

Entrepreneur's rights in antitrust cases. Conference Report Warsaw, 23 April 2012

A conference entitled 'Entrepreneur's rights in antitrust cases' was held in Warsaw on the 23rd of April 2012 gathering around 150 participants. The conference was co-organized by the Centre for Antitrust and Regulatory Studies (CARS) and the Institute of Law Studies of the Polish Academy of Sciences. It was co-financed by the Polish Science Foundation.

The opening speech was delivered by Professor Władysław Czapliński, Director of the Institute of Law Studies. The conference was divided into three sessions. The first session was chaired by Professor Tadeusz Skoczny, Director of CARS and contained four presentations, two of them related to the classification of antitrust proceedings (cases) as administrative and/ or criminal proceedings.

Professor Małgorzata Król-Bogomilska (Institute of Law Studies) spoke of 'Entrepreneur's rights standards in antitrust cases – administrative and criminal problems?' She concluded that 'the necessity to respect certain rights of entrepreneurs, sanctioned on the basis of antitrust law, cannot be put into question, irrespective of the extent to which the thesis is accepted on the criminal character of fines and antitrust proceedings'. The speaker noted in particular that the Lisbon Treaty made the criminalization process of antitrust violations more dynamic in EU Member States, because it introduced a direct legal basis for co-operation in criminal matters in the EU.

Dr. Anna Błachnio-Parzych (Institute of Law Studies) entitled her presentation 'Character of entrepreneur's liability in antitrust proceedings and the concept of accusation in the case law of the European Court of Human Rights'. In the analysed jurisprudence, she found under which conditions liability for particular legal breaches would be criminal in nature; one of these conditions was the seriousness of the resulting sanctions.

Dr. Rafał Stankiewicz (Faculty of Law and Administration, University of Warsaw) delivered a speech on 'The scope of the application of the Code of Administrative Procedure in antitrust proceedings'. He stressed therein, among other things, that 'the general reference included in Article 83 CAP is related to the creation of strong personal rights in antitrust proceedings'.

Aleksander Stawicki (LL.M) spoke of 'Court proceedings on an appeal from a decision of the UOKiK President and constitutional guarantees for the protection of entrepreneur's rights'. He addressed the necessity of the verification by the Court of

Competition and Consumer Protection of decisions issued by the Polish competition authority (UOKiK President) not only from the perspective of their merits, but also considering their procedural correctness.

In the discussion summing up the first session of the conference, many noted the lack of juridical control over the procedural dimension of the decisions issued by the Polish NCA and the fact that this results in a low standard of entrepreneurs' rights protection in domestic antitrust cases. Some commentators spoke however also of the danger of paralysing the activity of the competition authority by way of an overly restrictive approach to procedural breaches. In relation to the criminalization of antitrust violations, Professor Sławomir Dudzik (Jagiellonian University) stressed that the economization of competition policy means that the assessments of market behaviours are increasingly less clear cut. It is thus often really difficult to attribute liability for a given practice to a specific entrepreneur, because antitrust practices can result from the dynamics of market changes, independent from entrepreneurs.

Dr. Dawid Miąsik (Institute of Law Studies) moderated the second panel of the conference entitled 'Entrepreneur's rights in antitrust cases and European standards'.

Dr. Maciej Bernatt (Faculty of Management, University of Warsaw; CARS) started with a critical analysis of the right to a hearing in proceedings before the UOKiK President. Referring to current Polish legislation, he spoke of the need to interpret existing legal provisions in such a way as to guarantee the right to a hearing in antitrust proceedings. With regard to the planned changes of the Competition Act, he stated that the amendment should not only aim to increase efficiency, but also improve the level of respect of procedural fairness. Such changes were said to be required by the criminal (in the light of Article 6 ECHR) character of antitrust proceedings on competition restricting practices.

Bartosz Turno (LL.M, Adam Mickiewicz University) presented a speech prepared jointly with Agata Zawłocka-Turno (LL.M) under the titled 'Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?' In the opinion of the authors, the Lisbon Treaty established 'a new legal environment' (binding force, equal to the Treaties, for the Charter of Fundamental Rights as well as the signing of the ECHR by the EU). This development should result in the compliance of the LPP and the privilege against self-incrimination with the case law of the European Tribunal of Human Rights. Changes should cover, among others, the enlargement of the scope of the LLP, under certain circumstance, to in-house lawyers and communications related to compliance programmes as well as granting the LLP to lawyers from non-EU jurisdictions. Within the privilege against self-incrimination, the authors spoke in favour of an absolute right to remain silent.

