

YEARBOOK
of ANTITRUST
and REGULATORY
STUDIES

Volume Editor:
ANNA PISZCZ

Vol. 2016, 9(14)



CENTRE FOR ANTITRUST AND REGULATORY STUDIES University of Warsaw



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

Seventy-fourth Publication of the Publishing Programme



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.

Copyright by Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, Warszawa 2016

Translator: Ewelina D. Sage

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
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; www.elipsa.pl

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
VOL. 2016, 9(14)

Contents

| | |
|---|-----|
| Editorial foreword | 7 |
| List of acronyms | 11 |
| GUEST ARTICLE | |
| DANIEL BARNHIZER, Contracts and Automation: Exploring the Normativity of Automation in the Context of U.S. Contract Law and E.U. Consumer Protection Directives..... | 15 |
| ARTICLES | |
| TIHAMÉR TÓTH, The Interaction of Public and Private Enforcement of Competition Law Before and After the EU Directive – a Hungarian Perspective | 43 |
| DOMINIK WOLSKI, The Principle of Liability in Private Antitrust Enforcement in Selected European States in Light of the Implementation of the Damages Directive into the Polish Legal System | 69 |
| MACIEJ BERNATT, Effectiveness of Judicial Review in the Polish Competition Law System and the Place for Judicial Deference | 97 |
| KSENIJA SMYRNOVA, A Comparative Analysis of the Collective Dominance Definition in Ukrainian and European Law – the Electricity Market Case | 125 |
| VIRÁG BLAZSEK, Competition Law and State Aid for Failing Banks in the EU and its Specific Implications for CEE Member States..... | 145 |

| | |
|---|-----|
| MARCIN KRÓL, JAKUB TACZANOWSKI, So Close, So Different – Regional Rail Transport in Poland, the Czech Republic and Slovakia | 159 |
|---|-----|

NATIONAL LEGISLATION & CASE LAW REVIEWS

| | |
|--|-----|
| SOLOMON MENABDISHVILI, Merger Control in Georgia – National Legislation and Case Law Review | 181 |
| ALEXANDER KOROBENIKOV, Overview of Kazakhstani New Anti-monopoly Regulation..... | 195 |
| ANNA PISZCZ, A Note on 2015 Developments in Polish Competition Law: Is it Really a Drive Towards the European Model?..... | 203 |
| PETR FRISCHMANN, VÁCLAV ŠMEJKAL, 2016 Amendment of the Czech Significant Market Power Act of 2009..... | 227 |
| PAULINA KORYCIŃSKA-RZĄDCA, Review of the New Polish Model of Abstract Control of Standard Forms of Agreements Concluded with Consumers | 247 |

CASE COMMENTS

| | |
|---|-----|
| SANDRA MARCO COLINO, What Role for EU Competition Law in Regulated Industries? Reflections on the Judgment of the General Court of 17 December 2015 <i>Orange Polska v European Commission</i> (Case T-486/11)..... | 265 |
| OLGA STEFANOWICZ, Guidance on the Limits for the Use of Restrictive Clauses in Commercial Lease Agreements – Once Again on Restrictions “by Object”. Case Comment to the Preliminary Ruling of the Court of Justice of 26 November 2015 <i>SIA ‘Maxima Latvija’ v Konkurences padome</i> (Case C-345/14)..... | 279 |
| BARTOSZ TARGAŃSKI, Antitrust Liability in the Context of Online Platforms. Case Comment to the Preliminary Ruling of the Court of Justice of 21 January 2016 <i>‘Eturas’ UAB v Lietuvos Respublikos konkurencijos taryba</i> (Case C-74/14) | 293 |
| TIHAMÉR TÓTH, Evaluation of Pre-accession State Aid in the Energy Sector. Case Comment to the Judgment of the Court of Justice of 1 October | |

| | |
|---|-----|
| 2015 <i>Electrabel SA, Dunamenti Erőmű Zrt. v European Commission</i> (Case C-357/14 P)..... | 299 |
|---|-----|

BOOKS REVIEWS

| | |
|---|-----|
| PIOTR SEMENIUK, <i>Konceptcja jednego organizmu gospodarczego w prawie ochrony konkurencji [The Concept of a Single Economic Unit in Competition Law]</i> , University of Warsaw Faculty of Management Press, Warsaw 2015, 325 p. Reviewed by AGATA JURKOWSKA-GOMUŁKA..... | 317 |
|---|-----|

REPORTS

| | |
|---|-----|
| The Pursuit Before Polish Courts of Actions for Damages Based on Competition Law Infringements. Warsaw, 20 April 2016. Reported by PAULINA KORYCIŃSKA-RZĄDCA..... | 321 |
| Third National Conference: Consumer in the Rail Passenger Market. Łódź, 10 May 2016. Reported by KATARZYNA CHOJECKA, MARCIN KRAŚNIEWSKI, TOMASZ MIZIOCH, AGNIESZKA SOBIERAJSKA | 325 |
| 4th Polish-Portuguese PhD Students' Conference on Competition Law. Białystok, 10 June 2016. Reported by MAGDALENA KNAPP, RADOSŁAW NIWIŃSKI..... | 335 |
| Special Report on the Centre for Business Law and Practice, University of Leeds. Reported by PETER WHELAN | 338 |
| Articles in YARS 2008–2016 | 341 |

Editorial foreword

The editorial board is pleased to present the 14th volume of the Yearbook of Antitrust and Regulatory Studies (YARS 2016, 9(14)).

We are honoured to begin this volume with a guest article written by Professor Daniel Barnhizer (Michigan State University College of Law), a contribution which examines one of the big issues of our times – “Contracts and Automation: Exploring the Normativity of Automation in the Context of U.S. Contract Law and E.U. Consumer Protection Directives”.

Continuing the tradition set by YARS in 2013, the papers published in the current volume focus not only on the Polish competition law regime, but present also the national competition laws of other CEE countries as well as the Caucasus.

In the ‘Articles’ section, the current volume provides an insight into a variety of issues. They relate, first of all, to private enforcement of competition law. It seems that this is the last moment to try to provide *de lege ferenda* suggestions for EU Member States before the transposition of 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) into their national legislation. What suggestions can be made in this regard to Poland and Hungary? Answers to this question can be found in two articles. The paper written by Dominik Wolski looks at the principle of liability in private antitrust enforcement in selected European states in light of the implementation of the Damages Directive into the Polish legal system. Tihamér Tóth presents the Hungarian perspective on private enforcement and collective redress of EU competition law. Jurisdictional questions, collecting evidence, the interaction of public and private enforcement as well as collective redress prove to be among the most debated issues according to reports from Member States.

The current volume contains also a paper on the effectiveness of judicial review in the Polish competition law system (Maciej Bernatt). Is the Polish



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.

status quo satisfactory or not? It needs to be noted that this paper considers the permissibility of judicial deference. Worth recommending is the article written by Kseniia Smyrnova which contains a comparative analysis of the collective dominance definition in Ukrainian and European law on the example of the electricity market case. Included in the 'Articles' section of this YARS volume is a paper that introduces the issues of competition law and state aid for failing banks in the EU and its specific implications for CEE Member States (Virág Blazsek). Finally, the 'Articles' section provides readers with a great opportunity to familiarise themselves with the topic of regional rail transport in Poland, the Czech Republic and Slovakia, including its current models and history, as well as its spatial and socio-economic context (Marcin Król, Jakub Taczanowski).

Aside from the above research papers, the current volume of YARS contains also a number of national legislation and case law reviews. The first contribution contains a review of Georgian legislation and case law on merger control (Solomon Menabdishvili). Provided next is an overview of the new Kazakhstani anti-monopoly regulation (Alexander Korobeinikov). It is followed by critical assessment of 2015 developments in Polish competition law (Anna Piszcz). Discussed next is the 2016 Amendment of the Czech Significant Market Power Act of 2009 (Petr Frischmann, Václav Šmejkal). The final contribution consists of a review of the new Polish model of abstract control of standard forms of agreements concluded with consumers (Paulina Korycińska-Rządca).

The current volume of YARS also offers four case comments. This section opens with Sandra Marco Colino's reflections on the judgment of the General Court in case *Orange Polska v European Commission*. Olga Stefanowicz and Bartosz Targański analyse two preliminary rulings of the Court of Justice regarding anti-competitive practices (respectively, *SIA 'Maxima Latvija' v Konkurences padome* and *'Eturas' UAB v Lietuvos Respublikos konkurencijos taryba*). There is also something for those who prefer State aid issues, a comment by Tihamér Tóth to the judgment of the Court of Justice in case *Electrabel SA, Dunamenti Erőmű Zrt. v European Commission*.

In its next section, YARS contains the review of a Piotr Semeniuk's book published in 2015 in Poland regarding the concept of a single economic unit in competition law.

The final section of the current volume of YARS is devoted to 'Reports'. This section covers, first, the national conference on the pursuit before Polish courts of actions for damages based on competition law infringements which was held in Warsaw in April 2016. The following report concerns an event that took place in Łódź in May 2016 – the third national conference devoted to consumers in the rail passenger market. The last reported gathering, the 4th

Polish-Portuguese PhD Students' Conference on Competition Law, was held at the University of Białystok in June 2016 (it is worth mentioning that the 5th international conference of this series has already taken place in Białystok in October 2016). The 'Reports' section concludes with a Special Report on the Centre for Business Law and Practice at the University of Leeds.

I end this brief editorial note with expressions of deep gratitude. I wish to thank the authors and various anonymous reviewers who willingly gave their time and expertise to contribute to the current volume.

Białystok, 22nd November 2016

Anna Piszcz
YARS Volume Editor

List of acronyms

Institutions

- AMCU** – Antimonopoly Committee of Ukraine
- CAT** – Competition Appeal Tribunal (UK)
- CFI** – Court of First Instance
- CJ** – Court of Justice
- CJEU** – Court of Justice of the European Union
- CMA** – Competition and Markets Authority (UK)
- DG** – Directorate General
- EC** – European Commission
- ECB** – European Central Bank
- ECJ** – European Court of Justice
- GC** – General Court
- ICSID** – International Centre for Settlement of Investment Disputes
- NCA** – National Competition Authority
- NEURC** – National Energy and Utilities Regulatory Commission of Ukraine
- NRA** – National Regulatory Authority
- SA** – Appellate Court of Warsaw, *Sąd Apelacyjny w Warszawie* (Poland)
- SN** – Supreme Court, *Sąd Najwyższy* (Poland)
- SOKiK** – Court of Competition and Consumers Protection, *Sąd Ochrony Konkurencji i Konsumentów* (Poland)
- UKE** – Office for Electronic Communications, *Urząd Komunikacji Elektronicznej* (Poland)
- UOKiK** – Office for Competition and Consumers Protection, *Urząd Ochrony Konkurencji i Konsumentów* (Poland)
- UTK** – Office of Rail Transport, *Urząd Transportu Kolejowego* (Poland)



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.

Legal acts

- ACCP** – Polish Competition and Consumer Protection Act
APEC – Czech Act No. 143/2001 Coll. on protection of economic competition
ARC – German Act Against Restrains Competition
CC – Polish Civil Code of 23 April 1964
ECHR – European Convention on Human Rights
ECT – Energy Charter Treaty
GVH – Hungarian Competition Authority
LC – Law on Competition (Georgia)
LPEC – Law on the Protection of Economic Competition (Ukraine)
SMP – Significant Market Power
SMPA – Czech Significant Market Power Act of 2009
TEC – Treaty establishing the European Community
TFEU – Treaty on the Functioning of the European Union

Other acronyms

- AG** – Advocate General
AO(s) – alternative operator(s)
BSA – bitstream access
CEE – Central and Eastern Europe(an)
CEECs – Countries of Central and Eastern Europe
CIT – Corporate Income Tax
CZK – Czech koruna
DB – Deutsche Bahn
ECR – European Court Reports
EFTA – European Free Trade Association
EU – European Union
GDP – gross domestic product
GEL – Georgian lari
HUF – Hungarian Forint
iKAR – *internetowy Kwartalnik Antymonopolowy i Regulacyjny* (Poland)
LLU – local loop unbundling
MEI(P) – Market Economy Investor (Principle)

-
- OJ** – Official Journal
PIT – Personal Income Tax
PLN – Polish złoty
PMEIT – private market economy investor test
PPA(s) – power purchase agreement(s)
SO – Statement of Objections
SSM – Single Supervisory Mechanism
UK – United Kingdom
YARS – Yearbook of Antitrust and Regulatory Studies

**Contracts and Automation: Exploring the Normativity
of Automation in the Context of U.S. Contract Law
and E.U. Consumer Protection Directives**

by

Daniel Barnhizer*

CONTENTS

- I. Introduction
- II. Developments in the Automation of Contract
- III. Contract Practice and Homeostasis with the Contracting Environment
- IV. Automation of Contract Inputs
- V. Automation of Contract Outputs
- VI. Developing a Model of Automated Contract Doctrine
- VII. The Codability of Consumer Protection: Unconscionability versus Polish Civil Code Article 385¹
- VIII. Conclusion

Abstract

Given a choice between two systems of contract rules, a court or legislature may have a normative obligation to adopt the rule that is more susceptible to coding and automation. This paper explores the ramifications of that normative proposition through the lens of multiple contract doctrines that traditionally involve “messy” judgments or multiple interacting judgments regarding which human beings are – arguably – capable of making finely nuanced analyses. Using the common law doctrine of unconscionability and Polish Civil Code Article 385 on unfair terms in

* Professor of Law, Michigan State University College of Law, Bradford Stone Faculty Scholar; e-mail: daniel.barnhizer@law.msu.edu. Article received: 23 September 2016; accepted: 21 November 2016.



