Ministry of Science and Higher Education
Republic of Poland

The creation of the English-language version of these publications is financed in the framework of contract No. 768/P-DUN/2016 by the Ministry of Science and Higher Education committed to activities aimed at the promotion of education.

YEARBOOK of ANTITRUST and REGULATORY STUDIES
www.yars.wz.uw.edu.pl

Peer-reviewed scientific periodical, focusing on legal and economic issues of antitrust and regulation.

Centre for Antitrust and Regulatory Studies, University of Warsaw, Faculty of Management
www.cars.wz.uw.edu.pl

Guest Lecture: Peter Behrens, *The Continuing Relevance of Ordoliberal Thinking in European Competition Policy and Law*, 27 January 2016 (Q&A Session)

Dr. Maciej Bernatt (University of Warsaw, Centre for Antitrust and Regulatory Studies) has opened the Q&A session.

Nikodem Szadkowski (practicing lawyer): I like the ordoliberal approach and I think that most of the economists dealing with competition issues would agree with what you have said here today. Insights from Schumpeter are accepted by most of the economists, either American or European. Nevertheless, you seem to deny modern economic thinking the role of creating benchmarks for assessing market behavior. What I mean is all those general principles you describe are right. We like more choice, more competition, but it may break down if you look at concrete cases because sooner or later you are going to be confronted with such questions as what competition is; how much freedom of choice should consumers have; what is the sufficient number of competitors in the market and; that is where economics helps. If you analyze the issue from the consumer welfare perspective, for example, a small number of suppliers could be competitive despite the simplified view identifying competition only with a big number of suppliers. I do not regard those two views as contradictory, but rather as complementary.

Prof. Peter Behrens: Economics helps in understanding what is going on in the market. Economics has made a lot of progress. When it comes to defining the relevant market, ordoliberals are open to economic and econometric studies and projections of the future. Let me refer to your example of a monopolist who potentially could be the most efficient. When you have two firms holding fifty percent each, should the merger be allowed simply on the grounds that consumers may benefit from lower prices? In other words, should we sacrifice a market structure that allows minimum freedom of choice for consumers? Should we sacrifice competition between the two firms for the sake of little more efficiency in terms of prices? The controversy revolves around the question what kind of efficiency are we talking about? We distinguish productive efficiency, allocative efficiency, and dynamic efficiency. I think that despite some difficulties we can in a relatively easy way measure productive efficiency – lower cost, lower prices. However, how can we measure allocative efficiency if we define allocative efficiency in terms of certain consumers' preferences? Producers deliver what consumers want, and the allocation of the resources should be such that they

are allocated to them in the most efficient way – most efficient in terms of people's preferences. Nobody can measure dynamic efficiency. It is impossible. This is the reason why I am skeptical. If you read Article 101(3), I believe productive efficiency is at stake. Productive efficiency may justify the restriction of competition if there is efficient external competition left that may put pressure on the cartel. It is a question to what degree we should allow welfare and economics to overrule our desire to maintain the competitive process. Otherwise we should apply as much economics, which I call forensic economics. We have forensic psychology, forensic psychiatry, why not forensic economics? This is different from using welfare economics as a norm. The norms are in the Treaty, whereas there is not one economics. You have many different modules, which are based on assumptions, sometimes normative ones. Thus, the question is why should we replace the normative basis of the Treaty by norms we find in the economic market.

Nikodem Szadkowski: Why? Because economic norms are less fuzzy. If you have a norm, using as its building-blocks words such as *sufficient, artificial change in market*, it clearly invites flights of fancy. People could turn those concepts around.

Prof. Peter Behrens: Yes, indeed. Nonetheless, if you have a case of retroactive rebates should it not be sufficient if the Commission proves that competitors would be unable to compete in terms of prices with a dominant firm which applies a retroactive rebate scheme. Should this be allowed even if the consumers get lower prices? The rebates lead to lower prices for consumers, so where is the consumer harm? Predatory pricing – don't consumers profit? Should we not allow predatory pricing? Naturally it is temporary. I do acknowledge the role of economics, but we have to stick to legal foundations as well.

