

**Anna Piszcz, *Sankcje w polskim prawie antymonopolowym*
[*Sanctions in Polish Antimonopoly Law*],
Wydawnictwo Temida 2, Białystok 2013, 483 p.**

Sanctioning policy inspires some of the most vibrant controversies in competition law. Sanctions can be analyzed from several perspectives and the research conducted by dr. hab. Anna Piszcz takes on a variety of angles. Its general purpose is to investigate whether sanctions currently provided by Polish law are sufficient to protect competition, and whether they accomplish the goals defined by the law. The narrowing down of the scope of the research to Polish law only made the above task even more daunting for the array of available domestic cases, both administrative and judicial, remains rather modest compared to a broader European perspective. However, including other EU countries, or the EU itself, would have required an entirely different philosophy and methodology. The book, although written with an academic degree in mind, has practical applications. Its aim is to both expose the flaws of existing Polish competition law as well as to offer an improved model, better adjusted to the market.

The book's main hypothesis is that antitrust sanctions as envisioned in Polish law do not measure up to the general task of protecting competition, neither do they fulfill their specific normative purposes. Even more so, they do not constitute a coherent system, resembling instead a loose collection of various legal instruments.

The questions that dr. hab. Piszcz means to answer revolve around the fundamental functions of competition law: restitution, punishment and execution, of which the first is regarded as the most important. Of the many diverse research problems tackled in the book each is vital. Some pertain to administrative law concepts, such as the scope of discretionary powers vested with public authorities, but the main focus is on current decision-making practice. The most difficult of these questions is also the simplest one: are sanctions sufficient? It seems to be an insurmountable task, demanding the use of an all-embracing economic approach.

The approach followed by the book is to adopt a narrower, legalistic view of efficiency. Thus the 'measurement' fits squarely with mainstream legal analysis, the one relying on juxtaposition of law, casework and theory. Effectiveness becomes a very abstract notion, measured from one legal threshold to another. It is looked at autonomously between the different sanctions and different fields which constitute competition law. Nevertheless, the very explanation of the reasons why it is so difficult to precisely capture the various levels and degrees of effectiveness deserves praise. In this respect, the book is uneven, going from an abstract assessment of sanctions, to

being very specific. For example, on page 101 the reader can find a detailed analysis of a case where a decision made by the Polish competition authority cannot be sued because of the legal status of the enterprise.

Chapter I provides the background of the book as well as explains its terminology, thus setting up the stage for further considerations. One might question the necessity of bringing up the works of Jeremy Bentham and Immanuel Kant. However, some philosophers, namely R.A. Posner, provide a bridge to a broader context within which competition law operates. Should the sanction exceed the damage, as argued by Posner, or should they equal? If the main function of competition law is restitution, asserts dr. hab. Piszcz, than in spite of its public law character, the sanction should match the damage. This assertion may inspire skepticism for reasons not directly related to competition. A similar attitude as that exhibited in the book under review has dominated international business law where sanctions for conduct such as dumping are expected to be milder than the level of damage incurred by the economy of the importing state. If both systems have failed in terms of the efficiency of sanctions, why not learn from that failure and opt for deterrent punishment?

As mentioned above, dr. hab. Piszcz expresses her extreme criticism of current competition law by refusing to call it a system. To her, it is merely a loose collection of sanctions. She blames some of this situation on a faulty legislative process, where the final versions of legislative acts widely differ from their original drafts. This failure testifies to the inefficiency of the cooperation between the Polish government and the national parliament as well as to insincerity of the intentions of the bill proponents.

Chapter II deals with the restitutive function of competent law. The Author analyses the sanctions of nullity, the deprivation of a right (such as in mergers), the imposition of a competition law obligation and splitting an enterprise. The expansive scope of these considerations allows only for a summary opinion. The sanction of nullity is regarded as fully effective for the simple reason that, unlike others, its effectiveness does not rely on arbitrary research criteria such as the rate of administrative decisions being repealed by courts. Also, its effectiveness can be assessed without resorting to the economy, the book says. The restitutive sanction is viewed as a 'relatively open formula', resembling discretionary powers (p. 233), without negatively affecting the constitutional rights and freedoms of businesses.

However, some unanswered questions remain. The reader might be curious in what way the concept of discretionary powers is affected by the continuity of the relationship between an enterprise and the authority? Can we relax the prohibition of an expansive interpretation typical of administrative law on the grounds that the competition authority protects weaker market players, thus liberating them from potential abuses by a dominant enterprise? How much discretion has the competition authority in choosing between the various legal instruments available to it?

Chapter III covers the repressive sanction. The empirical data collected by dr. hab. Piszcz sheds a new light on the mitigation of punishment under the leniency program, on competition law fines, frequency and types of competition law decisions, which come divided by subject and by the status of the enterprises, thus providing an important background to the analysis. The book frequently opens itself to a broader picture of the

law. In this vein, it seeks a link between competition law fines and the jurisprudence of the European Court of Human Rights, which has subsumed large pecuniary fines under criminal penalties. This in turn calls for granting courts full jurisdiction, instead of mere control of legality. Using it as a guiding post, the book notes an excessive simplification of the instruments available to the Polish competition authority and various discrepancies between Polish and EU law. In this regards, the book might become a valuable guide in the current attempt to reform competition law in Poland.

