercises a decisive influence over a subsidiary where it holds 100 percent of the capital[39]. Therefore, separate companies are automatically recognized as a single economic unit, if 100 percent of the capital of a company is owned by the controlling entity. The presumption of liability deriving from the ownership of capital applies not only in cases where there is a direct relationship between the parent company and its subsidiary, but also in cases where that relationship is indirect, by way of an interposed subsidiary. It follows that in the specific case where a holding company holds 100 percent of the capital of an interposed company which, in turn, holds the entire capital of a subsidiary of its group which has committed an infringement of EU competition law, there is a rebuttable presumption that that holding company exercises decisive influence over the conduct of the interposed company and indirectly, via that company, over the conduct of that subsidiary[40].

The presumption of the decisive influence is based on the apparent fact that when the parent company is the only shareholder of the subsidiary, it has all the necessary measures to fully determine behavior of the subsidiary. Moreover, when the parent company is the sole shareholder in the subsidiary, it has at its disposal every possible means of ensuring that the subsidiary's

[39] Case C-97/08 P *Akzo Nobel NV*, para. 39.

[40] CJ judgment of 20.01.2011, Case C-90/09, *General Quimica SA v Commission*, ECLI:EU:C:2011:21, para. 86-88.

commercial conduct is aligned with its own. A single shareholder defines the degree of autonomy of the controlled undertaking through adoption of the Articles of Association, the appointment of management, approval of strategic commercial decisions and so on. The economic unity between the parent company and its subsidiary is further protected by obligations arising under the company law of the Member States, such as the obligation to keep consolidated accounts, the obligation for the subsidiary to account periodically for its activities to the parent company and also by the approval of the subsidiary's accounts in a general meeting, consisting solely of the parent company, which necessarily means that the parent company follows, at least in broad terms, the commercial activities of the subsidiary. Therefore, the ownership of all or virtually all the capital of the subsidiary by a sole parent company means in principle that they pursue the same conduct on the market[41]. Moreover, the CJ held that if the parent company becomes a technical and financial coordinator or provides the subsidiary with financial and investment assistance, it may be sufficient to recognize that such a group of companies constitutes a single economic unit[42].

Although it is difficult to imagine how the parent company might be separated from the subsidiary, the presumption of decisive influence might be rebutted by evidence demonstrating the independence of the subsidiary[43]. In such a case, it is for the parent company to put before the Court any evidence relating to the organizational, economic and legal links between its subsidiary and itself, which are apt to demonstrate that they do not constitute a single economic entity[44].

Bearing in mind that the presumption of decisive influence might be denied when sufficient evidence concerning the independence of a subsidiary is provided, this presumption is treated as rebuttable (Kuzniecowa, 2004, p. 27–28). At the same time the practice of the CJEU does not provide any clear criteria concerning separation of actions of the parent and subsidiary. Therefore, the CJEU formulated a strong presumption but failed to provide clear criteria for its rebuttal. In our opinion to achieve legal certainty, practice should be developed in order to formulate clear criteria for a rebuttal of the presumption. Although there exists a formal chance of a parent company to separate itself from the subsidiary, such possibility is quite theoretical. From the practical point of view, it is quite hard to imagine a parent company which

[41] CFI judgment of 11.07.2014, Case T-543/08, *RWE AG / RWE Dea AG v Commission*, ECLI:EU:T:2014:627, para. 42 – 43.

[42] CJ judgment of 8.05.2013, Case C-508/11, *Eni SpA v Commission*, ECLI:EU:C:2013:289, para. 64-65.

[43] Case C-97/08 P *Akzo Nobel NV*, para. 60-61.

[44] Ibidem, para. 65.

is not participating in the coordination of the group. As mentioned, according to the practice of the CJEU, any involvement of the parent company in an activity of a subsidiary potentially is sufficient for ascertaining the existence of decisive influence.

In *Eni SpA v. Commission*, the Commission held that in order to rebut the presumption based on the 100% ownership of the subsidiaries, Eni ought to have demonstrated that its subsidiary was managed as a separate undertaking for legal or regulatory reasons, or even that the 100% ownership was merely temporary and transitory, in order thus to demonstrate that it and its subsidiary did not form a single undertaking which committed the infringement in question[45]. We believe that the Commission has not provided a final list of the circumstances that should be proven.

We conclude that in case when one undertaking owns 'almost all' share capital of the controlled undertaking, the same presumption is applicable. The Court of Justice has held that the parent company that owns almost all share capital of the subsidiary is analogous to the situation of a single shareholder as much as it relates to the ability to exercise decisive influence over the subsidiary. Therefore, in such a case, there is a basis to apply the same rules of evidence and rely on the presumption that the parent company has exercised a decisive influence in relation to the subsidiary. In case this presumption is not rebutted, a conclusion should be made that the parent and subsidiary constitute a single economic unit. On the other hand, the rebuttal is more simple to exercise when the parent does not own 100 percent of the subsidiary.

VI. Conclusions

We may conclude that several conditions should be established to decide that a group of companies constitutes a single economic entity. The main criteria is the ability of the subsidiary to determine its course of action in the market. The formal separation of two companies resulting from their having distinct legal identity is not decisive. The test is whether there is a unity in their conduct on the market.

If one undertaking *de jure* or *de facto* exercises decisive influence over another company's commercial policy, such separate companies should be recognized as a single economic entity and not as competitors, since competing companies usually do not pursue a common goal. Moreover, 'control' is the main criterion for the evaluation of the relationship inside a group of

[45] Case C-508/11, *Eni SpA*, para. 59.

companies. In this situation, the interested parties or the court should use the concepts of 'control' and 'decisive influence' like the concepts used in the legal acts on concentration control.

When a company exercises decisive influence over another company they form a single economic entity. Decisive influence is the key element for recognizing that *de jure* separate undertakings constitute a single economic unit. In case of decisive influence, a controlled undertaking is not able to freely determine its economic behavior. On the other hand, the competition authority and the court faces difficulties establishing decisive influence because of many different forms it may take. There is a non-exhaustive list of the criteria for the determination of the decisive influence of the controlling undertaking: the ability to appoint/dismiss management, board members; influence of changes in the shareholding; influence of the dividend policy; influence on business plans; influence of investment policy; influence on financial planning; influence on production. The competition authority also considers the practical aspects of the exercise of decisive influence. The chances to prove that companies constitute a single economic entity increases when a group of companies for example provides protocols of meetings and voting of the shareholders, approval of the business plans and so on. Providing of evidence concerning practical influence is especially important if the dominant shareholder has only around 50 percent of the shares in the subsidiary.

At the same time, we need to make a reservation that unfortunately it is almost impossible to formulate universal rules for the determination of the existence of a single economic entity, which could be applied in all cases. Several issues are still to be determined on a case-by-case basis. On the other hand, there are certain limited exceptions, when the decisive influence is presumed. A decisive influence is presumed and the existence of a single economic entity automatically follows when a parent company holds 100 percent of the capital in a subsidiary.

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The Role of Economic Efficiency in Competition Law

by

Zbigniew Jurczyk*

CONTENTS

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Abstract

The main focus of the paper is the function of economics in the current application of competition law. While advocating further economization of the law, it is seen as necessary to widen the extent to which aspects of economic efficiency encompassing static and dynamic efficiency are taken into consideration in an antitrust analysis. Much attention is devoted to these issues, while clarifying what is meant by them, how they are to be understood and implemented in the practice of antitrust authorities, as well as discussing their importance for the promotion of innovation. It is noted that accounting for the economic efficiency aspects differently in the light of competition law allows for the assessment of the market behavior of dominant companies, which traditionally has been seen as anticompetitive. This main issue of the paper is analyzed extensively and explained using the case of Microsoft, a company accused by the US and EU antitrust authorities of abusing its dominant position on the market of operating systems in that it integrated the sale of its base product Windows OS exclusively with other applications (Media

* Dr hab. in economics; lecturer and researcher at Wyższa Szkoła Bankowa in Wroclaw (Poland); zbjur@op.pl. Article received: 30 July 2017; accepted: 26 September 2017.

Player and Internet Explorer). The differences presented in the research part of the paper as to the way Microsoft was treated by these authorities originated in their different methodology of analysis and assessment of the effects of the sales model launched by Microsoft for products offered to the PC manufacturers and their users, in spite of the US and EU antitrust authorities adopting the same evaluation standard – consumer welfare. Aspects of dynamic efficiency adequate in the assessment of the behavior of innovative firms holding a dominant position proved to be deciding. On the other side of the Atlantic, taking into account the aspects of dynamic efficiency was crucial in coming up with a lighter assessment of Microsoft's tying compared to the European authorities' assessment which was based largely on the structural analysis, where the benefits arising from dynamic efficiency are not visible. It is clear from the decisions made by the Commission that it favours regulation over effects generated by competition forces at a later time.

Resumé

L'objet principal du papier est la fonction de l'économie dans l'application actuelle du droit de la concurrence. Tout en préconisant une plus loin économisation de la loi, il est jugé nécessaire d'élargir la mesure dans laquelle les aspects de l'efficacité économique englobant l'efficacité statique et dynamique sont pris en compte dans une analyse antitrust. Une grande attention est accordée à ces questions, tout en clarifiant ce qu'on entend par elles, comment elles doivent être comprises et mises en œuvre dans la pratique des autorités de la concurrence, et en abordant leur importance pour la promotion de l'innovation. Il est noté que la prise en compte différente des aspects d'efficacité économique à la lumière du droit de la concurrence permet d'évaluer le comportement des entreprises dominantes sur le marché, traditionnellement considéré comme anticoncurrentiel. Cette question principale du papier est analysée largement et expliquée en utilisant l'affaire de Microsoft, une société accusée par les autorités de la concurrence des États-Unis et de l'UE d'abuser de sa position dominante sur le marché des systèmes d'exploitation en intégrant la vente de son produit de base Windows OS exclusivement avec d'autres applications (Media Player et Internet Explorer). Les différences présentées dans la partie de recherche du papier sur la façon dont Microsoft a été traité par ces autorités provenaient de leur méthodologie différente d'analyse et d'évaluation des effets du modèle commercial lancé par Microsoft pour les produits offerts aux fabricants de PC et à leurs utilisateurs, malgré L'adoption par les autorités de la concurrence des États-Unis et de l'UE de la même norme d'évaluation – le bien-être des consommateurs. Les aspects d'efficacité dynamique adéquats dans l'évaluation du comportement des entreprises innovantes occupant une position dominante se sont avérés décisifs. De l'autre côté de l'Atlantique, la prise en compte des aspects d'efficacité dynamique a été déterminante pour une évaluation plus légère de la vente liée de Microsoft par rapport à l'évaluation des autorités européennes fondée en grande partie sur l'analyse structurelle où les avantages l'efficacité ne sont pas visibles. Il ressort clairement des décisions prises

par la Commission qu'elle privilégie la réglementation sur les effets générés par les forces de la concurrence à un stade ultérieur.

Key words: dynamic efficiency; economic efficiency; efficient competition; innovations; static efficiency; tying.

JEL: K21, L40, L41

I. Introduction

An important issue in the application of competition law is to ensure coherence between the goal for which the law has been established and the practice of its enforcement. Competition law written in a simplified language of economics, containing abstract hypotheses on prohibited antitrust practices, affords competition authorities a great deal of scope for interpretation in terms of its application when declaring certain behavior of enterprises as unlawful. This creates a great potential for administrative discretion of antitrust bodies with the risk of flawed assessment of antitrust cases. The progressing economization of competition law certainly limits this subjectivity and arbitrariness and thereby the number of erroneous administrative decisions and court judgments. However, some claim that there is too much economics in competition law and that it has its limitations when it comes to solving antitrust cases, with some even claiming that economics unnecessarily complicates these cases. Lawyers are not the only ones to believe that the competition law economics should be simplified, reduced to a few simple economic models of market power, barriers to entry, market share, monopolistic prices, monopoly agreements, 'evil' monopoly or the abstract model of free competition which solves all consumers' problems. Nothing could be more wrong and harmful for competition policy than this kind of a simplified version of effective and efficient market and theory of economics. There is no turning back from the economization of competition law. In my view, it is crucial to consolidate the application of competition law into a single framework and into the principles of economic analysis which is strictly underpinned by the same criterion – consumer welfare -- the sole aim of competition policy. Competition law is an operational and ruling instrument of competition policy. This is possible when the sole criterion in the application of competition law and assessment of entrepreneurs' market behaviors is economic efficiency. How the role of economic efficiency is to be understood and perceived in terms of settling antitrust cases is the main objective of the considerations presented in this

paper. The discussions on the role of economic efficiency in competition law encompass not only issues relating to static efficiency (productive and allocative), since they also show how and when antitrust cases should take into account dynamic efficiency. In an antitrust analysis, aspects of dynamic efficiency become indispensible when they refer to innovative branches and hyper-competitive markets. The empirical part of the paper shows how the USA and EU differ in terms of their antitrust decision-making practice, with those differences being the result of the varying degree to which aspects of dynamic efficiency are included within the framework of their antitrust analysis. These differences will be demonstrated on the example of tying, a market practice used by Microsoft.

II. Economic efficiency vs. economization of competition law

Elevating the criterion of economic efficiency to the basic standard of the enforcement of competition law results from the new model of conducting competition policy based on competition law as proposed by economists and lawyers from the University of Chicago, in literature known as the Chicago School of Economics. Instead of the protection of competitors and competition, it was economic efficiency that came to the fore as the result of the School's argument that consumer welfare is the overriding goal of the application of competition law by competition authorities. Neoclassical microeconomics provides the theoretical basis for the Chicago School, also referred to as price theory. The school's representatives, however, relied on the efficiency elements of this theory contained in its fundamental concept of consumer welfare. In making this step, the Chicago School defined a practical imperative for the competition law practitioners in that the basis for the assessment of enterprises' prohibited market practices was an economic analysis underpinned by the logic of productive and allocative efficiency, since productive and allocative efficiency make up the content of the consumer welfare standard. The analysis of antitrust cases within the framework of this concept introduces just one criterion and, unlike Harvard School and ordoliberal economics (Jurczyk, 2012, pp. 67–105), finds references to socio-political criteria, structural aspects of the market and the protection of small enterprises to be erroneous. Thus, including the standard of consumer welfare in the practices of antitrust authorities was a breakthrough leading to a far-reaching economization of competition law. What is further important is that this view was accepted on both sides of the Atlantic. Although, as we will see later, the European Commission has failed to be consistent in this respect,

still placing significant importance on the market structure and the dispersion of enterprises' market power.

Economization should be understood as the application of economic methods and tools in order to examine market processes, economic factors and phenomena which are subject of the provisions of competition law. Economization is comprised of two blocks of economic tools, methods and models. The first block is made up of quantitative and qualitative economic methods and models suitable for use in antitrust proceedings, mostly showing characteristics of the relevant market, economic performance of the market and competitors, pricing behaviors, pricing simulations, market changes and effects associated with anticompetitive practices, correlations between market data crucial in the assessment of a particular practice, simulations of data making a monopolized market similar to competitive market, price analyses, analyses of purchasers' behaviors, as well as surveys and statistical extrapolation of data.

The second block of economization includes economic theories and models embedded in microeconomics, explaining (or making it plausible) which market practices defined by competition law as anticompetitive are yet not so from the point of view of economics. Market behaviors will thus not be seen as anticompetitive practices when they are distinguished by economic efficiency, innovation and consumer-oriented effects, even though there is a great market power behind them.

The economization of competition law effected by these two ways has actually been accepted both in the United States and European Union by having agreed that the overriding standard in the enforcement of competition law should be only consumer welfare.

The standard of consumer welfare brings to the fore the obligation to assess market behaviors of enterprises in terms of economic efficiency equated with productive and allocative efficiency. This requires that antitrust authorities provide relevant evidence. In order to verify correctly (from the point of view of consumer welfare) a particular practice described by competition law, antitrust authorities have to collect numerous pieces of economic evidence and carry out an in-depth and detailed analysis. R.H. Bork, a prominent representative of the Chicago School, argues that price theory forms the proper theoretical and methodological basis for this analysis of antitrust cases, or those pertaining to unilateral and agreed practices as well as concentration processes. Moreover, he stresses that the threat to competition are only those situations which cause prices to increase above the level that is appropriate for the competitive market. Only under such circumstances do we encounter serious market distortions leading to allocative inefficiency (Bork, 1993, p. IX).

In some proceedings, especially while considering vertical agreements and concentration notifications, the theory of transaction costs and behavioral economics can be of use. For reasons of fairness, it should be stated that economics has its epistemological limits when it comes to clarification of antitrust cases. The epistemological limits of economics become particularly apparent when there is a need to assess a short and long-term impact of a particular market behavior when its effects are opposing one another (Devlin and Jacobs, 2009, p. 256).

Microeconomics and quantitative analyses do not always provide unambiguous and coherent answers. Lawyers, therefore, argue that the influence economics exerts on competition law should not be extended and should not be of key importance. As mentioned before, economics is indeed not always able to clarify antitrust disputes with certainty, but does it have to mean that the exegesis of the competition law making no references to economics will provide better and less unambiguous results? The only thing that is certain is that in applying a simplified or intuitive interpretation of economic phenomena prohibited by competition law, antitrust authorities eschew arduous and multi-stage hearing of evidence and analyses, and consequently longer and more costly proceedings, too. This approach, however, entails a risk of committing more mistakes than when the decisions are based on economic considerations, even if these fail to be unambiguous. Also, since economic arguments are less important, being replaced by abstract legal hypotheses, defendants lose their chance of effective defense. The history of antitrust laws shows a considerable number of such cases.

Nor can one support the view that since conducting antitrust cases is in the lawyers' hands, economic analyses and considerations should be uncomplicated and easy to understand (Szymczak and Szadkowski, 2016, p. 155 and 156), in other words, simplified. Competition law is not the only law discipline where those conducting proceedings must refer to complex, expert knowledge of a variety of disciplines, such as, for example, penal and fiscal proceedings, administrative (tax) or civil proceedings of economic nature. What is important, antitrust authorities employ not only lawyers, but also numerous economists. Further to that, as economization of competition law has been progressing, a position of chief economist with considerable competences was established within antitrust authorities. This is not about making a fetish of economics in competition law (Sroczyński, 2016, p. 106–107), yet the fact remains that including more economics in competition law, marked by consumer welfare standard, provides a better chance of weighing up the positive effects against the negative ones of antitrust cases in question, even when accounting for some epistemological limits. Competition law uses economic terms. Applying more economics while explaining those terms in reference to specific market

practices which this law prohibits is therefore perfectly rational. Thanks to the economic analysis, the framework and methods of an antitrust analysis are made more real by providing substantial, logical and coherent economic and business facts. It is the explanation of all significant circumstances that is important and not the complexity of economic analyses. The conclusions made regarding antitrust cases should correspond to the reality in terms of the market effects assessed according to the consumer welfare criterion, and not solely to abstract legal reasons arising from the laws. Competition law does not use its own terms within the scope of substantive law and has not established its own language, nor are these terms appropriate for civil and administrative law. In competition laws we encounter terms created and explained by economic sciences. Thus, economics forms a natural base for the clarification of antitrust cases. Replacing economic analyses with simplified schemes of business market behaviors, tacit knowledge, sociological, psychological knowledge or even behavioral economics (Sroczyński, 2016, p. 145), where rationalism and economic efficiency take second place, involves running the risk by antitrust authorities of making erroneous decisions which are contradictory to market logic and the logic of business management, whose underlying basis is effectiveness and rationality. Other social sciences cannot be a substitute for the economic methods accepted in an antitrust analysis. They can merely play a complementary function. That economic analysis is providing increasingly better answers to questions posed by competition law is noticeable (Devlin and Jacobs, 2010, p. 253–262). This is attested by the changes the analysis brought to the evaluation of such unilateral practices as: bundling and tying, predatory prices, excessively high prices, closing access to essential facilities, refusal to sell which stopped being absolutely prohibited practices when holding a dominant position. Economization has also changed profoundly the classification of vertical agreements, mainly the functioning of distribution networks which, for all practical purposes, with the exception of minimum resale price, have been freed from the clauses which were prohibited earlier. In cartel law, economics of oligopolistic markets and game theory fulfill useful functions in their detection (Jurczyk, 2016a, pp. 350–359). Similar changes occurred in the analysis of concentration processes. The dominant criterion of assessment became economic efficiency resulting from the economies of scale and scope, synergy, reduction of transaction costs, innovation, and not market structure and share after the conclusion of a concentration transaction. The register of prohibited market practices has been considerably reduced over the last three decades owing to the economization of competition law. Also, economization made it necessary for antitrust authorities to replace in their work the useful rule of per se prohibition with a more demanding rule of reason (Jurczyk, 2016b, p. 249).

III. Consumer welfare vs. static and dynamic efficiency

Adopting the standard of consumer welfare signifies that antitrust authorities will be directed towards issues within the scope of allocative and productive efficiency, while maintaining a proper balance between them when under the circumstances of a particular antitrust case the effects are opposite, e.g. they can increase productive efficiency in concentration processes, yet worsen allocative efficiency. Allocative efficiency and productive efficiency are part of static efficiency. Static efficiency means optimal production and distribution of limited resources. Its objective is to lead a system (entity) towards reaching the production possibility curve (assuming it is known at a given time). The static approach to economic efficiency is the focal point of neoclassical economics and it is related to the concept of 'general equilibrium', that is a state in which markets are cleared by all individual economic entities at the prices which fulfill the objective function, which is the maximization of profit and usefulness (Kozuń-Cieślak, 2013, pp. 16–19).

Static efficiency occurs under the conditions of a perfect competition, which is a competition model that is purely theoretical. It can, however, be linked to monopolistic and imperfect competition, the models which are closer to reality. In the terminology of competition policy, these models can be associated with free competition. These are structural models of market competition, where there are no barriers to entry, companies compete in prices and quality, with none having considerable market power. Such a market consists of small and numerous undertakings having a sound knowledge of its parameters. Although they may for awhile gain economic power over purchasers and raise prices above the competitive level and thus gain a windfall, this is temporary. The increase in prices is the incentive for new players to enter the market, which makes the windfall soon disappear. Thus, only the static efficiency processes can take place under the conditions of free competition.

And so, under the conditions of free competition, productive efficiency (X-efficiency) materializes, in the first place, in the reduction of production costs through optimization of costs and production size, which is linked to a more effective use of material and non-material resources in technological processes. This kind of efficiency is also called technical efficiency, allowing allocative efficiency to be achieved in the production sphere. In other words, technical efficiency signifies a productive use of resources in the most efficient way (Kozuń-Cieślak, 2013, p. 22). Productive efficiency allows firms to optimize the size and costs of their production. However, if cost saving refers to the future, then we talk about dynamic efficiency. Research on dynamic efficiency shows that its effects provide more social welfare than static efficiency (allocative and productive) (Kozuń-Cieślak, 2013, p. 23).

Productive efficiency, however, does not end the problem of manufacturing products which are in line with consumer welfare, for it does not guarantee that the goods produced maximize consumer welfare. The structure and volume of production using the resources owned are also important. What is required for the production structure and volume to satisfy consumers is an effective allocation of resources. Allocative efficiency is less measurable in business practice and less discernible directly by economic undertakings. Its dimension is more macroeconomic and it is associated with such allocation of material and non-material resources across sectors and branches of economy that the products manufactured and services provided by these sectors and branches offer consumers values they most desire. Allocative efficiency is thus an economic phenomenon thanks to which only these production solutions are chosen from all available effective production solutions which ensure the greatest satisfaction in terms of consumption (as the result of allocating goods among consumers). In other words, the size and structure of production made from the resources allocated across industries (efficiency of production) ensure the highest possible level of consumer welfare (Kozuń-Cieślak, 2013, p. 22). It is possible because free competition ensures that market prices on a particular market at a particular time will be equal to marginal costs.

Next to static efficiency, dynamic efficiency was also introduced bringing some benefits to the antitrust analysis. J.H. de Soto argues that, from the dynamic perspective, the aim of economic activity is not only to avoid wasting resources, but first and foremostly to keep on discovering and creating new goals and resources; for the spirit of entrepreneurship goes on forever and never ends. When new non-adjustments emerge, entrepreneurs begin to find and solve them in an ongoing process, which keeps knowledge and resources growing. De Soto further stresses that waste cannot be entirely eliminated because there are always mistakes in new adjustments (De Soto, 2009, pp. 9–11).

Dynamic aspects of entrepreneurship are the most crucial, for entrepreneurs constantly improve their creativity and seek new chances of making profit. Dynamic efficiency also incorporates static aspects of economic efficiency, since each time new goals and resources are introduced, static efficiency increases as well. According to de Soto, it is dynamic efficiency, and not the static aspects of efficiency that should become a key factor in the considerations involved in every economic study and research. This is, among other things, because allocative and static efficiency are beyond reach by its very definition. De Soto argues that dynamic efficiency is the most important aspect of economic efficiency (De Soto, 2009, p. 29).

At this point it is important to emphasize which market environment can be considered to be friendly to dynamic efficiency. For static efficiency it is monopolistic competition, which here could be identified with free competition.

The situation is different for dynamic efficiency. Its proper environment is a market with oligopolistic competition. This results from the fact that the dynamic efficiency phenomenon founded on innovations requires that firms should have market power in order to win a windfall. Innovations need huge financial outlays which small firms from the free competition market cannot afford, gaining an average profit and only occasionally a windfall. From the point of view of dynamic efficiency, oligopolistic markets, more concentrated because of higher profits, are more productive and function better than small firms, although they can distort static efficiency, in particular, the allocative efficiency. But as already mentioned, dynamic efficiency can, in a long-term, compensate for losses sustained over the short period by improving productive efficiency.

Dynamic efficiency is part of business development strategies, while the aspects of static efficiency are part of operational activity aimed at finding ways and means to reduce production costs. Outlays on research and development with innovations being their outcome determine dynamic efficiency. Innovations can emerge as inventions, new technologies, production increase, new products, increased efficiency of distribution, new more productive business sales and organizational models, new effective methods of human resources management and others. Thus, dynamic efficiency stimulates growth and development in a long-term perspective. Moreover, static efficiency leads to a better operational use of existing material and non-material resources through their allocation, which is in line with consumer needs, across industries, and lower prices arising from the reduction of direct and indirect costs. Dynamic efficiency seen in this light also influences cost saving, only that unlike in the case of productive efficiency, it is revealed over a long period, over subsequent years of the development phase in the life-cycle of an enterprise, after having implemented innovative projects.

In an antitrust analysis, the aspect of the life-cycle of an enterprise should be taken into consideration in that short term effects are balanced out with long-term effects according to the values included in the consumer welfare standard. Balancing out these effects is key in the situation where the requirements posed by dynamic efficiency may cause static efficiency (allocative) to deteriorate. However, under free competition, it is possible to aim at and achieve both efficiencies and increase consumer welfare, although that is not so easy, as the literature tends to point out (Kathuria, 2015, p. 320). From the point of view of competition policy, it is about choosing between lower prices over a short term at static efficiency and relatively higher prices over a long-term at dynamic efficiency. The profit generated by higher prices is, however, necessary to finance the development and implementation of innovations, which will be paid back to consumers in the form of better or new

products (Kathuria, 2015, p. 319), and as their lower usage costs, too. Thus, the assessment as to the effects will be conditional on what time perspective is chosen for the assessment of market behaviors of enterprises.

In other words, some business behaviors may worsen static efficiency observed over a short time, yet in the long perspective they may be conducive to dynamic efficiency. For example, a merger may inject more money into research and development, that is, foster dynamic efficiency, while simultaneously worsen allocative efficiency by increased market power (Wiliamson, 1968, pp. 18–35). Tying and bundling may have similar positive effects if they take place in an innovative line of business, such as IT, pharmaceuticals, construction, business support services, media and telecommunication and e-business.

In forgetting the efficiency aspects in an antitrust analysis, the negative short-term effects regarding efficiency are likely to be more important for competition authorities than the unappreciated positive results yielded by dynamic efficiency (innovation) over a long period. This was precisely the choice the European Commission made while considering Ryanair plans to purchase the Irish air carrier Aer Lingus in 2007. Despite the fact that Ryanair showed significant benefits arising from this merger for productive and dynamic efficiency, the Commission did not give its approval to the merger because of a rise in market share of over 60% on the majority of flights operated jointly by the carriers and the likelihood that prices would increase and passengers would have a more limited choice, i.e. a deterioration of allocative efficiency[1].

Expanding the framework of considerations at this point, one should identify what changes, including technological progress and innovations, have been taking place for at least the last two decades in the market structure and competition processes. R. D'Aveni et al. (Ph. Kotler) talk in this situation about hypercompetition (D'Aveni, 1994). 'Hypercompetition is characterized by rapid and dynamic changes affecting competing firms in that they have to perform quick maneuvers in order to gain advantage'. What drives the pace of the groundbreaking turbulences triggered by hypercompetition are globalization, attractive substitutes, more fragmented consumer taste, deregulation and the constant influx of new business models. This leads to the emergence of a structural imbalance, collapse of the barriers to entry and dethronement of current leaders across a variety of industries (Kotler, 2016, p. 154). Hypercompetition is characteristic for high technology businesses which are adaptable to innovation. R. D'Aveni, a professor of business strategy, argues that today it is not possible to sustain competitive advantage over the long term. 'It is continually created, eroded, destroyed, and recreated through strategic maneuvering of enterprises disrupting markets, acting as if

[1] Commission Decision of 27.06.2007, COMP/M 4439 *Ryanair/Aer Lingus* (OJ C 47, 20.02.2008, p. 9).

there were no boundaries to entry. The way to go about winning today is to obsolete the current advantages of the leader' (D'Aveni, 1994, p. 154). He further asserts that in as much as hypercompetition undermines the traditional business development strategies, it makes antitrust policy obsolete. Such policy adversely affects hypercompetiton. Globalization and innovation make it difficult for firms not only to achieve a monopolistic position on the market, but even the oligopolistic one is hard to obtain (D'Aveni, 1994, pp. 362–378).

While rejecting the view that antitrust policy is no longer necessary and has gone by the board, two conclusions should be derived from these discoveries as to the way business is functioning. The first one refers to the perception of antitrust cases in the light of those changes and the search for answers posed by competition law should also be linked to the long perspective, and therefore the traditional approach founded on the paradigm of the Harvard School and Ordoliberal School can only disrupt effective competition. Secondly, one should look for the answers not only in microeconomics, but increasingly more in the contribution to the market, competition and business management made by scientific disciplines engaged in management.

Wishing to draw attention to the issues of economic efficiency, neglected by lawyers and economists in their proceedings of antitrust cases, the OECD presented a report titled *The Role of Efficiency Claims in Antitrust Proceedings in 2012*, in which the importance of economic efficiency was highlighted, while taking notice of the confusions involved in it. The confusions (delineated above) have the effect, according to the report, that even those who are more aware of having to include efficiency in the economization of competition law can make mistakes in its application[2]. That it is necessary for antitrust authorities to take more interest in efficiency was emphasized in the 2007 report of International Competition Network. The report argues that promoting efficiency is one of the goals of competition law. The efficiency that should be ensured included static as well as dynamic efficiency[3].

In competition law, referring to dynamic efficiency is justified while investigating concentrations, access to essential facilities, bundling, exclusionary transactions, predatory prices and excessively high prices, specialization and cooperation agreements, vertical agreements and resale prices[4]. The central unit of the concept of dynamic efficiency is innovation. T. Jorge and

[2] OECD, *The Role of Efficiency Claims in Antitrust Proceedings*, Competition Law &Policy, 2012, http://www.occd.org/competition/EfficiencyClaims2012.pdf (20.12.2016).

[3] The Unilateral Conduct Working Group, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power and State Created Monopolies, 6th Annual Conference of ICI, Moscow, May 2007.

[4] It is worth recalling at this point that in the recently passed legislation on competition protection in India, it draws on directly on dynamic efficiency.

D. Teesce associate innovations with research and inventions, development, improvement, adaptation and commercialization of new processes, new products, new organizational structure and new procedures (Jorde and Teece, 1990, p. 75). Research shows that innovations determine the productivity of firms, all industries and entire countries (Cameron, 1996). Thus, antitrust authorities should be equipped with analytical skills and be willing to accept practices which might appear to be anticompetitive in the context of static allocation, e.g. bundling sale, and pro-competitive according to the aspects of a dynamic analysis.

Accounting in the antitrust analysis for the aspects of static and dynamic efficiency which follow on from the adoption of consumer welfare as the only criterion in the enforcement of competition law brings about one more positive outcome, which tends to be either omitted or unnoticed. The valuable work of antitrust authorities as a public institution is no longer the result of subjective and simplified views of the staff employed by those institutions as to the role and goals they believe they are to realize with the help of competition law. Perceiving the standard of consumer welfare through static and dynamic efficiency limits such subjectivity, opening up the possibility to reveal the market processes which provide consumers with the value they expect. Under such circumstances, it is no longer what lawyers and economists working in antitrust institutions imagine about the market structure and behaviors that determines what is good for competition and consumers, and instead it is their verification on the basis of theories and methods provided by: microeconomics, studies and observations of changes taking place on the relevant market, and, in a specific antitrust proceeding, investigating the history of growth of firms suspected of anticompetitive behaviors with a view to find out how they build their market position (advantage), whether it is by unfair monopoly or by innovation and development. In applying this approach, it is the market that is given priority over administrative decisions, with antitrust bodies retaining their function of a regulatory body and not that of replacing market forces.

How the assessment of some behaviors of market dominant firms or of vertical agreements (seen in traditional antitrust doctrine as limiting competition) changes when efficiency criteria are given the center stage in the evaluation process is demonstrated by the two examples below.

The first one involves making a dominant firms' essential facilities available to competitors. The decision of a competition authority allowing competitors to access such facilities despite the owner's protest certainly intensifies competition over a short period. However, it may have negative consequences in the long run. Forcing owners to allow access to their facilities, built with huge effort and intellectual capacity, to competitors may induce such investors to give up further development of such facilities and improvement of devices,

since the regulator deprived them of the 'award' for managing their business effectively and for risk taking (Lemley, 1997, pp. 994–996). Other investors, watching this kind of practice on the part of regulators, may not engage in the development of capital-intensive and risky investments if they have to share the benefits thus achieved with their rivals who either eschew this kind of outlays or do not have sufficient capacity. Winning a smaller profit from the market also reduces its capabilities in terms of financing outlays on research and development and recovery of the fixed costs which represent R&D expenditures. Thus, the decision of antitrust bodies limits dynamic efficiency if it affects an innovative firm, whose history of growth and line of business should reflect its innovative nature.

