

2nd International Competition Law Forum. Report Warsaw, 27 September 2012

A conference took place on 27 September 2012 organized by the Polish Competition Authority (hereafter, UOKIK) in the premises of the Warsaw School of Economics. The conference was dedicated to most important challenges in the enforcement of competition law. It brought together prominent experts from foreign competition authorities (including the European Commission, OECD and UNCTAD), Polish officials and law practitioners.

After welcoming the participants, Małgorzata Krasnodębska-Tomkiel (UOKIK President) described the background and objectives of the meeting emphasizing that the opinions gathered during the conference were especially valuable in light of the amendment process to the Polish Competition Act underway at the time. It was also stressed that the conference was only the beginning of a broader debate to be continued at a meeting of the International Competition Network planned to take place in Warsaw in April 2013.

Piotr Ostaszewski (Vice-Rector, Warsaw School of Economics) took the floor next. By recalling the words of Margaret Thatcher: “*the manner of winning is a matter of honor*”, he highlighted the importance for companies of achieving their business goals by honest means. Joaquín Almunia (Vice-President, Commissioner for Competition, European Commission) presented the main challenges for competition policy in the European Union. He drew attention to the liberalization of the telecommunication sector and to current attempts to create a single energy market. He also introduced recent activities of the Commission in the *Google* and *Universal* case and noted the *Memorandum of Understanding* that has been signed with China.

Eduardo Perez Motta (Chairman, Mexican Federal Competition Commission, ICN Chair) discussed the main activities of the International Competition Network. He stressed, on the one hand, that the observed economic slowdown cannot be treated as an excuse for a relaxation of competition enforcement. He argued that such approach would be to the detriment of consumers who pay prices higher by 40% on average on non-competitive markets. On the other hand, policy must be balanced so as not to intervene where the mere costs of intervention outweighs the possible harm for consumers. To avoid this, OECD seeks to identify those sectors where over-regulation may restrict competition. One possible example is the area of credit or debit cards.

Finding the right balance between effective cartel detection and fair, legal procedure

The first panel, chaired by Marta Sendrowicz (Warsaw University, Partner at Allen&Overy, A. Pędzich), was devoted to maintaining a balance between efficient cartel detection and respecting the right to fair trial. Kris Dekeyser (representative of DG COMP) presented the main actions undertaken in this context in the framework of DG COMP proceedings. He stressed that the requirements of *due process* cannot be discussed in isolation from efficiency. Although, rights of different participants are not easy to reconcile, the current system is in line with the ECHR and within the Commission as such there are many mechanisms of mutual control, which are intended to ensure objectivity. Moreover, Commission notice on best practices for the conduct of proceedings broadened the scope of the right to be heard as well as increased the role of the Hearing Officer. This is not to say that the current system is perfect, there is, however, still room for improvement without radical institutional change.

Grzegorz Materna (Director of Competition Protection Department, Polish Office of Competition and Consumer Protection) presented the Polish perspective on this issue. He stressed that there is no contradiction between procedural fairness and efficiency, but with multiple equivalent solutions, the most effective should be chosen. He also indicated that the Polish Competition Authority (UOKiK President) strives to mitigate legislative failures in its decisional practice. A significant step to strengthening the guarantee procedural fairness in Polish legislation was taken when drafting the new amendment. In this respect, the Authority proposed to clarify the rules governing *legal professional privilege* (LPP). A substantial change should occur also with respect to control and search operations, the latter should not be used in preliminary proceedings and only be conducted upon court approval. In addition, the office proposed to clarify the methods of setting fines, as well as to extend the term in which an appeal can be lodged against a decision of the competition authority.

Jolanta Tropaczyńska (Director of Legal Office, Orange) considered procedural fairness from the perspective of Polish entrepreneurs. She indicated, as regards *legal professional privilege* (LPP), that the current arrangements are inadequate and that, much to the disappointment of entrepreneurs, the originally envisaged legal improvements were ultimately abandoned. She stressed that the postulated right to access all electronic data in the course of search operations is excessive. Raising the issue of confidentiality of the search, she pointed out that involving the public opinion in the search should be eliminated so as to prevent a premature loss of the investigated company's good name.

