ARTICLES
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DUSAN POPOVIC, Competition Law Enforcement in Times of Crisis: the Case of Serbia
MAJA BRKAN, TANJA BRATINA, Private Enforcement of Competition Law in Slovenia: A New Field to Be Developed by Slovenian Courts
AGATA JURKOWSKA-GOMULKA, Private Enforcement of Competition Law in Polish Courts: The Story of an (Almost) Lost Hope for Development
KARIN SEIN, Private Enforcement of Competition Law – the Case of Estonia

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Editorial foreword

The Editorial Board is pleased to present the 8th volume of the Yearbook of Antitrust and Regulatory Studies (YARS 2013, 6(8)). This volume continues and develops YARS’s new mission – presenting developments in antitrust and sector-specific regulation not only, as originally envisaged, in Central and Eastern Europe, but also in the Balkans.

The first article in YARS 2013, 6(8) is written by Alexandr Svetlicinii and concerns the concepts of an ‘undertaking’ and ‘economic activities’ in the competition law of Bosnia & Herzegovina. The analysis focuses on the application of these two notions with respect to the functioning of state (public) entities. The author assessed the impact of EU law and jurisprudence on the national enforcement practice and presents the peculiarities of the domestic system in this regard.

Dusan Popovic identifies in his article three key problems of the enforcement of competition law in Serbia, a country with a rather weak economy. Among them is the arguably privileged treatment of state-owned companies. This is reflected in a reluctant antitrust enforcement in ‘sensitive’ industry sectors, which are still dominated by state-owned companies.

Csongor Istvan Nagy writes about the decisions of the Hungarian competition authority with respect to the abuse of dominance, comparing them with EU jurisprudence and the case law of the European Commission. The author claims that domestic and EU standards for the application of the abuse of dominance prohibition diverge. These differences are identified in the article as well as their results both for the competition law enforcement system as such, and for the market situation of individual undertakings.

The three following papers present the state of the development of private enforcement of competition law in Slovenia (Maja Brkan and Tanja Bratina), Poland (Agata Jurkowska-Gomułka) and Estonia (Karin Sein). The authors analyze relevant national jurisprudence, if there is any, or assess the reasons for its absence. All three articles, despite referring to different jurisdictions, illustrate the under-development of private enforcement of competition law in their domestic systems of competition protection.
The current volume of YARS contains also a number of legislative and jurisprudential reviews. It opens with a paper by Anna Piszcz on the 2012 developments in Polish antitrust law and jurisprudence. Roman Svetnicky, Robert Neruda and Lenka Gachova resent next the recent amendments to the Czech Competition Act. The following two papers, written by Pál Szilágyi and Tihamér Tóth and by Aranka Nagy, concern competition law developments in Hungary in 2012. Nora Ziba Memeti and Adnan Jashari sum up the competition law enforcement practice in Macedonia in 2011-2012. Finally, Zuzana Šabová, Katarína Fodorová and Daniela Lukáčová discuss 2012 developments in the competition law of Slovakia.

The next part of YARS 2013, 6(8) is devoted to case comments. It includes an assessment of a judgment of the Polish Supreme Court delivered in an abuse of a dominant position case (prepared by Elżbieta Krajewska), a discussion of cartel judgments rendered by the court in Brno (written by Petra Pipkova) and finally, an analysis of judgments adopted by the Slovak Supreme Court regarding dawn raids (written by Ondrej Blažo).

In its book review section, the current volume of YARS presents the reviews of two books on competition law and IPRs both published in 2012, one in Poland and one in Serbia.

Finally, YARS 2013, 6(8) contains also two conference reports and the CARS Activity Report for 2012. The volume closes with antitrust and regulatory bibliography for 2012 in Poland, Croatia, the Czech Republic, Estonia, Hungary, Macedonia and Slovakia.

Two separate YARS volumes will be published in 2014. Aside from the regular volume, a special volume will be dedicated to the impact of EU law on domestic competition law and sector-specific regulation over the ten years of the CEE countries’ membership in the EU. A Call for papers for each of the volumes will be announced shortly on the YARS website. The YARS special volume is expected to become the first product prepared within the framework of CRANE – a newly established network of academics from CEE countries specialising in antitrust and regulation.

Warsaw, December 2013

Dr. Agata Jurkowska-Gomułka
YARS Volume Editor
List of acronyms

COMPETITION AUTHORITIES:
AMO – Antimonopoly Office of the Slovak Republic
CPC – Commission for the Protection of Competition in the Republic of Macedonia
GVH – Hungarian Competition Authority
HCO – Hungarian Competition Office
KV – Competition Authority in Bosnia and Herzegovina
NCA – National Competition Authority
OPC – Czech Office for the Protection of Competition
SOKiK – Polish Court of Competition and Consumer Protection
UOKiK – Polish Office for Competition and Consumer Protection

OTHER INSTITUTIONS:
CFI – Court of First Instance
CJEU – Court of Justice of the European Union
ECJ – European Court of Justice
ECN – European Competition Network
ECtHR – European Court of Human Rights
GC – General Court

LEGAL ACTS:
CCP – Estonian Civil Procedure Code
Competition Act – Polish Competition and Consumers Protection Act of 2007
CzAPC – Czech Act on Protection of Competition
CPC – Estonian Criminal Procedure Code
CUCA – Polish Combating Unfair Competition Act
ECHHR – European Convention for the Protection of Human Rights and Fundamental Freedoms
HCA – Hungarian Competition Act
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>GPCCA</td>
<td>General Part of Estonian Civil Code Act</td>
</tr>
<tr>
<td>LOA</td>
<td>Estonian Law of Obligations Act</td>
</tr>
<tr>
<td>LPC</td>
<td>Macedonian Law of the Protection of Competition</td>
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<tr>
<td>LSAC</td>
<td>Macedonian Law on State Aid Control</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>UPC</td>
<td>Unfair Commercial Practices Directives</td>
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**OTHER ACRONYMS:**

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<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>ATC</td>
<td>average total costs</td>
</tr>
<tr>
<td>AVC</td>
<td>average variable costs</td>
</tr>
<tr>
<td>B&amp;H</td>
<td>Bosnia and Herzegovina</td>
</tr>
<tr>
<td>CEE</td>
<td>Central and Eastern European (an)</td>
</tr>
<tr>
<td>LPP</td>
<td>legal professional privilege</td>
</tr>
<tr>
<td>LRAIC</td>
<td>long-run average incremental costs test</td>
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<tr>
<td>OJEU</td>
<td>Official Journal of the European Union</td>
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<tr>
<td>R.M.</td>
<td>Republic of Macedonia</td>
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<tr>
<td>RPM</td>
<td>resale price maintenance</td>
</tr>
<tr>
<td>SIEC</td>
<td>Significant Impediment of Effective Competition</td>
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<tr>
<td>UCP</td>
<td>Unfair Commercial Practices</td>
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Expanding the Definitions of ‘Undertaking’ and ‘Economic Activity’: Application of Competition Rules to the Actions of State Institutions in Bosnia and Herzegovina

by

Alexandr Svetlicinii*

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I. Introduction
II. State institutions as undertakings in EU competition law
III. State institutions as undertakings within the meaning of the B&H Competition Act
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   1. Anti-competitive agreements in the national healthcare system
   2. State institutions as undertakings in the public transport markets
   3. Reasons for exempting State institutions from competition law enforcement
V. Concluding remarks

Abstract

State-initiated competition restraints remain a recurrent problem for competition law enforcement in transition economies characterized by a history of price controls and extensive State regulation of economic activities. The application of the concepts of ‘undertaking’ and ‘economic activity’ to the actions of State institutions, as developed in EU competition law, allows national competition authorities to enforce competition rules against public bodies. EU candidate countries, as well as States aspiring to a candidate status, have been continuously reforming their competition laws, aligning them with acquis communautaire and applying EU competition law concepts and standards in their domestic enforcement.

