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The First Polish Competition Law Congress Warsaw, 13–15 April 2015

1. The First Polish Competition Law Congress took place between the 13th and 15th of April 2015 in the Conference Centre of Polish Office of Competition and Consumer Protection (in Polish: *Urzad Ochrony Konkurencji i Konsumentow*, hereafter, UOKiK). The event was organised by the Centre for Antitrust and Regulatory Studies (CARS), part of the Faculty of Management of the University of Warsaw. The energy company TAURON Sprzedaż sp. z o.o acted as a strategic partner of the Congress.

2. Directly prior to the Congress, **Adam Jasser**, the current UOKIK President hosted a commemorative session celebrating the 25th anniversary of the first competition law issued in modern Poland and of its first competition authority – the Anti-Monopoly Office. Many distinguished guests participated in this event including **Ewa Kopacz**, the Polish Prime Minister, and Professor **Małgorzata Gersdorf**, the President of the Polish Supreme Court. A letter written by Professor **Marek Safjan**, Judge of the Court of Justice of the European Union (hereafter, CJEU), was read out by Professor Maciej Szpunar, the EU Advocate General. In conclusion, the UOKIK President Adam Jasser informed the audience that the President of the Republic of Poland will soon award Professor Anna Fornalczyk (the first President of the Polish Anti-Monopoly Office) and Professor Tadeusz Skoczny (Director of CARS and Chairman of the current Advisory Council to the UOKIK President) with, respectively, an Officer's and a Knight's Cross of the Order of Polonia Restituta.

3. The opening session of the Congress was chaired by Professor Anna Fornalczyk, Professor **Tadeusz Skoczny** and the UOKIK President Adam Jasser. On behalf of Professor Fornalczyk and himself, Professor Skoczny first thanked Mr Jasser for supporting CARS's idea of organising the Competition Law Congress jointly with the official celebration of the 25th anniversary of Poland's first modern competition law regime and enforcement authority. President Jasser replied by emphasizing the need and the usefulness of a dialogue and co-operation between academic circles, UOKIK officials and competition law practitioners. This is illustrated, among other things, by the impressive statistics shown by Professor Skoczny concerning the Congress itself which gathered 152 participants and 30 scientific papers. Professor Skoczny expressed also his appreciation for the generous sponsorship of the entire event by the energy company TAURON Sprzedaż Sp. z o.o. – the strategic partner of the Congress.

4. Starting the opening session Professor **Stanisław Sołtysiński**, a government advisor in the early 90s and founder of the law firm SKS, was asked: what is competition

law for, and whether its objectives are the same now as they were at the beginning of the transformation process? Professor Sołtysiński answered in affirmative as the natural dilemma of free-market economy (struggling for efficiency and consumer welfare) is a never-ending story. Professor Sołtysiński evaluated positively the establishment of the first Polish Anti-Monopoly Office and sector-specific regulators. He also strongly emphasized the role of the Constitutional Tribunal. The speaker mentioned the beginnings of Poland's road to the European Union and emphasized the role of Article 2 of the Polish Competition and Consumers Protection Act (hereafter, PCCPA), which enables the National Competition Authority (hereafter, NCA) to take actions in many fields.

5. Professor **Maciej Szpunar**, Advocate General at the CJEU, was asked about the borders between private enforcement and private international law. Professor Szpunar spoke primarily of the persistent doubts about cross-border use of private competition law enforcement. These doubts concern two key issues: where to sue an enterprise responsible for an antitrust violation and in accordance with which law? With respect to identifying the appropriate court, Professor Szpunar discussed briefly issues connected with the specifics of claims (among others, the multitude of parties responsible for damages, large number of injured, issue of group vindication of claims, etc.), the location of the damage and the location of the damaging event itself. As regards governing law, the speaker emphasized that the vast majority of cases concerning claims for damages caused by antitrust infringements take the form of follow-on cases governed by the law of the EU Member States defining the premises of compensation. Finally, Professor Szpunar shared his doubts concerning joint and several liability of cartel participants.

6. Emphasizing the fact that Poland has a substantial amount of both case law and competition law jurisprudence already, Professor Skoczny spoke to Judge **Teresa Flemming-Kulesza**, the current President of the Labour and Social Security chamber of the Supreme Court responsible for competition law issues. Professor Skoczny asked Judge Flemming-Kulesza whether it is possible to talk about Poland already having its own jurisprudential canon. He then asked the Judge to pin point what are, in her view, the jurisprudential milestones in competition and consumer protection law in Poland. Judge Flemming-Kulesza began her speech by reminiscing about her personal involvement in the creation the Anti-Monopoly Court (now: Court of Competition and Consumers Protection, hereafter, SOKiK). She continued by presenting seven milestones in competition-related jurisprudence of the Polish Supreme Court. She listed, among crucial rulings, judgment in case III SK 6/06 regarding the features of a 'conspiracy' as well as judgment in case III SK 15/06 related to the understanding of the concept of 'competition restriction'. Noted also was the widely commented judgement in case III SK 67/12 (PKP Cargo) which was emphasized for its significance in view of intertemporal issues. Judge Flemming-Kulesza mentioned also the eight prejudicial questions sent to the CJEU by the Labour and Social Security Chamber of the Polish Supreme Court.

7. The next speech concerned issues connected with the relation between economics and competition law. Professor Skoczny asked Professor **Anna Fornalczyk** how much,

and which economics should be and is necessary in competition law and its application? Professor Fornalczyk stated, also on the basis of her own personal experience as an economic consultant, that there is a need for as much economics as necessary but it should be that sort of economics which solves problems. In her opinion, jurisprudence opens the road to the introduction of economics into competition law. The speaker also stated that it is essential not to focus on economic theories, but to look for economic justifications of legal terms included in competition law. Different methods can be used here: managerial economics, econometrics or games theory. Professor Fornalczyk spoke of two conditions for a successful economization of competition law. The first condition is the popularization of this idea by the NCA and the opening of a discourse through the presentation of methods and econometric results in the justifications of individual UOKiK decisions. The second condition – attributable to entrepreneurs – is the provision of 'good' data. Hereafter, Professor Fornalczyk presented the indicator of an anti-monopoly risk elaborated in her consulting firm.

With reference to the speech of Professor Fornalczyk, the UOKIK President Adam Jasser took the floor and emphasized that the NCA had raised the rank of economic analysis in all decisions which are currently being rendered. In his opinion, economic grounds are necessary particularly when investigating agreements restricting competition by their effects. As regards gaining and analysing data from the market, the UOKiK President is open to co-operation with entrepreneurs.