Jacques Steenbergen (Director General, Belgian Competition Authority, Directorate General for Competition) talked about finding the right balance between effective cartel detection and fair, legal procedure. He described the rationale of complaints and the approach that competition authorities should take towards them. Much attention was given to leniency applications and the need for a cautious use of information obtained therein. Noted was also the need to protect the legitimate interests of applicants. The speaker highlighted in addition, the controversies surrounding the

use by authorities of other inquiry methods such as eavesdropping, information from whistleblowers etc.

Competition law in the process of reforms: new trends in sanctioning policy

Efficiency of fines

The second panel was moderated by John Davis (Head of the Competition Division, Directorate for Financial and Enterprise Affairs, OECD) and devoted to new sanctioning trends. Efficiency of fines was discussed first. Grzegorz Kaniecki (Vice-President, Polish Association of In-House Lawyers) stressed that no direct relationship between the level of antitrust fines and the degree of law compliance is being observed. It is also problematic to see who is the actual addressee of the deterrence effect seeing as there is a significant dispersion of responsibility in the case of transnational corporations. There might, perhaps, be a need for the authorities to reformulate the noble objective of 'effective' law enforcement and set out a system of small steps, that is to say, the promotion of compliance programs and assisting companies in their effective implementation. The speaker stressed that the only way to influence large corporations is to attempt to change the way in which they operate, rather than pursue deterrence.

This subject was continued by Andreas Reindl (Professor, Leuphana University, Lueneburg). He stressed that the test of 'effectiveness' of deterrence is the extent to which it is capable to change the behavior of entrepreneurs. A reward system for those who implement and improve compliance programs should be introduced. Hassan Qaqaya (Head of Competition and Consumer Policies Branch, UNCTAD) stressed on the other hand that effective protection of competition means not only sanctions, but also compensation for the infringement. But here arises the problem of estimating damages as well as the question whether the possessed information is sufficient to determine the overall impact of an antitrust violation. A big challenge is also to find the best way to compensate the victims the harm they suffered. Considering the huge sizes of administrative fines, it is difficult to find optimal solutions. Economic analysis does not always offer an answer since a given number, calculated on the basis of probability calculus, does not guarantee that principles such as equal treatment will be respected.

Responsibility of individuals

The second part of the panel was devoted to the responsibility of individuals for breaches of competition law. Piotr Milczarek (Counsel, Attorney-at-law, British Polish Chamber of Commerce) posed the question here of the legitimacy of imposing such fines and noted a number of concerns with particular emphasis on the discussed draft amendments to the Polish Competition Act. In his view, the current circle of persons facing such responsibility is too broad and may potentially include the majority of a company's employees. Controversial is also the administrative character of the penalty

imposed. The main questions that remain are the circumstances in which penalties are imposed, their character and, above all, their aim.

David McFadden presented Irish experiences in this field. He stated that the main objective of penalties for individuals is to sanction the behavior of those, who are directly responsible for the infringement. A deterrent function is achieved by the introduction of imprisonment as well as deprivation of rights. It is worth noting that a court found it acceptable to punish individuals without sanctioning the company – this made it possible to punish offenders whose company ceased to do business. As a result, the attractiveness of the leniency programs has grown for both individuals applying individually or together with their companies.

Settlement procedure

The third part of the discussion was devoted to settlements as an alternative method of terminating antitrust proceedings. The EU law perspective was presented by Jean-François Bellis (Professor of University of Brussels, Partner, Van Bael & Bellis). He stressed that this procedure has always been controversial due to the number of procedural rights which must be waived by the participating companies. In addition, the EU procedure has for many years lacked a predictable method of fine calculation. Settlement is used only when facts of the case are not disputed between the participants. Although the amount of the penalty is not subject to negotiation, it is possible to discuss within the procedure the factors based on which it is calculated overall. This fact appears to be an advantage of settlement, alongside the 10% penalty reduction provided by the law. A disadvantage of the system lies in the fact that the Commission is reluctant to apply settlement if all parties do not agree to participate in the procedure (so-called hybrid settlements).