* Senior Research Fellow at the Jean Monnet Chair of European Law, Tallinn University of Technology, Tallinn Law School; alexandr.svetlicinii@ttu.ee
practices. This paper deals with the particularities of the application of competition rules to the actions of State institutions in Bosnia and Herzegovina. A detailed study of emerging domestic case law demonstrates significant deviations in the interpretation and application of these well known competition law concepts. The legislative and enforcement peculiarities observed in the target jurisdiction are compared with those found in EU competition law and in the legal systems of neighbouring courtiers.

Résumé


Classifications and key words: anti-competitive agreement; antitrust enforcement; Bosnia and Herzegovina; economic activity; sanctions and penalties; State institutions; undertaking.

I. Introduction

In the context of the EU enlargement process, accession candidates (Macedonia, Montenegro, Serbia), and countries aspiring to a candidate status (Albania, Bosnia and Herzegovina and Kosovo1)2, have been required

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1 This designation is without prejudice to positions on status, and is in line with UN SCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

2 For their current status in relation to the EU see http://ec.europa.eu/enlargement/countries/check-current-status/index_en.htm.
Competition Law Enforcement in Times of Crisis: the Case of Serbia

by

Dusan Popovic*

CONTENTS

I. General assessment of the Serbian competition law regime
II. Specific problems of competition law enforcement
   1. Doubts as to the privileged treatment of state-owned undertakings
   2. Competition advocacy as a substitute for competition law enforcement
   3. ‘Simulation’ of state aid control
III. Concluding remarks

Abstract

The development of Serbian competition law started in 2005 with the adoption of its first modern Competition Act. National competition rules are generally harmonized with European Union law, especially following the adoption of the current Competition Act of 2009. However, several problems in competition law enforcement can be identified still, the importance of which increases as the effects of the current economic crisis spread. The paper focuses mainly on three problems specific to competition law enforcement in Serbia, a country with a weak economy. The first problem identified is that of a possibly privileged treatment of state-owned companies. The Competition Authority commenced so far only two proceedings against undertakings with state-owned capital. Furthermore, the Authority seems to accord insufficient attention to some industry sectors that are of special public interest, such as the production and trade of gas or oil, dominated by undertakings with state-owned capital. Sector-specific analyses undertaken by the Competition Authority did not result in any proceedings being initiated ex officio. The second problem identified in this paper is the reluctance of the Serbian Competition

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Authority to enforce competition rules in certain ‘sensitive’ situations. Instead of taking a pro-active approach, it sometimes seems that the Authority chooses to act as an ‘advisor’ of undertakings rather than an enforcer of competition law. Finally, the paper analyzes the activities of the Commission for State Aid Control, notorious for its perpetually positive approach towards institutions granting state aid.

Résumé

Le développement du droit serbe de la concurrence a commencé en 2005, avec l’adoption de la première loi moderne relative à la protection de la concurrence. Les règles nationales de la concurrence sont généralement harmonisées avec le droit de l’Union européenne, en particulier suite à l’adoption de la loi relative à la protection de la concurrence en 2009. Pourtant, l’auteur identifie plusieurs problèmes relatifs à la mise en œuvre des règles de concurrence, dont l’importance a augmenté pendant la crise économique actuelle. L’article se concentre en particulier sur trois problèmes relatifs à la mise en œuvre des règles de concurrence en Serbie, un pays à difficultés économiques. Le premier problème identifié par l’auteur est relatif à un possible traitement préférentiel des entreprises publiques. Jusqu’à présent, l’Autorité de la concurrence n’a initié que deux procédures contre les entreprises publiques. De plus, il paraît que l’Autorité de la concurrence n’accorde pas suffisamment d’attention aux secteurs d’intérêt général, comme celui de la production et distribution de gaz, qui sont dominés par d’entreprises publiques. Les enquêtes sectorielles entreprises par l’Autorité de la concurrence dans ces secteurs n’ont abouti à aucune procédure initiée ex officio. Le deuxième problème identifié par l’auteur est celui de la réticence de l’Autorité de la concurrence d’initier des procédures dans certaines situations « sensibles ». Au lieu d’approche proactive, l’Autorité a choisi de jouer le rôle de « conseiller » d’entreprises dans certains cas. Finalement, l’auteur analyse les activités de la Commission pour le contrôle d’aides d’Etat, fameux pour la totalité de décisions déclarant l’aide compatible avec la loi.

Classifications and keywords: competition advocacy; competition law enforcement; control of state aid; economic crisis; Serbia.

I. General assessment of the Serbian competition law regime

Similarly to other South-East European countries, Serbia embraced competition rules quite late, under the direct influence of European Union law and following significant political changes. While it was still part of the Socialist Federative Republic of Yugoslavia, Serbia had a centrally planned economy where the majority of market participants were state-owned. The idea of free competition was, thus, inconsistent with the values of a socialist society. In the last decade of the twentieth century, Serbian economy started
A Chicago-School Island in the Ordo-liberal Sea?  
The Hungarian Competition Office’s Relaxed Treatment of Abuse of Dominance Cases

by

Csongor István Nagy

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I. Introduction
II. Predatory pricing
III. Refusal to deal
IV. Price squeeze
V. Evaluation

Abstract

The paper presents and evaluates the impact of the ‘more economic’ approach of the Hungarian Competition Office’s decisional practice as to predatory pricing, margin squeeze and refusal to deal under Hungarian competition law. It compares the Hungarian practice with the more formalistic approach of the CJEU’s jurisprudence. The paper evaluates the Hungarian decisional practice in abuse cases and provides a brief assessment on the consequences of applying diverging standards in EU and national abuse of dominance law.

Résumé

Cet article présente et apprécie l’impact de l’approche plus économique («more economic approach») de l’Autorité hongroise de la concurrence en matière de prix d’éviction, compression des marges et refus de vente en droit hongrois. Il compare...
la pratique hongroise avec l’approche plus formaliste de la jurisprudence de la CJUE. L’article apprécie la pratique hongroise en matière d’abus de position dominante et rend la récapitulation des conséquences de l’application des règles divergentes en droit européen et national en matière d’abus.

**Classifications and key words:** Article 102 TFEU; dominant position; Hungarian competition law; margin squeeze; predatory pricing; price squeeze; refusal to deal.

### I. Introduction

Although the European Commission has endeavoured to infuse the law on the abuse of a dominant position with a ‘more economic’ approach, the CJEU’s judicial practice still seems to be dominated by a rather ordo-liberal attitude. The enforcement practice of Hungarian competition law clearly differs from this judicial trend. The Hungarian Competition Office (hereafter, HCO) takes a rather relaxed position towards alleged abuse of dominance and has, in fact, imposed no fines between 2007–2010 under Sections 21–22 of the Hungarian Competition Act (hereafter, HCA), the domestic equivalent of Article 102 TFEU. Combating abuses appears to not have been a priority in Hungarian competition law enforcement. The HCO terminated its proceeding with a commitment order in numerous cases, in other words, the closure occurred in exchange for commitments from the dominant enterprise.

As a fundamental principle, the HCO has repeatedly stated that although exclusionary practices directly victimise rivals of the dominant undertaking, Hungarian competition law is not meant to shield competitors but to protect competition. This declaration can be found, among other places, in a policy document entitled ‘Fundamental principles followed by the HCO concerning the freedom of competition’, which summarizes its enforcement policy. This document clarifies that the purpose of competition law is to protect competition, rather than market operators and competitors, and especially

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1 See e.g. the Guidance on its enforcement priorities in applying Article 102 to abusive exclusionary conduct by dominant undertakings (hereafter, Guidance on Article 102), OJ [2009] C 45.
2 Act LVII of 1996 on unfair market practices and restraints of competition.
3 See C.I. Nagy, ‘Commitments as surrogates of civil redress in competition law: the Hungarian perspective’ (2012) 33(11) ECLR.
Private Enforcement of Competition Law in Slovenia: A New Field to Be Developed by Slovenian Courts*

by

Maja Brkan**, Tanja Bratina***

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   2. Conditions for the award of damages
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      2.2. Damages and casual link
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      4.1. Collective redress mechanisms
      4.2. Indirect purchasers
   5. Evidence and burden of proof
      5.1. Discovery and obtaining evidence from the opposing party
      5.2. Access to the administrative file

* This article is based on the national report for Slovenia, written in the framework of the project ‘Comparative Private Enforcement and Consumer Redress in the EU’, led by Professor Barry Rodger, Strathclyde University Law School and financed by Arts & Humanities Research Council (UK). The details of the project as well as the national report can be found at www.clpecreu.co.uk.

