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2nd International PhD Students Seminar. Competition Law in Portugal and Poland. Białystok, 1 July 2015

The 2nd Polish-Portuguese PhD Seminar took place on 1 July 2015 at the Law Faculty of the University of Białystok, Poland. The seminar was devoted to competition law issues in Portugal and Poland. The 1st meeting of this seminar series was held at the initiative of Professor Sofia Pais (Católica Porto Law School, Catholic University of Portugal) on 13 May 2015 in Porto, Portugal. Four representatives of the University of Białystok participated in the 1st Seminar including Professor Anna Piszcz, Dr Maciej Etel and two doctoral students: Marlena Kadej-Barwik and Paulina Korycińska. The 2nd Seminar was organized by the Department of Public Commercial Law of the University of Białystok and conducted by Professor Piszcz with the participation of Professor Pais and Dr Etel, among others.

The first speech was delivered by Rita Leandro Vasconcelos, a doctoral student supervised by Professor Pais; it was entitled '*Public enforcement tools – How far can the Portuguese Competition Authority go?*'. The speaker presented key information concerning the procedure and proceedings conducted by the Portuguese National Competition Authority (hereafter, NCA) – *Autoridade da Concorrência*. The fact was noted that the Portuguese NCA was only established as an independent institution in 2003, when it took over the powers and responsibilities of two entities which had directly belonged to Portuguese State administration.

The Portuguese NCA gained the same tools and powers as the European Commission under the 2012 amendment of the Portuguese Competition Protection Act (hereafter, PCPA) in order to ensure compliance with competition law provisions such as those on inspections, the settlement procedure or the possibility to end the proceedings with a commitments decision. Proceedings concerning restrictive practices, hence violating bans referred to in Articles 9 and 11 of the PCPA (equivalent to Articles 101 and 102 TFEU) are instituted either *ex officio* or by request. However, the Portuguese NCA, same as its Polish counterpart, is not bound by a request (notice) filed by a 3rd party. Unlike in Poland however, the party whose request was denied (that is, when the NCA decides not to institute proceedings) may appeal such decision in Portugal. All actions taken by the Portuguese NCA relate to the protection of the public interest which, similarly to Poland, can be seen in the promotion and protection of competition – a basis of market economy. They are meant to ensure the efficient functioning of markets while, at the same time, taking into account consumer interests. In her

speech, Rita Leandro Vasconcelos repeatedly emphasized that public enforcement of competition law may not serve the protection of private interests.

Rita Leandro Vasconcelos discussed also the individual tools and powers of the Portuguese NCA. During its proceedings, the NCA may not only request that both undertakings (parties to the proceedings) and 3rd parties deliver information and make statements, but has also the right to seize things. If a party to the proceedings or a 3rd party fails to fulfil the above requests, the NCA may impose a fine upon them. In presenting the principles of carrying out an inspection in Portugal, the speaker noted that a search of an undertaking's premises is subject to an authorisation by a public prosecutor. By contrast, court approval is required to search private premises, such as those belonging to the members of the managerial board, shareholders or employees of a specific undertaking. Still, the Portuguese NCA has not yet searched any private premises.

As a result of the proceedings, the Portuguese NCA may impose on the undertaking a fine equal to 10% of the turnover achieved in Portugal in the previous fiscal year. Nevertheless, if the undertaking is a repeat offender, the fine may amount to 20% of such turnover.

Rita Leandro Vasconcelos devoted a large part of her speech to the presentation of the NCA's practice regarding the imposition of commitments, either structural or behavioural in nature, in cases of both multilateral and unilateral restrictive practices. The speaker pointed out, when discussing the mechanism of a commitments decision under Portuguese law, that before issuing such a decision, the NCA must disclose the proposed commitments to the public and can issue such a decision only after market testing the commitments. Importantly, a commitments decision issued by the Portuguese NCA may not be appealed – it does not find or forbid the use of the questioned practices by a specific undertaking. Therefore, it may not constitute grounds for claiming redress of damages caused by the competition restricting practice.

Looking at the Portuguese competition protection system overall, Rita Leandro Vasconcelos noted also the very formalistic approach of its courts. She stressed that the Portuguese judiciary fails to use knowledge and instruments of an economic nature in considering competition law cases.

Paulina Korycińska delivered the second speech entitled '*Cooperation between the undertaking and the competition authority – unrealistic dream or inevitable future?*'. She presented an overview of those legal institutions available under the Polish Competition and Consumer Protection Act (hereafter, PCCPA) which are based on a certain level of cooperation between undertakings and the Polish NCA – *the UOKiK President*. These instruments include: the conditional consent to a concentration, commitments decisions, voluntary submission to a fine and leniency. The speaker presented a synthetic analysis of these legal solutions, which are largely based on public-private cooperation. She spoke of varies advantages of such dialogue as well as factors impeding such cooperation. Considering the standpoint of the NCA, the main advantages of a public-private dialogue include, first of all, the possibility to shorten proceedings, as compared to the typical – classic – administrative procedure. Cooperation during proceedings minimizes also the probability of a court appeal against