Another example of the dominant's price practice is predatory pricing which takes place when innovations form the basis for this pricing. Setting prices by dominants below the costs brings immediate benefits to consumers. However, there is a risk that the relevant market will not function effectively in the future if this price maneuver eliminates competitors, allowing the dominant for a deeper penetration of the market over the long run and thus its monopolization, which will raise prices above the level before predatory pricing to the detriment of consumers.

But are the consequences of predatory pricing always the same? An exact answer depends on the information gathered by the antitrust authorities. However, in such cases the antitrust bodies, as a rule, have to contend with an information deficit as to the future market behavior of dominants and struggle with weighing up the positive and negative effects of such practice. Under such circumstances, help could be found in looking at the history of the dominant's operating on the market and its competitors, which will show whether or not such behaviors happened before. Innovation within the industry should be taken into consideration and its impact on the length of the product's life-cycle. One can also search for the answer in a relevant economic theory which makes the way dominants might behave plausible, i.e. whether they will keep the lower prices or push them up to the level of monopolistic prices. In the first case, the decision finding the practice anticompetitive will very likely affect adversely the behavior of an undertaking affected by such decision in that it will cease to engage in development activities. In the second case, on the other hand, according to the dominant's business logic, an undertaking will not fail to take the opportunity and raise prices above the competitive level. And if it uses the windfall thus generated to continue its pro-development activities, while firms which are weaker in terms of productive and dynamic efficiency fall out of the market, which will improve allocative efficiency, the classification of such prices as practices which do not limit competition is in line with the concept of the consumer welfare standard.

IV. Aspects of static and dynamic efficiency at tying as exemplified by *Microsoft* case

While analyzing aspects of dynamic efficiency in competition law, an essential part of this analysis is to identify the economic environment that is beneficial to this efficiency. As we recall, monopolistic competition is an economic environment that is suitable for static efficiency. That is not the case for dynamic efficiency. Its proper environment is the oligopolistic competition market.

The earlier reflections let us conclude that the most difficult issue in the dynamic efficiency analysis is the situation when an antitrust body is facing two different results of the assessment of the market behaviors of enterprises, depending on whether the results pertain to a short or long term, i.e. should they promote the immediate benefits for consumers in the context of later losses, or the other way round, the immediate benefits should be sacrificed, assuming that the limitations accepted will bring desirable behaviors and benefits to consumers in the future. In such cases it is less the law and more the goals of competition policy adopted by antitrust authorities that has a deciding voice. Taking into account the socio-economic context, the antitrust authority must decide whether it trusts market forces and development and thus chooses the assessment of a particular practice from the longer perspective, or whether it opts for short term goals, with allocative and productive efficiency not necessarily being its guide. In such a case, it would assess a particular practice as reprehensive, considering its current effects to be harmful to the market and consumers.

This kind of situation is demonstrated by the case of Microsoft, investigated by the US and EU antitrust authorities. The US Department of Justice and the European Commission accused Microsoft of abusing its market dominant position by integrating the sale of its basic product, Windows OS, exclusively with its application (Media Player in Europe and Internet Explorer in the EU and the USA). The antitrust proceedings conducted over several years on both sides of the Atlantic proved to be different in terms of the outcomes. The difference in the perception of Microsoft's practice of integrating its operating system Windows for personal computers with the company's other software was caused by a different assessment of the effects of Microsoft's sales model designed for the products offered to the PC manufacturers and their users, despite the fact that the US and EU antitrust authorities applied the same standard in their assessment – consumer welfare. The Commission investigated mainly the aspects relating to the static efficiency while the American institutions, largely the courts, eventually supported effects resulting from the dynamic efficiency argument.

In its assessment of the integrated sales model of Microsoft's products (market-dominant operating system Windows together with Media Player and Internet Explorer), the Commission classified it as a practice prohibited under Art. 102 TFEU. In issuing its decision in 2004 on the tying of Windows OS with Media Player, and in January 2009 on the sale of Windows OS together with Internet Explorer, the Commission referred to the baseline ruling of the European Court of Justice (ECJ) in the *Hoffman-LaRoche* case[5]. In its decision, the ECJ contended that, pursuant to Art. 102 TFEU, a prohibited conduct takes place when an undertaking holding a dominant position deprives clients of the opportunity to choose freely their own source of purchase while blocking access of other producers to the market by directly or indirectly tying its clients in that they are compelled to purchase products from the dominant undertaking. In 2007, this position was confirmed by the Court of First Instance (CFI) considering Microsoft's appeal against the Commission's decision of 2004. The CFI's ruling established unequivocally that the tying of Media Player with the Windows PC operating system constituted an abuse of the dominant position on the market of PC operating systems[6]. Thus, the Commission did not entertain any more doubts when it came to the second case and decided that Microsoft abused its position by bundling Windows OS with Internet Explorer. In its Statement of Objections sent to Microsoft in January 2009, the Commission argued that Microsoft, having a 90% share of the PC operating system market, distorted competition by tying and protected its web browser Internet Explorer from other web browsers produced by competitors, which slowed the pace of innovation and hampered quality of products bought by consumers. The Commission drew a particular attention in its objections to the fact that with Internet Explorer being so wide-spread, an artificial incentive was created for suppliers and designers of computer applications to design those programs in such a way as to make them in the first place compatible with Internet Explorer, which weakened competition and innovation within the services provided to consumers[7].

The Commission certainly followed the standard of consumer welfare in its first as well as the second case brought against Microsoft. However, in drawing on the potential of this standard, the Commission considered mainly the aspects of economic efficiency (allocative) resulting from the structure of the market, that is, a strong and dominant position of Microsoft on the market of PC operating systems and barriers to entry created by the tying model

[5] ECJ judgment of 13.02.1979, Case 85/76 *Hoffman – La Roche v Commission*, ECLI:EU:C:1979:36.

[6] CFI judgment of 17.09.2007, Case T-201/04 *Microsoft v Commission*, ECLI:EU:T:2007:289.

[7] European Commission, Press Release*: Commission confirms sending a Statement of Objections to Microsoft on the tying of Internet Explorer to Windows*, Brussels, 17.01.2009).

launched by Microsoft. According to the Commission's assessment, in this way Microsoft strengthened its dominant position, generating negative effects for innovation within the market of computer software, and thus also generating negative outcomes for the users of personal computers. Yet, the Commission traced back these negative effects for dynamic efficiency, which is embodied in innovation, to structural factors, disregarding the potential arising for dynamic efficiency from the tying itself within the computer software industry. Playing down the aspects of dynamic efficiency contained in this kind of sales model within the IT industry is what makes it different from the American antitrust authorities.

The American Department of Justice began its battle against Microsoft earlier than Europe, already in 1998. In the first years of its antitrust proceedings, the Justice Department interpreted market implications of the operations of the market leader of the PC operating systems in the same manner as the Commission.

But less than 10 years from considering breaking up Microsoft, the U.S. antitrust authorities radically revised their initial legal judgment with respect to Microsoft's bundling Windows OS with Internet Explorer, seeing it as having a positive impact on economic efficiency through the development of Microsoft's innovation capabilities in the long run and economic benefits which consumers receive over a short period. In President G. Bush's administration, Microsoft found a strong ally in cases it faced outside the United States. In 2004, the Department of Justice expressed critical opinion on the punishment of Microsoft by the EU for including Media Player in its Windows operating system. In December 2005 the South Korean antitrust regulator was criticized when it prohibited the bundling of the Microsoft products (Media Player and Windows OS) and fined Microsoft USD 31 million. In the letter addressed to the Korean Fair Trade Commission, the US Department of Justice wrote that antitrust policy should protect competition and not competitors and should avoid cooling off innovation and competition also when it pertained to dominant undertakings. Moreover, the regulator should eschew trying to replace the market with its own judgments in that it was now the regulator determining how products should be made available to consumers (Ponsold and David, 2007, p. 422).

The disparities present in the application of competition law in the two key world centers of its enforcement are therefore quite striking. Two identical cases and two different positions traced back to the same phenomenon, i.e. the implications for innovation and the interpretation of consumer benefits obtained from these innovations. How it came to that will be the subject of further analyses.

V. Antitrust assessment of tying in the USA and EU using the example of *Microsoft* case

In 1998, the Department of Justice in its suit filed against Microsoft contended that Microsoft's monopolistic position on the market of operating systems was of lasting nature, for it restricted the entrance of other competitors into the market. This was not only because the vast majority of computer software worked only in the environment of Windows OS, but also because the new applications were designed in such a way as to function under this system. Users purchasing personal computers, being interested in various application software did not favor web browsers produced by other companies, since they could not work with the Windows operating system. This kind of sales scheme strengthened Microsoft's position on the market of both products, for it created a strong barrier preventing other companies engaged in web browser sales from entering the market, as the market was reserved solely for Microsoft's Internet Explorer. As a result, competing software producers encountered 'a barrier to entry for application software', being the outcome of the determination amongst the application creators to direct their efforts towards creating products compatible with the most commonly installed software. In referring to the analysis of 'possible benefits' coming from bundling, the Department of Justice contended that Windows 98 was a product comprised of two separate programs – an operating system and a web browser, which were technologically 'tied with each other' bringing no benefits to users. It therefore asserted that Microsoft restricted competition on the web browser market by discouraging end-users from installing and using web browsers other than Internet Explorer and regarded this kind of conduct as unlawfully maintaining a monopoly, which violated Section 2 of Sherman Antitrust Act, and as an illegal tying violated Section 1 of the same act (Bagdziński, 2008, pp. 144–151).

In its defense, Microsoft presented various arguments. For example, it insisted that Internet Explorer did not exist within the structure of Windows 98 as a separate product. It was merely a logical and natural part of Windows, which was an innovative solution. Following the company's arguments, the integrated architecture of Windows 98 brought about an increased efficiency of the system which was achieved, among other things, in that all functions of the operating system and services for the platform were supported by the Internet Explorer technologies. In addition, the installation of the Internet Explorer technologies onto Windows 98 provided users with the possibility to use a higher degree of software compatibility and a very advanced implementation of the function of a web browser. According to the defendant, these positive effects, which were

achieved thanks to designing such an 'integrated architecture', allowed this kind of integration to be seen as one product (Bagdziński, 2008, p. 148, 149).

Moreover, Microsoft questioned the legal reasoning behind accusing the company of imposing any condition in their sale of the operating system with the web browser (as an element of tying), explaining that there was no tying arrangement when the tied product was offered for free. It further argued that this integration (bundling) could not generate any restrictions in terms of competition because the company stopped neither the PC manufacturers nor users from obtaining, installing or using any kind of competitive web browser on their personal computers (Bagdziński, 2008, p. 148, 149).

However, in its settlement of the dispute between the US Justice Department and Microsoft in 2000, the District Court rejected the company's line of defense and did not accept the business logic behind the argument presented, above all that the company's bundling represented an innovative model that had never been used before. Also, the court disregarded the likely advantages to be gained by the IT tools manufacturers and end-users. For end-users, it could be valuable to receive products as a bundle because they incur smaller transaction costs and avoid other inconveniencies. Moreover, bundling allows innovative firms to cover their fixed costs linked to research and development expenditures. On top of that, there was no assessment as to the actual or potential impact on competition among the suppliers of competitive software which was aimed at the development and market launch of improved tools designed for web browsing.

Rather that conducting such an analysis, the Court confined itself to and focused on the goals and effects of tying as specified by the Department of Justice, which contended that the possibility of installing competitive web browsers (in particular Navigator software) onto personal computers would threaten Microsoft's monopoly on the operating system market if the competitive browsers were to be sufficiently wide-spread. The government authorities were mainly interested in Netscape Navigator, a flagship product of Netscape Communications, which used to hold a dominant position on the market of web browsers in the 1990s, losing it later to Microsoft Internet Explorer.

The District Court in its interpretation of tying as forcing licensees, including consumers, to purchase and pay for the entire software bundle concluded that Internet Explorer was simply 'software' attached to the Windows operating system, in this way making up a Windows 98 bundle[8]. It contended that Microsoft took advantage of its monopoly power on the market of web browsers in that it tied Windows 98 to its web browser Internet Explorer, which was to enable

[8] *U.S. v. Microsoft*, 87 F. Supp.2d 30 (D.D.C. 2000).

Microsoft to establish leveraging in the market by unlawfully combining two separate products, namely Windows and Internet Explorer into one. The Court justified its ruling as follows: Microsoft holding a monopolistic position (95% of the market) on the market of operating systems created a strong barrier to entry for other providers of web browsers, since Microsoft's operating system functioned as a platform for other applications which computer users considered to be key and vital[9]. At this point the Court agreed with the Justice Department that the Navigator software along with a set of applications Java Virtual Machine of Sun Microsystem represented a partial substitute for the software of the Windows operating system and offered an opportunity of opening the operating system market to Microsoft's rivals (Bagdziński, 2008, pp. 144–151). In ruling against Microsoft, the Court drew on the four-element test used to assess a tying arrangement developed according to the rule *per se illegal* by the Supreme Court in 1984 in the Jefferson Parish case. One of the criteria of this test is the demand to sell products separately[10].

In its final assessment, the District Court proved to be even stricter than the Commission several years later. A few months following its final judgment, the Court ordered a remedy in the form of Microsoft's divestiture, splitting the company into two separate companies; one was to be engaged solely in operating systems and the other in the entire application software. The company appealed against the District Court's ruling and in 2001 the Court of Appeals found that Microsoft used anticompetitive means to maintain its monopolistic position on the operating system market but rejected the view that the company was also seeking to monopolize the market of web browsers. With respect to the unlawful tying of the web browser with the operating system, the Court of Appeals did not overturn the ruling but referred the case back for reconsideration, this time according to the rule of reason, dismissing the *per se prohibition* rule as incorrect. Further, the Court of Appeals overturned entirely the ruling which ordered Microsoft to implement remedies in the form of the company's breakup. On top of that, the Court of Appeals rebuked the District Court for its conduct, seeing it as unacceptable and unethical*, ex parte*, in that it carried out the investigation in the interest of only one party. The District Court maintained undisclosed contacts with the media and made numerous offensive comments pertaining to the representatives Microsoft Company outside the courtroom[11].

[9] Ibidem.

[10] *Jeffersonn Parish Hospital v. Hyde*, 466 U.S. 2,9. 1984. This ruling attracted a wide-spread criticism over the next years. It was commonly recognized that the appropriate standard for tying was the rule of reason, according to which three adversary effects are compensated with benefits, even when firms holding a monopolistic position are involved in such sale.

[11] *U.S. v. Microsoft Corp*., 253 F 3.d 34, 56 (D.C. Cir. 2001).

In the re-examination of the case at a district court, the final dispute between the Department of Justice and Microsoft was settled in November 2004 by a consent decree. The decree imposed on Microsoft a number of prohibitions and obligations, including, among others: (i) conclusion of license agreements with PC manufacturers which would render their cooperation with other software suppliers impossible; (ii) restricting hardware manufacturers in their distribution and promotion of other companies' software applications; (iii) prohibiting PC manufacturers from automatic activation of other than Microsoft's applications while login or connecting with the Internet; (iv) making all interfaces available through the Microsoft application software for the connection with Windows operating system; (v) obligation not to undertake any retaliatory measures against suppliers and sellers of competitive application software; (vi) providing no support and assistance as incentives aimed at deterring them from the development, usage, distribution and support of programs competitive with those of Microsoft. Those restrictions were binding to Microsoft until 2010.

What disappeared from the terms of the decree consent was the original unlawfulness of sale of an integrated product, that is, the sale of Internet Explorer tied with Windows OS as one product, and the classification of such practices as *per se prohibition*, even when they refer to an undertaking holding a strong dominant position. The concept that prevailed was that the antitrust analysis should be conducted in accordance with the rule of reason. The Justice Department altered its position which was very restrictive initially in that it followed the aspects of economic efficiency which the standard of the rule of reason imposed. Its framework includes, for example, the right of an innovative firm to draw benefits from its competitive advantage, the firm's capacity to further innovation thanks to an integrated sales model and taking into consideration the benefits such sales brings to consumers in the short and long term.

It was not only the ruling of the Court of Appeal that changed the approach of the governmental antitrust authority towards bundling on the market of advanced technologies but also numerous comments received in relation to the Microsoft case. Commentators drew attention to the obvious, valid and immediate economic benefits which consumers derived from this kind of computer programs integration. Bundling of software designed for playing digital audiovisual files downloaded from the Internet, as well as from CDs and DVDs with the Windows operating system allowed consumers to avoid additional costs, including transaction costs incurred while buying them separately. Economic reasoning points out that suppliers of these products will sell them cheaper when in a bundle than when separate (Carlton and Perloff, 2006, p. 69–73).

In Europe, however, this point of view was dismissed by the Commission. In its decision issued in 2004, the Commission prohibited the sale of the Windows operating system installed on personal computers bundled with the Media Player application. Since 1976, Microsoft held a monopolistic position (90%) on the European market of operating systems, while on the market of operating systems for work group servers it held a dominant position (60%). As remedial actions, the Commission ordered Microsoft to make within 90 days a full and functional version of the Windows operating system for PCs available to PC manufacturers without the Media Player application and ordered Microsoft to undertake no action in the future that would have similar market effects[12].

The Commission found the argument that tying lowered transaction costs for consumers by saving time and confusion through having a set of default options in a personal computer 'out-of-the box', to be inaccurate. The fact that the pre-installation of a multimedia player together with an operating system in a client computer is advantageous does not yet mean that Microsoft should choose a multimedia player for consumers. Taking notice of the benefits of such transactions, it, nevertheless, contended that the short-term benefits did not compensate for the negative effects in the long run in the form of a deteriorated market structure for competition leading to the weakening of competition on the market of multimedia players. According to the Commission's assessment, Microsoft would create a strong barrier to entry for producers of such applications through its strong and dominant position on the operating system market. The Commission justified its position asserting that on the basis of the case law of the Court, it was not required to provide evidence that competition had already been distorted and that there was a risk of the elimination of all competition. Thus, the Commission emphasized the role of preventive control which it had to fulfill. Otherwise – as it further clarified – its intervention to detect anticompetitive practices would come too late, since proving that such practices are impacting the market would only be possible after such impact had already occurred. In this way, the Commission took the position that market forces themselves would not open up the European market more widely to other providers of multimedia applications and therefore it had to be done by the regulator[13].

In the context of the Microsoft case it can be seen that the EU antitrust authorities do not perceive any benefits that could be derived from bundling for consumers. According to the Commission, in holding a dominant position Microsoft brings no advantages to consumers, since they have been deprived

[12] Commission decision of 24.05.2004, COMP/C-3/37.792 – *Microsoft* (OJ L 32, 6.02.2007, p. 23).

[13] European Commission, Press Release IP/04/382*: Commission concludes on Microsoft investigation, imposes conduct remedies and a fine*, Brussels, 24.03.2004.

of the possibility to purchase Windows OS without Windows Media Player. Moreover, such a sales model significantly restricts competition on the market of operating systems and application software, for Microsoft effectively blocked entry for other providers to the market of application software and their functioning on this market. It is true that the EU authorities considered the context of innovation within the IT segment, the risks accompanying innovative undertakings, sustainability of Microsoft's competitive advantage, but eventually they rejected these efficiency aspects. Also disregarded were arguments which underscored the benefits for consumers when receiving two IT products in one bundle. The Commission assumed that consumers perceived these two products as separate. Unlike the US authorities, the Commission and the Court omitted these issues. Perceiving both products as separate may be different to what values consumers attribute to the same products when purchased in a bundle. At the same time, the Commission relied on no evidence that would indicate what inconveniences consumers saw in a bundle and what benefits they derived from it. In their assessment, the Commission and the Court followed four structural criteria, already established in the past:

1) the tying and the tied are separate products;
2) the accused entrepreneur holds a dominant position on the market of the tying product;
3) the dominant provides clients with no possibility of buying the two products separately;
4) the dominant undertaking eliminates competition on the market of the tied product, imposing on consumers the demand for the tied product.

While creating a phenomenon called monopoly leveraging[14], and reducing consumers' autonomy (sovereignty), these factors restrict competition on the market of the tied product, which in this case is the Media Player application.

The critics of this case law pointed out numerous shortcomings on the part of the Commission, resulting from neglecting the analysis of efficiency aspects combined with the innovation of IT products. These shortcomings included the fact that consumers expected a certain kind of functionality from computers and would be disappointed in buying a computer without a media player application. Many of them believed that Media Player and Windows OS are not separate market products Critics emphasize that the competition policy in the US is more consumer-oriented than it is in the EU. Its primary goal is neither individual competitor protection nor that of the market structure. The EU policy, on the other hand, is seen as strongly focused on the market structure so as to enable it to retain the model of free competition. Further, it is concerned with promoting economic activity and entrepreneurship across

[14] Monopoly leveraging implies using a monopoly power obtained on the market of the basic product to achieve benefits on the market of the product tied to the basic product.

the entire EU market and with social aims, such as cohesiveness and solidarity among member states (Ponsoldt and David, 2007, p. 445 and 446).

The perspective afforded by the long-term analysis based on the belief in market forces and on the effects of dynamic efficiency proved to be right in the United States. Over the next decade, Microsoft lost its market power in operating systems. Along with the development of the digital economy and e-business, today it must face not only the "old" rivals like Linux and Apple, but also AOL, Netscape, Sun and Oracle.

VI. Conclusion

The aspects of efficiency adopted in the approach towards tying and conclusions drawn from the changes the market has been experiencing make the application of competition law in the USA different from the way it is applied in the EU, and thus in the EU member states. Europe believes that it cannot protect competition without protecting competitors, that this will make competitive markets more innovative in the long term, and that the regulator should exercise an active role in promoting innovation. The Commission and European courts do not believe that a dominant undertaking can play a beneficial role in the development of innovation in the long run. As the example of Microsoft shows, the Commission favors short-term effects of competition and hence regulation over the effects of competition forces that come later. It continues then to favor not only the protection of small companies, less effective and competitive, but even their support. Some academics argue that such a stringent approach to tying and the structural analysis of its effects stifles dominant software undertakings to the detriment of innovation and consumers. Entrepreneurs are forced to comply with the rules which do not suit the sale of their products (Ponsold and David, 2007).

In the structural approach, the assumption is that monopolistic power allows an undertaking to control prices and exclude competition, and to implement leveraging practices through tying and bundling, and ultimately to set prices above the competitive level. As it is not easy to prove directly that prices are above the competitive level, the market structure is examined in order to find evidence of monopoly. According to this structural approach, a monopolistic power can be gleaned from the calculation of market shares and attributing it to undertakings holding a dominant position on the relevant market, with this position being protected by a barrier to entry. Barriers to entry are factors preventing new players from entering the market when prices on the market rise above the competitive level. However, an antitrust body

should carefully balance anticompetitive effects against pro-competitive effects of an alleged unilateral practice and should avoid following an intuitive belief that the practice in question is harmful so as not to make the mistake of any over-rigorous interpretation of the concept of an abuse of a dominant position The European case law, however, does not require from the Commission to perform this kind of work.

This traditional structural approach developed by the Harvard School has thus been not abandoned completely in Europe, as demonstrated by the *Microsoft* case. In the United States, the antitrust authorities proceeding in the same case eventually turned towards efficiency criteria, according to the benefits yielded by dynamic efficiency. In the same year of 2004 in which the Commission was punishing Microsoft by imposing a high fine of EUR 497 million, the United States saw the Supreme Court's ruling in the famous case of *Trinko*[15]. In its decision, the Supreme Court validated the legitimacy of the efficiency approach adopted for the assessment of monopolistic behaviors of undertakings not only with respect to tying arrangements.

The case of a local telecommunication company, Trinko, was linked to the essential facilities doctrine. In the context of this case, the Supreme Court contended, with regard to the behavior of a monopolistic undertaking, that holding a monopoly power in itself and the monopolistic price associated with this position not only do not violate the law, but represent a valid element of the free market economy. The chance of setting monopolistic prices, at least in the short term, is, firstly, an incentive for private entrepreneurship and secondly, it induces individuals to take risk arising from innovation and economic growth. With a view to protect the tendency to innovate, having monopolistic power will not be assessed as law violation, unless this power is accompanied by anticompetitive behavior. At this point it is worth noting that the Supreme Court's position just presented draws directly on Schumpeterian theory of development through innovation formulated over 90 years ago.

The Supreme Court's ruling was bound to attract sharp criticism (Waller, 2006) voicing similar arguments to those cited by the District Court in its judgment regarding the Microsoft case. Finally, it is noteworthy that with the judgment of 2007 pronounced by the Supreme Court in the *Leegin* case[16], where it applied the rule of reason also to minimum re-sale prices, the case law of the US Supreme Court reduces the areas of the law's application which traditionally have been reserved to it by increasing the role of economics in competition law. Also, we see clear differences between the USA and Europe in this process. Furthermore, what is important, as illustrated by the *Microsoft*

[15] *Verizon Communication Inc. v. Law Offices of Curtis v. Trinko*, LLP, 540 U.S. 398, 2004.

[16] A detailed economic analysis of vertical price agreements relating to the ruling on *Leegin* can be found [in:] Jurczyk, 2016b.

case, is that each line of competition law enforcement presented in the paper will continue to cause much controversy among commentators.

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Open Access Competition in the Long-Distance Passenger Rail Services in Poland

by

Marcin Król*

CONTENTS

I. Introduction
II. Evidence
III. Discussion and conclusions

Abstract

This paper presents evidence of the head-on open access competition which took place on the market of long-distance passenger rail services in Poland in 2009–2015. The regional governments-owned challenger managed to raise its market share to more than 33% (2010) but eventually was forced out of the market (2015) due to a sudden change in its business strategy as well as the incumbent's strategic pressure on the political and regulatory decision-makers. This case has not featured yet in the scientific discussion on the open access in the passenger rail markets in Europe and the main aim of this preliminary study is to fill this gap.

Résumé

Cet article présente la preuve de la concurrence frontale d'accès libre qui s'est déroulée sur le marché des services ferroviaires de voyageurs longue distance en Pologne en 2009–2015. Le challenger appartenant au gouvernements régionaux a réussi à augmenter sa part de marché à plus de 33% (en 2010) mais finalement était forcé à quitter le marché (en 2015) en raison d'un changement soudain de sa stratégie commerciale ainsi que de la pression stratégique de l'opérateur historique sur les décideurs politiques et réglementaires. Ce cas n'a pas encore figuré dans

* Collegium of World Economy, Warsaw School of Economics; mkrol2@sgh.waw.pl. Article received: 3.04.2017, accepted: 28.06.2017.

la discussion scientifique internationale sur l'accès libre aux marchés ferroviaires de voyageurs en Europe et l'objectif principal de cette étude préliminaire est de combler cette lacune.

Key words: low-cost entry; open access competition; railway transport.

JEL: L51, L92, L100

I. Introduction

Evidence of head-on open access competition in passenger rail transport is only recent in Europe. In contrast to competition *for the market*, where several operators compete for the exclusive right for a specific route or network, the 'open access' competition is *in the market*, as rivals run on the same route or network. The 'head-on' open access competition means that, in contrast to the niche-oriented, low-scale market entries (which took place in the UK, Germany and Sweden), the new entrants directly challenge the incumbents on important railway connections, including principal ones. As stated by Tomeš et al., such entries have been full-scale with intensive price competition and a clear ambition of winning substantial market shares from the incumbents with lower prices and comparable or even better service quality. They have resulted in an intensive price competition leading to accusations of predatory pricing by the incumbent (Tomeš et al., 2016).

The growing literature on this subject has so far observed evidence of head-on open access competition in Austria (2011-), the Czech Republic (2011-), Italy (2012-), Slovakia (2014-) and Sweden (2015-)[1]. The main aim of this paper is to present a case study of competition which emerged on the market for long-distance rail services in Poland in 2009 when Przewozy Regionalne[2] (PR), controlled by regional governments, challenged the incumbent operator PKP Intercity (PKP IC).

The successful strategy adopted initially by the newcomer combined lower prices, lower quality and full-scale entry. To some extent it copied therefore the routine of low-cost airlines challenging traditional air carriers, which seems to be one of several distinctive properties of the Polish case. By the strategic use (or abuse) of the political process, PKP IC tried to put its competitor at a disadvantage. The incumbent's strategic behavior included a successful push

[1] The most recent literature reviews can be found in: Tomeš et al., 2016; Fröidh and Nelldal, 2015.

[2] *Przewozy Regionalne* means literally "Regional Transport Services" in Polish.

to raise the rival's cost of access to the principal railway route in Poland (2013). Strategic lapses of the newcomer contributed largely to its failure in 2015.

However, before failing, in only one year, 2010, the full-scale entry raised PR's market share in the Polish long-distance rail transport services to more than 33%[3]. It means that more than 18 million passengers were transported by the challenger[4]. It is significant that while the total number of passengers transported by rail in Poland continued its downward trend (dropping by 7.7% in 2010[5]), the cut-throat rivalry led to a 4.4% increase of the transport volume in the analyzed market segment[6], suggesting pro-consumer effects of competition.

Interestingly, the Polish experience with passenger rail competition has not been analyzed in the official European Commission documents (e.g. European Commission, 2013)[7], nor in the international business reports on railways in Europe (e.g. IBM, 2011)[8].

In the next sections, I present the results of my preliminary research on this subject. I describe first what happened in Poland in regard to rail competition (Section II), then briefly discuss this evidence and provide first conclusions (Section III).

II. Evidence

Competition in the Polish railway transport services became legally possible in 1997. Yet over the next few years the activities of non-incumbent railway undertakings were in general limited to the local freight services, using mostly

[3] Passengers (UTK, 2012, p. 25).

[4] Based on the data from (UTK, 2011, p. 20–21).

[5] From 284 million passengers in 2009 to 262 million passengers in 2010 (UTK on-line statistics).

[6] From 49.3 million passengers in 2009 to 51.5 million passengers 2010 (calculated based on the data from: UTK, 2011, p. 20–21).

[7] This highly-quoted study is an impact assessment of an amendment of a crucial regulation for the opening of the market for domestic rail passenger transport services in the EU. It erroneously lists Poland among the countries where the whole market is open through 'open access' but there is no effective competition in the market at the time of writing (European Commission, 2013, p.15).

[8] In this influential comprehensive comparison of the rail markets of the EU Member State, Switzerland and Norway, the PR company has been rightly identified as an 'external RU [railway undertaking]', meaning independent from a government-owned incumbent. Unfortunately, the authors write next: '[a]lthough the market for purely commercial passenger transport is open in Poland, up to now no external RU is active on this segment. Accordingly, the market share in this sector is zero' (IBM, 2011, p. 180–181). This opinion may be justified today, after PR has been thrown away from this market, but certainly not in 2011.

mining and industrial railway infrastructure. In 2001, a horizontal and vertical break-up of the national rail monopoly PKP (Polish State Railways) gave momentum to the development of lively competition in rail freight in Poland (Król, 2010). For passenger services, however, this was not the case.

The divestiture of PKP resulted in the emergence of a state-owned holding structure called the PKP Group. It included two newly-created nationwide incumbent passenger operators: PKP Przewozy Regionalne (PKP PR) and PKP IC.

The main area of activity of PKP PR was regional rail services performed under a public service obligation (PSO) regime. In addition, the company operated lower-class inter-regional trains (under a separate inter-regional PSO scheme). This class of trains, stopping only at larger towns and skipping most of the stations operated by regional services, has been traditionally called the "fast trains" in Poland[9].

PKP IC was created to operate higher-class long-distance trains, using national trunk lines connecting Poland's major cities. In other words, the company was set up to provide commercial passenger services. They included two categories of trains: Intercity (IC) and Express (Ex)[10]. The company also operated (and still does) international passenger services. PKP IC was considered a jewel in the PKP Group crown, having the best rolling stock, and was earmarked for eventual public offering.

In 2005, the PKP IC decided it wanted a share of the inter-regional PSO subsidies. For this purpose, it started a lower-class long-distance service branded TLK[11]. Since then, both companies were present in the same market segment of subsidized inter-regional 'fast trains'. However, as they remained within the PKP Group, they did not compete directly. In terms of passengers transported, the PKP PR's share in the long-distance segment was about 75% and PKP IC's about 25% (both commercial and TLK services) (UTK 2012, 25). This changed suddenly in 2008.

Unlike PKP IC, the PKP PR was from the beginning considered the "sick man" of PKP Group. Its troubles arose from being heavily overstaffed and equipped with antiquated and inadequate rolling stock at the outset. Its financial position quickly worsened due to problems with financing for the public service obligations. Starting in 2001, the local governments in Poland's regions became responsible for organizing and subsidizing the regional passenger rail services. However, over the years 2001–2003, the subsidies

[9] *Pociągi pospieszne* in Polish.

[10] The distinction between the two categories wasn't very clear to customers. The most visible difference between them was that the IC fare, which was a bit higher, included a snack and a hot drink, when the Ex fare didn't.

[11] *Tanie Linie Kolejowe* – literally "Inexpensive Railways" in Polish.

were realized exclusively by means of a grant given to them by the central government. The problem was that this allowance turned out to be much lower than previously promised to the local authorities. As the exclusive final beneficiary of the grant was PKP PR – the incumbent company on the market for regional passenger rail services in Poland – this contributed to the loss of financial stability and then an acute financial crisis of this enterprise. The central government kept postponing restructuring of PKP PR until 2008, when ownership was transferred fully to the regional authorities. The PKP logo was removed and it became known as Przewozy Regionalne (PR). Crucially, the company's debts have not been fully restructured and it remained heavily indebted.

Additionally, before the company was passed on to the regional authorities, its 'fast trains' services were transferred to PKP IC, which thus became the only operator in the long-distance market. The transfer included all the rolling stock used in the inter-regional traffic, but not all the staff employed in this segment. It meant that PR was removed from a financially viable market segment (the 'fast trains' were under the governmental PSO scheme) and left, overburdened with debt and overemployment, in the unlucrative regions-financed segment of regional services. As the separate regional authorities became collective PR owners only reluctantly, the company's relations with numerous new public shareholders were a further impediment to adopt a coherent strategy.

Still, the company's management took a bold and unexpected decision to seek a way out. In 2009, PR created a new brand called *InterRegio* and directly challenged the PKP IC incumbent on the important railway connections in Poland[12]. Making additional revenue and improving the company's financial situation was a major objective.