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.

consumer contracts, this paper explores the differences between contract rules that require human analysis versus those that can be applied with strong reliability by automated processes. Finally, the paper analyzes some of the potential pitfalls of this normative proposition in light of technological, economic, and moral/ethical concerns.

Résumé

En donnant le choix entre deux systèmes de règles contractuelles, un tribunal ou une législature peut avoir l'obligation normative d'adopter une règle qui est plus susceptible de codification et d'automatisation. Cet article analyse les conséquences de cette proposition normative à travers des différentes doctrines contractuelles qui impliquent traditionnellement des jugements "désordonnés" ou des jugements multiples dépendant de la profondeur de l'analyse. En faisant la référence à la doctrine de "common law" de l'inconscience et à l'article 385 de Code Civil polonais concernant les clauses contractuelles abusives dans les contrats conclus avec les consommateurs, cet article explore les différences entre les règles contractuelles qui exigent une analyse humaine et celles qui peuvent être appliquées avec une grande fiabilité par des processus automatisés. Enfin, le document analyse certaines difficultés potentiels de cette proposition normative à la lumière des préoccupations technologiques, économiques et morales / éthiques.

Key words: contract automation; unconscionability; consumer protection; dispute resolution.

JEL: K12; K40; O33

I. Introduction

The processes associated with the practice of contracting and the practice of law have achieved high levels of automation. Automation in contracting has been around since the first standard form contracts eliminated individualized judgments and negotiations over contract terms. From there, contract automation has extended beyond mere mass produced contract forms to sophisticated contract assembly, machine contracting, and so-called "smart contracts" that are self-enforcing across a wide range of performance actions by the parties. Likewise, the practice of law in creating and developing new contract tools has followed a similar automation curve, increasing in complexity over time.

In contrast, contract common law itself has largely trailed this tendency towards automation. To some extent, it is inevitable that contract doctrines must lag behind changes in practice, but given the changes in contracting

practices over the last 150 years, common law courts and legislatures have developed relatively few doctrinal tools that promote or manage automation of contracts. A few notable examples of automation-friendly doctrinal changes in the United States include Judge Easterbrook's "money-now-terms-later" offer and acceptance paradigm in *Hill v. Gateway2000, Inc.*¹, treatment of one party's use of standard form contracts of adhesion as almost per se procedural unconscionability², and federal and state legislation deeming electronic signatures to be legally equivalent to physical signatures³. Despite these tentative steps, U.S. contract law has remained largely unsuited to large-scale automation of contract dispute resolution processes.

The disconnect between contract common law doctrines and actual contracting practices is problematic as courts attempt to use paper-era tools to police information-era practices. As Roscoe Pound observed at the inception of the American Legal Realist movement, this disagreement between the law on the books and the law in action as it deals with real cases is profound.

"[I]f we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations between man and man and those that in fact govern them, will appear, and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one" (Pound, 1910, p. 15).

In light of this rapidly widening gap between law and practice, this essay explores the hypothesis that given a choice of adopting new contract rules, a common law court or legislature has a normative obligation to adopt the rule that is more susceptible to coding and automation. In other words, given that nearly all contracting practice today is automated to some extent, do common law courts have a normative obligation to exercise judicial discretion to facilitate the codability and automation of the law itself? What are the ramifications of that normative proposition through the lens of multiple common law contract doctrines that traditionally involve "messy" judgments or multiple interacting judgments involving finely nuanced contextual analysis? Are there aspects of

¹ 105 F.3d 1147 (1997).

² See, e.g., *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005) (abrogated on other grounds by *AT&T Mobility LLC v. Concepcion*) ("The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.") (internal quotation marks omitted); *Armendariz v. Health Psychare Services, Inc.*, 6 P.3d 669, 690-94 (Cal. 2000) (adhesion contract found procedurally unconscionable).

³ Electronic Signatures in Global and National Commerce Act, Pub. L. 106-229, 114 Stat. 464, 15 U.S.C. §§ 7001-7006 (30.06.2000); National Conference of Commissioners on Uniform State Laws, Uniform Electronic Transactions Act (1999).

contract law that could be adjusted with no loss in justice, but with significant gains in terms of speed and regularity in the dispute resolution process? What are the potential pitfalls of such automation? And finally, does Polish civil law (and by extension EU directives) on consumer protection provide a useful model for what an automated legal regime could look like?

This analysis begins by surveying automated contracting. In particular, I will examine the concepts of automated and codable contract practice, law, and dispute resolution. In contrast to the extraordinary degree of automation in the practice of contracting, the American common law of contract has largely failed to facilitate automated contract practices except in marginal cases. Importantly, the lack of attention to automation practice has created a situation in which the pace of contracting is massive but the ability of courts to police abuses of contract has not increased significantly over pre-information era law. Against this background of automation in the practice of contracting, I compare two relatively specialized cases to develop issues relating to the codability of common law concepts to enable automation. Specifically, this comparison will examine the Polish enactment of the E.U. Directive on Unfair Terms in Consumer Contracts⁴ and the U.S. common law doctrine of unconscionability.

II. Developments in the Automation of Contract

A humorous article describes the study of contract law as focused irrelevantly on fully bargained, “bespoke”⁵ agreements carefully hammered out between individuals:

“An honest list of [law school] course descriptions might look something like this: ... Contracts. Study rules based on a model of two-fisted negotiators with equal bargaining power who dicker freely, voluntarily agree on all terms, and reduce their understanding to a writing intended to embody their full agreement. Learn that the last contract fitting this model was signed in 1879” (Gordon, 1991, p. 1696).

Although satirical, this description captures an important truth about the divergence between contract law and contract practice. Contract practice – the way in which parties actually craft agreements in the commercial and

⁴ Council Directive 93/13/EEC of 05.04.1993 on unfair terms in consumer contracts Art. 3(1); see also European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995, S.I. No. 27/1995.

⁵ Richard Susskind, in *The End of Lawyers*, discusses the evolution of legal services along a continuum from “bespoke” or custom work produced ad hoc from scratch by a lawyer for an individual client’s use through developments that render the work standardized, systematized, packaged, and finally “commoditized”; Susskind, 2010, pp. 28–52.

consumer world – does not look very much like the model assumed in the common law rules that courts use to enforce contracts. Contract practice has automated, first through widespread use of standard form agreements, and more lately through information era technological developments such as so-called “wrap contracts”⁶, contract assembly, automated contract analysis, and smart contracts. But contract law – specifically the common law of contract and the statutory Uniform Commercial Code – has largely maintained the same model of individual negotiation and agreement that existed at the end of the 19th century.

Contracting practice over the last 150 years can be described as a relatively steady transition from “non-programmed” to “programmed” decision making. In his early explorations of the impact of automation and computer-supported decision making in the corporate management context, Herbert A. Simon described “programmed” decisions as those decisions which are “repetitive and routine, to the extent that a definitive procedure has been worked out for handling them so that they don’t have to be treated *de novo* each time they occur” (Simon, 1960a, pp. 58–59). In contrast, “non-programmed decisions” address ad hoc, novel, or unusual situations in which “[t]here is no cut-and-dried method for handling the problem because it hasn’t arisen before or because its precise nature and structure are elusive or complex or because it is so important that it deserves a custom-tailored treatment” (Simon, 1960a, p. 59).

The movement from programmed to non-programmed decision making occurs in production of goods and services, contracting practices between and among producers and consumers, and in the background law controlling those contracts. The interactions between these three contexts are dynamic. Technological developments in manufacturing create a need for new contract terms and business institutions as parties try to take advantage of increased capacities to supply more goods at higher levels of quality. At the same time, the new possibilities for production and contract sophistication created the need for new common law approaches to enforcing contracts dealing with situations not present in pre-industrial economies⁷.

⁶ Wrap contracts refer to shrinkwrap, browserwrap, and clickwrap contracts. See Kim, 2013. See also Barnhizer, 2014, pp. 215–229 (analyzing quality of assent in various types of wrap contract situations).

⁷ For example, Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit observed in his [in]famous *Hill v. Gateway2000, Inc.*, 105 F.3d 1147, 1149 (1997), opinion that practical considerations in the sale of a computer over the phone made it impracticable for sales agents “to read the four-page statement of germs before taking the buyer’s credit card number,” and that “the droning voice would anesthetize rather than enlighten many potential buyers”.

This movement of contract practice from non-programmed to programmed decisions can be seen most clearly in the context of standard form contracting. The earliest standard form contracts developed incidentally out of the standardized and increasingly automated manufacturing processes and new technologies of the early industrial revolution. Before firms needed to deal with both standard products (made possible by mass production technologies and the associated business methods), creating standard contract terms provided benefits that could not significantly outweigh the associated costs of developing and requiring standard terms (see Horwitz, 1977; Kim, 2013, pp. 20–30). As Nancy Kim notes, “[A]s the business environment changed, [the traditional] model of equality [between contracting partners] failed to reflect the reality of many contracting situations. As mass market sales became possible with industrialization, so did mass consumer form contracts” (Kim, 2013, p. 20).

III. Contract Practice and Homeostasis with the Contracting Environment

This interplay between developments in production, commerce, and law is what Simon describes as homeostatic control of the environment in which those processes take place. “Homeostasis” is the process by which a system adjusts to stimuli or inputs in one part of the system that must be balanced by changes throughout the rest of the system. The human body, for example, maintains homeostasis with respect to its own water content. Drinking water hydrates tissues but also activates other body systems that excrete excess water. Exposure to high temperatures activates sweat glands to help maintain body temperatures at an average 98.6°F (37°C). Drinking mild diuretics such as coffee increase excretion to a point, but will also activate other biological systems that retain sufficient water to support bodily functions (Klein, 2013)⁸. And finally, having too little water in the human body causes us to feel thirst and drink more water. Throughout all of this, the human body remains in homeostasis as the entire system reacts to stimuli (temperature, chemicals, intake and outflow of water) to maintain a consistent level of hydration.

Technological developments in production, commercial practice, and the legal environment likewise trigger responses in other parts of the commercial system to maintain a level of homeostatic balance. This does not mean that

⁸ “While caffeine *is* dehydrating, the water in coffee (and tea, for that matter) more than makes up for the effects, ultimately leaving you more hydrated than you were pre-java”.

the system is static⁹ – rather, the commercial system for providing goods and services develops, and changes ripple through the system in response to each new stimulus. As Simon noted, homeostatic control of the commercial environment is a cumulative process: “When we have mechanized one part of a manufacturing sequence, the regularity and productiveness secured from this mechanization generally facilitates the mechanization of the next stage” (Simon, 1960b, pp. 40–41).

Simon observed that mechanization (or what he would later call “automation”) of manufacturing processes inevitably caused other changes in the commercial system. Thus, development of efficient means of mechanized transportation such as railroads and trucks led to the building of paved roads to take better advantage of the increased capacity those vehicles had over prior horse-drawn carriages. “The smooth road provides a constant environment for the vehicle—eliminating the advantage of [horse’s] flexible legs,” ultimately leading to the elimination of the horse as a factor in commercial production (*id.*). Likewise, Simon’s 1960s-era computers vastly increased production firms’ capacity for data analysis and the use of data in firm decision making, but were incapable of reading human handwriting, leading firms to invest in preparing “source data in a form that can be easily read by a machine” (*id.*, p. 42).