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6. Limitation periods
7. Legal costs and fees
   7.1. Court fees
   7.2. Attorney’s fees
8. Possibilities of judicial settlement and ADR
9. Cooperation between the Competition Protection Agency, the European Commission and national courts
   9.1. Binding and non-binding effect of administrative decisions
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III. Jurisprudence of Slovenian courts
   1. Methodology
   2. Analysis of existing jurisprudence
   3. Pending cases
   4. Potential follow-up actions

IV. Conclusion

Abstract
This contribution aims to demonstrate the legal framework that can shape and influence private enforcement in Slovenia. This includes, in particular, conditions for damage claims, collective redress mechanisms, legal costs and fees as well as discovery and burden of proof. It is shown which legislative changes may be needed in order to improve the effectiveness of private enforcement and the practical obstacles that will have to be overcome in the future. Furthermore, the article analyses the jurisprudence of Slovenian courts concerning private enforcement. Although there was practically no jurisprudence in this area only a few years ago, Slovenian courts have now ruled on a few such cases already. The number of private enforcement proceedings will most likely increase in the future. Therefore, it can be stated that private enforcement of competition law is an area that is slowly, but steadily, gaining importance in the Slovenian legal system.

Résumé
La présente contribution vise à démontrer le cadre juridique susceptible de former et d’influencer la mise en œuvre des règles de concurrence de l’UE à l’initiative de la sphère privée (« private enforcement ») en Slovénie. Les conditions pour des recours en dommages et intérêts, des mécanismes des recours collectifs, des règles sur des dépenses ainsi que la divulgation des preuves et la charge de la preuve y sont analysés. La contribution démontre quelles modifications législatives seraient nécessaires et quelles obstacles pratiques devront être surmontés à l’avenir afin d’améliorer l’effectivité de ce type de mise en œuvre du droit de la concurrence. La jurisprudence des juridictions slovènes dans ce domaine-là est également analysée.
Private Enforcement of Competition Law in Polish Courts: 
The Story of an (Almost) Lost Hope for Development* 

by 

Agata Jurkowska-Gomulka**

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II. Polish jurisprudence on private enforcement of competition law
   1. General overview
   5. MPEC (2008)
   6. TPPD (2008)
   7. Zinc (2009)

III. Legal, structural and institutional background of private enforcement of competition law in Poland

IV. Conclusions

Abstract

The article reviews judgments of Polish courts on private enforcement of competition law between 1993 and 2012. A quantitative analysis of this jurisprudence shows that very few cases of that type exist at all. Their qualitative characteristics illustrate that: none of them referred to consumers; none of the claims was a ‘pure’ damage

* This article is based on the national report for Poland, written in the framework of the project ‘Comparative Private Enforcement and Consumer Redress in the EU’, led by Professor Barry Rodger, Strathclyde University Law School and financed by the Arts & Humanities Research Council (UK). The details of the project can be found at http://www.clcpeereu.co.uk.

** Dr. Agata Jurkowska-Gomulka, Centre of Antitrust and Regulatory Studies, Faculty of Management, University of Warsaw; Of-Counsel Modzeleska&Paśnik; agathajur@o2.pl.
claim; all of these cases focused on partial or general nullity of contracts concluded as a result of an anticompetitive practice; almost all of them concerned an abuse of a dominant position; only one referred to competition-restricting agreements. The relevant jurisprudence largely focused on the binding force of a prior decision of the Polish competition body upon civil courts. Even if the fact that some cases of this type were at all record might suggest that there is a potential for developing private enforcement of antitrust in Poland, nothing like this actually happened. Unfortunately, the Act on Collective Redress (in force since July 2010) has not contributed to a growth in the number of consumers (or any other entities) engaging in court disputes with undertakings restricting competition.

Résumé

L'article passe en revue les jugements des tribunaux polonais sur l’application privée du droit de la concurrence entre 1993 et 2012. Une analyse quantitative de cette jurisprudence montre que très peu de cas de ce type existent. Leurs caractéristiques qualitatives montrent que: aucun d’entre eux ne concernait les consommateurs; aucune des revendications ne constituait une demande d’indemnisation dans le sense exacte; tous ces cas axaient sur la nullité partielle ou générale des contrats conclus à la suite d'une pratique anticoncurrentielle; la quasi-totalité d’entre eux concernaient un abus de position dominante; une seule visait aux accords restreignant la concurrence. La jurisprudence se concentrait surtout sur la force contraignante d’une décision préalable de l’organe polonais de la concurrence prise par des tribunaux civils. Même si le fait que certains cas de ce type-là étaient notés, il pourrait suggérer qu’il existe un potentiel de développement de l’application privée de la concurrence en Pologne – rien que cela ne s’est réellement passé. Malheureusement, la Loi sur les recours collectif (en vigueur depuis juillet 2010) n’a pas contribué à une augmentation du nombre de consommateurs (ou d’autres entités) s’engageant dans des litiges judiciaires avec les entreprises qui restreignent la concurrence.

Classifications and key words: antitrust damage; collective redress; evidence; nullity; private enforcement of competition law; Poland; public enforcement of competition law.

I. Introduction

Public enforcement of competition law started in Poland in 1990 as an element of the widespread economic and political changes that took place at the turn of the 1980s and 1990s¹. At its outset, the nature of public enforcement

¹ The first antimonopoly act was adopted in 1987 but it was not a competition act in a modern sense so it should not be seen as the beginning of competition protection in Poland’s market economy.
Private Enforcement of Competition Law – the Case of Estonia*

by

Karin Sein**

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   2. Limitation periods and the possibility of the passing-on defence
   3. Legal fees and costs in competition proceedings
III. Estonian jurisprudence on private enforcement of competition law
   1. Reasons for the scarcity of jurisprudence
   2. First Supreme Court ruling on private enforcement of competition law
IV. Conclusions

Abstract

Jurisprudence on private enforcement of competition law has so far been almost non-existent in Estonia. Most cases where competition law issues are raised within the context of damage claims are solved by out-of-court settlements. One of the main reasons for this scarcity is the fact that this is a fairly unfamiliar field for Estonian lawyers, attorneys and judges. The first reason for the low number of private enforcement of competition law cases in Estonia is therefore lacking awareness and legal uncertainty. The other key barrier lies in burden of proof issues associated with damage claims. It has proven very difficult in practice for an injured person to prove that he/she sustained damages as a result of a competition

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* This article is based on the national report for Estonia, written in the framework of the project ‘Comparative Private Enforcement and Consumer Redress in the EU’, led by Professor Barry Rodger, Strathclyde University Law School and financed by the Arts & Humanities Research Council (UK). The details of the project can be found at http://www.clcpecreu.co.uk.

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law infringement; even more so to prove the actual extent of such damages. There is no juridical practice yet on how to calculate business losses and judges face considerable difficulties when confronted with this task. Another problem lies in the availability of evidence. As discovery is not possible in Estonia, its civil procedure rules make it difficult for claimants to obtain evidence necessary to prove the facts underlying their claims.

Estonian law does not provide for a special procedure for antitrust damage claims – there are no collective claims, no class actions, nor actions by representative bodies or other forms of public interest litigation (no collective redress). It is thus only possible to file damage claims arising from competition law infringements either in normal civil proceedings or as a civil claim within the framework of criminal proceedings on a competition law crime. The need for collective redress has not yet been subject to a legal debate at the national level, and there has not been a single private enforcement case opened by a consumer in Estonia so far. The only Supreme Court case in existence in this field, which was decided in 2011, has cleared the basis and availability of damage claims for competition law infringement. It has shown, at the same time, the many problems connected to calculating damages in this context.

