B O O K S R E V I E W

Agata Jurkowska-Gomułka, *Publiczne i prywatne egzekwowanie zakazów praktyk ograniczających konkurencję: w poszukiwaniu zrównoważonego modelu współistnienia* [*Public and private enforcement of the prohibition of anticompetitive practices: in search of a balanced model of coexistence*], Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, Warszawa 2013, 484 p.

The reviewed book by Agata Jurkowska-Gomułka is entitled *Publiczne i prywatne egzekwowanie zakazów praktyk ograniczających konkurencję: w poszukiwaniu zrównoważonego modelu współistnienia* [*Public and private enforcement of the prohibition of anticompetitive practices*: *in search of a balanced model of coexistence*]. It was published in 2013 by the University of Warsaw, Faculty of Management Press. The author holds a PhD in legal sciences and works at the Department of European Economic Law of the Faculty of Management of the University of Warsaw. She is a member of the Centre of Antitrust and Regulatory Studies. Agata Jurkowska-Gomułka has written numerous publications in the field of Polish and European competition law.

As indicated by the title of the book, the author's aim was to present the public and the private enforcement procedure of the prohibitions of competition restricting practices (both multilateral and unilateral, hereafter: antitrust prohibitions) (p. 20) in order to find a balanced model of their coexistence. It should be stressed at the outset, that this is the first Polish-language publication which compares the two enforcement models of the antitrust prohibitions. Issues connected to public and private enforcement of competition law have been presented separately in the competition law and in the civil law doctrines. They were addressed by, *inter alia*, P. Podrecki and M. Sieradzka as well as A. Piszcz, who recently wrote about the need for 'sustainable antitrust enforcement'[1]. However, no publication has presented so far

[1] See amongst others P. Podrecki, *Porozumienia monopolistyczne i ich cywilnoprawne skutki*, Kraków 2000; M. Sieradzka, "Dochodzenie roszczeń odszkodowawczych z tytułu naruszenia unijnego i krajowego prawa konkurencji (część I)" (2012) 1 *Przegląd Ustawodawstwa Gospodarczego* ; M. Sieradzka, "Dochodzenie roszczeń odszkodowawczych z tytułu naruszenia unijnego i krajowego prawa konkurencji (część II)" (2012) 2 *Przegląd Ustawodawstwa Gospodarczego*; M. Sieradzka, "Dochodzenie roszczeń za naruszenie unijnych i krajowych reguła konkurencji a kwestie prejudycjalności rozstrzygnięć organów ochrony konkurencji" (2010) 12 *Przegląd Prawa Handlowego*; A. Piszcz, "Still-unpopular Sanctions: The Private Antitrust

the interactions between those two enforcement models in the domestic legal order or examined their impact on one another.

The value of the reviewed book goes, however, beyond the fact that it fills an important gap on the Polish publishing market by presenting a comparison of the public and the private enforcement model. What makes this publication so valuable to the competition law doctrine is the fact that the author not only thoroughly describes the key issues connected to both enforcement models, but also attempts to propose a number of valid solutions to the identified problems. Agata Jurkowska-Gomułka indicates also which existing legal instruments might prove useful in the process of creating a balanced model of coexistence between public and private enforcement of the antitrust prohibitions.

The reviewed book is divided into eight chapters preceded by a brief introduction which describes and explains the scope and subject of the research.

The first chapter continues to present some introductory issues and can thus be seen as a prolongation of the introduction. Aside from identifying the research problems and clarifying the terminology used in the book, the author states therein that the enforcement model of the antitrust prohibitions is made out of two modes (sub-models): public and private. Already this early in the publication, Agata Jurkowska-Gomułka rightly emphasizes that despite the fact that the public sub-model is used far more frequently, both sub-models are equally important. A noteworthy thesis is presented here according to which, there is a need for the coexistence of both sub-models within a balanced model of their coexistence. The term 'balanced model of coexistence' is understood as a competition law enforcement model in which each of the two sub-models support the enforcement of the antitrust prohibitions by facilitating the procedure undertaken within the other sub-model so that each mode can reach the aim designated to it (p. 47). This thesis is thoroughly researched and discussed in the following chapters of the monograph.

The second chapter covers the most important issues connected to the public enforcement of the antitrust prohibitions under Polish and European law. The author shows particular interest in the recently observed growing trend for the enforcement of competition law via criminal law measures – the analysis of this issue dominates this chapter of the reviewed monograph. Agata Jurkowska-Gomułka presents and examines in detail the solutions provided by criminal law in the legal systems of other countries. On the basis of the conclusions resulting from this analysis, she identifies and discusses issues connected to the criminalization of competition law regarding, in particular, criminal liability of collective entities and the definition of the crime of monopolization of the market (criminal cartel). After assessing the interactions between the administrative and the criminal enforcement of antitrust prohibitions, the author concludes that a moderate model would be most beneficial here whereby criminal liability is provided for individuals and the responsibility for administrative torts – for entrepreneurs (abstract legal entities) (p. 101).