This “homeostatic control of the environment” also occurs in the context of commercial activities, transactional practice, and contract law. Improved production and information technologies in the late-19th and early 20th centuries were associated with changes in commercial practice. As commercial practices developed, common law contract rules likewise responded. The development of the objective theory of contract replaced earlier jurisprudence based upon subjective intent and models of enforceability requiring analysis of relatively subjective benefits or detriments incurred by the parties as a result of contractual dealings (Bishop and Barnhizer, 2015, pp. 35–37 (describing the changes in contract law associated with late 19th and early 20th century industrialization); Friedman, 1965, p. 87 (arguing the objective theory of contract was developed by late 19th century scholars to reduce business risks and enhance predictability); Horwitz, 1977).

The information era brought technological advances in contracting practice that radically altered the manner in which consumers interact with producers. As Nancy Kim observes, contracting in the information era is quantitatively and qualitatively different than contracting in a paper-based paradigm (Kim, 2013). First, information-era contracting is quantitatively different in terms of the sheer number of contracts that consumers are required to execute in order

⁹ Similarly, the homeostatic nature of the systems in the human body likewise do not remain in a constant state. Rather, other environmental factors force adjustments to the totality over time.

to obtain goods or services (Kim, 2013). In the pre-Internet era, producers incurred substantial costs in reproducing and maintaining stocks of preprinted paper contracts, as well as transmission costs in providing such contracts to consumers (Kim, 2013, p. 58). Similarly, overly lengthy paper contracts impose costs against consumer goodwill and potentially cause consumer resistance to the proposed bargain.

“The length of a contract signals the importance of a transaction to a customer. Even if consumers generally don’t read their contracts, they may view with suspicion a thick contract handed to them to complete a simple transaction. Even if a customer is unable to negotiate, she will likely flip through the pages and skim the terms. An unusually hefty document for a minor transaction is likely to arouse the customer’s suspicion” (Kim, 2013, p. 58).

In contrast, digital maintenance and presentation of contracts in electronic form imposes no such costs on producers. There is no meaningful limit on the amount of text that can be presented to consumers in an electronic transaction, nor are there the physical signals that might notify consumers that more than a simple purchase of goods or services is occurring (Kim, 2013, p. 58). Information era contracting practices seem to impose contracts on every transaction and to make those contracts longer and more complex.

Second, beyond the sheer quantity of contracts and contract terms, information era contracting also affects the content and quality of the resulting contracts. Producers in the information era have the ability to move beyond mere sales, for example, and instead to impose complex terms upon buyers. For instance, in pre-information era contracting for entertainment products such as “record albums”¹⁰ the consumer might contract with a mail order distributor but more commonly generally only engaged in a face-to-face exchange of money for a physical medium containing the desired music. Even with mail order distributor intermediaries, the contract was short enough that it could be included as a tear-out card or brochure with several hundred words of text.

Compare that experience to the current iTunes or Amazon.com contract – if one takes the time to copy, cut, and paste the digital terms into a document with 12 point Times New Roman font with standard margins, the resulting contract extends for 37 printed pages. More importantly, the contract no longer covers merely the terms of the exchange, but also extends to issues such as Digital Rights Management (“DRM”) that limit the number of copies that may be

¹⁰ It is frightening that the day is fast approaching when the majority of my readers will have never purchased music or video entertainment in the form of physical media. See Christman, 2014 (noting that in 2013 CD sales comprised 57% of music album sales, digital downloads 41%, and vinyl albums 2%).

made and the devices on which the content may be played, collection and sale to third parties of the purchaser's private information, dispute resolution, and other matters no pre-information era producer would have dreamed of including in their short standard form contracts¹¹.

The informality of contracting in the online world, the difficulty of reading, and the extraordinary complexity of terms now made possible mean that consumers can be bound to terms that would have been unthinkable in a pre-information era world. For instance, some Internet sellers in the last several years have attempted to impose non-disparagement clauses upon consumers through their clickwrap and browsewrap contracts, despite that no reasonable consumer would agree to pay thousands of dollars in liquidated damages merely for complaining about a product or service. In one particularly egregious case, KlearGear.com, a seller of knickknacks, included in its clickwrap terms a non-disparagement clause prohibiting buyers from making negative comments regarding the firm to any third party¹². When a customer's wife (who never agreed to the clickwrap terms) became upset that the \$20 USD worth of Christmas presents the customer had purchased from KlearGear.com never arrived, she posted a complaint about the nondelivery and poor service on a consumer complaints website¹³. Three years later, KlearGear.com sent the couple a demand for \$3,500 USD, pointing to the non-disparagement clause and an associated liquidated damages clause¹⁴. Although the consumers successfully defended against the claim and even received a \$306,750 USD compensatory and punitive damages award (see Farivar, 2014), the case demonstrates the opportunities for unscrupulous producers to include pathological terms in their automated contracts in information era contracting.

IV. Automation of Contract Inputs

As suggested by the above discussion, most of the attention to automation in contract has occurred in two areas: the process of contract formation and standardization of contract terms. The process of creating contracts in the information era is automated to such an extent that an individual can potentially

¹¹ The current iTunes and Amazon.com Terms of Use for music purchases can be found at the following websites. iTunes (<https://www.apple.com/legal/internet-services/itunes/us/terms.html>). Amazon.com (<https://www.amazon.com/gp/help/customer/display.html?nodeId=201380010>).

¹² Complaint PP 37-59, *Palmer v. KlearGear.com* Case No. 1:13-cv-00175 (D. Utah Dec. 18, 2013).

¹³ *Ibidem*.

¹⁴ *Ibidem*.

carry out all of his or her activities of daily living without ever involving a natural person or a non-automated contract. Automation organizes and speeds the process of contracting, but as noted above, also provides incentives for producers to include pathological standard terms that would have been unthinkable in before the information era. On the other hand, contract automation tools such as “selective assent” and menued choices make it possible to create systems of term selection by the parties as part of the negotiation process (Barnhizer, 2016, pp. 170–188). I have elsewhere argued that this selective assent can produce contractual assent that is superior to the supposed ideal of dickered agreements (Barnhizer, 2016). Automation also threatens either to eliminate or to alter drastically the nature of legal work regarding the practice of contracting. Likewise, standardization of contract terms assists automated analysis of those terms, permitting some firms to offer statistical analyses of a firm’s entire database of extant contracts¹⁵. In that vein, automation technologies such as predictive coding permit review and analysis of vast arrays of contract terms to determine terms typically required in contracts and best practices. These technologies hold great promise for reducing the cost of legal services in transactional work, or at least for allowing lawyers to handle much greater workloads for contract negotiation, drafting, assembly, and review.

But as Frank Snyder and Ann M. Mirabito note, such technologies also present pitfalls for less powerful and less sophisticated contracting parties: “The last few decades have seen a steady erosion of [contract law’s] importance, and it functions today less as a tool that enables a rich vein of private ordering than as a series of arbitrary traps that lie in wait for the unwary” (Snyder and Mirabito, 2014, pp. 348-49). The technological developments observed by Snyder & Mirabito – the same technologies referred to here under the more general umbrella of “automation” – threaten to render classical common law contract principles outdated and irrelevant:

“We begin with the insight that the processes and rules humans use to carry out commercial transactions and to resolve disputes over those transactions are *technologies*, or, more precisely, as we call them here, *techniques*, the materials and processes of problem-solving. Like other techniques, these processes are subject to becoming outdated by changes in the world that make them less effective. That legal rules of contract become “outdated” and must be revised in light of current needs was, in fact, a principal argument made by the Legal Realist contracts professor Karl Llewellyn, and is nearly a truism today. Thus, contract law has regularly been “updated,” most notably by adoption of the Uniform Commercial Code in the 1960s. But, we argue, contract law’s adaption over the last century and a half has been mostly tinkering with a basic offering, and so contract law has become less and less valuable to contracting parties themselves and less and

¹⁵ ‘Welcome to KMStandards’, <http://www.kmstandards.com>, accessed 12.08.2016.

less important to those (government actors primarily) who would regulate those transactions” (Snyder and Mirabito, 2014, p. 349)¹⁶.

Snyder’s and Mirabito’s observations underscore the challenge of automation to existing legal structures in common law contract doctrine. Courts and legislatures have responded to new technologies that produce qualitative and quantitative changes in the practice of contracting. But those changes are at best marginal and generally fail to respond to real needs of the users of contract law. Instead of tweaking the margins, courts and legislatures need to address squarely the issue of how and to what extent the common law of contracts (and related statutory schemes such as the Uniform Commercial Code) must respond to the new realities of near universal automation of contract practice.

Automation and “codability” are linked concepts. Automation addresses the process by which individual contracting decisions are removed from ad hoc decision making and replaced or supplemented by programmed decision making. Automation occurs with the simplest standard operating procedure to control human agents’ discretion in making or not making a contract or in offering one set of terms versus any other set. The growth of mass contracting practices that diminish or eliminate human discretion has dominated the last century and a half of business methods development. By the 1970s, W. David Slawson famously estimated that “[s]tandard form contracts probably account for more than ninety-nine percent of all contracts made” (Slawson, 1971, p. 529). While necessary for a mass production and mass consumption society, Slawson also observes that automation of contract practice through standard form contracts has the potential to transfer a kind of lawmaking power from legislatures to the producers who draft and control the standard form contracts (Slawson, 1971, p. 529).

Where early 20th century contract automation was almost entirely paper-based, new innovations in contract technology took advantage of existing contract doctrines to automate the process of obtaining consent to contract terms beyond even the ritual need for handwritten signatures. Shrinkwrap contracts, for example, merely informed purchasers through a sticker or other seal on product packaging that (1) additional terms were contained in the box, and (2) by breaking the seal the purchaser manifested consent to those additional terms¹⁷. Shrinkwrap contracts “automate” the process of

¹⁶ Emphasis in original.

¹⁷ Cf. *ProCD v. Zeidenberg*, 86 F.3d 1447, 1450 (1996) (“Every box [containing the software product] declares that the software comes with restrictions stated in an enclosed license.”); *Step-Saver Data Systems, Inc. v. WYSE Technology*, 939 F.2d 91, 95–106 (1991) (evaluating enforceability of so-called “box-top-license” that provided, inter alia, “Opening this package indicates your acceptance of these terms and conditions.”); *Hill v. Gateway2000, Inc.*, 105 F.3d 1147, 1149 (1997) (evaluating additional terms included in a package for mail-order computer

contracting by eliminating the need for any affirmative action or even exercise of judgment, choice, or discretion by the purchaser of shrinkwrapped products in order to manifest assent.

“Codability” as used here means that some aspect of the contract formation, interpretation, performance, or enforcement of a contract can be represented in “code” or set of instructions and policies. Importantly, “codability” *does not* refer to statutory law or civil codes. Nothing suggests that common law contract doctrines are any more or less subject to representation through machine code than statutory law. Codability, in fact, encompasses multiple factors, including the coherence of the doctrines being translated into machine code, the transparency and fit between announced rules and the actual application of these doctrines (Smith, 2004, pp. 7–11, 24–32), and the character of the doctrines at issue, particularly whether such doctrines are framed as general standards or as specific rules.

In that context, codability, used here, refers to the degree to which either the inputs to the contracting process (contract creation) or the outputs from that process (performance and enforcement) can be represented in regularized instructions subject to automation through computer code. The automation of paper-based standard form contract practices permitted producers to engage in contracting on a massive scale involving millions of individual but identical contract transactions. As Herbert Simon foresaw, “[a]s technological ability increases, we modify the environment within which it operates to allow us to have greater advantage of the strengths of new technology” (Simon, 1960b).