Résumé

La jurisprudence relative à l'application privée du droit de la concurrence a été jusqu'à présent presque absente en Estonie. La plupart des cas où les questions de droit de la concurrence sont soulevées dans le cadre de demandes d'indemnisation, sont résolus par des règlements à l'amiable. L'une des raisons principales de cette pénurie est le fait que c'est un domaine assez inconnu pour les avocats, les procureurs et les juges estoniens. La première raison pour le faible nombre de cas de l'application privée du droit de la concurrence en Estonie est donc la manque de conscience et l'incertitude juridique. L'autre obstacle majeur réside dans des questions relatives à la charge de preuve liées à des demandes d'indemnisation. Il s'est avéré très difficile en pratique pour une personne blessée à prouver qu'il/elle a subi des dommages à la suite d'une infraction au droit de la concurrence; plus encore à prouver l'étendue exacte de tels dommages. Il n'existe pas encore de pratique juridique sur la façon de calculer les pertes commerciales. Alors les juges font face à des difficultés considérables lorsqu'ils sont confrontés à cette tâche. Un autre problème réside dans la disponibilité de la preuve. A cause du fait que la découverte n'est pas possible en Estonie, ses règles de procédure civile rendent l'obtention des preuves nécessaires pour soutenir les faits qui prouvent des revendications soumises par des demandeurs difficile.

La législation estonienne ne prévoit pas de procédure spéciale pour les demandes de dommages antitrust – il n'y a pas de revendications collectives, aucune action de classe, ni des mesures prises par les organes représentatifs ou d'autres formes de litiges d'intérêt public (pas de ressources collectif). Il n'est donc possible que de déposer des demandes d'indemnisation en cas d'infraction au droit de la
Key Legislative and Jurisprudential Developments of Polish Antitrust Law in 2012

by

Anna Piszcz*

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Abstract

This article has two objectives. First, it presents the most important developments of Polish antitrust legislation of 2012. These include recent amendments to legal

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provisions on judicial antitrust proceedings contained in the Code of Civil Procedure, and some novel issues in the area of non-binding guidelines of the Polish NCA, the UOKiK President. Second, the article introduces key developments in Polish competition law jurisprudence of 2012. It characterises selected rulings delivered by the Polish Supreme Court, the Court of Appeals in Warsaw and the Court of Competition and Consumer Protection. Judgments are divided according to their subject matter.

Résumé

Cet article a deux objectifs. Premièrement, il présente les développements les plus importants de la législation antitrust polonais de 2012. Il s’agit notamment de récentes modifications apportées à des dispositions juridiques en matière de procédure antitrust judiciaires qui se trouve dans le Code de procédure civile, et quelques nouvelles questions dans le domaine des lignes directrices non-contraignantes de l’Autorité natinale du contrôle polonaise, le président de l’Organe pour la protection de la concurrence et des consommateurs (UOKiK). Deuxièmement, l’article présente les développements principaux en matière de jurisprudence de 2012 relative à la loi polonaise de la concurrence. Il caractérise des jugements sélectionnés prononcés par la Cour suprême polonaise, la Cour d’appel de Varsovie et la Cour de la concurrence et de la protection des consommateurs. Les jugements sont présentés selon les sujects qu’ils concernent.

Classifications and key words: antitrust legislation; judicial antitrust proceedings; guidelines; antitrust jurisprudence; anticompetitive agreements; abuse of a dominant position; concentrations; fines.

I. Antitrust legislation

1. General remarks

The currently applicable Act of 2007 on Competition and Consumer Protection (hereafter, the Competition Act)\(^1\) underwent its last amendment in 2011, making 2012 a relatively quiet year for Polish antitrust legislation. At the same time, no new relevant regulations were issued by the Council of Ministers, nor existing ones amended. In light of the above, this review focuses on changes introduced in 2012 to Poland’s legislation on judicial antitrust

\(^{1}\) Journal of Laws 2007 No. 50, item 331, as amended.
9th Amendment to the Czech Competition Act

by

Robert Neruda*, Lenka Gachová**, Roman Světnický***

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I. Introductory Summary


The main objective of the Amendment Act is to improve the effectiveness of detecting cartel arrangements by the Czech Office for the Protection of Competition (the ‘Office’). Many of the legal tools covered by the Amendment were already in use before its promulgation – either on the basis of existing soft laws of the Office or in fact, without any legal backing. Their introduction directly into the Competition Act is expected to increase legal certainty and thus make their use more effective. They include, most of all, the leniency programme and the settlement procedure. Seen as novel is the introduction of certain material consequences of both instruments particularly with respect to the range of potential penalties and criminal law consequences associated with them.

The Amendment also expressly regulates the Office’s right to refrain from taking action against anti-competitive practices because of their minor harmful effects. The purpose of such ‘prioritisation’, which is a manifestation of the opportunity principle, is to free up the Office’s sparse resources in order to enable it to investigate more serious violations. Although this should be seen as a legitimate goal, it also entails risks which are addressed in this paper.

Last but not least, the Amendment introduces a new power into the Competition Act which allows the Office to supervise public administration bodies in order to determine whether their activities restrict competition. This is quite a controversial step which could ultimately create the impression that the principles of competition protection take priority in the Czech legal order over all other national interests. This impression is strengthened by the general wording of the relevant provision.

Each of these major amendments is described and thoroughly commented on in a separate section of this paper. The final part presents other changes introduced by the aforementioned Amendment Act relating mainly to jurisdictional and technical issues that might also be of interest.

FIVE KEY CHANGES
• Leniency application as protection against criminal liability
• Settlement – only a 20% fine reduction
• The Office is entitled to decide which cases to pursue
• Public administration bodies may not distort competition
• New penalty – ban on public contracts and concession agreements
Recent Competition Policy Developments in Hungary – Unfair Commercial Practices, Cartels and Abuse of Dominance*

by

Pál Szilágyi**, Tihamér Tóth***

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I. Introduction

This article introduces the most important Hungarian competition cases decided between the beginning of 2012 and May 2013. The paper presents

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legal novelties and issues which might prove interesting for an international readership in light of recent developments and focus of competition policy. Shown are both developments concerning unfair commercial practices and the UCP Directive\(^1\) as well as anticompetitive agreements and abuse of dominance.

Hungary has an enforcement system where the national competition authority, the Gazdasági Versenyhivatal (hereafter, GVH) is responsible for the enforcement of competition rules. Within the GVH the Competition Council is responsible for taking substantive decisions on infringements. The GVH is headed by a president and there are two vice-presidents supervising the operation of case handlers, while the other acts as the chairman of the Competition Council. The Competition Council consists of lawyers and economists who enjoy a quasi-judicial status. Decisions are made in proceeding councils composed of three or five members selected by the chairman of the Competition Council.

II. Unfair commercial practices

1. Introduction

The investigation of unfair commercial practices (hereafter, UCP) dominates the GVH’s enforcement agenda. This is certainly true with respect to both the number of its cases and its press appearances. Looking at the size of antitrust fines, cartel cases are usually considered to be more important. However, the year 2012 was an exception to this rule due to low numbers of cartel decisions. A quick look at the GVH’s official website illustrates that UCP dominate its policy and its competition culture agenda as well. It is notable that the Hungarian competition authority issued in 2012 new guidelines on commitments but they only cover UCP, excluding antitrust issues from its scope. It seems therefore that the GVH is campaigning much more against certain UCP than towards a further strengthening of the antitrust culture.

Cases decided in the reference period with respect to UCP related to markets that are at the top of the enforcement agenda for several years already: retail chains, time share, mobile phones, banking and other financial services. The unique areas that the GVH has recently tackled include:

Recent Competition Policy Developments in Hungary
– Merger Control*

by

Aranka NAGY**

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I. Introduction

One of the most significant enforcement tasks of the Hungarian Competition Authority (hereafter, GVH) is the control of concentrations. Undertakings are

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The content of this article does not necessarily reflect the official position of the Hungarian Competition Authority. Responsibility for the information and views expressed in this article lies entirely with the author.

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legally obliged to receive clearance for their transactions from the competition authority if the notified operation meets the turnover thresholds\(^1\) set out in the Hungarian Competition Act.

