

YEARBOOK  
*of* ANTITRUST  
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STUDIES

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Vol. 2015, 8(12)



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# YEARBOOK *of* ANTITRUST *and* REGULATORY STUDIES

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Volume Editor:  
ANNA PISZCZ

Vol. 2015, 8(12)



CENTRE FOR ANTITRUST AND REGULATORY STUDIES University of Warsaw



**Centre for Antitrust and Regulatory Studies  
University of Warsaw, Faculty of Management**

**Sixty seventh Publication of the Publishing Programme**

Copyright by Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu  
Warszawskiego, Warszawa 2015

Volume financed by the Faculty of Law, University of Białystok (Research  
Fund for Young Scientists) under the project No BMN-535

Language editor: Ewelina D. Sage (English);  
Maciej Gac (French)

Statistic editor: Prof. Jerzy Wierziński

Cover: Dariusz Kondefer

ISSN 1689-9024

The original (reference) version of the journal is printed.

**PUBLISHER**



University of Warsaw  
Faculty of Management Press  
PL – 02-678 Warsaw, 1/3 Szturmowa St.  
Tel. (+48-22) 55-34-164  
e-mail: [jjagodzinski@mail.wz.uw.edu.pl](mailto:jjagodzinski@mail.wz.uw.edu.pl)  
[www.wz.uw.edu.pl](http://www.wz.uw.edu.pl)

**LAYOUT**



ELIPSA Publishing House  
PL – 00-189 Warszawa, 15/198 Inflancka St.  
Tel./Fax (+48-22) 635-03-01; (+48-22) 635-17-85  
E-mail: [elipsa@elipsa.pl](mailto:elipsa@elipsa.pl); [www.elipsa.pl](http://www.elipsa.pl)

**YEARBOOK OF ANTITRUST AND REGULATORY STUDIES**  
**VOL. 2015, 8(12)**

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## Editorial foreword

The editorial board is pleased to present the 12<sup>th</sup> volume of the Yearbook of Antitrust and Regulatory Studies (YARS 2015, 8(12)). It contains contributions presented during the International Conference entitled ‘Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective’. The conference was organised by the Faculty of Law of the University of Białystok and the Centre for Antitrust and Regulatory Studies of the University of Warsaw (CARS). It was held on 2–4 July 2015 in Supraśl. It is the organisers’ intention for both the conference itself and the publication of its papers to contribute to the discussion on private antitrust enforcement. The conference provided a forum for a range of contributors from Central and Eastern Europe to present their approaches to the harmonisation of private antitrust enforcement. As a result, and continuing the tradition set by YARS in 2013, the research papers published in the current volume focus not only on the Polish competition law regime but also present the national competition laws of other CEE countries.

The current volume is dedicated to a whole spectrum of topics relating, in particular, to the Damages Directive (Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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). Much emphasis is devoted to difficulties in transposing the Directive into national legislation of EU Member States, which represent various legal traditions and cultures. The organisers of the conference wanted to actively engage in the vital discussion on this topic. This refers both to substantive and procedural issues, as well as private antitrust enforcement from the perspective of consumer interests.

This last issue raises the question of collective consumer redress in antitrust cases (including, in particular, legal standing and financing, as well as the opt-in vs. opt-out model). This aspect of the debate is analysed in the guest article by S.O. Pais, which opens the current volume of YARS, as well as in the article written by K.J. Cseres.

Two papers focus on the scope of the Damages Directive. The first specifically concerns the scope of civil liability for antitrust damages (A. Jurkowska-Gomułka), the second focuses on those issues which received too little attention in the Directive (A. Piszcz). Procedural challenges are discussed with reference to the disclosure of documents (A. Galič) and access to documents (V. Butorac Malnar), including access to the files of competition authorities (A. Gulińska). One of the papers refers to the consensual approach to antitrust enforcement (R. Moisejevas). Included in the 'Articles' section of this YARS volume are also national reports from the four CEE countries represented at the conference – Ukraine (A. Gerasymenko and N. Mazaraki), Georgia (Z. Gvelesiani), Lithuania (R.A. Stanikunas and A. Burinskas) and Slovakia (O. Blažo).

Aside from the above research papers, the current volume of YARS contains also a number of conference reports. They cover: (i) 'Private Enforcement of Competition Law. Key Lessons from Recent International Developments' (London, 5–6 March 2015), (ii) 'Abuse Regulation in Competition Law: Past, Present and Future. 10th Annual ASCOLA' (Tokyo, 21–23 May 2015), (iii) 'International Conference on the Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective' (Supraśl, 2–4 July 2015), (iv) '2nd International PhD Students Seminar. Competition Law in Portugal and Poland' (Białystok, 1 July 2015), (v) The First Polish Competition Law Congress (Warsaw, 13–15 April 2015). The current volume of YARS concludes with the CARS Activity Report 2013–2014.

I end this brief editorial note with expressions of deep gratitude. I wish to first thank the members of the Conference Organising Committee, in particular Prof. Cezary Kosikowski and Prof. Tadeusz Skoczny, for all their support. I offer thanks to the authors and various anonymous reviewers who willingly gave their time and expertise to contribute to the current volume. Finally, I would like to acknowledge the financial support of the Dean of the Faculty of Law, University of Białystok – Prof. Emil Pływaczewski – which allowed us to publish this volume.

Białystok, 2<sup>nd</sup> October 2015

*Anna Piszcz*  
YARS Volume Editor



## List of acronyms

### Institutions

- AMCU** – Antimonopoly Committee (Ukraine)
- AMO** – Antimonopoly Office of the Slovak Republic
- CAT** – Competition Appeal Tribunal (UK)
- CCA** – Croatian Competition Agency
- CCG** – Constitutional Court of Georgia
- CFI** – Court of First Instance
- CJ** – Court of Justice
- CJEU** – Court of Justice of the European Union
- EC** – European Commission
- ECJ** – European Court of Justice
- ECN** – European Competition Network
- ECtHR** – European Court of Human Rights
- GC** – General Court
- NCA** – National Competition Authority
- NRA** – National Regulatory Authority
- PCA** – Portuguese Competition Authority
- SOKiK** – Court of Competition and Consumers Protection, *Sąd Ochrony Konkurencji i Konsumentów* (Poland)
- UOKiK** – Office for Competition and Consumers Protection, *Urząd Ochrony Konkurencji i Konsumentów* (Poland)

### Legal acts

- AA** – Association Agreement
- APEC** – Act No. 136/2001 Coll. on protection of economic competition and amending act of the Slovak National Council No 347/1990 Coll. on organization of ministries of other central bodies of state administration of the Slovak Republic as amended

- BER(s)** – Commission’s Block Exemption Regulation(s)  
**CCPC** – Slovak Civil Court Procedure Code of 1963  
**CCU** – Civil Code of Ukraine  
**CDC** – Slovak Civil Dispute Code  
**CPA** – Civil Procedure Act (Slovenia)  
**CPCU** – Civil Procedure Code of Ukraine  
**CRA** – Consumer Rights Act (UK)  
**CUCA** – Combating Unfair Competition Act (Poland)  
**EA** – Europe Agreement  
**ECHR** – European Convention on Human Rights  
**FTA** – Free Trade Agreement  
**GLC** – Georgia’s Law on Competition  
**GCC** – Georgian Civil Code  
**GCPC** – Georgian Civil Procedural Code  
**KPC** – Polish Civil Procedure Code  
**LC** – Law on Competition (Georgia)  
**LCC** – Lituaniinan Civil Code  
**LCCP** – Lithuanian Code of Civil Procedure  
**LCL** – Lithuania’s Competition Law  
**LFTC** – Law on Free Trade and Competition (Georgia)  
**LPEC** – Law on the Protection of Economic Competition (Ukraine)  
**PAA** – Popular Action Act (Portugal)  
**PCA** – Partnership & Cooperation Agreement  
**PCCPA** – Polish Competition and Consumer Protection Act  
**PCPA** – Portuguese Competition Protection Act  
**PRCA-1** – Prevention of Restriction of Competition Act of 2008 (Slovenia)  
**SAA(s)** – Stabilisation and Association Agreement(s)  
**TEC** – Treaty establishing the European Community  
**TEU** – Treaty on the European Union  
**TFEU** – Treaty on the Functioning of the European Union

### **Other acronyms**

- ADR** – Alternative Dispute Resolution  
**AG** – Advocate General

- 
- CEE** – Central and Eastern Europe(an)  
**CEECs** – Countries of Central and Eastern Europe  
**CLP** – Corporate Leniency Programme  
**ECR** – European Court Reports  
**EEA** – European Economic Area  
**MLP** – ECN Model Leniency Program  
**OJ** – Official Journal  
**PA** – Popular Action (Portugal)  
**RPM** – resale price maintenance

# G U E S T A R T I C L E

## **Private Antitrust Enforcement: A New Era for Collective Redress?**

by

Sofia Oliveira Pais\*

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- I. Introduction
- II. The European Recommendation 2013/396/EU of 11 June 2013
  - 1. General remarks
  - 2. Opt-in vs. opt-out models
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- III. The new Belgian and British laws on consumer collective redress
- IV. The experience of collective redress in Portugal: the Popular Action
- V. Conclusions

### ***Abstract***

It will be argued in this article that the EU Recommendation on common principles for collective redress might have limited impact on the field of competition law due to: several uncertainties regarding the legal standing in class actions; difficulties in their funding; and the risk of forum shopping with cross-border actions. Nevertheless, Belgium and Great Britain have recently introduced class actions into their national legal systems and addressed some of the difficulties which other Member States were experiencing already. It will also be suggested that the Portuguese model – the ‘Popular Action’ – and recent Portuguese practice may be considered an interesting example to follow in order to overcome some of the identified obstacles to private antitrust enforcement.

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## Résumé

Dans cet article nous soutenons l'avis que la Recommandation de l'Union européenne relative à des principes communs applicables aux mécanismes de recours collectif pourrait avoir un impact limité sur le domaine du droit de la concurrence, en raison de plusieurs incertitudes concernant la qualité à agir dans l'action de groupe, les difficultés de leur financement et le risque de forum shopping dans le cas des actions transfrontalières. Néanmoins, la Belgique et le Royaume-Uni ont récemment introduit dans leurs lois nationales des actions de groupes et ont répondu aux certaines difficultés qui étaient déjà vécue par d'autres États membres. Nous soutenons aussi l'avis que le modèle portugais – Action Populaire – et la pratique récente des actions collectives au Portugal, peuvent être considérés comme des exemples intéressants à suivre afin de surmonter certains obstacles à l'application privée du droit de la concurrence.

**Key words:** Recommendation 2013/396/EU; collective redress mechanisms; legal standing; funding; forum shopping; popular action.

**JEL:** K23; K42.

## I. Introduction

The European Parliament and the Council adopted on 26 November 2014 a Directive on certain rules governing actions for damages under national law for infringements of the competition law<sup>1</sup> (hereafter, Damages Directive), which might have significant impact in the 28 Member States even if the EU is still far from US experiences where private antitrust enforcement represents more than 90% of all antitrust cases<sup>2</sup>. Even so, with the introduction of the new Directive, another step has been taken in order to increase the relevance of private antitrust enforcement as a complementary tool to its public enforcement<sup>3</sup>, which

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<sup>1</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 (OJ L 349, 05.12.2014, p. 1).

<sup>2</sup> See R.H. Lande, 'Benefits of private enforcement: empirical background' [in:] A. Foer, J. Cuneo (eds.), *The International Handbook on Private Enforcement of Competition Law*, Edward Elgar Publishing, 2012, p. 34.

<sup>3</sup> The Directive will not be addressed here which nevertheless be welcomed as a significant milestone to achieving a more effective enforcement of EU antitrust rules: by giving victims apparently easier access to evidence and more time to make their claims, but also by preserving the attractiveness of leniency and settlement programmes.

still plays the lead in the EU<sup>4</sup>. Yet the Directive does not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU, even if both Member States and consumers recognize that collective redress is a necessary solution in this context. In fact, a recent survey by Eurobarometer shows that almost 80% of European consumers would be more willing to go to court if collective redress procedures were available (because they would not have to carry the risk and litigation costs alone)<sup>5</sup>. This survey confirms also the explanation given by the European Court of Human Rights (hereafter, ECHR) in *Gorraiz Lizarraga and others v. Spain* which stated that ‘in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means available to them whereby they can defend their particular interests effectively’<sup>6</sup>. On the other hand, several Member States have recently introduced class actions into their national laws, confirming the urgent need for such mechanisms for effective private enforcement of competition law.

In the EU, the problem of collective redress was addressed with non-binding acts – a fact that may limit the success of such solutions. These included the European Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanism in the Member States, concerning violations of rights granted under Union Law<sup>7</sup> (hereafter, Recommendation). The Recommendation was accompanied by a Communication to the European Parliament and the Council ‘Towards a European Horizontal Framework for Collective Redress’<sup>8</sup>. According to the European Commission (hereafter, EC or Commission), EU Member States should implement the principles set forth in this Recommendation into their national collective redress systems by 26 July 2015<sup>9</sup>. On the basis of information and data that must be provided by Member

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<sup>4</sup> Another alternative to private enforcement is public compensation. According to Ezrachi and Ioannidou, public compensation ‘would enable competition authorities to award a certain form of compensation alongside the imposed fine following a public investigation’. Public compensation in the course of public investigation could, therefore, facilitate compensation, increase deterrence and encourage greater consumer involvement. The authors sustain that public compensation should be considered as another remedy (in addition to fines) and should be formalized. Cf. A. Ezrachi, M. Ioannidou, ‘Public Compensation as a Complementary Mechanism to Damages Actions: From Policy Justifications to Formal Implementation’ (2012) 3(6) *Journal of European Competition Law & Practice* 536-537.

<sup>5</sup> Flash Eurobarometer 299, *Consumer Attitudes Towards Cross-Border Trade and Consumer Protection*, [http://ec.europa.eu/public\\_opinion/flash/fl\\_299\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf) (accessed 8 April 2014).

<sup>6</sup> Cf. *Gorraiz Lizarraga and others v. Spain*, App no 62543/00, ECHR 2004-III, para. 38.

<sup>7</sup> OJ L 201, 26.07.2013, p. 60 (hereafter, the Recommendation).

<sup>8</sup> COM (2013) 401/2.

<sup>9</sup> Recommendation, point 38.

States, the EC will assess the implementation of the Recommendation by 26 July 2017 at the latest<sup>10</sup>.

The Recommendation applies not only to collective redress mechanisms in consumer law but also to procedures in a wide variety of EU law fields, including competition and environmental laws as well as data protection and financial services. The Recommendation is applicable to both judicial and out-of-court collective redress measures which should be fair, equitable, timely and not excessively expensive. Its aim is to promote an efficient justice system that will contribute to European growth<sup>11</sup>.

This article will focus mainly on antitrust class actions before courts, highlighting some of the gaps and difficulties in the implementation of the principles mentioned in the Recommendation. Furthermore, it will be shown that a new era in collective redress is arising with the recent introduction of new rules on class actions in some national legal systems. It will be suggested finally that Portuguese experiences in this domain might be relevant to other Member States also.

## II. The European Recommendation 2013/396/EU of 11 June 2013

### 1. General remarks

The Recommendation ‘aims to ensure a coherent horizontal approach to collective redress in the European Union without harmonising Member States systems’, improving access to justice while ensuring appropriate procedural guarantees to avoid abusive litigation<sup>12</sup>. As Vice-President Viviane Reding explained: ‘Member States have very different legal traditions in collective redress and the Commission wants to respect these. Our initiative aims to bring more coherence when EU law is at stake’<sup>13</sup>.

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<sup>10</sup> Recommendation, point 41.

<sup>11</sup> Translated into an economic perspective, this means the increase of European social welfare, ‘including consumer and producer surplus’; cf. G. Barker, B.P. Freyens, ‘The Economics of European Commission’s Recommendation on Collective Redress’ [in:] E. Lein, D. Fairgrieve, M. Otero Crespo, V. Smith (eds.), *Collective Redress in Europe – Why and How?*, British Institute of International and Comparative Law 2015, p. 5.

<sup>12</sup> Recommendation; cf. [http://europa.eu/rapid/press-release\\_IP-13-524\\_en.htm](http://europa.eu/rapid/press-release_IP-13-524_en.htm). Collective redress is a ‘procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar claims to be bundled into a single court action’. Cf. COM (2013) 401 final, para. 12.

<sup>13</sup> *Ibidem*.

At the end of the public consultation process launched in 2011, and in light of the 2012 resolution of the European Parliament<sup>14</sup>, the EC was well aware of the risk of abuses involving class actions seen on the other side of the Atlantic<sup>15</sup>. The solutions adopted in the Recommendation reflect such knowledge and try to avoid that risk, overcoming Member States' opposition regarding collective redress, particularly the opt-out model<sup>16</sup>. Even so, several difficulties and uncertainties remain. It will be shown that the main problems lie in the apparent ineffectiveness of the opt-in model; encumbrances in the implementation of due process guarantees (such as the right to be heard and the adequate representation of the group); difficulties to fund class actions and; uncertainties in cross-border mass claims. Member States must thus still face the challenge of finding reasonable solutions to these problems while achieving the right balance between an effective system (that facilitates access to justice in antitrust cases regarding low value damages claims) and the need to avoid speculative claims.

## 2. Opt-in vs. opt-out models

One of the main concerns in collective redress relates to the legal standing necessary to bring a collective action. In the opt-out model, the resulting court decision is binding on everyone that did not opt-out. This solution can increase the effectiveness of this mechanism as it overcomes the passive nature of victims of antitrust infringement as well as the fact that antitrust claims are usually of small value (a fact that discourages access to courts in light of the hard work and large legal expenses involved<sup>17</sup>).

Nevertheless, the Commission favours the opt-in model where the judgement is only binding for those who opted-in. The EC argues that this

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<sup>14</sup> Cf. COM SEC (2011) 173 and the Resolution of the European Parliament of 2 February 2012, 2011/2089 (INI).

<sup>15</sup> The solution to set aside the US model was also sustained by several authors; see, for instance, L.A. Willet, 'U.S. Style Class Actions in Europe: A Growing Threat' (2005) 9(6) *Briefly* 9. On the other hand, refusing the view that the USA model leads necessarily to abuses cf. I. Tzankova, D. Hensler, 'Collective Settlements in the Netherlands: Some Empirical Observations' [in:] A. Stadler, C. Hodges (eds.), *Resolving Mass Disputes: ADR and Settlement of Mass Claims*, Edward Elgar, 2013, p. 91 ff.

<sup>16</sup> It has been suggested that, in France, the principle '*nul ne plaide par procureur*' (no one shall plead by proxy) is part of the concept of '*ordre public*' and would prevent the opt-out model; cf. E. Werlauff, 'Class Action and Class Settlement in a European Perspective' (2013) 24 *European Business Law Review* 177.

<sup>17</sup> Providing a detailed analysis of this issue, cf. S.O. Pais, A. Piszcz, 'Package on Actions for Damages Based on Breaches of EU Competition Rules: Can One Size Fit All?' (2014) 7(10) *YARS* 209.



solution is compatible with the legal traditions of EU Member States, for instance the Italian solution<sup>18</sup>, it avoids litigation abuses and respects the freedom of potential claimants whether to take part in the action or not<sup>19</sup>. In fact, the principle of party disposition, which is the right to bring an action before the court as well as to end it, still underlies the procedural traditions of most civil laws in EU member States. Opt-out proceedings should thus only be allowed when Member States can prove that they are superior to the opt-in model (justified by ‘reasons of sound administration of justice’<sup>20</sup>), namely for claims which are not expected to be fulfilled in individual proceedings because of their small amount<sup>21</sup>.

Although the concerns of the EC should be considered relevant, other safeguards can be introduced at national level in order to avoid abusive litigation. Establishing the notion of a ‘preliminary assessment’ of the claim by national judges, or introducing the ‘loser pays’ principle, are among the solutions that will be shown to clearly reduce obstacles to collective redress mechanisms in competition procedures.

On the other hand, existing Member States’ experiences show that the opt-in model is not very effective. The *JJB Sports* case<sup>22</sup> provides a paradigmatic example here which involved the Consumer Organizations ‘Which?’ that brought a class action on behalf of 130 individual consumers, despite the fact that it was estimated that two million consumers were actually affected by the contested practice. The same is true for the *UCF Que Choisir* case<sup>23</sup> that concerns a follow-on action brought forward by a French consumer association claiming damages from a cartel involving three mobile operators. The French Competition Authority estimated in its own investigation that the cartel could have had a negative impact on almost 20 million consumers, but only around

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<sup>18</sup> In Italy, Article 140-bis of the Consumer Code allows opt-in class actions, which provide for a ‘preliminary judicial filter’: an action will be declared inadmissible when (i) it is clearly unfounded; (ii) the plaintiff has a conflict of interest; (iii) the interests are not identical or similar; (iv) the plaintiff is not able to adequately protect the interests of the class. On this topic, cf. C. Tesauro, D. Ruggiero, ‘Private Damage Actions Related to European Competition Law in Italy’ (2010) 1(6) *Journal of European Competition Law & Practice* 514–521.

<sup>19</sup> EC, White Paper on Damages Actions for Breach of the EC antitrust rules, COM (2008) 165, 2.4.2008; see also Commission Staff Working Paper, SEC (2008) 404, 2.4.2008 (hereafter, Commission Staff Working Paper).

<sup>20</sup> Recommendation, point 21.

<sup>21</sup> Cf. D. Panagiotis, L. Tzakas, ‘Effective Collective Redress in Antitrust and Consumer Protection Matters: a Panacea or a Chimera?’ (2011) 48 *Common Market Law Review* 1125.