8. Last but not least, Mr **Grzegorz Lot**, the President of TAURON Sprzedaż, took the floor to speak of problems connected with the application of competition law on regulated markets, focusing on the energy sector. First, Mr Lot analysed the changing of the electricity seller from the perspective of an average consumer, showing how such switch is performed as well as what premises are most often followed by consumers. Mr Lot presented next the characteristics of the Polish energy market with its four large companies (for instance, TAURON Sprzedaż sells electricity to approx. 5 million households) as well as other smaller electricity sellers. The President of TAURON Sprzedaż referred to the issue of regulating electricity prices (tariffs) and stated that it is currently almost impossible to get positive margins. He noted also a current trend of providing different services (including the sell of electricity or gas) by telecommunications firms or banks using their own marketing channels and customer base. Mr Lot spoke also of a separate issue which still remains in whether customers will want to get the majority of their services from the same supplier.

9. The first session of the Congress entitled: '"Competition" and "public interest" in competition law and the law on combating unfair competition', was chaired by Professor **Andrzej Wróbel**, Judge of the Polish Constitutional Tribunal.

10. In the first speech, Professor **Marek Szydło** (Faculty of Law, Administration and Economics of the University of Wrocław) presented his paper on the 'Judicialization of European and Polish competition policy: directions of the revision of the current paradigm'. Professor Szydło indicated that the term 'judicialization' means the creation of public administration authorities (of a judicial or quasi-judicial character) entitled to implement competition policy through the interpretation and execution of competition law rules. Second, judicialization of competition policy is visible in judicial

control of decisions taken by the aforementioned public authorities. Professor Szydło described the judicialization of European and Polish competition policy considering the independence of competition authorities from other public authorities. He focused on European and Polish competition policy with respect to judicial control over decisions issued by the NCA. In conclusion, he listed five key aspects: (i) judicialization of competition law means, on the one hand, giving administrative (public) competition authorities a judicial or quasi-judicial character, (ii) neither Polish not European law guarantee that NCAs have a sufficient scope of institutional independence from public authorities (iii) it is desirable to harmonize some aspects of judicial control over decisions issued by NCAs, (iv) current judicial control over decision of the UOKiK President is exercised by SOKiK and adopts the character of a control exercised by administrative courts over administrative decisions, (v) this jurisprudential trend should be supported as it moves into the right direction, which means that it should be sanctioned in a normative manner.

11. Mr **Jarosław Soroczyński** (Markiewicz & Sroczyński law firm) presented a paper 'On the necessity (and traps) of a more inter-disciplinary approach to public and private enforcement of competition law'. He indicated the need to use the accomplishments of other scientific fields in the practical application of competition law. He listed specific areas where development is necessary which included: economy, sociology, and criminal law. According to the speaker, a broader, methodological view will make it possible to limit the risks and traps coming from the notion of a 'more economic approach'. Mr Soroczyński also indicated the need to use varies tools during competition assessments. Benefits which may arise from a more inter-disciplinary approach to competition law include, in his view, a uniform understanding of definitions, which would eliminate the 'Babel Tower' which currently exists. The speaker also noted the excessive fetishization of interdisciplinary methods, simultaneously raising the risk of deviation mistakes, especially if decisions are contrary to commonsensical rules. In practice, this suggests the growing importance of industry experts, using experts in lawsuits, and relying to a greater extent on the results of the behaviours of consumers and managers.

12. Mr **Marcin Kolasiński** (Kieszkowska Kolasiński Rutkowska law firm) presented a speech entitled 'The essence of "competition" that should be protected in the public interest, in the context of business entities performing public duties'. He pointed out that the PCCPA uses the term 'competition' but does not define this phenomenon. The UOKIK President understands it as 'businesses operating independently to achieve similar economic goals'. A distortion of competition takes place as a result of actions taken by entrepreneurs within the meaning of the Act on Freedom of Economic Activity as well as due to actions of 3rd parties towards entrepreneurs within the meaning of this act (that is, public administration bodies, or entities other than public administration but performing public duties). Despite the fact that the definition of an entrepreneur provided in the PCCPA indicates a person organizing or performing services of public utility, the law does not define this notion either. Mr Kolasiński pointed to the broad reasoning of the concept of public services used by the Polish Supreme Court. In his opinion, the Polish NCA has so far never addressed

its decisions to other public institutions, which in fact have the character of organizing or providing public services. According to the speaker, the type of services, as well as entrepreneurs performing them, should therefore be identified more accurately. The same is true for those activities of such entities, which affect the market and which are thus under the scrutiny of the UOKIK President.

13. Mr **Piotr Adamczewski** (Director of the UOKIK Branch Office in Bydgoszcz) gave a speech on the 'Application of competition law on regulated markets – participation of the State in the economy and competition protection'. The speaker considered first the issue of the direction taken by the State in order to ensure economic development simultaneously with growth in the welfare of its citizens, arising from the proper functioning of competition. Mr Adamczewski talked about the freedom to conduct business in the context of ensuring public utility services by the State. Next he addressed the issue of liberalization and regulation, focusing on: liberalization of markets and the necessity of an intervention by the NCA designed to bring desired market effects. In conclusion he also mentioned that the jurisprudence of the Polish Supreme Court directs the actions of the UOKIK President towards the most important competition law infringements committed by entrepreneurs ruled by the quest for profit. The role of the UOKIK President is to properly choose which of the available measures to use in order to obtain the highest profits possible for consumers from the functioning of the mechanism of competition.

14. Professor **Agata Jurkowska-Gomułka** (Higher School of Information Technology and Management in Rzeszow) spoke of 'The public interest and private enforcement of competition rules'. She began by pointing out that both Polish case law, as well as Polish doctrine, accepted seeking compensation for antitrust breaches before court. In the first place, she focused on defining what the 'public interest' is within the framework of the public antitrust enforcement model. Next she touched upon the relationship between the prerequisite of public interest and private antitrust enforcement. She pointed out that the condition of public interest positions the PCCPA firmly in the field of public law. By asking the question what to do with the prerequisite of public interest in the context of private enforcement, she presented a conceptualization of several options which may solve this issue. She described the following options: (i) no need for legislative amendments or modifications to the position of courts in defining the public interest; (ii) direct 'absorption' of the public interest prerequisite into private enforcement; (iii) private interest in the law on competition and consumer protection; and (iv) resignation from the prerequisite of public interest. Professor Jurkowska-Gomułka noted that the use of each of these solutions will in fact result in the elimination (or at least weakening) of the division into public and private competition law. However, this seems to be in line with current development trends and cannot be seen as a weakness of the proposed solutions.