This article gives a short overview of the most significant procedural and case-law improvements that took place in the GVH’s practice in 2012.

**II. Procedural and structural reforms**

In 2012, the Hungarian Competition Authority undertook to reform its concentration control system. The aim of the reform was to speed up the review procedures, but at the same time, to preserve (and possibly improve) the quality of work conducted by the GVH in this area.

1. **New notification form, new unit**

   As of February 2012, a new notification form is in use that aims to reduce unnecessary administrative burdens placed on the parties, to shorten the review process and to strengthen transparency. The new form contains two main sections although its second part (Chapters VI–VII.) needs to be completed only if the concentration results in significant overlaps or relations (e.g. vertical or portfolio relations). However, the GVH is allowed to place a duty on the parties to complete Chapters VI-VII of the notification form even in other cases, if that seems to be necessary in order to conduct an in-depth analysis of the concentration.

   The GVH facilitated also the formal introduction of pre-notification contacts between the parties and itself (such contacts were informally available already before the reform). Their aim is to increase the efficiency and productivity of the review procedures by providing the parties with the opportunity to consult the authority on various questions relating to the notification form before its actual submission. These types of meetings are completely informal and

\(^1\) In line with Article 24 (1) ‘For a concentration of undertakings, the authorisation of the Hungarian Competition Authority shall be sought in cases where the aggregate net turnover of all the groups of undertakings concerned (Article 26(5)) and the undertakings jointly controlled by undertakings that are members of the groups of undertakings concerned and by other undertakings exceeded HUF fifteen billion in the preceding business year, and the net turnover of each of at least two of the groups of undertakings concerned in the preceding business year combined with the net turnover of the undertakings jointly controlled by undertakings members of the respective group of undertakings and other undertakings was more than HUF five hundred million’.
Competition Law in Macedonia in 2011–2012: New Perspectives and New Challenges

by

Adnan Jashari*, Nora Ziba Memeti**

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** Ph.D., Teaching Assistant, Nora Ziba Memeti, Faculty of Law, FON University, Skopje, Republic of Macedonia; nora.memeti@fon.edu.mk.
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I. Introduction

Keeping in mind that competition policy is of key importance for the European Union, the Republic of Macedonia (hereafter, R.M.) has taken it upon itself to introduce and adopt a domestic competition law regime in the framework of its EU accession process.

Macedonian Constitution guarantees the freedom of trade and business as well as security and equal protection of the legal position of different entities in the market. From a historical perspective, it should be noted that the R.M. was the first country in the Western Balkan region to sign the Stabilization and Association Agreement with the European Union in April 2001, which entered into force in 2004. In 2005, the European Council granted Macedonia the status of an EU ‘candidate country’. This status provides for a competition regime to be applied in the trade relations between the European Union and the R.M. Significant changes were made to Macedonian antitrust legislation, which was in force since January 2005, by way of the new Law on the Protection of Competition of 2010 (hereafter, LPC). These recent legislative reforms introduced relevant changes to the institutional structure of Macedonia’s competition protection system at the same time. The purpose of the LPC is to ensure free competition in the domestic market in order to stimulate economic efficiency and consumer’s welfare.

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1 Constitution of the Republic of Macedonia, Article 37.
2 Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, Brussels, 26 March 2001.
Recent Developments in Slovak Competition Law
– Legislation and Case Law Review¹

by

Zuzana Šabová*, Katarína Fodorová**, Daniela Lukáčová***

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¹ All views expressed by authors in this paper are strictly personal and do not represent the opinion of the Antimonopoly Office of Slovak Republic; zuzana.sabova@antimon.gov.sk.
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I. Introduction

Slovak competition law is set by the Act No. 136/2001 Coll. on the Protection of Competition, as amended (hereafter, Competition Act). Covered therein is the prohibition of competition restricting agreements and the prohibition of the abuse of dominance as well as concentration control. The wording of the prohibitions is identical to Articles 101 and 102 TFEU. Control of concentrations is largely modelled after the EU system also including the substantive test, Significant Impediment of Effective Competition, which is used in Slovakia since 2012 with some procedural divergences. Enforcement is administrative in nature and only undertakings are subject to investigations and fines. The relevant enforcement body is the Antimonopoly Office of the Slovak Republic2.

The EU enforcement model remains the main source of inspiration for national legislation, for the decision-making practice and competition policy of the national competition authority – the Antimonopoly Office (which tends to rely on the concepts and doctrines established at EU level) as well as for the soft laws adopted by the Office on its own initiative (Leniency programme, Guidelines on Commitments, Guidelines on Settlement etc.).

In recent years, the main issue has been the interplay between the Office’s decision-making practice and judicial review carried out by the Regional Court in Bratislava, acting as the first-instance court, and the Supreme Court of Slovakia, as the appellate body. The Office lost several big cases in 2009–2011 before the first-instance court that related to issues such as: bid-rigging in the construction sector; restrictive agreement in the banking sector and; several abuse cases in telecoms3. Some of these cases are still pending before the Supreme Court based on appeals lodged by the authority. The differences in opinion between the Courts and the Office related mainly to the evidential threshold and other procedural aspects. Unlike the authority, the courts tend to rely more on criminal investigations or general administrative principles than on EU case-law and doctrines as their reference point.

The need for coherent application of EU competition law has led to two amicus curiae interventions by the European Commission pursuant Article 15(3) Regulation 1/20034. The first took place in 2011 and concerned the notion of

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2 Decisions of the Office and the relevant national judgements are published on the Office’s web site www.antimon.gov.sk.
3 The Office’s stance on the judgments can be found in the document „Problems arising from the decision-making practice of the courts in competition law in Slovakia“ . The Office published the document on its webpage; an English version is available at http://www.antimon.gov.sk/849/c-2011.axd.
Lack of a Price Reduction Despite a Decrease in Service Quality as an Unfair Price and Abuse of a Dominant Position.
Case Comment to the Judgment of the Supreme Court of 13 July 2012, Autostrada Malopolska (Ref. No. III SK 44/11)

The Polish Supreme Court delivered in 2012 an important ruling with respect to the definition of unfair prices charged by a dominant firm. Imposing unfair prices was so far generally associated in Polish jurisprudence with either excessive prices (exploitive practices) or predatory pricing (exclusionary practices)\(^1\). The Supreme Court held here, instead, that the lack of a reduction in a set service fee (toll) despite a decrease in quality of the service provided by a dominant company can also count as imposing unfair prices.

1. Facts of the case

The case at hand concerns the fees charged for the use of the A-4 toll dual-carriageway leading from Cracow (point X) to Katowice (point Y) managed by Stalexport Autostrada Małopolska S.A. (hereafter, Stalexport or plaintiff). Stalexport holds a concession which places the company under a duty to operate and maintain this section of the A-4 dual-carriageway.

It was found in the framework of the investigation that Stalexport charged car drivers a fixed fee of 13 PLN for the use of the toll road irrespective of the fact that its substantial part was periodically being renovated, leading to numerous traffic problems and reduced utility for car drivers. The Polish Competition Authority, the President of the Office for Competition and Consumer Protection (hereafter, UOKIK President) found this behaviour to be an abuse of a dominant position and imposed a fine of 1,300,000 PLN (309,524 EUR) on Stalexport. The company appealed the decision to the Court of Competition and Consumer Protection (hereafter, SOKIK). However, SOKIK confirmed in its ruling the position of the UOKIK President. The plaintiff appealed the first instance judgment, but the ruling was once again upheld by the Court of Appeal. The dispute was eventually litigated before the Supreme Court.

\(^1\) Cases of margin-squeeze are exceptionally rare.
Similarly, the Court did not agree with the view that the toll was meant to constitute public revenue. It stressed that although the fee is charged within statutory obligations, it still belongs to Stalexport as a private investor that runs an economic activity and bears the financial risk associated with it. The mere fact that a public duty is placed upon a private entity does not classify it as part of the public sector.