<sup>22</sup> *Price-fixing of replica football kit* (Case CP/0871/01), OFT Decision CA98/06/2003 of 1 August 2003.

<sup>23</sup> Cited by P. Buccrossi, M. Carpagnano, ‘Is it Time for the European Union to Legislate in the Field of Collective Redress in Antitrust (and how)?’ (2013) 4(1) *Journal of European Competition Law & Practice* 5.

12,000 consumers joined the private action. The choice of the opt-in model should, therefore, be reconsidered at least in 2017 when the Recommendation is due for review.

Another matter that needs clarification concerns due process guarantees such as legal standing in representative actions and the right of victims to be heard, particularly in the opt-out model. In certain types of collective actions (such as group actions), the action can be brought jointly by those who claim to have suffered harm. However, in the case of a representative action, the Recommendation states that the legal standing to bring such an action should be limited to ad hoc certified entities, designated representative entities which fulfil certain legal criteria, or to public authorities. The question is: which criteria? Should legal standing be conferred only to consumer organizations? What about foreign representative entities? Should they have legal standing?

Although the Recommendation does not answer all those questions, it refers to certain conditions that the representative entity should meet: '(a) a representative entity should have a non-profit making character; (b) there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and (c) the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest'<sup>24</sup>.

It has been discussed whether these requirements apply to ad hoc certified foreign representative entities, as they are not clearly mentioned in the text of the Recommendation. In fact, it has been argued that points 4 and 6 of the Recommendation distinguish between 'entities which have been officially designated in advance' and 'entities which have been certified on an ad hoc basis by a Member State's national authorities or courts for a particular representative action' and for cross-border situations. Still, point 18 of the Recommendation only considers the first type<sup>25</sup>. Does this mean that entities certified on an ad hoc basis for a particular representative action in one Member State cannot act in another State? Taking into account the spirit of the Recommendation and the need to assure efficient collective redress mechanisms, ad hoc certified foreign representative entities should also have legal standing<sup>26</sup>.

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<sup>24</sup> Recommendation, recitals 17, 18, 21 and point 63

<sup>25</sup> Cf. Statement of the European Law Institute on Collective Redress and Competition Damages Claims (hereafter, Statement ELI), at p. 15; [http://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Projects/S-5-2014\\_Statement\\_on\\_Collective\\_Redress\\_and\\_Competition\\_Damages\\_Claims.pdf](http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Projects/S-5-2014_Statement_on_Collective_Redress_and_Competition_Damages_Claims.pdf) (access 01.05.2015).

<sup>26</sup> Ad hoc certification of representative entities in the context of class actions might also require, as it has been pointed out, 'training programmes' for judges who will be deciding on those claims, cf. Statement ELI, p. 15–16.

Finally, as far as the right to be heard in the opt-out model is concerned, dissemination of information is considered vital to avoid the risk of individuals being bound by the court decision without being aware of it. Problems arise when the identity of the victims is not known and notification is not possible. In the Netherlands, for instance, it is the Court of Appeal of Amsterdam that is competent to approve group settlements in this kind of actions and it makes significant efforts to ensure that potential victims are informed of class actions. In the *Shell* case, for example, ‘110,000 letters in 22 languages were sent to shareholders in 105 countries, and announcements were made via 44 newspapers throughout the world’<sup>27</sup>. A problem arises in situations where a personal notice (by post or email) is not possible because victims are unknown or costs thereof are excessive. It has been suggested that a national or European registration system for class actions should be implemented as it could contribute to solving this issue<sup>28</sup>. The problem here is that this reasonable solution does not yet exist, be it in all Member States or at the European level. For the time being, national courts should thus have the discretion to fix other solutions to ensure that an individual is aware of his/her possibility to opt-out.

### 3. Funding

Funding is another key problem of class actions. In these types of actions, the value of the individual claims is usually low, while access to courts is expensive and time consuming. It is a priority to find solutions to the issue of how to fund such actions, besides the use of the victims’ own resources. One of the interesting choices here is the creation of special funds, either through the use of *crowdfunding* ‘based on the solicitation of multiple voluntary contributions of small amounts’<sup>29</sup>, or through donations from successful litigants to fund future class actions.

It has also been proposed to use State resources in this context, such as state legal aid. The problem with public resources, particularly considering the 2008 financial crisis, is that they are usually very limited and will only address people with very limited (or without) resources of their own. As a matter of fact, national requirements concerning the use of legal aid are strict,

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<sup>27</sup> R. Hermans, J. de Bie Leuveling Tjeenk, ‘International Class Action Settlements in the Netherlands since *Converium*’ [in:] *The International Comparative Legal Guide to Class & Group Actions 2015*, p. 5, cf. <http://www.debrauw.com/wp-content/uploads/NEWS%20-%20PUBLICATIONS/ICLG-Class-Action-15-Chapter-2.pdf> (access 31.08.2015).

<sup>28</sup> Point 35 of the Recommendation. Cf. Statement ELI, p. 16.

<sup>29</sup> *Ibidem*.

and usually do not apply to Small and Medium Sized Enterprises (hereafter, SMEs) and to cross-border claims<sup>30</sup>.

An alternative solution might be the use of lawyers' contingency fees (which include preparation of the claim, representation in court and gathering of evidence; those fees are calculated as a % of the awarded compensation). Yet the EC does not support this option, and neither does a meaningful number of Member States who fear the risk of abusive and frivolous claims as well as the risk of conflicting interests of lawyers and their clients (for instance, whether or not to settle more quickly for a lower amount)<sup>31</sup>. Actually, according to the Recommendation: 'The Member States should ensure that the lawyers' remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties'<sup>32</sup> and 'Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party'<sup>33</sup>. Although the risk of abusive claims should not be underestimated, it can be reduced with the 'loser pays' rule that exists in an important number of Member States. Avoiding contingency fees, as suggested by the EC, can thus represent a potentially significant barrier to full compensation. Contingency fees should, therefore, be considered a useful solution, provided certain safeguards are also introduced.

Third party funding is another solution worth noting despite the fact that the Recommendation does not clarify this concept and only requires that funding-entities do not influence procedural decisions or settlements. Third party funding is usually considered to be a practice where a 3<sup>rd</sup> party (not a party to the actual proceedings) offers financial support to a claimant in order to cover his/her litigation expenses. The 3<sup>rd</sup> party receives in return a given % of the victim's indemnity if the claim is successful, or nothing if the case is lost. As it has been pointed out, 'the logic is similar to the US-style contingency fee scheme, except that the funds come from a third party and not from the plaintiff's lawyer', allowing the victim to file the claim and, in turn, improving access to justice as well as the deterrence effect<sup>34</sup>. Several

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<sup>30</sup> Cf. Statement ELL, p. 33.

<sup>31</sup> P.T. Hurst, 'Thoughts on the American rule and contingency fees' (2012) 2 *European Business Law Review* 35.

<sup>32</sup> Recommendation, points 29, 30.

<sup>33</sup> Recommendation, point 30.

<sup>34</sup> M. Morpurgo, 'A Comparative Legal and Economic Approach to Third-Party Litigation Funding', (2011) 19 *Cardozo Journal of International and Comparative Law* 343, *apud* O. Cojo Manuel, 'Third-Party Litigation Funding: Current State of Affairs and Prospects for Its Further Development in Spain' (2014) 3 *European Review of Private Law*, 441, 443.

doubts arise, however, concerning the frontiers of this concept. For instance, which litigation decisions can be taken by the ‘funders’ without turning the funder agreement into an assignment agreement?<sup>35</sup> Should insurance for legal expenses (before the event) be included in the concept?<sup>36</sup> What about individual member contributions or donations?

This is not the place to study in detail all of these situations. However, it is important to stress that the key element of the 3<sup>rd</sup> party funding concept should be that the latter does not own the claim and it is not a ‘party’ to the actual proceeding, and may lie with the court fixing the guidelines on this issue<sup>37</sup>.

#### 4. Cross border mass disputes

The Recommendation suggests that Member States should ensure that where cross-border mass disputes emerge ‘a single collective action in a single forum is not prevented by national rules on admissibility or standing of the foreign groups of claimants or the representative entities originating from other national legal systems’<sup>38</sup>. Therefore, it is possible that parallel actions against the same infringer on behalf of different groups of victims may emerge in courts of different Member States. However, the risk of *forum shopping* (and it is interesting to compare the solutions of the

<sup>35</sup> See, however, the ‘Austrian model of group litigation’ (an opt-in model) where potential claimants assign their claims to a consumer association; cf. Statement ELI, p. 6.

<sup>36</sup> Insurance for legal expenses must take into account the *Eshig* case, C-199/08, ECR I-82, 95 which concerns an Austrian national who, together with thousands of other investors, invested money in companies which became insolvent, and sought an assurance from UNIQA to cover legal expenses taken by lawyers chosen by him. The Court of Justice ruled that Article 4(1)(a) of Council Directive 87/344/EEC of 22 June 1987 (on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance) must be interpreted as not permitting the legal expenses insurer to reserve to itself the right to select the legal representative of all the insured persons concerned, where a large number of insured persons suffer losses, as a result of the same event (no. 70). With this decision, insurers may choose to exclude those actions from their insurance or may try to force settlements in order to swiftly end the case.

<sup>37</sup> In addition, for cases of private 3<sup>rd</sup> party funding of compensatory collective redress, the Recommendation says that it is prohibited ‘to base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties’ (point 32). Importantly however, the assignment of claims is not easily allowed in all Member States (hereafter, MSs) (in fact, ‘funder becomes owner of the claims and the action is no longer representative’; cf. Statement ELI, at p. 56 and [http://www.justiz.nrw.de/nrwe/lgs/duesseldorf/lg\\_duesseldorf/j2013/37\\_O\\_200\\_09\\_Kart\\_U\\_Urteil\\_20131217.html](http://www.justiz.nrw.de/nrwe/lgs/duesseldorf/lg_duesseldorf/j2013/37_O_200_09_Kart_U_Urteil_20131217.html) (access 01.06.2015)).

<sup>38</sup> Recommendation, point 17.

Recommendation with those of the Injunction Directive<sup>39</sup>, as it has been pointed out<sup>40</sup> and parallel actions have not been addressed by EU institutions yet. For instance, can Article 6 of the Brussels I Regulation<sup>41</sup> be applied, which allows claimants to sue several defendants in the Member States (as long as claims are closely connected and there is a risk of conflicting decisions), to the situation where several victims intend to sue the same defendant? What about the risk of conflicting decisions in the case of parallel actions? Or the

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<sup>39</sup> Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51. To discuss the Directive, see I. Benöhr, 'Collective Redress in the Field of European Consumer Law' (2014) 41(3) *Legal Issues of Economic Integration* 248. In the beginning, only traditional areas were covered by the Directive such as consumer law, travel packages and contracts negotiated away from business premises, and certain practices such as unfair terms and misleading advertising. However, sale of consumer goods and associated guarantees, electronic commerce, distance marketing of consumer financial services, and unfair business-to-consumer commercial practices in the internal market were also included in 2009 with Directive 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests (OJ L 110, 01.05.2009, p. 30). The Directive may lead to the prohibition of an infringement and the imposition of fines, but it does not allow the award of damages. As already mentioned, this issue was addressed in the Consumer Policy strategy of 2007-2013 and the EC (DG SANCO) launched a public consultation on collective consumer redress which led to the Green Paper on Consumer Collective Redress (2008). In 2011, DG Competition, DG SANCO and DG Justice issued a joint consultation paper on collective redress which produced the European Parliament Resolution of 2012 and the Recommendation of 2013.

<sup>40</sup> As it has already been explained – Statement ELI, p. 37 – according to article 4 of the Injunctive Directive, each Member State shall take the necessary measures to ensure that, in the event of an infringement originating in that Member State, any qualified entity from another Member State where the interests protected by that qualified entity are affected by the infringement, may seize the court or administrative authority referred to in Article 2, on presentation of the list provided for in paragraph 3; while point 18 of the Recommendation invites MSs to accept the legal standing of foreign representative entities in other circumstances: if in a cross-border mass claims, the infringement has its origin in one MS (normally the place where the infringer is domiciled) but causes harm to consumers in other MSs, the Recommendation asks all MSs, having jurisdiction over the case to accept the legal standing of particular representative entities from other MSs. This solution favours forum shopping. Claimants will search which jurisdiction offers better instruments of collective redress such as out of court settlements binding (as it happens in Dutch law).

<sup>41</sup> Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.01.2001, p. 1, recasted with Regulation 1215/2012/EU of the Parliament and of the Council of 12.12.2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, which entered into force on 01.01.2015, OJ L 351, 20.12.2012, p. 1 (hereafter, Brussels I Recast Regulation). With this Regulation, the geographical scope of Section 4 of Chapter I changed. Under Regulation 44/2001, that section applied only if the defendant was domiciled in a MS; according to Regulation 1215/2012/EU the section is applicable regardless of the defendant's domicile. The aim is to ensure protection for EU consumers.

risk of overcompensation (multiple recoveries of the same harm)? A specific solutions for anticompetitive practices causing damages in the territories of different States needed?

In the absence of specific rules for class actions concerning antitrust infringements, in tort cases if victims suffer damages in different States and at a different time, only the court of the defendant or the court where the harmful event occurred<sup>42</sup> will have jurisdiction to decide the case<sup>43</sup>. Moreover, the court must have jurisdiction over all the absent claimants.

The Amsterdam Court of Appeal applied Article 6(1) (now Article 8(1) of the Brussels I Recast Regulation) to establish Dutch jurisdiction over foreign tort victims who do not reside in the Netherlands; it is sufficient that one of the ‘interested parties’ resides there. This approach, as well as the use of Article 5(1) (now Article 7(1) of the Brussels I Recast Regulation) by the Dutch court, has, however, been criticized particularly due to the preclusive effect of settlement under Dutch WCAM proceedings<sup>44</sup>.

It has been argued that Brussels I Regulation is not adequate to solve the problems of collective redress<sup>45</sup> (it was mainly conceived for two-party proceedings), or at least that specific solutions should be built into the existing legal framework<sup>46</sup>. On the other hand, it has also been suggested<sup>47</sup> to apply the law of the defendant’s domicile or the law of the Member State where the majority of victims reside, in other words, to apply the ‘principle of the

<sup>42</sup> That is to say, the place where the ‘illegal’ act was committed or the place of injury or damage.

<sup>43</sup> Articles 2 and 5 of Regulation Brussels I 44/2001 (now articles 4 and 7(2), Brussels I Recast Regulation).

<sup>44</sup> As A. Stadler mentions, cf. ‘The Commission’s Recommendation on Common Principles of Collective Redress and Private International Law’ [in:] E. Lein, D. Fairgrieve, M. Otero Crespo, V. Smith (eds.), op. cit., p. 242–246, the Dutch law (WCAM) allows the parties to negotiate an out-of-court settlement and, if the Amsterdam court approves the settlement, ‘interested parties’ (liable party and representative entity) will be legally bound and cannot sue the liable party, which can be problematic in the opt-out model.

<sup>45</sup> B. Hess, ‘Cross-border Collective Litigation and the Regulation Brussels I’ (2010) 30 *Praxis Des Internationalen Private Und Verfahrensrechts (Iprax)* 116.

<sup>46</sup> Tzakas (*supra* note 21 at 1163) argues that ‘the group plaintiffs or the represented claims must be accurately defined in order to avoid multiple recoveries of the same harm, and (...) lis pendens should apply to the extent that a potential for irreconcilable rulings is present’.

<sup>47</sup> Green Paper – Damages actions for breach of the EC antitrust rules {SEC(2005) 1732} / COM/2005/0672 final. The EC suggests that ‘the applicable law should be determined by the general rule (...) that is to say with reference to the place where the damage occurs’ (option 31); and ‘that there should be a specific rule for damages claims based on an infringement of antitrust law. This rule should clarify that for this type of claims, the general rule (...) shall mean that the laws of the States on whose market the victim is affected by the anti-competitive practice could govern the claim’ (option 32).

centre of gravity (which also raises several doubts in itself)<sup>48</sup>. Additionally, the EC proposed a system of national registers for collective redress either at national or European level<sup>49</sup>, to address, among others, the problems of parallel proceedings and irreconcilable judgements.

### III. The new Belgian and British laws on consumer collective redress

Despite some of the uncertainties still surrounding the Recommendation, several Member States have adopted domestic legislation to introduce (or improve) collective redress mechanisms. Particularly interesting are some of the solutions found in recent Belgian and British laws.

The Belgian Law of 28 March 2014<sup>50</sup> (hereafter, Belgian Law) entered into force in September 2014. It introduces a new section into the Economic Law Code entitled 'Actions for collective redress' which intends to enhance and enforce the rights of consumers. The new Belgian Law allows the parties (or the judge, if the parties cannot agree) to choose between the opt-in and the opt-out solution (the opt-in model is mandatory to those that do not reside in Belgium, or if the collective action seeks to redress moral or bodily harm). These class actions make it possible to aggregate individual consumer complaints in order to be dealt with in a single court proceeding; its aim is to obtain compensation for losses (although a claim cannot be brought against public authorities or non-profit organisations) and the judgement has *res judicata* effects on all members of the group.

Class actions can only be brought by a limited group of representatives: (1) the Federal Ombudsman; (2) a consumer organization represented in the 'Conseil de la Consommation' recognized by the Minister of Economic Affairs; (3) an association recognised by the Minister, with legal personality for at least three years, which has a corporate purpose directly related to the collective prejudice suffered by a group of consumers, and which does not pursue a sustainable economic purpose.

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<sup>48</sup> B. Añoveros Terradas argues that it would be difficult to choose the criteria for identifying the centre of gravity and it could, again, discriminate consumers whose domiciles have not been chosen; cf. 'Consumer Collective Redress under the Brussels I Regulation Recast in the Light of the Commission's Common Principles' (2015) 11(2) *Journal of Private International Law* 143–162.

<sup>49</sup> Recommendation, point 35.

<sup>50</sup> Cf. <http://www.collectiveredress.org/collective-redress/reports/belgium/overview> (access 01.04.2015).



Regarding the procedures, the national court may play a fundamental role here. In fact, the new Belgian Law establishes a two-stage procedure (admissibility of the petition and negotiation). If no settlement agreement is reached between the parties, or no settlement agreement was confirmed by the court (and the court can refuse the agreement if the compensation for the group is unreasonable, or if the indemnity exceeds the real costs), then the proceedings continue on the merits. If the judge decides that the application for collective redress is successful, a claims administrator will be appointed for the execution of the final judgement (only lawyers, ministerial civil servants and holders of a judicial mandate can fulfil that role). The Court will check the execution of the decision and if the claims administrator is not able to pay the full amount of the compensation to the consumers, the Court has discretion to decide on the distribution of the funds.

Unfortunately, the new Belgian Law has no rules on 3<sup>rd</sup> party funding and the principle is that the representative entity will support the financial risk of the procedure. The Belgian government argued, albeit not in a convincing manner, that the choice to grant standing only to selected organizations guided by the collective interest that they represent, would overcome hesitations to bring forwards claims. As it has already been suggested, the 3<sup>rd</sup> party funding option, or similar solutions, must be considered or ‘the law is thus clearly not meeting the requirements of the Recommendation’ regarding the funding of collective actions<sup>51</sup>.

Another recent reform regarding class actions took place in Britain in the form of the UK Consumer Rights Act of 26 March 2015 (hereafter, CRA)<sup>52</sup>, which is expected to come into force on 1 October 2015. It amends the Competition Act of 1998 gathering in one place consumer rights covering contracts for the supply of goods, services, digital content and the law relating to unfair terms in consumer contracts; it also deals with consumer collective actions for anti-competitive behaviour.

The aim of the CRA is to empower consumers and SMEs to challenge anti-competitive behaviour through the Competition Appeal Tribunal (hereafter, CAT), in addition to the clarification of other issues<sup>53</sup>. The CAT will be able to adjudicate not only follow-on actions but also stand-alone actions. The

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<sup>51</sup> J.T. Novak, ‘The new Belgian law on consumer collective redress and compliance with EU law requirements’ [in:] E. Lein, D. Fairgrieve, M. Otero Crespo, V. Smith (eds.), *op. cit.*, 196.

<sup>52</sup> Cf. <http://www.legislation.gov.uk/ukpga/2015/15/notes/division/2> (access 01.04.2015).

<sup>53</sup> It (1) consolidates enforcers’ powers as listed in Schedule 5 to investigate potential breaches of consumer law; (2) gives civil courts and public enforcers greater flexibility to take the most appropriate action for consumers when dealing with breaches of consumer law; (3) imposes a duty on letting agents to publish their fees and other information; (4) expands the list of higher education providers which are required to join the higher education complaints handling scheme.

new British law will, therefore, introduce a new ‘opt-out’ class action before the CAT, making it easier for private parties (SMEs and consumers) to bring damages actions for competition law breaches. As such, it will implement changes suggested by the Department for Business, Innovation & Skill<sup>54</sup> which conducted in 2012 a consultation on options for reform concerning private actions in competition law. From now on, claimants will not need to specify the regime, as it is for the CAT to decide whether the action will follow the opt-in or the opt-out solution. On the other hand, to avoid abuses, the CRA prohibits contingency fees and exemplary damages in collective actions and applies the ‘loser pays’ rule<sup>55</sup>.

British Civil Procedure Rules provide for representative actions in rule 19.6 whereby a claim can be brought by a representative entity when more than one person has the same interest in the claim. However, the opt-out class action model was set aside in the *Emerald Supplies* case where the High Court held that it was not possible to determine the ‘same interest’ until the question of liability had been tried<sup>56</sup>.