Moreover, entering another market segment allowed PR to make better use of the excessive resources at the company's disposal – staff and rolling stock. Because of the fall in the regional passenger traffic, the company had a considerable number of inactive electric multiple units (EMUs). Using regional EMUs in the long-distance services quickly became emblematic to *InterRegio*.

This scheme was repeatedly criticized by representatives of PKP IC, who argued that the EMUs had not been designed for this kind of service and that as such they were 'irrelevant and unfit'[13]. The challenger, however, intentionally applied a low-cost, low quality and low-price strategy. While the IC- and Ex-class PKP IC locomotive-hauled trains offered relatively high comfort level, with compulsory seat reservations, restaurant cars etc., *InterRegio* customers

[12] The first *InterRegio* connection was Warsaw – Białystok in March 2009.

[13] In fact, however, PR operated under *InterRegio* both class EN57 EMUs designed for regional transport and class ED72 EMUs designed for inter-regional traffic.

often could not be sure if they would find a seat and had to travel standing-up in crowded units. Yet the travel time was similar and the fares much lower. When PR entered the Warsaw – Cracow route, PKP IC fares were 97 PLN in the Ex-class train and 107 PLN in the IC-class train[14]. The challenger set the price at 40 PLN. Travel time was 2h55 for the incumbent and 3h18 for the newcomer. From the very beginning the *InterRegio* EMUs were especially crowded on this principal Poland's route. In the customers' opinion, the new service was therefore 'relevant and fit'. And it expanded.

While by the end of 2009 PR operated 23 pairs of *InterRegio* trains, in 2010 this number increased to 48. In 2011 the service reached all Polish regions. In effect, PR regained around one-third of the long-distance market. In 2009 *InterRegio* transported 2.6 million passengers, in 2010 as many as 18.2 million and 17 million in 2011. In its most successful year (2010), revenues generated by the new service were 130 million PLN, while its direct costs 80 million PLN (Trammer, 2014). *InterRegio* became financially sustainable. Several connections were subsidized by the regions, but the bulk of them were purely commercial. At some destinations, *InteRegio* competed in the subsidized 'fast trains' segment, but the challenger managed to hit the incumbent in its core business or – at least – at what was perceived as its natural zone of activity – the commercial services.

The reaction of PKP IC was dual. On the one hand, as one would expect, it involved pricing. However, the managers of the company decided not to engage in a price war – its regular fares remained at the previous level. Yet, they made a significant change in special offers for the destinations where they faced new competition. They started to market a limited number of seats at 19 PLN (in presale). Before the open access entry occurred, this special offer was available at 59 PLN[15]. In addition other minor offers and adjustments were introduced[16].

On the other hand, the incumbent engaged in a strategic behavior by using political process to disadvantage the competitor. After PKP PR has been devolved to regional authorities, PKP IC obtained from the government the informal status of the sole 'national operator'. The Minister of Infrastructure, who exercised corporate control, in relation to the company, wrote in August 2009 an official letter to the Presidents of Polish regions acting as owners of PR

[14] Both for a 2nd class ticket.

[15] It is worth noting that on the routes where competition didn't appear the presale offer remained at the previous level of 59 PLN (Beim, 2009).

[16] Among them the PKP IC's train classification was straightened up. The Ex and IC categories were combined into one class, called Express InterCity (EIC). The ex-PKP PR's "fast trains" were finally incorporated into TLK category (standing since 2011 for *Twoje Linie Kolejowe* – "Your Railways").

to express concern about the *InterRegio* connections being created and posing a threat to the economic activities of PKP IC. In October 2009 the incumbent filed a formal complaint to the railway market regulator – Urząd Transportu Kolejowego (in English: Office of Rail Transport; hereinafter, UTK), accusing PR of unfair competition. According to Trammer, UTK – dependent on the Minister of Infrastructure and led by ex-PKP executives[17] – sought to find a way to suspend *InterRegio* connections. The alleged misclassification of the services when ordering train paths was to be used as a pretext (Trammer, 2010). It did not work, but the *InterRegio* trains were anyway halted by the PKP PLK[18] infrastructure operator in May 2010 on the grounds that PR was in arrears on its infrastructure charge payments.

This was controversial. The painful financial situation of the regions-owned company was traceable to the years when it was within the PKP Group. PKP PR debts were not fully repaid at the time of its transfer to the new public owners, who inherited a financially distressed enterprise operating in an unprofitable market of regional services. Starting commercial services on the long-distance market was a step towards financial recovery and repayment of debts – including the cumulating overdue track access charges. When the infrastructure operator stopped the profitable *Interregio*, it was thus depriving itself of the chance that the arrears would be eventually paid. This is why this action has been widely considered to be caused by a different motive: stopping a new rival to the 'national operator' in its tracks (e.g. Trammer, 2010). Not only the infrastructure operator, PKP PLK, was together with PKP IC in the same PKP Group, but also the Minister of Infrastructure exercised proprietary functions in relation to both companies. It is worth noting that the incumbent also had overdue infrastructure access charges – yet its trains have not been stopped[19].

PR's long-distance services were resumed after a month, when a debt repayment schedule was set. Interestingly, despite a monthly break in operations, 2010 was the best year in the *InterRegio* history. The next year was almost as good – but in 2012 the operations fell by 60%, with less than 6.7 million passengers transported. It seems, however, that it was less due to the incumbent's strategic countermeasures, but to the challenger's strategic error of abandoning the successful initial strategy.

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[17] A detailed analysis of the fundamental conflict between the government's regulatory, proprietary and economic functions concerning the railway market in Poland can be found in (Król, 2010).

[18] PKP *Polskie Linie Kolejowe* – PKP "Polish Railway Lines" in Polish.

[19] As well as the PR's regional trains: unlucrative and generating overdues in infrastructure access charges.

According to Biega, who co-authored the PR's initial strategy (2009–2011), the original game plan was a low-cost entry into the routes where the number of passengers was large and where it was possible to offer travel time comparable to both PKP IC and road transport. The examples were Warsaw – Cracow, Warsaw – Poznań or Poznań – Toruń – Olsztyn (*Z Biegiem Szyn*, 2015). Very competitive fares, which attracted many customers, were conditioned by low operating costs thanks to the deployment of the EMUs. The quality of service was relatively poor, which is an inherent attribute of a 'no-frills' strategy. Such a strategy had been consciously adopted by the challenger.

Unexpectedly, starting in the 2011/2012[20] timetable offer, PR abandoned this approach. The new management decided to improve the quality of service by offering better travel comfort. The company started replacing class EN57 EMUs with locomotive-hauled trains. This, however, generated costs. Sixteen passenger cars were thoroughly modernized, including fitting them with air conditioning, LCD screens and wireless internet service. PR did not own locomotives, so it had to rent them. Moreover, because of their greater axle load, locomotive-hauled trains incurred larger track access charges. Suddenly, PR's managers found themselves on the verge of losing financial sustainability of the long-distance offer.

As the bulk of *InterRegio* services were commercial, raising fares to maintain profitability was unavoidable. Prices of tickets increased by up to 40%, depending on a route. This caused a customer outflow. But ticket sales were also reduced by another factor. As Trammer writes, more and more connections were operated intermittently – on selected days only. For instance in the 2012/2013 timetable, 52 of the 113 trains were episodic (e.g. on Mondays only). This made the offer less transparent and attractive to customers (Trammer, 2013).

Furthermore, the approach to planning new connections changed. As Biega stresses, the focus was no longer on the routes with the largest number of passengers. On the contrary, the company started to introduce *InterRegio* services where it was clear that they would not be financially viable. Also, the challenger ceased to be reactive – PR stopped adjusting offers to changes in demand on the routes (*Z Biegiem Szyn*, 2015).

Consequently, the number of passengers transported by *InterRegio* trains decreased dramatically in 2012 and never increased subsequently. At the same time the service ceased to be financially sustainable.

[20] A new timetable starts in Poland on the December's second Sunday.

As with many examples of spectacular business mistakes, it is hard to explain why PR's management adopted this new strategy. I It is clear, however, that the business culture embedded in the operator's core segment of regional services, with direct focus on gaining subsidies rather than passengers, prevailed.

The next act of the *InterRegio* drama took place at the end of 2013. By using strategic influence with regulators, PKP IC managed to raise its rivals' cost on the principal railway destination Warsaw – Cracow (317 km). The challenger operated class ED72 EMUs on this route designed for inter-regional traffic at 110 km/h. The key section of the Warsaw – Cracow route uses the CMK[21] line (224 km). The CMK, completed in 1977, was designed for 250 km/h, but never operated at this speed[22]. In 2013 the maximum speed was of 160 km/h reached by the PKP IC trains[23].

Unexpectedly, starting with the 2013/2014 timetable, PKP PLK infrastructure manager – the incumbent's sister company in the PKP Group – introduced the minimum speed requirement for the CMK at 120 km/h. The rail market regulator UTK voiced no objection and PR's low-cost EMUs were no longer allowed on the tracks. The challenger had to introduce locomotive-hauled trains on the route resulting in losses on this destination. According to Trammer, the track access charges themselves increased by 0.2 million PLN per pair of trains (Trammer, 2014). As a consequence, by the end of 2014 the *InterRegio* Warsaw – Cracow service was closed.

Eventually, at the end of August 2015, the PR company ended the provision of long-distance commercial passenger services in Poland. The disastrous financial situation in the regional operations was pivotal to the decision. PR was on the verge of bankruptcy and by the end of 2015, the controlling interest in the company has been taken over by a governmental restructuring agency. One of the conditions required to obtain public aid was to remove the commercial *InterRegio* services.

"Order was restored" on the market and the 'national operator' no longer had to struggle with an unwanted rival. At the time of writing, the PR's subsidized Warsaw – Łódź services[24], which survived under the *InterRegio* logo, are but a distant memory of the fierce head-on open access competition that used to take place in Poland's long-distance passenger rail services.

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[21] *Centralna Magistrala Kolejowa* – Central Trunk Rail Line in Polish.

[22] In 1994 a Pendolino train reached here 250,1 km/h during a high-speed test. By the end of 2013 a new Pendolino ED250 reached 293 km/h.

[23] Only starting 2014/2015 timetable PKP IC begun regular operations using Pendolino trains at 200 km/h and branded 'Express Intercity Premium' (EIP).

[24] This connection is subsidized by the Łódź Region.

III. Discussion and conclusions

The case study presented above is interesting for many reasons. PR, an incumbent company in one market segment (regional services), challenged PKP IC, an incumbent company in another market segment (long-distance services). Both companies have been public sector-owned entities: PKP IC is a classic state-owned enterprise (SOE), while PR was at that time a regions-owned enterprise[25]. Therefore the full-scale open access competition involved two state-owned rivals from the same country. That is, the entry was not by a private challenger (as it was in the Czech Republic) or from abroad (as in rail freight in the UK).

Both companies obtained public service contracts (PSCs) in their core market segments. It is unclear, and needs further research, whether they used them to cross-subsidize commercial long-distance services subject to head-on competition.

PR was operating simultaneously in two market segments, but the company's conduct was extremely different in each of them. In the quasi-monopolistic segment of regional services, where PR was the dominant entity, its conduct could be a textbook example of a managerial slack, with a clear focus on gaining subsidies rather than passengers. In the long-distance segment subject to competition, the company's behavior (2009–2011) was profit-oriented and aggressive, with an ambition to attract as many passengers as possible. The difference was apparent even at the first sight: the staff was more courteous and trains cleaner in *InterRegio* compared to *Regio*[26]. This led to a grotesque situation: at the same time the PR logo stood as a symbol of an irredeemable monopolistic SOE being a relic from the past and – in the other market segment – as the driver of desirable changes in the Polish rail sector.

All full-scale open access entries in the railway passenger markets described in literature used a strategy involving lower prices and comparable or even better service quality. The Polish case differs significantly, as PR used a full-entry strategy based on both lower prices and lower service quality. Interestingly, according to Tomeš et al., such approach has so far been typical rather of low scale-entries, targeting small, neglected market segments (Tomeš et al., 2016).

The "no-frills" strategy enabled the company to favorably segment the market of long-distance services. The group of customers who were much more sensitive to price than to service quality turned out to be large. Focusing

[25] At the time of writing it co-owned by the Polish regions, as the controlling interest in the company has been taken over by a governmental agency.

[26] Such opinions of *InterRegio* and *Regio* customers are still to be found on the Internet.

on them was the successful initial (2009–2011) policy. However, the price sensitivity of the customers came out finally to be a two-edged sword. Lifting costs for the sake of the higher service quality called into question the main source of the company's strategic advantage (2012-). The unavoidable price increase resulted in the natural outflow of price-sensitive customers, to whom the service quality was not essential. Unfortunately, it was the core clientele of the operator.

Another feature of the case is that despite of what theoretical studies and experience from other countries may suggest, a fierce price war between the challenger and the incumbent did not happen. Apparently PKP IC decided that a price war was a dangerous game and should not be deployed before other options are exhausted. The PKP IC management used a typical weapon of an enterprise enjoying the status of "a national provider" – political influence. Using it was facilitated by the fact that the challenger's entry was not "assisted" by a government eager to open up the market. PKP IC was thus able to engage in a strategic behavior without running the risk of jeopardizing government objectives. The evidence from Poland confirms that a strategic use of political process is a method for disadvantaging competitors that can be easily available to an incumbent SOE[27]. The PKP IC's strategic behavior included a successful applying of the raising rivals' costs strategy. As expected, it proved to be an extremely effective routine against a low-cost operator.

The analyzed case can be considered as one of the first, if not *the* first, examples of head-on open-access competition in passenger rail transport in the EU. The rise and fall of *InterRegio* services is very instructive but still little known and investigated. It undoubtedly deserves further research.

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NATIONAL LEGISLATION REVIEWS

Commitment Procedure under Serbian Competition Act

by

Srđana Petronijević and Zoran Šoljaga*

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Key words: commitment; competition law; Serbia

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* Srđana Petronijević, Partner with Moravčević, Vojnović and Partners in cooperation with Schoenherr, head of competition practice; s.petronijevic@schoenherr.rs. Zoran Šoljaga, Attorney at law, Moravčević, Vojnović and Partners in cooperation with Schoenherr; z.soljaga@schoenherr.rs. Article received: 10.08.2017; accepted: 12.09.2017.

I. Preliminary remarks

The Serbian Competition Act[1], which has been in force since November 2009, was amended in 2013 in order to improve the effective enforcement of competition rules by the Commission for Protection of Competition (hereinafter, the Commission or Competition Commission), and to further harmonise national regulations with the EU *acquis* in the area of protection of competition. The 2009 Competition Act (hereianfter, the Act), which introduced some modern competition protection concepts into the Serbian legal system, had certain deficiencies which hindered the practical application of the statute and, consequently, effective enforcement by the Commission.

In addition to the existing provisions of the Act, the legislator introduced a novelty that will, beyond any doubt, produce considerable effects on the Commission's actions in deciding on competition infringement cases. The novelty concerns the introduction of the so-called commitment procedure, which allows the Commission to close a competition infringement case by accepting commitments offered by the undertakings concerned, without establishing whether there has been an infringement. The instrument has turned out to be exceptionally effective in closing proceedings before the competition authorities of the EU and the Member States.

The concept ensures procedural economy, as the Commission need not to establish the existence of the infringement, which makes the proceedings shorter and more appropriate particularly for more dynamic sectors of the economy, while the actual concerns about the market are effectively addressed. Further, the concept is favourable for the undertakings concerned as it enables them to propose measures they believe will resolve suspicions of competition law infringement, thus bringing proceedings to an end without finding the infringement, allowing them to avoid high fines and potential actions for damages.

II. Introduction of commitment procedure into Serbian Competition Act

1. Legal framework

The amendments to the Competition Act modify Article 58 of the Act, by regulating the stay of proceedings; they stipulate that proceedings may be stayed in case a party makes certain commitments. Pursuant to the relevant Article:

[1] The Competition Act (Official Gazette RS, nos. 51/09 and 95/2013).

> "the Commission may by a resolution stay antitrust proceedings aimed at imposing remedies referred to in Article 59 of the Act (structural and behavioural measures), where a party, based on the content of the resolution initiating proceedings or facts established in the proceedings, offers commitments it is prepared to make on a voluntary basis to meet any competition concerns, along with the terms and the time-limits for implementing the remedy".

The party may submit its proposal for commitments no later than the date of receipt of the Statement referred to in Article 38(2) of the Act. The Commission must publish the main elements of the proceedings and a concise summary of the offered commitments and invite all interested third parties to submit their observations, positions or opinions in writing within 20 days. Paragraph 5 of this Article stipulates that the Commission is not bound by a proposal of commitments.

It is within the remit of the Commission Council to adopt resolutions staying proceedings, which must contain the remedies, terms and time limits for implementation, and the party's obligation to provide evidence of compliance with its commitments. Further, the amendments set out that proceedings will be resumed in case certain circumstances occur within 3 years.

2. Deficiencies in the transposition of EU instruments

The introduction of modern competition law concepts and the harmonisation with the EU Acquis are not only one of Serbia's international obligations, but also contribute to a better regulation of the Serbian market and more effective enforcement by the Commission. The introduction of the commitment procedure is an important step towards more effective handling of cases before the Commission, which will allow the parties to respond to Commission's objections within shorter time limits and bring their behaviour on the market into compliance with the competition rules, while enabling the Commission to resolve specific competition concerns more swiftly and focus on priority cases.

3. How and when parties learn what constitutes a competition concern in individual cases

Unfortunately, the Act does not fully transpose all the elements of the commitment procedure from the EU law, while some of the provisions introduced by the legislator into the Serbian competition law lack precision. The provisions in Article 58 could produce converse effects than those aimed

for. The provision setting out that a party may only offer commitments based on the allegations in the resolution initiating the proceedings does not serve the purpose of effective application of commitments. The resolution initiating proceedings mainly contains a short description of the allegations in the complaint or information the Commission collected before it opened proceedings. It does not contain the Commission's assessment of market disruptions as, at that time, the Commission does not have sufficient information on the market that would allow it to make any kind of assessment, other than a reasonable assumption of the existence of a competition infringement. When applying the European institutions' case law, which holds that the European Commission is obliged to fully investigate and clearly identify its competition concerns, the national competition authority must have access to the relevant data and must adequately analyse it. In this respect, the provision stipulating that commitments and a stay of proceedings may be proposed based on the resolution is contrary to the EU case law, particularly in view of the fact that the Competition Act does not regulate the pre-investigation stage, so that the Commission for the most part has only limited data available at the very beginning of the proceedings.

Alternatively, a party may also offer commitments "on the basis of facts found in the proceedings". However, the issue here is that, in proceedings before the Commission, the parties are not informed of the facts found in the proceedings until they have received the statement of objections, which is provided at the end of the investigation and whose provision, pursuant to Article 58(2), is the final time limit for the parties to offer commitments. This contradiction/lack of logic is a consequence of the "copying" of EU law provisions without taking into account the previous rules applying to proceedings conducted before the national authority, or the absence of the pre-investigation stage, or indeed other EU law elements, in Serbian law. The Competition Commission's practice does not know the so-called "preliminary assessment" or State of Play meetings, which are a signal to the parties that the European Commission is ready to engage in discussions on the application of Article 9 of the EU Regulation. The parties are not familiarised with the Commission's assessments and the tests carried out during the proceedings until they receive the statement of objections.

The Commission will evidently have to harmonise its practices with this statutory power and enable parties to familiarise themselves with the Commission's assessment of the action that is the subject matter of an investigation, so that they could submit a proposal for commitments.

4. Time limit for submitting observations on the market test

The Competition Commission must publish a concise summary of the offered commitments and of the main elements of the proceedings. This allows all the undertakings concerned to partake in the assessment of the offered commitments, making the proceedings transparent and enabling the Commission take into account the positions of undertaking concerned and of expert bodies. Since practice has shown that Article 9 of the EU Regulation is frequently applied in regulated sectors of the economy such as telecommunications and energy, it is essential for the Commission's decision-making process and effective implementation of commitments to consult the competent regulatory bodies and institutions. What could have a restrictive effect on the Commission's actions is the statutory time limit of 20 days to submit observations and opinions concerning the published summary of offered commitments. The time limit is considerably shorter than that provided for under the EU Regulation, which leaves the third parties a minimum of one month to comment (Article 27(4) of the EU Regulation). Since it is a statutory time limit, the Commission may not extend it and will be largely restricted in gathering high quality observations and opinions concerning the offered commitments, particularly when in comes to structural remedies, which may have significant effects on the functioning of the relevant market.

5. Inability to impose fines in case of non-compliance with commitments

The grounds for re-opening proceedings correspond to those in Regulation 1/2003, but the Commission is not authorised to impose fines in case of non-compliance with a commitment made. Conversely, the European Commission may impose a fine up to 10% of a party's total annual turnover in case of non-compliance with a commitment made binding by a decision pursuant to Article 9 of the Regulation, or a non-compliance penalty of 5% of a party's daily turnover for each day of delay, to compel the party to comply with its commitments made binding by a decision. The only remedy available to the Competition Commission, is to, in fixing a competition infringement fine imposed after the re-opening of proceedings, take the party's non-compliance as an aggravating circumstance and impose a higher fine. In this sense it is necessary to amend the existing Competition Infringement Fines Decree and Guideline, specifically the part defining the criteria for imposing fines, by introducing a new criterion pertaining to non-compliance with commitments

made binding by a resolution staying proceedings. The existence of a direct fine for non-compliance with commitments would have a deterrent effect on the parties contemplating non-compliance. In previous EU institution practices the only fine for non-compliance with commitments was imposed on Microsoft, in the amount of EUR 561 million, in a case of a restriction of competition in the choice of a web browser. Joaquin Almunia, the former European Commissioner for Competition, following the Microsoft decision, stated that: "If companies agree to offer commitments which then become legally binding, they must do what they have committed to do or face the consequences – namely, the imposition of sanctions".

6. Types of antitrust investigations allowing for the application of the commitment procedure

Finally, the legislator failed to restrict the application of commitments, i.e. to detail in which types of proceedings it is inappropriate to adopt the resolution staying proceedings. Unlike Serbia's legal framework, the EU Regulation and subsequent EU case law imply that commitment decisions are not appropriate in cases where the Commission intends to impose a fine, i.e. in hard-core cartel cases. Pursuant to the current version of the Competition Act, even in cartel cases parties may offer commitments, which the Commission is obliged to consider although it is allowed to dismiss them. This additionally lengthens proceedings and creates a burden on the Commission.

The Commission attempted to overcome this deficiency by adopting the Opinion on the implementation of Article 58 of the Competition Act[2]. In it, the Commission states that the application of Article 58 of the Competition Act is not appropriate in most serious competition infringement cases, such as cartel cases. The Commission refers to the relevant European regulations and case law, invoking the obligation under the Stabilisation and Accession Agreement, entered into between Serbia and the EU, to interpret competition rules in accordance with EU legislation and practices. As stated in the Opinion, the Commission received a large number of petitions for a stay of proceedings in horizontal agreement cases, and the purpose of the Opinion was to deter parties in such cases from submitting petitions for a stay of proceedings. Although the Opinion has no legal effects, it was a valid initiative by the Commission to correct the legislative omission.

[2] http://www.kzk.gov.rs/kzk/wp-content/uploads/2015/05/misljenje-primena-clana-58-zakona-o-zastiti-konkurencije-13052015.pdf (2.11.2017).

7. Resolution staying proceedings is not the final act of the Commission

Contrary to the EU practice, a resolution staying proceedings is a procedural document and does not close administrative proceedings. Therefore, the commitment decision in Serbia is not the final act in a given proceeding. Specifically, proceedings may continue for up to three years in case of (i) a major change in the circumstances on which the resolution was based; (ii) a party fails to comply with its commitments within the fixed time limit or fails to submit evidence of compliance; and (iii) the resolution is found to be based on incorrect, untrue, incomplete data provided by a party during the proceedings. After a three-year period, the Commission should, according to the rules of administrative proceedings, adopt a resolution staying proceedings, which would constitute the final administrative instrument. The consequence of such a solution is a limited duration of the commitments of up to three years.

As the resolution staying proceedings is a procedural document, it may not be appealed. Further, it is questionable whether an appeal is allowed to the Administrative Court, which is competent for deciding on the lawfulness of the Commission's final instruments. In the previous court practice, procedural resolutions were not subject to court control. If this resolution is treated the same way, this could result in a failure to create case law or ensure control over the Commission's work and adequate application of the commitment procedure in Serbia. Evidently the number of appeals against such decisions is small, but this obstacle additionally hampers the development of competition case law in Serbia. In addition, third parties have no rights in proceedings before the Commission and the Administrative Court has so far dismissed third party appeals against Commission decisions, including complaints concerning suspected infringements of competition rules, on grounds of lack of capacity to act as a party in proceedings. Appeals should be allowed against resolutions staying proceedings, which must be adopted within three years, provided that the commitments have been complied with.

III. Practice in the application of commitment procedure in proceedings before the Commission

The Commission has adopted three resolutions staying proceedings since 2013. All three proceedings involved investigations of a suspected abuse of

dominant position, interestingly all of them in state-run companies, i.e. public enterprises[3].

The first decision was adopted shortly after the 2013 amendments to the Competition Act entered into force. In the *Telekom*[4] case, the Commission investigated the existence of (i) margin squeeze; (ii) price discrimination; (iii) tying; and (iv) unfair trading conditions on the wholesale market for ADSL broadband internet access. The proceeding lasted 3 years, until in late 2014 Telekom offered commitments, which were accepted by the Commission following a market test. Although the Commission did not, in the rationale of its resolution, elaborate on the competition concerns relating to the relevant infringements, the party offered a commitment for each individual infringement. The resolution defines the remedies and the time limit for complying with the commitments, which was set at two years as of the adoption of a decision in the case at hand. The only observation on the market test was given by a direct competitor of Telekom, requesting, among other, that the Commission apply the Reasonably Efficient Operator test, instead of the Equally Efficient Operator test, to assess margin squeeze, and that it impose stricter commitments on the company. The Commission took into account the competitor's observations, but did not accept them, invoking the principle of proportionality.

The second decision was adopted in a proceeding against JP Železnice Srbije involving a suspected abuse of dominance. The Commission investigated a suspected abuse of dominant position in the railway infrastructure market with foreclosure effects. The decision sets out as many as 34 commitments the party must comply with within three years. Most commitments involve the adoption of internal rulebooks and other bylaws, with the consent of the Government, to regulate railway infrastructure management. Hence, these are mainly regulatory commitments. The third decision staying proceedings was adopted in a case against JP Infostan Beograd. In this proceeding, the Commission investigated abuse of dominance by Infostan, which allegedly charged apartment insurance costs on behalf of an insurance company,

[3] Although the Commission adopted all three decisions in proceedings against state-run, i.e. public enterprises, this should not lead to a premature conclusion that such companies are privileged in proceedings before the Commission. Specifically, the highest fine imposed so far in Serbia was EUR 3 mln at the end of last year to the state-run company EPS Distribucija, a power distribution system operator. The proceeding was an example of a standard commitment decision, as it involved an abuse of dominance case – application of dissimilar conditions to equivalent transactions – which lasted a short time and, according to the allegations in the rationale, did not produce significant effects on the market. However, the case ended with an infringement decision.

[4] http://www.kzk.gov.rs/kzk/wp-content/uploads/2014/11/Zakljucak-o-prekidu-postupka-pokrenutog-protiv-Preduzeca-za-telekomunikacije-Telekom-Srbija-ad-Beograd.pdf (2.12.2017).

thus bringing it into a favourable position relative to its competitors on the insurance market. In both these cases, unlike the Telekom case, the rationale of the resolutions do not indicate the Commission's competition concerns. They do not sufficiently substantiate either the definition of the relevant markets or the actions subject to proceedings. Further, they do not list the evidence collected or the procedural actions taken in order to establish the facts. Further, it remains unclear after an analysis of these cases at what time the parties decided to offer commitments, since, as mentioned above, the Commission's practice does not include State of Play meetings or a preliminary assessment, unlike in the EU enforcement regime. It remains unknown at what time in a proceeding before the Commission the parties should offer commitments. Finally, in the latter two cases there were no third party observations or proposals concerning the market test, which may imply that, unlike in the Telekom case, the actions subject to Commission investigation were not significant enough for the undertakings concerned.

IV. Final remarks

The Commission's competence to adopt resolutions staying proceedings, provided for in Article 58 of the Competition Act, will contribute to the application of competition rules and efficiency of the proceedings before the Commission. However, several omissions were made in the transposition of the provision in Article 9 of the EU Regulation.

Article 58(5) of the Competition Act stipulates that the Commission is not required to accept commitments offered, i.e. that it has discretion in deciding on the proposals submitted by parties. In order to, on the one hand, ensure compliance with the principles of legal certainty, and on the other hand, avoid the overburdening of the Commission with petitions filed based on this Article, the Commission must adopt more detailed guidelines for proceeding on such cases. Unfortunately, this will not allow it to remedy the omission the legislator made by failing to provide for a possibility to impose a fine on a party not complying with the commitments it made. This omission could present a considerable issue in the application of the concept, particularly since the parties could view it as a means to protract proceedings. Specifically, the parties are not at a risk of being subject to high fines in case of failure to comply with their commitments, but only face the risk of re-opening of proceedings, whose time and manner of closure are unknown. In order to prevent such a scenario, the Commission will have to put in place an effective mechanism for the control of compliance with commitments. There are

several manners in which competition authorities may control compliance with commitments, such as acting on their own initiative, regulatory control, control by undertakings concerned or regular reports submitted by parties to the proceedings. After it imposed the fine on Microsoft, the European Commission launched an initiative to improve the commitments compliance monitoring system, as it was established that its previous practice had certain deficiencies. Regardless of the method of monitoring, this will be an additional burden on the Commission's specialist service, which already operates with limited capacities. It is to be expected that the Commission will, in most cases, rely on complaints filed by third parties, the competitors of the party having made commitments, alleging non compliance, in order to make its capacities available for other priorities. In order to efficiently implement the procedure under Article 58, the Commission will have to make the procedure for the adoption of resolutions staying proceedings as transparent as possible and find a way for all the undertakings concerned to be adequately informed of the content of the commitments defined.

The Commission recently announced that it would proceed with the drafting of a new competition act, in order to further harmonise the national competition regulation with the EU Acquis. This will be an opportunity to address all the deficiencies identified in Article 58 of the Competition Act and enable a complete application of the commitment procedure provided for in Article 9 of the EU Regulation. It is the only way to ensure an adequate legal regime that will guarantee the efficient application of the commitment procedure in Serbia. Evidently, the Commission's practice will have to be consistent with the EU's and will have to guarantee the respect of parties' rights, transparency of proceedings and legal certainty in its procedure.

Protection of Consumers' Rights in Railway in the Slovak Republic

by

Matej Horvat, Hana Magurová, Mária Srebalová*

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I. Introduction
II. Railway in the Slovak Republic and customers' satisfaction in railway
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V. Conclusions

Abstract

The paper focuses on railway services in the Slovak Republic and describes the organization of public administration in this area and its responsibility for protecting consumer rights. It analyses customers' rights stipulated in the Slovak legislation and comes to a conclusion that they drive mainly from the EU law. The paper also presents a customer satisfaction survey regarding rail services in the Slovak Republic and several other EU states and proposes suggestions on how to improve customer satisfaction. The aim is to start a discussion on customers' rights in the Slovak Republic because in the last couple of years the total number of rail customers is on the rise.

* JUDr. Matej Horvat, PhD., senior lecturer, Comenius University in Bratislava, Faculty of Law, Department of Administrative and Environmental Law; matej.horvat@flaw.uniba.sk. JUDr. Hana Magurová, PhD., LL.M., senior lecturer, University of Economics, Faculty of Commerce, Department of Business Law; hana.magurova@euba.sk. Doc. JUDr. Mária Srebalová, PhD., associate professor, Comenius University in Bratislava, Faculty of Law, Department of Administrative and Environmental Law; maria.srebalova@flaw.uniba.sk. This paper has been supported via VEGA No. 1/0136/15 "Právna úprava správneho trestania" (Legal Regulation on Administrative Punishment" granted by Ministry of Education, Science, Research and Sports of the Slovak Republic and Slovak Academy of Arts. Article received: 30.12.2016, accepted: 30.05.2017.

Resumé

Le papier se concentre sur les services ferroviaires dans la République slovaque et décrit l'organisation de l'administration publique dans ce domaine et sa responsabilité de protéger des droits des consommateurs. Il analyse les droits des clients prévus par la législation slovaque et conclut qu'ils découlent principalement du droit communautaire. Le document présente également une enquête sur la satisfaction des clients concernant les services ferroviaires dans la République Slovaque et plusieurs autres états de l'UE et propose des suggestions sur la manière d'améliorer la satisfaction des clients. L'objectif est d'entamer une discussion sur les droits des clients dans la République Slovaque, parce que le nombre total de clients ferroviaires est en hausse depuis quelques années.

Key words: customer rights in railways; Ministry of Transport; protection of customers' rights in railway, public administration in railway; railway; Regulation (EC) No. 1371/2007; Slovakia; Transport Authority.

JEL: K23

I. Introduction

A strong influence of EU legislation is seen when it comes to protection of consumer rights in all markets of transport services[1]. This applies to railways as well. The main source of railway passenger rights is stipulated by Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (hereinafter, Regulation)[2]. But a long path has led to adopting this Regulation.

The first important EU legal act on railways was the First Railway Directive[3]. Its aim was to separate the management of railway operations and infrastructure from the provision of railway transport services (separation of accounts being compulsory and organizational or institutional separation being optional). After that there was Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings[4] that concerned the criteria applicable to the issue, renewal or amendment of licences by a Member State intended for railway undertakings which are or will be established in the Community;

[1] See Article 90-100 TFEU (especially Article 90, 91 and 100).

[2] OJ L 315, 3.12.2007, p. 14–41.

[3] Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ L 237, 24.8.1991, p. 25–28).

[4] OJ L 143, 27.6.1995, p. 70–74.

a license provided in one Member State has been henceforth generally valid in all other member states. And finally Council Directive 95/19/EC of 19 June 1995 on the allocation of railway infrastructure capacity and the charging of infrastructure fees[5] that defined the principles and procedures to be applied with regard to the allocation of railway infrastructure capacity and the charging of infrastructure fees for railway undertakings which are or will be established in the Community and the international groupings which they form (Král, 2011).

Since May 1, 2004 all EU law applies to the Slovak Republic as Slovak Republic became one of the EU Member States.