This modification of the environment to take greater advantage of information era, primarily Internet-based, codable contract automation technologies now dominates contract practices. Coding contract formation and other practices, such as through browwrap and clickwrap contract terms, also includes other mechanisms for tracking consumer and other purchaser preferences and interests. The coding of contract practices includes not just the visible legal relationships resulting from individual purchasing decisions, but also is part of a broader tapestry of related inputs to the contracting process. Contracting in the information era does not begin and end with clicking the “I Accept” button. Rather, contracting practice begins in a web of connected activities, any of which have no clear connection to the eventual contract that nonetheless results from these activities. Consumers in any online interaction, whether a social media discussion, shopping, surfing news sites¹⁸, or even many

that asserted consumers accepted those terms if they failed to return the computer within 30 days of receipt).

¹⁸ See Google Analytics. (10.09.2016). Retrieved from: https://en.wikipedia.org/wiki/Google_Analytics (describing Google Analytics application and uses for tracking the online activity of customers) (10.09.2016).

offline interactions such as joining a gym, completing a warranty card, and so on, assist producers in targeting specific consumers and adjusting those consumers' environments to develop desires and expectations for specific products and services.

Thus, as I have argued elsewhere, data brokers and other third parties collect, collate, and sell personal data from the vast majority of commercial interactions to develop sophisticated models of individuals for the purpose of enhancing producers' ability to draw consumers into contracts:

“The information culture self-consciously defines itself by the technologies that permit the collection, processing and dissemination of vast amounts of data. In the consumer context, this information capacity permits marketers and producers to create detailed electronic dossiers of a consumer's interests, wants, habits, and needs. The reality of consumer life in the information era is that marketers, data miners, and producers collect, process, and store incredible amounts of data about everything a consumer does online. This includes the Internet searches a consumer performed, web sites visited, items viewed, purchases made, as well as any personal data surrendered by the consumer in the course of his or her shopping. ... Producers use these electronic dossiers to identify consumers least likely to resist their marketing efforts, to design and market products most likely to entice the consumer into purchasing, and to lower the consumer's resistance to granting consent to a proffered transaction” (Barnhizer, 2006, p. 77).

Producers in this context deliberately modify more than just the commercial environment to maximize their chances of making a sale. It is fair to say that they are actively modifying the *consumers themselves* to reduce resistance and make the nominal expressions of assent involved in clicking an “I Accept” button or browsing a webpage into automatic reactions (see, e.g., Frischmann and Selinger, 2016)¹⁹. In this sense, producers have successfully automated and coded the entire input side of the transactional world. It may fairly be said that automation on the input side of contract practice has rendered consumer consent almost entirely fictional (Radin, 2000, pp. 1155–1160).

V. Automation of Contract Outputs

In contrast to the extraordinary degree of automation on the input side of contract practice, the “output” – both the background legal principles and the resolution of contract disputes – has lagged. Parties bargain “in the shadow

¹⁹ “Simply put, almost no one is discussing the negative impact the electronic contracting environment has on our habits and dispositions, and more generally, on who we are as human beings”.

of the law” (see Mnookin and Kornhauser, 1979, p. 950²⁰; Barnhizer, 2007, pp. 125–126 arguing that prosecutors offering plea bargains can be modeled on “producers and producers’ agents, who offer an array of products and services for sale to their customers through standard form contracts”). What this means in the information era is that producers – sophisticated parties with strong access to legal expertise and control over contract terms offered to consumers – are able to take advantage of relatively archaic contract principles that are still wedded to a commercial model of contract behavior in which both parties are expected to guard their own interests in the transaction. The result is that producers are generally able to use classical contract doctrines such as the common law’s “duty to read” and the objective theory of contracts to create an appearance of assent that fully satisfies the legal requirements while providing none of the protections of consumer interest that are presumed by the classical models.

As Wayne Barnes, for example, has observed, “[t]he beginning of the use of standard form contracts represented a shift in the ordinary transactional process. Contract law largely developed around the paradigmatic bargain struck between two individuals after a protracted period of dickering over terms. As a result, all or nearly all of the terms were extensively discussed, negotiated and understood by the contracting parties. The use of standard terms changed this paradigm” (Barnes, 2007, p. 235).

Classical contract rules, for example, determine whether the parties had contractual intent based upon whether a reasonable person in the position of the promisee and in light of the surrounding facts and circumstances would understand that the promisor has manifested an intent to contract²¹. This model works in the context of fully-engaged parties who are able to dicker over the terms of a contract. But the justifications for classical contract doctrine break down where one of the parties cannot meaningfully access, read, or understand the terms presented (see, e.g., Ben-Shahar and Schneider, 2014, pp. 11, 33–50). Likewise, classical common law contract doctrines lose legitimacy in contexts like clickwrap and browsewrap contracts where the user has become more or less trained or habituated to clicking the “I Accept” button as quickly as possible in order to get on with the transaction (clickwrap), or where the website purports to bind the consumer to contract terms that actually require additional effort by the consumer to find the terms themselves (browsewrap). Objective manifestations of assent in that context have themselves become

²⁰ “We see the primary function of contemporary divorce law not as imposing order from above, but rather as providing a framework within which divorcing couples can determine their postdissolution rights and responsibilities. This process by which parties to a marriage are empowered to create their own legally enforceable commitments is a form of ‘private ordering’.”

²¹ See Restatement (Second) of Contracts §§ 19, 20 (1981).

automated to the extent that non-drafter expressions of assent to virtually all contract terms beyond price, subject matter, and possibly warranties are not meaningful.

VI. Developing a Model of Automated Contract Doctrine

In contrast to the coding of the online and real world contract formation experience, the legal and dispute resolution contexts are only minimally automated or codable. Contract law is taking place in the context of coded and automated contract formation. As discussed in the next section, with few exceptions, common law contract doctrine resists coding and automation. This section seeks to examine what it means to make the law codable.

Private dispute resolution systems provide the best example of what automated contract law and public dispute resolution could look like. Specifically, in some markets participants have wholly opted out of the public dispute resolution system by requiring all participants in the market (or at least in the association that controls the market) to agree to private arbitration. For instance, Lisa Bernstein's work on the private dispute resolution systems in the cotton market and the grain market in the United States provide one example of contract "law" that is easily codable. In the cotton markets, according to Bernstein, transactions between producers (cotton mills), shippers, and merchants are governed by a small number of trade associations that require members to comply with trade rules governing those transactions and to submit to private arbitration under trade association rules (Bernstein, 2001, pp. 1726–1727). Likewise in the National Grain and Feed Association (NGFA), members are required to adhere to "a comprehensive set of default rules governing the most important aspects of cash-market transactions in grain or feed" (Bernstein, 1996, p. 1773). In both cases, the members of the trade associations have entirely opted out of public dispute resolution systems – courts – in favor of private arbitration applying relatively formalist, bright-line rules to adjudication of contract disputes concerning standard terms used throughout the industries in question (Bernstein, 2001, pp. 1726–1727; Bernstein, 1996, pp. 1774–1775). More importantly, particularly with respect to the NGFA, arbitrators are limited compared to common law courts with respect to the degree to which the tribunal is required to eschew indeterminate rules such as "good faith" in deciding contract disputes:

"In deciding cases, the NGFA arbitrators take a formalistic approach to adjudication; they consistently refuse to look behind the letter of a trade rule to discern and take into account the type of behavior that the rule is intended to encourage or

discourage. The trade rules do not contain an explicit equivalent of the [Uniform Commercial] Code's broad duty of good faith. Although the term "good faith" occasionally appears in NGFA opinions and is sometimes used to signal the arbitrators' view of the propriety of a party's commercial behavior, or to provide additional support for a result reached on other grounds, violation of a general duty of good faith is never the explicit basis of the arbitrators' decision. In a recent case, NGFA held that acting in accordance with the trade rules and the terms of the written contract is per se acting in "good faith." (Bernstein, 1996, p. 1775).

Common between these two trade associations' private dispute resolution systems are elements that make the legal output side of contracting more subject to automation through coding. First, the systems are inherently limited to a relatively small number of transaction types and disputes over those transactions, compared to the wide variety of issues and law that public courts must address. Consequently, the inputs to those systems are more standardized than the contract cases before public courts. Second, the rules at issue are simple. The parties' contracts deliberately limit resort to high discretion contract rules in favor of rules designed to simplify and speed resolution of disputes. Thus, for example, both systems limit disputes to the texts of the contracts under dispute. This limitation consequently limits recourse to interpretive doctrines relying on extrinsic evidence, standards, and human discretion. Finally, again as noted, particularly with the NGFA, the private dispute resolution systems prefer formalist treatment of the legal questions at issue rather than using legal rules to require greater discretion by decision makers.

This same pattern can be seen with a heavily automated and coded dispute resolution system such as the system used by eBay, the online auction provider, to address disputes between buyers and sellers. Most importantly, eBay controls 100% of the environment within which buyers and sellers interact. This includes the code that presents auctioned items on the website, as well as payment systems, and dispute resolution. Within the framework established by eBay, sellers control the product description, price, shipment (both terms and actual performance), and return policy. Because of eBay's control of the transactional context, buyers and sellers may generate only a limited number of potential disputes. The eBay dispute resolution system only provides two default options for buyers seeking to challenge a seller's performance – the buyer did not receive an item or the item received was not as described²².

²² See EBay Buyer Protection. (n.d.). Retrieved from: <http://pages.ebay.com.sg/eBP/#s1> (25.02.2016). How to use the Resolution Centre. (n.d.). Retrieved from: <http://pages.ebay.co.uk/ebay-money-back-guarantee/how-to-help.html> (25.02.2016). Worry-Free Shopping. (n.d.). Retrieved from: <http://pages.ebay.com/ebay-money-back-guarantee/how-to-help.html> (25.02.2016).

Seller complaints are largely limited to opening automated dispute resolutions where the buyer fails to pay²³ or to requesting the buyer to change posted feedback on seller performance²⁴.

eBay has created and controlled a transactional environment that facilitates automated dispute resolution within that system in which the vast majority of disputes can be resolved through code and automation (Bulinski and Prescott, 2016, p. 208 examining Online Case Resolution systems such as eBay's dispute resolution system and noting that "[o]nline tools and technology have also been revolutionizing the way private parties resolve their disputes")²⁵. Buyers and sellers do not contact each other directly, but rather must open a dispute with eBay through an automated web form²⁶. Because the eBay standard terms of use regulate the interactions of buyers and sellers, nearly all of the disputes that can arise between buyers and sellers occupy a limited number of possible issues. As a consequence, eBay can code rules for automating resolution of disputes without any human interaction on the part of eBay. Human beings need to get involved only in the rare instances when eBay's tightly-controlled transactional environment fails to anticipate a particular dispute or when resolution of the dispute cannot be easily coded. By delegating millions of low level disputes to codable resolution mechanisms, eBay speeds resolution and saves costs while at the same time filtering disputes requiring non-programmed and discretionary judgment to human beings capable of dealing with such problems.

The private dispute resolution systems discussed above represent one form of codable law. The "law" in those cases is only tangentially related to the common law of contracts, and then only in the sense that common law contract doctrine renders enforceable the private agreements among cotton merchants, grain sellers and buyers, and parties to the terms of service for an online auction provider. Consequently, the inputs to the contracting process are highly standardized and effectively channeled into an interaction that can generate only a limited number of dispute types. Moreover, the structure

²³ What to do when a buyer doesn't pay. (n.d.). Retrieved from: <http://pages.ebay.com/help/sell/unpaid-items.html> (25.02.2016).

²⁴ Resolving Feedback problems. (n.d.). Retrieved from: <http://pages.ebay.com/help/feedback/feedback-disputes.html?rmvSB=true> (27.02.2016).

²⁵ I must also thank my former colleague, Prof. Dan Katz, now of the Chicago-Kent College of Law, for introducing me to the eBay system and providing substantial insights into the role of the system in segregating disputes that could be coded and automated from those requiring human intervention.

²⁶ Resolving Feedback problems. (n.d.). Retrieved from: <http://pages.ebay.com/help/feedback/feedback-disputes.html?rmvSB=true> (27.02.2016). Worry-Free Shopping. (n.d.). Retrieved from: <http://pages.ebay.com/ebay-money-back-guarantee/how-to-help.html> (27.02.2016).

of the transaction also causes the creation of evidentiary triggers necessary to resolve most disputes. Whether a buyer paid or not, for instance, can be shown by the fact that eBay processes credit card payments through its former subsidiary, PayPal²⁷. Whether a seller shipped the products can similarly be shown by objective evidence. In more difficult situations, such as the product failing to conform to the auction description or improper negative feedback by the buyer, most cases will not involve significant factual issues – those that do can be flagged by the automated system for direct human involvement²⁸.