On the other hand, according to Section 47B of the British Competition Act of 1998, only certain bodies (such as consumer organizations) could, until the recent amendment, bring such claims and they had to identify the individual consumers being represented. These solutions proved to be time consuming, expensive, and ineffective as the famous *JJB Sports*<sup>57</sup> case shows where the Consumer Organization ‘Which?’ brought a class action on behalf of about 130 consumers. At the same time, it was estimated that two million consumers were actually affected by the infringement and that they incurred losses amounting to 50 million pounds. The case ended with a settlement whereby the infringer paid 20 pounds to each victim who joined the suit, and 10 pounds to all future victims who would appear within one year of the compromise.

The CRA of 2015 modified Section 47B so that other representative entities (but not law firms) besides consumer organizations or individual class members may now bring claims collectively as long as they raise the same, similar or

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<sup>54</sup> Cf. <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform> (access 01.04.2015)

<sup>55</sup> The English rule according to which the loser pays all litigation costs apparently prevails over the American rule, that is to say, each party supports its own costs; cf. O. Cojo Manuel, op. cit., p. 439–468. On the other hand, there are several statutory exceptions to the US rule; in fact, English ‘loser pays’ rule was included in tort reform legislation proposed by the Bush Administration in 1992; for more details on the Common Benefit Doctrine, cf. P.T. Hurst, ‘Thoughts on the American rule and contingency fees’ (2012) *European Business Law Review* 27.

<sup>56</sup> *Emerald Supplied Limited v. British Airways* [2010] EWCA Civ. 1284.

<sup>57</sup> *Price-fixing of replica football kit* (Case CP/0871/01) OFT Decision CA98/06/2003 of 1 August 2003.

related issues of fact or law. Therefore, claims can be brought on behalf of a defined group without having to identify each individual claimant. An opt-out collective action would cover all class members except those who opted out (and any class member who is not domiciled in the UK at the specified time and who has not opted in). Awarded damages that remain unclaimed will go to a prescribed charity, or to the class representative for costs in connection with the proceedings.

In addition, the CRA of 2015 introduces a collective settlement procedure – representative entities may settle a case prior to bringing the claim before the CAT, as long as the terms of the settlement are ‘just and reasonable’. It also provides a redress scheme – the Competition and Markets Authority can authorise voluntary redress schemes where the level of the fine can be reduced if the competition law infringer offers compensation.

This CRA of 2015 is considered a significant step forward on the road to effective private enforcement in the UK<sup>58</sup>, with safeguards being observed with a strong judicial review process (regarding the departure of certain points from the EU Recommendation, namely preliminary merits test, an assessment of the adequacy of the representative entity and whether class action is the best solution). Nevertheless, uncertainties remain such as those regarding the funding of such actions. Therefore, it is important to take into account the experiences obtained in this field in other countries such as Portugal.

#### **IV. The experience of collective redress in Portugal: the Popular Action**

In Portugal, there are no specific rules for actions for damages from antitrust infringements besides the Portuguese Competition Law (Law 19/2012, 8 May), general substantive and procedural rules established in the Portuguese Civil Code<sup>59</sup>, and its Code of Civil Procedure.

In case of an antitrust infringement, the plaintiff may complain to the Portuguese Competition Authority and its decision can be reviewed by the Competition, Regulation and Supervision Court (and subsequently by the Lisbon Court of Appeal). The plaintiff can also complain to a civil court and ask for the compensation of damages and/or challenge the validity of an agreement through common declaratory actions or (more rarely) through

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<sup>58</sup> A. Nikpay, D. Taylor, ‘The New UK Competition Regime: Radically Different or More of the Same?’ (2014) 5 *Journal of European Competition Law & Practice* 278, 285.

<sup>59</sup> Particularly Articles 483 (tort liability) and 562 (damages award).

collective actions (the decision can be reviewed by the Court of Appeal and subsequently by the Supreme Court).

As there are no specific rules for antitrust damages actions, this means that both direct and indirect purchasers may have standing. Courts can request the disclosure of documents considered relevant from the parties, opposing parties or 3<sup>rd</sup> persons; refusal to comply with such request could lead to a fine and even reverse the burden of proof. Moreover, the judge may also order the production of evidence in order to find the truth, as well as require expert evidence, such as an assessment of quantitative damages and a clarification of the economic issues at stake – the probative value of such evidence is decided by the judge<sup>60</sup>.

Concerning collective redress, Portugal has an opt-out system called ‘Ação Popular’ (Popular Action; hereafter, PA)<sup>61</sup>. It is mentioned in Article 52(2) of the Portuguese Constitution which establishes: ‘*Everyone shall be granted the right of popular actions, to include the right to apply for the adequate compensation for an aggrieved party or parties, in such cases and under such terms as the law may determine, either personally or via associations that purport to defend the interests in question. That right shall be exercised namely to (...) promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life or the preservation of environment and the cultural heritage*’. Damages from antitrust infringements can be compensated through the PA since the list of interests mentioned in Article 1 is only exemplary and the Portuguese Supreme Court did not refuse that solution in its decision of 7 October 2003. This right was implemented through Law 83/95 of 31 August 1995 (Popular Action Act; hereafter, PAA), which establishes certain special procedural rules such as: ‘it is up to the judge’s own initiative to collect evidence and [the judge] is not bound by the initiatives of the parties’ (Article 17), and even ‘if a particular appeal has no suspensive effect,

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<sup>60</sup> This kind of request was recently made in the *Portuguese Sport TV* case; the Portuguese Court of Competition, Regulation and Supervision confirmed, on 4 June 2014, the decision of the PCA (although reducing the fine), condemning Sport TV for the abuse of its dominant position in the conditional access market for channels with premium sports content.

<sup>61</sup> On this topic, see H.S. Antunes, ‘Class Actions, Group Litigation and Other Forms of Collective Litigation (Portuguese Report)’ (2009) 622 *The Annals of the American Academy of Political and Social Science* 161; S.O. Pais, ‘A união faz a força? Breves reflexões sobre os mecanismos colectivos de reparação no contexto da aplicação privada do direito da concorrência da União’ [in:] *Liber Amicorum em Homenagem ao Professor Doutor Mota Campos*, Coimbra editora 2013, p. 873; S.O. Pais, ‘Entre clemência e responsabilidade – Uma história de sucesso? – Ac. do Tribunal de Justiça (Grande Secção), de 14 de Junho de 2011, Proc. C-360/09’ (2012) 37 *Cadernos de Direito Privado* 1; L. Rossi, M. Sousa Ferro, ‘Private enforcement of competition law in Portugal (II): Actio Populari – Facts, fictions and dreams’ (2013) IV(13) *Revista de Concorrência e Regulação*, 35.

in general terms, the judge may, in a class action, give that effect, to prevent damage irreparable or difficult to repair' (Article 18)<sup>62</sup>.

According to Articles 2, 3 and 16 PAA, standing to initiate a PA is granted to: a) any citizen (and it has been argued that this reference can include foreigners)<sup>63</sup>; b) any legal association or foundation (a legal entity whose powers include the interests covered by the PA, which is not engaged in any type of professional business competing with companies or liberal professionals); c) to local authorities (concerning the interests of all those who are residing in the area) and, finally: d) to the public prosecutor's office, which may replace the claimants if the contested behaviour endangers the interests involved. While SMEs cannot seek compensation directly, they can do so through the aforementioned types of claimants referred to in the PAA. If the action is not dismissed by the judge during its preliminary assessment, the claimants will represent all of the holders of rights or interests who suffered the given antitrust damage and did not opt-out. This rule can be excluded by the court considering the circumstances of the case (for instance, if the representation was inadequate)<sup>64</sup>.

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<sup>62</sup> There are other opt-out models used in the EU such as the Dutch model, which is usually also considered 'economically and legally' interesting; cf. K. Purnhagen, 'United We Stand, Divided We Fall? Collective Redress in the EU from the Perspective of Insurance Law' (2013) 1 *European Review of Private Law* 500. In fact, the Dutch law has three mechanisms of collective action: (1) the collective action of art. 3:305 BW (Dutch Civil Code) which allows a foundation or association to obtain an injunction, but it does not allow the award of damages; (2) legal entity or individual claimants represent the victims (individual mandates) and this action allows the award of damages; (3) extrajudicial negotiations by representative entities may lead to a settlement which the court may consider binding to all those that have not opted out (WCAM Procedure). Furthermore, the Dutch Act on Collective Settlement of Mass Damage Claims (WCAM) also allows foreign applicants in the proceedings (a foreign representative organization can participate, so long as it has legal standing) and every victim who is included in one of the categories of the settlement and did not opt-out in time is bound by that settlement, including foreign parties, which happened for instance in the *Converium* case. Cf. H. Van Lith, *The Dutch Collective Settlements Act and Private International Law*, Rotterdam 2010, p. 26, available at [http://ec.europa.eu/competition/consultations/2011\\_collective\\_redress/saw\\_annex\\_en.pdf](http://ec.europa.eu/competition/consultations/2011_collective_redress/saw_annex_en.pdf). On these topics, see also the Danish solution; cf. the Danish Competition Act, consolidated Act no. 23 of 17 January 2013, as amended by Section 1 in Act no. 620 of 12 June 2013 and Section 22 in Act no. 639 of 12 June 2013, <http://en.kfst.dk/Competition/~media/KFST/English%20kfst.dk/Competition/Legislation/Engelsk%20udgave%20af%20lovbekendtgørelse%207002013.pdf>. (access 01.04.2015).

<sup>63</sup> Cf. M.T. de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, Lex, Lisboa 2003, p. 178.

<sup>64</sup> Settlement agreements in the popular action must be checked by the court (and its assessment should include the adequacy of the representative entity), see M. Teixeira de Sousa, *op. cit.*, p. 247.

Regarding financial expenses, the PAA establishes that the claimant is exempt from the payment of the costs if the application is at least partially granted; if the claim is totally unsuccessful, the claimant will be obliged to pay an amount fixed by the judge, between 10% and 50% of the costs that would be normally payable, taking into account the claimant's financial situation and the formal or substantive reason for the dismissal (Article 20). Contingency fees are not allowed as the Portuguese Bar Association Statute prohibits *quota litis*. At the same time, however, 3<sup>rd</sup> party funding is not prohibited<sup>65</sup> and the role played by the Public Prosecutor may prevent abuses in this regard.

On the other hand, the court may have to fix compensation for the infringement of the interests of those not individually identified (Article 22(2) PAA). The right to damages shall be extinguished within three years from the final judgement that has recognized the damage and the unclaimed funds shall be delivered to the Ministry of Justice. The latter will create a special account and allocate the payment to attorney fees and to support access to the courts (Article 22(4)-(5) PAA). The PAA does not explicitly provide for specific entities to distribute the total compensation among the injured parties. In antitrust cases, consumer associations (or similar entities) should be considered the most appropriate to receive and manage the indemnities. Indeed, this solution is one of those suggested in the Commission Staff Working White Paper: the distribution of unclaimed funds should be directed to a public interest foundation or via “cy-pres” distribution, that is, ‘damages awarded are not distributed directly to those injured to compensate for the harm they suffered (for instance because they cannot be identified) but are rather used to achieve a result which is as near as it may be (e.g. damages attributed to a fund protecting consumers’ interests in general)’<sup>66</sup>.

The Portuguese Consumer Association, DECO, has already successfully used the PA to seek compensation for consumers in the famous *DECO v. Portugal Telecom* Case. The parties arrived here at a settlement amounting to 120 million EUR, paid by Portugal Telecom to its clients through free national calls provided during a certain period of time<sup>67</sup>.

Recently also, on 12 March 2015, the Portuguese Competition Observatory, a non-profit association of academics from several Portuguese universities, filed a mass damages claim against Sport TV<sup>68</sup>. The latter had a dominant

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<sup>65</sup> Ibidem, p. 247.

<sup>66</sup> Point 47 of the Commission Staff Working Paper.

<sup>67</sup> The Supreme Court decided the case in 2003; cf. Supreme Court Decision – *Portuguese Consumer Protection Association (DECO) v. Portugal Telecom*, 7.10.2003, Case 03 A1243, <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/1db6e4a1a7cadeed80256de5005292d4?OpenDocument> (access 10.02.2015).

<sup>68</sup> Lisbon Judicial Court, case no. 7074/15.8T8LSB.

position in two relevant products/services markets: the (wholesale) domestic market of conditional access channels with premium sports content (upstream), and in the (retail) market of subscription television (downstream).

In 2013, the Portuguese Competition Authority (hereafter, PCA) imposed a fine of 3.7 million EUR upon Sport TV for applying a discriminatory remuneration system in distribution agreements for Sport TV's television channels (abuse took place from 1 January 2005 to 31 March 2011). The PCA's decision concluded an investigation launched in 2010, following a complaint by the operator of subscription-based television services Cabovisão – Televisão por Cabo S.A. Sport TV had implemented a remuneration system that involved the systematic application of discriminatory conditions to pay-TV operators for equivalent services; imposing unfair transaction conditions; placing other operators at a competitive disadvantage in the market for pay-TV; limiting the production, distribution, technical development and investment for the services in question; abusing its dominant position in the market for premium sports channels to the detriment of competition and end-users. Sport TV was condemned by the PCA and the decision was upheld (in part) by both Portuguese courts. In fact, although the Competition, Regulation and Supervision Court (specialized Portuguese court of first instance for competition matters) had reduced the fine from 3.7 to 2.7 million EUR, it upheld (in part) the PCA decision. In the judgement delivered on 11 March 2015, the Lisbon Court of Appeal confirmed that Sport TV abused its dominance by applying discriminatory conditions to subscription-based television operators, at the same time dismissing the appeal filed by Sport TV. The next day, on 12 March 2015, a class action was submitted against Sport TV by the Portuguese Competition Observatory. The action seeks 'to compensate over 600,000 clients for damages allegedly resulting from a number of anticompetitive practices, but also to compensate those who were excluded from the benefit of these channels due to the inflation of prices and all Portuguese pay-tv subscribers, between 2005 and June 2013 (over 3 million at the end of the period), who suffered from a reduction of competition on this market'<sup>69</sup>.

To sum up, the Portuguese collective redress system may be considered as an interesting example to be followed by other European countries as it has the added value of giving standing to any injured consumer or consumer association. Moreover, court fees are not meaningful (they might even not exist), the public prosecutor may replace the claimant if the latter decides to withdraw from the suit, and the judge can collect evidence on his own initiative. Finally, judicial checks are available during several phases of the proceedings, providing safeguards to avoid abusive class actions.

<sup>69</sup> M.S. Ferro, 'Collective Redress: Will Portugal Show the Way?' (2015) *Journal of European Competition Law & Practice* 1-2.

## V. Conclusions

The recent reforms in Belgium and Britain suggest a new era for collective redress. On the one hand, the introduction of opt-out systems, not only in the two above laws but also in other Member States such as Portugal for instance, should be considered a duly justified departure from the option proposed by the European Commission in its Recommendation. Taking into account the positive effects of the opt-out system in national laws, provided it is accompanied by the necessary safeguards (such as judicial checks in several phases of the proceedings), it represents a meaningful step towards a more effective collective redress system. On the other hand, although funding of collective actions is still a major issue, Member States' laws rarely address this concern and ignore the need to adapt certain traditional solutions. In this context, the prohibition of contingency fees should be reconsidered and a reduction of the amount payable for court fees should be provided, as is the case in Portugal.

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# A R T I C L E S

## **Harmonising Private Enforcement of Competition Law in Central and Eastern Europe: The Effectiveness of Legal Transplants Through Consumer Collective Actions**

by

Katalin J. Cseres\*

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### ***Abstract***

The aim of this paper is to critically analyze the manner of harmonizing private enforcement in the EU. The paper examines the legal rules and, more importantly, the actual enforcement practice of collective consumer actions in EU Member States situated in Central and Eastern Europe (CEE). Collective actions are the key method of getting compensation for consumers who have suffered harm as a result of an anti-competitive practice. Consumer compensation has always been the core justification for the European Commission's policy of encouraging private enforcement of competition law. In those cases where collective redress is not available to consumers, or consumers cannot apply existing rules or are unwilling to do so, then both their right to an effective remedy

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and the public policy goal of private enforcement remain futile. Analyzing collective compensatory actions in CEE countries (CEECs) places the harmonization process in a broader governance framework, created during their EU accession, characterized by top-down law-making and strong EU conditionality. Analyzing collective consumer actions through this 'Europeanization' process, and the phenomenon of vertical legal transplants, raises major questions about the effectiveness of legal transplants *vis-à-vis* homegrown domestic law-making processes. It also poses the question how such legal rules may depend and interact with market, constitutional and institutional reforms.

### *Résumé*

Le but de cet article est d'analyser de façon critique la manière d'harmonisation d'un mécanisme d'application privée du droit de la concurrence dans l'UE. Le document examine non seulement les dispositions juridiques, mais surtout la pratique actuelle des actions collectives dans les États membres de l'UE et dans les pays d'Europe centrale et orientale (PECO). Les actions collectives représentent une méthode clé pour les consommateurs, qui permet d'obtenir une indemnisation d'un préjudice subi du fait d'une pratique anticoncurrentielle. L'indemnisation des consommateurs a été toujours la justification principale de la politique de la Commission européenne visée à encourager l'application privée du droit de la concurrence. Si les actions collectives ne sont pas disponibles pour les consommateurs, ou si les consommateurs ne peuvent pas appliquer les règles existantes ou sont réticents à le faire, le droit à un recours efficace finit par son abandon, et l'objectif d'application privée du droit de la concurrence n'est pas réalisé. L'analyse des actions collectives dans les PECO place le processus d'harmonisation dans un large cadre de gouvernance, mise en place pendant l'adhésion des PECO à l'UE. Ce cadre est caractérisé par l'adoption des lois de la façon «descendante» («top-down») et une forte dépendance du processus législatif national de l'UE. L'analyse des actions collectives à travers le processus «d'eupéanisation» et le phénomène des «transplantations juridiques» verticales, provoque des questions importantes concernant l'efficacité des «transplantations juridiques» en comparaison avec le processus législatif national. Cette analyse provoque aussi une autre question, concernant la relation entre les règles juridiques et le marché, les réformes constitutionnelles et institutionnelles.

**Key words:** private enforcement of competition law; collective actions; consumer; EU law; Europeanization.

**JEL:** K23; K42.

## **I. Introduction**

Ever since the European Commission (hereafter, EC or Commission) has initiated its 1<sup>st</sup> proposal on private enforcement of EU competition rules, it was the success of US private antitrust enforcement that has served as the comparison

# **How to Throw the Baby out with the Bath Water. A Few Remarks on the Currently Accepted Scope of Civil Liability for Antitrust Damages**

by

Agata Jurkowska-Gomułka\*

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### ***Abstract***

The Damages Directive introduces the right to ‘full compensation’ and the principle of ‘joint and several liability’ for antitrust damages (Article 3(1) and Article 11(1) respectively). The Directive does not determine the type of damage that can be awarded in civil proceedings. In theory, there are thus no barriers to establish punitive, multiple or other damages. In practice, it is rather unlikely that such types of damages will be awarded after the implementation of the Directive due to the ban placed on overcompensation in its Article 2(3).

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This paper will try to decode the concept of ‘full compensation’ and ‘joint and several liability’ in light of the Damages Directive as well as EU jurisprudence. An adequate understanding of these terms is without a doubt one of the key preconditions of correctly implementing the Directive and, consequently, a condition for making EU (competition) law effective.

While on the one hand, a limitation of the personal scope of civil liability can currently be observed in EU law (covering both legislation and case law), a broadening of its subject-matter scope is visible on the other hand. With reference to the personal scope of civil liability, the Directive itself limits the applicability of the joint and several responsibility principle towards certain categories of infringers: small & medium enterprises (Article 11(2)) and immunity recipients in leniency (Article 11(3)). Considering the subject-matter scope of civil liability, the acceptance by the Court of Justice of civil liability for the ‘price umbrella effect’ should be highlighted. In addition, the principle of the ‘passing-on defence’ can also be regarded as a manner of broadening the scope of civil liability for antitrust damage (Article 12–16).

The paper will present an overview of the scope of civil liability for antitrust damages (in its personal and subject-matter dimension) in light of the Directive and EU jurisprudence. The paper’s goal is to assess if the applicable scope will in fact guarantee the effective development of private competition law enforcement in EU Member States. This assessment, as the very title of this paper suggests, will be partially critical.

### *Résumé*

La Directive relative aux actions en dommages introduit le droit de la «réparation intégrale» et le principe de la «responsabilité solidaire» dans le contexte des préjudices causés par des pratiques anticoncurrentielles (l’article 3(1) et l’article 11 (1), respectivement). La Directive ne précise pas le type de dommage qui peut être accordée dans les procédures civiles. En théorie, il n’y a donc pas d’obstacles pour accorder des dommages punitifs, multiples ou d’autres. Néanmoins, en pratique, il est peu probable que les dommages de ce type seront accordés après la mise en œuvre de la Directive, en raison de l’interdiction de la réparation excessive introduit dans l’article 2 (3) de la Directive.

Cet article va tenter d’interpréter la notion de la «réparation intégrale» et la «responsabilité solidaire» à la lumière de la Directive, ainsi que la jurisprudence de cours européennes. Une bonne compréhension de ces termes est sans doute l’une des conditions essentielles de la mise en œuvre correcte de la Directive et, par conséquent, la condition d’efficacité du droit européen de la concurrence.