Enforcement Developments in Poland after the 2008 White Paper" (2012) 6(7) *YARS*; A. Piszcz, *Sankcje w polskim prawie antymonopolowym*, Białystok 2013.

Private enforcement of the antitrust prohibitions is examined in chapter 3. Agata Jurkowska-Gomułka provides here a complex analysis of existing legislation and case-law regarding the private enforcement procedure under EU competition law. Covered are, in particular, the sources of the rights of individuals to seek redress for competition law infringements and procedural problems arising from the lack of harmonization of procedural rules at EU level. It should be indicated here that the reviewed monograph was published in May 2013, that is, before the Commission's announcement of its legislative package on private enforcement of competition law[2]. The book does not therefore include the issues arising from this package. As a result of the study of European competition law, the author rightly observes that the legal solutions adopted in the EU regarding private enforcement of the antitrust prohibitions are seen by national legislators and authorities, including national courts, as a model system. Standards provided at the EU level are therefore implemented also in national legal systems.

Agata Jurkowska-Gomułka continues on to discuss private enforcement of competition law in Poland drawing attention to the possible legal acts that might become the legal basis for seeking redress for breach of the antirust prohibitions: the Civil Code (tort liability rules under Article 415 of the Civil Code, contractual liability under Article 471 of the Civil Code, unjust enrichment under Article 405 of the Civil Code) and the Act on combating unfair competition. Importantly also, the author emphasises that the Act on combating unfair commercial practices is sometimes also pointed out in the doctrine as a legal basis for private enforcement of competition rules in Poland, she is nevertheless of the opinion that it is not an appropriate legal basis for this purpose (p. 135–138).

The fourth chapter of the reviewed book is devoted to the issue of public and private interest in the enforcement of the antitrust prohibitions. The author convincingly explains first why public enforcement should not only be associated with public interest, and why private enforcement should not only be associated with private interest. To prove that an opposite view would be incorrect, Agata Jurkowska-Gomułka gives the following example: when a civil court hears an individual case, it

[2] The Commission legislative package on antitrust damages actions published on 11 June 2013 consists of: the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013) 404, 11.6.2013), Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (C(2013) 3440, 11.6.2013), Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (SWD(2013) 205, 11.6.2013), the proposal was accompanied by an Impact Assessment Report (SWD(2013) 203 final, 11.6.2013) and Executive Summary of the Impact Assessment Report (SWD(2013) 204 final, 11.6.2013). See also A. Piszcz, „'Pakiet' Komisji Europejskiej dotyczący powództw o odszkodowania z tytułu naruszenia unijnych reguł konkurencji oraz zbiorowego dochodzenia roszczeń" (2013) 5(2) *Internetowy Kwartalnik Antymonopolowy i Regulacyjny* 52.

acts also in the public interest (p. 211). It means that the public interest and the private interest shall not be seen as opposite values seeing as proceedings within each sub-model have a chance to influence both interests. Noteworthy is also the statement that indirect purchasers and public authorities may, under certain conditions, be entitled to seek redress for breaches of the antitrust prohibitions. However, while analyzing this issue the author rightly indicates that a public authority may be legitimate to do so only if its claims appear in the sphere of civil law relations between the authority and entrepreneur (p. 192).

The fifth chapter concerns another key problem – the availability of evidence obtained in the course of antitrust proceedings and using it for the purposes of private enforcement of the antitrust prohibitions. Agata Jurkowska-Gomułka has made an attempt to identify legal instruments that could be applied in the absence of specific rules authorizing the use of evidence obtained in antitrust proceedings for the purpose of later judiciary proceedings. One of the solutions recommended under Polish law would be to refer to the rules on access to public information. However, the author makes a point to say that this is not a perfect or fully effective instrument in the domestic legal order mainly because it derives from jurisprudence, which is not homogeneous (p. 267). Another downside of this solution is the fact that access to public information on this legal basis is only possible for 3rd parties (those that were not party to the original antitrust proceedings). The author proposes therefore another solution that may complement the one presented above: for the purpose of creating a balanced model of coexistence of public and private enforcement of competition law, the application of the rules governing access to public information should be supplemented by actions undertaken by judges determined to obtain evidence under the applicable provisions of the Code of Civil Procedure (for instance, court orders for disclosure of evidence or admission of evidence by the court acting *ex officio*). In practice, however, actions undertaken *ex officio* may easily result in an inequality of the parties, which makes this instrument less helpful.

The arguments given by Agata Jurkowska-Gomułka in this chapter are complex and coherently presented. Nevertheless, none of the instruments proposed as a remedy for the abovementioned problem is fully adequate. They do not solve practical problems related to the potential scope of the availability of evidence obtained in antitrust proceedings regarding, for instance, evidence which is a trade secret, evidence related to the leniency program, or information obtained during the settlement procedure. After identifying and fully describing those practical problems, a fully functional solution to eliminate them was not actually proposed. This can be seen as a downside of this analysis. In this matter, the author seemed to be satisfied with the conclusion that no rule of law is capable of eradicating those practical problems (p. 215–216).