When it comes to the Slovak Republic, besides EU law, we have to name two national statutes for they stipulate a lot of legal regulations concerning railways. They are:

1) Act No. 513/2009 Coll. on tracks as amended and
2) Act No. 514/2009 Coll. on service on tracks as amended.

Railways and service on railways are mainly regulated by these two acts[6].

II. Railways in the Slovak Republic and customers' satisfaction

Pursuant to Act No. 513/2009 Coll. there are three types of tracks in the Slovak Republic:

1) railways,
2) trolley tracks,
3) cableways.

Railways are train tracks, tram tracks and special tracks. Special tracks are for example subways[7]. Tram tracks are used for city transport only and as of today are built only in Bratislava and Košice[8]. Train tracks are widely used to connect cities and regions of the Slovak Republic; they are used for international connection also. There are 3 Paneuropean train corridors (corridors IV, V and VI) in the Slovak Republic.

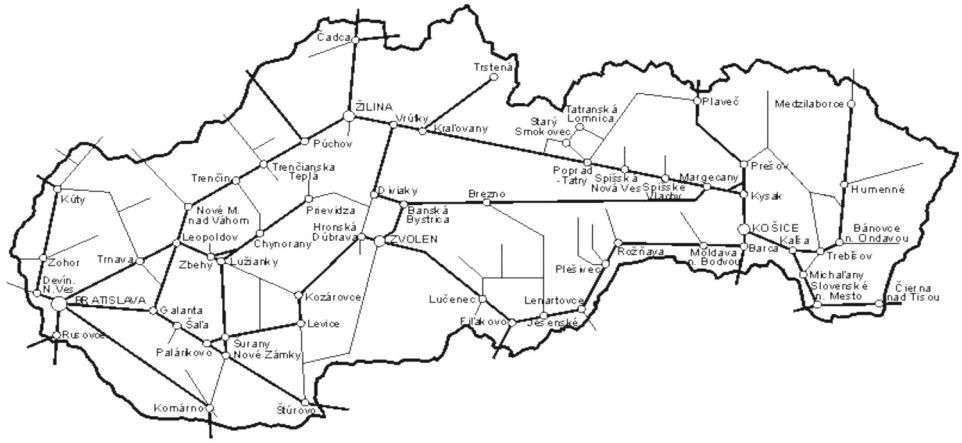
[5] OJ L 143, 27.6.1995, p. 75–78.

[6] Literature mentions much more legislation (Kropaj, 2016).

[7] However there are no subway tracks in Slovak Republic. Subway track was started to be built in the capital city of Bratislava in 1989. Subsequent social changes following 1989 have caused termination of this project.

[8] The last operator is Leo Express.

Map 1: A map of railways in the Slovak Republic



Source: http://www.zsr.sk/slovensky/zeleznicna-dopravna-cesta/marketing/tabulky-tratovych-pomerov/mapa-siete-zsr.html?pageid=921 (8.12.2016).

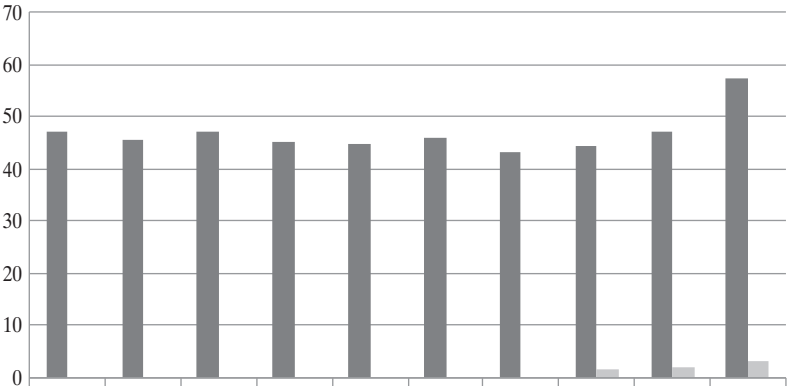
According to the 2016 Annual Report of Železnice Slovenskej republiky, a. s., (Slovak railways operator), there are 3 626 km of train tracks operated by the end of 2016 in the Slovak Republic[9]. Rail freight transport is operated mainly by Železničná spoločnosť Cargo Slovakia, a. s., and rail passenger transport is provided mainly by Železničná spoločnosť Slovensko a. s. (hereinafter, ZSSK). All of these companies are state-owned. Rail personal transport is provided by several private companies also, the most known is RegioJet, a. s.[10] Hereinafter, ZSSK and RegioJet may be together referred to as service operators.

For purposes of this paper the term "railways" means passenger rail transport. Since railways are gaining in importance, it is much needed to point out all the main rights of its customers and describe how they are being enforced. The rise in rail customers is presented in Chart 1 below.

[9] Retrieved from: http://www.zsr.sk/buxus/docs/vyrSpravy/VyrocnaSprava2016.pdf (18.07.2017).

[10] This private company has started offering its services since March 14, 2012. At the beginning it was operating a regional track from Bratislava to Komárno. Since December 2014 it has started offering its services for the main train track between Bratislava and Košice.

Chart 1: Number of rail customers in the Slovak Republic (in millions)



	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
ZSSK	47,0	45,7	47,2	45,3	45,0	46,0	43,4	44,3	47,3	57,3
RegioJet	0,0	0,0	0,0	0,0	0,0	0,0	0,0	1,8	2,0	3,3

Sources: Annual Report of Železničná spoločnosť Slovensko, a.s. for 2015, retrieved from: http://www.slovakrail.sk/fileadmin/Dokumenty2/2016_pdf/VS_2015_EN.PDF (3.12.2016) and Annual Report of RegioJet, a. s., 2015, retrieved from: https://www.regiojet.sk/dokumenty/ (3.12.2016); own adaptation.

There is a significant rise in total numbers of customers for ZSSK in 2015 (by 21%)[11]. This was the consequence of the introduction of a was caused because free of charge transport for selected groups of persons (children, students and seniors) by the government as of November 17, 2014[12]. If we compare data from 2014 and 2015 there is a huge rise of 11.3 million rail customers (ZSSK and RegioJet combined).

There is no doubt that given those numbers, railways have a great impact on the economy and society (Pekár, 2012), with ZSSK being one of the biggest employers in the Slovak republic. Given the ubiquity of rail service, customer satisfaction can be a major factor influencing their performance.

[11] The rise for RegioJet was even 65%. This was caused due to reasons mentioned in the previous reference.

[12] Free of charge transport does not apply to IC trains between Bratislava and Košice. It applies to all regional railways. It applies for international railway too but only through territory of the Slovak Republic. Free of charge transport applies also to private provider RegioJet (to minimalize its financial loss this provider got 7 million € subside from the state budget). There are no official data on how this governmental measure has cost the state budget. As of yet, unofficial data states it is approximately 13–15 million € per year. Source: http://www.topky.sk/cl/100535/1547567/Minister-Brecely-prezradil--kolko-stat-stoja-vlaky-pre-studentov-a-dochodcov--Zadarmo-rozhodne-nie-su (7.12.2016).

The EU conducts several surveys on how customers are satisfied on a given market. One of the surveys is called The Consumer Market Monitoring Survey (hereinafter, Survey). It tracks the functioning of consumer markets across the EU, Iceland and Norway. It provides data for the Consumer Markets Scoreboard. The Survey is conducted since 2010 (up until 2013 on an annual basis). The Survey allows ranking markets on the basis of the Market Performance Indicator (hereinafter, MPI): a composite index taking into account five key aspects of consumer experience: comparability[13], trust[14], expectations[15], choice[16], overall detriment[17]. The five components of the index are weighted on the basis of their relative importance as stated by consumers and the maximum total score is 100. In addition, the Survey also covers complaints[18] and switching[19]. The resulting number from all key aspects of consumer experience indicates how well a given market performs according to consumers. Last Survey was taken in 2015.

The Survey was produced under the EU Consumer Programme (2014–2020) in the frame of a service contract with the Consumers, Health, Agriculture and Food Executive Agency (CHAFEA) acting under the mandate from the European Commission[20]. The Survey was focused on several service markets[21]. One of them is a market of train services. The results, presented in Chart 2, provide a relevant context for this paper.

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[13] It assesses how easy or difficult it is for consumers to compare goods or services as they are offered by different suppliers or providers in a market.

[14] It measures the extent to which consumers are confident that suppliers, or providers, respect the rules and regulations that protect the consumer.

[15] It is a dimension that measures the extent to which the market meets consumers' expectations.

[16] It measures the level of competition and the choice of retailers/providers in a given market.

[17] It assesses the extent to which consumers who experienced a problem suffered financial loss or other detriment as a result.

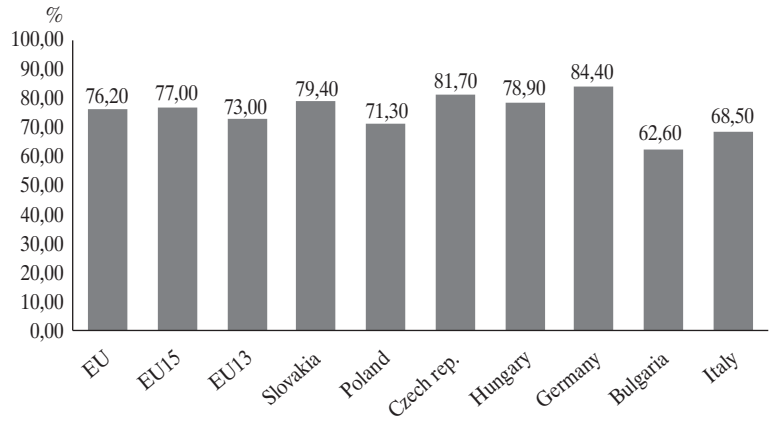
[18] It measures the propensity to complain to the seller/provider and/or third parties if problems are experienced.

[19] It asks whether consumers have changed provider within the market timeframe. Depending on their answer, consumers are then asked about the ease of switching – how easy or difficult they think it was to switch – or about their reason for not switching. Retrieved from: http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/market_monitoring/index_en.htm (4.12.2016)

[20] Retrieved from: http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/market_monitoring/docs/mms2015_final_report_part_i_en.pdf (4.12. 2016).

[21] A total of 29. For example: holiday accommodation, gas services, postal services, legal and accountancy services, internet provision, mortgages, airline services, mobile telephone services, postal services, etc.

Chart 2: Average Survey results for Train Service (MPI)



Source: http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/market_monitoring/docs/mms2015_final_report_part_ii_en.pdf (4.12.2016); own adaptation.

There are almost no differences in the overall scores between EU15 and EU13 and the average score for the whole EU. But train services in EU13 are perceived 3.2 percentage points below the EU average and 4.0 pp. below EU15 average. This indicates significantly lower satisfaction with train services in EU13.

The chart also shows satisfaction scores of selected EU countries. The most satisfied customers of train services[22] are from Germany, while the most dissatisfied are from Bulgaria.

When it comes to the Slovak Republic, customer perception of train services is better than the EU average as well as the average Slovak MPI score for all of the Survey's 29 service markets. Also the perception of train services in Slovakia has improved by 6.1 percentage points compared to the 2013 results. However, it seems that customer satisfaction can still improve when it comes to Slovak rail services.

III. Public administration in railways in the Slovak Republic

Public administration in the Slovak Republic is divided by legal theory into state administration (conducted primarily by various state bodies)), self-

[22] The top three ranked countries for this market are Lithuania (89.6), Luxembourg (85.9) and Austria (85.2), while Bulgaria (62.6), Croatia (63.8) and Romania (68.2) are at the other end of the scale.

government (local and professional) and so-called other public administration (Škrobák, 2012).

Organization of public administration in railways in Slovakia consists of:

1) Ministry of Transport, Construction and Regional Development of the Slovak Republic (hereinafter, Ministry) as a central state administration body (it has territorial competence over the whole area of Slovakia),
2) Transport Authority as other state administration body (it has territorial competence over the whole area of the Slovak Republic; despite this fact Transport Authority is not a central state administration body. It is subordinated to the Ministry).

Several competences are also given to:

1) units of local self-government (they have territorial competence over eight regions of the Slovak Republic); some of their competences are delegated on higher territorial unit by law therefore they conduct delegated state administration[23] which is financially covered by the state and the state also bears responsibility for the exercise of these competences; and some of the competences are self-governmental competences[24] which are financially covered by the territorial units themselves and they also bear responsibility for the exercise of these competences,
2) municipalities as a units of territorial self-government (they have a territorial competence over municipal areas of the Slovak Republic; there are approximately 3000 municipalities in the Slovak Republic).

The Ministry manages and monitors the state transport policy; determines priorities in the state transport policy; acts as the investigating body in cases of accidents on railway tracks; and grants exceptions from the Regulation;

The Transport Authority licenses companies for providing railway transport; acts as ssafety and ecurity body for railway transport; and imposes sanctions for breaking obligations.

IV. Consumers' rights in railway in the Slovak Republic

The basic scope of consumer rights is defined by the Regulation. These rights are perceived as a minimum standard. It means that national legislation

[23] All the competences stipulated by the Act No. 513/2009 Coll. For example higher territorial units are investigating bodies in case of accidents on city tracks; Special Building Authority for city tracks; etc.

[24] All the competences stipulated by the Act No. 514/2009 Coll. For example higher territorial units are: contractors for regional railway service; licencing bodies and security bodies for city transport; conducting state control over city transport; etc.

can expand them and guarantee broader customers' rights. However, statutes of the Slovak Republic do not stipulate any extended scope of customers' rights. Apart from the legislation itself, customers' rights could be expanded also by internal regulations of the operators.

However in the area of public law, only rights guaranteed by the Regulation are binding and therefore enforced by public law. This is because of the direct effect of EU regulations. All EU regulations become immediately enforceable as law in all Member States simultaneously. The rights that are stipulated broader in internal regulations of operators are protected in the area of private law. They subject to civil proceedings as a private law dispute[25].

In general the consumer has a right to get information before and during the journey; to ensure personal safety at stations as well as on board of trains; reimbursement and re-routing; compensation for total or partial loss of registered luggage; other compensations (such as meals and refreshments, hotel or other accommodation) (Magurová, 2016).

Pursuant to the Regulation, there are several exemptions to the rights guaranteed by it. National administrative body could grant exemptions from all of the Regulation's articles (and rights protected by them) except those enumerated in Art. 2(3) of the Regulation; this being:

1) Art. 9 (availability of tickets through tickets and reservations),
2) Art. 11 (liability for passengers and luggage),
3) Art. 12 (insurance),
4) Art. 19 (right to transport),
5) Art. 20(1) (information on the accessibility of rail services and on the access conditions of rolling stock for disabled persons and persons with reduced mobility),
6) Art. 26 (personal security of passangers).

All the above mentioned articles shall apply to all rail passenger services throughout the EU.

In the Slovak Republic, the Ministry is the national administrative body that decides upon exemptions from the Regulation. The Ministry is obliged to inform the Commission of all the exemptions that were granted[26]. As a measure of control, the Commission takes appropriate actions if such an exemption is deemed not to be in accordance with the provision on exemptions in the Regulation.

There are few differences when it comes to the exemptions. The Regulation differs between domestic rail passenger services and urban, suburban and regional rail passenger services. Exemptions on the former can be granted

[25] Conditions are laid by Act No. 160/2015 Coll. Code on Civil Dispute Proceedings.

[26] A full text of this information (in Slovak language) can be retrieved from: http://www.telecom.gov.sk/index/open_file. php?file=doprava/zeleznica/oznamenie_vynimky.pdf (8.12.2016).

based on a transparent and non-discriminatory basis and for a period of maximum five years. However this exemption may be renewed twice for a maximum period of five years on each occasion, i.e. for the total period of 15 years. For the latter there is no basis upon which this exception should be granted and also it can be granted for unlimited time.

Slovak operators were granted several exemptions. Their list for domestic rail passenger services is seen in Table 1. These exemptions were granted for the full period of five years.

Exemptions to urban, suburban and regional rail passenger services are much broader because they were granted towards all articles of the Regulations except those listed in Article 2(3) of the Regulation.

Table 1: Exemptions from the Regulation – Domestic Rail Passenger Services

Article	ZSSK	RegioJet
Article 13	✓	✓
Article 15	×	✓
Article 16	×	✓
Article 17	✓	✓
Article 18	✓	✓
Article 21	✓	✓
Article 22	✓	✓
Article 23	✓	✓
Article 26	×	✓
Article 28	×	✓

Sources: http://www.slovakrail.sk/sk/o-spolocnosti/prava-cestujucich/prava-a-povinnosti-cestujucich.html and https://www.regiojet.sk/opencms/export/sites/regiojet.sk/dokumenty/prepravny-poriadok/PP_od_17.7.pdf (8.12.2016); own adaptation.

The biggest means for achieving a great competitive advantage is through reimbursement and re-routing when the delay in the arrival at the final destination under the transport contract is more than 60 minutes (Magurová, 2016). The Regulation sets out rules for compensation of the ticket price as follows. The minimum compensations for delays is

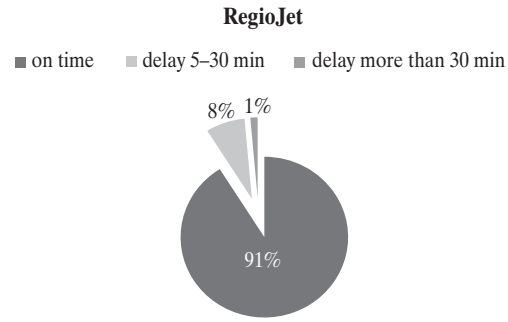
1) 25% of the ticket price for a delay of 60 to 119 minutes,

2) 50% of the ticket price for a delay of 120 minutes or more[27].

[27] The passenger does not have any right to compensation if he/she is informed of a delay before he/she buys a ticket, or if a delay due to continuation on a different service or re-routing remains below 60 minutes.

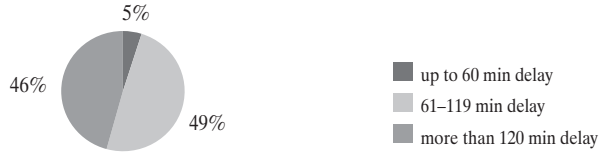
In Chart 3 you can see data on delays of RegioJet[28]. The number means how big a share of all train services were delayed. Unfortunately, ZSSK did not publish any data that would provide us the same chart as seen in the Chart 3. ZSSK published only information on how many international train services were delayed. Therefore the percentage shares in Chart 4 means how many delayed train services were delayed by their respective time.

Chart 3: Delays RegioJet



Source: https://www.regiojet.sk/opencms/export/sites/regiojet.sk/dokumenty/pdf-sk/sprava-o-kvalite-2015.pdf (8.12.2016); own adaptation.

Chart 4: Delays ZSSK

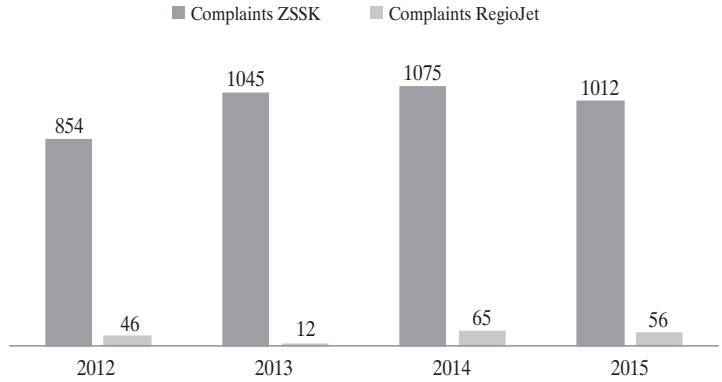


Source: http://www.slovakrail.sk/sk/o-spolocnosti/prava-cestujucich.html; (q. December 9, 2016); own adaptation.

Lastly, in Chart 5 you can see how many complaints on delays were considered legitimate and therefore were compensated by operators since 2012.

[28] There are only data on domestic railways when it comes to RegioJet. When it comes to ZSSK there are no official data on how many train services are provided per day. Source: http://www.webnoviny.sk/ekonomik a/clanok/1080716-pozor-na-zmeny-zeleznice-upravili-bezplatne-cestovanie/ there are 1455 train services per day which means 531 075 train services per year. Nevertheless a data for ZSSK could not be used because ZSSK published only data on how many train services in international railway were delayed.

Chart 5: Legitimate complaints on delays



Source: https://www.regiojet.sk/dokumenty/ and http://www.slovakrail.sk/sk/o-spolocnosti/prava-cestujucich.html (9.12.2016); own adaptation.

It was already mentioned that in domestic railway services, the Ministry has informed the Commission on exemptions from all the articles of the Regulation (naturally except those enumerated in Article 2(3)). RegioJet does not apply the exemption from Article 17. Pursuant to this Article, a minimum delay for granting any compensation is 60 minutes.

However, according to the Internal Passenger Regulation of RegioJet if a railway service is delayed more than five minutes upon the boarding station, the customer has a right to either cancel the trip or board the train. If he/she cancels, he/she is entitled to get the full ticket price back. If he/she chooses to continue on his/hers journey, then he/she is entitled to claim:

1) 10% of the ticket price if the train is 30–59 min. delayed,
2) 50% of the ticket price if the train is 60–119 min. delayed,
3) 100% of the ticket price if the train is delayed over 120 min.

There is no similar provision in the Internal Passenger Regulations of the state-owned company ZSSK.

Pursuant to Article 30 of the Regulation, each Member State shall designate a body or bodies responsible for the enforcement of this Regulation and each body shall take the measures necessary to ensure that the rights of passengers are respected. As a means of ensuring that the customers' rights are protected, Act No. 514/2009 Coll. stipulates a special administrative offence. Pursuant to Article 43(1)(c) of the Act, a licensing body imposes a financial fine up to 1,000€ on an operator that violates customers' rights granted by the Regulation. Such proceedings can begin within six months since the licencing body has known of such violation but maximum up to three years since the actual violation of the right.

When it comes to railways (train service), this licencing body is Transport Authority.

A party to the proceedings can file an appeal against decision of Transport Authority. The appellate body is the Ministry. Administrative proceedings are conducted under Act No. 71/1967 Coll. Code on Administrative Proceedings.

The party to the proceedings can then file an administrative action against final decision of the Ministry. The conditions for filing the action are laid by Act No. 162/2015 Coll. Code on Administrative Justice Proceedings.

V. Conclusions

The rise of total numbers of customers means that there will be more discussions about their rights and how to protect them. A leading role in protecting customers' rights plays the EU regulation. As of today, EU adopted four railways packages[29], with the final goal of creating a single European rail area.

When it comes to customers' rights, the most important legal act that stipulates them, is the Regulation. It adopts the minimum standard of rights that are granted to rail customers. National legislation can grant even broader scope of the rights. However, this is not the case of the Slovak Republic. Slovak legislation is fully following the rights stipulated in the Regulation.

The most known right of the customer is the compensation for the ticket price when the train is delayed for at least 60 minutes. This right can be even used as means of competition for customer. Pursuant to the Regulation, the compensation of at least 25% of the ticket price is granted for a delay of 60 to 119 minutes and at least 50% of the ticket price is granted for a delay of 120 minutes or more. A disadvantage of the Regulation is that a Member State can claim exemptions from its articles. These exemptions could be granted either for a period of maximum 15 years, or even for unlimited time period. If a Member State chooses to claim the exemption, it has to inform EU about this step. EU could prevent such exemption if it is deemed not to be in accordance with the provision on exemptions in the Regulation.

[29] The last (so far) fourth railway package was adopted in December 2016. The fourth railway package aims to remove the remaining barriers to the creation of a single European rail area. The proposed legislation would reform the EU's rail sector by encouraging competition and innovation in domestic passenger markets. It would also implement structural and technical reforms (http://www.consilium.europa.eu/en/policies/4th-railway-package/ (22.12.2016). See more on; http://www.europarl.europa.eu/news/en/news-room/20160427BKG24994/the-4th-railway-package; http://ec.europa.eu/transport/modes/rail/packages/2013_en.

Administrative body that is responsible for claiming the exemptions in the name of the Slovak Republic is the Ministry. The Slovak Republic claimed exemptions from all the articles of the Regulation when it comes to urban, suburban and regional rail passenger services. Several exemptions are granted from domestic rail passenger services too. They are shown in Table 1. However, the Regulation also stipulates that rights enumerated in Art. 2(3)[30] do not subject to any exemptions and therefore no Member State can claim exemptions from rights enumerated therein.

When it comes to reaching EU transport goals, it is needed to know customers' opinions and level of satisfaction. Customers' satisfaction with railway is being under the scrutiny of EU. EU regularly conducts surveys on the matter. The result for train services in the Slovak Republic is average, which means that there is still much to do if we want to achieve (for example) a level of satisfaction as is in Germany. In order to do so, operators should always try to take great care of their customers by (e.g.) providing high quality services; avoiding increase of delays; informing customers about every aspect of their journey including information on any harm (for example resulting from delay); etc. One way of achieving high level of satisfaction of customers is to grant them more rights than only those that operators are obliged to provide.

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[30] They are as follows: availability of tickets, through tickets and reservations; liability for passengers and luggage; insurance; right to transport; information to disabled persons and persons with reduced mobility; personal security of passengers.

Insights from the Slovak Hybrid Mail Services Case. Case Comment to the Judgement of the General Court of 25 March 2015 and Order of Court of Justice of the EU of 30 June 2016 *Slovenská pošta v Commission* (Cases T-556/08, C-293/15P)

by

Karolis Kačerauskas*

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Key words: dominant position; postal sector; statutory monopoly.

JEL: K21

I. Introduction

The Slovak hybrid mail services case (or *Slovenska posta* case) is truly unique in EU jurisprudence. Within the last decade, the European Commission rarely applied Article 106(1) in conjunction with Article 102 TFEU to challenge

* Mykolas Romeris University, Vilnius, Lithuania, e-mail: karolis.kacerauskas@ellex.lt.
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competition distortions in individual cases. Thus *Slovenska posta* constitutes one of the rare examples of such enforcement. *Slovenska posta* also constitutes a very rare example of a judicial review of Commission decisions based on Article 106(1) and 102 TFEU. *Slovenska posta* is only the second case when European courts were called upon to review the application of Article 106(1) and 102 TFEU by the Commission and the first when the judicial review was conducted over a Commission decision regarding "failure to meet the demand".

Indeed, since 1989–1990 (when the Commission commenced to apply Article 106(1) and 102 TFEU to challenge competition distortions introduced by the Member States) and until 2014, when the Court of Justice adopted its decision in *Greek lignite (DEI)* case[1], none of the Commission decisions was reviewed by EU courts. Such lack of appeals resulted in a rather strange situation under which the Commission and CJEU developed their own jurisprudence on the application of Article 106(1) and 102 TFEU and occasionally interpreted the same legal criteria differently. In this regard, a court review in *Slovenska posta* was eagerly awaited in the hope it would reconcile these diverging positions and provide more clarity on the application of Article 106(1) and 102 TFEU.

II. Facts of the case

The *Slovenska posta* case originated in 2008, when the Commission adopted an infringement decision[2] challenging the decision of the Slovak government to extend statutory monopoly of the postal company into hybrid mailing services. This decision was challenged on the basis of two grounds: 1) failure to meet the demand by *Slovenska posta*; and 2) illegal extension of a dominant position by State measures.

Hybrid mailing services are usually required by clients requiring to deliver large quantities of letters (usually invoices). Normally, clients supply service providers with electronic files, which are printed, enveloped and delivered to addresses specified by the client. Having conducted the investigation, the Commission concluded that following the extension of the monopoly, *Slovenska posta* provided clients with hybrid mail services (i.e. demand for services as such was satisfied). Nevertheless, *Slovenska posta* did not offer

[1] CJ judgment of 17.07.2014, Case C-553/12 P *Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)*, ECLI:EU:C:2014:2083.

[2] Decision of the European Commission of 7.10.2008, COMP/39.562, Slovakian Law on Hybrid Mail Services, Re [2009] 4 C.M.L.R. 13.

two specific features of hybrid mail services which were previously offered by private companies. *Slovenska posta* failed to 1) provide electronic reports on delivery of postal items; and 2) deliver mail items 7 days a week. Failure to provide such services by *Slovenska posta* was sufficient for the Commission to adopt an infringement decision in 2008[3].

III. Case comment

The General Court (hereinafter, GC)[4] and the Court of Justice (hereinafter, CJ)[5] decisions in *Slovenska posta* should be primarily praised for their explanations on the legal test which should apply in "failure to meet the demand" cases. It also shone light on legal tests applicable in cases when state measures allow to establish, maintain or expand a dominant position of undertakings having special relations with the State.

1. Failure to meet the demand: the problem of a causal link

The general idea that failure to meet the demand available on the market could amount to an infringement of Article 106(1) and 102 TFEU can be traced back to the Commission decision in *Dutch Courier Services*[6] and *Spanish post*[7] adopted in 1989–1990. In those cases, the Commission suggested that an infringement takes place when the establishment of a monopoly deprives customers of services previously offered on the market. Nevertheless, the conceptual explanation for such type of infringement was formulated by CJ in *Höfner* case in 1991[8]. According to the CJ, an infringement of Article 106(1) and 102 TFEU could take part when an undertaking entrusted with exclusive rights "is manifestly not in a position to satisfy the demand prevailing

[3] Ibidem.

[4] GC judgement of 25.03.2015, Case T-556/08 *Slovenska posta v Commission*, ECLI:EU:T:2015:189.

[5] CJ order of 30.06.2016, Case C-293/15 P *Slovenska Posta AS v Commission*, ECLI:EU:C:2016:511.

[6] Decision of European Commission of 20.12.1989, 90/16/EEC concerning the provision in the Netherlands of express delivery services, OJ 1990 L 10, 12.01.1990, p. 47–52.

[7] Decision of European Commission of 1.08.1990, 90/456/EEC, concerning the provision in Spain of international express courier services, OJ 1990 L 233, 28.08.1990, p. 19–23.

[8] CJ judgement of 23.04.1991, Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron* GmbH, ECLI:EU:C:1991:161, para. 30.

on the market for activities of that kind"[9]. In such cases, the liability of the State under Article 106(1) could be invoked, taking into account that the State "creates a situation in which a public employment agency cannot avoid infringing Article [102]"[10]. Such legal test formulated in *Höfner* suggests that an infringement of Article 106(1) and 102 TFEU could be invoked only in cases in which there is a causal link between State actions and failure to meet the demand by the holder of monopoly rights.

In failure to meet the demand cases there are always two actors who could potentially be liable for the failure. Such failure could be attributed to the State, which created a legal monopoly, and/or an inefficient holder of monopoly rights who lacks proper incentives and efficiency to respond to the demand prevailing on the market.

Interestingly, for more than two decades following *Höfner* (i.e. until the *Slovenska posta* case) case law still lacked proper explanation on the causal link between State actions and failure to meet the demand which should be proven in such type of cases.

The legal test formulated by the CJ in *Höfner* argues that the State measure should place an undertaking in such a situation, where it "cannot avoid infringing Article [102]"[11]. Such test generally suggests that the liability of the State in failure to meet the demand cases could arise only in case the demand cannot be satisfied irrespective of efforts made by the holder of monopoly rights. In other words, an infringement of Article 106(1) and 102 TFEU could be invoked only in such cases, when the liability for failure to meet the demand could be attributed *solely* to the State which created such legal monopoly that even the most efficient operator would fail to meet the demand prevailing on the market. Such a strict legal test was followed by the CJEU in subsequent *Job Centre II*[12] and *Carra*[13] cases. Although in *Albany*[14], *Pavlov*[15], *Ambulanz Glocker*[16] and *AG2R*[17] cases the Court showed some signs that the CJ could

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[9] C-41/90 *Klaus Höfner*, para. 31.

[10] C-41/90 *Klaus Höfner*, para. 26.

[11] C-41/90 *Klaus Höfner*, para. 26.

[12] CJ judgement of 11.12.1997, Case C-55/96 *Job Centre Coop. arl*, ECLI:EU:C:1997:603.

[13] CJ judgement of 8.06.2000, Case C-258/98 *R. v Criminal Proceedings against Carra and Others*, ECLI:EU:C:2000:301.

[14] CJ judgement of 21.09.1999, C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, ECLI:EU:C:1999:430.

[15] CJ judgement of 12.09.2000, Joined Cases C-180-184/98 *Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, ECLI:EU:C:2000:428.

[16] CJ judgement of 25.10.2001, C-475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz*, ECLI:EU:C:2001:577.

[17] CJ judgement of 3.03.2011, C-437/09 *AG2R Prévoyance v Beaudout Père et Fils Sarl*, ECLI:EU:C:2011:112.

be ready to accept the existence of an infringement even when the State and the holder of monopoly rights would be jointly liable for the failure to meet the demand.

At the same time the Commission's practice clearly accepted a joint liability test, suggesting that "failure to meet the demand" should be analysed from the perspective of consequences. When demand prevailing on the market subjected to a statutory monopoly remains unsatisfied, the infringement could be declared irrespective of whether such a situation was caused by the State or by inefficient holder of monopoly rights. Such joint liability theory was applied by the Commission in *Dutch Courier Services*[18], *Spanish post*[19], suggested to the CJ in *Höfner* case[20], and subsequently applied in *Italian GSM*[21], *Spanish GSM*[22] and *Slovenska posta*[23] cases. Interestingly, the Commission insisted on applying such *joint liability* theory irrespective from the fact that in the *Höfner* case, the CJ quite explicitly departed from the joint liability theory, suggested there by the Commission.

The *Slovenska posta* case managed to reconcile different positions of the CJ and the Commission, leaving little room for any further debates.

As noted above, the *Slovenska posta* case concerned an extension of monopoly into hybrid mail services, which had previously been provided by private companies. Following monopolisation, hybrid mail services as such have been provided. Nevertheless the customers were no longer offered very specific features of such services, namely the delivery of postal items 7 days a week and the submission of electronic reports on delivery of postal items, both of which were previously offered by private operators.

Considering that such additional services had been provided by private market operators, it was rather clear that *Slovenska posta* could in principle offer such services by making additional investment. Such circumstance manifestly suggested that the failure to meet the demand considered in *Slovenka posta* depended mostly on the inefficiency of the postal company,

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[18] Decision of European Commission of 20.12.1989, 90/16/EEC concerning the provision in the Netherlands of express delivery services, OJ L 10, 12.1.1990, p. 47–52.

[19] Decision of European Commission of 1.08.1990, 90/456/EEC concerning the provision in Spain of international express courier services, OJ L 233, 28.8.1990, p. 19–23.