17. Professor **Dawid Miąsik** (Institute of legal Sciences of the Polish Academy of Science) concluded the panel with a speech on 'Interactions between combating unfair competition through public law and through private law on the example of the prohibition of practices infringing collective consumer interest'. The speaker first

indicated that conducting an analysis of the aforementioned interactions is caused by the fact that the same action may be seen as an act of unfair competition as well as a practice infringing collective consumer interests. The speaker mentioned: (i) issues concerning consumer protection on the basis of the Combating Unfair Competition Act (hereafter, CUCA); (ii) prohibition of practices infringing collective consumer interests in competition protection; (iii) combating unfair competition acts on the basis of public law. Professor Miąsik noted that the interactions within the national legal system between combating unfair competition and infringements of collective consumer interests are regulated in Article 25 PCCPA. This rule makes it possible to accumulate defence measures against unfair competition. According to the speaker, such accumulation should not be a surprise considering the differences between the instruments prescribed to realize convergent goals. Professor Miąsik pointed out in conclusion that where the prohibition of collective consumer interest is applicable to practices which harm the sovereignty of their decisions, the goals of both institutions are overlapping.

18. A discussion took place thereafter. First Professor **Sławomir Dudzik** (Faculty of Law and Administration of the Jagiellonian University in Kraków, partner at SPCG Studnicki Płeszka Cwiąkalski Górski law firm) mentioned the need to develop procedural guarantees based upon the *Menarini* case and Article 6 of the European Convention on Human Rights (hereafter, ECHR). He also indicated that Polish civil courts are already dealing with cases of a similar degree of difficulty than competition law (such as those on the liability of managers or cases on financial markets). He stated that every analysis should also take into account the evolution of the jurisprudence of civil courts in the last 25 years of competition law enforcement in Poland. Mr **Maciej Berger** spoke subsequently of the public interest notion in staid aid case law. Professor **Bożena Borkowska** (Wroclaw Economic University) indicated that there is only one 'economics' and behavioural economics is probably a way for psychologists to enter the social sciences area.

19. The morning session held on 14th April related to the application of competition law. It was moderated by Ms **Bernadeta Kasztelan-Świetlik** (UOKIK Vice-President) and **Tomasz Wardyński** (partner at Wardyński & Partners law firm).

20. Professor **Małgorzata Król-Bogomilska** (Institute of Legal Sciences of the Polish Academy of Science and the Faculty of Law and Administration of the University of Warsaw) took the floor as the first speaker and discussed the issue of the right to a fair trial in combating cartels as well as the question of the criminalization (traditional or hidden) of competition law. The speaker noted four contentious issues: (i) the character of antitrust cases and their sanctions; (ii) the application of the European Convention on Human Rights (hereafter, ECHR) to undertakings; (iii) the question of striking a fair balance between the protection of undertakings' rights and the effectiveness of competition law; and (iv) whether the criminalization of competition law would be a good solution. With regard to the first issue, Professor Król-Bogomilska referred to judgments of the European Court of Human Rights (hereafter, ECtHR) such as *Engels* and *Menarini,* which confirmed that the criminal part of Article 6 ECHR applies to competition cases. As to the application of the Convention, the

speaker indicated that Article 34(1) ECHR clearly states that the Convention applies to 'anyone' (German '*alle Personen'*). With regard to the third issue, the speaker made reference to the criteria provided in Article 8 ECHR and by the ECtHR regarding the protection of the right to privacy and stressed the importance of the principle of proportionality. The speaker noted also that the last issue is hard to achieve since the criminalization of competition law may result in hidden penal liability. Professor Król-Bogomilska concluded that guarantees in competition law should be reinforced and national laws harmonized in order to prevent 'forum shopping'. She also stated that the relevant provisions should be contained in Poland in a single act, instead of being spread across several.

21. Dr **Maciej Bernatt** (Faculty of Management of the University of Warsaw) presented the findings of his research project concerning the application of Article 101 and 102 TFEU by the Polish, Czech and Slovakian NCAs. After a brief introduction regarding the decentralization of the application of EU competition law based on Regulation 1/2003, Dr Bernatt presented various statistics that have shown the infrequency of the direct application of Articles 101 and 102 TFEU by the aforementioned NCAs. He also presented a number of hypothesizes explaining this state of things. According to the speaker, low levels of direct EU law application in the relevant Member States may result, first of all, from the strict interpretation of 'impact on trade between Member States' prerequisite. Second, infrequent application of the TFEU in Poland results from the fact that a significant number of domestic decisions is taken by local branch offices of the UOKiK, which deal with cases concerning local geographic markets only. Third, such stance may be caused by existing procedural obstacles. In conclusion, Dr Bernatt noted that despite some relevant CJEU jurisprudence, it is still not clear which types of decisions may be issued by NCAs and suggested the introduction of a quantitative criteria for judging 'the effect on trade'.

22. The third presentation given by Dr **Grzegorz Materna** (Institute of Legal Sciences of the Polish Academy of Science) focused on the restriction of competition as a factor limiting the application of Article 6(1)7 PCCPA to agreements influencing a tender. The speaker commenced by analysing the characteristics of bid-rigging and presented the current approach of the Polish NCA (the President of UOKiK) and of the national judiciary (SOKiK) to this type of anticompetitive conduct, which is prohibited *per se*. Subsequently, Dr Materna noted that not every agreement regarding a tender may lead to the restriction of competition. He presented relevant examples showing that some seemingly anticompetitive conducts do not automatically and always infringe competition law. Thus, the speaker argued that the assessment of undertakings' conduct in relation to tenders should always be based on a case-by-case study of its effects. In particular, the variety of types of conduct falling within the category of agreements relating to a tender should be taken into account in this regard.

23. Mrs **Joanna Noga-Bogomilska** (UOKIK) discussed selected issues regarding the protection of business secrets as an element of the procedural justice principle. This question was analysed in the context of cases on anticompetitive agreements

in Polish competition law. Mrs Noga-Bogomilska stressed the importance of this protection as an element of procedural justice. She argued that the high level of such protection granted to undertakings by the Polish NCA encourages them to provide the authority with their sensitive information. The speaker noted that the protection of business secrets is regulated in various legal acts, including the ECHR, the PCCPA, the CUCA, Regulation 1/2003 and the Polish Code of Administrative Procedure. The speaker noted several issues connected with this subject, for instance undertakings' obligation to provide the requested information to the UOKIK President or the restriction of the right to access the file (right to defence). The speaker concluded that despite the high level of protection given to business secrets already, there is always space for some additional legal improvements.

24. Anna Mlostoń-Olszewska (UOKIK) compared subsequently Polish and EU rules on the material scope of undertakings' duty to provide information to a competition authority. First, the speaker denied the existence of any practical problems regarding this obligation in the context of the protection of undertakings' right to defence. Mrs Mlostoń-Olszewska argued that it was the media and the legal doctrine that have created a fake problem since in practice undertakings hardly ever raise an argument regarding the protection of their right to defence in this regard. Subsequently, however, the speaker discussed various contentious aspects relating to the material and procedural scope of the information duty, including a case currently pending before the Polish Supreme Court regarding the very issue of the privilege against self-incrimination. She also presented differences between EU and Polish rules and concluded that due to the principle of procedural autonomy, Member States do not have to adapt their own rules in this regard to the solutions adopted at the EU level. In conclusion, she pointed at the principle of procedural autonomy of EU Member States.