The sixth chapter is devoted to the reciprocal impact of decisions taken in the public and in the private sub-model of competition law enforcement. Agata Jurkowska-Gomułka presents here an opinion, supported by jurisprudence, that the final decisions issued by competition authorities should bind common courts. In her opinion, a balanced model of competition law enforcement requires that the decisions of antitrust authorities must be of a prejudicial nature. However, the same mechanism

does not apply in the opposite direction, that is, antitrust authorities are not (and shall not be) bound by the rulings of civil courts delivered in antitrust cases. This should not be seen as the unjustified supremacy of public enforcement of competition law over the private enforcement.

The author continues on to present possible instruments that may be used in order to ensure coherence between the decisions of antitrust authorities and the rulings delivered by civil courts. One of such instruments is seen in the possibility to suspend court proceedings under Article 177 § 1 point 3 of the Code of Civil Procedure. Agata Jurkowska-Gomułka strongly recommends this solution when civil law and antitrust proceedings are conducted simultaneously. At the same time, the author stresses that the lack of an administrative decision shall not prevent a party from initiating private proceedings aimed at the enforcement of their claims. If a lawsuit is filed spontaneously (without prior administrative decision), the civil court has full judicial discretion in assessing whether a breach of the antitrust prohibitions took place or not (p. 310). The author is critical here of the lack of procedural rules allowing the Polish NCA to play an active role in civil law proceedings based on competition law infringements. Without such rules, the national enforcement practice is said to be deprived of an important tool ensuring that private and public enforcement is harmonious (p. 317). This instrument is seen as particularly useful in the development of private enforcement of competition law because courts may frequently need actual support from the specialized competition authority.

The seventh chapter is particularly interesting as it presents an in-depth analysis of the types of sanctions and remedies in proceedings taking place before competition authorities and civil courts. Agata Jurkowska-Gomułka draws special attention to the problem of accounting sanctions imposed in one sub-model on the sanctions applicable under the second sub-model. While analyzing this issue, it is indicated that the vast majority of legal systems, including the Polish one, maintain a total autonomy of sanction for the breach of the antitrust prohibitions in the public and private enforcement model. However, according to the author, transfer of sanctions could be used, to some extent, in order to optimise the overall effectiveness of the entire competition protection system (p. 425). It is argued therefore that the rules on sanctions in the public and private sub-models should be construed so that each could, as a rule, independently fulfil its basic functions. This would give entities interested in the enforcement of antitrust prohibitions a sense of effectiveness of the sanctions and remedies that are being used (p. 429). Still, the author makes a crucial statement here: impact of public and private sanctions on each other in order to strengthen the effectiveness of competition protection is possible only when the sanctions in one sub-model implement the basic and pure functions of this very sub-model – compensation for the private sub-model and repression for the public sub-model. Otherwise there is a risk of a breach of the *ne bis in idem* principle (p. 428).

The shortest eighth chapter provides a brief summary of the overall arguments presented in the monograph. The fact that each of the earlier chapters closes with a subchapter entitled ‘Conclusions’, summarising all of the argumentation presented by the author in the given chapter, is a great feature of this publication. As a result,

however, chapter 8 is used by Agata Jurkowska-Gomułka to concisely demonstrate her crucial conclusions without the need to develop them any further at this point. Therefore, the last part of the publication has become a collection of the essential conclusions contained in the book. It is here that the author presents her *de lege ferenda* proposals which coherently correspond with the arguments presented in the monograph and make the elaborate complete.

The book covers crucial problems connected to public and private enforcement of the antirust prohibitions under Polish and European law. But as explained in the book's introduction, the presentation of all issues regarding this topic was not the purpose of this publication. The value of the reviewed monograph partially results from the fact that the analysis presented therein is supported by numerous references to jurisprudence and case-law as well as civil and competition law doctrine. The comprehensiveness of the analysis increases also thanks to the provided coverage of the solutions adopted in other countries. Still, the book does not constitute a comparative legal analysis of foreign legal systems.

Agata Jurkowska-Gomułka has presented the subject of public and private competition law enforcement in an adequate and deliberate manner. An excellent feature of the reviewed monograph is that the author has managed to present the researched topic in a light and user-friendly manner. Since each crucial problem is preceded by an explanation of its basic issues, the thesis presented in the publication can be fully understood not only by those who are familiar with antitrust prohibitions but also by those who are new to this topic.

The value of the monograph arises also from the fact that Agata Jurkowska-Gomułka has quoted opinions of other representatives of competition and civil law doctrine, including views which the author does not agree with. Such thorough presentation of the given subject not only makes the discussion more interesting, but it also helps readers to get familiar with contradictory opinions allowing them to formulate their own views.

In conclusion, I would strongly recommend the reviewed monograph not only to the representatives of the competition law doctrine. Due to the numerous references to the thesis presented in the doctrine and jurisprudence, the book may prove to be useful especially for practicing lawyers. I therefore believe that this publication should be found in every legal library concerned with the prohibition of anticompetitive practices.

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