[20] C-41-90 *Klaus Höfner*.

[21] Decision of European Commission of 4.10.1995, 95/489/EC concerning the conditions imposed on the second operator of GSM radiotelephony services in Italy, OJ L 280, 23.11.1995, p. 49–57.

[22] Decision of the European Comission of 18.12.1996, 97/181/EC concerning the conditions imposed on the second operator of GSM radiotelephony services in Spain, OJ L 76, 18.3.1997, p. 19–29.

[23] Decision of the European Comission of 7.10. 2008, COMP/39.562, Slovakian Law on Hybrid Mail Services, Re [2009] 4 C.M.L.R. 13.

rather than the State, which extended the legal monopoly. Nevertheless, such fact did not stop the Commission from assuming a joint liability of the State and the holder of monopoly rights[24].

In reviewing the *Slovenska posta* case, the General Court followed the joint liability theory applied by the Commission. Although the decision adopted by the court commenced its analysis by mentioning the *Höfner* case, which apparently suggests that a determination of direct causal link between the State measures and failure to meet the demand should be established, the subsequent explanations clearly suggest that the *Höfner* case was mentioned merely as an example illustrating that failure to meet the demand may lead to an infringement of Article 106(1) and 102 TFEU[25].

This becomes clear in subsequent sections, where the court concluded that Article 106(1) applied in conjunction with Article 102 may be infringed once the holder of monopoly rights "is led" to an infringement of Article 102, which corresponds to the modern legal test accepted by the CJEU in *Greek lignite*[26]. Such legal test presupposes the existence of joint liability, which contrasts with the "cannot avoid infringement" test employed in *Höfner*, presupposing the sole liability of the State.

And finally, the determination of the GC to accept the joint liability test could be derived from the fact that the court upheld the presence of an infringement irrespective of clear indications that the establishment of monopoly was not the sole and primary cause of failure to meet the demand. It was rather obvious that such minor additional services as a 7-days a week delivery and track-and-trace options could be provided by an efficient holder of monopoly rights, which was confirmed by the provision of such services by private companies earlier.

The decision of the GC was appealed by the Slovak government to the CJ. The claimant referred to the *Höfner* case, suggesting that an infringement of Article 106(1) and 102 TFEU could take part only when the State is solely liable for failure to meet the demand, i.e. irrespective of the efforts by the holder of monopoly rights, the demand could not be satisfied[27]. Nevertheless, the CJ specifically rejected such a position, explaining that "the case-law covers all cases of manifest inability to satisfy the demand for certain activities, and not only those where the inability is "structural"[28].

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[24] Decision of the European Comission of 7.10. 2008, COMP/39.562, Slovakian Law on Hybrid Mail Services, paras 149-155.

[25] T-556/08 *Slovenska posta v Commission*, para. 315.

[26] C-553/12 P *Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)*.

[27] C-293/15 P *Slovenska Posta AS*, para. 24.

[28] C-293/15 P *Slovenska Posta AS v Commission*, paras. 36-37.

Such straightforward explanations provided by the CJ in *Slovenska posta* managed to reconcile divergent views of the Commission and the CJ, which lasted for more than two decades. *Slovenska posta* made it clear that failure to meet the demand should be analysed from the perspective of consequences – in case when some demand on the market remains unsatisfied and the State simultaneously prevents customers from seeking alternative supplies, this is sufficient for the establishment of State liability under Article 106(1) and 102 TFEU.

2. Failure to meet the demand: the notion of demand

As noted above, the *Höfner* test enables invoking State liability in case the holder of monopoly rights "is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind"[29]. The application of such a legal test requires understanding of at least two elements. Firstly, it is necessary to understand what *gravity* of failure is required to conclude the presence of a "manifest" failure to meet the demand. Secondly, it is necessary to understand the context in which the failure to meet the "demand prevailing on the market" should be analysed. In particular, it needs understanding whether satisfaction of demand should be assessed from the perspective of the relevant market, the perspective of the type of services, the perspective of each individual customer, etc.

The question of the appropriate perspective is very important as a change of perspective may deliver totally different results of the assessment. For example let us assume that the company providing public transportation services fails to run services suitable for the disabled. In case we would consider "failure to meet the demand" from the perspective of society in general, such failure most possibly would not lead to a manifest failure to meet the demand prevailing on the market because disabled people statistically constitute only a small portion of the customers. Nevertheless, in case we would analyse the same failure from the perspective of disabled customers, we would definitely conclude that a public transportation company failed to meet the demand as the service needed was not offered.

Until *Slovenska posta*, there was an obvious lack of clarity how the above two elements should be interpreted.

The position of the CJEU with regards to the interpretation of the above elements had mostly been formulated in the early case practice – *Höfner* and *Job Centre II* cases resolved in 1991 and 1997. Both of these cases concerned

[29] C-41-90 *Klaus Höfner*, para. 31.

rather extreme examples of failure to meet the demand, where the failure was obvious. Such case law induced some commentators to consider that an infringement of Article 106(1) and 102 could take part only in marginal failure to meet the demand cases[30]. Yet some room for a debate remained over the question if in *Höfner* and *Job Centre II* the CJ used the notion of "manifest" failure referring to the specific circumstances of the case or established the necessity to prove a certain gravity of failure. Only in subsequent *Pavlov, Ambulanz Glockner* and *AG2R*, the CJ provided some hints suggesting that the gravity of failure (i.e. "manifest") should amount to a separate legal criterion. Nevertheless, the definition of gravity required to establish the infringement remained unclear.

The CJ practice also did not provide sufficient clarity with regard to the perspective which should be taken to decide whether the holder of monopoly rights failed to meet the demand prevailing on the market. Early CJ practice formulated in *Höfner*, *Job Centre II* and *Pavlov* seemed to suggest that the assessment should be performed from the perspective of "each service" failing within the scope of a monopoly (which is narrower than the relevant market but wider than the needs of each individual customer). Only in the *AG2R* case, the CJ provided some hints that the assessment should be made from the perspective of interests of "each individual customer".

While the CJ struggled with the formulation of an appropriate legal test, the Commission consistently applied a low standard for State liability under Article 106(1) and 102 TFEU. As suggested by the Commission decisions in *Dutch Courier Services*[31], *Spanish post*[32], *Italian GSM*[33] and *Spanish GSM*[34], failure to meet the demand could be associated with a simple failure to provide the service, rather than extreme failure. Moreover, the Commission always conducted its analysis from the perspective of interests of each particular customer, rather than the relevant market or the scope of monopoly.

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[30] E.g. "by referring in *Höfner* to an undertaking manifestly not in a position to satisfy demand the Court made it clear that it exercises only marginal review of the legality of monopolies". Opinion of AG Jacobs in CJ judgement of 21.09. 1999, Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, ECLI:EU:C:1999:430, paras 408, 409.

[31] Decision of European Commission 90/16/EEC concerning the provision in the Netherlands of express delivery services.

[32] Decision of European Commission 90/456/EEC concerning the provision in Spain of international express courier services.

[33] Decision of European Commission 95/489/EC concerning the conditions imposed on the second operator of GSM radiotelephony services in Italy.

[34] Decision of the European Comission 97/181/EC concerning the conditions imposed on the second operator of GSM radiotelephony services in Spain.

As noted above, *Slovenska posta* case concerned failure of the statutory post monopoly to provide two specific features of hybrid mail services: (i) track-and-trace service enabling to receive electronic reports on delivery of postal items; (ii) delivery of mail items 7 days a week. Demand for such specific features of the hybrid mail service was very different. Major clients attached high importance to electronic reports on delivery of letters, as such reports are necessary for the proper invoicing process. At the same time delivery of letters 7 days week was considered as a less important additional feature[35], which even made the GC ponder if such services were needed by some customers at all. Nevertheless, both the Commission and the GC accepted that failure to provide each of those services with very different demand constituted infringement of Article 106(1) and 102 TFEU. In its turn, the CJEU upheld this decision by rejecting the appeal of the Slovak government suggesting that presence of demand was not proven with sufficient evidence[36].

In this regard, the *Slovenska posta* decision suggests several conclusions. Firstly, even though the legal test formulated in *Höfner* case remains valid and suggests the presence of an infringement only in cases of "manifest" failure to meet the demand, the legal standard applicable for finding the infringement is much lower. An infringement could be established when a service needed by some customers is not provided. Secondly, for the presence of failure it is sufficient to establish that the holder of monopoly rights failed to introduce specific features of the service, i.e. even when services subject to the legal monopoly *in general* are provided perfectly. Thirdly, *Slovenska posta* made it clear that the assessment of failure to meet the demand prevailing on the market should be viewed from the perspective of each individual customer (e.g. in *Slovenska posta* nthe ecessity of 7-day delivery was based on the alleged needs of a single customer). Following *Slovenska posta*, it could be clearly concluded that the State liability under Article 106(1) and 102 TFEU could be established when there is at least a single customer having very specific needs for monopolized services and such needs are not satisfied by the holder of a statutory monopoly.

3. Legal test applicable in cases concerning extension of dominant position by State measures

It is generally accepted in the CJEU jurisprudence since *Sacchi*[37] that Article 106(1) and 102 TFEU as such does not prevent Members States from

[35] T-556/08 *Slovenska posta*, paras 322-355.

[36] C-293/15 P *Slovenska Posta AS*, paras 25, 39.

[37] ECJ judgement of 30.04.1974, Case 155/73 *Italy v Sacchi*, ECLI:EU:C:1974:40.

establishment of a dominant position by granting exclusive rights. Nevertheless, the subsequent CJEU practice also suggests that having established a logical link between granting exclusive rights and a reduction of effectiveness of Article 102 TFEU, such a grant of exclusive rights could be perceived as an infringement of Article 106(1) and 102 TFEU.

When it concerns the extension of a dominant position by State measures, the predominant legal test has been formulated by the CJ in *GB-INNO-BM* case[38]. *GB-INNO-BM* test is based on the following logical structure. Firstly, it is necessary to determine anti-competitive consequences caused by the introduction of State measures. Secondly, it is necessary to consider whether analogous anticompetitive consequences could have been achieved by the undertaking by abusing its dominant position. Thirdly, the State shall be held liable under Article 106(1) and 102 TFEU when State measures place undertakings in a position which they could not attain by their own conduct without infringing Article 102. In other words, the State is liable for reduction of effectiveness of Article 102 TFEU in case the State measures entitle an undertaking to enjoy desired anti-competitive effects without having to engage in actions which could be caught under Article 102 TFEU[39]. Such legal test formulated in *GB-INNO-BM* was explicitly applied by the Commission in the *Slovenska posta* case[40].

In this regard, it should be noted that after the adoption of the Commission decision in 2008, in 2014, the CJ issued its landmark decision in the *Greek lignite* case[41], which constituted the first judicial review of Commission decisions based on Article 106(1) and 102 TFEU. In *Greek lignite*, the CJ accepted the presence of State liability for the extension of a dominant position by State measures. Nevertheless, the presence of an infringement was declared on the basis of an equal opportunities test, which was quite different from the test established in *GB-INNO-BM*. In this regard, the GC decision in *Slovenska posta* was largely awaited to understand whether the contemporary case law shall rely on the equal opportunities test or the *GB-INNO-BM* legal test, which was employed by the Commission in *Slovenska posta* case.

The GC in *Slovenska posta* case quite naturally decided to follow the reasoning provided by the CJ in the *Greek lignite* case in 2014, rather than to uphold the *GB-INNN-BM* test employed by the Commission. In this regard, the GC repeated various considerations from *Greek lignite*[42] and concluded that:

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[38] CJ judgement of 13.12.1991, Case C-18/88 *Régie des télégraphes et des téléphones v GB-Inno-BM SA.*, ECLI:EU:C:1991:474.

[39] C-18/88 *Régie des télégraphes et des téléphones v GB-Inno-BM SA.*, paras. 18-21.

[40] Decision of the European Comission, COMP/39.562, para. 116.

[41] C-553/12 P *Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)*.

[42] T-556/08 *Slovenska posta*, paras 97-103.

> "102. (…) infringement of Article 86(1) EC in conjunction with Article 82 EC may be established irrespective of whether any abuse actually exists. All that is necessary is for the Commission to identify a potential or actual anti-competitive consequence liable to result from the State measure at issue. Such an infringement may thus be established where the State measure at issue affects the structure of the market by creating unequal conditions of competition between companies, by allowing the public undertaking or the undertaking which was granted special or exclusive rights to maintain (for example by hindering new entrants to the market), strengthen or extend its dominant position over another market, thereby restricting competition; it is not necessary to prove the existence of an actual abuse.
>
> 103. Accordingly, it is sufficient to show that that potential or actual anti-competitive consequence is liable to result from the State measure at issue, and it is not necessary to identify an abuse other than that which results from the situation brought about by the State measure at issue."

The analysis of the GC decision suggests that the equal opportunities test, which was articulated by the CJEU in *Greek lignite* and followed by the GC in *Slovenska posta*, significantly expanded State liability under Article 106(1) and 102 TFEU. Indeed, the equal opportunities test elaborated in *Slovenska posta* seems to suggest that an infringement of Article 106(1) and 102 TFEU could be implied in any situation, where the State decides to intervene in the market and provide competitive advantage for State-owned companies or companies holding special or exclusive rights. Such legal standard does not require proving any *hypothetical* abuse of dominant position, which is required by the logical structure of the *GB-INN-BM* test.

Nevertheless, such wide interpretation of the GC ruling implies some conceptual difficulties. An infringement of Article 106(1) and 102 TFEU requires a rational explanation as to how the measures introduced by the State resulted in a reduction of effectiveness of the prohibition of dominant position established in Article 102 TFEU. That means that there should be some causal link between competition distortions and abuse of a dominant position.

In this regard the lacking legal link could be discovered by referring back to the analysis of *Greek lignite* decision, which clearly inspired GC in *Slovenska posta*. It should be noted that the CJ reasoning in *Greek lignite* dlargely relied on the *Connect Austria* case[43], which also implied an Article 106(1) and 102 TFEU infringement on the basis of the equal opportunities theory.

As suggested by the CJ in *Connect Austria*, having received competitive advantage, an undertaking having special relations with the State will inevitably perform some unidentified *abusive actions* because it will be thus enabled to establish, maintain or expand its dominant position. *Greek lignite* optimized the

[43] CJ judgement of 22.05.2003, Case C-462/99 *Connect Austria Gesellschaft fur Telekommunikation GmbH v Telekom-Control-Kommission*, ECLI:EU:C:2003:297.

legal test deployed in *Connect Austria* and does not require any discussion on *the unidentified abusive actions*, assuming that in most cases such actions will be present. Nevertheless, the absence of necessity to discuss *abusive actions* does not mean that the CJ in *Greek lignite* or the GC in *Slovenska posta* wanted to imply that an infringement of Article 106(1) and 102 TFEU could be invoked without any logical link between the State measures and abusive actions.

To maintain conceptual grounds of an Article 106(1) and 102 TFEU infringement, it should be admitted that such a logical link exists in the reasoning provided by the CJEU in *Greek lignite* and followed by the GC in *Slovenska posta*. Although the abusive actions should not be necessarily discussed, the equal opportunities test applied in *Slovenska posta* did not eliminate the necessity to show the causal link between competition distortions and the reduction of effectiveness of Article 102 TFEU. Hence, at least theoretically, a distortion of equal opportunities could be justified having proved that benefits received from the State were so isolated that such benefits did not allow to establish, maintain or expand a dominant position, thus the effectiveness of Article 102 TFEU was not reduced.

Notably, the decision of the GC in *Slovenska posta* was appealed to the CJ. The CJ rejected this appeal without providing any explanation on the application of equal opportunities or GB-INNO-BM tests. The CJ accepted that the expansion of *Slovenska posta* monopoly infringed Article 106(1) and 102 TFEU due to the failure to meet the demand. Respectively, the CJ did not find the necessity to analyse pleas concerning the extension of the dominant position submitted by the Slovak government[44].

IV. Conclusions

The GC and CJ decisions in *Slovenska posta* are truly significant for the interpretation of the prohibition established in Article 106(1) and 102 TFEU. *Slovenska posta* was the first instance when a Commission decision in a "failure to meet the demand" case underwent a full judicial review. This review allowed to reconcile different interpretations of legal requirements, which need to be proven in failure to meet the demand cases, suggested by the practice of the CJEU and the Commission. *Slovenska posta* made it clear that (i) failure to meet the demand should be analysed from the perspective of consequences, i.e. in case the demand remains unsatisfied, an infringement of Article 106(1) and 102 TFEU could be invoked without any further analysis of the person

[44] C-293/15 P *Slovenska Posta AS v Commission*, paras 46-47.

liable for such a situation – the State or an ineffective holder of monopoly rights; (ii) "manifest" failure to meet the demand does not require proving certain graveness of failure; "manifest" failure to meet the demand could be also declared in case of "simple" or "obvious" failure; (iii) failure to meet the demand prevailing on the market should be analysed from the perspective of each customer, hence an infringement could be implied in case there is at least one customer who is not offered goods and/or services needed and is simultaneously prohibited by the State measures from seeking alternative supplies.

The decisions in *Slovenska posta* also made it clear that modern jurisprudence prefers the equal opportunities doctrine, rather than the *GB-INNO-BM* hypothetical abuse test, to imply an infringement of Article 106(1) and 102 TFEU in cases concerning the establishment, maintenance or expansion of a dominant position. It should be admitted here that the GC in *Slovenska posta* followed the reasoning provided in the CJ decision in *Greek lignite* and hence does not add any significant details to the interpretation of the equal opportunities doctrine formulated by the CJ.

Substantive and Procedural Issues of Cement Sector Investigations in Turkey

by

Hanna Stakheyeva and Ertugrul Canbolat*

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* Hanna Stakheyeva, Assistant Professor, Bogazici University, Istanbul, Turkey, hanna.stakheyeva@actecon.com; Ertugrul Canbolat, LL.M., Competition law expert, Istanbul, Turkey, ertugrul.canbolat@actecon.com. Article received: 4.04.2017, accepted: 30.04.2017.

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Abstract

In 2016, the Turkish Competition Authority (hereinafter, TCA) published the Cement Sector Inquiry Report (hereinafter, Cement Sector Report) following more than two years of market analysis. One of the reasons for conducting such a market inquiry was the fact that the implementation of competition rules and accuracy of the economic analysis by the TCA in cement cases were frequently criticized. In order to provide some guidance and have better understanding about the competitive dynamics of the cement market, the TCA initiated the inquiry in 2014. Another reason for the inquiry was the importance of the cement industry for the construction sector and the economy of Turkey, as well as numerous competition law concerns in this sector.

The article provides an analysis of the substantive and procedural issues in the TCA activity in the cement sector in Turkey. Particular emphasis is placed on the assessment of the Cement Sector Report and common competition law violations in the sector in Turkey based on a review of the decisions of the TCA. Additionally, legal grounds for conducting sector inquiries in Turkey, as well as limits to and potential impact on the TCA's powers to issue extensive compulsory information requests (in the light of the recent CJEU's judgements in cement cartel cases) are discussed. Overall, the article provides the reader with a better understanding of the Turkish cement sector dynamics and most common anticompetitive practices there. In conclusion, it is argued that inspite of having a reputation of a "problematic sector", the behaviour of cement producers and developments in the cement market in Turkey may be justified by economic reasons and the oligopolistic nature of this market.

Resumé

En 2016, l'Autorité turque de la concurrence (ci-après, ATC) a publié le rapport d'enquête sur le secteur du ciment (ci-après, Rapport sur le Secteur du Ciment) après plus de deux ans d'analyse du marché. Une des raisons pour mener une telle enquête de marché était le fait que la mise en œuvre des règles de concurrence et l'exactitude de l'analyse économique par l'ATC dans les affaires concernant le marché du ciment étaient fréquemment critiquées. Afin de fournir des conseils et une meilleure compréhension de la dynamique concurrentielle du marché du ciment, l'ATC a lancé l'enquête en 2014. Une autre raison de l'enquête était l'importance de l'industrie du ciment pour le secteur de la construction et l'économie turque, ainsi que de nombreuses préoccupations en matière de droit de la concurrence dans ce secteur.

L'article fournit une analyse des questions de fond et de procédure dans l'activité ATC dans le secteur du ciment en Turquie. L'accent particulier est mis sur l'évaluation du Rapport sur le Secteur du Ciment et des violations du droit de la concurrence communes dans le secteur en Turquie sur la base d'un examen des décisions de l'ATC. En outre, les motifs juridiques pour mener des enquêtes sectorielles en Turquie, ainsi que des limites et des effets potentiels sur les pouvoirs de la ATC d'envoyer des demandes d'informations vastes et obligatoires (à la lumière des arrêts récents de la CJUE dans les affaires de cartel de ciment) sont abordés. Dans l'ensemble, l'article permet au lecteur de mieux comprendre la dynamique du secteur du ciment en Turquie et les pratiques anticoncurrentielles les plus communes dans ce pays. En conclusion, il est soutenu que, malgré sa réputation d'un «secteur problématique», le comportement des producteurs de ciment et les développements sur le marché du ciment en Turquie peuvent être justifiés par des raisons économiques et le caractère oligopolistique de ce marché.

Key words: antiturst decisions; anticompetitive practice; cement; information requests; obligation to provide information; sector inquiry; Turkey; Turkish Competition Authority

JEL: K21

I. Substantive and procedural issues of sector inquiries in Turkey

1. Introduction

"[…] every system of competition law will deal with cartels and the first thing for any new competition regulator is to go out and find the cement cartel. […] it is always there, somewhere […]". This statement of R. Whish (2001) illustrates the reality of the competition authorities' approach to the cement market in various jurisdictions, including Turkey. It has become a prejudgement mostly because in sectors "where standardized products are produced and/or sold […], the parameters to agree are generally issues about price and sale; therefore, cartels are more frequent"[1]. However, at the same time we should not forget that the cement sector is characterised by the oligopolistic structure, hence even if the undertakings compete with each other, it is not realistic to observe price trends that are expected from the

[1] OECD Roundtable On Promotıng Compliance Wıth Competıtıon Law – Note by the Delegation of Turkey, Directorate For Financial And Enterprise Affairs Competition Committee, DAF/COMP/WD(2011)36, 2011, p. 16. Retrieved from: http://www.rekabet.gov.tr/File/?path=ROOT%2f1%2fImages%2fHaber%2f71_Compliance_Turkey.pdf (20.01.2017).

fully competitive market structure. This situation is accepted in the economic theory.

Nevertheless, the cement sector has always attracted attention of the competition authorities worldwide. Back in 1994, the European Commission fined 42 companies for partitioning the cement market among themselves and various information exchanges (the fine was reduced by the Court of Justice from EUR 248 million to EUR 108 million). In 2003, Bundeskartellamt (German Competition Authority) fined 6 cement companies EUR 660 million for colluding and setting production quotas. In 2008–2009, the European Commisison conducted inspections of several leading cement companies on suspicion of forming a cartel[2] (although following the investigation it decided to close the case due to lack of evidence). In 2009, the Office of Competition and Consumer Protection of Poland imposed a fine of EUR 99 million on 7 cement producers[3].

In Turkey, the cement sector has been under the supervision of the TCA since its establishment in 1997[4]. In fact, the first investigation of the TCA was on the cement market (Çelen and Gunalp, 2010, pp. 150–168). The cement sector is considered one of the most profitable and at the same time troublesome sectors in Turkey[5]. This explains the increased attention and competition enforcement efforts of the TCA in the form of investigations, fines, as well as sector inquiries. The latest cement sector inquiry was finalized in December 2016. Main substantive and procedural issues arising from the Report are analysed in the below sections.

2. Main findings under the Cement Sector Report

2.1. Introductory remarks

The TCA decided to initiate a sector inquiry and to conduct both descriptive and statistical analyses of the cement market in 2014, considering

[2] Commission welcomes General Court judgments in cement cartel case confirming its investigatory powers- Press Realese, Brussels, 14.03.2014. Retrived from: http://europa.eu/rapid/press-release_MEMO-14-192_en.htm (20.01.2017).

[3] Commission opens antitrust proceedings against a number of cement manufacturers – Press Release, IP/10/1696, Brusssels, 10.12.2010. Retrieved from: http://europa.eu/rapid/press-release_IP-10-1696_en.htm?locale=en (20.01.2017).

[4] The Turkish Competition Law was adopted in 1994, the Turkish Competition Authority was established in 1997, when the Turkish Competition Law started to be effective.

[5] This is one of the reasons why the privatization in Turkey began with cement sector in 1989 (Demek, 1994, p. 18). Retrived from: http://seyhan.library.boun.edu.tr/record=b1154512~S5 (25.01.2017).

the importance of the cement industry for the construction[6] and economy of Turkey and numerous competition issues in this sector. Following two years of research and analysis of the cement market, the Cement Sector Report was published in the TCA's website[7].

The Cement Sector Report includes economic analysis of several issues regarding the Turkish cement sector, such as demand-price, efficiency-price, and cost-price comparison, as well as market allocation and profit maximization in relation to possible anti-competitive indicators. The Cement Sector Report may be regarded as "guidelines" to the TCA's future approachregarding the cement market.

The overall focus of the Cement Sector Report is on the cement market structure and pricing policies. Considering that cement is a homogeneous product, customers choice between cement producers would depend primarily on price. The cement industry is notorious worldwide for certain anti-competitive practices and coordination. Cartels, as the most serious anti-competitive practice in the cement sector, are considered to be effective when on a limited scale, i.e. in a local or regional market that is dominated by a few cement plants. Due to the fact that cartels are costly to operate particularly on a large scale, there are other practices with the help of which the companies may potentially coordinate their behaviours, i.e. with the help of (1) basing point system where the market price is set by the leading company according to the base mill price, and other smaller competitiors become price-takers; (2) vertical integration by way of buying the concrete producing companies; (3) information exchanges, etc. (Dumez and Jeunemaître, 2000, p. 8).

Price increases in the cement sector are very common. According to the Cement Sector Report, price increases for cement in Turkey starting from 2013 have prominently been above the inflation rate. While this may raise certain competition law concerns, at the same time price increase alone cannot be considered as a *per se* violation of competition rules. A case-by-case examination is necessary to understand whether the pricing could be explained by economic reasons, such as cost, demand structure, growth, etc. Interestingly, the Cement Sector Report concludes that there is no direct correlation between price and either demand structure, or concentration in the cement market, or cost.

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[6] Cement being one of the fundamental inputs in the construction sector.

[7] Cement Sector Report, 2016. Retrieved from: http://www.rekabet.gov.tr/File/?path=ROOT%2f1%2fDocuments%2fG%C3%BCncel%2fraporlar%2f%C3%87imento+Sekt%C3%B6r+Raporu+-+Ticari+s%C4%B1rlardan+ar%C4%B1nd%C4%B1r%C4%B1lm%C4%B-1%C5%9F.pdf (27.03.2017).

2.2. Cement as a local consumption product

Cement tends to be a local consumption product due to high transportation cost (around 10–15% of the total value added, with trucks being the prevailing means of transportation (Dernek, 1998, 39). Hence, local producers have a considerable advantage in their local market (Dernek, 1998). The same views have been expressed by Dumez and Jeunemaître (2000, p. 12):

> "Each plant can be seen as at the centre of a "natural" market, the boundaries of which are determined by the relationship between production costs (which fall strongly as the size of plant and its rate of utilisation increase), and transportation costs (which rise with distance). A cement producer is secure from competition within his natural market as the price he will normally quote, given the combination of production and transportation costs, is lower than that which can be quoted by distant competitors".

It is clear that cement producers are normally selling within their geographical area, and they do not tend to change the boundaries of their own market even when the economic conditions change. In our opinion, this could be regarded as the natural business strategy of cement producers, which may be explained by the peculiarities of the cement sector (capital-intensive industry, regional market, high transportation cost, and local competition).

2.3. No correlation between demand and demand structure: questioning market seasonality argument

The TCA states that the cement market is characterised by the periodic/seasonal demand structure, which normally decreases in September/October and increases in March/April[8] reflecting the business cycle of the construction industry and country's climate. This issue has been addressed by the TCA in its previous decisions. For instance, in its Decision No 13-07/65-34 as of 24 January 2013, the TCA confirms that the following circumstances are frequently encountered in the cement sector: seasonal demand for cement, increase in prices associated with the escalating demand during spring-summer months, decrease in prices due to the fall in demand during winter months, and similarities in price movements of different cement producers.

At the same time, in spite of the seasonal structure, the TCA has also observed in its decisions that prices do not always correlate with the demand patterns. As a general trend, the price does not always decrease in the the low-demand periods. An increase in price would not also have an impact on demand for cement, since there is no substitute to it in a short run at least

[8] TCA – Cement Sector Report, Section II.E.I, p. 28, para. 1.

(Dumez and Jeunemaître, 2000). In other words, an increase in price takes place independently from the demand tendencies. For instance, the TCA in its Decision No 12-17/499-140 dated 6 April 2012 found that cement price movements were not related to the market structure and refused seasonality defenses of the parties concerned. Therefore, considering that there is no unquestionable relation between the cement prices and seasonal demand, in the TCA's opinion, any price increase defence strategies based on the seasonality of the cement market are unlikely to be accepted in the future without any other sufficient economic infrastructure and convincing information/evidence.

2.4. No clear correlation between price and market concentration levels

Another important finding of the Report in relation to prices is that no clear positive or negative correlation between price and concentration in the cement market has been observed by the TCA[9]. Prices are at a close level in both highly and less concentrated regional markets. The Report concluded that market shares of undertakings are rather low at the national level, but at the same time, certain undertakings have a greater market power in certain cities. The concentration levels differ depending on the city (and number of companies making sales there). The higher the number of undertakings, the more price differences in a city may be observed.

2.5. No correlation between price and cost

The TCA carried out its analyses regarding the relation between prices and costs in both short-term and long term perspective (by using various methods such as autoregressive distributed lag, cointegration and error correction models, Engle-Granger). In the end, no close correlation between cement price and cost was found by the TCA. Cement production is normally characterized by significant economies of scale, meaning that the average cost may be reduced by increasing output (Dernek, 1998). When output does increase, however, changes in costs are not really reflected in price movements. In other words, if the company manages to reduce its cost of cement production, the prices will not normally decrease relatively, according to the TCA's findings.

It has not been possible to determine a positive relation between costs and prices as expected in economics and theory. It has been observed that the concerned relation is mostly a negative one, meaning that in the event where the costs for the production of the cement decline, the prices do not always decrease, but rather, may increase.

[9] TCA – Cement Secor Report, Section III.B.II.I, Table 29, p. 78.

2.6. Bulk v packaged cement: price similarities

The Report also evaluates cement as a product and notes that bulk cement is sold more (min. 60% of cement sales per year[10]) than packaged cement[11]. Packaged cement is mostly sold through dealers, while bulk cement is mostly sold to the ready-mixed concrete facilities. In other words, concerning the bulk cement, dealers constitute a significant customer share (28%) although the ready-mixed concrete plants represent the primary customer group. On the other hand, dealers lead in the field of packaged cement with an 87% share[12]. The TCA has concluded that there is some degree of similarity between the price trends for certain types of bulk cement products, but still the price trends for various types of packaged cement are very close to each other.

This may be explained by the fact that the cement sector demonstrates the characteristics of an oligopolistic market structure. Even if the undertakings compete with each other, it is not realistic to observe price trends that are expected from the fully competitive market structure. This situation is accepted in the economic theory. On the other hand, in cases where prices are determined through an agreement or concerted practices (by the competing undertakings), the price level will be higher than the level arising from the oligopolistic competition. The competition law, particularly in Article 4 of the Turkish Competition Law (hereinafter, TCL), prohibits this. That said, the determination of prices by the competing undertakings (without existence of any agreements or concerted practices) below the competitive levels just because of oligopolistic interdependence and rational choices is known and accepted in both theory and commercial life. This shall not be considered as a violation from the perpective of competition law.

The Report provides data on 404 simulations made in the course of 5 years (2010–2014) and in 81 provinces in relation to calculation of prices, which arise in cases where the production and sales units show oligopolistic competition (Bertrand game) and profit maximisation behaviours (either wholly or partially together)[13]. In the light of the findings, the Report states that the common

[10] This is valid for the cement products under codes 14 and 24.

[11] TCA – Cement Sector Report, Section III.B.II.III, p. 102.

[12] TCA – Cement Sector Report, Section III.B.II.IV, p. 103–104, Chart 34 and 35.

[13] In terms of the observations made for the cases where only one unit operates currently, the monopolistic course of behaviour has been included into the simulations.The prices obtained as a result of the simulations and actually observed average prices in the concerned province/year have been compared and the closest course of behaviours/actions to the reality has been established. Considering the simulation performances of the closest scenarios to the reality and the proximity ratios between calculated and real prices, it has been evaluated in three categories (5% or below, between 5% and 10%, and between 10% and 15%). Accordingly, in 277 observation points from 404, the difference between the calculated prices for the closest

course of behaviour in the cement sector is the "joint profit maximisation"[14], in terms of the provinces and years. Therefore, it is possible to argue that the observed price levels in the cement sector during recent years generally (except some observation points) were determined above the levels that are expected from oligopolistic competition in terms of the economic analysis. On the other hand, it does not necessarily confirm the existence of anticompetitive practices between the undertakings; rather it may be a result of rational choices of the cement companies in the circumstances of an oligopolistic market.

The Report emphasizes that the cement market is rather difficult for the new players to enter due to certain economic and legal entry barriers. The TCA concluded that the cement sector in Turkey bears anti-competitive characteristics. The product and market structure of the cement sector facilitate the implementation of anticompetitive practice and collusion. The TCA has not taken any action as a result of the Report yet. However, it may be anticipated that the economic activities of the cement companies in Turkey will continue to be under a special scrutiny of the TCA in order to improve competition.

3. Procedural issues of sector inquiries directed at cement manufacturers: right to request information versus duty to provide information

3.1. Introduction

Both antitrust investiations and sector inquiries aim at increasing competition in the market. At the same time, both may result in the cement market becoming more transparent and paradoxically more suitable for collusion. As noted by Çelen and Gunalp (2010, p. 166), "most of the studies that have addressed this question have reached the startling conclusion that antitrust enforcement does not lead to lower prices". "Indeed, antitrust investigations do not lead to the decrease in prices, but rather serve as a preventive mechanism for future violations – as a disincentive, discouraging factor for the companies to collude considering the level fines". In fact, the findings of Çelen and Gunalp's research emphasize that the investigations conducted by the TCA have made the cement market more competitive.