25. Dr **Dominik Wolski** (in-house lawyer in Jeronimo Martins) spoke about the implementation of Directive 2014/104/EU 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 (the Damages Directive). The speaker noted numerous difficulties regarding the implementation of the Directive, including whether the relevant provisions should be incorporated in already existing legal acts or whether the implementation should result in the adoption of a new, separate act. While discussing the content of the Directive, distinguishing its material and procedural provisions, Dr Wolski focused on possible practical problems that may arise in the context of its implementation and application. He concluded that the development level of private enforcement depends mainly on the efficiency of proceedings, the level of preparation of courts and on the legal awareness of consumers.

26. The above presentations were followed by a discussion including questions and comments from the audience. Professor **Fornalczyk** spoke of the difficulties in calculating damages, resulting from the lack of relevant data, and underlined the necessity of collecting data by undertakings in order to manage anticompetitive risks. Mr **Marcin Berger** did not agree with the opinions presented by Ms Mlostoń-Olszewska. He stressed that protection of the right to defence in the context of

undertakings' duty to provide information to the competition authority is a very real problem which was vividly discussed during the consultation process that preceded the introduction of the last amendments to the PCCPA, albeit current rules are still far from being perfect and so more changes are needed in this regard. Dr **Bernatt** added here that the sole fact that a case regarding this issue is currently pending before the Supreme Court proves the existence and the importance of this problem.

Mr **Tomasz Dec** (UOKIK Branch Office in Łódź) asked three questions related to the presentations of Dr Wolski, Mrs Mlostoń-Olszewska and Dr Materna. The first question related to the possible way of implementing Article 17 of the Damages Directive which states that the NCA may help in assessing the damage if it believes it to be appropriate. With regard to this issue, Mrs **Katarzyna Lis** (Ministry of Justice) – notably in charge of the implementation of the Directive in Poland – acknowledged that NCAs were afraid during the Directive's legislation process of introducing upon them a duty to provide help in assessing damages. Mr Dec asked also how to strike a fair balance between the right to access the file and undertakings' right to defence. Mrs **Mlostoń-Olszewska** responded that the refusal to access the file should only be used exceptionally and to a limited, necessary extent. For instance, access might be refused to that part of a document which contains business secrets. Mr Dec's third question related to bid-rigging. He asked whether a change in practice would suffice, or if a legal change (i.e. PCCPA) would also be needed in this context? However, since the available time limit for this session has already been significantly exceeded, Dr **Materna** could not express his opinion on this matter.

27. The next session held on the 14th of April focused on cartels and economization. Professor **Zbigniew Jurczyk** (Director of the UOKIK Branch Office in Wrocław; lecturer at the Wrocław School of Banking) presented first how diversified the assessments of cartels used to be in various periods of economic history and trends. According to the speaker, cartels emerged as an economic phenomenon in the 2nd half of the 19th century – their main objective was the desire to survive economic crises. Until World Word II, cartels operated legally in nearly all market economies. The positive attitude to cartels of the so-called 'historical school' resulted from that school's greater concern for producers than for consumers. A positive attitude to cartels characterised the Austrian School also according to which cartels were an alternative form of market organisation, allowing for better coordination of decisions by undertakings. The fact that cartels constitute a threat to competition was realised when it emerged that they did not have a temporary nature and did not disintegrate after the crises had subsided. The harmfulness of cartels was shown by neoclassical economics proving their external and internal ineffectiveness on the basis of economic models. As part of competition law, the economisation trend began in the 1970s thanks to the so-called Chicago School, which postulated that competition policy should aim to establish which practices are anti-competitive and which are pro-effective. The Chicago School spoke also in favour of using in competition policy of economic tools and theories. They included: consumer prosperity (allocation and production efficiency), price theory, institutional economics (transaction costs), and behavioural economics (study of motivation). In turn, the so-called post-Chicago

School postulated that competition policy should study the actual effects of the alleged monopolistic practices from the perspective of consumer prosperity. An economic analysis of the actual effects of agreements took on the form of the rule of reason in the judgments of the US Supreme Court in the mid 1970s concerning vertical arrangements. The US Supreme Court continued the approach based on effectiveness in the 1980s extending the application of the rule of reason to horizontal agreements also. Professor Jurczyk showed that in practice an examination of the actual effects of cartels exceeds the capabilities of courts. Nevertheless, the effect of economization on the actions of courts is apparent – their assessments are made through the prism of the effects of cartels, which have been described in economic models and theories, for instance with respect to the assessment of discounts, exclusivity clauses, tying and bundling.

28. Professor **Bożena Borkowska** (Economic University in Wrocław) gave a presentation on creating competition in sectors with a natural monopoly showing first the theoretical premises for new regulation of sectors with a natural monopoly and the effects of competition promotion therein. In her opinion, market regulation aimed at creating competition in sectors with a natural monopoly is a relatively new and controversial practice. The speaker noted that economics does not provide clear arguments in favour of creating competition in these sectors. This is because there are two competing hypotheses in economic theory: on the one hand, the hypothesis that launching the mechanism of competition will result in increased efficiency; on the other, the hypothesis that the restructuring of incumbent companies will result in under-investment in sectors with a natural monopoly. The speaker pointed out that according to the contemporary concept of a natural monopoly, a non-regulated natural monopoly may operate efficiently provided that there is a high risk of potential competition. Such a situation takes place on so-called 'contestable markets', which have low entry and exit barriers and where potential competitors have access to the same technologies as the monopolist. Examples of contestable markets can be found in flight connections between individual cities, which can be entered by other undertakings, thanks to the possibility of sales and lease of aircrafts, without incurring high sunk costs. At the same time, with reference to Williamson's transaction costs theory, the speaker noted that a natural tendency to monopolise occurs in the case of trading in highly specific assets – the higher the transaction costs of such trading, the greater the importance of bilateral contracts and transaction coordination within an individual undertaking. According to the speaker, introducing competition on these markets leads to an under-investment problem. She stated that this is visible, for example, in Polish water mains and sewage networks. The correctness of the hypothesis of efficiency growth and the hypothesis of under-investment is verified through the reform of a given sector. Professor Borkowska gave here the example of the Polish electricity sector which, after it was regulated, became under-invested and characterised by raising electricity prices. An analysis of these issues has led the speaker to conclude that in de-regulated sectors an experiment takes place testing new economic hypotheses with results that are difficult to predict.