a decision of the UOKiK President – if the decision ending the proceedings stems from an agreement between the NCA and the parties, the odds of the undertakings appealing it are small. Paulina Korycińska spoke subsequently of the advantages of public-private cooperation for undertakings. She mentioned here: (i) the fact that the undertaking can attempt to convince the NCA that the alleged violation did not take place at all; (ii) the undertaking can also influence on the authority's final decision, e.g. by the undertaking attempting to persuade the competition authority to impose on it commitments that may be cheaper and/or easier to carry out than those originally intended by the UOKiK President; (iii) the ability to limit reputational damage for an undertaking charged by a competition authority; (iv) reducing costs sustained by the undertaking in connection with pending proceedings (the shorter the proceedings, the lower the related legal costs); (v) the possibility of persuading the competition authority to refrain from imposing a fine or reducing it considerably.

Despite so many advantages to public-private cooperation, Paulina Korycińska noted that such dialogue is not yet common in Poland, albeit it is growing. The speaker attributed this situation to, *inter alia*, psychological barriers whereby undertakings continue to perceive the NCA as an adversary, rather than a negotiating partner. Another obstacle for the development of public-private cooperation and dialog in Poland was found in the market's low level of awareness of the advantages available to those companies that decide to cooperate with the UOKiK President.

Marlena Kadej-Barwik presented subsequently a paper entitled '*Criminalization of antitrust enforcement*' pondering the role of criminal law in the economy, with an emphasis on competition protection under criminal law. The speaker noted that the criminalization of competition law has long since been an established tradition in the United States and has been generally accepted. By contrast, this issue is still widely debated in Europe by representatives of legal doctrine. Apart from the United States, the criminalization of competition law has been taking place in: Australia, Canada, Brazil, Israel, India, Mexico, Norway, Russia, Japan, South Korea and Republic of South Africa, among others. Two opposing trends can be identified in EU Member States: both the criminalization and the de-criminalization of competition law. The criminalization model has been followed, *inter alia*, in Ireland, Slovenia, Czech Republic, Estonia or the United Kingdom. On the other hand, Austria followed the de-criminalization model – since 2002, its penal regime applies only to tender fixing.

The model of liability under administrative law is dominant in the majority of EU Member States with respect to competition law infringements – this situation stems, primarily, from the general application by Member States of TFEU rules. Nevertheless, specific solutions concerning the nature and scope of liability for competition law infringements do differ in individual Member States – and often to a sizable degree.

Marlena Kadej-Barwik presented also the conclusions of a number of analyses to be included in her forthcoming PhD dissertation concerning issues such as: (i) What is the scope of competition restricting practices that trigger criminal liability? (ii) Which categories of entities are criminally liable for those practices? (iii) What are the basic arguments for and against the penalization of actions of collective entities that violate

competition law? (iv) What are the basic arguments for and against the penalization of actions of managers that violate competition law? (v) What sanctions are appropriate for collective entities? (vi) What sanctions are appropriate for managers? Marlena Kadej-Barwik concluded her speech by outlining her own opinion on the direction of the development of criminal law liability for competition law infringements in Poland, and on the impact of such regulations on liability under administrative law.

Teresa Kaczyńska delivered the last paper entitled '*Leniency programme for managers under Polish competition law*' focusing on the assumptions of the Polish leniency programme for managers. She explained that as a result of the amendment of the Polish Competition and Consumer Protection Act (PCCPA) which came into force in January 2015, the UOKiK President may now impose fines on management – managers or members of the undertaking's management bodies – for deliberately allowing their undertaking to violate the ban on competition restricting agreements. The fine for a manager, which can be up to PLN 2 million (ca. EUR 500 000), may only be imposed by way of a decision finding that the undertaking has violated the ban on anticompetitive multilateral practices. In light of the Polish NCA's ability to fine managers, the amended provisions thus also provide for the possibility for such managers to benefit from the leniency programme. The speaker pointed out that the purpose of the amendment was, *inter alia*, to fine-tune the conditions that have to be met when applying for leniency by both undertakings and managers. Teresa Kaczyńska presented a list of conditions that have to be satisfied so that a manager can count on the NCA refraining from imposing a fine upon him/her or reducing it. She then briefly compared the list of conditions that must be met by an undertaking applying for leniency and by a manager. On this basis, the speaker noted that it would be very difficult to show in practice the limitation of the scope of information that a manager is required to present only to such information that he/she posses due to his/her position at the undertaking and his/her role in the agreement. In light of the conditions for managerial fines – that is, deliberate actions or omissions – the speaker was of the opinion that it is hard to imagine a situation where a manager's knowledge of a restrictive agreement, in which that manager's undertaking participates, is in any way limited. In summing up the assumptions of the Polish leniency programme for managers, the speaker outlined also the ethical aspects and business consequences of a manager's leniency application.

All the three Polish speakers are doctoral students of Professor Piszcz (Department of Public Commercial Law at University of Białystok).

A discussion took place between the individual speeches and at the end of the seminar. Professor Pais and Professor Piszcz concluded that a 3rd Polish-Portuguese PhD Seminar should take place in 2016.

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