**Consumer welfare**

Last but not least, another interesting argument raised in the comments to this judgment\(^{11}\) concerned the issue of *consumer welfare* and the real consequences of public intervention into the behaviour of a dominant firm. During the entire administrative and juridical proceedings, Stalexport did not change the amount of the toll it charged – it did not introduce any price reductions for the time periods when construction works were being carried out. Concerns were also raised that the antitrust fine (1,300,000 PLN) could have been, at least indirectly, passed on to consumers seeing as the toll for car drivers now stands at 18 PLN as compared to 13 PLN which it used to be in the past.

**Conclusion**

According to the ruling under review, the notion of excessive (and thus unfair) prices can be applied to cases where the level of prices remains unchanged irrespective of the decrease in the quality of the service rendered. If this practice is committed by a dominant firm, it can amount to abuse. When determining this practice, reference needs to be made to the model of a full-fledged service (so-called reference transaction). This test largely resembles the ‘equivalence test’ which compares the price and the value of the service provided in exchange.

The Supreme Court confirmed also the narrow relevant market definition established originally by the Competition Authority as the market for paid driving on the A-4 dual-carriageway from point X to point Y. The adopted reasoning is based on the features of paid-for dual-carriageways, which are largely different to national roads – they provide two driving lines that facilitate a faster driving speed and easier overtaking.

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\(^{11}\) Ibidem.
Regional Court in Brno on Cartels in 2012.
Case comments to judgments in CRT cartel and GIS cartel

In 2012, the Regional Court in Brno has delivered a couple of judgements in two globally notorious cases which were primarily dealt with by the European Commission: the gas insulated switchgear cartel (GIS cartel) and the cathode ray tubes cartel (CRT cartel). Czech authorities decided these cases because the duration of the scrutinised cartels extended to the time before the Czech Republic’s accession to the EU.

The parties to both of the proceedings disputed the competences of the Czech Office for the Protection of Competition (hereafter, OPC or Office) to impose financial penalties upon them. They saw these fines as a breach of the *ne bis in idem* principle, seeing as the Commission has already fined the same cartels. The Office, as well as the reviewing courts, stated first that the question of parallel prosecution of the cartels was clear and that the Czech authority had indeed jurisdiction to decide these cases. The Supreme Administrative Court cited in this context its older *RWE* judgement. Following the jurisprudence of the Court of Justice, the Court confirmed that the purpose of national competition law is to protect effective competition on the domestic market. By contrast, the aim of EU competition law is not only to protect competition but also, through it, to protect the effective functioning of the common market against, in particular, activities sealing off national markets or affecting the structure of competition within the common market. The Court reasoned that the *ne bis in idem* principle is subject to the threefold condition of identity of facts, unity of offender and uniformity of legal interest protected. The respective cartel decision of the European Commission repeatedly referred to the EC/EEA territory and did not cover the anti-competitive consequences of the said cartel in the territory of the Czech Republic before its accession to the EU. Therefore, the OPC had the competence to decide on this case.

Both courts, the Regional Court in Brno as well as the Supreme Administrative Court, held that the question of jurisdiction was an *acte claire* here. However, the

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1 The Regional Court in Brno as well as the Supreme Administrative Court.
2 See e.g. the judgements of the Regional Court in Brno ref. no. 62 Ca 22/2007 of 25 June 2008 and of the Supreme Administrative Court ref. no. 2 Afs 93/2008 of 10 April 2009, both in the GIS cartel.
3 Judgment of the Supreme Administrative Court ref. no. 5 Afs 9/2008 of 31 October 2008 in the case of *RWE Transgas*.
managers in defining business strategies of its subsidiary may acts as another factor for determining liability (see Court of Justice judgement in Commercial Solvents\textsuperscript{17}). This, however, may not have discriminatory effects – liability shall be determined according to the cumulative principle (cumulative fines) rather than on the basis of solidarity (see General Court judgement in Tokai Carbon\textsuperscript{18}).

The Regional Court in Brno then resumed that there are several methods how to take into account the concept of a single economic unit. It is necessary to choose the method that corresponds best with the concept of the given cartel and with reasonable sanctioning of cartel participation, without unjustifiably discriminating any of the cartel members. It is thus sometimes necessary to determine the individual degree of cartel participation of each given undertaking. In some cases, particular companies within the corporate group may be regarded as mere instruments of the cartel idea concluded among corporate groups. In this scenario, it is reasonable to establish liability of parent companies. However, it is unreasonable to cumulate liability in such a manner that it is established for the parent company and its subsidiaries. This cannot be viewed as establishing liability within the particular corporate group on the basis of solidarity, be it from the point of view of declaring that an infringement has been committed, or from the point of view of imposing a fine.

The Regional Court in Brno concluded on the basis of the administrative case file that the Office did not gather enough material to determine liability of individual companies within particular groups.

It must be stated for the sake of completeness that the Regional Court’s judgement was reviewed by the Supreme Administrative Court in April 2013. The conclusions of the Regional Court in Brno were confirmed. The Supreme Administrative Court added also that it is indeed possible to determine liability of each of the undertakings party to the proceedings according to different methods, considering which of these methods is in each particular case the most appropriate.

**Conclusions**

It must be stated in conclusion that the two 2012 judgements of the Regional Court in Brno provided very useful guidelines for the Czech Competition Office and for parties to future cartel proceedings. They summarised the jurisprudence of EU courts on how the Commission is to conduct its proceedings in cartel cases and acknowledged its applicability to proceedings conducted by the Czech authority.

Although one cannot always agree with the conclusions reached by the Regional Court in Brno, its judgements in both the GIS cartel and the CRT cartel case provide helpful new guidance for the Office and parties to cartel proceedings.

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\textsuperscript{17} 6-7/73 \textit{Commercial Solvents} [1974] ECR 223.
\textsuperscript{18} T-71/03, T-74/03, T-87/03, T-91/03 \textit{Tokai Carbon} [2005] ECR 00010.
Recent judgements of the General Court and the Supreme Court of the Slovak Republic in inspection matters – Landmark Decisions or Wasted Opportunities to Solve Problem?

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IV. Conclusions

I. Introduction

On-the-spot investigations (inspections, dawn raids) are now an indispensable tool in the portfolio of a competition authority's investigative powers. They constitute a very efficient method of seizing documents and accumulating information of an undertaking regarding its alleged anticompetitive behaviour – information that the undertaking would not normally be willing, or in fact obliged to provide because of the right of non self-incrimination. On the other hand, inspections are a rather “uncomfortable” intrusion into the private sphere of undertakings. As a result, the violation of the principle of the ‘inviolability of the home’ has become a common objection against inspections carried out by competition authorities. It is not the aim
The ECtHR found the ‘envelope procedure’ to be an efficient safeguard against abuse, but it also spoke of another necessary safeguard in this context – the availability of immediate judicial review of the procedure. It is unlikely that the Court of Justice will consider annulling a part of the General Court’s judgement on this ground because this issue does not seem to be mentioned in the appeal. So whilst the Court of Justice of the European Union opted for a narrower interpretation of the notion of the act reviewable by the action for annulment, the legality of the inspection procedure will be put in danger because of the lack of effective judicial remedy required under Article 8 ECHR designed to scrutiny performance of the inspection.

Ondrej Blažo, PhD
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The relationship between intellectual property law and competition law is certainly a fascinating one. It is therefore not surprising that it has attracted the attention of many scholars. Leading Polish jurisprudence on the relationship between intellectual property rights (IPRs) and competition law has also, and unsurprisingly, attracted the attention of numerous academics and commentators. However, there has never been a comprehensive analysis of this relationship. Dawid Miąśik’s excellent book certainly fills this important gap.

The author properly points out that the exercise of such exclusive rights as IPRs can potentially have negative effects on the market. This is particularly so, as the author rightly notices, when an IP holder is capable of excluding others from the market by exercising his/her exclusive right. Indeed, the way in which the IPR is exercised might not be the most desired one from the perspective of satisfying the public interest in the proper functioning of the market.