29. The next speech delivered by Professor **Konrad Kohutek** (Andrzej Frycz Modrzewski Kraków University) referred to problems of an anti-competitive 'object' or 'effect' of agreements in the context of vertical resale price maintenance (RPM). The aim of this presentation was to set out and assess the antitrust qualification of vertical RPM in the Polish jurisprudence and in the practice of the UOKiK President. According to the speaker, it is incorrect to classify RPM as a competition constraint when there is an absence of actual or potential constraints on inter-brand competition. In support of this thesis, the speaker cited the US ruling in the *Leegin* case which assessed RPM on the basis of the rule of reason. Professor Kohutek criticised the judgment of the Polish Supreme Court in the *Röben* case and the UOKiK decision in the *Sphinx* case as having excessively stressed the role of price competition among the various forms that competition can take. According to the speaker, price (although certainly material) constitutes only one of the areas of market competition; depending on the sector, the price may be of less importance – there are even markets lacking in price competition (e.g. Internet search engine markets). He argued that an agreement's type should not in itself prejudge whether or not a given practice belongs to the category of agreements prohibited by 'object' or by 'effect'. Professor Kohutek spoke for changing the law (or its interpretation) so that RPM is not treated as prohibited by 'object' but subject to the rule of reason.

30. The presentation of Dr **Bartosz Turno** (WKB Wierciński, Kwieciński, Baehr law firm) focused on problems, methodology as well as proposed alternative solutions regarding defining the relevant market in antitrust cases. The thesis of the presentation was that it is not the market definition that is crucial in antitrust cases, but rather determining competitive pressures and therefore determining market power that may result in the restriction of consumer welfare. The speaker noted that it is indispensable to define the market in cases concerning: agreements benefitting from the *de minimis* exemption, those concerning infringements which are prohibited due to their effects, and in the case of concentration control. On the other hand, there is no need to define the relevant market in cases concerning agreements prohibited by object. Dr Turno presented the problem of defining the relevant market with the use of the SSNIP (Small but Significant, Non-transitory Increase of Price) test. He then set out his own proposed systematised assessment of competitive constraints impacting market players. The speaker presented also a number of solutions with regard to defining the relevant market that appear in economic literature. With regard to concentration control, they include direct forecasts (with the aid of econometric instruments) of the impact of the concentration on unilateral behaviour (unilateral effects) with respect to 'upward pricing pressure'. According to Dr Turno, the concept of 'upward pricing pressure' is also subject to criticism as it does not seem easier, quicker or more efficient than 'traditional' methods of defining the relevant market due to lack of suitable data to calculate it quickly. In summary, Dr Turno noted that the definition of a relevant market, although imperfect, makes it possible (for lawyers in particular) to preserve the necessary discipline (it guarantees that the assessment will not be arbitrary) and places economic analyses in a certain organisational and conceptual

framework. By doing so, it simplifies and speeds up the analysis of anti-competitive effects.

31. The next presentation was given by Mr **Paweł Ważniewski** (UOKIK) on behalf of himself and Dr **Wojciech Dorabialski** (also UOKIK). It focused on the economics of the 'economization of competition protection' from the point of view of the UOKIK, especially its priorities in the application of economic tools. The aim of the speech was to analyse selected economic methods used in competition protection, and to determine the optimal direction of 'economization' from the point of view of the Polish NCA. The instroduciton to this analysis included an explanation of the sources of, and reasons for the increasing involvement of economists in competition enforcement and a brief summary of the history of 'economization' of competition protection worldwide and in Poland. Individual areas where economic theory and economic methods are applied were then discussed in detail. In particular, this concerned competition protection *sensu stricte*, illustrated by antitrust case law as well as other aspects of competition policy (competition protection *sensu largo*). The facts described in the first part of the speech were the starting point and background of an analysis of the 'economics' of the Polish NCA's use of economic tools. The analysis resulted in a list of priorities for the application of economics in competition enforcement and an outline of the development route of the economic approach in competition protection by the UOKIK.

32. This speech was followed by a discussion of the economic approach to competition law. Commenting on the effectiveness of competition law, Mr **Sroczyński** (in response to Professor Kohutek's presentation) pointed out the decision in the *ToolTechnic* case where the Australian antitrust authority held that RPM was legal on the basis of the rule of reason. Mr Sroczyński asked Professor Borkowska and Professor Jurczyk what they understood by the term 'competition for competition' and whether competition should be an aim in itself. In her reply, Professor **Borkowska** stated that it was necessary to avoid such generalisations and stressed that modelling the market from the point of view of its structure did not always bring the expected results. She also warned against the simplification used in legal discussions which states that regulation 'x' will have a specific effect 'y'. According to Professor **Jurczyk**, competition is not an aim in itself – it cannot be defined without reference to a specific axiological context. Competition is only a means to efficiency and it is efficiency that is the aim. Summarising, Professor Borkowska stated that it was not difficult for an economist to calculate efficiency – what poses a problem is an interpretation of the result and model that can be applied where the market is legally regulated.

As regards economic methods in the work of the UOKIK, Professor **Fornalczyk** asked about the economic methods the NCA currently uses, for example when defining the relevant market. According to this commentator, the NCA should tell undertakings clearly which methods they should use in proceedings before the President of UOKiK. In response, Mr **Ważniewski** gave the example of analysing substitutability between rail and road transport. At the same time, he proposed a future presentation of additional examples of cases where the UOKIK had used economic methods. Professor Fornalczyk postulated that the NCA should explain

in the justifications to its decisions which analytical methods it had used. This would serve to advocate the use of economic methods.

Dr **Turno** wanted to discuss the disadvantages of an economic analysis. At this point, he expressed concern whether economics should define the standards, tests and rules used in competition law. In his opinion, the excessive application of an economic analysis by the NCA could incapacitate the system and result in legal uncertainty.

The last part of the discussion during this session concerned the combination of law and economics in competition policy. Professor **Skoczny** expressed the view that competition policy should combine law and economics. He cited the example of western countries where such a solution is beneficial to competition. He also noted that the Department of Market Analyses of the UOKIK has recently managed to strengthen its role, even though its output is still minor. Professor Skoczny spoke also in favour of law firms increasing their use of economic analyses in preparing competition cases. To close, he added that it would be difficult to apply an economic analysis straight away to all practices violating competition law. He suggested to first 'test' the use of economic analysis tools in relation to a specific anti-competitive practice.

Some commentators referred also to the economization of consumer cases and cases from specific sectors. Dr **Bartosz Targański** (Warsaw School of Economics and Clifford Chance law firm) asked about the practice of using an economic analysis in consumer protection cases, which was one of the postulates of the UOKIK in 2014 (the beginning of the term of office of the current UOKIK President). Mr **Ważniewski** confirmed that an economic analysis is applied in this category of cases as well. He gave the example of the analysis of the behaviour of banks towards customers with loans in Swiss francs. Professor **Borkowska** shared a critical comment concerning the expectations for regulation of the financial services sector (amendments to the PCCPA giving the President of UOKIK greater powers in the financial services sector). According to her, such interference could have the opposite effect to the one intended – it could result in increased costs, which are ultimately borne by the clients.