D’une part, nous pouvons actuellement observer la limitation du champ d’application personnel de la responsabilité civile dans le droit européen (dans la législation européenne et dans la jurisprudence), mais d’autre part, nous pouvons aussi remarquer un élargissement du champ d’application matérielle. En faisant la

référence au champ d'application personnel de la responsabilité civile, la Directive limite l'application du principe de la responsabilité solidaire à l'égard de certaines catégories de contrevenants : des petites et moyennes entreprises (l'article 11 (2)) et des bénéficiaires d'une immunité accordée dans le programme de clémence (l'article 11 (3)). En ce qui concerne le champ d'application matérielle, nous devons souligner l'acceptation par la Cour de justice de l'Union européenne le principe de la responsabilité civile pour «l'effet parapluie». De plus, le principe de la répercussion du surcoût peut aussi être considéré comme une manière d'élargissement du champ d'application de la responsabilité civile pour les préjudices causés par des pratiques anticoncurrentielles (les articles 12–16).

Cet article va présenter une vue d'ensemble des règles concernant la responsabilité civile pour les préjudices causés par des pratiques anticoncurrentielles (dans sa dimension personnelle et matérielle) à la lumière de la Directive et la jurisprudence européenne. Son objectif est d'évaluer si le champ d'application actuelle pourrait garantir le développement efficace de l'application privée du droit de la concurrence privée dans les États membres de l'UE. Cette évaluation, comme le titre même de cet article l'indique, sera partiellement critique.

**Key words:** antitrust civil liability; damage; Directive 12014/104; joint and several liability; immunity recipient; private enforcement of competition law; public enforcement of competition law; umbrella pricing.

**JEL:** K23; K42.

## I. Introduction

After a long-lasting debate on harmonizing the rules on private enforcement of competition law in the EU, a Directive 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 was ultimately born<sup>1</sup> in November 2014 (hereafter, Damages Directive or Directive). The Directive provides a framework of solutions, some of which are of a very general character. As a result, they must be 'completed' by much more detailed provisions of national laws. It is a commonly recognized opinion that implementing the Damages Directive will be quite challenging for Member States. A key reason for this realisation lies in the fact that some of the rules of the Directive nearly devastate traditional institutions (or their traditional interpretation) of

<sup>1</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 (OJ L 349, 05.12.2014, p. 1) (hereafter, Damages Directive).

# **Piecemeal Harmonisation Through the Damages Directive? Remarks on What Received Too Little Attention in Relation to Private Enforcement of EU Competition Law**

by

Anna Piszcz\*

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## ***Abstract***

On 11 June 2013, the European Commission adopted a package of measures to tackle the lack of an efficient and coherent private enforcement system of EU competition law in its Member States. In particular, a draft Damages Directive was proposed in order to meet the need for a sound European approach to private enforcement of EU competition law in damages actions. The Damages Directive was ultimately adopted on 26 November 2014. This paper explores some aspects of private antitrust enforcement which have not received sufficient attention from the EU decision-makers during the long preparatory and legislative works preceding the Directive. The paper discusses also some of the remedies that have not been harmonised, and shows how these ‘gaps’ in harmonisation may limit the

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Directive's expected influence on both the thinking and practice of private antitrust enforcement in Europe. It is argued in conclusion that further harmonisation may be needed in order to actually transform private enforcement of EU competition law before national courts.

### *Résumé*

Le 11 Juin 2013, la Commission européenne a adopté un train de mesures pour lutter contre l'absence de système efficace et cohérent d'application privée du droit de la concurrence dans l'UE et dans ses Etats membres. En particulier, un projet de la Directive relative aux actions en dommages a été proposé afin de répondre au besoin d'introduction d'une approche européenne à l'application privée du droit européen de la concurrence. La Directive relative aux actions en dommages a été finalement adoptée le 26 Novembre 2014. Cet article analyse certains aspects de l'application privée du droit de la concurrence qui n'ont pas reçu l'attention suffisante de la part du législateur européen durant les longs travaux préparatoires et législatifs qui ont précédés l'adoption de la Directive. L'article aborde également certaines solutions qui n'ont pas été harmonisées et montre comment ces « lacunes » dans le processus d'harmonisation peuvent limiter l'influence de la Directive à la pratique et l'interprétation d'application privée du droit de la concurrence en Europe. En conclusion, l'article affirme que l'harmonisation plus profonde peut être nécessaire afin de transformer réellement l'application privée du droit européen de la concurrence devant les cours nationales.

**Key words:** private enforcement; competition; remedies; action for damages; claim for damages; unjust enrichment; undue performance; declaration of invalidity; injunctions.

**JEL:** K23; K42.

## **I. Introduction**

National courts of EU Member States are required to safeguard rights created under Articles 101 and 102 of the Treaty on the functioning of the European Union (hereafter, TFEU). As the Court of Justice of the EU eloquently explained in *Courage/Crehan* and *Manfredi*<sup>1</sup>, detailed national procedural rules governing private actions for safeguarding such rights must not be less favourable than those governing similar domestic actions (principle

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<sup>1</sup> See ECJ judgments in cases: C-453/99 *Courage/Crehan* (ECR 2001, I-06297); C-295-298/04 *Manfredi et al.* (ECR 2006, I-06619).



# Disclosure of Documents in Private Antitrust Enforcement Litigation

by

Aleš Galič\*

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### *Abstract*

Procedural tools aimed at access to information in general, and disclosure of documents in particular, are crucial for the effectiveness of private antitrust enforcement litigation and for facilitating more genuine equality of arms. Currently, profound differences exist among EU Member States' civil procedure laws concerning disclosure of evidence held by the opponent. The transposition of the litigation disclosure mechanism contained in the Damages Directive will undermine the existing principles of Slovenian

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civil procedure. However, this is due to the fact that Slovenian law is outdated with regard to evidence disclosure. Not only that, it is also partially based on an erroneous premise, typical for the traditional civil law approach, whereby the principle against self-incrimination applies in civil cases in the same way as in criminal cases. As a result, the obligatory transposition of the Directive's requirements should be perceived as a positive step for Slovenia. Yet this step will be successful only if followed by a general reassessment of evidence disclosure rules in Slovenian civil procedure law.

### *Résumé*

Les outils procéduraux visant à l'accès à l'information en général et à la divulgation des documents en particulier, sont nécessaires afin de garantir l'efficacité de l'application privée du droit de la concurrence et d'assurer l'égalité des armes. Actuellement, des divergences profondes concernant la divulgation de la preuve détenue par l'adversaire existent entre les procédures civiles des États membres de l'UE. La transposition du mécanisme contentieux de la divulgation de la preuve contenue dans la Directive relative aux actions en dommages va mettre en danger les principes existants de la procédure civile slovène. Cependant, cela est dû au fait que la législation slovène est obsolète à l'égard de la divulgation des preuves. De plus, cela est conséquence d'une prémisse erronée, typique à l'approche traditionnelle du droit civil, selon laquelle le principe interdisant l'auto-incrimination est appliqué dans les affaires civiles de la même manière que dans les affaires pénales. En conséquence, la transposition obligatoire des exigences posées par la Directive doit être perçue comme une étape positive pour la Slovénie. Pourtant, ce changement ne sera réussi que s'il est suivi d'une réévaluation générale des règles de divulgation de preuve incluses dans la procédure civile slovène.

**Key words:** disclosure of documents; privilege against self-incrimination; business secrets; principle of proportionality; civil procedure; antitrust; damages.

**JEL:** K23; K42.

## **I. Introduction**

Antitrust damages litigation usually involves complex questions of law and facts. Such litigation cannot be effectively pursued without extensive access to information. Yet the aggrieved party rarely has sufficient knowledge of such information, or sufficient access to it. Instead, relevant information is kept secret in the hands of wrongdoers<sup>1</sup>. Antitrust damages litigation is thus

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<sup>1</sup> Commission Staff Working Document Executive Summary of the Impact Assessment: Damages actions for breach of the EU antitrust rules Accompanying the proposal for a Directive

# Access to Documents in Antitrust Litigation – EU and Croatian Perspective

by

Vlatka Butorac Malnar \*

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- II. Access to documents and information from the Commission in cartel-based damages claims
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  - 1. Access under the Competition Act
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  - 3. Possibilities and pitfalls of the pending implementation of the Damages Directive
- IV. Conclusions

## *Abstract*

The paper analyses access to documents in cartel-based damages cases from the EU and Croatian perspective. It considers all relevant EU and Croatian legislation and case-law primarily focusing on the expected impact of the newly enacted Damages Directive. It is argued that the new rules on access to documents provided by the Directive will not necessarily have a significant impact on damages proceedings following cartel decisions issued by the Commission. This is due to

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the introduction of an absolute ban on the disclosure of leniency statements and settlement submissions via a ‘maximum harmonization’ rule. This conclusion is drawn from statistic figures showing that EU cartel enforcement rests solely on the leniency and settlement procedures. With that in mind, it is concluded that the Directive’s general, permissive rules on access to documents (other than leniency and settlement procedures) will not be applicable in most damages cases following the cartel infringement decision issued by the Commission. However, it is also observed that the Damages Directive’s new rules on access to documents may have the opposite impact on private enforcement in cases following infringement decisions issued by National Competition Authorities (NCAs) which do not rely as much on leniency in their fight against cartels as the Commission. The Directive’s general rule on access to documents will apply in jurisdictions such as Croatia, where all of its cartel decisions so far have been reached within the regular procedure. It is argued that the general access rule, coupled with other rules strengthening the position of claimants in antitrust damages proceedings, might actually be beneficial for both public and private enforcement in such jurisdictions.

### *Résumé*

Cet article analyse, de la perspective européenne et croate, la question d’accès aux documents dans les affaires concernant les actions en dommages introduites par les victimes des cartels. Il examine toute la législation et la jurisprudence européenne et croate, en se focalisant principalement sur l’impact attendu de la Directive relative aux actions en dommages récemment adoptée. Nous affirmons que les nouvelles règles sur l’accès aux documents prévues par la Directive ne vont pas avoir un impact significatif sur les actions en dommages introduites postérieurement à une décision de la Commission constatant une infraction. Cela est dû à l’interdiction absolue par une règle de « harmonisation maximale » de la divulgation des déclarations effectuées en vue d’obtenir la clémence et des propositions de transaction. Cette conclusion est tirée des informations statistiques qui montrent que la lutte contre les ententes repose uniquement sur les programmes de clémence et les procédures de transaction. En tenant compte de cela, il est conclu que des règles générales et permissives de la Directive concernant l’accès aux documents (autres que les procédures de clémence et de transaction) ne seront pas applicables dans la plupart des actions en dommages introduites après la décision sur la violation du droit de la concurrence rendue par la Commission. Cependant, il est également observé que des nouvelles règles sur l’accès aux documents introduits par la Directive peuvent avoir l’effet inverse sur l’application privée du droit de la concurrence dans les actions introduites après les décisions constatant l’infraction rendues par les autorités nationales de concurrence (ANC), qui ne comptent pas autant sur les programmes de clémence dans leur lutte contre les cartels, que la Commission. La règle générale de la Directive sur l’accès aux documents sera applicable dans les pays comme la Croatie, où l’ensemble des décisions constatant l’infraction du droit de la concurrence par un cartel, ont été jusqu’à maintenant atteint dans la

procédure régulière. Nous affirmons que la règle générale sur l'accès aux documents, accompagnée d'autres règles renforçant la position des requérants dans les actions en dommages, pourrait être bénéfique à l'application publique et privée du droit de la concurrence dans telles juridictions.

**Key words:** EU Damages Directive; private enforcement; cartels; antitrust litigation; access to documents; access to file; evidence in antitrust litigation.

**JEL:** K23; K42.

## I. Introduction

It has long since been established<sup>1</sup> that efficient private enforcement of competition law is a vital complement to public enforcement<sup>2</sup>, both acting as prerogatives for the proper functioning of the EU internal market<sup>3</sup>. However, a study performed in 2004 found a 'total underdevelopment'<sup>4</sup> of private antitrust enforcement in individual Member States. This finding was the source of the idea of introducing a specific, EU-wide regime that would facilitate private damages actions<sup>5</sup>. General procedural and substantive tort rules of the Member States proved to be unsuitable for effective antitrust litigation. With

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<sup>1</sup> The European Parliament proposed the idea of introducing rules on antitrust damages already in 1961 during the consultations on the European Commission's (EC) proposal for the first regulation on the application of articles 85 and 86 of the EEC (later becoming Regulation No. 17), OJ 1409, 15.09.1961, point 11.

<sup>2</sup> There has been some academic debate over the desirability of private enforcement. See e.g. W.P.J. Wils, 'Should private antitrust enforcement be encouraged in Europe?' (2003) 26(3) *World Competition* 473. Wils argues that there isn't even a case for a supplementary role for private enforcement. For an opposite view see C.A. Jones, 'Private Antitrust Enforcement in Europe: A policy Analysis and Reality Check' (2004) 27(1) *World competition* 13–24.

<sup>3</sup> 'Both forms are part of a common enforcement system and serve the same aims: to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them. Private as well as public enforcement of antitrust law is an important tool to create and sustain a competitive economy'. Green Paper – Damages actions for breach of the EC antitrust rules {SEC(2005) 1732} COM/2005/0672 final, Section 1.1. (hereafter, Green paper). Along the same lines see e.g. speech delivered by the former EU Commissioner for Competition Policy Mario Monti entitled 'Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation' SPEECH/04/403.

<sup>4</sup> Green Paper, Section 1.2.

<sup>5</sup> For more see M. Bukovac Puvača, V. Butorac, 'Izvanugovorna odgovornost za štetu prouzročenu povredom pravila tržišnog natjecanja' (2008) 6 *Zbornik radova Pravnog fakulteta Sveučilišta u Mostaru* 249.

# Collecting Evidence Through Access to Competition Authorities' Files – Interplay or Potential Conflicts Between Private and Public Enforcement Proceedings?

by

Anna Gulińska\*

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- I. Introduction
- II. Hitherto practice regarding access to competition authorities' files – the European Commission's perspective
- III. Hitherto practice regarding access to competition authorities' files – the case of Poland
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- VI. Practical issues with respect to the implementation of the Damages Directive – the case of Poland
- VII. The European Commission's efforts to harmonize its own rules on access to its files
- VIII. Conclusions

### *Abstract*

Information asymmetry between claimants seeking damages for competition law violations and the alleged infringing undertaking(s) is a key problem in the development of private antitrust enforcement because it often prevents successful actions for damages. The Damages Directive is a step forward in the facilitation of access to evidence relevant for private action claims. Its focus lies on, *inter alia*, 3<sup>rd</sup> party access to files in proceedings conducted by national competition authorities (NCAs). The harmonization was triggered by the inconsistencies in European

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case-law and yet the uniform rules on access to documents held in NCAs' files proposed in the Damages Directive seem to follow a very stringent approach in order to protect public competition law enforcement. The article summarizes the most relevant case-law and new provisions of the Damages Directive and presents practical issues with respect to its implementation from the Polish perspective.

### *Résumé*

L'asymétrie d'information entre les demandeurs, réclamant des dommages pour les violations du droit de la concurrence, et les entreprises, accusées d'une infraction, est un problème clé dans le développement d'application privée du droit de la concurrence, car elle empêche souvent les actions efficaces. La Directive relative aux actions en dommages est un pas en avant dans la simplification d'accès à la preuve par les demandeurs, réclamant des dommages pour les violations du droit de la concurrence. La Directive se focalise, entre autres, sur la question d'accès par des tiers aux documents figurant dans les dossiers des autorités nationales de concurrence (ANCs). L'harmonisation a été déclenchée par des incohérences dans la jurisprudence européenne, alors que les règles uniformes sur l'accès aux documents figurant dans les dossiers des ANCs proposées dans la Directive, semblent suivre une approche rigoureuse afin de protéger l'application publique du droit de la concurrence. L'article résume la jurisprudence la plus pertinente, ainsi que des nouvelles dispositions de la Directive relative aux actions en dommages et présente des problèmes pratiques concernant sa transposition dans la loi polonaise.

**Key words:** competition; cartels; private enforcement; damages actions; leniency; Damages Directive; access to file.

**JEL:** K23; K42.

## **I. Introduction**

The issue of information asymmetry between claimants seeking damages for competition law violations and the alleged infringing undertaking(s) is a key problem in the development of private antitrust enforcement because it often prevents successful actions for damages.

Evidence required to prove a claim in private antitrust enforcement actions (based on EU or national competition law infringements) is usually held exclusively by the opposing party or by 3<sup>rd</sup> parties – including the competition authority pursuing a public action – and is neither easily nor directly accessible to the claimant. In some cases, it may be overly difficult to formulate a case solely on the basis of publicly available information since the very nature

# The Damages Directive and Consensual Approach to Antitrust Enforcement

by

Raimundas Moisejevas\*

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- II. The benefits of Alternative Dispute Resolution methods for actions for damages
- III. The Damages Directive and consensual dispute resolution
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  - 2. Suspension of the limitation period and pending proceedings
  - 3. Benefits for the settling infringer
  - 4. Effect of decisions of National Competition Authorities and national courts
  - 5. Disclosure of evidence and quantification of harm
- IV. Some thoughts on the status of the use of Alternative Dispute Resolution in practice
- V. Conclusions

## *Abstract*

The article focuses on the novelties introduced by the Damages Directive in the field of consensual settlements of disputes concerning private enforcement. The Damages Directive obliges Member States to ensure that the limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process. The Directive also establishes the main principles that govern the effect of consensual settlements on subsequent actions for damages.

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Since the EU framework for consensual dispute resolution of private enforcement disputes is quite new, many issues must still be solved in Member States' practice. While analysing consensual dispute resolution in private enforcement cases, particular interest should be paid to mediation and arbitration as a form of Alternative Dispute Resolution (ADR). Mediation is often used in competition law litigation. In a mediation process, parties are subject to fewer legal costs than in litigation and arbitration. It may thus be concluded that consensual dispute resolution is usually a faster way to receive compensation. However, voluntary arrangements and ADR in competition law still raise many problems concerning both procedural and substantial legal acts.

### *Résumé*

Cet article porte sur les nouveautés introduites par la Directive relative aux actions en dommages dans le domaine de règlement consensuelle des litiges concernant l'exécution privée du droit de la concurrence. La Directive oblige les États membres à assurer que le délai de prescription fixé pour intenter une action en dommages est suspendu pour la durée de tout procédure de règlement consensuel du litige. La Directive établit également les principes concernant l'effet des règlements consensuels sur les actions en dommages subséquentes. Etant donné que le cadre européen pour le règlement consensuelle des litiges concernant l'exécution privée du droit de la concurrence est relativement neuf, de nombreuses questions doivent être encore résolues dans la pratique des États membres. En analysant le règlement consensuelle des litiges concernant l'exécution privée du droit de la concurrence, un intérêt particulier devrait être accordée à la médiation et à l'arbitrage, comme des modes alternatifs de résolution des conflits (MARC). La médiation est souvent utilisée dans les litiges en droit de la concurrence. Dans un processus de médiation, les parties sont soumises aux frais juridiques moins élevés que dans le cas d'un procédure judiciaire ou d'arbitrage. Nous pouvons donc conclure que le règlement consensuelle des litiges est généralement le moyen plus rapide pour recevoir une compensation. Toutefois, des accords volontaires et le MARC posent encore de nombreux problèmes substantiels et procédurales en droit de la concurrence.

**Key words:** antitrust damage; consumers; arbitration; alternative dispute resolution; mediation; consensual dispute resolution; Lithuania; private enforcement of competition law; antitrust damage claims; Directive on antitrust damages actions; consensual settlements.

**JEL:** K23; K42.

# **Antitrust Damages Actions in Ukraine: Current Situation and Perspectives**

by

Anzhelika Gerasymenko\* and Nataliia Mazaraki\*\*

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- I. Introduction
- II. Legal rules on private enforcement of competition law in Ukraine
- III. Quantifying harm from antitrust infringements in Ukraine
- IV. New sources of damages caused by market power
- V. Conclusion

### ***Abstract***

The article gives an overview of Ukrainian legislation and experiences concerning antitrust damages actions. The analysis has led to a number of conclusions: private claims are rare in Ukraine due to difficulties in obtaining evidence, high legal costs, and lacking confidence in the Ukrainian court system. The paper gives examples of Ukrainian private antitrust enforcement practice and provides a statistical analysis of the dynamics of ‘compensated’ damages caused by antitrust infringements in Ukraine. The value of ‘compensated’ damages is compared to the value of the economic effect of stopping antitrust infringements, as well as to the value of the overall welfare loss deriving from market power in the national economy. Finally, some new sources of damages caused by market power are discussed considering the development perspectives of this branch of antitrust activity.

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## *Résumé*

Cet article donne un aperçu global de la législation et de l'expérience ukrainienne concernant l'application privée du droit de la concurrence. L'analyse conduit à plusieurs conclusions : les actions en dommages sont rares en Ukraine en raison de difficultés avec l'obtention des preuves, en raison des frais juridiques élevés, et à cause de manque de confiance dans le système judiciaire ukrainien. Cet article donne des exemples de l'application privée du droit de la concurrence en Ukraine et fournit une analyse statistique des préjudices indemnisés causés par les violations du droit de la concurrence. La valeur des préjudices indemnisés est comparée à la valeur de l'effet économique de la cessation des pratiques anticoncurrentielles, ainsi qu'à la valeur d'une perte globale de bien-être pour la société. Enfin, certaines nouvelles sources de préjudices causés par un pouvoir de marché sont examinées, en tenant compte des perspectives de développement futur de cette branche du droit de la concurrence.

**Key words:** antitrust damages actions; private antitrust enforcement; harm from antitrust infringement; non-infringement scenario; economic effect of cease of antitrust infringements; welfare loss from market power.

