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CARS Centre for Antitrust and Regulatory Studies
Centrum Studiów Antymonopolowych i Regulacyjnych
Centre for Antitrust and Regulatory Studies, University of Warsaw, Faculty of Management
www.cars.wz.uw.edu.pl

Living with Competition Law Issues. Report on the Conference

An international conference was held on 14 March 2014 in Warsaw entitled 'Living with Competition Laws Issues'. The conference was organized by the International Association of Advocates (Union Internationale des Advocats – UIA[1]), under the honorary patronage of the President of the Polish Competition and Consumer Protection Office – the President of UOKiK (National Competition Authority, NCA). The conference was prepared with co-operation of the International League of Competition Law (ILCL), the Polish Bar Council, the National Chamber of Legal Advisers and the Polish Association of Corporate Lawyers. The conference gathered lawyers from numerous legal firms (external advisers) as well as corporate lawyers from almost all countries across the European Union (EU), Bosnia et Herzegovina, Russia, Serbia, Turkey and the USA. The event was addressed in particular to lawyers whose interests and legal practice focus on competition law issues. It was a great opportunity to exchange knowledge and experiences in national and European competition law as well as in other legal systems and cultures. The conference was composed of an introductory part, three substantive panels and a short summary.

The introductory part of the conference was chaired by Aleksander Stawicki, the President of the Competition Law Commission of UIA (WKB Wierciński, Kwieciński, Baehr, Warsaw). Małgorzata Krasnodębska-Tomkiel[2] followed as the first speaker presenting the key projects and main policy directions of the Polish competition authority. M. Krasnodębska-Tomkiel stressed the fact that competition law is not 'black and white' and demands explanations in many cases. Moreover, many ambiguous issues need clarification which surface in legal practice. This is why the NCA publishes guidelines as well as why it drafted the latest amendments to the Polish Competition and Consumer Protection Act processing currently in the Polish Parliament[3]. Summing up, M. Krasnodębska-Tomkiel said that consumer welfare depends mainly on good competition policy. She also expressed the hope that the

[1] UIA is one of the oldest global lawyers' organizations; it was established 85 years ago and bands together a few thousands lawyers from almost 120 states worldwide.

[2] Małgorzata Krasnodębska-Tomkiel was at the time of the conference the President of UOKiK (the conference was held just after her dismissal). Adam Jasser is the current President of UOKiK.

[3] On 21–22 May 2014 the amendments have been adopted at the last session of the Polish Senat. The new law will come into force 6 months after its announcement in Journal of Laws.

main policies and initiatives undertaken during her time in office will be continued by the newly appointed President of UOKiK.

The next prominent speaker was Stephen L. Dreyfuss, the President of UIA, who focused on the efficiency of leniency in the USA and the subject matter of competition law, which in his opinion varies in the USA and in Europe (differentiating protection of competition and protection of competitors). He also emphasized the advantages for Poland arising from the active involvement of Polish lawyers in the works of UIA, especially due to the international dimension of this organization and number of interesting events it is involved in. The preliminary part of the conference closed with Gusztav Bacher, the President of ILCL. He briefly presented the history of ILCL and stressed the solutions applied to unify the law in the context of the leniency procedure and commitments as well as the importance of competition law for internet business activity.

The first substantive panel of the conference was entitled 'Assessing competition law risk – how to do in practice'. It gathered representatives of external legal firms as well as in-house lawyers: Dorothy Hansberry-Bieguńska (Hansberry Competition, Warsaw), Jolanta Tropaczyńska (Orange Telekomunikacja Polska, Warsaw), Marc Reysen (O'Melveny&Myers, Brussels) and Dominik Wolski (Jeronimo Martins Polska, Warsaw).

The panel was chaired by Aleksander Stawicki who gave a short presentation first. He focused on issues such as difficulties relating to antitrust risk assessment due to the general nature of antitrust and progressing development of its interpretation, very often leading to serious changes in legal practice. One of the examples provided was the European Commission decision addressed to the Intel Corporation, which imposed an enormous fine for 'loyalty rebates'. This example is really exceptional because no provision of competition law outright prohibits this kind of rebates. A. Stawicki stressed also the problem of the existing 'grey area' which causes many doubts and really broad interpretations of competition rules. This realization is even more important since often the solution which is attractive for the businesses simultaneously brings many dangers for other undertakings from the competition law perspective. As a result, it can lead to breach of competition rules. As a consequence, competition law risk assessment is characterized by a significant level of uncertainty in relation to the potential effects of activities planned/carried out by undertakings. A. Stawicki also emphasized the crucial role of lawyers involved in the competition law risk assessment process.