33. The last session held on the 14th of April was jointly chaired by Professor **Agata Jurkowska-Gomułka** and **Małgorzata Szwaj** (Linklaters law firm). It was devoted to negotiated competition law enforcement.

34. Professor **Tadeusz Skoczny** delivered the introductory paper entitled 'Negotiated competition law enforcement: realities, substance, problems' was delivered. Negotiated competition law enforcement is the object of extensive discussions both in jurisprudence and in legal literature. In his introductory remarks, Professor Skoczny emphasized that both the practice and the doctrine of competition law are at a very interesting juncture at the moment because of the implied negotiated enforcement of competition law. It is thus up to representatives of judicial literature to forge the nomenclature and terminology related to that concept. On the other hand, it is up to practitioners to elaborate on the principles of using negotiations in competition law cases. In his paper, Professor Skoczny outlined two existing models of competition law enforcement: the adversarial (contested) model and the negotiated (non-contested) model. In his opinion, over the last decade or so, a significant change has taken

place in the nature of the relations between competition authorities and undertakings. Moreover, undertakings' influence on competition decisions has also changed its scope and form. Preliminary research results confirm that the negotiated model of competition law enforcement (and the resulting 'settlements') has begun to be increasingly prominent. The speaker listed the most important advantages and losses associated with the use of the negotiated model and noted a number of issues related to competition law enforcement under this model.

Individual legal instruments (commitments decisions, voluntary submission to a fine, compliance programmes and leniency) that could be used within the framework of negotiated competition law enforcement were discussed in subsequent papers.

35. The speech of Mrs **Małgorzata Modzelewska de Raad** (Modzelewska & Paśnik law firm) entitled 'Commitments decision as a form of an undertaking's participation in the decision of the completion authority: advantages and traps' was devoted to practical aspects of commitments decision. In the opinion of the speaker, co-operation and dialogue between the interested undertaking/undertakings and the competition authority are of key importance for an effective use of commitments decisions. A brief analysis of the three-year negotiations between the European Commission and Google was the starting point of Mrs. Modzelewska de Raad's presentation of her 12 truths on commitments decisions. Further on, the speaker emphasized that issuing a commitments decision must be preceded by a real, thorough and intense dialogue between the competition authority and the undertaking/undertakings concerned where both sides need to actively take part in the entire negotiation procedure. Another important truth related to commitments decisions is the fact that the results of such a decision affect *de facto* the entire market. At this point, the subject of a market test was brought up and it was postulated that this instrument should be used as broadly as possible (repeatedly if necessary) in antitrust cases. Mrs Modzelewska de Raad drew the audience's attention to Polish statistics which confirm that commitments decisions have constituted over half of all recent UOKIK decisions and that they are most frequently used in cases concerning the abuse of a dominant position. As one important obstacle to the consensus between the authority and the undertakings, the speaker pointed to the fact that it is a *sine qua non* condition for the issuing of a commitments decision to institute explanatory proceedings. Mrs Modzelewska de Raad believes that such pending proceedings make the dialogue more difficult and reduce the effectiveness of negotiations. The dialogue should start as early as possible. In the current legal framework, it is exceptionally difficult to detect the exact moment (between the institution of antitrust proceedings and the substantiation by NCA of its findings) when the undertaking can propose commitments. In that context, a postulate *de lege ferenda* was made for the competition authority to also propose possible commitments. Introducing legal grounds for the authority to suggest to undertakings certain actions in order to remedy their allegedly illegal behaviour would provide grounds for the UOKiK's full involvement in the negotiations, without detriment to the executive nature of a commitments decision. In conclusion, Mrs Modzelewska de Raad emphasized that a commitments decision implies numerous advantages for the undertaking/undertakings concerned, the

competition authority and the entire market. There is no doubt that market effects of commitments will be generated the fastest by the undertaking placed under those obligations.

36. Professor **Anna Piszcz** (Faculty of Law of the University of Białystok) spoke next delivering her paper entitled 'Voluntary submission to a fine in light of the Law on Protection of Competition and Consumers vs. the Damages Directive'. Professor Piszcz contemplated therein whether in line with the provisions of the Damages Directive, information and documents provided by undertakings under the procedure of a voluntary submission to a fine (Polish legal instrument resembling the EU settlement procedure) may be disclosed to 3rd parties. The situation is unambiguous in cases examined under EU laws by the European Commission – the EU lawmakers have excluded (indefinitely) the disclosure of evidence in settlement proposals, also including withdrawn settlement proposals (in which case the exclusion is temporary). According to the speaker, the situation is not so unambiguous in light of domestic laws and regulations, because a Member State does not have to have in place a procedure covering settlement proposals that fits the Directive's definition. Professor Piszcz emphasized that a Member State may have a 'settlement' procedure in place, the form of which does not make it possible to conclude that it in fact has 'settlement proposals' falling within the meaning of the Directive. The requirement to transpose the Directive into Polish law does not mean that the national lawmakers will be obliged to alter the provisions of the PCCPA that govern the Polish procedure for a voluntary submission to a fine. The Directive requires harmonization of civil law procedures, *inter alia,* to the extent of protecting settlement proposals and the disclosure of evidence in damages lawsuits. It does not require competition law to be harmonized regarding its settlement procedures. Therefore, as long as the PCCPA does not provide for settlement proposals within the meaning of Article 2(18) of the Damages Directive, it will not be possible to effectively protect information and evidence obtained under the Polish procedure for a voluntary submission to a fine in civil lawsuits with an EU element. The proposal *de lege ferenda* made by Professor Piszcz referred to the requirement to adjust Polish provisions to the EU model of evidence protection. Furthermore, in the speaker's opinion, the Polish procedure for a voluntary submission to a fine may not be considered expedited or simplified because such procedure may only start when the UOKIK President is already familiar with the preliminary findings of the antitrust proceedings (as well as the anticipated content of the UOKIK decision, including the amount of fine that is going to be imposed upon the party).

37. The next paper entitled 'Compliance programmes as an instrument of effective implementation of competition law: Stick and carrot?' was delivered by Dr **Małgorzata Kozak** (Łazarski University). It was devoted to compliance programmes and their role in competition law compliance of undertakings. According to the speaker, compliance programmes are in between the adversarial and the negotiated model of competition law enforcement. Dr Kozak also noted the phenomenon of the European compliance culture, which she briefly described using the example of the policies of the European Commission, the French Autorité de la Concurrence and

Competition and the British Market Authority. In her speech, Dr Kozak also referred to the speech of the UOKIK President Adam Jasser, delivered on 24 November 2014, where he extensively addressed the role of compliance programmes from the perspective of the Polish NCA. Dr Kozak stressed that there is no uniform definition of compliance, and the way compliance programmes are understood depends on the industry. In her opinion, there is no single compliance model. Nevertheless, as a basic characteristic of compliance programmes, the speaker pointed to their voluntary and motivational nature. Ensuring compliance with competition law ought to be seen as the main objective of compliance programmes. In conclusion, she stated that despite an in-depth analysis of the possibilities of an effective application of compliance programmes, it would be difficult to create a compliance programme that takes into account all the expected features and objectives of those types of instruments. Moreover, without a clear and univocal interpretation of legal provisions, it will be hard to talk about a compliance culture in the Polish legal system.