**JEL:** K23; K42.

## **I. Introduction**

Article 42 of the Constitution of Ukraine provides that 'the State shall ensure the protection of competition in the pursuit of entrepreneurial activity' and bans 'abuse of a monopolistic position in the market, the unlawful restriction of competition, and unfair competition'. It also states that 'the types and limits of monopolies shall be determined by law' and provides that 'the State protects the rights of the consumers'. At the same time, Article 3(1) of the Law on the Protection of Economic Competition (hereafter, LPEC) clarifies that Ukrainian competition law is based on the norms established in the Constitution and consists of: the LPEC, the Law on the Antimonopoly Committee of Ukraine (1993), and the Law on Protection against Unfair Competition (1996), as well as other normative and legislative acts adopted in accordance with these laws. Among other things, they contain provisions that regulate the sphere of damages actions.

Many experts assume that Ukrainian competition law is opaque and often arbitrary, that changes are needed to bring clarity and certainty to the regulatory environment. Some amendments are expected due to Ukraine's commitments to harmonise its laws with European legislation deriving from the Ukraine-EU

# **Georgia's First Steps in Competition Law Enforcement: The Role and Perspectives of the Private Enforcement Mechanism**

by

Zurab Gvelesiani\*

## **CONTENTS**

- I. Introduction
- II. Evolution of Georgian competition law and its recent reforms
- III. Necessity for private enforcement of competition law in Georgia
- IV. Availability of private enforcement of competition law infringements and damages claims
- V. Challenges for the development of an effective private enforcement system
- VI. Conclusions

### ***Abstract***

The goal of this article is to assess the role and perspectives of the private enforcement of competition law mechanism in Georgia. The discussion starts with a brief review of a number of major events that have occurred in Georgia in the last two decades, which have shaped its competition law. The paper provides next an assessment of the current stage of the development of Georgian competition legislation, the necessity for a private enforcement model as well as the rules and legal tools offered by existing Georgian law in that regard. Outlined are also a number of challenges that must be overcome in order for Georgia to develop a successful and effective private enforcement system. The examination is based on a wide range of Georgian legislation; the interpretations provided are supported by existing enforcement practice, views of experts and scholars, research studies, reports and surveys from various national and international organizations.

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## *Résumé*

Le but de cet article est d'évaluer le rôle et les perspectives de l'application privée du droit de la concurrence en Géorgie. L'analyse commence par un bref examen d'un certain nombre de grands événements qui ont eu lieu en Géorgie dans les deux dernières décennies et qui ont façonné le droit de la concurrence géorgien. Ensuite, le document fournit une évaluation d'état actuelle du développement de la législation concernant le droit de la concurrence en Géorgie, souligne la nécessité du développement d'un modèle d'application privée du droit de la concurrence, ainsi qu'entreprend une analyse des mécanismes d'application privée du droit de la concurrence disponibles actuellement dans la loi géorgienne. L'article indique aussi un certain nombre de défis qui doivent être surmontés afin que la Géorgie puisse développer un système efficace d'application privée du droit de la concurrence. L'analyse est basée sur une grande partie de la législation géorgienne. Les interprétations fournies sont soutenues par la pratique de l'application privée du droit de la concurrence en Géorgie, par les opinions des experts et des chercheurs, ainsi que par les différentes études, rapports et enquêtes publiés par des diverses organisations nationales et internationales.

**Key words:** competition law; competition law infringement; damages; private enforcement; damage claims; Georgia; country specific challenges.

**JEL:** K23; K42.

## **I. Introduction**

Georgia has a new Law on Competition<sup>1</sup>. It has also not been long since its new competition authority – the Competition Agency – was formed and started functioning. So far, there is no national jurisprudence or developed case law, therefore no special tendencies have yet been shaped in practice. Georgia does have, however, a distorted market with supposedly numerous victims of various competition law infringements. Private actors are finally offered a possibility to take direct action and claim damages. The article will discuss how practical the existing model is, and what are the perspectives, opportunities and challenges facing it in the future. In order to better demonstrate Georgia's current developmental stage, the following section explores the unique evolutionary path taken by Georgian competition law, which has shaped its modern national market. The paper provides an analysis of the need for the development of private enforcement in Georgia, and reviews existing legal

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<sup>1</sup> Parliament of Georgia, Law of Georgia of 8 May 2012, No. 6148-Is on Competition.

# The Interaction of Public and Private Enforcement of Competition Law in Lithuania

by

Rimantas Antanas Stanikunas\* and Arunas Burinskas\*\*

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- I. Introduction
- II. Modernisation of private antitrust enforcement by the Damages Directive
- III. Rules and case law applicable to private antitrust enforcement in Lithuania
- IV. Challenges concerning the quantification of harm and the establishment of causality
- V. Private enforcement and the leniency programme
- VI. Conclusions

### *Abstract*

This paper provides a study of the interaction between public and private enforcement of Lithuanian antitrust law. The study refers to the Damages Directive. It has been found that private enforcement depends greatly on public enforcement of competition law. Therefore, their compatibility and balance are of great importance to antitrust policy. The Lithuanian NCA prioritises cases where an economic effect on competition does not have to be proven. This creates uncertainty about the outcome of private enforcement cases. Private enforcement in Lithuania is also in need of detailed rules on the identification of harm and causality. The analysis reveals how challenging it can be to estimate and prove harm or a causal link in private enforcement cases. Support from the NCA is therefore exceedingly needed. Moreover, even though the use of the leniency programme helps, it remains insufficient to solve the problem of under-deterrence. However, measures introduced by the Damages Directive do not make the leniency programme safe.

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## *Résumé*

Cet article fournit une étude concernant l'interaction entre l'application publique et privée du droit de la concurrence en Lituanie. L'étude se réfère à la Directive relative aux actions en dommages. Il constate que l'application privée du droit de la concurrence dépend largement de son application publique. En conséquence, leur compatibilité et l'équilibre sont de grande importance pour la politique de la concurrence. L'autorité de la concurrence lituanienne donne la priorité aux affaires dans lesquels un effet économique sur la concurrence ne doit pas être prouvé. Cela crée une incertitude concernant le résultat des actions en dommages. L'application privée du droit de la concurrence en Lituanie a également besoin de règles détaillées sur l'identification du préjudice et la causalité. Comme l'analyse effectuée révèle, il peut être très difficile d'estimer un préjudice ou de prouver un lien de causalité dans les affaires concernant l'application privée du droit de la concurrence. C'est pourquoi, le soutien de la part de l'autorité de la concurrence lituanienne est extrêmement nécessaire. En outre, même si l'utilisation du programme de clémence peut être évalué positivement, elle reste insuffisante pour résoudre le problème de la sous-dissuasion. Toutefois, les mesures introduites par la Directive n'assurent pas la sécurité du programme de clémence.

**Key words:** antitrust damages actions; private enforcement of antitrust rules; competition law; leniency programme.

**JEL:** K23; K42.

## **I. Introduction**

The recently adopted EU Directive on Antitrust Damages Actions<sup>1</sup> (hereafter, Damages Directive) is aimed at facilitating and boosting private antitrust enforcement. The Directive incorporates different measures that aim to remove the main obstacles that plaintiffs face when bringing private actions. It also tries to strike a balance between public and private enforcement. The Directive contains measures that pretend to protect efficient public antitrust enforcement through leniency programmes. Therefore, this analysis starts with a short review of the Directive.

In the EU, private litigation normally follows a decision of a National Competition Authority (hereafter, NCA). Private enforcement heavily depends

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<sup>1</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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, OJ L 349, 05.12.2014, p. 1.

# Directive on Antitrust Damages Actions and Current Changes of Slovak Competition and Civil Law

by

Ondrej Blažo\*

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- I. Introduction
- II. Protection of leniency applicants and participants in settlement procedures
  - 1. Position of the leniency programme and the settlement procedure in the Slovak legal order
  - 2. Protection of leniency and settlement documents in the APEC
  - 3. Actions for Damages and Access to Leniency and Settlement Documents
- III. Disclosure of Evidence and Slovak Civil Court Proceedings
- IV. Joint and several liability
- V. Collective redress
- VI. Limitation periods
- VII. Effect of NCAs' decisions
- VIII. Conclusions. Transposition of the Damages Directive into the Slovak legal order

## *Abstract*

Slovak competition law enforcement can be characterized by infrequency of leniency applications and near absence of private enforcement. As a result, the adoption of the Damages Directive is not likely to cause substantial breakthrough in Slovakia, be it with respect to the rate of leniency applications or in private enforcement. A comprehensive amendment of Slovak competition law took place in 2014. Changes introduced therein reflected, among other things, the practice

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of the European Commission regarding access to its file. A new approach was also introduced towards damages claims submitted against leniency applicants. The paper will first consider the question whether it is necessary to further redesign these new Slovak rules because of the adoption of the Damages Directive, or if they have been successfully pre-harmonized. Along with changes to Slovak competition law, procedural rules for civil courts were also re-codified. Hence the second part of this analysis will focus on the question if a new civil procedure framework, including obligatory harmonization, could foster private enforcement of competition law. Summarizing the resulting answers, the third question focuses on who could benefit from further changes to Slovak legislation – final consumers or enterprises that are involved in the production chain. Finally, will changes in Slovak legislation driven by the Directive be coherent with its overall legal system, or will they appear to be an odd and peculiar piece of legislation?

### *Résumé*

Le droit slovaque de la concurrence peut être caractérisé par la rareté des demandes de clémence et par la quasi-absence de l'application privée du droit de la concurrence. En conséquence, l'adoption de la Directive relative aux actions en dommages n'est pas susceptible de causer percée importante en Slovaquie, quoi que ce soit le taux des demandes de clémence ou l'application privée du droit de la concurrence. La réforme complexe du droit de la concurrence slovaque a eu lieu en 2014. Les changements introduits par cette réforme ont pris en compte, entre autres, la pratique de la Commission européenne concernant l'accès aux documents figurants dans ses dossiers. Une nouvelle approche a également été introduite vers les actions en dommages concernant les demandeurs de clémence. Cet article examinera d'abord la question si il est nécessaire de remanier ces nouvelles règles slovaques en raison de l'adoption de la Directive, ou si elles ont été déjà pré-harmonisé. Outre les modifications apportées à la loi slovaque de la concurrence, la réforme mentionnée ci-dessus a ré-codifié les règles de procédure civile. En conséquence, la deuxième partie de cette analyse se concentrera sur la question si un nouveau cadre de la procédure civile, y compris l'harmonisation obligatoire, pourrait contribuer à encourager le développement de l'application privée du droit de la concurrence. En résumant les réponses données, la troisième question porte sur qui pourraient bénéficier des changements à la législation slovaque – consommateurs finaux ou des entreprises impliquées dans la chaîne de production. Enfin, l'article va tenter de répondre si les changements dans la législation slovaque entraînés par la Directive seront cohérent avec le système juridique, ou vont-ils plutôt être une pièce étrange et particulière de la législation?

**Key words:** competition law; Directive 2014/104/EU; Slovakia; civil law; commercial law; reform of competition law; leniency programme; settlement; procedural law.

**JEL:** K23; K42.

# C O N F E R E N C E   R E P O R T S

## **Private Enforcement of Competition Law. Key Lessons from Recent International Developments. London, 5–6 March 2015**

### **I. Introduction**

The international seminar entitled ‘Private Enforcement of Competition Law – Key Lessons from Recent International Developments’, held in London on the 5<sup>th</sup> and 6<sup>th</sup> March 2015, was organised by the Competition Law Commission of the International Association of Lawyers (*Union Internationale des Avocats*, ‘UIA’) in cooperation with the UIA Litigation Commission and with the support of the Law Society of England and Wales, Berwin Leighton Paisner law firm (London, UK) and MLex as its media partner. The seminar brought together experts from many jurisdictions, including academics, a leading Judge, officials, private practice lawyers and in-house lawyers from global corporations.

On the first day of the seminar participants were invited to a welcome cocktail hosted by the Law Society of England and Wales. The cocktail provided the participants with the opportunity to get introduced to one another, exchange experiences and conduct informal talks.

The second day of the seminar included speeches and presentations which were held at the premises of Berwin Leighton Paisner. The seminar was opened by Harold Paisner (Senior Partner, Berwin Leighton Paisner), Stephen Sidkin (Partner, Fox Williams, UK and Co-Director of Communications of the UIA) and Aleksander Stawicki (Senior Partner, WKB Wierciński, Kwieciński, Baehr, Poland and President of the UIA Competition Law Commission). Mr Stawicki expressed his delight that the seminar was being held in London – the place where the heart of private enforcement beats.

The seminar was inaugurated with the speech by Sir Peter Roth, Justice of the High Court and President of the Competition Appeal Tribunal (UK) – one of the most eminent experts in the field of private enforcement. Sir Peter Roth introduced the conference agenda and noted a number of recent issues which would be discussed during the seminar. They included: the issue of a potential claimant and defendant; admissibility of assigning claims to a third entity (such as a specialised law firm); the competent court; exclusive jurisdiction clauses; liability of subsidiaries; and limitation period. He highlighted also several problems or difficulties that may arise in private

enforcement cases. These include inequality created between a potential claimant and defendant if the publication of a given infringement decision is delayed (while the potential defendant does have the text), or when the decision is published but contains redactions (especially with respect to information relating to leniency applications). Sir Roth expressed his concern that private actions for competition damages can be unattractive for small and medium-sized enterprises (hereafter, SMEs). He noted that a fast track procedure for SMEs, which will be introduced as a result of recent legislative works in the UK<sup>1</sup>, might somewhat remedy this problem. Regarding the disclosure of evidence, Justice Roth pointed out that disclosure should be proportionate, yet the application of such general principles is not easy. The quantification of harm (where there is relatively little jurisprudence to provide guidance on this matter) was named as another difficulty here. Furthermore, Justice Roth voiced concerns about judges needing to assess economic evidence that is often very complex posing a challenge for competition lawyers in assisting the judiciary to properly understand the evidence.

## II. Key issues in private enforcement

The first panel was dedicated to key issues in private enforcement. The panel was introduced and chaired by Adrian Magnus (Partner, Berwin Leighton Paisner). Daniel Beard (Barrister, Monckton Chambers, UK) first discussed recent trends in private antitrust enforcement in the UK as well as the legislative changes in this field introduced by the Consumer Rights Act 2015. Mr Beard noted that the claims are becoming more frequent and bigger, but that there is still a large scope for obstruction in private enforcement proceedings. He indicated that following the above legislative reform, a new form of actions for competition claims will be available in the UK for potential claimants – so-called opt-out actions<sup>2</sup>. The Competition Appeal Tribunal (hereafter, CAT) will determine whether a claim should be proceeded as opt-in or opt-out. The CAT's jurisdiction will also be extended so that it will be competent to hear stand-alone actions (and not only follow-on claims)<sup>3</sup> and grant injunctions.

Dr Florian Neumayr (Partner, Hügel Rechtsanwälte, Austria) proceeded to speak of umbrella claims. There may be damages to be collected (also) because of a non-

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<sup>1</sup> On 26 March 2015, the Consumer Rights Act 2015 was enacted. The new law entered into force on 1 October 2015. For more information see: <https://www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers/supporting-pages/consumer-bill-of-rights>. The text of the Act is available at: <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted> (last accessed on 25 August 2015).

<sup>2</sup> In an opt-out action, the claim is brought by a representative on behalf of a defined class without the need to identify each individual class members. Those class members can be consumers or businesses. All those falling within the opt-out class will be bound by the judgement in the case unless they opt-out. Source: <http://eu-competitionlaw.com/uk-consumer-rights-bill-proposes-opt-out-class-action-for-uk-competition-claims/> (last accessed on 25 August 2015).

<sup>3</sup> So far only the High Court was competent to hear stand-alone claims.

cartelist that had raised its own prices for products or services in the wake of a cartel. Dr Neumayr presented recent Austrian and EU case law relating to the issue of umbrella pricing, which in principle has allowed for bringing umbrella claims. He concluded that currently it is possible to bring an umbrella claim against a cartelist, even if a potential claimant had not been a party to any agreement with the cartelist, on condition that the claimant is able to prove that the effects of the cartel could have affected the pricing of services or products that the claimant has obtained from a third party.

Christopher Rother (Head of Deutsche Bahn Group Regulatory, Competition and Antitrust, Germany) continued the presentations by speaking of Deutsche Bahn's policy and strategy in enforcing claims for competition damages against DB's contractors. He briefly described cases where DB sought or is seeking damages, including the air cargo cartel, the rail tracks cartel and the carbon and graphite products cartel.

The last presentation in this panel was made by Laurie Webb Daniel (Partner, Holland & Knight, USA) who discussed the US private enforcement model and cited recent US Supreme Court case law.

### **III. Recent policy and legislative developments – what are their likely impacts?**

The second session, chaired by Aleksander Stawicki, was devoted to recent policy and legislative developments and their likely impacts. Filip Kubik (European Commission – DG Competition, Private Enforcement Unit, Belgium) characterised the guiding principles of the EU Damages Directive. He highlighted that the Directive pursues two main goals: more compensation for victims and stronger enforcement overall (both public and private). He indicated that the Directive guarantees a right to full compensation, easier access to evidence, or the possibility to rely on a final decision of a national competition authority (hereafter, NCA) finding an infringement. The Directive allows also for a certain level of 'forum shopping' which is considered by DG Competition to be a good trend. According to the Commission representative, it will also be easier to settle damages out of court. Mr Kubik stated that DG Competition is very closely following the implementation of the Directive.

Paolo Palmigiano (Chairman, European Association of In-house Competition Lawyers & General Counsel and Chief Compliance Officer Sumitomo Electric Group, UK) explained why the UK is considered a forum of choice for private enforcement of competition law. He listed a number of factors: access to documents through wide-ranging discovery; easiness in establishing jurisdiction; experience of courts in awarding damages; high quality of judges, most with competition law expertise; speed of the process; possibility for English or foreign claimants to seek to recover the entire loss in English courts, irrespective of where the loss was actually suffered, provided there is an English subsidiary that implemented the cartel. However, proceedings in the UK can also be expensive, complex and time consuming for jurisdiction disputes. In his concluding remarks, Mr Palmigiano noted also the possible downsides of the

UK's recent legislative changes stating that they may lead to the increase of the cost of doing business in the UK. He also wondered whether there will be enough safeguards for opt-out actions.

Dr Aniko Keller (Szecskey Attorneys at Law, Hungary) focused her presentation on the current situation in Hungary and changes to be introduced because of the implementation of the Damages Directive. The speaker indicated that the main reasons for few damages actions in Hungary are costs of litigation matters, lack of effective collective redress, limitation period, and access to documents. She expressed also her conviction that the implementation of the Damages Directive would significantly change the current practice by, for instance, raising the awareness and knowledge of competition law in Hungary.

Professor Renato Nazzini (King's College London, UK) gave the last presentation of this session devoted to the issue of seeking competition damages in arbitration proceedings. Professor Nazzini listed several legal problems connected with the fact that arbitration tribunals are not 'courts of a member state' according to EU case law. For this reason, procedural rules such as Articles 15 and 16 of Regulation 1/2003 or the rules on evidence and on the effect of national infringement decisions in the Damages Directive do not apply before arbitrators. This means, among other things, that arbitrators are not bound by strict rules on the disclosure and admissibility of evidence, even if the seat of the arbitration is in the EU.

#### **IV. Claimant considerations**

David E. Vann (Partner, Simpson Thacher, UK) opened the third session dedicated to the issue of a claimant. Andrew Hockley (Partner, Berwin Leighton Paisner) provided guidance on how the strategy of a potential case should be prepared and, in particular, how to assess the loss suffered in case of purchases directly from a cartel. Dr Till Schreiber (CDC Cartel Damage Claims, Belgium) followed-up with legal and practical issues connected with proving damages. Mick Smith (Partner, Calunius Capital, UK) closed the panel with a presentation of the factors which make a case fundable. According to him, these include: quantum (realistic value of a claim), merits (probability of positive outcome), recoverability (can the opponent pay?), time (likely investment period), costs and variability (likelihood of changing factors).

#### **V. Defence considerations**

The fourth panel, chaired by Dr Florian Neumayr, focused on defence considerations. Fernando de le Mata (Partner, Baker & McKenzie, Spain) provided some remarks on the issue of legal standing in order to verify if a claimant is really entitled to sue. He indicated the following points to be considered: due assignment – different laws will need to be taken into account (at least, *lex contractus* and *lex fori*); compliance with

organisational laws; the claimant's business model; the passing-on argument; and, in case of umbrella damages, whether they fall within the scope of assignment.

Martin André Dittmer (Partner, Gorrissen Federspiel, Denmark) presented the possible defence tactics that a defendant can use in case of a follow-on claim. He advised that the best way to pre-empt follow-on litigation is to ensure that there is no infringement decision for claimants to follow on. A potential defendant should explore as early as possible whether the public enforcement investigation (be it before the EU Commission or NCAs) can be closed by way of a settlement procedure, or even better, by way of informal undertakings, thus resulting in no decision at all. If a decision finding an infringement has been issued, a defendant should in general look for any and all indications in the decision that infringing undertakings enjoyed limited market power. It may be helpful to look in detail at the scope of the infringement in order to obtain information on whether the claimant's business falls in some way outside the scope of the infringement/decision.

Stephen Wisking (Partner, Herbert Smith Freehills, UK) discussed the consensual methods of enforcing claims indicating potential problems which may arise.

## **VI. Discussion of claimant and defence tactics on hypothetical case study**

The last panel, chaired by Beckett McGrath (Partner, Cooley, UK), included a case study of a hypothetical scenario where a decision finding a cartel has been issued. Participants conducted a vivid discussion on possible tactics and steps to be taken, and exchanged a great deal of practical remarks on the basis of their experience in private enforcement cases.