Likewise, on the output side of the dispute resolution equation, the legal relationships between the parties are controlled by the contractual arrangements between the parties. That control lets the provider set the rules to be applied to the dispute and to control the types of inputs that will be considered in deciding those disputes. As discussed above with respect to Simon's theory of automation, the automation of one stage of a process (e.g., standardization of the contracts between all parties involved in common and repeated transactions) allows automation of other parts of the process (e.g., resolution of disputes arising from those standardized agreements).

These types of limited, fully standardized contractual relationships are ideally suited for automation of contract dispute resolution through traditional coding techniques. Traditional sequential coding – that is, a series of instructions framed in terms of connected and contingent “if/then” statements – has already coded and automated vast swaths of the U.S. income tax code. The most popular tax preparation program, TurboTax, automates nearly the entire process of individual income tax return preparation by collecting standardized inputs from employers and other potential sources of income, using the software to collect information from the taxpayer, and finally based on these inputs producing a tax return that the software will also file on behalf of the taxpayer (Block, 2016). This level of automation and coding is possible only because the U.S. tax code is highly formalist. Although grey areas, factual disputes, and room for creative interpretation exist, for the most part the tax code can be replicated in computer code as a series of sequential if/then statements that track precisely the actual language used in the statute books.

²⁷ eBay auction listings contain a notation with the listing's payment options both providing for payment through PayPal and noting that “Credit Cards processed by PayPal”. Although the two companies separated in 2015 (EBay & PayPal to Become Independent Companies in 2015. (2014). Retrieved from: <https://www.ebayinc.com/stories/news/ebay-paypal-become-independent-companies-2015/> (18.09.2016)), the separate firms continue to share payment information and customer data. See PayPal. (n.d.). Retrieved from: <https://www.paypal.com/webapps/mpp/paypal-ebay-update> (18.09.2016).

²⁸ Resolving Feedback problems. (n.d.). Retrieved from: <http://pages.ebay.com/help/feedback/feedback-disputes.html?rmvSB=true> (25.01.2016).

Where the input has been fully standardized and the output of contract dispute resolutions is controlled precisely by the terms of the parties' contract (such as with eBay's terms of service), contract dispute resolution is highly susceptible to coding and automation because the producers of the contract terms have taken pains to remove any non-formalist (and thus difficult to code) inputs into the system. Seen in this light, automation in law is ultimately another iteration of the debate over the proper roles of formalist versus realist elements in contract law and dispute resolution. Intuitively, formalist principles – with emphasis on clear, abstract, acontextual bright line rules limiting judicial discretion – seem ideal for automation. A party asserts claim X with elements X_{1-n} . The opponent may demur that element X_i is missing, may deny facts supporting element X_i , or may assert additional defenses. Similarly, it is relatively simple to identify the potential sources of evidence likely to exist and relevant to resolution of any dispute or question of law. An automated system using traditional, sequential instructional code can theoretically respond to formalist rules because, as with the tax code, those formalist rules follow the same if/then, sequential logic as traditional coding principles.

The standardized contract and resulting transactions can be rendered in coded instructions fully transparent to programmed decision making. If eBay or the NGFA decide to change the background rules of their tightly-controlled transactional environments, they can selectively edit the related modules of their coded contract and dispute resolution systems to reflect those changes. Thus, for example, in 2013 eBay changed its background terms of service agreement from a system that permitted dissatisfied buyers to either contact sellers or to open a dispute claim to one that required all buyers to open a dispute claim before contacting sellers (Steiner, n.d.). Although this change was created through management level non-programmed decision making, the resulting new terms of service were implemented by a change in eBay's website code that forces disgruntled buyers to comply with the coded defaults in order to get any potential relief for their problem.

Traditional coded programming may work well in carefully controlled online environments like eBay, but is problematic in unstructured contexts. It is one thing to create code that decides to refund a buyer's payment if the seller has failed to ship product. It is quite another to address real world situations in which courts routinely deal with issues regarding reasonableness, good faith, party intent, and public policy. In those situations, traditional coded solutions break down. But where traditional code fails, so-called "machine learning" and particularly "deep learning" artificial intelligence ("AI") systems may provide a superior solution.

Deep Learning AI approaches coding and automation from the opposite perspective of traditional coding. Instead of building coded instructions that

attempt to reflect rules in the real world, Deep Learning AI establishes a coded infrastructure that distributes problems to a bank of parallel processors that analyze small parts of the problem and pass probable solutions to the next layer of processors until the entire network can render a suggested solution (for a description of Deep Learning suitable for a sophisticated layperson, see Copeland, 2016). This structure allows the code to teach itself to make nuanced decisions by analyzing large sets of samples and then comparing those samples to correct solutions. For example, in late 2015, computer hacker George Hotz demonstrated a self-driving car using consumer grade electronics and cameras (see Vance, 2015). In contrast to others' attempts to code individual, line-by-line instructions for self-driving cars, Hotz applied Deep Learning principles to the problem:

“[Hotz] says the usual practice has been to manually code rules that handle specific situations. There's code that helps cars follow other vehicles on the highway, and more code to deal with a deer that leaps into the road. Hotz's car has no such built-in rules. It learns what drivers typically do in various situations and then tries to mimic and perfect that behavior” (Vance, 2015).

Although Deep Learning AI has been around only since about 2012, the concept shows promise for coding human decision making in legal disputes. Rather than code from scratch the rules governing contract formation, interpretation, defenses, and remedies, it may be possible to have coded case resolution systems “learn” the law by analyzing how human judges exercise their discretion within established legal rules. Just as computers can now learn to drive or to distinguish online videos containing cats from those that do not, it is entirely possible for those systems to develop their own sets of instructions regarding application of legal rules to different fact patterns by observing large numbers of similar decisions under similar facts in past and present cases.

Research Fellow Maximilian Bulinski and Professor J.J. Prescott, in a recent and creative article, have proposed and examined the potential benefits of exactly this type of system to supplement judicial decisions in routine, low-stakes legal disputes and transactions (Bulinski and Prescott, 2016). Bulinski and Prescott focus on the promise of what they call “Online Case Resolution” (OCR) systems that would automate the filing and management of legal disputes (Bulinski and Prescott, 2016, pp. 211–212). More importantly, the OCR systems proposed by Bulinski and Prescott would assist courts in evaluating cases and rendering decisions:

“[T]he user would be able to answer (or supply documents that answer) specific, legally relevant inquires [sic] and to explain his side of the story to the judge, magistrate, prosecutor, or other decision maker who is tasked with managing or resolving the case. ... [I]n this hypothetical system, once the litigant submits this information, a judge or other decision maker would evaluate the information

available, which would include both what the litigant supplies and information that comes from other sources, to determine whether the individual's dispute or issue can be resolved over the Internet—or, alternatively, whether the judge needs to acquire more information in a formal, in-person setting" (Bulinski and Prescott, 2016, p. 212).

Although Bulinski and Prescott do not incorporate Deep Learning AI in their proposal, they note the promise of such systems to track judicial performance across a range of cases and to develop transparent reporting mechanisms to "offer evolving guidance in the ongoing decision-rule creation and amendment process, thus fine-tuning the interactions between litigants and the court" (Bulinski and Prescott, 2016, p. 214).

Deep Learning AI has the potential to enhance the process suggested by Bulinski and Prescott. A Deep Learning system has the potential to replace human discretion in situations where such discretion is redundant or adds no or only de minimis value. Bulinski's and Prescott's proposed OCR system enhances the possibility that a Deep Learning AI can aggregate data, learn how the courts respond to and assess that data, and over time learn to anticipate and predict the decisions of courts in new cases. By letting the code learn from actual judicial decisions, Deep Learning AI could potentially develop the ability to address highly nuanced evaluations such as the parties' reasonable expectations, unconscionability, application of the parol evidence rule, and other common law contract doctrines.

VII. The Codability of Consumer Protection: Unconscionability versus Polish Civil Code Article 385¹

The doctrines of unconscionability under contract common law²⁹ (and related Uniform Commercial Code § 2–302) and the Polish Civil Code Articles 385¹–385³ (enacting the 1993 EEC Directive on Unfair Terms in Consumer Contracts) provide a useful basis for illustrating the potential for automation and codability of the common law and civil code regimes. Notably, comparing these doctrines explores only one of the issues related to whether common law judges should exercise discretion to make the common law more subject to coding and automation. Exploring the dichotomy between unconscionability and Polish Civil Code 385¹ compares a deliberately unrestricted, ad hoc, open-ended standard against a relatively objective, formalist set of rules regarding prohibited terms. Other issues with the codability of the common law, which

²⁹ Restatement (Second) of Contracts § 208 (1981).

will be the subject of later papers, include common law rules that are mutually dependent and interrelated with other doctrines so as to prevent rendering those doctrines as sequential coded instructions, as well as other doctrines involving legal fictions and hidden law.

Both the common law unconscionability doctrine and the Civil Code enactments attempt to police unfair contract terms, although the common law unconscionability doctrine applies in all contractual situations while the EEC Directive and Polish Civil Code Article 385¹ cover only consumer contracts³⁰. As discussed below, common law doctrines like unconscionability are inherently resistant to traditional coding compared to civil code approaches to the same problems. In contrast, the approach of the Civil Code is significantly more amenable to traditional coding principles.

In its modern formulation³¹, drawn largely from jurisprudence under Uniform Commercial Code § 2–302, courts may refuse to enforce contracts as unconscionable: “(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit application of any unconscionable clause as to avoid any unconscionable result”³². The unconscionability doctrine has been interpreted to render unenforceable

³⁰ Despite the apparently greater scope of the common law unconscionability doctrine, the elements of unconscionability will rarely be satisfied in situations involving repeat players with access to legal counsel and meaningful alternatives. Consequently, unconscionability is primarily concerned in practice with protection of consumers dealing with standard form contracts. See, e.g., Fleming, 2014, p. 1386; Prince, 1995, p. 479–82 (“A consensus exists among courts and commentators that [Uniform Commercial Code § 2–302] is more likely to be available to consumers than to merchants”).

³¹ At common law, the doctrine of unconscionability has existed for hundreds of years. See Brown, 2000, pp. 289-90 (discussing development and history of the unconscionability doctrine); Davenport, 1967, pp. 124–25 (“[T]he notion of unconscionability, although that word was not then used to describe it, may be traced in the English common law at least as early as 1663” (citing *James v. Morgan*, 83 Eng. Rep. 323 (1663) (refusing to enforce a contract calculating purchase price of a horse based upon 2 pence for first nail in horse’s shoes, doubled for each of additional 31 nails))); Swanson, 2001, p. 361 (“Two centuries before the [U.C.C.] made the unconscionability doctrine available at law, the courts had woven public policy and ideas from equity and tort into innovative principles that would save consumers from unfair bargains”); Teeven, 1992, pp. 136–43 (surveying the history of unconscionability doctrines since the 15th century).

³² Notably, the common law formulation of the unconscionability doctrine as contained in the Restatement (Second) of Contracts § 208 (1981) is nearly identical to that in § 2–302: “If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”

contracts in which there is “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party”³³. Over time most jurisdictions have reformulated this test to require both (1) “procedural” unconscionability and (2) “substantive” unconscionability in order to justify refusing to enforce an otherwise valid contract³⁴. “A finding of unconscionability requires a ‘procedural’ and a ‘substantive’ element, the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results”³⁵.

Unconscionability doctrine at common law is thus a broadly open inquiry into the relationship between the parties and the context in which that relationship occurs. Courts in unconscionability cases routinely consider factors such as party status, sophistication, education, and apparent bargaining power (see Barnhizer, 2010, pp. 618–32 (analyzing ten years of unconscionability cases in the U.S. Court of Appeals for the Ninth Circuit to assess the Court’s use of contextual factors such as party status, education, sophistication, apparent bargaining power, transaction type, and concluding that the Court’s unconscionability jurisprudence was incoherent for that period of time)). Because of the ad hoc and highly contextualized nature of the unconscionability analysis, a clause that is valid for one party may be unconscionable in another contract with a different party. Moreover, because a contract term may be conscionable with respect to one party and unconscionable with respect to a different party, legal outcomes are difficult to predict in most circumstances. Consequently, virtually every unconscionability case involves an ad hoc review of each particular contract and the characteristics and context of the parties to that contract, even if previous courts have held the contract or specific terms to be unconscionable.