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scenarios to the reality and observed prices is 15% or below. In 234 of these 277 observations, the joint profit maximisation behaviour reveals a result with 15% or much lower proximity in average. Taking lower proximity levels into account, it is seen that the wholly or partially joint pricing behaviour in cement sector generates results to the observed prices in reality at a significant rate.

[14] TCA – Cement Sector Report, Section III.D, p. 131.

While we share this opinion, it should be also stated that there are certain issues which require clarifications and improvements such as the duration of the investigation procedure (which is rather long – normally the TCA takes the decision within 2 years), powers of the TCA to request extensive information/documents from the parties, and the appeal procedure to the court of first instance/the Council of State. Let us focus of the issue of TCA's powers to request information (which could also be used as one of the procedural grounds for appeal of the decision) and its comparative analysis with those that the European Commission enjoys.

Request for information shall be regarded as a (preliminary) investigative measure, part of the investigation procedure/sector inquiry enabling the competition authorities to obtain information/documentation and verify the actual existence and scope of a specific factual and legal situation in the market[15].

3.2. Legal grounds for information requests

The TCA uses its investigatory powers through request for information and on-the-spot inspections[16]. The TCA under Article 14 TCL may request any information it deems nesessary from all public/private institutions and organizations, undertakings and associations of undertakings; while officials of these authorities, undertakings and associations of undertakings are obliged to provide the requested information within the period determined by the TCA[17].

In the EU, under Regulation 1/2003, there are two obligations for both the authority and the undertakings concerned: obligation to state reasons: the European Commission, in requesting information via its formal decision, must specify legal basis and purpose of such request, as well as fix the time limit for the companies to respond to the request[18] and obligation to provide the requested information[19].

[15] ECJ judgment of 18.10.1989, Case C-374/87 *Orkem v Commission*, ECLI:EU:C:1989:387, para. 21.

[16] Besides the requests for information, in order to gather information/documents for the purposes of investigation, the TCA may conduct on-the-spot inspections. Within this scope, the TCA may perform examinations/searches at the premises of undertakings and associations of undertakings where it deems necessary. Legal basis authorizing the TCA in terms of on-the-spot inspections is Article 15 of the Turkish Competition Law. In cases where undertakings do not cooperate with the TCA, it is highly likely that administrative fines would be inevitable for them.

[17] http://www.rekabet.gov.tr/en-US/Pages/Act-No-4054 (25.01.2017).

[18] Article 18(3) of Regulation 1/2003. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.

[19] In addition, recital 23 in the preamble to Regulation 1/2003 states: "The Commission should be empowered throughout the Community to require such information to be supplied as is necessary to detect any agreement, decision or concerted practice prohibited by [Article

The European Commission may request information when when a relationship between the information and alleged behaviours exists[20], while companies are required to provide all information requested by the Commission[21]. In case of ignoring formal requests for information, the companies concerned may face penalties of up to 1% of the total turnover in the proceeding year[22]. Additionally, periodic penalty payments[23] may be imposed of up to 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 to supply complete and correct information, as requested by the European Commission's decision under Article 18(3) of Regulation 1/2003).

3.3. Limitations to (scope of) information requests

Both the TCA and the European Commission are vested with broad powers to request information and determine the periods for the response. The main question that arises here is how to protect the companies/individuals against the disproportionate intervention by the competition authorities, i.e. what the limits to the competition authority's power to request information are. Normally, a measure is disproportionate when it is taken in the absence of facts "capable of justifying the interference with the fundamental rights of an undertaking"[24] and when it constitutes an excessive interference with those rights[25].

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101 TFEU] or any abuse of a dominant position prohibited by [Article 102 TFEU]. When complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement".

[20] CJ judgment of 19.05.1994, Case C-36/92 P *SEP v Commission*, ECLI:EU:C:1994:205, para. 21.

[21] Article 18(1) of Regulation 1/2003.

[22] Article 23 of Regulation1/2003 states that "The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1% of the total turnover in the preceding business year where, intentionally or negligently: (a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2); (b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit…"

[23] Article 24 of Regulation 1/2003.

[24] CJ judgment of 22.10.2002, Case C-94/00 *RoquetteFrères*, ECLI: EU:C:2002:603, para. 55; ECJ judgment of 17.10.1989, Joined cases C-97/87 to 99/87 *Dow Chemical Ibérica and Others v Commission*, ECLI:EU:C:1989:380, para. 52.

[25] C-94/00 *Roquette Frères*, para. 76 and 80.

In its recent cement cartel judgements (Case C-247/14 P *Heidelberg Cement v Commission*[26], C-248/14 P *Schwenk Zement v Commission*[27], C-267/14 P *Buzzi Unicem v Commission*[28], C-268/14 P *Italmobiliare v Commission*[29]), the Court of Justice (CJ) set aside the 2014 rulings of the General Court (GC) where the GC upheld the statement that it was for the European Commission to decide what information it considered necessary to request in the process of antitrust investigations and deciding whether the infringement took place. The CJ supported the applicants' position and limited powers of the European Commission to request extensive information/documents in its formal requests for information.

These cement cartel judgements arose from the 2011 formal requests for information of the European Commission addressed to several cement companies suspected in participating in the cement cartel. The companies were requested to provide extraordinary quantities and very diverse types of data within a relatively short period of time (a questionnaire itself was 67 pages long, in relation to economic activities of companies in 12 EU member states for a period of more than a decade; financial documents; information that was already publicly available etc.). Moreover, they were asked to provide that data in a very specific and strict format, which involved significant amount of additional work since the parties had to perform numerous, complex and burdensome operation on formatting/re-formatting of that data, which in principle should have been carried out by the European Commission[30].

Seven companies brought an action before the GC to cancel the European Commission's decision. Following GC's judgement not in their favour, certain companies appealed to the CJ. In March 2016, the CJ delivered its judgement supporting the companies' position and setting aside the GC's judgments by stating that the GC "erred in law in finding that the Commission decisions were adequately reasoned"[31]. Interestingly, by the time of the judgment, the European Commission decided to close its investigation due to the lack of evidence of the existence of the cement cartel. Nevertheless, the judgments

[26] CJ judgment of 10.03.2016, Case C-247/14 P *Heidelberg Cement v Commission*, ECLI:EU:C:2016:149.

[27] CJ judgment of 10.03.2016, Case C-248/14 P *Schwenk Zement v Commission*, ECLI:EU:C:2016:150

[28] CJ judgment of 10.03.2016, Case C-267/14 P *Buzzi Unicem v Comission*, ECLI:EU:C:2016:151.

[29] CJ judgment of 10.03.2016, C-268/14 P *Italmobiliare v Commission*, ECLI:EU:C:2016:152.

[30] Opinion Of Advocate General Wahl delivered on 15.10.2015, Case C-247/14 P *HeidelbergCement AG v European Commission*, para. 119, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=169761&doclang=EN#Footref76 (3.03.2017).

[31] Case C-247/14 P *Heidelberg Cement v Commission*, para. 40.

are of great importance for the future of the procedural aspects on the investigatory powers of the competition authorities.

From the judgments, it is clear that the main mistake made by the European Commission was insufficiently explaining the reasons for requesting that information (why such burdensome information was necessary for the investigation). Hence, it is not that the European Commission could not ask for extensive/detailed information, but rather that it cannot do so without providing sufficient reasons (proving necessity) for that.

In assessing the necessity of the request against the level of detail/clarity of the European Commission's statement of reasons, the CoJ relied on the proportionality test (Frenz, 2016, p. 1289) involving two main variables – (1) quantity and complexity of the information requested and, (2) the actual capacity of the parties to provide that information.

> "The quantity and complexity of the information requested depends, obviously, on many variables: the seriousness of the suspected infringement, the nature of the involvement of the undertaking concerned, the importance of the evidence sought, the amount and type of useful information which the Commission believes to be in the possession of the undertaking in question"[32].

In other words, the European Commission should have indicated the purpose of the request for information with "sufficient precision"[33] in order to determine the necessity of information for the purposes of the investigation.

Consequently, the CJ ruled that the European Commission's statement of reasons was "[…] excessively succinct, vague and generic – and in some respect, ambiguous. Such types of statement of reasons do not fulfil the requirements of the obligation to state reasons as laid down in Article 18(3) of Regulation 1/2003[34]. In addition, another important conclusion to the benfit of the undertakings subject to investigation is that the Competition Authority should not require "exceptional efforts" from the undertaking. "After all, it is not an undertaking's role to perform the tasks of the Commission, and that holds true irrespective of the size of that undertaking and the means at its disposal"[35].

As regards to the Turkish Competition Law, it does not contain any specific boundaries to the powers of the TCA regarding its investigation tools and scope of information requests in particular. Nevertheless, the TCA's powers are not limitless. *Ratio legis* of the Turkish Competition Law shall be regarded as the first boundary to the investigatory powers of the TCA. Correspondingly, the

[32] Opinion of Advocate General Wahl, 15.10.2015, Case C-247/14 P *Heidelberg Cement v Commission*, para. 129.

[33] Case C-247/14 P *Heidelberg Cement*, para. 24.

[34] Case C-247/14 P *Heidelberg Cement*, para. 39.

[35] Opinion Of Advocate General Wahl in Case C-247/14 P *Heidelberg Cement*, para. 133.

TCA is obliged to use its investigatory powers in order to ensure compliance with provisions of the TCL, namely Article 4, 6 and 7 thereof. Right to privacy, which is explicitly envisaged by the Constitution of the Republic of Turkey, shall be regarded as the second boundary to the investigatory powers of the TCA. Accordingly, the TCA is not able to expand its investigatory powers to the information, documents and other data, which actually belong to employees of undertakings under investigation and therefore bear a personal character, hence falling under the scope of personal data protection regime. In addition to these two possible limitations to the powers of the TCA to request information, it is anticipated that following the court judgments in cartel cases in the EU, the TCA's discretion in deciding on the scope of information requested and setting the periods for response will be further clarified.

Indeed, the analysed developments in relation to the obligation to state reasons in the information requests are crucial for the undertakings subject to antitrust investigations for the purposes of enabling them to understand the reasons for the particular action so that they can exercise their rights to defence in a proper way. As confirmed by the CoJ, the obligation to state specific reasons is "a fundamental requirement, designed not merely to show that the request for information is justified but also to enable the undertakings concerned to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence"[36]. Hence, the more burdensome the request is, the higher the burden of proof on the competition authority should be why the response to the request is necessary. It is expected that the judgments will have impact on the powers of competition authorities in third countries' jurisdictions which have undertaken certain obligations in terms of harmonizing their legislation with the EU standards, e.g. Turkey.

II. Most common competition law violations in cement sector: major cases in Turkey

1. 1997–1999 investigations

As already mentioned, the TCA has been investigating the cement sector in Turkey since its establishment in 1997 in order to induce a more competitive

[36] Case C-247/14 P *Heidelberg Cement*, para. 19. See also: joined cases 97/87 to 99/87 *Dow Chemical Ibérica and Others v Commission*, para. 26; C-94/00 *Roquette Frères*, para. 47; CoJ judgment of 25.06.2014, Case C-37/13 P *Nexans and Nexans France v Commission*, ECLI:EU:C:2014:2030, para. 34; CoJ judgment of 18.06.2015, Case C-583/13 P *Deutsche Bahn and Others v Commission*, ECLI:EU:C:2015:404, para. 56.

environment. Today cement producers are more cautious about their practices and competition law compliance. But the cement market still remains under the scrutiny of the TCA. Price fixing and market sharing have been among the most common competition law violations detected by the TCA in the cement sector. This has been confirmed by the Report findings[37] and the TCA's decisions, the highlights of which are provided below.

One of the first investigations conducted by the TCA was in relation to 5 companies in the Aegean region[38] (Dernek, 1998, p. 25) of Turkey. In its Decision No 99-30/276-166(a), dated 17 June 1999, the TCA concluded that the cement manufacturers acted in breach of competition law by way of setting their sales prices and partitioning the market geographically. As a result, the TCA imposed a fine on the companies.

At the very same time, the TCA launched another investigation against 22 companies operating in Central Anatolia, Marmara and Mediterranean regions of Turkey to determine whether they concluded an anti-competitive agreement or/and abused their dominance. The investigation was completed by the Decision No 02-06/51-24 dated 1 February 2002 imposing a fine on 18 companies, which were found acting in violation of competition law by way of price fixing and market sharing.

2. 2003–2004 investigation

In 2003, the cement companies from the Aegean region (the same as in the 1997 investigation) were again under the scrutiny of the TCA. They were found guilty and fined again for price fixing, with TCA's Decision No 04-77/1108-277 dated 2 December 2004.

It should be mentioned that the above-mentioned decision was appealed to the court (Council of State). The TCA's Decision No 99-30/276-166(a) was appealled to and annulled by the Council of State due to the fact that the text/explanation of the dissenting vote mentioned in the decision was missing. Subsequently the TCA appealed the latter decision of the Council of State, however the TCA's application was rejected and the annulment decision became final. It should be mentioned that in the course of the review of the decision by the Council of State, the TCA in order to avoid the annulment of its decision due to the mentioned procedural deficiency, issued the same decision with the addition of the text of the dissenting vote. Nevertheless, the Council of State annulled the mentioned decision and the TCA subsequently

[37] TCA – Cement Sector Report, Section I, p. 5, para. 3.

[38] Turkey is traditionally divided into seven geographic/economic regions: Marmara, Aegian, Mediterranean, Black Sea, Central A., Eastern A., and S. Eastern A.

had to adopt a separate Decision No 05-57/850-230 dated 13 September 2005. This decision was again appealed by four out of five companies to the Council of State and annulled – again on the procedural grounds – for the lack of the majority of the TCA's Board members in the process of taking the decision. Subsequently, the TCA rendered Decision No 07-62/740-268 dated 26 July 2007 and imposed fines on the undertakings.

As regards the TCA's Decision No 02-06/51-24, it was also annulled by the Council of State upon the appeal application of the investigated undertakings. Subsequently, the TCA had rendered its final decision and imposed various fines on investigated undertakings[39].

The TCA's Decision 04-77/1109-278 dated 2 December 2004 was also set aside by the Council of State due to the participation in the decision taking process of the TCA's Board member, which previously was involved in the investigation process. Afterwards the TCA rendered its final Decision 06-77/992-287 dated 19 October 2006.

Therefore, the 1999, 2002 and 2004 decisions were appealed and set aside by the court on the ground of procedural deficiencies. The decisions were subsequently reassessed by the TCA but without changing substance and hence the amount of fines[40] for the parties concerned.

3. 2012–2014 investigation

In April 2012 with its Decision 12-17/499-140, the TCA decided to launch an investigation against 10 cement companies which allegedly violated Article 4 of the TCL. The investigation was launched upon complaint from the Adana Chamber of Commerce and three The TCA decided that investigated undertakings had engaged in price-fixing upon the meeting arranged by marketing executives of the mentioned undertakings and thus infringed Article 4 of the Law No 4054. Following the investigation, the TCA in its Decision No 14-07 /138-M dated 19 February 2014 determined that the mentioned companies were indeed acting in violation of Article 4 TCL and imposed a fine on them.

The TCA's Decision No 14-07/138-M was appealed to and set aside by the court. Later, upon this cancellation, the same applicants requested an investigation again, but this time the investigation was conducted only in

[39] TCA's Decision No 06-29/354-86 and dated 24 April 2006.

[40] According to Article 17(6)of Law of Turkey No 5326 (Misdemeanor Law) in case the administrative fine is being paid prior to applying for any legal remedies/appeal, the undertaking concerned shall be entitled to a ¼ discount. Such advance payment is without prejudice to the right to apply for the legal remedy.

relation to two companies. It was determined that these two companies were severely penalized and the amount of fine was reduced. Six undertakings were fined with an amount corresponding to 2% of their turnover in financial year 2011 and four undertakings were fined with an amount corresponding to 3% of their turnover in financial year 2011.

Unlike in the EU, there has not been any precedent of appeal of the TCA's decision on the grounds of extensive information requests yet; although most of the appeals in Turkey are related to the procedural deficiencies and decision-making powers of the TCA.

4. 2014–2016 investigations

4.1. No violation found

In October 2014, the TCA received complaint against cement producers with allegations that the undertakings were involved into price-fixing, shared customers and forced their dealers to behave in accordance with customer allocation. A preliminary report of the experts was prepared on 14 November 2014. Subsequently the TCA's Board initiated a pre-investigation against cement producers, involving on-the-spot inspections and document collection.

Taking into account the characteristics of allegations, specifications of cement and the TCA's precedents, the Board defined the relevant product market as "bagged and bulk grey cement market". The sales activities of the investigated undertakings geographically overlapped in "Balıkesir, Bursa and Yalova".

The TCA assessed the practices in light of Article 4 of the TCL. Considering the documents obtained within on-the-spot inspections and their assessments, the TCA's Board stated that it could not find sufficient evidence concerning the involvement of investigated undertakings into the anti-competitive agreement. Besides, according to the Board's findings, it was quite possible for such price increases to take place within the period in question without any collusion among competitors. Furthermore, the TCA stated that during the on-the-spot inspections, on the contrary to the allegations of the complainants, it obtained documents indicating customers purchased cement from different producers within the same period. Finally, the TCA by majority vote decided[41] not to launch an investigation against the undertakings.

Another complaint to the TCA against cement producers was registered on 25 February 2015. According to allegations, the undertakings subject to

[41] TCA's Decision of 22.01.2015 No 15-04/51-24.

investigation increased their prices every other week, allocated customers within the relevant market (defined by the TCA as the "grey cement market"), and one of the undertakings (Votorantim) was the one providing the basis for making aforementioned practices happen. Preliminary report of the experts was prepared on 20 March 2015. Subsequently, on 2 April 2015, the TCA's Board initiated a pre-investigation against cement producers.

In the course of investigation, the TCA did not find anything that could be considered solid evidence revealing the alleged collusion under Article 4 TCL. On the contrary, Board got documents demonstrating the existence of competition within the relevant market. As for the increase in price, the Board stipulated that in order to assert whether the increase in price arises from an agreement between competitors, relevant allegation had to be supported with sufficient evidence, but no such was discovered within the investigation in question. As regards the allocation of customers between investigated cement producers, according to the findings of the TCA's Board, the investigated undertakings always made sales to different customers except one. That said, in the course of on-the-spot inspections, the Board did not obtain any evidence demonstrating such allocation.

Subsequently the Board concluded that there was no information/document showing the existence of either an agreement or a concerted practice, and by the majority vote decided[42] not to launch an investigation against mentioned undertakings.

These two cases demonstrate that inspite of having a reputation of a "problematic sector", some behaviour of cement producers and developments in the cement market in Turkey may be justified by economic reasons.

4.2. Allegations confirmed

The TCA launched its latest investigation against 6 cement producing companies in June 2014 upon complaints received from the Ministry of Customs of Turkey and Trade, Alanya Chamber of Commerce and Industry and Manisa governorship[43]. Interestingly, 4 out of 6 investigated cement producers were the same companies investigated and fined back in 1999 and 2004.

The TCA examined the quantities and price dynamics for the bulk cement in the Aegean region of Turkey, where the cement companies sell their products. In addition to that the TCA conducted inspections at the investigated companies and examined documents in three different periods: January-March 2013 (the cement market was found to be of a competitive structure), between

[42] TCA's Decision of 9.07.2015 No 15-29/434-127.

[43] Seven of the applicants claimed privacy.

January-March 2013 and October-December 2014 (documents discovered confirmed communications among the parties, including discussions on the future sales strategies for 2014, information exchanges on the stock amounts, variable costs, etc. In addition to that, according to the minutes of the meeting found, the parties participated in two meetings in order to discuss export-related topics), and October-December 2014[44].

Therefore, the TCA found sufficient evidence to conclude that the meetings and information exchanges between the parties were enough to establish a relationship that could influence their market behaviour and result in a similar conduct, thereby preventing/restricting competition in the cement market. The TCA compared this period with the normal market conditions (January 2009–2013) and determined that following January 2013 the average prices increased for approx. 83% within 21 months (while the unit production cost went up approx. 16% only). The profit rates of the companies under investigation reflected the price increases significantly over costs increases. Therefore, price increases could not be explained with reasonable economic justifications[45].

As a result of the investigation, the TCA in its Decision No 16-02/44-14 dated 14.01.2016 the TCA determined that the mentioned cement producing companies between January-March 2013 and October-December 2014 were engaged in anticompetitive concerted practices under Article 4 TCL. In particular, they (i) allocated the markets/customers based on the location of cement plants; (ii) prevented dealers from selling other brands of cement, and increased their prices for more than what would have been necessary under the normal economic conditions and interrelation between the cost/supply and demand. The TCA imposed fines on the companies.

The above described investigations conducted by the TCA over the period of 1999–2016 prove that horizontal price fixing, customer and market allocations (in the ready-mixed concrete market mostly) are among the most common competition law issues detected by the TCA in the cement sector in Turkey. Same companies are often subject to repeteated investigations and fines. This demonstrates that fines do not always serve as an effective deterrence tool for competition law violations.

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[44] Competition Bulletin, TCA, No 61m July 2016, External Relations, Training and Competition Advocacy Department (retrieved from: http://www.rekabet.gov.tr/File/?path=ROOT%2f1%2fDocuments%2fB%C3%BClten%2fCompetition+Bulletin+No+61+-+July+2016.pdf (25.03.2017).

[45] Competition Bulletin, TCA, No 61, July 2016, External Relations, Training and Competition Advocacy Department

III. Conclusion

The cement sector inquiry and the Cement Sector Report outline main substantive issues related to competition in the cement sector in Turkey. Horizontal price fixing, customer and market allocation and abuse of dominant position in the ready-mixed concrete market are among the most common competition law issues detected by the TCA in the cement sector in Turkey.

The Cement Sector Report places particular emphasis on price increases and market partitioning. It concludes that there is no direct correlation between the price increases and economic parameters of the market, i.e. demand, cost of production, season and overall level of efficiency. Irrespective of increased efficiency levels, the prices would not go down. In other words, inspite of efficiency, the producers would continue to apply high prices. There is also no unquestionable relation between the cement prices and seasonal demand. Any price increase defence strategies based on the seasonality of the cement market are unlikely to be accepted by the TCA in the future without any other convincing information/evidence.

The common behavior in the cement sector is 'joint profit maximization', i.e. prices observed in the cement market are above the level that may be expected under the oligopolistic competition normally. However, it does not necessarily confirm the existence of the anticompetitive practices; rather it may be a result of rational choices of the cement companies in the circumstances of an oligopolistic market. As for the market partitioning/allocation, the TCA found that most of the cement used in the rural areas is obtained from the local facilities, i.e. where it is produced. The market shares of the cement producers are rather symmetric throughout Turkey. It may be anticipated that the economic activities of the cement companies in Turkey will continue to be under a special scrutiny of the TCA in order to deal with the current/potential competition problems and improve competition climate in the cement market.

As for the procedural issues, considering the recent cement cartel judgements in the EU limiting the power of the European Commission to request unnecessary burdensome information, it is expected that the respective impact will be felt in Turkey as well. The key issue here is that the more burdensome the request, the higher the burden of proof on the Competition Authority (statement of reasons) should be why the response to the request is necessary. Another important conclusion to the benfit of the undertakings subject to investigation is that the Competition Authority should not require "exceptional efforts" from the undertaking (in other words, it is not the undertaking's role to perform tasks of the competition authority).

Investigations conducted by the TCA over the period of 1999–2016 prove same companies are often subject to repeteated investigations and fines. This

demonstrates that fines do not always serve as an effective deterrence tool for competition law violations. The TCA decisions are normally appealled to and set aside by the court on the grounds of procedural deficiencies and decision making powers of the TCA. The decisions are being subsequently reassessed by the TCA but without changing substance and hence the amount of fines for the parties concerned. Unlike in the EU, there has not been any precedent of appeal of the TCA's decision on the grounds of extensive information requests yet.

Finally, in spite of having a reputation of a "problematic sector", the behaviour of cement producers and developments in the cement market in Turkey may still be justified by economic reasons and the oligopolistic structure of the market. Even if the undertakings compete with each other, it is not realistic to anticipate price trends that would be present under a fully competitive market structure. Hence, there should be no prejudgments that the cement sector is anticompetitive *per se*. However, a thorough analysis is required on a case-by-case basis.

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B O O K R E V I E W

Dragan Gajin, Tijana Kojovic *Competition Law in Serbia*, Kluwer Law International BV, Netherlands, 2017, 168 p.

In May 2017, Wolters Kluwer published the first monograph on Serbian competition law written in English. The monograph is co-authored by two attorneys from Belgrade – Mr. Dragan Gajin and Ms. Tijana Kojovic. The book is available either online or in a printed version.

The publication is part of the series titled International Encyclopaedia of Laws: Competition Law, edited by Francesco Denozza and Alberto Toffoletto. The series provides an in-depth description of the antitrust laws of more than 30 countries. Each monography includes a description of the substantial as well as the procedural rules of a particular jurisdiction and a description of the leading cases.

The Serbian monograph follows the structure of other publications in the series and is divided into three parts: (i) the structure of antitrust law and its enforcement; (ii) the application of the prohibitions, and (iii) the administrative procedure.

The first part focuses on the substantive rules in Serbian antitrust. Considering that Serbian competition law has been to a large extent imported from the EU, in the relevant part the Serbian rules are compared with the EU model. The ways in which the Serbian law departs from the corresponding EU rules are particularly highlighted.

The substantive law overview is comprehensive: it includes all three main pillars of competition law enforcement: restrictive agreements, abuse of dominance, and merger control. Within these three pillars all relevant issues are covered – types of restrictive agreements, forms of abuse of dominance. State aid is not covered as this is outside the scope of the series.

The second part, describing the practical application of the antitrust rules, is perhaps the most interesting part of the monograph. Serbia has had modern antitrust enforcement for a little more than a decade now. This is a relatively short period, but still sufficient to produce a substantial amount of case law – both in proceedings before the Serbian competition authority and before courts.

This part of the book provides a comprehensive overview of how restrictive agreements, abuse of dominance, and concentrations are dealt with in practice. The overview is helpful in identifying which areas of competition law have been in the competition authority's focus as well as which industries most often come under the authority's radar.

The final part deals with the administrative procedure applicable in competition cases, including the judicial review process. The procedural part gives an additional

context to the substantive rules and completes the picture of the Serbian competition law. Particularly catching the eye are administrative procedures which are different from those in place in the EU – for instance, individual exemption of restrictive agreements is in Serbia still effected by notification to the competition authority.

The aim of the book was not to cover competition law theory, but to focus on the rules and how they are applied in practice. The theoretical underpinnings of Serbian competition law therefore remain for some upcoming project.

The monograph is up-to-date as of December 2016.

Dr. Dragan Gajin
Attorney at law, Belgrade (Serbia)
dragan@gajin.rs

Security and regulation of the energy market: national academic conference on the 5th anniversary of the Society of Energy Law and Other Infrastructural Sectors of the University of Łódź, 24 May 2017

On 24 May 2017, the First National Academic Conference "Security and regulation of the energy market" was held at the Faculty of Law and Administration of the University of Łódź (WPiA UŁ). The Society of Energy Law and Other Infrastructural Sectors of the University of Łódź (NKPEiISI) was the main organiser. The Strategic Partner of the Conference was Polskie Górnictwo Naftowe i Gazownictwo S.A., the co-organisers were: the Department of European Economic Law of WPiA UŁ, the Polish Foundation of Competition Law and Sector Regulation Ius Publicum and the University of Economics in Katowice. The Conference was held under the patronage of the President of the Energy Regulatory Office and the Centre for Antitrust and Regulatory Studies of the University of Warsaw.

The Conference was opened by its organiser – M. Kraśniewski (Deputy Chairman of Ius Publicum. Next, the floor was taken by Prof. M. Królikowska-Olczak, head of the Department of European Economic Law of WPiA UŁ. She stressed the importance of the topics discussed and expressed gratitude to all persons who contributed to this event.

Next, a letter by Minister Piotr Naimski (Undersecretary of State at the Chancellery of the Prime Minister, the Government Plenipotentiary for Strategic Energy Infrastructure) was read. The author stressed the importance of the energy sector for Poland's economic development and safety. He also mentioned that each and every energy market – electricity, gas, fuel – were facing regulatory challenges which needed to be addressed. Mr. Naimski wrote that the limitations in energy supply in August 2015 and losses incurred thereunder by Polish companies showed the urgency and scale of action required in the electricity sector. In particular, it is necessary to create new conditions for construction and modernisation of power plants. In his opinion, the gas market needed diversification of sources of supply. Mr. Naimski noted that thanks to consistent actions of the Polish government, the Committee of Permanent Representatives of the Governments of the Member States to the European Union reached an agreement on the Security of Gas Supply Regulation on 10 May 2017. Its solidarity mechanism, included in the draft regulation upon Poland's request, is a tool which will automatically help ensure supply of natural gas from neighbouring countries in case of an emergency. As for the fuel market, actions are carried out

to improve conditions for the functioning of legal entrepreneurs by restricting the so-called grey market.

After the official opening of the Conference, Prof. Królikowska-Olczak opened the first panel – "Security and regulation of the energy market – theoretical approach".

The first to speak was M. Pawełczyk, D. Sc. (Chairman of the Board of the Polish Foundation of Competition Law and Sector Regulation Ius Publicum, Professor, Department of Public Economic Law, University of Silesia), who delivered a lecture entitled: "The normative aspect of energy security". He indicated that both academic discourse and public debate had a deservedly growing interest in "energy security" and presented a list of sources related to energy security as well as an analysis of energy security itself as a legal term. The second paper – "The development of energy clusters in Poland" – was presented by M. Czarnecka, PhD (Assistant professor, University of Economics in Katowice). She pointed out that the amendment to the Renewable Energy Sources Act had introduced the concept of energy clusters, which was in line with the proposals of the Winter Package. Next, she discussed the definition of an energy cluster as well as its subjective and material scope. The next to take the floor was Z. Muras, PhD (Head of the Department of Legal Issues and Dispute Settlement, Energy Regulatory Office), who gave a lecture "The regulator of fuel and energy sectors – market regulation versus promotion. Deliberation on case law on tariffs." He highlighted the scale of legal regulation required in the energy industry and discussed the issue of tariff regulation based on selected case law of the Supreme Court. The final lecture of the panel was delivered by A. Szafrański, D. Sc. (Faculty Member, Department of Commercial and Banking Administrative Law, Faculty of Law and Administration, University of Warsaw), who focused on legal circumstances of delivery of the Sustainable Development Strategy regarding energy. He pointed at strategic areas of the energy sector and stressed that they would require appropriate legal environment and stability. It was noted that two strategic projects – e-mobility and the power market – were unable to function properly without appropriate statutory regulation and required more attention in that respect. The lectures were followed by a discussion.

The second part of the Conference was a plenary discussion on security and regulation of the energy market in a practical approach, which was moderated by A. Fornalczyk, D. Sc. (first President of the Antimonopoly Office, founding partner of COMPER Fornalczyk i Wspólnicy). Lectures were delivered by F. Grzegorczyk, D. Sc. (Chairman of the Board of Tauron Polska Energia S.A, associate professor, Cracow University of Economics), Ł. Kroplewski (Deputy Chairman of the Board of Polskie Górnictwo Naftowe i Gazownictwo S.A.), M. Pawełczyk, D. Sc., and Z. Muras, PhD.

The main topic of the discussion was the Sustainable Development Strategy, which is also related to the energy industry. In the introduction, Ms. Fornalczyk referred to cyclical sociological research of the Polish Academy of Sciences and Public Opinion Research Center on energy awareness among Poles. The research shows that 70% of respondents think that energy is a very important infrastructure sector for social and economic life. The respondents were also asked about renewable energy sources – 60% were willing to use renewable energy. They are also ready to pay more for energy, but by not more than 6% of current prices.

The first question was about diversification of supplies and development plans. Ł. Kroplewski pointed out that technical and economic conditions were important for the diversification of gas supplies, but it should not hamper the provision of energy security. The aim of actions taken by PGNiG is to ensure energy security. As an example, he mentioned the project of pre-operational extraction of coal-mine methane (CMM) and coal-bed methane (CBM) from mines. The company pays a lot of attention to innovation as it contributes to the diversification of natural gas supplies. He also mentioned that important changes regarding infrastructure, whose improvement helped sell larger amounts of gas, had taken place. Mr. Kroplewski indicated that for the first time PGNiG's current strategy was focused on innovation development. New technologies may reduce costs, e.g. of wells, by up to 30%. In his opinion, the diversification of gas portfolio and infrastructure improvements would contribute to larger sales – the activity of PGNiG agency in London and PGNiG Supply & Trading GmbH shows that there is potential for trade in gas abroad. PGNiG's strong entry into the LNG and CNG market results also from the EU's climate policy, which is heading towards replacement of conventional fuels with unconventional ones (e.g. methane). Furthermore, PGNiG is becoming a technically stronger company. It is planned to create a gas hub in the future, which will certainly strengthen PGNiG's position in Europe, especially in Central and Eastern Europe. However, he also explained that the company had to make sure that Gazprom saw it as a partner. He believes that it was important that PGNiG was seen as a business partner due to being one of strategic companies in Poland – therefore, it should not be dependent on foreign entities. In summary, he stated that energy security should be ensured at any cost. Mr. Kroplewski explained that profits and rationality of decisions were vital as well. He admitted that innovation would be of increased importance for energy security.

Prof. F. Grzegorczyk argued that energy security and business do not always go along with each other. He also referred to renewable energy sources and their role in the provision of energy security. In his opinion, energy security could not be based on uncontrollable energy sources. At the same time, he explained that modern technologies already existed but could not be used from the business point of view. It is not about the lack of technologies but their unprofitability. As an example, he mentioned coal gasification. It is technologically possible but unacceptable in business terms. Therefore, actions which will make modern technologies profitable must be found. According to Prof. Grzegorczyk, the Sustainable Development Strategy clearly defined the basis of the Polish energy policy – it presented facts instead of beliefs. The Strategy stresses the importance of energy security, continuity of supply and diversification of energy sources. He explained that if coal of specific parameters was burnt, smog would not be a problem. Electric heating would be the best solution, but it would be hard to convince society. At the same time, a question should be asked whether entire cities can be connected to an electric network.

Prof. M. Pawełczyk pointed at incoherent regulation of infrastructure sectors. He said he was in favour of the adoption of strong and powerful legal instruments, which would bring order in these sectors of economic life. The sectors themselves contain many similar solutions. In his opinion, we were on the eve of a revolution of the

economic model, which would establish a canon of instruments securing the interest of market operators and the public interest. Expectations of cheap and reliable service must be reconciled with public security.