As the author correctly states, the key issue at the intersection of IPRs and competition law is the importance that should be attached to the fact that a given activity, which is considered potentially anticompetitive, is in fact a form of the exercise of an IPR. One should not forget that exclusive IPRs are granted as a reward for investments already incurred and as an incentive for further innovation. This suggests that a dynamic competition perspective must be taken into account when an intervention by way of competition law is being considered. Having studied Dawid Miąśik’s book, I believe that this is the view taken by its author. The question remains, however, whether dynamic competition concerns are the only valid ones here or whether, and if so in what circumstances, should static competition issues also be addressed.

The author provides the readers with a comprehensive analysis of the relationship between IP and competition law in US, EU and Polish law. The thorough analysis of this relationship in the above jurisdictions is preceded by the presentation of leading theories that explain the relationship between these two legal fields. Although some of these doctrines are no longer in use, their presentation remains useful as it helps to

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1 D. Miąśik, Stosunek prawa, p. 67.
2 D. Miąśik, Stosunek prawa, p. 75.
It seems that the author’s approach to the ordoliberalism is rather critical, in particular with respect to the manner in which ordoliberals approached the concept of competition restrictions and, as a result, the importance they attached to rivalry between competitors. This criticism is indeed widely accepted today. Protecting rivalry, which results in a certain market structure, might in the long run be positive for competition, also if competition is understood in terms of economic efficiency. Microsoft seems to prove ordoliberal concerns about market players gaining too much economic power. Lack of rivalry affected competition in a negative manner by depriving consumers of products, in this case software, capable of satisfying their needs to a much greater extent.

Concerns over structure should not be abandoned. Indeed, EU competition law makes reference to market structure. It must be stressed that Article 101(3) TFEU not only refers to ‘promoting technical progress’ and ‘allowing consumers fair share of the benefits’ but also stresses that competition should not be eliminated with ‘respect of a substantial part of the products concerned’. By making a reference to technical progress, the TFUE indicates that dynamic competition concerns must be taken into account. By underlining at the same time that competition should not be eliminated, it points to market structure as well.

I would also like to address comments made by the author when referring to the Masterfoods case. The CJEU states therein that it is possible to place restrictions on the exercise of an IPR if these restrictions are proportional and do not affect the specific subject matter of that right. The author then adds that forcing IP holders to make their immaterial property available without compensation could be regarded as overly excessive interference with the exercise of their right. Generally, this is correct but there are circumstances where this will not be an accurate assumption. An IP holder who additionally holds a dominant position is required to license on FRAND terms. In the context of standardization, as well as patent pools, an obligation to license on FRAND terms dictates non-discriminatory treatment with respect to setting conditions for access to technologies controlled by dominant undertakings. If an IP holder decides to license royalty free, which is by no means uncommon, subsequent licenses must also be granted on royalty free terms. A different approach would result in discrimination and the conditions of competition on the downstream product markets would not be the same for all market participants.

Finally let me say that Dawid Miąsik’s book is both a must have and a must read for all those who deal with IP law. It is now no longer possible to operate in many markets without properly understanding how competition law affects the exercise of IPRs. Dawid Miąsik’s book helps the reader to understand this complicated relationship. It is not easy to read, but getting through it certainly gives a lot of satisfaction.

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Dr. Rafal Sikorski
Adam Mickiewicz University, Poznań

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The monograph entitled *Exclusive Intellectual Property Rights and Free Competition* by Dr. Dušan Popović, Assistant Professor of Intellectual Property Law and Competition Law at the Faculty of Law of the University of Belgrade (Serbia), is one of Serbia’s first to examine, in detail, the complex relationship between the protection of intellectual property and the protection of free and undistorted competition. It is not surprising that Dušan Popović has decided to tackle this complex issue. In the course of his career he has demonstrated the courage and the capacity to examine, analyze and competently comment on cross-cutting issues concerning competition law. Over the past years, the issue analyzed in the monograph has become a topical one in comparative law, given the increase in the number of decisions of competition authorities which limit intellectual property rights. Such practice results in an external limitation of subjective IP rights that goes alongside the exemptions inherent to intellectual property law itself. However, the author does not perceive the relationship between competition law and IP rights as a necessarily disharmonious one – quite to the contrary. The monograph first analyses this relationship through examples of successful coexistence (in the first part). It is only after that the author singles out the cases which he finds to be an impressive incursion of competition law into the system of IP rights protection (second part).

Given the lack of relevant Serbian case-law, Dušan Popović focuses on EU law and, to a lesser extent, US law as well as national legal systems of certain European countries. Since Serbia signed the Stabilization and Association Agreement with the European Union, the analysis of the *acquis communautaire* in this area is of the outmost importance to Serbian readers. International scholars will particularly benefit from the detailed and insightful comparative analysis contained in this book.

In the first part is entitled “Intellectual property rights as possible means of competition infringement”. Analyzed here is the possible outcome of the application of competition rules to market participants which own IP rights, relying mostly on the practice of the European Commission and the Courte of Justice of the European Union. The first chapter deals with the prohibition of anti-competitive agreements. The author assesses the treatment of certain clauses contained in license agreements concluded by the owners of IP rights such as: exclusivity clauses, non-compete clauses, exclusive supply clauses, confidentiality clauses etc. It is concluded that
that would allow for the harmonization of national competition rules and, possibly, the creation of a world-wide competition authority. Meanwhile, owners of IP rights participating in the global economy remain exposed to multiple competition law regimes. The outcome of proceedings undertaken by different national or regional competition authorities may differ significantly and further generate legal uncertainty for IP rights owners.

Dušan Popović writes systematically and precisely; his arguments are easy to follow and convincing, and while dealing with complex legal issues, the monograph is easy to read.

Dr. Ana Knezevic Bojovic
Institute of Comparative Law in Belgrade
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 Blachnio-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. Rafal 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
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.

Dr. Agata Jurkowska-Gomułka
CARS Scientific Secretary
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.
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).


Elżbieta Krajewska
Centre for Antitrust and Regulatory Studies (CARS)
LLM candidate at College of Europe
CARS Activity Report 2012

1. General information

In the sixth year of its activities, CARS focused once again on the pursuit of key scientific goals specified in its founding documents. The first CARS Award for an outstanding book on legal and economic aspects of competition protection was granted in 2012 to Professor Marek Szydłowski, University of Wroclaw (sponsored by PKO BP).

2012 was especially active in the publishing field. CARS started to issue a new journal: ‘internet Quarterly on Antitrust and Regulation’ (‘internetowy Kwartalnik Antymonopolowo-Regulacyjny’ – iKAR). It published at the same time two separate volumes of the ‘Yearbook of Antitrust and Regulatory Studies’: a special edition, vol. 5(6) and a regular volume, vol. 5(7). The CARS Publishing Series, Antitrust and Regulatory Monographs and Textbooks, was expanded by another publication also.

Two CARS Open PhD Seminar meetings took place in 2012 as well as two scientific seminars. CARS co-organized also a conference in conjunction with the Institute of Law Studies of the Polish Academy of Sciences.

Importantly also, CARS participated in 2012 in public consultations announced by the Polish Competition Authority on a draft amendment to the current Competition Act as well as in public consultations announced by the European Commission concerning General Block Exemption Regulation on State Aid Measures.

2. Open PhD Seminar

2.1. Judicial review of decisions issued by the President of the Polish Office of Electronic Communications

The fourteenth meeting of the CARS Open PhD Seminar was held on 18 September 2012. The opening speech was delivered by Mateusz Cholodecki, PhD candidate (Faculty of Law, Adam Mickiewicz University in Poznan) and commented on by Professor Stanisław Piątek (Faculty of Management, University of Warsaw). The focus of the seminar was on the dual character of the juridical review model applicable to regulatory decisions of the Polish Telecoms regulator (President of the Office of Electronic Communications) – depending on the type of decision issued, judicial control is exercised by administrative courts or by the Court of Competition and Consumer Protection. The key speaker outlined the legal basis of both forms of
juridical review, their similarities and differences as well as the varied consequences resulting from the two models. Different types of regulatory decisions were analyzed in light of the judicial control model applicable.