Portuguese experiences were described by Marina Tavers (Director of the International Relations Bureau, Portuguese Competition Authority). She stressed that the main objective of settlement is to accelerate proceedings while maintaining their effectiveness and respecting the participants' right to defense. Therefore, it is mandatory to conduct a full investigative process where cooperation with the parties can facilitate the accumulation of evidence. Questions on the fixed level of fine reductions as well as whether settlement should be available to all types of violations are left open.

The next speaker, Wojciech Graczyk (Director of Legal Affairs and Regulatory Management/Compliance Officer, RWE Polska S.A) highlighted the fact that terminating antitrust proceedings by way of settlement can be both faster and more efficient than litigation. In this context, it would be advisable for the Polish Competition Authority to issue Guidelines on the application of commitment decisions. He also noted that entrepreneurs often face significant difficulties in complying with commitments, especially if their activity is controlled by multiple regulators, the actions of which are not consistent.

Review process – effective case presentation in the courtroom

The last panel was chaired by Małgorzata Krasnodębska-Tomkiel (UOKiK President). It was dedicated to the effective presentation of antitrust cases before the judiciary. Frédéric Jenny (Chairman, Competition Committee, OECD) described the challenges associated with the economization of competition law and the difficulties in delivering an economic expertise in the courtroom. It is clear that providing judges with appropriate training plays a central role here. However, much depends also on the manner in which economic arguments are being presented. It is important that they are based on suitable methodology, combined with an objective justification of their application to a particular case. In addition, the analysis should refer to well-established economic theories so that it is possible to confront a variety of views. Finally, it is essential to remember that the obtained results are a reflection of a certain probability only – the court cannot be expected to accept them without reservations.

A number of practical remarks were given by William McKechnie (President, The Association of European Competition Law Judges). He pointed out that the primary task of judges is to determine whether the alleged violation has actually taken place. Economic expertise should thus be presented in a way that enables the judiciary to assess the assumptions as well as the quality of the obtained parameters. In the case of a plurality of opinions, their confrontation is advisable. Moreover, economists should draft a special memorandum, containing information about the applied fields and justifying disparities in their arguments.

Pierre Horn (Officer in charge of the COMPAL Programme, UNCTAD) presented the conclusions gathered within the framework of UNCTAD in the area of effective cooperation between competition authorities and courts. He stressed that antitrust decisions should be based on an adequate and effective investigation strategy. Errors committed at this earliest of stages increase the probability of drawing incorrect conclusions in the decision and might result in courtroom defeat. Close cooperation between lawyers and economists seems to be essential at every stage of the administrative procedure. It should also be kept in mind that direct evidence is always more convincing than circumstantial one, especially if the latter takes the form of ambiguous economic opinions, which can be interpreted in multiple ways.

Monique van Oers (Director of the Legal Service, Netherlands Competition Authority) presented the practical implementation of the aforementioned rules by the Dutch competition authority. She emphasized how important it is that decisions in antitrust cases are drafted by the same people who will later defend them in court. By doing so, antitrust officials gain litigation experience and can more easily identify arguments which, supported by evidence, will be convincing for the courts in future cases.

Jolanta de Heij-Kaplińska (Judge, Court of Competition and Consumer Protection) considered the above relationship from the Polish perspective describing the appeal path applicable to decisions of the Polish Competition Authority. She highlighted the distinction between partial judicial review as regards administrative proceedings and full control in the area of substantive law and the facts of the case. Particular attention was drawn to the burden of proof and the fact that the UOKiK President should not

only present evidence supporting his/her position but also respond to the allegations of the plaintiff. The speaker mentioned also changes connected to a recent amendment to the Polish Civil Procedure Code.

The President of the UOKiK summarized the conference emphasizing the value of the discussion that has taken place, especially in view of the debate concerning the planned amendment to the Polish Competition Act (The bill is currently being discussed in Polish Parliament, it is expected to come into force in 2014).

More information on the conference together with a choice of its presentations is available at <http://competitionforum.uokik.gov.pl/2012/en>.

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