Z. Muras also discussed the issue of sector regulation. He said that primarily the regulator had to investigate legitimate costs as it was the essence of infrastructure markets. In other words, the regulator must balance interests. It should be remembered that energy security and innovation will be paid for by the customers. The panellist also said that society needed a reliable regulator as it would be the one to set prices at the right level. Mr. Muras argued that innovation should also be applied to tariffs. The Winter Package suggests that tariff performance should head towards an absorption of less stable sources. This removes price peaks and helps absorb new technologies as well as sources. However, he mentioned that this issue required a legal framework – performance requires very accurate laws.

Prof. M. Pawełczyk referred to the previous speaker's statement and added that a legal framework was an inevitable process as blanket regulations did not work in practice. At the same time, he stressed that the "marriage" between the Polish energy sector and coal had to be continued. In his opinion, this meant that a return to administrative solutions was required.

Mr. Kroplewski said that coal should be used in the Polish economy for a long time, but a more effective way was needed. He also mentioned that the European Commission had a very narrow view on coal and recommended to limit its use. The UN has a completely different opinion on this resource as it is widely used worldwide and due to the fact that it would be difficult to replace it overnight.

Among the questions asked by the audience, A. Szafrański, D. Sc. asked whether electricity undertakings should be excluded from the definition of an entrepreneur pursuant to the Act on freedom of economic activity and whether the restrictions of the Commercial Code were appropriate for electricity undertakings.

Prof. F. Grzegorczyk said that inclusion of transmission companies in energy groups was a bad idea from the start. He expressed his support for the following solution: if a country carries out own tasks (not only related to energy) via economic activity, it should not be involved in public limited companies because the basic rule of the Commercial Code is that a company should be profitable. In his opinion, the public law had been unnecessarily privatised. For instance, a connection agreement has so many obligatory elements that it is hard to talk about contractual freedom upon its conclusion. He also presented an example of violation of the commercial law by the State Treasury – it obligated Polska Grupa Energetyczna S.A. to enter a nuclear programme. Prof. A Fornalczyk agreed that the obligation imposed on Polska Grupa Energetyczna S.A. by a resolution of the Council of Ministers had been illegal and added that the State Treasury should always comply with the commercial law, not only as it deemed fit. However, she disagreed with the previous speaker on another issue. In her opinion, execution of public tasks should not lead to unlimited funding for their execution. Commercial companies were introduced to solve this problem. i.e. to control the budget of an undertaking and limit state subsidies for it. Prof. Grzegorczyk concluded that energy operators always had to have the economic

balance in mind as they carried out an economic activity. Prof. M. Pawełczyk stated that perhaps instead of a public limited company, a state enterprise, which would provide services of general economic interest, should be chosen. In his opinion, not only the energy sector but also rail transport and airports would be able to function in such a form.

The third panel titled "Security in the power sector" moderated by Robert Zajdler, PhD (Warsaw University of Technology), began with the presentation on energy storage by Andrzej Nentwig, LL.M. and Andrzej Walkiewicz, LL.M. (both Bird &Bird). They said that storage was geared towards specific services or products called storage related to network management and network efficiency. In their opinion, storage was primarily related to renewable energy sources, i.e. sources that are characterised by a certain variability in production. Mr. Nentiwg disagreed with the theses from previous panels, according to which renewable energy sources are uncontrollable. Experience of other jurisdictions showed that these were highly predictable sources and that the fact that more or less energy was produced at certain times did not pose an unsolvable problem. In their presentation, the speakers showed the advantages and disadvantages of storage, the regulatory situation in relation to storage and planned legal changes.

Another lecture was delivered by M. Kraśniewski, MA who talked about a stock ticket contract. He began with the definition of a stock ticket contract as a new form of implementation of the obligation to create and maintain mandatory gas reserves. He analysed the most important changes in the law on compulsory gas reserves. The speaker noted that a number of changes had been made in both the liquid fuel market and the natural gas market. The key changes in the natural gas market included the extension of the scope of the obligation of mandatory natural gas reserve and the introduction of a gas storage contract. He discussed the subjective and material scope of a stock ticket contract and the procedure for its control and approval by the regulator, as well as legal doubts associated with it.

The next speaker was M. Piekarski, LL.M (Baker McKenzie), who delivered a speech on the reconstruction of the power system in case of a blackout. At first, he gave his own understanding of energy security and highlighted the multidimensional nature of this concept. The speaker emphasized that the system should defend itself on many levels, first and foremost, to provide adequate generating capacity. He also pointed out that energy security also meant the reliability of network operation. In the end, he presented the role of gas-fired power plants in the reconstruction of the power system.

The fourth paper: "The positive impact of the development of the renewable energy sector on the safety of the power grid" was delivered by M. Izbicki, MA (WPiA UŁ). In the introduction, he put forward the thesis that in the long term the development of renewable energy could have a positive impact on the long-term operation of the network and, above all, influence its modernisation and expansion. He presented the arguments for this thesis by comparing two basic obligations of energy companies – on the one hand, the operator is obliged to connect all stakeholders to the managed

network, and on the other hand – to ensure that the network remains in place to meet electricity demand. In addition, he discussed the obligation of renewable energy producers to finance their connection to the grid.

The last paper on the functioning of the President of the Energy Regulatory Office (URE) was delivered by M. Karpiński, MA (University of Silesia in Katowice, Kancelaria Prawna Pawełczyk).

A parallel panel discussed regulation in the energy sector. The moderator of this session was Marzena Czarnecka, PhD.

The opening paper was delivered by J. Sroczyński, LL.M. (Kancelaria Markiewicz & Sroczyński), whose speech was about out-of-court consumer disputes in the energy industry and an attempt to answer the question of how to adapt to new regulations on solving disputes. He analysed a new institution, which is the negotiating coordinator at URE and discussed the competences and rules of conduct before the coordinator. In addition, he analysed the obligation of energy companies to adapt to the requirements of the new law. In the final part of the paper, the speaker presented two draft executive regulations to the act on out-of-court settlement of consumer disputes.

Another lecture was delivered by R. Maruszkin (DLA Piper), in which he discussed the legal framework of e-mobility in Poland. The speaker started with an analysis of the very concept of e-mobility, referring to its advantages, disadvantages and, above all, its impact on infrastructure development. He also discussed EU regulations, paying particular attention to Directive 2014/94 on the deployment of alternative fuels infrastructure. Mr. Maruszkin also presented Polish regulations and a draft act on e-mobility and alternative fuels. His speech ended with a sketch of the opportunities and challenges for the business of electro-mobility.

The third paper –"Forwards or futures as the primary energy trade instrument in the light of MIFID II regulation. The risk of contract equivalence" was delivered by P. Hawranek, LL.M. (Hawranek Kancelaria Prawnicza). He pointed out the inseparable element of trade in goods such as forward and futures products. He discussed forwards on the Polish commodity exchange and Phelix Futures on the European energy markets. Mr. Hawranek also asked whether forward and futures with physical delivery differed from each other, as they both created similar operational risks and showed further similarities in relation to risk. The speaker stated that it would not be possible to eliminate the risk of recognising the above-mentioned as equivalent and all the consequences arising therefrom, irrespective of the final national regulations.

The next paper was given by M. Olszewska-Staniec, MA (Cardinal Stefan Wyszynski University in Warsaw, Kancelaria CMS). Her speech was devoted to selected aspects of tariff decisions and their control, based on the example of gas fuel tariffs. In the first part of her speech, she presented the rules of setting tariffs and conducting the approval procedure before the President of URE. She referred to doubts regarding the tariff procedure. Ms. Olszewska-Staniec discussed the application of Article 316 of the Code of Civil Procedure in appeal proceedings against the decision of the President of URE to deny approval for a tariff.The last lecture – "Changes for participants in the wholesale energy market in light of MIFID II – evolution or revolution?" – was

delivered by A. Janosz, MA (University of Silesia in Katowice). In the introduction, she discussed issues related to the scope of the MIFID II Directive, including the scope of commercial activity without the need to apply for a brokerage license. Next, she outlined the grounds for exemptions to avoid the full application of the provision of MIFID II by energy sector entities. The speaker also discussed the definition of financial instruments and the impact of its revised definition on trade in energy. In the final part of her speech, she referred to questions concerning interpretations that appear in the legislative works on the amendment to the Act on Trading in Financial Instruments.

In the next session, the following students and PhD students of the University of Warsaw appeared as speakers: Jan Gryza, Adrian Król, Michał Bałdowski and Magdalena Porzeżyńska, MA. The panel moderator was Łukasz Grzejdziak, PhD (WPiA UŁ).

J. Gryza gave a speech about "The issue of execution of the TPA (third party access) rule and unbundling illustrated by the complaint filed by PGNiG to the Court of Justice of the European Union against the decision of the European Commission regarding access to the OPAL pipeline ". He analysed the matter of access to the OPAL pipeline and the complaint against the Commission's decision to allow Gazprom to use 80% of the pipeline's capacity. The author pointed out arguments revolving around the lack of competence on the Commission's side to "renegotiate" the decision or the Commission using disproportionate measures. He presented possible judgments of the Court of Justice in the matter.

A. Król presented a paper about the regulatory assessment of growth of power markets in the European Union Member States. At the beginning, the author briefly explained the concept of a power market and factors of its development. Subsequently, he analysed the regulatory challenges faced by the power market, both at the European and domestic level. He also mentioned the issue of state aid in the context of the power market and the "Winter Package".

The paper entitled "The application of MAR Regulation in commodity derivatives trading" was presented by M. Bałdowski. He underlined the connection between his subject and the capital market. According to the speaker, one of the most important matters of the MAR Regulation was entrepreneurial information obligation, the definition of confidential information and the problem of insider dealing. He pointed out that the public energy entrepreneurs and the ones engaged in trade in emission rights should comply to the fullest extent with the MAR Regulation. The author enumerated the traits of the confidential information regarding the commodity derivatives. He emphasised the accuracy of said information.

Magdalena Porzeżyńska gave a speech about the influence of the amendments proposed to the Directive 2009/28/EC on the promotion of the use of energy from renewable sources on the security of the energy market in Poland. She stated that the amendment established an integrated vision of the market in four spheres: the domestic energy market, energy efficiency, security of supplies and energy transformation. The author put an emphasis on the contents and assessment of the amendment (also pointing out the negatives).

Following the main part of the session, the moderator called for a discussion. M. Izbicki asked M. Porzeżyńska about the average share of renewable energy sources in the energy mix on the European level. She responded that the aforementioned Directive had precautionary measures that obliged the Member States to maintain their previous renewable energy production levels. Mr. Grzejdziak pointed out that the opportunity to regulate the power market as compensation for services of general interest was wasted. A.Król retorted that he was not familiar with the European Commission's reasons to base the concept of the power market on Article 107 (3) (c) of the Treaty on the Functioning of the European Union.

Concurrently, a neighbouring session about selected issues of the energy law took place. The moderator of this session was Prof. M. Pawełczyk. The following persons took part: Marta Urbańska-Arendt, LL.M (WPiA UŁ), Przemysław Zdyb, MA (University of Szczecin), Aleksandra Barwaniec, MA (WPiA UŁ), Katarzyna Chojecka, MA (WPiA UW) and Mateusz Sokół (WPiA UŁ).

First, M. Urbańska-Arendt gave a speech about the influence of ECHR on treating "guilt" as grounds for permissibility of financial sanctions in the antitrust and energy law. The author pointed out the fact that such grounds had been very imprecise and that the doctrine had underlined the need for a change on numerous occasions. Subsequently, P. Zdyb presented a paper on "Imposing administrative financial sanctions by the President of the Energy Regulatory Office in the light of the Code of Administrative Procedure amendment of 7 April 2017. The author covered the legal definition of a financial penalty, penalty directives, limitation periods, rules for reductions, rules for calculating interests, terms and conditions of enforcement, imposing penalties and resigning from penalisations. He also presented the sequence of regulations to be used by the President of URE when imposing penalties.

A. Barwaniec dealt with the matter of a special hydrocarbon tax. She stated the purpose of introducing it and the following principles covered by it: the rule of fair taxation, effective taxation, general taxation and universal taxation.

The paper entitled "Permits for building offshore wind farms in investment process in Poland and Germany – comparative comments" was presented by K. Chojecka. The major part of her speech was devoted to the many requirements which must be met to obtain building permits in both jurisdictions. The author criticised the discretionary freedom of Poland's economy minister in this regard. In comparison to Poland, Germany has a stable and detailed regulation concerning spatial planning for the Baltic and the Northern Sea.

M. Sokół covered in his paper the issue of transmission corridors in the United States of America. The author presented the general idea of a corridor as a normatively isolated terrain of special legal status, where transmission infrastructure is or will be located. He indicated the existence of the said issue also in Polish legislation, presented the division of different types of transmission corridors and gave a detailed description of those, along with the contemplation concerning their relations.

After the last contributor, Prof. Pawełczyk, summarised all the deliberations. M. Czarnecka, D. Sc. closed the Conference, thanking the organisers and underlining her admiration for the level of professionalism of the presented speeches. She also

invited everyone present to take part in next year's edition of the Conference. Prof. Pawełczyk encouraged every participant to contribute to the post-conference publication.

Marcin Kraśniewski
PhD candidate, Faculty of Law and Administration, University of Łódź
marcin.krasniewski@unilodz.eu

Wojciech Modzelewski
Faculty of Law and Administration, University of Łódź
wojciechmodzelewski94@gmail.com

Mateusz Sokół
Faculty of Law and Administration, University of Łódź
sokol.mat@gmail.com

Fourth National Academic Conference – Consumer in the Rail Passenger Market, Łódź (Poland), 26 April 2017

On 26 April, the Fourth National Academic Conference entitled "The Consumer in the Rail Passenger Market" was held at the Faculty of Law and Administration of the University of Łódź (WPiA UŁ). The event was organised by the Student Society of Energy Law and Infrastructural Sectors of the University of Łódź (NKPEiISI), the Department of European Economic Law of WPiA UŁ and the Polish Foundation of Competition Law and Sector Regulation Ius Publicum in Warsaw (Ius Publicum Foundation). The Conference was held under the patronage of the President of the Office of Rail Transport (Urząd Transportu Kolejowego – UTK), the Centre for Antitrust and Regulatory Studies (CARS) and the Railway Business Forum. The Strategic Partner of the Conference was PKP Intercity S.A., the Golden Partner – Polskie Koleje Państwowe S.A., the Silver Partner – Łódzka Kolej Aglomeracyjna Sp. z o.o., and the Bronze Partner – Koleje Wielkopolskie Sp. z o.o. The Regional Partner was the Marshal Office of Łódź, the Content Partner – the ProKolej Foundation, and the Publishing Partner – Instytut Prawa Gospodarczego Sp. z o.o. This year's Conference built on previous editions[1].

The Conference was opened with a welcome address by M. Kraśniewski, MA (Deputy Chairman of the Board of the Ius Publicum Foundation, Chairman of NKPEiISI). Next, the floor was given to A. Liszewska. D. Sc., University of Łódź Professor (Dean of WPiA UŁ) and M. Pawełczyk, D. Sc., University of Silesia Professor (Chairman of the Board of the Ius Publicum Foundation, University of Silesia). On behalf of Prof. M. Królikowska-Olczak, D. Sc. (Head of the Department of European Economic Law of WPiA UŁ), A. Górczyńska, PhD (Assistant professor at the Department of European Economic Law of the University of Łódź) took the floor, and A. Giedryś (Adviser to the Marshal of Łódzkie province) spoke on behalf of Marshal W. Stępień (Marshal of Łódzkie province).

The introductory lecture was delivered by J. Marcinkowska, LL.M. – the Rail Passenger Ombudsman since 1 February 2017. She presented the legal basis for the Ombudsman, the purpose of proceedings for out-of-court settlement of passenger disputes and the form of dispute settlement by the Ombudsman, including the

[1] K. Chojecka, M. Kraśniewski, T. Mizioch, A. Sobierajska, *Third National Conference: Consumer in the Rail Passenger Market. Łódź, 25 May 2016*, YARS 2016, issue 9(14) p. 325–334.

so-called alternative dispute resolution methods. A reference to the first experiences as the Rail Passenger Ombudsman was an important part of the speech.

After the introductory lecture, M. Pawełczyk, D. Sc. opened the first panel, related to the amendment to the Act on Rail Transport. The first lecture was given by M. Będkowski-Kozioł, PhD, LL.M.Eur.Int. (Cardinal Stefan Wyszyński University in Warsaw, Kochański, Zięba & Partners Sp. k.), who sought to assess the amendment of 16 November 2016. He presented the assumptions and main regulation areas of the amendment, including the new division of railway infrastructure, changes to the rules on access to individual infrastructure categories and to railway undertaking licences. S. Akira Jarecki, PhD (Warsaw School of Information Technology, CARS) delivered the next lecture – "The concept of public service and open access". He presented a protection mechanism of public service against potential negative impact of decisions to grant open access to railway infrastructure. He also discussed the open access mechanism and thoroughly assessed the provisions in that respect. Next, E. Kosiński, D. Sc., UAM Professor (Adam Mickiewicz University in Poznań) discussed the legal position of the President of UTK as a regulatory element of the rail sector in the context of the amendment. He pointed at the broadly understood legal guarantees of independence of the President of UTK, discussed the impact of the amendment on the independence of the regulator in the rail sector and opposed the total structural separation of the President of UTK from government administration. The first panel was concluded with a discussion moderated by Prof. M. Pawełczyk.

The second part of the Conference was a debate on the operating model of the rail transport market in Poland. The session was chaired by A. Fornalczyk D. Sc. (first President of the Antimonopoly Office, founding partner of COMPER Fornalczyk i Wspólnicy Sp. j.). The panellists were: P. Halupczok (Chairman of the Management Board of Arriva RP Sp. z o.o.), P. Jančovič (Member of the Management Board of LEO Express Polska Sp. z o.o.), A. Kozłowska (Head of the Regulation Department in UTK), K. Krasowski (Deputy Head of the Offer and Products Development Office in PKP Intercity S.A.), A. Wasilewski (Chairman of the Management Board of Łódzka Kolej Aglomeracyjna Sp. z o.o.), W. Wilkanowicz (Chairman of the Management Board of Koleje Wielkopolskie Sp. z o.o.), T. Woźniak (Head of the Infrastructure Department in the Marshal Office of Łódź) and P. Stomma (Ministry of Development).

Prof. A. Fornalczyk referred to the differences between forecasts regarding the development of railways and actual indicators, which affect railway density and competitiveness as well as the importance of the 4th Railway Package for the market. The Chair of the panel asked whether promoting small regional undertakings or nationwide ones was better for the sector. Ms. Woźniak was first to speak. She argued that the rail development programme implied an improvement of the existing infrastructure – i.e. renovation instead of new railways (restoration of original parameters). Speaking about renovation of existing railways, Mr. Wilkanowicz mentioned the differentiation between regional and long-distance connections. He explained that high speed was impossible on short railways and did not reimburse economic expenses in the case of longer ones. Mr. Wasilewski stated that a "good offer" for potential purchasers of tickets was enough to attract customers. He stressed that

undertakings had to prepare for the 4th Railway Package. In his opinion, appropriate supply trains and modern facilities had to be prepared to ensure fair competition that benefits the passenger. Ms. Kozłowska referred to the adjustment of infrastructure to local conditions and requirements. She also spoke about the quality of infrastructure and the UTK's current and future mission which entails the development of safe and competitive rail transport. Mr. Halupczok stressed that instead of a leap in the railway infrastructure, an increase in competition was needed for the development of the rail sector. He referred to the German company DB Regio, which had increased its turnover in the rail transport market in Germany despite earlier reduction in market share. In his opinion, the efficiency of railway undertakings was vital for better market conditions. Mr. Jančovič saw the latest legal regulation as an incentive for travellers to use rail services more often. He also highlighted that offers needed to be diversified as part of competition as it was impossible for a single undertaking to satisfy the needs of all potential passengers. Mr. Krasowski opined that competition was a positive phenomenon, and the rail market had nothing to fear from it. At the same time, he mentioned high economic barriers to entry as well as exit barriers, which hardly translated into proliferation of competition. He argued that a sudden reduction of barriers, proposed in the 4th Railway Package, would be counterproductive – therefore, it would be wise to ensure conditions for the preparation for economic barriers to be lowered. Mr. Stomma said that a market model had to be defined, which is suggested by the unsolved issue of high-speed rail and the fact that in Poland the part of the sector financed from public funds in other EU states was covered by the market. He pointed out the need for a transport policy in Poland which would take into account the upcoming industrial revolution 4.0 and the Internet of Things.

The third panel of the Conference was led by Prof. M. Królikowska-Olczak, D. Sc. The discussion was related to consumer and passenger rights in the rail passenger market. Mr. Kłosowski (Nicolaus Copernicus University in Toruń, UTK) delivered the lecture "Monetary penalty as a sanction for infringement of the provisions of Regulation (EC) No 1371/2007 – an overview of European solutions". He analysed sanctions applied in individual EU Member States in the case of infringement of the provisions of Regulation No 1371/2007, described their nature and presented entities on which they may be imposed. The next speaker was G. Pilecki, MA (UTK), whose lecture was about obligations of rail market entities in relation to the disabled. It was based on two legal acts: Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations and Commission Regulation (EU) No 1300/2014 of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility. The third paper – "Comments on Regulation (EC) No 1371/2007 concerning minimum information provided by railway undertakings or ticket vendors before the journey" – was delivered by P. Kowalik, PhD (Lublin University of Technology). He presented information requirements laid down in the Regulation and referred to the Computerised Information and Reservation System for Rail Transport. Furthermore, Mr. Kowalik discussed potential problems with the introduction of the system and the need to

regulate the rules of searching for connections. The final lecture of the third panel – "The Rail Passenger Ombudsman as UTK's means to fulfil passengers' expectations" – was presented by W. Wilamowski, MA (W&B Wilamowski), who highlighted the important social role of the Ombudsman.

The next panel was devoted to the financing of transport activity in the rail passenger market. The moderator of this part of the Conference was Ł. Grzejdziak, PhD (Assistant professor at the Department of European Economic Law of the University of Łódź, supervisor of NKPEIiSI).

The lecture "Changes to the procedure of outsourcing passenger rail transport in the context of the amendment to Regulation (EC) No 1370/2007" was delivered by Ł. Ziarko, MA (University of Łódź, COMPER Fornalczyk & Wspólnicy Sp. j.). He analysed the key changes regarding outsourcing and financing of public transport which would enter into force on 24 December 2017. Next, P. Kulczycki, MA (COMPER Fornalczyk & Wspólnicy Sp. j.) took the floor. He presented the basic rules for the calculation of compensation for the provision of public rail transport. The final paper of the fourth panel – "Financing of reduced fares in public transport – selected issues" – was delivered by B. Mazur, PhD (Rybnik City Hall, ProKolej Foundation). He discussed the legal basis of reduced fares, criteria for their division and reservations related to the system of reduced fares by referring to case law in that respect.

The final part of the Conference focused on environmental protection in railway law. The discussion was chaired by M. Kraśniewski, MA. The speakers were: A. Bogusz, MA (WPiA UŁ), K. Chojecka, MA (University of Warsaw) and M. Sokół (WPiA UŁ). A. Bogusz delivered the lecture "Legal issues of waste management in rail transport". She presented issues of waste management in the context of rail transport and highlighted the role of the EU in development of these issues. Ms. Chojecka pointed at the normative issues of acoustic protection in the paper "Counteracting noise in the rail sector – analysis and conclusions". She placed special emphasis on the installation of noise barriers and train braking technologies. The aim of the final paper, presented by Ms. Sokół – "The railway law and environmental protection in the United States of America" was to present the American environmental protection system, its specificity and methods of regulation in a brief comparison with generally described ecology law systems of other countries to show its complexity and fragmentation in the American law.

Prof. M. Królikowska-Olczak summarised the discussions and closed the conference. In her opinion, the conference was of a very high level and an inspiration for further deliberations. She congratulated M. Pawełczyk, D. Sc., Ł. Grzejdziak, PhD and M. Kraśniewski, MA and expressed her gratitude for organising the conference.

Marcin Kraśniewski
PhD candidate, University of Łódź
marcin.krasniewski@unilodz.eu

Annual Conference on European State Aid Law 2016. Trier (Germany), 24–25 November 2016

On 24–25 November 2016, the Academy of European Law (ERA) hosted in Trier the Annual Conference on European State Aid Law 2016, organised with the support of Jacques Derenne (Sheppard Mullin, Brussels office). The conference was devoted to the latest developments from the European Commission and the European courts, with the focus on tax, energy and infrastructure. Participants included mainly civil servants, in-house counsels, lawyers in private practice and industry representatives.

The conference was opened by Eirini Volikou (ERA) and Jacques Derenne who welcomed the participants on behalf of the organising committee. Mr. Derenne was the chair of the conference.

The first panel "Policy and Application" started with the presentation by Nina Niejahr (Baker & McKenzie, Brussels office) who concentrated on the EU Commission's tax aid enforcement. She discussed some recent tax aid cases and their practical implications for the Member States, taxpayers and others. She pointed to the difficulty in assessing by the Commission the selective character of a measure, as illustrated, for example, by the *Banco Santander/Autogrill* (*Spanish Goodwill taxation*) case. She also referred to the Commission's recent decisions in *Starbucks*, *Fiat* or *Belgian Excess Profit exemption* cases which concerned transfer pricing tax rulings. She was critical of the approach adopted by the Commission in these cases, which seems to suggest that the Commission applies its own arm's length principle (which is a general principle of equal treatment in taxation), and not that derived from the OECD Transfer Pricing Guidelines, in assessing transfer pricing rulings.

Next speaker in this session, Lorena Ionita (European Commission, DG Competition), focused on State aid in aviation. She discussed the Commission's proposal to further expand the General Block Exemption Regulation (GBER) to cover investments in small regional airports (below 3 million passengers per year), with particular support to very small airports (under 150,000 passengers per year), for which additional simplifications had been proposed.

Following this presentation, Nicole Robins (Oxera, Brussels office) highlighted the importance of economic analysis in State aid cases. She noted that there are still a number of challenges for ports and airports in assessing State aid risk. Those challenges are connected with the need to focus on *ex ante* profitability analysis in market economy operator principle airport-airline assessments, the increased

emphasis on ensuring that airport-airlines agreements lead to airport returning to overall profitability, or the evidence required to demonstrate anticipated network externalities.

The session was closed by Gareth Evans (UK's Department for Business, Energy & Industrial Strategy) who shared British experiences in applying the GBER in practice. Mr. Evans provided some figures showing that the UK approach to grant State aid measures is rather rigorous as compared to other EU countries, which is evidenced by very low number of the recovery of illegal State aid cases against the UK.

In the second session entitled "The Commission's priorities, probes and future plans" Gert-Jan Koopman (European Commission, DG Competition) summarised the main objectives and results of the State Aid Modernisation programme (SAM) [set out by the European Commission in 2012 – *author's note*]. He indicated that the SAM led to the significant decrease in the number of notifications, with an almost double increase of general block exemptions cases. Currently 90% of measures and around 45% of expenditures are exempted from notification to the Commission (as compared to less than 50% of measures and around 32% of expenditures before the SAM). Another result of the SAM listed by Mr. Koopman was the reduction of the average length of most proceedings, including complaint procedures (from 14 to 10 months). Further, he identified the Commission's current priority sectors, which include energy, tax planning and banking. He concluded by listing the Commission's next steps which would focus on the review and evaluation of the new rules put into place under the SAM before they expire by the end of 2020. In response to a question from the audience concerning the arm's length principle, he commented that there is no "separate EU arm's length principle", but only the one derived from the OECD guidelines which "are a great tool" in dealing with transfer pricing issues.

The third session was devoted to the developments in the energy and automobiles sector. Dr Dörte Fouquet (Becker Büttner Held, Brussels office) and Dr Patrick Thieffry (Thieffry & Associés, Paris and Sorbonne School of Law, Paris) spoke about support for renewable energy. As one of the recent trends, Mrs. Fouquet pointed to the Commission insisting on opening support schemes for electricity from renewable sources to other EEA or Energy Community countries. She illustrated this by the latest State aid decision regarding German auction systems notified to the Commission, where 5% of the tendered capacity had to be opened to other Member States. Dr Thieffry analysed some recent EU and French cases concerning State aid in the electricity supply sector, concluding that the line between private funds and those under State control will keep being tested due to the lack of a clear and full EU mandate in the energy policy.

Michael Jürgen Werner (Norton Rose Fulbright, Brussels office) continued the presentations by speaking of funding of hybrid and electric vehicle purchases by the German Government, which he qualified as State aid. In Mr. Werner's view, although the funding is granted to customers, it creates an indirect advantage for producers, because it constitutes an incentive for the customer to buy an e-car with the effect that the producer benefits of the amount (4,000 EUR) the customer does not have to spend.

The last session of the conference was dedicated to the procedural aspects of State aid. Dr Viktor Kreuschitz (Judge at the General Court of the EU) and Dr Marianne Dony (Professor at Université Libre de Bruxelles) reviewed some case law of the Court of Justice of the EU and the General Court from 2015 and 2016 on State aid.

Next speaker, Dr Petra Nemeckova (Legal Service of the European Commission), discussed the admissibility issues related to annulment actions in the State aid field, focusing on the notion of direct and individual concern.

Julia Rapp (European Commission, DG Competition) had a presentation on the Commission Notice on the notion of State aid. She discussed main concepts referred to in the Notice such as the economic activity, advantage, selectivity or effect on trade between Member States, which need to be taken into account when assessing if public support to undertakings constitutes State aid.

Jean-Luc Sauron (Councillor at the French Council of State) proceeded to speak of the role of the Council's representative responsible for EU law in the French system of administrative courts in terms of "taking charge" of EU case law on State aid by those courts. He indicated that the representative conducts monthly overview of the rulings of the European courts and the European Court of Human Rights, and reports them to the Council of State, administrative courts of appeal and administrative tribunals. His other duties include advising in matters of EU law to fellow members of the Council of State, as well as providing trainings and practical guidance to councillors at the administrative tribunals, administrative courts of appeals and administrative magistrates.

The conference was closed by Mr. Derenne who thanked all speakers for their contributions and other attendees for their participation.

Emilia Wardęga, LL.M.
Associate at WKB Wierciński, Kwieciński, Baehr Sp.k., Warsaw
emilia.wardega@wkb.com.pl

5th Polish-Portuguese PhD Students' Conference on Competition Law. Białystok (Poland), 14 October 2016

The 5th Polish-Portuguese PhD Students' Conference took place on 14 October 2016 in Białystok, Poland. The conference focused on private enforcement of competition law and combating unfair competition in Portugal and Poland. It was organized by the Department of Public Economic Law at the Law Faculty of the University of Białystok. The conference was the result of on-going fruitful cooperation between the latter and the Católica Porto Law School, Catholic University of Portugal. The international character of the conference provided an excellent opportunity for Portuguese and Polish PhD students to exchange opinions on issues related to competition law in particular.

Prof. Anna Piszcz (University of Białystok) opened the conference and welcomed a number of guests including: Prof. Miguel Sousa Ferro (Law School, University of Lisbon), Prof. Agata Jurkowska-Gomułka (Chair of Administrative Law, University of Information Technology and Management, Rzeszów) and Prof. Dusan V. Popovic (Faculty of Law, University of Belgrade). Prof. Piszcz presented subsequently the assumptions and scope of the conference.

The first session was chaired by Prof. Piszcz. Prof. Miguel Sousa Ferro took the floor first with a presentation entitled "Directive 2014/104/EU: Portuguese precedents and transposition". He started his speech by describing the concept of private enforcement in Portugal. The speaker also presented statistics, history, examples of success, examples of failures and leading pending cases referring to the antitrust private enforcement in his country. The second part of the presentation was devoted to the transposition of Directive 2014/104/EU in Portugal. Prof. Sousa Ferro presented the legislative procedure of the transposition the Directive into Portuguese legal system. Furthermore, he discussed the most relevant options relating to this issue. He also highlighted problems with binding effect (non-rebuttable presumption) of *res judicata* national decisions and binding effect of res judicata decisions of other Member States.

Prof. Anna Piszcz spoke next presenting a paper entitled "Polish transposition of Directive 2014/104/EU: The state of play". In the first part of her presentation, the speaker analysed Polish legal background for the private antitrust enforcement (hereafter, PAE). She also indicated difficulties for research on PAE in Poland. The second part of the presentation was devoted to Polish calendar of implementation works. In the last part of the speech, Prof. Piszcz presented the most probable content of the Polish legal provisions implementing Directive 2014/104/EU.

Prof. Agata Jurkowska-Gomułka gave the third paper entitled "Too much privatization: Does the Polish competition authority still protect competition in public interest?". Her speech centred on determining reasonable and objective justification of competition authorities' interventions in single cases. The speaker also deliberated over the practical applicability of Article 31a of the Act of 16 February 2007 on Competition and Consumer Protection. In the second part of the presentation, Prof. Jurkowska-Gomułka discussed the fact that in some cases President of the Office of Competition and Consumer Protection has to find balance between protecting conflicting interests.

Prof. Dusan V. Popovic presented the last paper of the first session entitled "The importance of unfair competition rules for owners IP rights". He started his speech by comparing unfair competition rules to IP rules. The speaker also described types of unfair competition protection. Moreover, Prof. Popovic indicated the most important unfair competition rules for owners of IP rights. Afterwards, the author presented formal recognition of the importance of unfair competition rules for owners of IP rights and discussed their practical importance.

The first session ended with a panel discussion where the participants of the conference discussed legislative proposals and the role of national competition authorities. The discussion was followed by PhD students' session. Second part of the conference was moderated by Prof. Miguel Sousa Ferro.

Nuno Sousa e Silva (Católica Porto Law School, Catholic University of Portugal) gave first presentation entitled "The interplay of unfair competition and antitrust". He discussed the problem stemming from interdependent aims and overlapping areas of application of the rules on combating unfair practices in competition and the rules against practices that restrict competition in a given market. The speaker raised the issue of legislators struggle to draw a line between unfair competition and antitrust and what qualifies conduct as anticompetitive or unfair.