2.2. Leniency as an instrument for combating anti-competitive agreements in the Polish system of competition protection

The fifteenth meeting of the Open PhD Seminar, held on 10 October 2012, was dedicated to practical problems associated with the use of leniency in the Polish competition protection system. Dr. Bartosz Turno (law firm WKB, Wierciński, Kwieciński, Baehr) presented the results of his extensive research in this field outlining, most importantly, the foundations of an ‘optimal’ leniency programme that he formulated for application in Poland. Particular elements of the model were defined within the legislative sphere, application practice and antitrust policy. A key part of the analysis of the proposed model was devoted to a critical appraisal of past experiences with the use of leniency for competition protection in Poland.

3. Publications

3.1. Yearbook of Antitrust and Regulatory Studies (YARS)

A special volume of YARS [vol. 5(6)] was published in April 2012 followed by a regular volume [vol. 5(7)] in December 2012.

The special volume focused on the protection of entrepreneurs’ rights in antitrust proceeding before Polish and EU antitrust authorities. The periodical contains twelve articles based on papers delivered during a conference co-organized in April 2012 by CARS and the Institute of Law Studies of the Polish Academy of Science. The volume contained also two case comments (one of them referring to a merger prohibition issued by the Polish Competition Authority), a book review and Polish bibliography on antitrust procedure.

The 2012 regular volume of YARS was the first to contain articles submitted not only by Polish authors, but also by specialists from other Central European countries (Croatia and Slovakia). YARS 2012, vol. 5(7) contains six articles, seven legislative and jurisprudential reviews on antitrust and sector-specific regulation (among them an exhaustive review of ECJ judgments in competition cases), three case comments and three book reviews, CARS annual activity report 2011 and a bibliography of Polish publications on antitrust and sector-specific regulation.

3.2. internetowy Kwartalnik Antymonopolowy i Regulacyjny (iKAR) [internet Quaterly on Antitrust and Regulation]

CARS started publishing a completely new e-periodical in 2012 – iKAR – which is available at http://www.ikar.wz.uw.edu.pl. The basic (reference) version of the journal is electronic in nature, paper copies play a marketing role only. iKAR (acronym
for *internetowy Kwartalnik Antymonopolowy i Regulacyjny*) is open to both legal and economic publications as well as papers bordering on either/both of these areas as well as on management or even technical disciplines. iKAR’s two basic fields of interest are: (1) antitrust (including restrictive practices and merger control) and (2) sector-specific regulation. The second area was initially limited to infrastructure sectors only, but with the development of the periodical it now also covers other sectors (such as audiovisual and financial services) or related areas (e.g. state aid, consumer protection, relationships between competition and IPRs etc.). iKAR contains both full articles and smaller texts such as case comments or book reviews, related to Polish, European and global problems.

Six volumes of iKAR were published in 2012, two of them [vol. 5(1) and 6(1)] are dedicated to telecommunications.

3.3. ‘Special clearances in the law on merger control’ (ISBN: 978-83-61276-99-9)

The tenth monograph published in the CARS ‘Textbooks and Monograph’ series written by Professor Tadeusz Skoczny is devoted to the key element of pre-emptive merger control – the material and formal legal basis for the issue of special clearances. The analysis is centered on the theoretical concept of ‘special’ clearances for the issue of which it is not sufficient to establish that a notified merger is not likely to lead to a significant impediment of competition (as is the case for ordinary clearances) or to clearances that must be issued despite the fact that the notified operation will in fact lead to a significant impediment of competition and thus should be prohibited. The analysis covers 3 types of special clearances: exceptional clearances issued when a prohibitive decision is inappropriate due to the fact that the expected significant impediment of competition will occur even if the merger is prohibited; extraordinary clearances for anti-competitive mergers that must be permitted for public policy reasons other than competition protection; and finally conditional clearances issued in order to avoid a prohibitive decision in situations when the parties modify their operations so as to eliminate the expected impediment of competition. The Author proves that special clearances, and in particular conditional clearances, should be seen as a preferred option before prohibitive decisions.

4. Conferences and seminars

4.1. Enterpreneurs’ rights in antitrust proceeding

A conference held on 23 June 2012 was co-organized by CARS and the Institute of Law Studies of the Polish Academy of Sciences and financed from the Foundation for Polish Science programme Pomost/Powroty/2010-1/1/NQC.

The conference focused on the discussion of entrepreneurs’ rights in national and European antitrust proceedings. Participants debated over such problems as: legal character of antitrust proceedings; applying the European Convention on Human Rights in antitrust cases; particular rights and guarantees for entrepreneurs that are a
'party' to antitrust proceedings (access to the file, right to fair hearing, etc.); juridical control of decisions issued by competition authorities as a tool for the formulation of standards for the activities of the competition bodies concerned etc.

A set of articles based on the specific papers presented during the conference were published in YARS 2012, vol. 5(6) [see point 3.1. above].

4.2. Safety/security and effectiveness of airports

A seminar co-organized by CARS and the State Enterprise ‘Polish Airports’ (PPL) was held on 24 May 2012. It was a platform for the presentation of the results of a major research project entitled ‘Airport services in the European Union and Poland – selected problems’. These results were published in a book (under the same title) included in the CARS Publishing Series, Antitrust and Regulatory Monographs and Textbooks.

Papers were delivered by researchers from the Faculty of Management, University of Warsaw as well as by Professor Anna Fornalczyk (Technical University of Lodz), Krzysztof Banaszek (President of Polish Air Navigation Services Agency) and Filip Czernicki (PPL). Speakers focused on safety of air traffic, personal control at airports as well as building a business strategy for airports. The benchmarking of selected airports located in the EU was also presented.

4.3. Juridical control model applicable to antitrust and regulatory cases

A conference organized by CARS on 4 July 2012 gathered academics and practitioners interested in the problems surrounding juridical control of decisions issued by the Polish Competition Authority (President of the Office of Competition and Consumer Protection) and other regulatory authorities. Panelists participating in the debate included: Professor Zbigniew Kmieciak (judge of the Supreme Administrative Court), Professor Stanisław Piątek (Chair of Legal Problems of Administration and Management, Faculty of Management, University of Warsaw), Professor Tadeusz Skoczny (CARS), Professor Karol Weitz (member of the civil law codification commission) and Professor Andrzej Wróbel (judge of the Constitutional Tribunal).

Participants discussed problems such as: constitutional and European Convention-based requirements for juridical control of administrative proceedings; full and specialized jurisdiction of courts in cases related to the control of administrative proceedings in competition and regulatory cases in the current model; juridical control of proceeding before the European Commission; juridical control of proceedings in antitrust and regulatory cases from the perspective of administrative courts and legislation.

5. Consulting

In May 2012, CARS presented its expert opinion on the draft amendment to the current Polish Competition Act prepared by the Polish Competition Authority (President of the Office of Competition and Consumer Protection). The opinion was
jointly written by a Working Group, founded by CARS, consisting of academics and practitioners active in this field. The opinion extended beyond merely commenting on the amendments proposed by the Competition Authority. Contained therein were also alternative ideas for potentially more desirable legislative solutions. The full paper is available on the CARS website (http://www.cars.wz.uw.edu.pl/tresc/doradztwo/06/Opinia_GR_CARS-fin.pdf) and became the starting point for a wider discussion on the proposed draft that continued in iKAR (internet Quarterly on Antitrust and Regulation).

In September 2012, CARS submitted also to the European Commission a Questionnaire providing its comments on the application of a General Block Exemption Regulation (‘GBER’) exempting state aid programmes/projects from the mandatory notification duty set in Article 108(3) TFEU. The submitted comments were part of the 2013 GBER review. The opinion prepared by the CARS Working Group chaired by Dr. Łukasz Grzejdziak (Faculty of Law and Administration, University of Lodz) is available on the CARS website (http://www.cars.wz.uw.edu.pl/tresc/doradztwo/07/gber_questionnaire_pl_CARS_final.pdf).

*Dr. Agata Jurkowska-Gomulka*

CARS Scientific Secretary

Warszawa, August 2013
B I B L I O G R A P H Y  2 0 1 2

POLAND*

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