Speaking *ad vocem*, Mrs **Szwaj** commented on Mrs Kozak's paper saying that the application of compliance programmes by undertakings should not be a matter of fashion (and if so, it should be perennial) but a matter of classics. In her opinion, a compliance programme itself, if effectively implemented, contributes to building a culture of compliance with competition law.

38. The last paper during that session was delivered by Dr **Antoni Bolecki** (Greenberg Traurig Grzesiak law firm) under the title 'How much room is there for negotiated law enforcement in the leniency procedure?' Dr Bolecki referred to American roots of both the leniency procedure and the model of negotiated competition law enforcement. He stressed that almost 90% of cases conducted by competition authorities in the US end in a settlement, and that the model of negotiated antitrust enforcement is considered by Americans to be the best and the most effective. According to Dr Bolecki, a Polish substitute for the model of negotiated competition law enforcement can be considered to include the commitments decision, a decision granting a voluntary submission to a fine, a decision to conditionally consent to a concentration, and also undertakings' cooperation with the competition authority within the leniency procedure. In his opinion, the possibility of negotiated competition law enforcement within the leniency procedure stems from the discretionary nature of the actions of the NCA, general provisions of the Code of Administrative Procedure and the requirement of cooperation of leniency applicants with the President of UOKIK. Dr Bolecki listed the areas that may become the subject of negotiations between the undertaking/undertakings and the NCA. Within the leniency procedure, such negotiable areas include: the scope of the presented evidence; the scope of the agreement; the amount of the fine; the evidence that the President of UOKIK can deem sufficiently credible; the issue of potential misleading of the NCA, and the consequences of such action for the undertaking, as well as negotiations concerning legal status, in particular its interpretation and which jurisprudential line to follow. The speaker emphasized that there is no room for negotiations between undertakings and the NCA concerning the legal status of other participants of the proceedings and findings concerning substantive truths – the applicant may not

negotiate with the competition authority the submission of evidence to suit a given thesis.

39. The session ended in a discussion where the participants of the Congress expressed their opinions about the instruments of negotiated competition law enforcement as discussed in the papers.

40. The last day of the Congress was devoted to the law on unfair competition, which includes in Poland primarily the already mentioned Act on Combating Unfair Competition Act (CUCA) of 1993. Also relevant are the Act against Unfair Commercial Practices of 2007 and Article 24 PACCP with respect to collective consumer interests. The first session, entitled 'The multiplicity of legal remedies aimed at combating unfair competition', was chaired by Professor **Piszcz**.

41. In his speech, Professor **Marian Kępiński** (Faculty of Law and Administration of the Adam Mickiewicz University in Poznań) analysed the relationship between the general clause contained in Article 3(1) of the Combating Unfair Competition Act (hereafter, CUCA) and specific provisions set out in the second chapter of this Act. The speaker admitted that the application of the general clause is sometimes necessary in order to classify a commercial behaviour as an act of unfair competition. However, Professor Kępiński argued that Article 3(1) CUCA is not designed to lay down additional conditions to be fulfilled in all circumstances. The speaker criticised judicial practice which undermines the role of specific provisions by requiring compliance with the conditions of Article 3(1) CUCA for no valid reason.

42. Professor **Ryszard Skubisz** (Maria Curie-Skłodowska University in Lublin) presented a paper entitled 'Objectives and scope of the CUCA. Dilemmas surrounding the CUCA's difficult neighbourhood with the Act against Unfair Commercial Practices'. The speaker pointed out that the implementation of Directive 2005/29/EC caused considerable difficulties in EU Member States, which traditionally adopted an integrated model of equal protection of competitors, consumers and the general public. Professor Skubisz expressed doubts whether the concept of 'good practice' introduced by the Polish legislator is in conformity with EU law. Given the principle of full harmonisation, as well as an extensive enforcement activity of the European Commission, it may prove necessary to amend the CUCA in order to remove the aforementioned discrepancy. Professor Skubisz called also for a wider reform *de lege ferenda* which would restore an integrated protection model while staying in compliance with EU law.

43. The issue of collective redress in cases based on the Combating Unfair Competition Act (CUCA) was dealt with by Professor **Paweł Podrecki** (Faculty of Law and Administration of the Jagiellonian University in Kraków). The speaker emphasised the difference between the protection of economic interests afforded by the CUCA and the protection of intellectual property rights. He further argued that in order to ensure that the line between these two types of protection is not blurred, claims for breaches of the CUCA must respect the general principles of civil liability, in particular its compensatory function. The speaker went on to analyse the preconditions for the admissibility of group proceedings, pointing to significant practical problems with regard to the condition of 'the same or common factual

grounds of the claim'. In conclusion, Professor Podrecki described the main benefits and risks of examining a case based on the CUCA in group proceedings while stressing the need for a careful examination whether all admissibility criteria are met.

44. Subsequently, Professor **Rafał Sikorski** (Faculty of Law and Administration of the Adam Mickiewicz University in Poznań) analysed the limitation regime for antitrust damage actions in the light of Directive 2014/104/EU and respective national provisions. The speaker presented the main policy considerations supporting and opposing different types of limitation periods. In his view, it would be advisable to make a distinction between limitation periods for stand-alone and follow-on actions. When actions are brought following a decision issued by a competition authority, a five-year limitation period set out in the Directive may prolong the proceedings unnecessarily. Other elements of the limitation regime, such as prerequisites for the starting of the limitation period and circumstances affecting its running, were assessed rather positively.

45. Professor **Monika Namysłowska** (Faculty of Law and Administration of the University of Łódź) spoke of unfair commercial practices between businesses under EU law. The author described the current EU *acquis* in the field of unfair competition, noting the limited scope of the rules applicable to unfair practices in business-to-business transactions. New developments in this field are anticipated, though, the most important of which being the draft Business Marketing Directive. The speaker noted that no regulatory actions are currently taken with regard to aggressive practices and B2B marketing practices other than misleading. It remains to be seen also whether future laws will provide for a differentiation between practices in vertical and horizontal trading relations. Professor Namysłowska stressed the need to rethink the model for assessing marketing practices between businesses and expressed the view that the introduction of new provisions at EU level may require the Polish CUCA to be repealed and a new one formulated.