Magdalena Knapp (University of Białystok) discussed the status of entrepreneur who's seeking legal protection against unfair practices of his competitor in presentation "Polish model of legal protection against unfair competition in B2B relations". She focused on legal instruments that entrepreneurs are equipped with to protect their interests. Speaker described types of sanctions that Polish law provide for: civil, criminal and administrative. She pointed out that administrative sanctions are limited to situations in which collective consumer interests are threatened. The current model of protection is based on private enforcement scheme therefore the success of unfair competition law depends largely on how courts rule in individual cases.

Next speaker, Paulina Korycińska-Rządca (University of Białystok) presented the paper entitled "Disclosure of evidence in Damages Directive: A chance to reduce information asymmetry between victim and infringer?". She discussed the issue of burden of proof in private enforcement proceedings and whether Directive 2014/104/EU provide for efficient tools enabling victims to obtain evidence vital to facilitate private enforcement. Speaker outlined and analysed the main concerns related to new measures introduced by the Directive such as absolute protection of self-incriminating statements and temporary limitations on the disclosure of evidence.

Next presentation entitled "Practical implications of introducing a binding effect of competition authorities' final decisions: Polish perspective" was delivered jointly by Teresa Kaczyńska (University of Białystok) and Joanna Lenart (Allen & Overy in Warsaw). Speakers presented rationale behind Art. 9 of Directive 2014/104/EU and proposals for the implementation of the Directive. Presentation focused on effects the transposition of the Directive would have on final decisions issued by Polish Competition Authority.

Second session of conference concluded with debate and comments regarding presentations delivered by PhD students. The conference allowed for the exchange and analysis of international experiences on private enforcement of competition law and unfair practices issues. The conference is one of the many to come in series of international conferences organised by Department of Public Economic Law at the Law Faculty of the University of Białystok. The next meeting is announced to take place in spring 2017.

Magdalena Knapp
PhD student at the Department of Public Economic Law at the University of Białystok; e-mail: knapp.magdalena@gmail.com

Radosław Niwiński
PhD student at the Department of Public Economic Law at the University of Białystok; e-mail: rniwinski@op.pl

Antitrust Aviation Seminar – Faculty of Management, University Warsaw (Poland), 12 October 2016

The Antitrust Aviation Seminar was held on October 12, 2016 at the Faculty of Management of University of Warsaw. The event was organized by Center for Antitrust and Regulatory Studies (CARS) of the Faculty under auspices of Polish Civil Aviation Authority and LOT Polish Airlines.

The principle goal of the seminar was to familiarize guests with antitrust policy and legal regulations in civil aviation in American and European environment from both academic and practical perspectives. Speeches were given by distinguished experts representing universities and aviation sector: Prof. Michael Jacobs (DePaul University, Chicago), Prof. Marek Żylicz, Dr. Izabella Szymajda-Wojciechowska (vice-president, Polish Civil Aviation Authority), Dr. Agnieszka Kunert-Diallo (compliance officer, LOT Polish Airlines), Dr. Filip Czernicki ("Polish Airports" State Enterprise) and Dr Jan Walulik (CARS).

The whole seminar was held in English. At 3.00 pm Dr. Jan Walulik opened a the session by welcoming the guests and introducing all panelists. Then presentations were launched. The first to speak was Prof. Jacobs who discussed deregulation in aviation sector in the United States introduced by the Act of 1979. Prof. Jacobs described the US policy which eased mergers between airlines and caused that by 2010s many American carriers have been consolidated into larger companies (including mergers between American Airlines and US Airways, United and Continental or Delta Air Lines and Northwest). And although prof. Jacobs praised the solution for its impact on competition, he pointed out several issues concerning formation of oligopolies resulting from mergers: accessibility to particular flights, seats availability, entering alliances and airport capacity.

Next to speak was Prof. Marek Żylicz, who admitted that for a long period of time competition was not the core point of regulation in aviation, at least for governmental organizations. Commercial aspects of air travels were the domain of bilateral agreements between states and primarily concerned tariffs, commercial operations etc. Universal arrangements were absent, at least until 1960s, when IATA introduced several regulations on standards in air services.

Dr. Izabella Szymajda-Wojciechowska's paper was devoted to common points and differences between American and European aviation markets. Although the EU struggled to unify its market, regulations between EU Member States and third countries still needed to be based on bilateral agreements. The situation has changed

in 2002 when thanks to a judgement by the CoJ, the Commission became able to negotiate on behalf of the EU agreements with third states. In result, EU designation clauses have been developed. The presentation of Dr. Szymajda-Wojciechowska has been illustrated by various examples.

Dr. Agnieszka Kunert-Diallo pointed out that in European environment it is difficult to be competitive, especially when an airline acts independently. Nowadays, when two models are exploited by carriers: hub-and-spoke and point-to-point, a company should seek to join a larger team (e.g. an alliance) to stay in the game. The positive point is that European Commission cares good conditions for airlines in the EU.

The last presentation was delivered by Dr. Filip Czernicki. He referred to the situation of airports in Poland and Europe. Although in the past aerodromes were regarded as being monopolists and non-competing with each other, today, the situation has changed significantly and aspects of competition can be found everywhere. This is still controlled by authorities. First, airport tariff regulations are regularly controlled by CAA. Also, provisions on transparency should be respected – distribution of slots, especially during rush hours or ground handling issues should be in regulated in a perfectly transparent way. Running airports may also rise several problems related to competition. For instance, should Warsaw have two separate airports, like todays Chopin and Modlin, or is the "duoport' concept a preferable solution. Dr. Czernicki supported his views with cases concerning Chopin Airport from the recent past.

Afterwards, guests were welcomed to ask questions and to comment on the topics. The questioning session lasted from 4.00 pm to 5.30 pm. Guests posed various queries concerning balance between antitrust policy and antitrust regulations, financing construction of airports from European funds, role of Chapter 11 in aviation sector in the United States, position of regional airports, state funding for airports and many more.

After this session ended, Dr. Jan Walulik officially closed the seminar.

Mateusz Osiecki
PhD candidate, Department of International Law and International Relations, University of Lodz
mateusz.w.osiecki@gmail.com

ACTIVITIES OF CARS

CARS Activity Report 2016

1. General Information

The Centre for Antitrust and Regulatory Studies (CARS) continued its regular research, publishing, conference and educational activities in 2016 – the 10th year of its existence.

The granting of the 5th CARS Award for an outstanding academic monograph on the law and economics of competition protection and sector-specific regulation is among the most noteworthy events of 2016. This year, the CARS Antitrust Award honoured **Professor Cezary Banasiński** for his exceptional book entitled ***Dyskrecjonalność w prawie antymonopolowym*** [*Discrectional Power in Antitrust Law*] (Wolters Kluwer, Warsaw 2015).

As in previous years, the 2016 Award was once again generously funded by PKO Bank Polski, one of Poland's leading banks.

2016 saw also the creation of the CARS Honorary Award – the so-called 'Wielka Sowa' [Big Owl]. The Award was established for exceptional scientific and practical achievements in the field of broadly understood competition law. **Professor Dr Stanisław Sołtysiński** became the first laureate of this Award.

CARS continued also to engage in research and advisory activities. In this context, two research projects were conducted. They dealt with the punishment policy for practices infringing the collective interests of consumers and competition restricting practices – both research projects were commissioned by the Polish Office of Competition and Consumers Protection. CARS also prepared five academic expertises commissioned by external partners; three of them have already been published on the CARS website (www.cars.wz.uw.edu.pl/ekspertyzy).

The year 2016 proved very productive for the CARS Publishing Programme. Four new titles were added to the CARS Publishing Series 'Antitrust and Regulatory Monographs and Textbooks'. It also continued to publish its well established English-language *Yearbook of Antitrust and Regulatory Studies* (YARS) – two volumes of YARS were released in 2016 (YARS 2016, vol. 9(13) and 9(14)). At the same time, CARS published eight volumes of the Polish-language journal *internetowy*

Kwartalnik Antymonopolowy i Regulacyjny, iKAR ['internet Quarterly on Antitrust and Regulation'].

Moreover, in 2016, CARS organize four Polish scientific conferences and seminars as well as noticeably expanded the CARS 'guest lecture' programme. Two outstanding foreign professors dealing with antitrust policy and law visited CARS in 2016.

Throughout 2016 CARS continued to organize workshops for employees of the Office of Competition and Consumer Protection (Polish abbreviation – UOKiK) and judges from the Court of Competition and Consumer Protection (Polish abbreviation – SOKiK). Additionally, CARS organized one workshop commissioned by UOKiK.

For the first time, CARS signed cooperation agreements with national scientific institutions and an outstanding entrepreneur.

A completely new element of CARS activities is the creation of sector-specific laboratories, which have a research and educational character. Since 2016, three such laboratories have been established.

2. Research projects

In autumn of 2015, CARS was commissioned by the Office of Competition and Consumers Protection to prepare (until 30 June 2016) two separate, albeit related research projects:

a) '*Complex [Comprehensive?] analysis of the decisions of the President of UOKiK and the resulting judgments of the courts examining appeals against those decisions (Court of Competition and Consumers Protection (SOKiK), the Appellate Court in Warsaw and the Supreme Court) with respect to fines imposed by the President of UOKiK in cases of practices infringing the collective interests of consumers*';

b) '*Complex [Comprehensive?] analysis of the decisions of the President of UOKiK and the resultingjudgments of the courts examining appeals against those decisions (Court of Competition and Consumers Protection (SOKiK), the Appellate Court in Warsaw and the Supreme Court) concerning the fines imposed by the President of UOKiK in cases of competition restrictive practices'*.

Both reports were submitted to the Commissioner [?] within agreed time but were not accepted by the UOKiK by the end of 2016 due to a conflict that arose between UOKiK and CARS over the payment for these projects.

3. Academic expertises (expert opinions)

3.1. Expert opinion concerning amendments to Romanian Law No 321/2009 regarding the sale of food products in the context of its compliance with EU law and Polish experience

This academic expertise was commissioned by IMS Consulting (Cracow) acting on behalf of the Rumanian Network Retailer CEO PROFI Rom Food srl. The opinion

was prepared based on Annex No 1 (Accepted amendments) to the Rumanian Law No 321/2009 regarding the sale of food products. The aim of the expertise was to assess the above amendments in the context of EU law and Polish experiences concerning the application of supply chain regulation in retail trade of food products. The results of the analysis were delivered in the form of an expert opinion on the compliance of Romanian Law No 321/2009 regarding the sale of food products with EU law. The project included also a workshop discussion between Polish experts and the representatives of the Purchaser, as well as an additional report presenting the conclusions drawn from this discussion. The project was prepared by Dr Dominik Wolski (JM Polska) with co-operation of Professor Dr Tadeusz Skoczny (Department of European Economic Law, Faculty of Management of the University of Warsaw), Dr Maciej Bernatt (Department of European Economic Law, Faculty of Management of the University of Warsaw), Dr Jan Markiewicz (Wardyski @ Co. Law Firm), legal advisor Jarosław Sroczyński (Markiewicz Sroczyński Law Firm) and Dr Jan Walulik (CARS, Faculty of Management of the University of Warsaw).

3.2. The status of a spin-off company established by a special-purpose entity of a university in the light of the definition of SMEs in the context of public aid applications

This expert opinion was commissioned by the Institute of Applied Research of the University of Technology. Its goal was to specify the status of a spin-off company established by a special-purpose entity of the university in the light of the definitions of SMEs in the context of applying for public aid. The aim of the expertise was, in particular, to answer the question whether the establishment of a new (spin-off) company, with the participation of a special-purpose entity of a university (set up on the basis of Article 86a of the Higher Education Act, in order to carry out indirect commercialization) and other entities with the status of micro, small and medium enterprise, in the situation when the newly established company fulfills the SME criteria, will allow the new company to keep the SME status despite the participation of a university's special-purpose entity at the level not exceeding 25% of the capital or 50% of the votes.

The argumentation presented in this expertise lead to the conclusion that a spin-off company established by a special-purpose entity of a university can be recognized as a SME under the following conditions: the spin-off fulfills the criteria of an 'enterprise' as understood by EU law; the special-purpose entity (treated as a non-profit university) has less than 50% of the voting rights or stocks and shares; and no other circumstances are present listed in Article 3(3) of Annex I to Regulation 651/2014 allowing to identify the link [?]. Moreover, the new spin-off company must fulfill the quantitative criteria of a SME, that is, it cannot exceed the limits of employment as well as the financial limits mentioned in Article 2 of Annex I to Regulation 651/2014, taking into account the relationships with other stockholders or shareholders.

The expertise was prepared by the legal advisor Justyna Kulawik-Dutkowska (PhD Student at the Chair of Legal Problems of Administration and Management, Faculty of Management of the University of Warsaw) with the co-operation and supervision of Professor Dr Tadeusz Skoczny (Head of Chair on European Economic Law, Faculty of Management of the University of Warsaw).

3.3. Assessment of the public financing, including EU sources, of an investment in railway station buildings in the context of the notion of state aid in the meaning of Article 107(1) TFEU (2016)

This expert opinion was commissioned by PKP S.A. (Polish State Railways). Its aim was to assess whether public financing of an investment in the rehabilitation (modernization) of railway station buildings constitutes state aid in the meaning of Article 107(1) TFEU. The purpose of the expertise was also to answer the question whether support for such investments should be notified to the European Commission according to Article 108(3) TFEU as well as according to rules laid down in Regulation 2015/1589.

The expertise was prepared by Dr Stefan Akira Jarecki (Head of Rail and Public Transport CARS Laboratory).

3.4. Legal aspects of number portability in case of subscribers' special services (AUS)

This expert opinion was commissioned by the National Institute of Telecommunications. The report, entitled *Legal aspects of number portability in case of subscribers' special services (AUS)*, will become part of broader expert works prepared by the National Institute of Telecommunications.

The expertise was prepared by Professor Dr Stanisław Piątek (Head of the Chair on Legal Problems of Administration and Management, Faculty of Management of the University of Warsaw).

3.5. Legal aspects of reshaping the principles of numbering usage for the purpose of providing Premium Rate Services

This expert opinion was commissioned by the National Institute of Telecommunications. The report, *Legal aspects of reshaping the principles of numbering usage for the purpose of providing Premium Rate Services*, will become part of broader expert works prepared by the National Institute of Telecommunications.

The expertise was prepared by Professor Dr Stanisław Piątek (Head of the Chair on Legal Problems of Administration and Management, Faculty of Management of the University of Warsaw).

4. Publications

4.1. Adam Doniec, *Imposing Fines in EU and Polish Competition Law in the Light of Human Rights Standards*, CARS 'Textbooks and Monographs' (20), University of Warsaw Faculty of Management Press, Warsaw 2016

The subject of this book is a legal analysis of norms regulating the application of EU and Polish competition law on financial penalties in the light of the requirements of human rights protection. The basic aim of the book is to answer the question if human rights are being respected in the EU and Polish system on the application of financial penalties in competition law. In order to do so, the author presents the meaning and the scope of selected human rights. After a short analysis of the norms regulating the application of EU and Polish financial penalties in competition law, the author presents potential threats to the protection of human rights which might occur in the EU and Polish systems. The aforementioned analysis lets the author to the conclusion that the existing EU and Polish systems on the application of financial penalties in competition law require changes, and how significant those changes should be in order to meet the protection standards concerning the chosen human rights. The following human rights are being analyzed: principle of legal certainty, principle of equality, right to an effective remedy, right to a fair trial, and right not to be tried or punished twice (ne bis in idem/double jeopardy). In the last part of the book, the author considers if the criminalization of competition law might be the right way to remedy the existing deficiencies.

4.2. *Pursuing damages for competition law infringements before Polish courts*. Edited by Anna Piszcz and Dominik Wolski, CARS 'Textbooks and Monographs' (19), University of Warsaw Faculty of Management Press, Warsaw 2016

The book entitled *Pursuing damages for competition law infringements before Polish courts* is a collective work of authors analyzing the provisions of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union ccovered by the national law (the so-called Damages Directive) and their transposition into Polish law.

The authors sum up the hitherto state of knowledge on competition law enforcement by way of private law, and tend to [try to?] solve the essential problems of transposing the provisions of the directive into Polish law. The individual chapters include a critical analysis of the provisions of the Directive, their substantial part is dedicated to recommendations to the national legislator. The authors expect for the book to be of significant use in the substantive discussion about the changes of Polish law related to the enforcement of competition rules by way of private law. According to the authors, the book could also support the transposition of 2014/104/UE Directive

so that it makes it possible to effectively pursue damages resulting from competition law infringements in Poland.

4.3. ***Economics of Competition Protection. Vertical Restraints*****, Edited by Anna Fornalczyk and Tadeusz Skoczny** [in Polish: Ekonomia ochrony konkurencji. Ograniczenia wertykalne.], **CARS Textbooks and Monographs (19), University of Warsaw Faculty of Management Press, Warsaw 2016**

This book presents the contributions to an international conference co-organized by the Polish Office of Competition and Consumer Protection (UOKiK) and the Centre for Antitrust and Regulatory Studies (CARS) of the University of Warsaw, Faculty of Management. The conference took place on the 13th and 14th October 2015 in Warsaw and gathered competition law practitioners from the US, the European Commission and a number of national competition authorities from several EU Member States. Many representatives of the academia from both Poland and abroad were also present. The participants of the conference took an active part in panel discussions, presented scientific papers and benefited from the possibility to attend many interesting exchanges of professional opinions and practical experiences. What characterizes this publication is that it represents both the theoretical as well as the practical approach to the application of economics in competition law enforcement. This book was, at the same time, the first publication in Poland that offered both Polish and foreign economic and legal contributions which look for the optimal solution to the use of economic analyses and tools in the administrative decision-making process by competition authorities as well as in the judicial review process following such decisions.

4.4. ***Changes in the Polish postal services sector*****, Edited by Tadeusz Skoczny [in Polish: …] CARS 'Textbooks and Monographs' (23), University of Warsaw Faculty of Management Press, Warsaw 2016**

This book is the result of the I National Scientific Conference entitled *Changes in the Polish postal services sector*. The conference was organized by the Scientific Organization of the Energy Law and other Infrastructural Sectors of the University of Lodz; it was held under the honorary patronage of the President of the Office of Electronic Communications (UKE) and CARS, the National Chamber of Legal Advisers, the Lodz Scientific Society as well as the National Employers Union of Non-Public Postal Operators.

The book includes the conference presentations as well as additional texts that discuss, among others, such issues as: non-regulatory state interference in the postal services market, including issues of state aid for postal sector companies; financial and regulatory conditions for the liberalization of the postal services market or; the provision of universal postal services. The book includes also the 'Programme' of the conference and the 'Bibliography of Postal Law in Poland'.

4.5. *Yearbook of Antitrust and Regulatory Studies* (YARS) (www.yars.wz.uw.edu.pl)

Both volumes of YARS issued in 2016 – that is, 2016, vol. 9(13) and 2016, vol. 9(14) – were regular numbers. They contained academic papers from authors from Albania, Georgia, Kosovo, Poland, Slovakia, Ukraine, Hungary and the United States.

4.6. *Internet Quarterly on Antitrust and Regulation (internetowy Kwartalnik Antymonopolowy i Regulacyjny*, iKAR) www.ikar.wz.uw.edu.pl

The year 2016 proved to be another expansion period for the *internet Quarterly on Antitrust and Regulation*. Eight separate volumes of iKAR were published that year. Four of them had a general nature containing varied contributions on competition and consumer protection matters (volumes 1(5), 3(5), 5(5), 6(5)). The remaining four volumes were dedicated to specific regulated sectors: air and railway transport (No 2(5)), energy and air transport (No 4(5)), telecommunications (No 7(5)) and science (pharmaceuticals and healthcare (No 8(5)).

5. Conferences

5.1. CARS scientific conference on *Pursuing damages for competition law infringements before Polish courts*

On 20 April 2016, the Centre for Antitrust and Regulatory Studies (CARS) organized a scientific conference entitled Pursuing damages for competition law infringements before Polish courts. The conference provided the opportunity to discuss selected assumptions and problems related to the implementation of the Damages Directive (2014/104/UE) – an issue broadly analyzed in the aforementioned book of the same title edited by Anna Piszcz and Dominik Wolski and published as CARS 'Textbooks and Monographs' (21).

The conference was composed of two sessions moderated by Professor Stanisław Sołtysiński and Judge Katarzyna Lis-Zarrias. The authors of the book presented their contributions as well as implementation suggestions, which were then publicly discussed.

5.2. Polish Consumer Conference

The Polish Consumer Conference was the key event of 2016 within the area of competition and consumer protection law in Poland. The conference was organized by CARS and the University of Economics in Katowice in cooperation with the Office of Competition and Consumer Protection (UOKiK). Tauron Sprzedaż acted as the patron of the conference. The conference materials were published in a book entitled *Consumption law in practice* edited by Marzena Czarnecka and Tadeusz Skoczny (C.H. Beck, Warsaw 2016).

The Polish Consumer Conference took place on 9-10 May 2016. Its goal was to provide the participants with the opportunity to exchange their experiences. It was also meant to help those present – entrepreneurs, practicing lawyers and economists – to establish contacts with representatives of the most important organizations involved in the protection of consumer rights in Poland, including courts. The conference was an opportunity to sum up the scientific achievements related to consumer protection. It also helped to point out current and future challenges for academics and practitioners specializing in the law and economics of consumer protection. The conference covered four areas: (1) abusive clauses; (2) prohibition of infringing collective consumer interests; (3) economics of consumer protection; and (4) consumer and competition protection in energy sector.

5.3. Antitrust Aviation Seminar

The Antitrust Aviation Seminar was held on 12 October 2016 at the Faculty of Management of University of Warsaw. The event was organized by the Centre for Antitrust and Regulatory studies (CARS) under the auspices of the Polish Civil Aviation Authority and LOT Polish Airlines. The principal goal of the seminar was to familiarize its participants with antitrust policy and legal regulations in civil aviation in the American and European environment from both an academic and a practical perspective. The seminar covered, among others: (a) the relationship between antitrust and aviation policy and economic regulations in civil aviation; (b) competition between local and international transportation systems and its impact on airlines' strategy; (c) the impact of antitrust policy on the establishment and activity of airline alliances; (d) antitrust perspectives in the relationships between airlines and airports.

Speeches were given by a number of distinguished experts representing both the academia as well as the aviation sector: Professor Michael Jacobs (DePaul University, Chicago), Professor Marek Żylicz, Dr Izabella Szymajda-Wojciechowska (vice-president, Polish Civil Aviation Authority), Dr Agnieszka Kunert-Diallo (compliance officer, LOT Polish Airlines), Dr Filip Czernicki ('Polish Airports' State Enterprise) and Dr Jan Walulik (CARS).

5.4. Conference on the *Judicial review of the decisions of the President of the Office of Electronic Communications (UKE)*

On 6 December 2016, CARS and the Modzelewska & Paśnik law firm organized at the Faculty of Management, University of Warsaw, a conference dedicated to the judicial review of the decisions of the President of UKE. The conference was composed of two panels.

The first panel covered evidence issues, including: (a) difficulties in determining the reasons for specific decisions of the President of UKE; (b) confidentiality of evidence for the recipients of the decision; (c) burden of proof in court proceedings in the case of an appeal against the decision of the President of UKE, if the appellant seeks the cancellation of the decision; (d) the role of expert witnesses/private experts.

The second panel covered the character of verdicts changing and repealing the decisions of the President of UKE, including: (a) the admissibility of the decision to be repealed if a change is requested; (b) the consequences of the judgment depending on the nature of the repealed decision (that is, whether it is a declaratory decision or not); (c) the effectiveness of the protection of the rights of the appellant; (d) the consequences of a judgment repealing or amending a decision.

6. Guest lectures

6.1. Professor Dr Peter Behrens, *The Continuing Relevance of Ordoliberal Thinking in European Competition Policy and Law*

As a part of the CARS guest lecture series dedicated to the axiology of competition protection, Professor Peter Behrens from the University of Hamburg (1984–2006) and the Europa-Kolleg Hamburg, held a lecture about the continuing relevance of ordoliberal thinking in European competition policy and law. Professor Behrens is also a guest lecturer at the Central European University (Budapest), University of St. Gallen (Switzerland) and College of Europe (Brugia).

6.2. Professor Dr Michael Jacobs, *Durability of the Chicago School in Antitrust: What Accounts for it?*

As a part of the CARS guest lecture series dedicated to the axiology of competition protection, Professor Michael Jacobs from the DePaul University Chicago held on 11 October 2016 a lecture about the importance of the Chicago School for competition protection. Professor Jacobs is a renowned American antitrust expert, cited by the US Supreme Court, whose articles are published in the most prestigious American journals such as, among others, the *Antirust Law Journal* and the *Yale Law Journal*. Professor Jacobs works also at universities in Australia and China.

7. Training workshops

7.1. Workshop on consumer and competition protection for judges specializing in competition law and UOKiK employees

From autumn 2015 until the summer of 2016, CARS organized a series of workshops commissioned by the District Court in Warsaw, in cooperation with the Court of Appeal in Warsaw and the Office of Competition and Consumer Protection (UOKiK). The workshops were specifically designed for antitrust judges and UOKiK employees. The goal of the workshops (moderated by CARS employees and co-operators) was to facilitate the exchange of opinions and practical experiences between antirust judges

and UOKiK employees in selected areas of competition and consumer protection. The workshops covered: (1) subjective scope of the application of the Act on Competition and Consumers Protection, including the concept of a single economic unit; (2) fining policy; (3) bid rigging; (4) inspections and searches; (5) evidentiary issues.

7.2. Workshop for UOKiK employees

In the autumn of 2016, CARS organized also a workshop on evidence issues, which was commissioned by UOKiK and designed for its own employees. The workshop was conducted by Dr hab Tomasz Szanciło, Judge of the Court of Appeal in Warsaw.

8. Laboratories

In 2016, CARS established three research and training laboratories – Civil Aviation Laboratory, Postal Market Laboratory as well as Railway and Public Transport Laboratory. The laboratories will fulfill CARS's statutory tasks in the areas of regulated and special sectors. The three units started their activities from building an expert team and preparing action plans. The Civil Aviation Laboratory organized its first aerial seminar, the Antitrust Seminar, and began to work on the International Airline Regulatory and Antitrust Conference to be held in October 2017.

9. National Cooperation

9.1. Cooperation with the Railway Institute

On 28 February 2016, the Faculty of Management (University of Warsaw) signed a Cooperation Agreement with the Railway Institute. CARS will perform most of the tasks arising from this agreement.

9.2. Cooperation with the National Institute of Telecommunications

On 14 November 2016, the Faculty of Management (University of Warsaw) signed a Cooperation Agreement with the National Institute of Telecommunications. CARS will perform most of the tasks arising from this agreement.

9.3. Cooperation with Polish Post S.A.

On 7 November 2016, the Faculty of Management (University of Warsaw) signed a Cooperation Agreement with Polish Post S.A. Tasks arising from this agreement will be performed by CARS and other units of the Faculty of Management.

Warsaw, 31 December 2016

CARS Postal Market Laboratory

The Laboratory of Postal Market was established on 1st September, 2016 as the research subdivision of the Centre for Antitrust and Regulatory Studies (CARS). The Laboratory fulfils the CARS mission by conducting research on the postal market in Poland and the EU. The activities concentrate on sector-specific regulations as well as competition protection and pro-competitive factors in a market economy. The Laboratory was established as a response to dynamic changes in the postal market, which are important for the wider economy. At the same time, the EU postal market after the liberalization process is still in the shaping phase, which brings a need for an in-depth scientific study.

A number of activities have been undertaken by the Laboratory in recent months. Among the more significant ones is the signing of a cooperation agreement between CARS and the incumbent post operator Polish Post (Poczta Polska S.A.) in November 2016.

The agreement provides a unique possibility to both parties to collaborate and conduct joint research about the postal market. It is worth pointing out that CARS has a similar agreement with the President of the Office of Electronic Communication (UKE), which is the Polish national postal regulator. Moreover, in December 2016, the Laboratory, in cooperation with senior researchers from the Faculty of Management, University of Warsaw, completed an analysis and evaluation of the development strategy of the Polish Post.

The ongoing research includes work on the first commentary on the Polish Postal Law (expected to be published in 2018). Besides, on 28th September, 2017, the First National Postal Conference was held at the Faculty of Management. The title of the conference was "The postal market in a changing world" (pol. *Rynek pocztowy w zmnieniającym się świecie*). Conference proceedings will be published in a special edition of *internetowy Kwartalnik Anrymonopolowy i Regulacyjny* (iKAR) in 2017. Moreover, at the end of 2018, we plan to organize an international postal conference. The main topic will focus on the liberalization of the postal sector from the Central and Eastern European perspective.

Dr. Mateusz Chołodecki
Head of CARS Postal Market Laboratory
mateusz.cholodecki@amu.edu.pl

CARS Rail and Public Transport Laboratory

On 17th October, 2016 was established the Rail and Public Transport Laboratory as a part of the Centre for Antitrust and Regulatory Studies (CARS) at the Faculty of Management of Warsaw University. It is the third unit of its kind, which will encompass main CARS activities within the framework of regulated and specific sectors. It is worth mentioning that it is the first this type research unit in Poland.

The Laboratory was established for several reasons. The issues of European pro-competitive regulation of railway and public transport sectors has become increasingly important for the functioning both polish and EU transport markets. The promotion of economic competition in railway transport sector has been main aim of European transport legislation since 1991. Step by step the European Commission created a legal framework for opening of railway transport market for competition in the form of three and now four so-called Railway Packages. One of the main goals of EU transport policy is to enhance the role of rail transport, as eco-friendly mean of transport, and ensure the provision of more numerous, safer, cheaper and higher quality public transport services. These targets are closely related. Described aims can only be achieved if railway undertakings and public service operators will provide efficient and attractive services. The main mechanism to achieve efficiency of the railway and public transport sectors is to introduce competitive mechanism in these sectors. Increased competition should enhance the attractiveness of rail (as well as public transport) and make the railway sector more responsive to customers' needs, allowing rail operators to compete with other modes of transport. In January 2013, the European Commission announced proposals for a Fourth Railway Package, a set of far reaching measures to encourage more innovation in European railway mainly by further opening railway market to competition. In 2016 the Fourth Railway Package has been finally adopted. It consisting of two pillars – technical pillar and political pillar. The Fourth Railway Package covers the issues of rail governance, market opening for domestic passenger rail transport, competitive tendering for Public Service Obligations contracts and a new role for the European Railway Agency. The new EU legislation have to be implemented into the polish law. Some acts of the Fourth Railway Package provide long transitional periods. It means that implementation of the package into the national law might be a quite long-term process. For the above reasons, the issues of EU pro-competitive regulation of rail and public transport has become very important for railway undertakings, infrastructure managers, public transport operators, competent authorities, sectoral regulators and their organisations.

The Head of the Laboratory is Dr. Stefan Akira Jarecki, at CARS he is also a coordinator of railway transport sector. Dr. Stefan Akira Jarecki is a well know expert in the field of transport and state aid law, author of several publications in these areas, lecturer at the Warsaw School of Information Technology under the auspices of the Polish Academy of Sciences, former Director of the Railway Transport Department at the Ministry of Infrastructure and Construction, participant in the Warsaw Seminar of Axiology of Administration, speaker at numerous workshops and conferences on transport-related topics and State Aid. He represented Polish authorities before the European Commission. His book, titled "Pro-competitive regulation in the area of passenger railway transport" was nominated to the CARS 2015 award. He also works for the Polish government administration, currently dealing with cases concerning European Structural and Investment Funds, as well as with cases on State Aid. Associate of the Laboratory is Mr. Łukasz Gołąb. He is an assistant in the Chair of Public Commercial Law at the Faculty of Law and Administration at Cardinal Stefan Wyszynski University in Warsaw and member of a Competition Law Association. He is an excellent expert in the field of transport, energy and antitrust law. The team of the Laboratory will be further developed.

The Laboratory activity concentrates on widely understood issues of competition and consumer protection and pro-competitive and pro-consumer sector-specific regulation in railway and public transport sectors. In this respect, the Laboratory is conducting interdisciplinary scientific research and preparing scientific reports and expert opinions (surveys), publishing books and periodicals, holding scientific conferences, organising training courses and cooperating with similar research units in Poland and in foreign countries.

Within the framework of consultancy the Laboratory offers preparation of experts reports for public institutions and companies. There is always open access to these expert reports from CARS website (www.cars.wz.uw.edu.pl). For example, in 2016 the Laboratory have prepared Expert Opinion of CARS titled "Assessment of public financing, including EU resources, of the investment in the railway station buildings in the context of the notion of state aid in the meaning of the article 107(1) of the Treaty on the functioning of the European Union". The expertise was commissioned by the PKP S.A. (Polish State Railways). The aim of the opinion was to assess whether public financing of the investment in the rehabilitation (modernisation) of railway station buildings constitute state aid in the meaning of the article 107(1) of the Treaty on the functioning of the European Union. The purpose of the expertise was also to answer to the question whether support for such investments should be notified to the European Commission according to article 108(3) of the Treaty on the functioning of the European Union and rules laid down in the regulation 2015/1589.

The Laboratory will publish periodicals (special volumes of Yearbook of Antitrust (in English) and volumes of Internet Quarterly of Antitrust and Regulation – internetowy Kwartalnik Antymonopolowy i Regulacyjny – IKAR (in Polish) as well as books dedicated to various aspects of law and economics of pro-competitive sector specific regulation of railway and public transport sectors. Another volume

of Internet Quarterly of Antitrust and Regulation dedicated to railway and public transport sectors will be published in September 2017.

In order to popularize the knowledge on economic and legal aspects of pro-competitive sector specific regulation of railway and public transport sectors and in order to inspire a discussion on these problems, the Laboratory organizes traditional conferences and seminars. Workshops may be organized jointly by the Laboratory and a partner institution (a law or consulting firms). The national conference concerning new regulations in the field of railway transport ("Railway transport challenges ahead") will be held in November 2017. The CARS Railway Transport Conference will be organized every year. International conferences are also planned.

Moreover, the Laboratory offers trainings for people from public institutions and companies, covering law and economics of pro-competitive sector specific regulation of railway and public transport sectors. The Laboratory strategy for the following years foresees also the application for public – national and European – grants. The Laboratory is also ready to carry out research projects commissioned or sponsored by public institutions and economic entities. In 2016 CARS have signed the Cooperation Agreement with the Railway Institute in Warsaw. It was the first CARS cooperation agreement with industrial scientific institution. All the activities of the Laboratory may be conducted in cooperation with the Institute.

Dr. Stefan Akira Jarecki
Head of CARS Rail and Public Transport Laboratory
stefan_jarecki@poczta.fm

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