Dr. Andrzej Nałęcz (University of Warsaw, Faculty of Management): Do you think that from an ordoliberal point of view the regulations related to the European telecommunications sector have gone too far? The latest *EU Regulation on the Open Internet* stipulates that public network operators have to offer either an open, unlimited internet access service or a specialized service that may not serve as a substitute for open access. Do you think that from an ordoliberal point of view this is excessive or is it acceptable?

Prof. Peter Behrens: The first question is the most difficult one because I am not familiar with that specific regulation, but certainly regulation can go too far. There is always a risk of overregulation and it needs to be properly balanced. The regulation is simply *ex-ante* abusive control. Without such regulation we would apply Article 102, but on the case by case basis such a method is not practical. In network industries particularly we need clear rules in advance, but the idea of regulation is still fighting abuse. Limiting access to the network is abusive. I have no specific response to your question.

Marcin Kolasiński (practicing lawyer): We have heard from you that dominance is acceptable, so it should not be prohibited. It is the abuse of this dominance which is prohibited. Whether something is an abuse or not is defined by the rules of the game, namely competition law. Yet apart from competition law a growing number of cases influences the way we understand competition law. Why, as a dominant

company, can I not use target rebates? I do not want to decrease competition in the market. What I want is only not to lose my position, which is fine. We can protect our position, but if the case law prohibits me from using target rebates, my competitors will achieve a better position on the market than me since they will offer better conditions to the clients. In your opinion, the rules of the game should be rather dictated by competition law or by the case law? How should this case law be interpreted? My view is that when we look at case law, especially in Poland, our approach is too simplified.

Prof. Behrens: It would be desirable from the perspective of your clients to have clear rules, but this is a legislative problem in my opinion. Could you as a lawyer come up with a clear rule at least for a certain category of cases? I am afraid that every case is special and all we can do is apply these admittedly broad concepts, make sense out of it, but I think that over decades of jurisprudence lawyers could give us a safe solution, but we should be careful about every case. When it comes to loyalty rebates you have some idea what goes too far. You can calculate what prices the competitor has to offer to compete for the contestable part of the supply of the demand. Here economics is absolutely helpful and indispensable. I would say that the test of efficient competitors is disastrous for dominant firms because they cannot properly calculate what they are allowed to do or not. There is always a possibility to justify – you must prove as a dominant firm that what you are doing is legitimate. There is always room for justifications.

Jarosław Sroczyński (practicing lawyer): I will follow on my colleague's question, which I would like to rephrase. Is it the right time we should introduce and express the rule of reason into the abuse of dominance system, that is, to supplement Article 102 and its national equivalent by some form of explanation? What is allowed, what is not allowed? As we know, there is nothing like a rule of reason expressed in Article 102 for agreements limiting competition. However, if you are looking at the case of Post Danmark I of 2010, you will find competition on the merits, where the Court has agreed that a weaker entrant can be wiped out of the market by the incumbent if the latter plays the rules of the game correctly and competes on the merits. In Post Danmark II we have the "as/if" situation, we have the Guidelines of the Commission. All that taken together – what do you think from the ordoliberal perspective. Should the law be supplied to give us more comfort or should it be left to occasional analysis case by case?

Prof. Peter Behrens: Answering the third question I would like to say that there is always a possibility to justify conduct on objective grounds. You must prove as a dominant firm that you are promoting your legitimate business interests, which are not nearly meant to drive out your competitors. Although it is not the rule of reason there is still room for justifications or counterarguments.

Jarosław Sroczyński: However, ontologically, without the rule of reason we are in a dark room because there is a big difference at the end of the day to claim that there was a restriction of competition and yet it can be excused, explained, as opposed to the situation under Article 102 when we must prove that there was no restriction of competition. Formally speaking, we cannot say that there was a restriction, but we are

explaining it. We must end up with the reasoning which will lead us to the conclusion that there was no restriction.

Prof. Peter Behrens: Don't you think that this is part of the Commission's rules already? They should at least consider not only those facts that are detrimental to the dominant firm. My feeling is that the Commission tries to rule on this already. Of course the Commission is not always right, but the formal rule of reason would increase the problem and it will make it more difficult for your clients to plan their strategies.