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Guest Lecture: Paul Nihoul, *Freedom of Choice as a Possible Paradigm for Competition Law*, 17 December 2015 (Q&A Session)

Professor Tadeusz Skoczny (University of Warsaw, Centre for Antitrust and Regulatory Studies) has opened the Q&A session.

Dr. Tomasz Bagdziński (practicing lawyer): I have a question related to the institution of choice as a value in the context of standardization. Setting standards is not seen as a bad practice, although it often does limit the possibility of choice to one single option, like it was in the case of cassettes. Would you say therefore that standardization becomes automatically wrong because it does not leave us with any choice?

Prof. Paul Nihoul: If you buy a printer you need cartridges – printer manufacturers throw their printers free of charge so that users are technically forced to use only the cartridges produced by those manufacturers, very expensive cartridges. I can thus get a cheap printer and I am locked in. We have to find the right measure – from which moment onwards do we need choice? What is the level at which we need competition? Surely, at a certain level we need it. In my opinion, the criterion is the opinion of consumers. If you need a printer, would you like to choose the cartridge? [Few people from the audience raised their hands] What kind of products would you like? Are you happy paying Intel to make sure there are no alternatives? This is a question about standards. Should we have at a certain time the standard that everyone agrees on? This is a question of choosing the level where choice exists.

Nikodem Szadkowski (practicing lawyer): I would like to understand better what is your criterion for saying that a given behavior is sufficiently competitive or not. Clearly, maximizing choices does not look like a good point to me. Choice itself does not seem to be a good guide for competition policy. If something is efficient, it will promote choice in most of the cases, but if you make maximization of choices as the paramount goal of competition law, then we all end up in a situation we would not like to be at.

Prof. Paul Nihoul: I think it is only a proxy. I personally like the definition which is given by the Court of Justice of the European Union to the notion of dominance and I think we can apply it also to the concept of market power. First, I need an obligatory partner, second, I have the capacity to behave independently, and third, I have the ability to fix the conditions on the market. It is a qualitative approach. In most cases a big market share would mean that there is no credible competition. For example, there are several supermarkets in Belgium, so there is no dominance, there is not even market power and yet each of them has control over suppliers to the extent that they are actually threatening the existence of choice. Even though there is no huge market share, they are in the position to alter fundamental market mechanisms. Most of us are concerned with the application of competition law in our country, but we have to be aware of the fact that the firms that we represent now do not operate only in Poland, but also in Africa, Asia, America; and they apply different standards on those continents. There is a need for the same standard worldwide. What is it going to be? Chicago standard based on science, but not accepted by everybody?

Jarosław Sroczyński (practicing lawyer): I have a general question related to one of the features discussed during your lecture, namely fairness. How do you understand fairness? I think it may contain an ocean of interpretations. Do you think that fairness means that some entities should be receiving protection if they are weaker for example?

Prof. Paul Nihoul: There was a famous case of the firm in the UK with only 12% market share, which was thought to be dominant on the secondary market of cash registers, because they were the only one able to provide spare parts for machines. The primary market was for the machines – the secondary market was for spare parts. Everybody is criticizing it saying that there are other cash machines, people should have a choice. I find this interesting since it denies access to other producers – access to the market, which is extremely important in Europe. Why is this? It is a question of opportunities and a question of efficiency. Back in the 19th Century, the man who stands in the middle of this square – Napoleon Bonaparte – said we are not going to be able to win if we keep the elites as the heirs; we need some fresh air from time to time. We need new people coming in and that is where the idea of meritocracy comes from – allowing people through education to come to mid positions and to serve the country. It is the same with markets! Do we want Microsoft to be there forever impeding access to third parties? Do we want Intel to stay forever, or do we have to provide for some mechanism allowing 3rd parties to enter the market and give consumers a choice? That is the question. Personally, I don't like the concept of fairness, but I do like the concept of market access. Those of you interested in the internal market may follow the case law and see whether national regulation hinders access of other European countries to the national market.