The introductory presentation was followed by a discussion between the participants of the panel. This part focused on the possibility of competition law risk assessment in undertakings, the scope of lawyers' responsibility in the framework of such assessment and the decision-making process as well as the differences between the role of internal and external advisers therein. There were discernible discrepancies between the panellists, arising among other things from the position of lawyers in the competition law risk assessment process and the specifics of particular businesses. While they contributed to the discussion becoming heated, the panellists agreed that lawyers have a significant role to play here. They also agreed on the specific nature of antitrust law

as the subject of the assessment process and the related risks as well as the fact that lawyers need to give clear and useful instructions to businesses. The last part of the panel was dedicated to the creation of a matrix of competition law risk assessment in undertakings. The resulting matrix indicated the main points in the process and the evaluation of their importance. This part of the conference was summarized by a discussion between the panellists regarding these points of the matrix where the biggest discrepancies in the assessment of competition law risk arose.

The next panel was entitled 'Managing competition law risk – compliance and beyond' and was entirely devoted to compliance issues. It was led by Martina Maier, Vice-president of the Competition Law Commission of UIA (McDermott, Will & Emery, Brussels). The composition of this panel consisted of Piotr Borowiec (PKN Orlen, Warsaw), Grzegorz Kaniecki (Unilever, Warsaw), Robert Neruda (Havel, Holasek & Partners, Prague) and Vassily Rudomino (Alrud, Moscow).

First to speak was Grzegorz Kaniecki, who presented the main principles of compliance programmes. In this case, competition law is one of the key elements of the entire compliance programme. The latter must be based, in relation to competition matters, on knowledge and experiences and should be shaped somewhat differently for managers (middle and top) and non-managerial stuff. This way, it is tailor-made to the needs of particular groups of employees and, hence, more effective. Moreover, each compliance programme must be accompanied by clear guidelines on what is allowed and what is not (Dos & Don'ts). These must be evaluated and updated regularly due to the permanent changes in the structure of the undertaking as well as in the business environment. Education and regular training for employees are also extremely important because people working for the company must be aware of competition law and the consequences of violation its rules. The crucial factor here is the voice from the top (top managers) emphasizing the importance of compliance programmes.

Piotr Borowiec agreed with the previous speaker in relations to the need to update compliance programmes due to changes in the law and in business. In response to the question why compliance programmes are so important, Grzegorz Kaniecki argued that legal compliance is, in the long term, one of the key factors for success in business. Unfortunately, the long-term perspective is rather rarely taken into consideration in the decision-making process in existing business organizations.

In the next part of this panel, Robert Neruda said that the main aim of compliance programmes is to increase competition law awareness – competition law is very important, but unfortunately this is not a common opinion. The dissemination of this knowledge among employees and managers of each company should thus be the key element of compliance programmes. Vassily Rudomino stressed subsequently the difficulties in the popularization of compliance programmes in Russia, which is, in his opinion, accompanied by the need to overcome barriers arising from historical hangovers (planned economy) and a number of mentality changes in undertakings. The centrally planned economy, existing in the former economic system, can be recognized as the one, great 'collusion'. In the current economic system, which brings a number of business opportunities, but at the same time

many great expectations, people do not want to agree with restrictions imposed by competition law.

In the following discussion, the panellists noted that there is no single compliance programme but that each must be tailor-made in relation to the organizational culture of every individual organization. Moreover, compliance programmes must be short and clear in their form (readers should not face more than one page of text). The importance of the engagement of bosses was emphasized (message from the top). Panellists agreed that if business people do not see any added value in the responses they receive in the framework of compliance programmes, than they stop asking questions. In the panellists' opinion, compliance programmes must be well structured, must not be overloaded with information and cannot use legal language. The main role of such programmes is not to impede, but to enable running a business. The role of compliance is especially important in these jurisdictions which have criminal responsibility for competition law violations. The implementation of a compliance programme is an important business decision in light of the costs to be incurred by the undertaking. Finally, the panelists expressed their disappointment about the lack of a perceptible trend to grant compliance programmes an adequate role by the European Commission and the NCAs (the existence of compliance programme is not recognized as a mitigating circumstance within the ascertainment of a violation). It is worth mentioning that exceptions to this approach exist and hopefully this trend will be developed further.

Two expert panels took place in the following part of the conference covering selected competition law issues. This part of the conference focused more on presentations, than on open discussion.