The EEC Directive on Unfair Terms in Consumer Contracts (hereinafter, EEC Directive) and the Polish Civil Code enactment of that directive in Articles 385¹–385³ take a different approach. Polish Civil Code Article 385¹ declares terms not binding if the consumer’s “rights and obligations are set forth in a way that is contrary to good practice, grossly violating his interests (unlawful contractual provisions)” *except for* terms relating to “the main performances of the parties, including price or remuneration, so long as they are worded clearly”³⁶. Polish Civil Code Article 385³ lists twenty-three specific types of contract provisions that are presumptively unlawful. (The

³³ See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

³⁴ See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) (interpreting California law).

³⁵ *Id.* at 1746 (internal quotation marks omitted).

³⁶ Polish Civil Code references are taken from Domański, Dobkowska, Zbiegień-Turzańska and Stępiak, 2015.

EEC Directive is substantially similar to the Polish Civil Code enactment, although with a shorter list of only seventeen presumptively unenforceable terms)³⁷. These include clauses or contracts that:

- exclude or limit liability towards the consumer for personal injury;
- contain clauses which the consumer did not have the opportunity to become familiar with before the contract was executed;
- entitle the consumer’s contracting party to unilaterally amend the contract without good cause as specified in the contract;
- specify only the consumer’s contracting party the unilateral right to change, without good cause, material features of the performance; and
- entitle the consumer’s contracting party to set or increase the price or remuneration after the contract is executed without granting the consumer the right to rescind the contract³⁸.

The presumptively unlawful terms or contracts listed in Polish Civil Code Article 385³ are unenforceable unless the contract drafter can show that the provision has “been agreed individually” by the consumer³⁹. “Provisions which are not agreed individually are those provisions of a contract on which the consumer has no actual influence. This refers particularly to contractual provisions taken from a standard contract proposed to a consumer by a contracting party”⁴⁰.

With respect to traditional, sequential programming techniques, the Polish Civil Code Articles 385¹–385³ are potentially much easier to render in code and to automate than the common law doctrine of unconscionability. Articles 385¹–385³ represent a relatively formalist approach to identifying unfair (and therefore unenforceable) terms in consumer contracts. Although factual issues exist in every case, such as whether particular allegedly unfair terms were individually negotiated (see Jabłonowska, 2016; Grochowski, n.d.), Article 385¹ depends upon objectively determinable compliance with the Article 385³ list of presumptively unfair terms. The rules of Article 385 can be analyzed sequentially and “chunked” to different programmed modules to assess the entire contract or particular contract terms against those rules. Even with current programming and automation technology, the approach to policing of Polish Civil Code Articles 385¹–385³ (and the corresponding EU consumer protection law) could be coded to produce a system similar to that of Bulinski and Prescott addressed

³⁷ See Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts Art. 3(1); see also European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995, S.I. No. 27/1995.

³⁸ Polish Civil Code Art. 385³ §§ 1, 4, 10, 19, 20.

³⁹ Polish Civil Code Art. 385¹ § 1 (“Provisions of a contract executed with a consumer *which have not been agreed individually* are not binding on the consumer...”).

⁴⁰ Polish Civil Code Art. 385¹ § 3.

above. Even if such a system cannot determine the outcome of any given case, the ability to automate even a portion of the analysis could provide substantial savings in judicial time and party resources.

While this simplified comparison of the common law doctrine of unconscionability and the Polish provisions addressing unfair terms in consumer contracts suggests that the Polish approach (and by extension the E.U. approach as well) to consumer protection is inherently more codable, that is only the first step in the analysis. The normative question raised by this article is not whether it is possible to reform common law doctrines to promote codability and automation. It clearly is possible. Common law doctrines such as unconscionability require human judgment in virtually all aspects of the unconscionability analysis⁴¹. The inquiry is highly contextualized, such that minor differences in contract presentation, formation, party status, available alternatives, minor differences in terms, and other factors create significant disparities in outcomes. Every aspect of the unconscionability analysis requires application of human discretion and judgment. As a tool for judicial policing of unfair contract terms, unconscionability can only be described as grossly inefficient, especially in comparison to approaches such as that of Polish Civil Code Articles 385¹–385².

If the only criteria for the normative question of whether common law courts should exercise discretion to reform contract doctrine to promote codability and automation is efficiency, then the answer is clear. But automation of contract dispute resolution mechanisms is not an end in itself, it is a possible means to an end. The ends of contract law also include the values associated with the intervention of judicial decision makers' judgment, even if that judgment is slow, inefficient, costly, and flawed. As Amy Schmitz has persuasively argued, the function of unconscionability is not necessarily incompatible with efficiency goals in contract law (Schmitz, 2006). As Schmitz argues, "Unconscionability is not an afterthought gloss on classical contract doctrine. Instead, it flows from an unshakable concern for fairness and equity that lies at the core of contract law" (Schmitz, 2006, pp. 76–77). In this sense, unconscionability doctrine preserves the fundamental morality of contract law precisely because it preserves the legitimacy of contract law "by enhancing its reputation as 'fair' law worthy of public obedience" (Schmitz, 2006, p. 79). This analysis suggests that there exist situations in which contract law is justified and legitimated by human discretion and explicit attention to soft concepts such as fairness. This is true even if the intervention of human discretion drastically reduces

⁴¹ Indeed, some scholars suggest that courts are relaxing remaining formalist elements from unconscionability in favor of even greater discretion and flexibility to address perceived unfairness in consumer contracts. See, e.g., Lonegrass, 2012, pp. 1–27.

the efficiency of individual cases (see also Fairfield, 2009, p. 1456)⁴² and even if that human discretion ultimately reduces the accuracy of individual dispute resolutions compared to alternative, more formalist and codable approaches such as Polish Civil Code Article 385.

VIII. Conclusion

Should courts in common law contract cases exercise their discretion in indeterminate cases to choose or create rules that promote the codability of contract doctrine? As discussed above, absent legislative intervention banning private arbitration, coded dispute resolution systems will inevitably become the norm for at least basic, low-value disputes. The question for proponents of public law is not whether to adopt codable rules or procedures for automated contract dispute resolution. Rather, the deeper question is whether the common law of contract can remain relevant as private coded and automated systems proliferate.

At the end of the day, the question really is not about whether the common law of contracts should be rendered codable in order to facilitate automation of contract dispute resolution. That will happen, and it is happening, even without the participation of public courts. If public courts continue to ignore private coded systems, the parties will increasingly avoid public resolution in favor of cheaper, faster, and more controlled private systems. Instead, the important question is whether courts as guardians of common law contract doctrine can beneficially anticipate both which doctrines can and should be codable and the degree to which we are willing to trust automation to reproduce our human judgment. The point at which code fails is the point at which human reason demonstrates its comparative advantage over the machine.

Literature

- Barnes, W.R. (2007). Toward a fairer model of consumer assent to standard form contracts: In defense of Restatement subsection 211(3). *Washington Law Review*, 82, 227–274.
- Barnhizer, D.D. (2006). Propertization metaphors for bargaining power and control of the self in the information age. *Cleveland State Law Review*, 54(69), 69–113.
- Barnhizer, D.D. (2007). Bargaining power in the shadow of the law: Commentary to professors Wright and Engen, professor Birke, and Josh Bowers. *Marquette Law Review*, 91, 123–143.

⁴² Fairfield argues that courts applying the unconscionability doctrine force buyers to buy more information through increased disclosure and other fairness protections they increase the inefficiency of the transaction in ways that may harm consumers overall without significant benefits.

- Barnhizer, D.D. (2010). Context as power: defining the field of battle for advantage in contractual relations. *Wake Forest Law Review*, 45, 607–640.
- Barnhizer, D.D. (2014). Escaping toxic contracts: How we have lost the war on assent in wrap contracts. *Southwestern Law Review*, 44, 215–229.
- Barnhizer, D.D. (2016). Reassessing assent-based critiques of adhesion contracts. In L.A. DiMatteo and M. Hogg (eds). *Comparative contract law: British and American perspectives*. Oxford: Oxford University Press, 170–188.
- Ben-Shahar, O. and Schneider, C. (2014). *More than you wanted to know: The failure of mandated disclosure*. Princeton, NJ: Princeton University Press.
- Bernstein, L. (1996). Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms. *University of Pennsylvania Law Review*, 144(5), 1765–1821. doi:10.2307/3312639.
- Bernstein, L. (2001, June). Private commercial law in the cotton industry: Creating cooperation through rules, norms, and institutions. *Michigan Law Review*, 99, 1274–1788. doi: 10.2307/1290478.
- Bishop, C.G. and Barnhizer, D.D. (2015). *Contracts: Cases and theory of contractual obligation* (2nd ed.). St. Paul, Minn.: West Academic Publishing.
- Block, S. (2016, February). Which tax software is best for you? Retrieved from: <http://www.kiplinger.com/article/taxes/T056-C005-S003-which-tax-software-is-best-for-you.html> (08.03.2016).
- Brown, E.L. (2000). The uncertainty of U.C.C. section 2–302: Why unconscionability has become a relic. *Commercial Law Journal*, 105, 287–307.
- Bulinski, M.A. and Prescott, J.J. (2016). Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency. *Michigan Journal of Race & Law*, 21, 205–249.
- Christman, E. (2014, January 3). Digital Music Sales Decrease For First Time in 2013. Retrieved from: <http://www.billboard.com/biz/articles/news/digital-and-mobile/5855162/digital-music-sales-decrease-for-first-time-in-2013> (11.08.2016).
- Copeland, M. (2016). The Difference Between AI, Machine Learning, and Deep Learning? | NVIDIA Blog. Retrieved from: <https://blogs.nvidia.com/blog/2016/07/29/whats-difference-artificial-intelligence-machine-learning-deep-learning-ai/> (08.08.2016).
- Davenport, W.B. (1967). Unconscionability and the Uniform Commercial Code. *University of Miami Law Review*, 22, 121–150.
- Domański, G., Dobkowska, K., Zbiegień-Turzańska, A. and Stepniak, L. (2015). *The civil code: Bilingual edition* (E. Kucharska & M.L. Mauviel, Trans.). Warszawa: Wydawnictwo C.H. Beck.
- Fairfield, J. (2009). The cost of consent: Optimal standardization in the law of contract. *Emory Law Journal*, 58, 1401–1458.
- Farivar, C. (2014, June 25). KlearGear must pay \$306,750 to couple that left negative review. Retrieved from: <http://arstechnica.com/tech-policy/2014/06/kleargear-must-pay-306750-to-couple-that-left-negative-review/> (13.02.2016).
- Fleming, A. (2014). The rise and fall of unconscionability as the “law of the poor”. *Georgetown Law Journal*, 102, 1383–1441
- Friedman, L.M. (1965). *Contract law in America; a social and economic case study*. Madison: University of Wisconsin Press.
- Frischmann, B.M. and Selinger, E. (2016, September 2). Engineering humans with contracts. Cardozo Legal Studies Research Paper No. 493. Available at SSRN: <http://ssrn.com/abstract=2834011> or <http://dx.doi.org/10.2139/ssrn.2834011>.