46. In the last speech of this session Dr **Anna Zientara** (Institute of Legal Sciences of the Polish Academy of Sciences) analysed what sanctions can be imposed on traders involved in the organisation of prohibited consortium systems in the context of the *ne bis in idem* principle. The speaker examined legal provisions applicable to such infringers, concluding that the sanctions laid down in the PCCPA may be accompanied by further criminal sanctions under the Act against Unfair Commercial Practices, the Act on Liability of Collective Entities as well as Polish Banking law. Dr Zientara stated that in the light of the jurisprudence of the Polish Constitutional Court and the ECtHR, a financial penalty imposed under the PCCPA can be qualified as a criminal sanction. This qualification leads to the conclusion that the *ne bis in idem* principle might in fact be breached. In her concluding remarks, Dr Zientara called for the introduction of a general rule that would offer a solution to the problem of overlapping criminal and administrative liability. She further emphasised that protection should not only be granted against double punishment but also against multiple trials for the same offence.

47. The session concluded with a panel discussion opened and moderated by Professor Piszcz. First to speak was Professor **Beata Giesen** (Faculty of Law and

Administration of the University of Łódź) who expressed her reservations regarding the presentation of Professor Kępiński. The commentator argued that specific provisions of the CUCA are poorly designed and so their correct interpretation requires a reference to the general clause. In his response Professor **Kępiński** stated, that Article 3(1) CUCA may have a correcting role, however he considers this as a function of last resort. In his opinion, Article 3(1) CUCA should primarily be applied to behaviours which are unlawful or contrary to good practice, but are not regulated in the second chapter of this Act. Professor Kępiński reiterated his critical observations regarding the judicial practice of applying the general clause in order to exclude the application of specific torts, for example by requiring the trader to show his legitimate interest. According to the speaker, the trader may also act in the public interest, and the lack of interest may only be relevant to damages actions.

Subsequently, Dr **Wolski** asked Professor Sikorski whether Directive 2014/104/EU should be implemented into Polish law so as to extend the limitation period for stand-alone actions beyond the 5-year period set out in the Directive. Dr Wolski also pointed to another important aspect of the limitation regime, namely the impact onto the limitation period of the initiation of proceedings by a competition authority. Professor **Sikorski** replied that a better solution would be to shorten the limitation period for follow-on actions, but he admitted to being aware of the fact that this is an argument of a purely academic nature since the harmonisation model provided for in the Directive excludes such possibility. With regard to the second question, Professor Sikorski spoke in favour of suspending the limitation period if a competition authority takes action, claiming that an interruption could unnecessarily prolong the proceedings.

Mr **Robert Gago** (Hogan Lovells law firm) asked about the relationship between the CUCA and the PCCPA. He expressed his doubts whether the removal of 'consumer interests' from Article 3(1) CUCA did not, in fact, have a normative character which should have an impact on the application of PCCPA (Article 24 PCCPA states that acts of unfair competition constitute an infringement of collective consumer interests). In response, Professor **Skubisz** expressed the view that, according to current law, Article 24 PCCPA should continue to be applied to acts of unfair competition. At the same time, the speaker stressed that an expert group should be established in order to conduct a comprehensive study on this issue and propose necessary regulatory improvements.

48. The second session concerning the law on combating unfair competition (CUCA) was dedicated to problems of applying the prohibitions of unfair competition acts. The session was chaired by Professor **Marian Kępiński** and Professor **Ryszard Skubisz**.

49. The first paper in this session was presented by Dr **Łukasz Żelechowski** (Faculty of Law and Administration of the University of Warsaw) and entitled 'Protection of distinctive signs in the law on combating unfair competition. Problems surrounding the civil law protection regime'. The speaker started with asking about the character of the protection granted to distinctive signs. He stated that the consequences of the accepted qualification constitute the starting point for a further analysis if

the principles governing the trade in distinctive signs protected by the CUCA. Dr Żelechowski continued on to discuss the term 'distinctive signs' and developed the issue of the potential bases of absolute subjective rights to distinctive signs. The speaker presented also essential prerequisites of protection from the perspective of the qualification of protection regime.

50. The next speech was delivered by Dr **Jarosław Dudzik** (Faculty of Law and Administration of the Maria Curie-Skłodowska University in Lublin). He presented a paper entitled '*Locus standi* on the basis of CUCA rules – current problems". Dr Dudzik began his speech with a discussion of *locus standi* based on Article 18 CUCA and the definition of an 'entrepreneur'. He then discussed, on the basis of existing jurisprudence, the prerequisite of the 'participation in an economic activity'. The second part of the speech was dedicated to the status of a foreign dominant company as an entrepreneur within the meaning of Article 2 CUCA. Here, the speaker also referred to existing jurisprudence.

51. Dr **Edyta Całka** (Faculty of Law and Administration of the Maria Curie-Skłodowska University in Lublin) presented a speech entitled 'Application scope of the rules contained in the Combating Unfair Competition Act concerning the protection of the geographical indication of origin'. Discussed first was the understanding of the term 'geographical indication', also in view of the so-called 'average' recipient. The speaker presented next the categories of products to which geographical indications apply, together with their specific examples as well as classification. The second part of the presentation was dedicated to the protection model for geographical indications, including the identification of the legal sources that give such protection (international, European, Polish). Dr Całka put special emphasis on the existing EU framework, discussing key sources of its secondary law and selected judgments of the CJEU.

52. Dr **Anna Tischner** (Faculty of Law and Administration of the Jagiellonian University in Kraków) delivered the penultimate paper of the session entitled 'Prohibition of unfair imitation in Article 13 CUCA in light of the extensive protection given to the character of products by intellectual property rights including EU legislation'. The speaker began with the presentation of the ban referred to in Article 13 CUCA in light of the available forms of protection of the character of products in two time frames: 1) from the year of the entry into force of the CUCA; and 2) from the present perspective. She subsequently analysed the external relations of CUCA rules concerning imitations with intellectual property rights, as well as its internal relations within unfair competition law. The second part of the paper was dedicated to selected issues concerning the structure of unfair imitation, among others, related to the character of the product, a slavish imitation, or the market identity of the product.

53. Dr **Beata Giesen** (Faculty of Law and Administration of the University of Łódź) presented the closing speech on 'Collecting slotting fees – a practice justified by economic freedoms or an act of unfair competition? Controversies surrounding the interpretation of Article of 15 section 1 point 4 of the Act on Combating Unfair Competition'. Presented first were issues connected with so-called 'slotting fees' and with long standing controversies which they have been causing. In this respect, the

speaker presented the position of the judicature and the doctrine referring to key controversies which occur in cases of Article 15 section 1 point 3 CUCA. In the second part of her speech, Dr Giesen presented her own views concerning slotting fees, referring to such issues as: the subjective scope of the ban of collecting slotting fees or the premise of 'dishonesty' of hindering access to the market.

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