The third panel was chaired by Carmen Verdonck (Altius, Brussels). The first presentation was devoted to interesting matters related to the Commission's legislative plans on the acquisition of minority stakes control. Koen Platteau (Olswang Belgium, Brussels) noted that the Commissions' proposal is the consequence of its approach to the acquisition of Aer Lingus by Ryanair and the decisions issued in this context. It was said that there is common agreement that a competition law loophole exists in a vast majority of EU Member States in relation to minority stakes control. As a result, this kind of acquisition can potentially lead to a competition restraint, even if the number of such cases remains insignificant. This is the reason why the Commission is right to wish to amend the Merger Regulation so as to make it possible to control minority stakes acquisitions. The question which still remains open is the method of that control. The legislative process preliminarily induced by the European Commission will start in 2015.

In the next presentation, Bartosz Turno (WKB Wierciński Kwieciński Baehr, Warsaw) discussed his doubts on most favoured nation clauses. He stressed the possible anti- as well as pro-competitive consequences of such clauses. Pro-competitive effects can be induced by ensuring price drops leading to more investments. Yet on the other hand, anti-competitive effects might materialize by discouraging the buyer to enter price negotiations due to the fact that ultimately the sale will go to the entity entitled to the most favoured clause. The speaker mentioned major antitrust case law in this regard.

The third part of the conference closed with the presentation of Pedro Callol (Roca Junyent S.L.P., Madrid) who spoke of the relations between competition law and intellectual property law covering issues such as problems relating to the granting of media licenses for sports events and possible restraints of competition in this field.

The fourth panel focused on issues related to proceedings before competition authorities, in particular dawn raids. The panel was lead by Astrid Ablasser-Neuhuber, Vice-president of the Competition Commission of UIA (BPV Huegl, Wien). Becket McGrath (Edwards Wildman Palmer, London) mentioned a number of questions frequently asked by clients in relation to pending proceedings. They include: types of evidence appointed by competition authorities, risk of competition law violation, potential fines, related risk and press release of proceedings pending against undertaking, chances for appeal and amendment or annulment of an antitrust decision. The speaker also indicated elements such as the necessity of maintaining good relationships with the relevant authority (aggressive attitude of attorneys does not work in favour of the undertaking; it pays to be polite). He stressed the possibility of private enforcement to follow public proceedings. Clients also ask about leniency as well as its pros and cons. According to the speaker, lawyers must often be able to assess their client's situation and give appropriate advice – what should be done in certain circumstances.

Rickard Vernet (Vinge, Malmo) focused his speech on evidence listing key issues in this context such as burden and standard of proof as well as the lack of strict rules on evidence in proceedings pending before competition authorities. He also said that the Commission can, in practice, allow the use of any evidence which confirms the violation of competition law. Summing up, the speaker stressed the risk arising from giving too much information as well as too little information – there must be balance here.

Pranvera Kellezi (Meyerlustenberger Lachenal, Genève) discussed strategic choices available to undertakings in proceedings, especially in relations to commitments and settlements. She mentioned key issues such as the ability to control proceedings by undertakings and influence its course. The speaker noted the minor risk of private enforcement in case of commitments not recognizing a violation. Summarizing, she even said that it is really difficult to create any general rules in this context and every situation must be considered on a case by case basis.

Gonenc Gurkaynak (ELIG, Attorneys-at-law, Istanbul) was the last to speak in this part of the conference. He made a range of practical remarks concerning proceedings and activities carried out by competition authorities. He mentioned such important procedural elements like time (speed) of an undertaking's reaction, launching an internal investigation aimed at the assessment of a given situation and possible use of the leniency procedure.

The conference closed with a short summary. Astrid Ablasser-Neuhuber and Martina Maier reviewed and briefly commented on its four panels. With respect to the two morning sessions, the speakers emphasized: trust between external and internal lawyers, the necessity of supporting compliance programmes by top management and differences between the role and responsibility of external and internal lawyers. They

mentioned with respect to the afternoon sessions: minority stakes control in relations to M&As, most favoured clauses, very large area of interrelations between intellectual property law and competition law and proceedings pending before competition authorities. The speakers thanked also all organizations and individual persons who helped to organize this conference.

The conference was a very interesting and useful platform allowing the exchange of knowledge and experiences in the field of competition law between lawyers representing various countries, legal systems and legal cultures. It must thus be recognized as a very successful event. The organizers can be proud that so many guests attended from a variety of countries and that this kind of conference was organized in Warsaw. It is worth emphasizing that no topic mentioned during the conference is new to Poland and that many of them have already been considered by legal practitioners as well as the Polish doctrine. This in itself is strong proof that Poland has firmly joined the circle of main European economies and the legal culture of modern European States as far as competition law is concerned. Polish lawyers are actively involved in pending proceedings and are experts on selected key issues. This realization is supported by the great level of interest in the discussions accompanying the sidelines of the conference. Hopefully this trend will continue and result in another equally interesting conference.

dr Dominik Wolski
Legal adviser, e-mail: wolski_d@yahoo.pl