- Gordon, J.D. (1991). How Not to Succeed in Law School. *The Yale Law Journal*, 100(6), 1679. doi:10.2307/796783.
- Grochowski, M. (n.d.). Polish Consumer Law. Polish Private Law. Retrieved from: <http://polishprivatelaw.pl/polish-consumer-law/> (03.10.2016).
- Horwitz, M.J. (1977). *The Transformation of American Law, 1780-1860*. Cambridge, MA: Harvard University Press.
- Jablonowska, A. (2016, June 7). Extended legal effect of court rulings in unfair contract term cases – AG’s opinion and the recent reform of Polish law. Retrieved from: <http://recent-ecl.blogspot.com/2016/06/extended-legal-effect-of-judgments-in.html> (18.10.2016).
- Kim, N.S. (2013). *Wrap contracts: Foundations and ramifications*. New York City, NY: Oxford University Press.
- Klein, S. (2013, June 27). *Dehydration Myths: 7 Things You Should Know About Staying Hydrated*, Huffington Post. Retrieved from: http://www.huffingtonpost.com/2013/06/27/dehydration-myths_n_3498380.html (21.11.2016).
- Lonegrass, M. (2012). Finding room for fairness in formalism – the sliding scale approach to unconscionability. *Loyola University Chicago Law Journal*, 44, 1–64.
- Mnookin, R.H. and Kornhauser, L. (1979). Bargaining in the shadow of the law: The case of divorce. *The Yale Law Journal*, 88(5), 950–997. doi:10.2307/795824.
- Pound, R. (1910). Law in books and law in action. *American Law Review*, 44, 12–36.
- Prince, H.G. (1995). Unconscionability in California: A need for restraint and consistency. *Hastings Law Journal*, 46, 459–554.
- Radin, M.J. (2000). Humans, computers, and binding commitment. *Indiana Law Journal*, 75, 1125–1162.
- Schmitz, A. (2006). Embracing unconscionability’s safety net function. *Alabama Law Review*, 58, 73–118.
- Simon, H.A. (1960a). The new science of management decision. In H.A. Simon, *The shape of automation for men and management*. New York City, NY: Harper & Row, 53–111.
- Simon, H.A. (1960b). Will the corporation be managed by machines?. In H.A. Simon, *The shape of automation for men and management*. New York City, NY: Harper & Row, 26–52.
- Slawson, W.D. (1971). Standard form contracts and democratic control of lawmaking power. *Harvard Law Review*, 84(3), 529–565. doi:10.2307/1339552
- Smith, S.A. (2004). *Contract theory*. Oxford: Oxford University Press.
- Snyder, F.G. and Mirabito, A.M. (2014). The death of contracts. *Duquesne Law Review*, 52, 345–413.
- Steiner, I. (n.d.). EBay’s New Dispute Resolution Process Takes Effect. Retrieved from: <http://www.ecommercebytes.com/cab/abn/y13/m04/i10/s04> (27.02.2016).
- Susskind, R.E. (2010). *The end of lawyers?: Rethinking the nature of legal services* (rev. ed.). Oxford: Oxford University Press.
- Swanson, C.B. (2001). Unconscionable quandary: U.C.C. article 2 and the unconscionability doctrine. *New Mexico Law Review*, 31, 359–399.
- Teeven, K.M. (1992). Decline of freedom of contract since the emergence of the modern business corporation. *St. Louis University Law Journal*, 37, 117–168.
- Vance, A. (2015, December 16). George Hotz Is Taking on Tesla by Himself. Retrieved from: <http://www.bloomberg.com/features/2015-george-hotz-self-driving-car/> (15.03.2016).

A R T I C L E S

The Interaction of Public and Private Enforcement of Competition Law Before and After the EU Directive – a Hungarian Perspective

by

Tihamér Tóth*

CONTENTS

- I. Introduction
- II. Public and private enforcement of competition rules
- III. Private enforcement of competition law in Hungary
- IV. Liability for damages under EU law
 - 1. EU case law
 - 2. The Directive
 - 3. Hungarian law and jurisprudence
- V. Regulating the interaction of public and private enforcement
 - 1. EU law
 - 2. The Directive
 - 3. Hungarian law and practice
 - 3.1. The friendly interaction: *Amicus Curiae*
 - 3.2. The hierarchical interaction: the binding effect of competition authority's decisions
 - 3.3. Discovery and leniency
- VI. Beyond the Directive: the case for class actions
 - 1. EU law and the Recommendation
 - 2. Hungarian law and practice
- VII. Conclusion

* Assistant professor, Pázmány Péter Catholic University, Budapest, Hungary; of counsel at Réczicza Dentons Europe LLP; toth.tihamer@jak.ppke.hu. Article received: 25 May 2016; accepted: 17 November 2016.



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.

Abstract

The paper explores the changes the EU Directive on harmonizing certain rules governing actions for damages under national law for infringements of the competition law provisions will bring about in Hungary, with a special focus placed on damages liability rules, the interaction of public and private enforcement of these rules, and the importance of class actions. Amendments of the Competition Act introduced in 2005 and 2009 had created new rules to promote the idea of private enforcement even before the Directive was adopted. Some of these rules remain unique even now, notably the legal presumption of a 10% price increase for cartel cases. However, subsequent cases decided by Hungarian courts did not reflect the sophistication of existing substantive and procedural rules. There has only ever been one judgment awarding damages, while most stand-alone cases involved minor competition law issues relating to contractual disputes. The paper looks at the most important substantial rules of tort law (damage, causality, joint and several liability), the co-operation of competition authorities and civil courts, as well as at (the lack of) class action procedures from the perspective of the interaction of public and private enforcement of competition law.

Résumé

Le document analyse les changements apportés par la directive européenne relative aux certaines règles régissant les actions en dommages et intérêts en droit national pour les infractions aux dispositions du droit de la concurrence en Hongrie, en particulier concernant les règles sur la responsabilité civile en matière de dommages, l'interaction de l'application publique et privée du droit de la concurrence et l'importance des recours collectifs. Les modifications à loi de la concurrence introduites en 2005 et 2009 ont créé de nouvelles règles pour promouvoir l'idée d'une application privée du droit de la concurrence même avant que la directive a été adoptée. Certaines de ces dispositions sont toujours uniques, notamment la présomption légale d'une augmentation de prix de 10% par les ententes. Néanmoins, les jugements ultérieurs rendus par les tribunaux ne reflétaient pas les règles de fond et de procédures sophistiquées. Il n'y avait juste le jugement qui a accordé des dommages et intérêts, alors que la plupart des actions autonomes (« stand-alone actions ») portaient sur des problèmes secondaires du droit de la concurrence liés aux conflits contractuels. L'article examine des règles les plus importantes du droit de la responsabilité civile (le dommage, la causalité, la responsabilité solidaire), la coopération entre les autorités de la concurrence et les tribunaux civils, ainsi que l'absence de mécanisme de recours collectifs et de la perspective de l'application publique et privée du droit de la concurrence.

Key words: private enforcement of competition law; public enforcement; discovery; leniency; damages; joint and several liability; *amicus curiae*; class action; representative action.

JEL: K13; K15; K21; K41

I. Introduction

This paper explores the changes the EU Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions¹ (hereinafter, the Directive) will bring about in Hungary, with a special focus placed on damages liability rules, the interaction of public and private enforcement of these rules, and the importance of class actions.

The decentralisation of competition law enforcement through Regulation No. 1/2003² coincided with the enlargement of the European Communities. Abolishing the Commission's monopoly on exempting competition restricting agreements made it more likely that national judges would apply EU competition rules. The Hungarian legislator followed suit and so the exemption procedure was also phased out under national competition law in 2005. Soon after the new implementing regulation entered into force, the Commission issued a *Green Paper on damages actions for breaches of the EC antitrust rules* in 2005³. Its goal was to understand why there have been so few litigations before national courts and to propose appropriate legal and policy measures. Since then, Commission press releases heralding each new cartel decision have ended with a short paragraph drawing the attention of injured parties to their rights under EU law to start follow-on damages actions⁴.

The Commission submitted its *White Paper on damages actions for breach of the EC antitrust rules* in April 2008⁵. This act suggested the need for a reform

¹ 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.

² Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter, Regulation 1/2003), OJ L 1, 04.01.2003, p. 1.

³ Commission Green Paper of 19 December 2005 – Damages actions for breach of the EC antitrust rules, COM(2005) 672, with an annexed Commission Staff Working Paper SEC 2005/1732 (hereinafter, Green Paper).

⁴ See, for example the press release in the industrial bags cartel case issued in November 2005: “Any person or firm affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States and seek damages, submitting elements of the published decision as evidence that the behaviour took place and was illegal. Even though the Commission has fined the companies concerned, damages may be awarded without being reduced on account of the Commission fine”. Available at http://europa.eu/rapid/press-release_IP-05-1508_en.htm?locale=hu (17.11.2016).

⁵ Commission White Paper on Damages actions for breach of the EC antitrust rules, COM(2008)165 final, accompanied by a Commission Staff Working Paper SEC(2008)404 (hereinafter, White Paper).

of national procedural rules, like the standing of indirect consumers, collective redress, access to evidence, the binding nature of decisions of national competition authorities (hereinafter, NCAs), and the estimation of harm. The White Paper started a discussion spanning many years, which finally led the Commission to submit a proposal for a Directive in June 2013⁶. In April 2014, the Parliament approved the Directive and, after its linguistic corrections, the Council formally adopted the Directive in November 2014. The Commission proposal excluded binding rules on collective redress in order to secure its easy approval by the Council and in the Parliament. This sensitive, but crucial topic was addressed in a non-binding recommendation adopted on the same day as a Proposal on competition law damages actions⁷. The third element of the legislative package consisted of soft law rules designed to aid judges to assess the quantity of damages caused by anti-competitive actions⁸.

Hungary did not wait for the outcome of the lengthy European law-making process. As early as 2005, and in line with the proposals of the Hungarian Competition Authority (hereinafter, GVH), an amendment of the national competition law regime was prepared, intended to introduce new rules to promote the idea of private enforcement. The next wave of strengthening private enforcement occurred in 2009. Some of these national rules are now also reinforced by the EU Directive, some of them will retain their national origins, like the presumption of a 10% price increase created by cartels.

EU Member States have to implement the directive harmonizing national civil procedure rules and substantive rules as regards damages until December 2016. The Hungarian government submitted its proposal to the Parliament in October 2016. The new set of rules will cover not only EU but also national competition law related claims. This makes sense, since the vast majority of the few competition law based litigations so far have involved the application of Hungarian competition rules only. Interestingly, the implementation

⁶ Proposal of 11 June 2013 for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union, COM(2013) 404 final. Available at: http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html (17.11.2016).

⁷ Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law, OJ L 201, 26.07.2013, p. 60 (hereinafter, the Recommendation on collective redress).

⁸ See the Commission Staff Working Document of 11 June 2013 – Practical guide – Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (OJ C 167, 13.06.2013, p. 19). See at http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf (17.11.2016).

process coincides with the adoption of a new civil procedural code. Yet the new, competition law related civil procedure and substantive rules will form a special chapter of the Competition Act⁹, rather than being incorporated into the code on civil procedure. There are two good reasons for this: first, the Competition Act hosted similar provisions in the past and second, the timing of the adoption of the code on civil procedure is uncertain.

It is within this broader context that this paper aims to explore how Hungary strived to establish a civil litigation friendly legal framework before and after the Directive. After outlining the rules introduced in 2005 and 2009, the next part of the paper is devoted to summarizing the practice of national civil law courts applying competition law. After recalling those main points of the Directive which deal with the interaction of public and private enforcement of competition rules, it will be concluded that new procedural rules, however important they seem to be, do not immediately result in more complaints being filed before courts. Soft factors such as competition law knowledge of parties, judges, local business culture and the overall civil procedural regime, including the availability of class actions, are even more important.

II. Public and private enforcement of competition rules

The main competition rules of the EU addressed to undertakings are set out in Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter, TFEU). Article 101(1) prohibits anti-competitive agreements, concerted practices and decisions by associations of undertakings; Article 102 outlaws abuses of a dominant position enjoyed in a significant part of the single market. Sections 11 and 21–22 of the Hungarian Competition Act incorporate similarly worded prohibitions. Under EU law, directly effective provisions which are sufficiently clear, unconditional and do not require the adoption of implementing measures can form the legal basis of a complaint before courts of Member States. Since the adoption of the new implementing Regulation 1/2013, the whole body of Articles 101 and 102 TFEU can be litigated before courts¹⁰. In Hungary, where the competition authority

⁹ Act No. LVII of 1996 on the prohibition of unfair and restrictive market practices (hereinafter, the Competition Act).

¹⁰ Cases where the Court acknowledged the direct effect of these provisions are, for example, Case 127/73 *BRT v SABAM* ECLI:EU:C:1974:6, para. 16; Case C-282/95 *Guérin automobiles v Commission* ECLI:EU:C:1997:159, para. 39. Regulation 1/2003 abolished the EU Commission's exemption monopoly under paragraph (3) of what is now called Article 101 TFEU, allowing judges and national competition authorities to apply the whole article themselves.

has always played the dominant role in enforcing competition rules, the Competition Act has long since made it clear that the procedure of the GVH cannot be an obstacle for civil law litigations initiated by private parties.