Dr. Piotr Semeniuk (journalist at Polityka Insight): I am puzzled about this notion of choice you are trying to advocate. I am not sure whether you try to defend this notion as a proxy for efficiency, which is intriguing in my opinion since you can understand it however you want. Do you only treat choice as a proxy for efficiency, or do you defend choice as a choice *per se*? Will you also advocate protecting competitors who are less efficient, as there is no way to become more efficient in a foreseeable future just for the sake of protecting another product they produce and for the sake of choice? And if you defend this, which is very intriguing, than we move beyond the traditional understanding of competition law in my opinion. Maybe it is the right choice, I am just not sure whether this is the notion of choice you are trying to defend.

Prof. Paul Nihoul: Am I using choice as a proxy for efficiency? Economics is producing such interesting tools that it would be foolish not to use it. My economic definition of efficiency would be, simply said, prices as low as possible. The definition of choice would be the capacity of a market to produce outcomes, which are found satisfactorily by people. How to translate that into tools, that is a different question, but the two cases show us that there are instances where, even though you have very low prices, consumers are in fact unhappy. They would prefer another solution. How can we work out another definition of efficiency? I think it is related to the question of choice as well as fairness. Should we have a competition policy where we take the risk to defend competitors who are not as efficient as the big one?

That is 'as-efficient-competitor' test. If you defend a small firm which is not as efficient as the big one, you are providing society with bad quality, because the big company would produce better things.

Dr. Maciej Bernatt (University of Warsaw, Centre for Antitrust and Regulatory Studies): I have a short question. I would like to ask whether in the US this paradigm of choice is also present in the academic discourse?

Prof. Paul Nihoul: Chicago translates into economic concepts and terms and equations, it is a faith in the markets. That is what increasingly impacts American competition, particularly because if you see the main judgement defended by most economists who say that we don't price amendments and others who say we need it. Concretely, if you shift evidence, you see it is very complicated. It shows that a given situation is complicated for the society. It is impossible to find the right answer, but now predominantly, also for political reasons, the Chicago School is the dominant one.

Law Student: How do you define 'choice'? What does choice mean? Is it about having the choice between products made by different companies or would it be sufficient for consumers to have a choice of products offered by one company? For example, Apple releases a new phone model every minute just because they know consumers would like an upgraded product. That is what drives the company to be more innovative. Even if there is not much competition, the company still wants to offer a better product, because it knows that the consumers would buy a new device and that they expect new products.

Prof. Paul Nihoul: Apple is a very interesting case indeed. I can send you back to books written by Michael Porter, a Harvard Business School Professor. He is a guru of strategy in the US and the reason why he has become the guru is that he has been studying the profits made by companies in the US. He has arrived at the conclusion that the best way to make money is not necessarily to be innovative, not necessarily to make the best products, but to make sure you have a competitor, because you can increase the prices and put money into your pocket. So how do you turn a product into a monopolistic situation? That is exactly the question he was asking. That is what Apple is able to do to a certain extent, because if Apple does not keep on releasing new products, it is going to lose its customers to some other producers. Apple has been able to produce an ecosystem locking its consumers in and making them buy new products. When the battery is not working anymore, memory is not big enough to download new applications, it is time to change your phone, but you still have a choice.

Constantly renewing the necessity to buy they are trying to lock-you-in the Apple ecosystem limiting your possibility to change. It is true that there is no competition.

Dr. Jan Walulik (University of Warsaw, CARS): I have the impression that in a longer-term there is something dangerous about the theory of freedom of choice you are presenting. It is prone to manipulation and it deprives competition policy of its economic content. It focuses on the freedom of choice in a non-quantitative way. Freedom of choice is seen as personal freedom of consumers.

Prof. Paul Nihoul: Let me answer briefly that choice is not a value in itself and it is economically undefinable. I would like to stress that examining consumers' preferences with the use of surveys is a valid scientific method applied very often in different scientific fields.

Prof. Skoczny: Thank you very much. It was a pleasure to have you here. It was a very fruitful discussion. I have to say that I like much more the previous title of your lecture "Fairness, efficiency, choice". We still have to discuss the relation between all these values. We hope that Professor Nihoul will deliver in the future more choices as a Judge of the European Court.

Prof. Paul Nihoul: Thank you Tadeusz for your invitation as well as your excellent capacity to organize events, conduct research and manage teams. I would also like to thank the President of the Competition Office, Adam Jasser, for his warm hospitality, his dedication to reforms and intellectual stimulus.