## **VII. Concluding remarks**

The programme of the seminar was very rich and speakers had a lot of experiences to share in this context. Time allowing, panels were followed by questions or comments from the audience. These included some remarks from economists in areas such as, for example, the quantification of harm.

The seminar was closed by Aleksander Stawicki who briefly summarised the proceedings, thanked all seminar speakers as well as its other participants, and expressed his sadness that Poland is not yet among those EU countries where private enforcement of competition law actually takes place.

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**Abuse Regulation in Competition Law: Past, Present and Future.  
10th Annual ASCOLA.  
Tokyo, 21–23 May 2015**

The 10<sup>th</sup> Annual Conference of the Academic Society for Competition Law (ASCOLA) was hosted by Meiji University in Tokyo, Japan on 21-23 May 2015. The Conference was entitled ‘Abuse Regulation in Competition Law: Past, Present and Future.’ ASCOLA is an academic association embracing lawyers and economists who specialize in competition law. ASCOLA promotes the exchange of views and ideas between scholars through the organization of annual conferences and the publication of their proceedings.

This year’s conference focused on one of the pillars of modern competition law – the regulation of the abuse of market power. Even though rules on unilateral conduct are part of competition law worldwide, there are many points which differentiate one regime from another. The Conference was meant to facilitate a discussion between scholars in order to find different solutions to similar problems.

The Conference was opened on the 21<sup>st</sup> of May with several welcome addresses. The first to take the floor was Mr Kazuyuki Sugimoto, Chairman of the Japan Fair Trade Commission. Mr Sugimoto welcomed the participants and thanked everybody for coming to Tokyo. He introduced the basis and fundamental values protected by Japanese competition law and provided an insight into the recent practice of the Japan Fair Trade Commission. Professor Kenichi Fukumiya, the President of Meiji University, spoke next expressing his gratitude to all that arrived at Meiji University. He emphasised that it was a great honour for the Meiji University to host an ASCOLA conference and expressed the hope that the Conference would be a meaningful experience for both Meiji University and ASCOLA. The theme of the conference was explained in the next welcome speech delivered by Professor Paul Nihoul, Chair of ASCOLA. The structure of the conference was thereafter outlined by the main organizer of this event Professor Iwakazu Takahashi (Meiji University).

After the opening remarks, keynote speeches were delivered by Professor Mitsuo Matsushita (Tokyo University) and Professor Eleanor Fox (New York University). Professor Matsushita spoke about abuses of superior bargaining position in Japanese antitrust law. The two elements that constitute an abuse of superior bargaining position are: superior bargaining position and its unreasonable use in a particular transaction. Professor Matsushita emphasised that what differentiates abuses of superior bargaining position from abuses of dominance or monopolization offences

is that the former requires only an impact in a particular transaction, whereas the two latter concepts require an impact on a market as a whole. To give examples of the discussed conduct, the speaker referred to retail trade and the financial sector. After outlining the historical evolution of Japanese regulation in the discussed field, Professor Matsushita presented the legislative definitions of superior bargaining position in Japanese law. The speaker stressed a major feature of abuses of superior bargaining position, namely the fact that a party with a weaker position is coerced into accepting conditions which it would not have accepted had there been an alternative way.

According to Professor Matsushita, the law governing abuses of superior bargaining position is important to Japan because it protects medium and small enterprises. Since over 99% of enterprises in Japan are small and medium-sized, and almost 70% of all workers are employed by such enterprises, the promotion and protection of such businesses is important from a political, economic and social point of view. Such concerns, however, may not be shared by other jurisdictions and in different antitrust philosophies. The focus of antitrust philosophies may be on the protection of different values such as efficiency, consumer welfare, freedom, egalitarianism, fairness, or a pluralistic society. Professor Matsushita mentioned in this context the Harvard School, the Chicago School and Ordoliberalism. Each country should decide its antitrust philosophy and identify what it would protect. The regulation of abuses of superior bargaining position in Japan is mainly concerned with fairness, egalitarianism and independence. The speaker noted in conclusion that the regulation of these abuses is closely related to civil law principles and presented a diagram of the relationship between civil law and competition law.

Professor Fox spoke subsequently about US law on the prohibition of monopolization. Her main thesis was that this part of US law is hermetically sealed. Professor Fox distinguished two periods in US antitrust law on monopolization. The first period extends from 1890 to 1980 when US law protected various values. Since the law was general, much space was left for courts to interpret the law. Professor Fox concluded that in that first period, the law was basically against power and was not concerned with efficiency. She stressed that US law was never against excessive prices; rather, it protected the open market. According to Professor Fox, it could thus be said that US law resembled the ordoliberal approach.

The second period began in 1980s when the law started to aim to protect efficiency and consumer welfare, with no recourse to other values. Professor Fox mentioned the *Trinko* case which expresses the philosophy that markets work, and that the government and antitrust law should be kept out of them. In conclusion to her speech, she stated that there are jurisdictions outside the US which are concerned with legitimacy and democracy problems and that such approaches may be justified. If society does not see economic transactions as legitimate, the problem spreads to the whole market which, in turn, is not seen as legitimate. Professor Fox offered a few recommendations for jurisdictions protecting values other than economic efficiency. In her opinion, clear standards and some limitations on the application of the law must be developed. Otherwise, anything can be treated as illegal.



The opening session ended with a dialog between Professor Matsushita and Professor Fox. Professor Matsushita asked about antitrust law at the level of individual American States and whether it protects more than efficiency. Professor Fox replied that she was not aware of individual States having antitrust laws protecting values other than consumer welfare, but it was possible that some States might have 'unfair practices' laws to focus on the protection of other values. Professor Fox then asked Professor Matsushita whether he would agree that if Japanese law protected small businesses, then this might be in conflict with consumer welfare. Professor Matsushita agreed that this might be the case.

Thereafter the opening session and the first day of the Conference was concluded by Professor Takahashi.

The second day of conference included general and parallel sessions. Two general sessions were held, one in the morning and one in the afternoon of the 22<sup>nd</sup> of May. The morning general session was chaired by Professor Fox. First to take the floor was Dr Adi Ayal (Bar Ilan University) whose presentation was entitled 'Abuse of Power: Market, Economic, and Bargaining.' His starting point was a political cartoon depicting the Standard Oil octopus as an example of a monopoly that controlled the economy and the government in the USA. According to Dr Ayal, in the era of Standard Oil, antitrust was aimed at fighting economic power because of the effects that this power had on politics. The central point of his presentation was to find an answer to the question: what is an abuse? Dr Ayal claimed that the concept of abuse is unhelpful and it is hard to distinguish between behaviour that should be desired and conduct that should be punished. Nobody would argue that abuses of power should go unpunished, since the concept of abuse as such denotes some kind of unfair conduct. On the other hand, one may have different opinions as to whether a particular business practice (without any connotations of unfairness) should be lawful or not. Therefore, in order to determine what an abuse is, it is necessary to go deeper.

Dr Ayal proposed to delineate antitrust and mentioned three points to consider: (1) public or private character of antitrust; (2) current or future oriented; (3) focused on local or general effects. In his view, antitrust should be seen as public in character, economy-wide and future-oriented. Competition is a network structure: it is stable but shifting; markets are linked and firms holding power may lose it to their competitors. Abuse should be seen through the paradigm of fairness. In order to determine what an abuse is, one should look for the cause of the problems in the structure. Antitrust should protect markets rather than its current participants. Therefore, focus on individual transactions is not warranted unless the current action is part of a plan. Dr Ayal's conclusion was that the fairness that antitrust should protect is 'a right to compete' rather than 'a right to win.'

Professor Peter Behrens (University of Hamburg) spoke next on ordoliberalism and its impact on Article 102 of the Treaty on the Functioning of European Union (TFEU). Professor Behrens emphasised that he intended to clarify some of the misunderstandings concerning ordoliberalism present in the current scholarship on dominant position abuses in the EU. In his opinion, the concept of abuse contained in Article 102 TFEU was in fact influenced by ordoliberalism. It is, however, unfortunate

that some authors in the debate about the roots of Article 102 TFEU depicted ordoliberalism as a static and frozen concept. Widespread views about ordoliberalism and its features refer only to the first (out of four) generation of this set of ideas; this, according to Professor Behrens, is an unduly narrow approach. Although the various generations of ordoliberalism differ, it is possible to identify some common constituent elements which they share: (1) competition as a rivalry resulting from individuals' freedom of choice; (2) competition as a dynamic system of interactions between choice-making individuals; (3) competition law protecting the system as well as individuals' rights.

In the second part of his presentation, Professor Behrens tried to identify concepts in EU competition law that could be regarded as parts of the ordoliberal approach. Among them he mentioned concepts of competition on the merits and special responsibility of dominant firms. He also claimed that ordoliberal thinking is present in the contemporary jurisprudence of EU Courts. This may be seen in judgments such as *TeliaSonera* (from the Court of Justice) and, most recently, *Intel* (decided by the General Court). In conclusion, Professor Behrens referred to Judge Richard Posner who stated that even though efficiency is the ultimate goal of antitrust, protection of competition may be a mediate goal to achieve efficiency. Ordoliberalism protects a system of undistorted competition as the most efficient way of organizing the economy.

Next to take the floor was Dr Pablo Ibáñez Colomo (the London School of Economic and Political Science). He delivered a speech entitled 'Uncovering the Rationale of Article 102 TFEU: The Real Nature of Abuse of Dominance Provisions.' Dr Ibáñez Colomo recalled that the jurisprudence of EU Courts on Article 102 TFEU is surrounded by controversy. The most recent example of a debate in EU scholarship relates to the ruling of the General Court in the *Intel* case. He noted that recent literature trends to analyse the jurisprudence of EU Courts on abuses from the perspective of its conformity with economic theories. By contrast, the speaker wanted to analyse EU judgements from a legal perspective.

The starting point of Dr Ibáñez Colomo's analysis was a reference to the distinction between restrictions of competition by object and by effect contained in Article 101 TFEU. This distinction differentiates between practices which are most harmful to competition, and thus considered restrictive of competition by object, and practices the detrimental effects of which are not certain, and thus need to be determined on a case-by-case basis. In light of recent jurisprudence, object restrictions should be interpreted narrowly. Hence conduct could only be regarded as an object restriction when confirmed by economic analysis.

Dr Ibáñez Colomo thesis was that a similar distinction between abuses that are anticompetitive by their very nature, and those the effects of which need to be established, is present in EU jurisprudence on Article 102 TFEU. Examples of the former are exclusive dealing and loyalty rebates. In the context of these practices, Dr Ibáñez Colomo referred to rulings such as *Hoffmann-La Roche* or, most recently, *Intel*. On the other hand, margin squeezes and selective price cuts are not considered abusive by their very nature, a fact confirmed by cases such as *TeliaSonera* or *Post Danmark I*.

The main problem with the current position of EU law is that similar practices receive different treatment under Articles 101 and 102 TFEU. For example, the ruling of the Court of Justice in *Delimitis* is an example of a different treatment of exclusivity arrangements under Article 101 TFEU compared to that of the *Hoffmann-La Roche* judgement under Article 102 TFEU. According to Dr Ibáñez Colomo, it would be desirable to provide consistent treatment of similar practices under both provisions. He concluded by making reference to the recently published opinion of Advocate General Kokott in *Post Danmark II* which could mark a different approach to Article 102 TFEU.

The next presentation was given by Dr Thomas K. Cheng (University of Hong Kong) and Professor Michal S. Gal (University of Haifa). They focused on the issue of the prohibition of the abuse of superior bargaining position as a regulatory tool to deal with problems of aggregate concentration. The latter phenomenon occurs when a small number of firms control a large part of the economy. Aggregate concentration is a problem in Japan and South Korea and the speakers focused on these jurisdictions. They discussed effects of aggregate concentration on competition and welfare. They also analysed abuse regulation in South Korea by distinguishing five types of abuses.

Professor Nihoul (Universite´ catholique de Louvain) was the last to deliver a speech in this session entitled ‘Dominance and Market Power – Do We Need an Abuse?’ Professor Nihoul strived to find an answer to the question whether competition law should focus on abuses of market power or whether the sole existence of market power suffices for an intervention. He claimed that emphasis is currently being placed on abuses, rather than on market power. Yet, there are some judgements such as *Hoffmann-La Roche* and *Continental Can*, which put great emphasis on market power. Professor Nihoul also considered this issue within the area of anticompetitive agreements and merger regulation. He stressed that the current position is derived from the strong influence of the Chicago School, which is part of the ‘more economic approach’ to EU competition law.

The morning general session ended with a panel discussion and brief, one minute conclusions from the panellists.

The general session in the afternoon focused on ‘The relationship with dominance’ and was presided over by Professor Barry Rodger (University of Strathclyde). Dr Florian Wagner-Von Papp (University College London) delivered the first presentation focusing on unilateral conduct by non-dominant firms. In the first part of his presentation, Dr Wagner-Von Papp took a comparative law approach and looked at various jurisdictions such as Germany, Japan or the United States, in order to find provisions dealing with unilateral conduct of non-dominant firms. He concluded that all three jurisdictions apply certain rules to regulate conduct of such firms. In the following, normative part of his presentation, Dr Wagner-Von Papp spoke about desirability of non-economic dependency rules such as rules on superior bargaining position.

Professor Stefan Thomas (Eberhard Karls University) spoke subsequently about *ex-ante* and *ex-post* control of buyer power. Professor Thomas started by explaining what buyer power is. According to him, there are two types of buyer power: one is

single price monopsony and the other is that based on bargaining power. Monopsony power is a mirror image of single price monopoly, where the monopsonist can obtain lower prices by reducing its purchase quantity. Bargaining power allows the buyer to influence prices and contract conditions for reasons other than efficiency. Professor Thomas tried thereafter to identify potential effects that buyer power can have on downstream markets. Particular attention was also given to the issue of supplier harm as a justification for an antitrust intervention. He concluded that supplier welfare cannot be treated as a legitimate goal of antitrust law.

Dr Mor Bakhoun (Max Planck Institute for Innovation and Competition) delivered the next speech entitled 'Abuse without Dominance in Competition Law: Abuse of Economic Dependence and its Interface with Abuse of Dominance.' He began by outlining the interface between economic dependence, freedom of contract and competition law. Freedom of contract may be used to lock-in smaller business partners. By creating a network of such contracts, a relatively dominant firm limits the economic freedom of its partners and strengthens its market power. This was the scenario in the *Carrefour* case in France. Dr Bakhoun then moved on to discuss the legal approach to economic dependence as well as the international dimension of economic dependency situations.

The last paper of the second general session was authored by Professors Mariateresa Maggolino and Maria Lillà Montagnani (Bocconi University). The speech entitled 'Wandering in the Land of the EU Abuse of Rights. Coordinates from the Antitrust Experience?' was presented by Professor Montagnani as Professor Maggolino was absent. The paper concerned the abuse of rights doctrine which, according to the authors, had emerged in EU law. This fundamental doctrine had then turned into a principle of EU abuse of rights. In order to support their theses, the authors surveyed a number of cases from various areas of EU law.

The afternoon general session ended with a panel discussion and, afterwards, Professor Takahashi thanked all participants for their presence and closed the second day of the Conference.

Two general sessions took place on the 23<sup>rd</sup> of May. The first focused on national practices relating to abuses of dominance and superior bargaining position; the second general session of the day covered unconscionable conduct and the Japanese Subcontract Act.

Professor Josef Drexl (Max Planck Institute for Innovation and Competition) chaired the earlier general session. Professor Toshiaki Takigawa (Kansai University) spoke first on regulating abuses of bargaining position through competition law. He addressed, in particular, Japanese law in comparison to EU regulation on exploitative abuses. He started by introducing the enforcement practice of the Japan Fair Trade Commission concerning abuses of superior bargaining position, which form part of Japanese antimonopoly law, and is directed at business methods which are abusive to weaker trading partners regardless of their effect on competition.

According to Professor Takigawa, abuses of superior bargaining position can be characterized as exploitative abuses. However, dominant enterprises may only be prohibited from engaging in unreasonable exploitation, which is difficult to identify.

Professor Takigawa analysed examples of unreasonable procedures in reaching agreements on trading terms as well as the ‘unreasonableness’ in the substance of trading terms. The speaker referred also to the regulation of exploitative practices in the EU and to examples from other jurisdictions. In conclusion, Professor Takigawa pointed out the weaknesses of substantive standards for identifying illegal abuses. In his opinion, the regulation of exploitative abuses should be exercised with restraint so as to minimize sacrifices to consumer welfare.

Professor Josef Bejček (Masaryk University) spoke next on ‘Regulatory Dancing Between a Plain Market Power and Genuine Significant Market Power’. He discussed the notion of significant (but still subdominant) market power in the context of relevant Czech legislation. He critically examined potential goals which could be ascribed to this legislation, namely: protection of weaker parties, protection of fairness, protection of competition (abuse of sub-dominance) and disguised redistribution. The speaker also stated that the concept of significant market power may overlap with other market positions and conduct (such as market power, economic dependency, buyer power, bargaining power or fairness). He considered that the objective concept of significant market power can be equated with qualified sub-dominance and went on to discuss its theoretical foundations.

Professor Valeria Falce (European University of Rome) delivered the next speech on Italian regulations against abuses of economic dependence. Professor Falce started from explaining the current stance of Italian legislation on abuses of economic dependence. In her opinion, this legislation has different rationales and is not harmonized. In Italy, the law that regulates abuses of economic dependence can be found in the 1998 Law on Subcontracting. The scope of the application of this law in Italy is not clear – while some courts are in favour of a broad interpretation (abuses occur in all kinds of relations), other courts tend to favour a narrow one (abuses occur in subcontracting relations only). Professor Falce continued on to discuss the notion of economic dependence, examples of abusive conduct as well as public law regulations dealing with abuses of economic dependence. The last part of the speech concerned a new law on late payments as abuses of superior bargaining position.

The last to take the floor in this panel was Dr Emmanuela Truli (Athens University of Economics and Business) who spoke of Greek provisions on economic dependence. Dr Truli began by providing an overview of how economic dependence rules function in different competition law regimes in Europe. Then she turned to the Greek legal system. Prior to 2009, legal provisions concerning economic dependence were contained in the Greek Competition Act. According to Dr Truli, this part of this legislation was not in line with the general purposes of competition law, since it was concerned with private interests of weaker parties. In 2009, provisions on economic dependence were moved to the Unfair Commercial Practices Act. Accordingly, the Greek National Competition Authority is no longer required to enforce them – the competence to apply these rules was given to civil courts. Dr Truli concluded her presentation by discussing the impact of relevant changes in Greek competition law.

The session ended with questions from participants and a brief conclusion from the chairman.

The last general session of the Conference was devoted to unconscionable conduct and the Japanese Subcontract Act and was chaired by Professor Allan Fels (University of Melbourne). Professor David Bosco (Aix-Marseille University) delivered a speech on unconscionable conduct in France. He focused firstly on identifying what unconscionable conduct is. For that purpose, he surveyed US and Australian laws and subsequently went on to discuss relevant French legislation. For a long time there were relatively few means in France to address contractual abuses by dominant parties. This situation changed because of a judgement delivered by the Supreme Court and amendments to the relevant French commercial legislation. The current rules on unconscionable conduct are enforced through the concept of abuse. After explaining relevant provisions on this issue, Professor Bosco finished his presentation by raising some objections to the French regulation of unconscionable conduct.

Dr Kazuhiko Fuchikawa (Yamaguchi University) devoted his presentation to a legal analysis of the Japanese Subcontract Act. The said act was established to prevent abuses of superior bargaining position of parent companies against subcontractors. After describing the history of the Subcontract Act, Dr Fuchikawa moved on to explain its contents and examples of practice prohibited by the Subcontract Act. In general, the purpose of the act is to protect fairness in transactions between subcontracting entities and their subcontractors, as well as to provide protection to subcontractors. Subsequently, the speaker demonstrated how the Subcontract Act works in practice by surveying relevant case law. Most of the cases concerned reduction in the cost of the subcontract or unjust lowering of prices. According to Dr Fuchikawa, the main flaw of the Subcontract Act lies in its enforcement practice, which was described by the speaker as 'weak'.

Dr Abayomi Al-Ameen (Cardiff University) delivered a speech entitled 'Application of Abuse of Dominance in New Competition Regimes: Unconscionability as a Stabilising Tool at Time of Indecision.' Dr Al-Ameen focused on finding alternative legal tools that could be used by new competition law regimes to address problems of dominance abuse. In his opinion, there is no ultimate method for assessing abuses. Pure economic models used in advanced competition law jurisdictions, such as the US or the EU, have proven unreliable and may cause difficulties in new competition law regimes. The speaker proposed therefore to use the doctrine of unconscionability as an alternative method of addressing abuses of dominance. What this doctrine could offer to emerging economies is, among others, the ease of establishing legal liability, a simple and amenable tool of enforcement and the improvement of understanding among stakeholders such as lawyers.

In the final speech of the conference, Professor Fels and Mr Matthew Lees (Arnold Bloch Leibler) discussed unconscionable conduct in the context of competition law with reference to retailer-supplier relationships in Australia. The current structure of the national retail grocery industry and factors which had led to it was the starting point of the presentation. According to the speakers, the high level of concentration in Australian grocery retail is problematic. Potential policy responses include divestiture, proper use of merger law, direct price control, use of cartel laws, prohibition of misuse of market power, or the concept of unconscionable conduct. That last concept was

then discussed by the two panellists in detail. This included a case study of a decision of the Australian Competition and Consumer Commission issued against one of the supermarket chains. In their concluding remarks, Professor Fels and Mr Lees categorized various policy responses that may be employed in Australia to deal with the current situation in the retail grocery industry and explained their pros and cons.