Dr. Grzegorz Materna (Institute of Law Studies) spoke of 'Judicial control over dawn raids during antitrust proceedings before the UOKiK President'. In his opinion, the current scope and method of regulating judicial control over dawn raids 'cannot be assessed in a decisively positive manner'. This is so neither from the perspective of the entrepreneurs subject to unannounced controls, nor from the perspective of the competition authority. Dr. Materna criticized also the fact that current provisions on

dawn raids for antitrust proceedings are to be found in two separate legal acts: the Act on Economic Freedom and the Competition Act.

The last speech in the second session, entitled 'Impact of the *ne bis in idem* rule on proceedings of the European Commission and the UOKiK President in cases of anticompetitive agreements', was delivered by Przemysław K. Rosiak (legal advisor). The author outlined the conditions for the application of the *ne bis in idem* rule in EU competition law. Mentioned were also the many problems arising in this context in situations such as a concurrence of proceedings before the Commission, Member States' NCAs and competition bodies of 3rd countries as well as the concurrence of fines imposed on entrepreneurs in such cases.

In the closing discussion, Jarosław Sroczyński claimed that the Polish Competition Act contains an element guaranteeing the right not to self incriminate. Commentators held that the LPP should be protected in Poland even now, despite the lack of appropriate legislation, in the application practice of the Competition Act by the UOKiK President, mainly during dawn raids.

The last session of the conference, 'Entrepreneurs' rights and legal solutions in the EU', was chaired by Dr. Agata Jurkowska-Gomułka (Faculty of Law, University of Warsaw; CARS).

Dr. Inga Kawka (Pedagogical University of Cracow) delivered first a speech on 'Entrepreneurs' rights in proceedings that result in a commitment decision in EU competition law'. She argued for the need to positively establish the scope of the binding force for NCAs and courts of commitment decisions issued by the Commission. She also spoke in favour of the introduction of the requirement of proportionality of commitments and the seriousness of the infringements, as well as for the use of a specialized competition court competent to judge antitrust cases on their merits. Some of her postulates were considered 'far-reaching' in the closing discussion.

The next presentation was entitled 'Exchange of information and evidence among competition authorities and the protection of entrepreneurs' rights'. Its authors, Sonia Jóźwik (University of Silesia) and Dr. Mateusz Błachucki (Institute of Law Studies), focused on key doubts surrounding the standards of entrepreneurs' rights protection in the practice of information and evidence exchange within two biggest European organizations gathering national competition bodies: European Competition Authorities and the European Competition Network. They stated that these doubts arise mainly in the area of cooperation on anticompetitive practices and regard, for instance, the awareness of entrepreneurs that cooperation in information and evidence exchange takes place at all, as well as the scope of the protection of entrepreneurs' secrets. Cooperation in merger cases is far less controversial as it is based on the free will and engagement of the interested entrepreneurs.

Mariusz Baran and Adam Doniec (both from Jagiellonian University) spoke of problems related to the scope of the jurisdiction of EU courts ruling on the legality of decisions imposing fines. Identified first were two judicial control models over Commission decisions that impose sanctions – the model of 'unlimited' and the model of 'limited' control. The speakers stated that limiting the scope of the control of decisions imposing sanctions in the unlimited control model might infringe

the rule of effective legal protection and Convention-based standard of a right to a fair trial.

Dr. Krystyna Kowalik-Bańczyk (Technical University in Gdańsk, Institute of Law Studies) dedicated her speech to ‘Procedural autonomy of Member States and EU rights of defence in antitrust proceedings’. The paper meant to answer the question whether EU ‘procedural *aquis*’, resulting from the jurisprudence of EU courts and concerning proceedings before the Commission, should become the standard applicable to national antitrust proceedings concerning Article 101 and 102 TFEU. The authors concluded that reference to EU jurisprudence is necessary when it improves the level of entrepreneurs’ protection.

Among the many comments made during the concluding discussion, special note should be taken of the views expressed by Professor Sławomir Dudzik (Jagiellonian University). When analysing entrepreneurs’ rights in antitrust proceedings in the context of ECHR’s jurisprudence and EU *aquis*, Professor Dudzik stressed that the fact should not be forgotten that proceedings before the UOKiK President, also in EU-related matters, are first and foremost subject to the provisions of the Polish Constitution. Constitutional standards cannot be lowered in comparison to EU standard.

Prof. Małgorzata Król-Bogomilska raised the problem of fines for antitrust violations, especially as far as their concurrence is concerned (for instance, in the case of bid-rigging which can be sanctioned on multiple legal bases, not just the Competition Act).

In conclusion, Dr. Krystyna Kowalik-Bańczyk summarized the most important issues raised in the speeches delivered during the conference as well as thanked a number of persons for their contribution to the organization of the conference.

The decisive majority of the papers delivered during the conference were based on articles published in the Yearbook of Antitrust and Regulatory Studies 2012, vol. 5(6). Its content is available at <http://www.yars.wz.uw.edu.pl>.

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