Systemic observations recur in the context of proportionality of sanctions, a problem directly linked to the penalization of competition law. In my view, human rights jurisprudence is not a sufficient legal framework. Still, undeniably, the Author had the liberty to narrow down the scope of her own research. Alternatively, one might encourage an autonomous or semi-autonomous theory vis-à-vis criminal law. After all, the ECHR has held that substantial fines fall under criminal punishment only 'as a matter of principle'. Therefore, the two realms are not expected to be identical. There remains ample room for tailoring the punishment criteria to the need of protecting competition. Also, regardless of what the ECHR thinks, I doubt that the same severity criteria of punishment should apply to big international corporations and to lesser market players, and that maximum fines are excessive, as the Author suggests on page 346. To prove the contrary one must venture far outside the competition law doctrine. Sufficient evidence is provided by academic literature on legal and political science as to the ruthlessness of corporations and their devastating effect on weaker national economies as well as competition. However, I agree with the Author that the necessity of imposing fines on smaller enterprises should be revised. In a similar vein, one might explore in depth sanctions on enterprises with a small or no profit. Lack of profit may be a sign that the practice in question is not as damaging to competition as believed. Yet, it may also be a product of manipulation, which should be taken into account in setting punishments.

The above raises the question of how precisely should we define the powers of the competition authority. An intuitive conclusion could be that if the current system fails, than tightening the rules is in order. This seems to be the book's prevailing train of thought and one worth debating. Perhaps some fine-tuning of the competences is necessary, but the very essence of antitrust decision-making rests on our inability to typify market situations. There are too many market variables to provide a secure statutory matrix for future decision-making. Otherwise, we would be able to supervise and correct the market with 'plain' administrative instruments. The powers of competition authorities and sectorial regulators (for instance in telecoms and energy) have been purposefully couched in general terms so as to provide flexibility in reacting to constant fluctuations of market forces. Excessive formalization of competences could detach the authorities from the economic reality of the market. Still, this issue remains open in view of the recent removal of the Polish competition authority – the UOKiK President – which took place after the book had already been published. The removal followed serious concerns being voiced on an overly restrictive use of legal instruments, for instance, as if the authority had the right to run an independent economic policy. This revealed the 'original sin' of antitrust – torn between the need of independence and the need of democratic legitimacy. The latter, apart from

accountability, requires that authorities act according to the law, which in the case of competition matters cannot be too specific.

One of the more 'sensitive' issues in this context is the legal status of 'explanations' attached to the sanctioning policy provided by the competition authority. In themselves, such guidelines do not seem to pose a systemic threat. However, the continuous hardening of EU's 'soft law' testifies to the contrary. One has to agree with the Author, therefore, when saying that such guidelines must not be accorded any legally binding power. Even the very term 'guidelines', the book argues, should be eliminated for it may mislead businesses as to their binding nature, particularly since the book reveals gross entrepreneurial ignorance in matters of competition law, not to mention about its systemic intricacies (page 336 et seq.).

Chapter IV covers the coercive sanction. Decision-making practices drew heavy criticism from the Author for the late initiation of proceedings meant to verify the implementation of competition law decisions. On the one hand, the book is correct in concluding that the sanctioning policy is, 'as a matter of principle', too lenient. On the other hand, it raises the question of trust. In my opinion, if mutual trust between the State and businesses constitutes a virtue confirmed at the constitutional level, than do we really need to rush to supervision? What is even more interesting, should we look differently at the principle of trust in general competition law and in sectorial regulation? It seems that if competition law instruments are designed for *ex post* intervention, while sectorial regulation is designed for *ex ante* prevention, than we should have two different philosophies. The one for the regulatory regime presupposes, in my view, earlier and speedier reaction, because it is supposed to build competition. The one for competition does not build anything (in theory), but corrects the infringements of the past. This is not to imply that time does not matter in competition law enforcement. It just may be that the expectations as to the speed of public intervention may be conceptually different.

The book's final conclusions are extremely diversified. Much of the cognitive success of the book stems from the appreciation of the interdependence of substantive and procedural rules in their organizational context. With all its methodological strictness, including the bibliographical background, the book demonstrates the limits of using the legal method to analyze the very core of competition, which is economic by nature. Even more so, it denudes the flaws of the legislative process which, in the light of dr. hab. Piszcz's research, seems detached from the economic and technical reality in which competition law is inevitably immersed.

The book leaves the reader convinced that Polish competition law does indeed need a reform, which should, inter alia, pay attention to antitrust sanctions in their systemic context. Whether that reform should take the direction currently proposed by the government is a different story. The book represents a big step forward in our understanding of sanctions in competition law. And, personally, I value it as much for what it expressly says, as for what it just hints at.

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