After the closure of the last session Professor Daniel Zimmer (University of Bonn) delivered a summary of the Conference. Professor Zimmer noted that the Conference shed light on a major divide between different jurisdictions in terms of abuses of market power regulations. Some jurisdictions focus on pursuing exclusionary conduct, while others would rather target exploitative behaviours. In regard to the latter, Professor Zimmer warned that it is a tricky and difficult task to intervene in pricing policies of firms. Another point to consider relates to the issue of market power. Should competition law be concerned solely with market power? Or should it be devoted also to the concept of economic dependence? These are questions to which there are no uniform answers. Professor Zimmer placed particular emphasis on the point that in addressing concerns of market power abuses one should look at a number of different legal areas – such as the law on unfair practices, administrative law or private law – rather than only looking at competition law. He considered the Conference to be a real eye-opener that generated vast amount of knowledge. Professor Zimmer thanked all speakers and organizers for their work.

Apart from a morning and an afternoon general session, the schedule of the second day of the Conference (22<sup>nd</sup> of May) also included five parallel conference sessions and three workshop sessions where a variety of contributors presented papers on a number of subjects related to the regulation of market power abuse. The two parallel sessions which started shortly after the general morning session were devoted to topical issues.

Four speakers participated in a session concerning general matters and state intervention, which was chaired by Professor Daniel Zimmer. Professor Rupprecht Podszun (University of Bayreuth, Max Planck Institute for Innovation and Competition) spoke therein about pitfalls of market definition. He was followed by Mr Lorenz Marx (research assistant and PhD Candidate, University of Bayreuth) who shared the results of his statistical analysis of Article 102 TFEU enforcement. Professor Francisco Marcos (IE Law School) discussed different forms of state intervention which result in granting market power. Professor Fang Xiaomin (Nanjing University) addressed the issues of the application of Chinese antimonopoly law to state-owned enterprises.

Another parallel session chaired by Professor Sandra Marco Colino (Chinese University of Hong Kong) focused on conduct which may amount to an abuse of market power. Professor Antonio Robles (Universidad Carlos III de Madrid) presented his research on exploitative prices in EU competition law. Professor Andreas Fuchs (University of Osnabrück) delivered a speech about margin squeezes both in EU and US antitrust law. Mr Krzysztof Rokita (research assistant, PhD candidate, University of Wrocław) addressed the issue of rebates granted by dominant undertakings in EU competition law. Dr Petri Kuoppamäki (Aalto University Business School) spoke of tying in the context of two-sided digital platforms.

Professor Michal S. Gal presided over another parallel session which focused on abuses in specific economy sectors. Professor Luís Silva Morais (University of Lisbon) discussed regulation of abuses in the financial sector. Dr Maria Ioannidou (Queen Mary University of London) presented the issues of abuse regulation in the EU energy sector. Dr Björn Lundqvist (Copenhagen Business School) spoke about abuses in the pharmaceutical and biotech sectors. Professor Claudia Seitz (University of Basel) delivered a speech entitled 'Healthcare Systems and Competition: Challenges and Boundaries for the Application of Competition Law in Highly Regulated Markets of the Healthcare Sector in the European Union'. The session ended with a presentation concerning abuses of market power in the context of online platforms given by Dr Jonathan Galloway (Newcastle Law School).

Another round of parallel sessions took place in the afternoon. Conference participants could also choose to join workshops which were held simultaneously. Professor Marcos chaired a parallel session concerned with intellectual property rights. Professor Wolfgang Kerber and Mr Severin Frank (School of Business and Economics, Philipps-University Marburg) spoke of patent settlements in the pharmaceutical industry. Their presentation was followed by a speech by Professor Sofia Oliveira Pais (Catholic University of Portugal) who addressed the issue of standard essential patents. Professor Shuya Hayashi and Mr Kunlin Wu (Nagoya University Graduate School of Law) gave a speech entitled 'Exclusionary Effects of Blanket Copyright License Agreement Offered by a Dominant Firm'. The session concluded with a presentation from Dr Sven Gallasch (UEA Law School and Centre for Competition Policy) on unilateral product hopping through pay-for-delay settlements under Article 102 TFEU.

Participants interested in procedural issues could join a session chaired by Dr Lundqvist. The first to speak in this session was Dr Pieter Van Cleynenbreugel (Leiden Law School) who delivered a speech on legal presumptions in the regulation of abuses. Thereafter Dr Ewelina D. Sage and Professor Tadeusz Skoczny (Centre for Antitrust and Regulatory Studies, University of Warsaw) addressed the issue of negotiated enforcement of the abuse prohibition by means of commitments decisions. This panel ended with a presentation by Dr Viktoria HSE Robertson (University of Graz) who presented her reaches conducted with Dr Marco Botta (University of Vienna) concerning injunctive relief for standard-essential patents under US antitrust and EU competition law.

Three different workshops were also held. The workshop chaired by Professor Bosco started with an address delivered by Professor Rodger who spoke about abuses of dominance before UK courts. Dr Gintare Surblyte (Max Planck Institute for Innovation and Competition) discussed dominance in the digital economy. The next presentation was given by Mr Knut Fournier (City University of Hong Kong) and entitled 'The dark side of "authors as customers": Amazon as a two-sided market and its antitrust implications.' Dr Sujitha Subramanian (University of Bristol) discussed the car spare parts decision taken by the Indian Competition Authority.

In another workshop, Professor Michal S. Gal and Professor Daniel L. Rubinfeld (U.C. Berkeley, New York University) spoke of the hidden costs of free goods.



Thereafter, Dr Peter Whelan (University of Leeds) addressed the issues of section 47 of the Enterprise and Regulatory Reform Act 2013 in the UK. The next contribution was presented by Dr Alexandr Svetlicinii (University of Macau) who spoke also on behalf of his two co-authors: Dr Marco Botta (University of Vienna) and Dr Maciej Bernatt (University of Warsaw). Their paper concerned the assessment of the 'effect on trade' by NCAs of new EU Member States. This session ended with a speech from Ms Florence Thépot (University College London) who discussed corporate compliance with competition law.

Professor Podszun chaired the third workshop session. Professor Amedeo Arena (University of Naples 'Federico II') discussed recent developments in Italian law concerning abuses of economic dependence. He was followed by Professor Colino whose presentation dealt with boundaries of abuse regulation. Professor Kelvin H. Kwok (University of Hong Kong) spoke about abuses of substantial market power under Hong Kong competition law.

The 10<sup>th</sup> Annual ASCOLA Conference on abuses of market power was closed by Professor Takahashi. He thanked all participants and expressed his hopes that the conference would be a new start in approaching abuses of market power.<sup>1</sup>

*Krzysztof Rokita*

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<sup>1</sup> The official conference website is available at: <http://ascola-tokyo-conference-2015.meiji.jp/>.

**International Conference  
on the Harmonisation of Private Antitrust Enforcement:  
A Central and Eastern European Perspective.  
Supraśl, 2–4 July 2015**

An International Conference entitled ‘Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective’ was held in Supraśl (Poland) on the 2-4 July 2015. It was organized jointly by the Faculty of Law of the University of Białystok (Department of Public Commercial Law) and the Centre for Antitrust and Regulatory Studies (CARS, University of Warsaw). The Conference focused on issues connected to the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 Conference has gathered numerous competition law researchers primarily from countries of Central and Eastern Europe (CEE).

The Conference was preceded by a meeting of CRANE – *the Competition Law and Regulation. Academic Network. Europe – Visegrad, Balkan Baltic, East*. During this meeting, Professor Tadeusz Skoczny (Director of CARS) presented the initial assumptions and objectives of the CRANE initiative.

The Conference was officially opened by Professor Anna Piszcz (University of Białystok, Poland) who welcomed the participants and presented the assumptions and scope of the Conference.

A welcome address was subsequently delivered by Professor Emil W. Pływaczewski (Dean of the Faculty of Law of the University of Białystok). He emphasized that the international character of the Conference provides an excellent opportunity for the exchange of experiences of CEE countries on issues related to private competition law enforcement. Professor Pływaczewski noted also that the Conference was a result of a fruitful cooperation between the Faculty of Law of the University of Białystok and CARS. He also acknowledged the support given to the organizers by, *inter alia*, the Polish Office of Competition and Consumer Protection and the Polish Supreme Court.

Bernadeta Kasztelan-Świetlik (Vice-President of the Office of Competition and Consumer Protection) spoke next. She stressed that the public and the private model of competition law enforcement must complement each other. The role of an antitrust authority is to detect and punish the most severe of infringements; the application of competition

law by the antitrust authority must be supplemented by its private enforcement. She later pointed out that the adoption of the Damages Directive will establish a basic standard for private enforcement and should eliminate barriers to its development. She informed the Conference participants that works had begun at the Polish Ministry of Justice aimed at the implementation of the Damages Directive into the Polish legal order.

The final welcome address was given by Professor Tadeusz Skoczny (Director of CARS, University of Warsaw).

Professor Sofia O. Pais (Catholic University of Portugal, Oporto) delivered the keynote speech which focused on the Portuguese model of private competition law enforcement. Professor Pais spoke also of the most important problems arising because of Portugal's duty to implement the Damages Directive. She stated that Portuguese law does not provide specific rules on procedures for claims arising from antitrust violations. As a result, they are conducted in accordance with the rules established in Portuguese Competition Law, Civil Code and the Code of Civil Procedure. Despite the fact that there are many national public enforcement decisions concerning antitrust infringements, she noted that there are very few examples of private enforcement in Portugal. Professor Pais emphasized also that public competition law enforcement remains dominant there and that this should not be changed. Public and private enforcement should complement each other.

After the keynote address, the Conference participants discussed the possibility of applying class actions in private competition law enforcement in Portugal, and the reasons for the low number of such private enforcement cases. Professor Pais spoke here of the reasons for the apparent lack of popularity of private enforcement in Portugal listing the absence of a private enforcement tradition, and the fact that consumers are not familiar with the applicable rules (while relevant consumer damages would generally be very low).

Four sessions were held during the second day of the Conference. The first was moderated by Professor Pais and dedicated to substantive challenges facing the harmonisation of private competition law enforcement.

The first paper was delivered jointly by Professor Alexander Svetlicinii (University of Macau, Macau, China) and Professor Marco Botta (University of Vienna, Vienna, Austria). It was dedicated to the phenomenon of umbrella pricing. Professor Svetlicinii presented the umbrella pricing model, paying particular attention to provisions of US law concerning the recovery of claims resulting from price agreements. He stressed that even if only a few companies are party to the anti-competitive agreement, other entities (not-parties) may also benefit from it in practice since they may remain 'under the umbrella' of the agreement. Claiming damages from the price agreements is extremely difficult, due to the need to prove the causal link between the agreement and the damage as well as the actual amount of damages. Professor Botta spoke subsequently of problems related to claiming damages arising from umbrella pricing under EU law, which concern, in particular, the lack of a general standard for a causal link that has to occur in order to claim damages.

Professor Agata Jurkowska-Gomułka (University of Information Technology and Management, Rzeszów, Poland) presented the next paper. She indicated that the

public and private model of competition law enforcement interfere with each other. In order to ensure that each fulfils its goal, jurisprudence has to establish a good balance between them. Professor Jurkowska-Gomułka did not share general concerns about difficulties in determining the actual amount of damages suffered as a result of a competition law infringement. She drew attention to the fact that antitrust is not the only area which suffers from difficulties in calculating the amount of damages. She also expressed the opinion that the implementation of the Damages Directive into the Polish legal order will not significantly increase the popularity of private enforcement.

The last paper in this session was presented by Professor Anna Piszcz. In her speech, she focused on those issues which had, in her opinion, received too little attention in the Damages Directive. Professor Piszcz pointed out that there is no justification for limiting the Directive to claims for damages and actions for damages only. Since the Directive regulates only this type of claims, the harmonisation of private competition law enforcement is only partial. Professor Piszcz spoke therefore in favour of the Damages Directive not becoming the end of the harmonisation process of private competition law enforcement in Europe.

Dr Maciej Bernatt (University of Warsaw, Warsaw, Poland) moderated the second Conference session dedicated to the procedural challenges related to the adoption of the Damages Directive.

The first paper was presented by Professor Aleš Galič (University of Ljubljana, Slovenia) who focused on issues surrounding the disclosure of documents in the process of private enforcement. He stressed that private enforcement is not possible without ensuring extensive access to information and documents. Procedural tools enabling such access are thus particularly important for the development of this enforcement model. While discussing the solutions provided in this regard by the Damages Directive, he emphasized that the implementation of the Directive will require much more than just a technical adaptation of the Code of Civil Procedure. He stressed that in a number of key aspects relating to the disclosure of documents, Member States' legislation contains fundamental differences. In this regard he also gave examples on the basis of Slovenian law. In some EU Member States, the implementation will thus also require amendments of currently applicable fundamental procedural principles – merely introducing changes required by the Directive would be ineffective.

Professor Vlatka Butorac Malnar (University of Rijeka, Croatia) presented subsequently a paper in which she emphasized that cartels have the greatest number of victims of any antitrust infringement. An additional difficulty in the investigation of claims of cartel victims is that cartels are so secretive that even competition authorities have difficulties in searching for evidence proving their existence. If the authorities encounter such significant problems in obtaining evidence, an expectation that such evidences would be in the possession of a private person would thus be naïve. Professor Butorac Malnar stressed furthermore that most cartels are now disclosed as a result of the leniency and settlements procedures – yet the use of these procedures would facilitate the hiding of information and documents from victims. There is therefore a risk that entrepreneurs will be even more likely to want to engage in leniency and settlements so as to hide documents and to make it more difficult for victims to claim damages.

Anna Gulińska (legal counsel, Dentons Europe Oleszczuk, Warsaw, Poland) gave the last speech of the session. She focused on key issues related to access to documents collected in antitrust proceedings in Poland. She emphasized that in Polish civil proceedings, the plaintiff is obliged to present the facts as well as to provide evidence to support them. At the same time, civil procedural rules introduce time-limits for the presentation of evidence – a fact that has a negative impact on the development of private enforcement of competition law in Poland.

Professor Anna Piszcz moderated the third session regarding the benefits associated with the adoption of the Damages Directive for consumers.

Professor Rafał Sikorski (Adam Mickiewicz University in Poznań, Poland) presented the first paper. He drew attention to the fact that antitrust injuries suffered by most consumers are small. For that reason, individual consumers are unlikely to sue individually. He compared the US and EU private enforcement model noting their basic difference. He noted that the problem of overcompensation does not exist in the US model. In EU law, the main goal of the damage is to compensate, which means that the compensation may not exceed the damage.

Dr Raimundas Moisejevas (Mykolas Romeris University, Vilnius, Lithuania) spoke of the consensual application of competition law. He pointed out that the use of consensual methods of enforcing competition law may prove to be beneficial for the infringer. On the one hand, the settling infringer can get a fine reduction and on the other hand, his liability is subject to a limitation. According to Dr Moisejevas, the Damages Directive might encourage the use of alternative methods of resolving disputes arising on the basis of competition law. This may prove beneficial for consumers since they will not have to bear the high costs associated with claiming damages in courts.

Professor Tadeusz Skoczny moderated the last session of the second day of the Conference focused on private antitrust enforcement by CEE countries which are not members of the EU.

Ermal Nazifi (PhD candidate, University of Tirana, Albania) presented the first paper. He first briefly described the evolution of competition law in Albania, focusing on problems related to the indication of the grounds for compensation (infringement, damage and the causal link). He pointed out that effective competition law is necessary for the proper functioning of the economy. In addition, it is one of the conditions for Albania's EU accession. Yet implementing EU solutions by Albania should not take place by way of their automatic transfer into the national legal order – current Albanian solutions should also be considered.

The next paper was presented jointly by Professor Anzhelika Gerasymenko and Professor Nataliia Mazaraki (Kyiv National University of Trade and Economics, Ukraine). Professor Mazaraki described existing regulations on private enforcement of competition law in Ukraine. She also discussed a number of major obstacles that prevent effective private enforcement of competition law. Amongst them, she mentioned psychological barriers, which prevent people from seeking compensation before the courts, difficulty in determining the amount of damages, and problems associated with obtaining evidence of the infringement. Professor Gerasymenko

subsequently spoke of the rules for determining the amount of damages in Ukrainian law and compared them with the EU model.

Zurab Gvelesiani (PhD candidate, Central European University, Budapest, Hungary) closed this session by presenting a brief history of the development of competition law in Georgia. The origins of its competition law date back to 1992, when the first competition act was adopted. Mr Gvelesiani continued on to present existing Georgian rules concerning claims arising from antitrust infringements.

One session was held on the third day of the Conference. It was dedicated to private enforcement of competition law in CEE countries that are members of the European Union. This session was moderated by Professor Agata Jurkowska-Gomułka.

The first paper was presented jointly by Professor Rimantas Antanas Stanikunas (Vilnius University, Lithuania) and by Arunas Burinskas (PhD candidate, Vilnius University, Lithuania). It addressed issues related to the interactions between public and private competition law enforcement in Lithuania. The Lithuanian Competition Act makes it possible to claim damages by victims of antitrust infringements – the public competition law enforcement model supports claims by victims. Nevertheless, Lithuanian law requires more detailed legislation on the recovery of claims by victims.

Dr Ondrej Blažo (Comenius University in Bratislava, Slovakia) outlined problems surrounding private claims in Slovakia, which relate primarily to the following spheres: obtaining evidence, establishing the entity liable, the limitation period, and calculating the amount of the damage.

The last paper in this session was delivered by Judge Katarzyna Lis-Zarrias (judge, Ministry of Justice, Poland). Judge Lis-Zarrias presented the background of the negotiations on the Damages Directive. She also discussed the basic problems relating to its implementation into the Polish legal order. They concern, *inter alia*, the methods of implementing the Damages Directive. According to Judge Lis-Zarrias, it would be best to create a separate legal act for that purpose, rather than adopting changes to several relevant existing acts. She also spoke of problems with the scope of the implementation of the Directive. If the rules resulting from this Directive were to be limited solely to competition law issues, it would in practice result in creating two separate procedures for the investigation of damage claims in Poland – one in cases of competition law and a one for other cases. This might significantly impede the conduct of court proceedings because in their course, the case may change its nature as a result of the disclosure of new facts and evidence.

The session was concluded with a discussion of issues covered during the Conference including: the economic aspects of private competition law enforcement and the impact on the development of private enforcement of new solutions, where the competition authority would act as *amicus curiae* in civil proceedings.

The Conference was subsequently closed by Professor Anna Piszcz.

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**2<sup>nd</sup> International PhD Students Seminar.  
Competition Law in Portugal and Poland.  
Białystok, 1 July 2015**

The 2<sup>nd</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> Seminar including Professor Anna Piszcz, Dr Maciej Etel and two doctoral students: Marlena Kadej-Barwik and Paulina Korycińska. The 2<sup>nd</sup> 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 3<sup>rd</sup> 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 3<sup>rd</sup> parties deliver information and make statements, but has also the right to seize things. If a party to the proceedings or a 3<sup>rd</sup> 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 various 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 possesses 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 3<sup>rd</sup> Polish-Portuguese PhD Seminar should take place in 2016.

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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 13<sup>th</sup> and 15<sup>th</sup> of April 2015 in the Conference Centre of Polish Office of Competition and Consumer Protection (in Polish: *Urząd Ochrony Konkurencji i Konsumentów*, 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 25<sup>th</sup> 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 25<sup>th</sup> 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 nor 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 & Soroczyński 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 various 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 3<sup>rd</sup> 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 Pleszka 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** (Wrocław 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 14<sup>th</sup> 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 hypotheses 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 Młostoń-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 Młostoń-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 Młostoń-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 Młostoń-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 **Młostoń-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 14<sup>th</sup> 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 2<sup>nd</sup> half of the 19<sup>th</sup> century – their main objective was the desire to survive economic crises. Until World War 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 introduction 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 stricto*, illustrated by antitrust case law as well as other aspects of competition policy (competition protection *sensu lato*). 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 14<sup>th</sup> of April was jointly chaired by Professor **Agata Jurkowska-Gomułka** and **Małgorzata Sz waj** (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 **Malgorzata Modzelewska de Raad** (Modzelewska & Pańnik 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 3<sup>rd</sup> 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 **Piszc**.

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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# A C T I V I T I E S     O F     C A R S

## CARS Activity Report 2013–2014

### 1. General Information

The Centre for Antitrust and Regulatory Studies (CARS) continued its regular publishing, research and educational activities in the 7<sup>th</sup> (2013) and 8<sup>th</sup> (2014) year of its existence. This was an exceptional time for CARS's evolution, which has given its activities a truly international dimension. The Academic Society for Competition Law (ASCOLA) granted CARS the privilege of organizing its 9<sup>th</sup> annual conference, which was ultimately held in June 2014 in Warsaw. Simultaneously, CARS has set up a network of academic cooperation in research on competition and pro-competitive regulation in Central and Eastern Europe and Balkans – the Competition and Regulation Academic Network Europe (CRANE - Visegrad, Balkan, Baltic, East). The year 2014 had a remarkable influence on CARS's institutional development also. On 1 October 2014, CARS received the status of an independent organizational unit subordinate to the Dean of the Faculty of Management, University of Warsaw. This was a significant institutional upgrade for CARS keeping in mind that until then, that is for the first seven years of its existence, CARS had acted solely in the form of a research group constituted of ordinary and affiliated members as well as permanent co-operators. As a result, CARS is now a fully institutionalized scientific research centre specializing in economics, competition protection and sector specific regulation.

CARS continued also to grant awards for outstanding academic monographs on the law and economics of competition protection. The 2013 CARS Award honoured Professor Dawid Miąsik (Institute of Law Studies, Polish Academy of Sciences) for his outstanding book entitled 'The interface between competition and IP laws' (Wolters Kluwer, Warsaw 2012). Dr hab. Agata Jurkowska-Gomułka received the 3<sup>rd</sup> edition of the CARS Award in 2014 for her excellent monograph on 'Public and private enforcement of prohibitions of anticompetitive practices: searching for a sustainable model' (Wyd. Naukowe Wydziału Zarządzania UW, Warsaw 2013). Both awards were once again generously funded by PKO BP, one of Poland's biggest banks.

The years 2013 and 2014 were also an active period for CARS's advisory activities. In April 2013, a specially formed CARS research team prepared a reply to the European Commission's call for input in the public consultation on its Green Paper on Unfair Trading Practices in Business-to-Business Food and Non-Food Supply Chain in Europe. In 2014, CARS prepared its first publicly available academic expertise.



CARS continued also to publish the English-language ‘Yearbook of Antitrust and Regulatory Studies’ (YARS) – one volume of YARS (vol. 6(8)) was released in 2013 and two volumes in 2014 (vol. 7(9) and 7(10)). In addition, CARS published also the Polish-language journal – ‘internetowy Kwartalnik Antymonopolowy i Regulacyjny, iKAR (‘internet Quarterly on Antitrust and Regulation’). Overall, three volumes of YARS and nine volumes of iKAR were published between 2013 and 2014. Five new publications were also added in 2013 to the CARS Publishing Series ‘Antitrust and Regulatory Monographs and Textbooks’.

2013 and 2014 saw CARS organizing two national conferences as well as the international 9<sup>th</sup> Annual ASCOLA Conference Warsaw 2014. CARS arranged two workshops in 2013, held its first two ‘guest lectures’ and three sessions of the Open PhD Seminar (2013-2014). A Regulatory Student Workshop series was held in 2014.

Importantly, CARS signed a cooperation agreement in 2014 with the Office of Competition and Consumer Protection (UOKiK).

## 2. Research and academic expertise

In April 2013, CARS submitted to the European Commission a written position prepared by a specially formed CARS Working Group within the public consultation process on the Green Paper on Unfair Trading Practices in Business-to-Business Food and Non-Food Supply Chain in Europe. The Working Group was headed by Professor Tadeusz Skoczny and included researchers from the Faculty of Management as well as representatives of suppliers and retail chains. The answers of the CARS Working Group to the Commission’s questionnaire are accessible via its website (<http://www.cars.wz.uw.edu.pl/tresc/doradztwo/08/Responses.pdf>).

CARS’s advisory activities had a two-fold character in 2014. First, CARS prepared a scientific expertise entitled ‘Legal and economic analysis of the insurance clause in mortgage agreements requiring a small deposit’ commissioned by one of Poland’s banks. The paper is available on the CARS website ([www.cars.wz.uw.edu.pl](http://www.cars.wz.uw.edu.pl)). The main goal of the expertise was to address the question whether the typical insurance clause contained in mortgages that require only a small deposit (a low ‘down payment’) has an economic and regulatory justification or whether it could be considered a potentially illegal clause in the light of Article 385<sup>1</sup> of the Polish Civil Code – a so-called abusive clause.

In terms of its advisory activity, CARS prepared also two separate lists of academic journals which publish papers on, respectively, competition protection and on sector-specific regulation ([www.cars.wz.uw.edu.pl/doradztwo-12.html](http://www.cars.wz.uw.edu.pl/doradztwo-12.html)). The lists are intended to help CARS members (as well as other individuals, such as young academic employees, PhD candidates and practitioners) choose the academic journal best suited to their publication needs – offering them a wide spectrum of readers and a high number of points.

### 3. Publications

#### 3.1. Yearbook of Antitrust and Regulatory Studies (YARS) [www.yars.wz.uw.edu.pl](http://www.yars.wz.uw.edu.pl)

The 8<sup>th</sup> volume of YARS (YARS 2013, vol. 6(8)) is characterised by its wide geographical scope – it presents competition protection and sectorial regulation discussed not only from the Polish, but also Central-Eastern European and Balkan perspective. Contributions written by foreign authors largely outweighed Polish papers. YARS 2013, vol. 6(8) contains: six articles related to the issue of competition protection in Poland, Slovenia, Estonia, Serbia, Bosnia and Hercegovina, and Hungary; six overviews of legislation and jurisprudence related to competition protection in countries such as Poland, Czech, Hungary, Slovenia, Macedonia; three case comments to Polish, Slovak and Czech jurisprudence; two book reviews – one Polish and one Serbian; CARS's annual report for 2012; as well as an antitrust and regulatory bibliography for 2012 based on publications from Poland, Czech, Slovakia, Hungary, Estonia, Macedonia and Croatia.

The 9<sup>th</sup> volume of YARS (YARS 2014, vol. 7(9)) was prepared in order to commemorate the 10<sup>th</sup> anniversary of the 2004 EU accession of ten new Member States deriving, among others, from the Central-Eastern European region. This volume contains contributions from authors originating in the Czech Republic, Moldova, Poland, Slovakia and Hungary. The 10<sup>th</sup> volume of YARS, the 2<sup>nd</sup> of 2014 (vol. 7(10)), constitutes a special issue. It contains selected papers presented during the 'Competition Policy Workshop' organized within the 9<sup>th</sup> Annual ASCOLA Conference Warsaw 2014.

#### 3.2. Internet Quarterly on Antitrust and Regulation (*internetowy Kwartalnik Antymonopolowy i Regulacyjny*, iKAR) [www.ikar.wz.uw.edu.pl](http://www.ikar.wz.uw.edu.pl)

The recognisability of iKAR as an antitrust and regulatory journal has increased substantially since 2013 strengthening its position on the Polish market of academic journals. Eight separate volumes of iKAR were published in 2013 – four were 'general' in nature containing articles on a variety of topics within the competition protection and sector specific regulation fields (nr 1(2), 3(2), 5(2), 6(2)). The remaining four volumes were specialised – one was dedicated to the topic of 'slotting allowances' (nr 2(2)), the three remaining focused on regulated sectors: rail transport (vol. 4(2)) and telecommunications (vol. 7(2) and 8(2)).

The year 2014 was very productive also. Out of the nine volumes of iKAR published in 2014 overall, four were general in nature (volumes 1(3), 3(3), 6(3), 9(3)). The remaining five volumes were once again specialised: volume 4(3) was dedicated solely to the issue of consumer protection; the remaining three dealt with specific regulated sectors: post (nr 2(3)), finance (nr 5(3)), rail transport (nr 7(3)) and telecommunications (nr 8(3)).

### **3.3. Monographs and research reports**

#### **3.3.1. 'Exchange of Information among competitors in the assessment of competition protection authorities' (ISBN: 978-83-63962-18-0)**

This monograph written by Antoni Bolecki constitutes the 11<sup>th</sup> position in the CARS Textbooks and Monographs Publishing Series. It contains a legal and economic analysis of one of the most interesting economic phenomena in the competition protection field – information exchange between entrepreneurs. The author presents therein the forms and methods of information exchange as well as the scope of information available to other entrepreneurs, competitors in particular. The analysis of the character of the exchanged information, and the method of its exchange, leads to the assessment of the influence of entrepreneurs' behaviours on competition. The conclusions are presented in relation to Polish and European jurisprudential and case law practice concerning the information exchange process. The author concludes the book by providing business managers with some practical guidelines on the provision of safe information flow between competitors (adopting the perspective of competition protection rules).

#### **3.3.2. 'Private and public enforcement of prohibitions of practices restricting competition' (ISBN: 978-83-63962-23-4)**

The 12<sup>th</sup> position of the CARS Textbooks and Monographs Publishing Series is written by Agata Jurkowska-Gomułka. The book focuses on the correlation between two competition law enforcement modes. The author shows interdependent relations between the two modes in the area of the interests pursued by each of the two manners of implementing the prohibitions placed on restrictive practices, proving a violation of these prohibitions, as well as the mutual impact of verdicts and sanctions used in both modes. One of the most important conclusions drawn by the author implies that it is not possible to ensure complete equality of the two enforcement modes, as this would weaken the overall enforcement system. Nonetheless, it is possible and desirable to create a sustainable model, which would ensure the optimal effectiveness of both, the two modes of enforcing competition rules as well as of the system as a whole. This book was honoured by the CARS Award of 2013.

#### **3.3.3. 'Polish Airports in the European Union – Competitive Challenges, Regulatory Requirements and Development Perspectives' (ISBN: 978-83-63962-25-8)**

The 13<sup>th</sup> book in the CARS Textbooks and Monographs Publishing Series provides a compilation of updated articles published previously (in Polish) in the form of two volumes edited by Filip Czernicki and Professor Tadeusz Skoczny. The included articles provide an overview of a research project on competition and regulatory issues related to airport activities undertaken by the employees of the Faculty of

Management, University of Warsaw and the employees of the State Enterprise ‘Polish Airports’ (Przedsiębiorstwo Państwowe ‘Porty Lotnicze’).

### **3.3.4. ‘Judicial control of the decisions of the President of the Office of Electronic Communications’ (ISBN: 978978-83-63962-45-6)**

The 14<sup>th</sup> position in the CARS Textbooks and Monographs Publishing Series is authored by Mateusz Chołodecki, PhD. It presents the model of judicial control exercised over the decisions taken by the President of the Office of Electronic Communications (the National Regulatory Authority responsible for the Polish telecommunications sector). The author analyses the legal basis of the judicial control model used in order to assess its homogeneity and to identify significant differences between the two judicial control methods (control by administrative courts and by the Court of Competition and Consumer Protection) applied within this model. The author makes an attempt at defining the concept of a regulatory decision taken by the Polish Telecoms NRA.

### **3.3.5. ‘Telecommunications Regulation in Poland’ (ISBN: 978-83-63962-48-7)**

The end of the 2013 was marked by the release of a book edited by Professor Stanisław Piątek. This publication compiles a variety of articles dedicated to the evolution of Polish law and regulatory practices in the telecommunications sector. EU regulatory frameworks for telecommunications form the reference point for the various analyses made in this book. Most of the papers go further than just discussing the areas of complete, or incomplete compatibility of national provisions with EU law. They also identify and analyse the legal solutions, which in the light of EU law had to be accepted in Poland because of the specificity of the national telecommunications sector.

## **4. Conferences and workshops**

### **4.1. National conferences**

#### **4.1.1. ‘Slotting fees. Necessity for amending regulations or their interpretation?’**

A conference dedicated to the regulation of so-called ‘slotting fees’ was held on 19 March 2014 at the Faculty of Management, University of Warsaw. An introductory speech was delivered by Maciej Bernatt, PhD (Faculty of Management, University of Warsaw). The conference programme covered two panels. The first panel was moderated by Professor Tadeusz Skoczny (Faculty of Management, University of Warsaw); it was entitled ‘What is “an unfair competition practice” defined in Art. 15(1)(4) of the Act on Combating Unfair Competition?’. Professor Adam Noga

(Leon Koźmiński Academy, Warsaw) moderated the second panel entitled ‘Where does the problem lie: in not making things difficult or in the lack of equivalence? Economic problems related to the application of Art.15(1)(4) of the Act on Combating Unfair Competition’.

The conference was primarily attended by business representative. Papers based on speeches delivered during this conference were published in iKAR 2013, vol. 2(2).

#### **4.1.2. Impact of European law on Polish competition law and sector specific regulation**

CARS organised a conference focusing on the ‘Impact of European law on Polish competition law and sector specific regulation’. The conference was held on 21 May 2014 in order to commemorate the 10<sup>th</sup> anniversary of Poland’s accession to the European Union. The goal of the conference was to discuss the most interesting aspects of the impact that EU law has on Polish competition law and sector specific regulation.

The conference was attended by 78 participants, both practitioners and academics representing 10 different research institutions.

#### **4.2. International conference**

CARS organized the 9<sup>th</sup> Annual ASCOLA Conference Warsaw 2014 held on 26-28 June 2014 in Warsaw – it was the event of the year in the field of competition protection in Poland. The conference was organized by CARS at the request of the ASCOLA Board ([www.ASCOLA-conference-warsaw.2014.wz.uw.edu.pl](http://www.ASCOLA-conference-warsaw.2014.wz.uw.edu.pl)). The conference focused on the topic of ‘Procedural fairness in competition proceedings’. Its programme contained four plenary sessions and a ‘Competition Policy Workshop’.

The conference was attended by 84 participants from as many as 5 different continents, 18 countries, representing 23 universities as well as a large group of invited guests. The post-conference materials were published in the book ‘Procedural Fairness in Competition Proceedings’ edited by Paul Nihoul and Tadeusz Skoczny released in 2015 by Edward Edgar Publishing as a part of its ‘ASCOLA Competition Law series’. Selected papers presented during the ‘Competition Policy Workshop’ were published in YARS 2014, vol. 7(10).

#### **4.3. Workshops**

##### **4.3.1. ‘Current problems of restricting the right to access files in proceedings before the Court of Competition and Consumer Protection (SOKiK)’**

This workshop held on 16 April 2013 was inspired by two separate orders issued by the Polish Court of Competition and Consumer Protection (SOKiK) in January and March 2013 (XVII AmA 112/12 i XVII AmA 113/12). An introductory speech was delivered by the President of SOKiK, Judge Andrzej Turliński. The workshop was attended by a large number of lawyers.

#### **4.3.2. ‘The application of the prohibition of competition restricting agreements to agency agreements’**

The workshop held on 20 June 2013 was inspired by practitioners facing major problems and expressing doubts about the antitrust assessment of agency agreements. Grzegorz Materna, PhD (Institute of Law Studies, Polish Academy of Sciences) delivered an introductory speech. His presentation focused primarily on the interpretation of Polish rules (contained in the Polish Competition and Consumer Protection Act (PCCPA) and in the Polish Regulation on the Block Exemption of Vertical Agreements from the Prohibition of Agreements Restricting Competition) meant to identify the category of agency agreements which is subjected to an assessment based on competition rules. In the following discussion, participants focused on differences in defining agency agreements in Polish and EU law as well as on the difference between the definition of agency agreements provided by competition and civil law.

#### **4.4. Guest lectures**

In 2013, CARS organized three guest lectures. On 1 March 2013, Eduardo Pereira (STR Holding, Managing Director & Chief Legal Officer) delivered a speech entitled ‘International Upstream Investments: Legal Framework’. On 22 May 2013, Zbigniew Grycan (the President of the supervisory board of the company ‘Grycan - Lody od Pokoleń’) delivered a speech on ‘How to achieve success on a competitive market?’ The 3<sup>rd</sup> guest lecture was delivered by Professor Andrzej Wróbel, Judge of the Polish Constitutional Tribunal, during the ceremony for the CARS Award 2012 which took place on 6 June 2013. The lecture focused on ‘EU freedoms and fundamental rights after the Lisbon Treaty’.

### **5. Open PhD Seminar**

#### **5.1. ‘Competition and financial stability in the banking industry. The interplay between sector regulation and competition policy’**

The 16<sup>th</sup> meeting of the CARS Open PhD Seminar took place on 24 October 2013. Wojciech Podlasiński, PhD candidate (Faculty of Management, University of Warsaw) presented therein the concept of his PhD thesis dedicated to the relations between competition on markets for financial services and the financial stability of banks. Key problems pointed out by the speaker concerned the need for an active role of banking sector regulation in supporting competition on the market for financial services. The speaker considered also the role of competition policy measures as an effective complement for prudential regulation. Noted was also the possibility of coordinating the regulation of the banking sector and competition policy in order to improve consumer welfare and increase the stability of the financial system. Problems

raised by the speaker were discussed by Professor Marcin Olszak (European Centre, University of Warsaw), the Director of the Legal Department of the Polish Financial Supervision Authority.

### **5.2. ‘Protection of collective consumer interests – the prohibition of practices infringing the collective interests of consumers’**

The 17<sup>th</sup> CARS Open PhD Seminar was held on 12 December 2013. Izabela Wesołowska, PhD candidate from the Faculty of Law, University of Łódź, presented therein the concept of her PhD thesis dedicated to the protection of the collective interests of consumers. The speaker raised the problem of the compatibility of Polish rules on collective interests of consumers with Directive 2009/22/EC as well as with international and constitutional standards. The speaker considered also the effectiveness of the protection system of collective consumer interests and the question of safeguarding the protection of such interests by the President of the Office of Competition and Consumer Protection. The presentation was discussed by Professor Bożena Popowska (Faculty of Law, Adam Mickiewicz University in Poznań) and Professor Kazimierz Strzyczkowski (Faculty of Law, University of Łódź).

### **5.3. ‘Single economic unit in Polish and European competition law’**

This Open PhD Seminar took place on 10 March 2014. The presentation given by Piotr Semeniuk, as well as the following discussion, was dedicated to key aspects related to the concept of a single economic unit in Polish and European competition law. This issue plays a crucial role at different stages of competition law application. It is related to notions of ‘control’ and ‘corporate group’ in merger control rules, it leads to the exemption of some types of agreements (e.g. agency agreements, employee agreements and others agreements ‘within the framework’ of a single economic unit) from the rules on restrictive agreements, and it can be related to assigning responsibility for a competition law infringement.

## **6. Student Regulatory Workshops**

On the basis of a student initiative, a series of Student Regulatory Workshops took place at CARS between February and May 2014. The workshops attracted 24 students from the Faculty of Law, Faculty of Economics and the Faculty of Management. During the workshops, students were able to meet specialists in sector specific regulation relating to telecommunications, audiovisual media, rail and air transport, energy, financial services and the pharmaceutical sector. Participating students were divided into groups of no larger than 12 and had the meetings had a primarily discursive character.

## **7. Agreement between CARS and the Office of Competition and Consumer Protection**

In order to continue expanding the network of agreements concluded by CARS with public authorities responsible for competition protection and sector specific regulation, CARS signed on 5 May 2014 a cooperation agreement with the Office of Competition and Consumer Protection. The agreement envisages extensive cooperation in terms of research, publications and organization of conferences between CARS and Polish National Competition Authority.

Warsaw, 2015

*Agata Jurkowska-Gomulka  
Tadeusz Skoczny*



# REVIEWERS OF YARS IN 2015

- Maciej Bernatt** (PhD, University of Warsaw, Poland)  
**Ondrej Blazo** (PhD, Comenius University in Bratislava, Slovakia)  
**Nina Bučan Gutta** (PhD, Radboud University, Netherlands)  
**Mateusz Choledecki** (PhD, Adam Mickiewicz University in Poznań, Poland)  
**Andrej Fatur** (PhD, Law Firm Fatur, Ljubljana, Slovenia)  
**Miguel Sousa Ferro** (Prof., University of Lisbon, Portugal)  
**Vano Gogelia** (Senior Associate, Ernst & Young, Georgia)  
**Jaunius Gumbis** (Doc. Dr., Faculty of Law, Vilnius University, Lithuania)  
**Marius Juonys** (PhD, lecturer, Faculty of Law, Vilnius University, Partner of Valiunas Ellex, Lithuania)  
**Mirta Kapural** (Dr.sc., Croatian Competition Agency)  
**Konrad Kohutek** (Dr. Hab., Prof. of Andrzej Frycz-Modrzewski Cracow Academy, Poland)  
**Krystyna Kowalik-Bańczyk** (Dr. Hab., Prof. of Polish Academy of Sciences, Warsaw, Poland)  
**Ketevan Lapachi** (Dr., Prof., International Black Sea University, Tbilisi, Georgia)  
**Daniela Lukáčová** (Antimonopoly Office of the Slovak Republic, Slovakia)  
**Dina Lurje** (Competition Council of the Republic of Lithuania, Vilnius University)  
**Jurgita Malinauskaitė** (PhD, Brunel University London, United Kingdom)  
**Marek Martyniszyn** (PhD, Queen's University Belfast, United Kingdom)  
**Solomon Menabdishvili** (Tbilisi State University, Georgia)  
**Dawid Miąsik** (Prof., Institute of Law Studies, Polish Academy of Sciences)  
**Bartosz Michalski** (PhD, University of Wrocław, Poland)  
**Kasturi Moodaliyar** (Prof., University of the Witwatersrand, South Africa)  
**Sebastian Peyer** (PhD, the University of East Anglia, United Kingdom)  
**Paweł Podrecki** (Dr. Hab., Prof. of Jagiellonian University in Kraków, Poland)  
**Dusan Popovic** (Prof., University of Belgrade, Serbia)  
**Barry Rodger** (Prof., University of Strathclyde, United Kingdom)  
**Karin Sein** (PhD, University of Tartu, Estonia)  
**Kseniya Smyrnova** (Dr. Hab., Institute of International Relations Kyiv National Taras Shevchenko University, Ukraine)  
**Hanna Stakheyeva** (Ph.D., legal counsel, Ketenci Law Firm, Istanbul, Turkey)  
**Zuzana Šabová** (Antimonopoly Office of the Slovak Republic, Comenius University, Bratislava, Slovakia)  
**Maciej Szpunar** (Advocate General at the Court of Justice of the European Union, Dr. Hab., Prof. of University of Silesia in Katowice, Poland)  
**Evelina Uogintaite** (Competition Council of the Republic of Lithuania)

**Steven Van Uytsel** (Prof., Kyushu University, Japan)

**Vigita Vebraitė** (PhD, Vilnius University, Lithuania)

**Louis Visscher** (Prof., Rotterdam Institute of Law and Economics, Netherlands)

**Bojana Vrcek** (PhD, European Commission, DG Comp)

# ARTICLES IN YEARS 2008–2015

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