Competition rules can be enforced by public institutions with the aim of furthering public policy aims, or by individuals protecting their own interests before courts (Komninos, 2008, p. 11–12, noting that the question of the relationship between public and private enforcement must be seen in the context of the more substantive question of the goals of competition law norms). Public enforcement involves the enforcement of competition rules through criminal and administrative rules by a competition authority, whereas courts apply their own rules of civil procedure. The final decision or judgment in a public enforcement regime may impose sanctions on undertakings or on individuals, involving imprisonment in criminal law cases and heavy fines in administrative procedures. Plaintiffs can seek compensation for damages (where punishment does not play a role) or may challenge the legality of an anti-competitive agreement. In reality, private actions follow public procedures more often than not (follow-on actions), but can also be brought independently (standalone actions) where plaintiffs face a higher hurdle to prove their case.

In Europe, compliance with competition rules is mainly ensured through administrative procedures. Anti-competitive conduct is investigated and prohibited by competition authorities, including the European Commission. Private enforcement was never meant to substitute public enforcement, unlike in the U.S. where private litigations have always been seen as a way to further public interests in fields like environmental and consumer protection, misleading advertising, labour law, and antitrust (“social control model” vs. the more European model of “conflict resolution”) (Shapiro, 1981, p. 24). Civil litigation was regarded by the Commission as a useful supplementary procedure that, if working well in practice, could even help achieve its public policy aims of deterring anti-competitive actions (Wils, 2016, p. 14).

The problem is that in many Member States, Hungary among them, not even this supplementing follow-on function of private enforcement seems to work. Alexander Italianer, former director general for competition, had to acknowledge in 2013 that only 25% of the antitrust infringements found by the Commission have been followed by civil claims over the eight preceding years. Moreover, most of these claims were brought in the UK, Germany and the Netherlands, where procedures are perceived to be more favourable¹¹ (see also: Van Nuffel, 2016, p. 256, suggesting that Member States that so far attracted more damages actions may wish to implement the Directive in a way that preserves their attractiveness).

¹¹ See: http://ec.europa.eu/competition/speeches/text/sp2013_06_en.pdf (17.11.2016).

III. Private enforcement of competition law in Hungary

Litigating competition law issues before a civil court had been an option under Hungarian law even before Hungary's accession to the then existing European Communities. However, in those rare cases where competition law related pleas were raised before a civil court, judges suspended court procedures to await a decision of the GVH¹². The positive side of such cautious judicial attitude, which is still well and alive today, was that the danger of inconsistent decisions has never been a serious issue in Hungary. Judges tend to respect the activity of the competition authority, and thanks to its unique decision-making process, they may even consider the Competition Council as a sort of specialized tribunal¹³.

Accession to the European Communities did not increase the number of competition law related private litigations. Pál Szilágyi summarized the practice of Hungarian courts in two papers published in 2013 and 2014 (Szilágyi, 2013, p. 136; Szilágyi, 2014, p. 168) by concluding that private competition law enforcement is still underdeveloped in Hungary. After studying 16 cases from between 2007 and 2012, Szilágyi noted that there was not a single private action which had stood the chance of succeeding (Szilágyi, 2013, p. 141).

With this background, it was with the enthusiasm of an explorer that the first Hungarian judgment awarding damages for a competition law infringement could be presented during the research project conducted for the Fide Congress in 2016 in the capacity as a national rapporteur (Tóth, 2016, p. 549).

Now, due to the focus of this paper which centres on the interaction of private and public enforcement, focusing on follow-on cases of the past years, it can be concluded that they related to public procurement cartel cases decided by the GVH between 2004 and 2008. Interestingly, none of the cases on anti-competitive agreements referred to the application of EU law. Publicly

¹² See, for example, the judgment of the second instance court of Szeged in 2004, Szegedi Ítéltábla: Gf.I.30.351/2003.* sz. (BH 2004. 151.). The Hungarian Ashurst report criticized the practice of the courts because procedural rules did not, in fact, restrain courts assessing an infringement of competition rules as one of the elements of liability for damages, but only reserved the competence of the competition authority procedure (and not of the civil procedure) for the Competition Office. See Éless and Németh, p. 2. In 2005, a new Article 88/A was introduced into the Hungarian Competition Act which provided that “the power of the Hungarian Competition Authority to proceed (...) and used to safeguard (...) the public interest, shall not prevent civil law claims, arising out of the infringement of the provisions (...) [on unfair manipulation of business decisions, cartels and abuse of dominant position], from being enforced directly in court”.

¹³ The GVH is an independent authority. Within the GVH, infringement decisions are adopted by the Competition Council, which is a separate body within the authority, with its members enjoying judge-like independence.

owned companies responsible for the organization of road construction tenders sued several corporations fined by the competition authority. They did not prevail though, mainly for procedural reasons. The courts argued that the plaintiffs lacked legal standing – instead of the public company organizing the construction tenders, the State itself could have suffered damages¹⁴. Privately initiated lawsuits were thus not able to fulfil their mission of supplementing an earlier public enforcement measure.

For example, the Metropolitan Court of Appeal agreed with the first instance court which had refused to award damages despite a GVH decision proving a public procurement cartel¹⁵. The courts rightly observed in these cases that the Civil Code's rules on non-contractual liability should be applied, even if a contract existed between the parties. The court held, however, that no damage was proven, neither by the plaintiff, nor by the court appointed expert. The judicial expert estimated the “but for price” of the roads to be constructed and concluded that it is for the judge to decide whether the HUF 75 million (EUR 243,000) difference amounts to damage or not. The expert pointed out that the actual cartel-related price only involved a modest 0,9% profit rate, compared to the industry average of 5.2%. The courts agreed that the lack of extra-profit suggested that no damage was caused to the plaintiff (or the State). There was also a lack of causality: the Metropolitan Court of Appeal explained that the GVH established a market allocation cartel, which does not prove that prices were driven up by the undertakings (it was not a price cartel)¹⁶. Judicial reasonings like these prove that there is still need for improving the competition law and economics awareness of judges.

There were also unique follow-on litigations based on commitments decisions adopted by the GVH¹⁷. For example, the judgment delivered by the Regional Court of Appeal of Győr on 3 July 2014 approved the ruling of a first instance court that had established the infringement of Hungarian antitrust rules and awarded damages¹⁸. The GVH started its investigation

¹⁴ Judgment of the Curia of 29.01.2013 in Gfv.30284, appeal against the judgment of the Metropolitan Court of Appeal No. 14.Gf.40.088/2012/11. The Metropolitan Court noted that even if the plaintiff suffered some damage, it was ultimately passed on to the State.

¹⁵ 14.Gf.40.600/2012/6. This case also shows how lengthy follow-on litigation can be. The public procurement tenders related to road constructions were conducted in 2002. The GVH imposed the fines in 2005, after which it took almost two years for the plaintiffs to start the litigation – the final judgment was handed down in 2012.

¹⁶ This lack of microeconomic knowledge may suggest that judges might benefit from some more training.

¹⁷ These are not typical follow-on actions since the competition authority does not establish the existence of an anti-competitive conduct, but rather terminates the investigation in light of the commitments offered by the undertakings.

¹⁸ Pf.V.20047/2014/5.

against a decision of the Trade Board of Győr, defining it as an association of undertakings despite its public law origins. The procedure involved only Hungarian competition law concerning both anti-competitive agreements and the abuse of a dominant position. In its preliminary position¹⁹, the GVH argued that some of the rules relating to the use of assigned parking places used exclusively by taxis may be abusive. However, after the Trade Board promised to change its rules, the GVH terminated the procedure making the commitments binding in September 2007.

In a follow-on litigation, the plaintiff was awarded damages already in the first round of the litigation in 2008. However, the first instance judgment was annulled by the regional court of appeal in 2011 due to procedural flaws. The second round of the judicial procedure brought the same positive result for the plaintiff. This time the court of appeal agreed with the first instance court's decision of December 2013 and the plaintiff taxi company was awarded HUF 3 million (EUR 9,700) in damages.

The nature of commitments is that they do not establish the existence of an infringement or the lack thereof. As a result, the order of the GVH cannot have any binding effect on judges. Yet, as this case shows, the very existence of a previous competition law procedure and the reasoning of the order may help plaintiffs prove their case.

To sum up, the role of private enforcement has been quite unnoticeable on the development of competition law in Hungary. Neither have there been judgments in cases of significant economic or business importance, nor were there ever sizeable damages awarded in follow-on litigations. Most issues decided by civil law judges related to minor contractual disputes where competition law played a minor role only. In many of the few stand-alone private litigation cases available in the public register of the Hungarian courts²⁰, competition law issues had no merit. The low number of follow-on cases could be the result of non-transparent, out of court settlements. Alternatively, it may also be due to the GVH's strong focus on cases involving "by object" restrictions, where there is no need to prove actual harm. This may make public investigation less complex, but it is certainly bad news for plaintiffs.

The next part of the paper will present the most important provisions of the Directive relating to substantive civil law issues. It will be followed by a discussion of the rules on the interaction of public and private enforcement.

¹⁹ Equivalent to the statement of objection (SO) issued by the EU Commission.

²⁰ See <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> (17.11.2016).

IV. Liability for damages under EU law

1. EU case law

Both EU and Hungarian laws acknowledge the right of injured parties to bring an action for damages against companies that infringed EU or domestic competition rules. The EU Court's *Courage* judgment of 2001 confirmed that the right to claim damages also exists under EU law, contributing to the effective enforcement of EU competition rules²¹. The Court of Justice further clarified the conditions for exercising the right to claim damages in the *Manfredi* case²².

The jurisprudence of the Court helps identify those persons who can come forward with an EU law based damage action. The ECJ made it clear in *Courage v Crehan* that even a party that signed the anti-competitive contract enjoys that right²³.

Unlike in the U.S., the Court has not limited the right to sue for damages to direct purchasers²⁴. General principles of civil law countries in Europe allow each and every person that suffered damages to have access to courts.

Another building block of EU substantive civil law is that according to *Manfredi*, individuals can claim compensation for the harm suffered if there is a *causal relationship* between that harm and an agreement or practice prohibited under Article 101 TFEU²⁵.

²¹ Case C-453/99 *Courage and Crehan* ECLI:EU:C:2001:465, paragraph 26: "...the full effectiveness of Article 85 of the Treaty [subsequently Article 81 EC and then Article 101 TFEU] and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition".

²² Joined Cases C-295/04 to C-298/04 *Manfredi and Others* ECLI:EU:C:2006:461 (clarifying the rights of indirect purchasers downstream in the supply chain and the fact that there was no need to prove fault in order to establish a claim).

²³ Case C-453/99 *Courage and Crehan* ECLI:EU:C:2001:465, paras 24 and 31–34. *Crehan* was a pub tenant seeking damages against its beer supplier, *Courage*. The Court found that the beer supply agreement could be considered as an anti-competitive agreement under Article 101(1). In order to reconcile the reasoning with general principles of law, the Court emphasised that this challenge is available against an undertaking that bears significant responsibility for the distortion of competition.

²⁴ The Supreme Court, mainly for practical reasons to avoid multiple damage payments, denied indirect purchasers standing under federal antitrust law. See the ruling in *Illinois Brick Co. v. Illinois* 431 U.S. 720 (1977). However, most States recognize standing of indirect purchasers. See, for example: Antitrust Modernization Commission – Report and Recommendations 265–283 (2007).

²⁵ Joined Cases C-295/04 to C-298/04 *Manfredi and Others* ECLI:EU:C:2006:461, paras 60–61; Case C-199/11 *Otis and Others* ECLI:EU:C:2012:684, para. 65.

Relying upon the principles of effectiveness and the right of individuals to seek full compensation for loss caused by an anti-competitive conduct, the injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest²⁶. It is not entirely clear to what an extent does the loss of profit cover the “loss of a chance”, which has been referred to in a few cases on EU non-contractual liability²⁷ and is considered harm to be compensated under the tort laws of England and France.

In *Otis*, a case related to the Commission’s lift cartel decision, the Court applied the notion of “direct causal link” as a requirement for compensation of damages caused by an infringement of EU competition law²⁸. This suggests that the causal link should not be broken by an independent decision taken by the seller that is a “non-cartel member”.

The Austrian *Kone* case²⁹ raised another interesting liability issue: can a person be awarded compensation who did not have a contractual link with the cartellists but purchased the product at a higher price from a supplier that did not participate in the cartel? The plaintiff’s argument would be that the cartel had an overall upward effect on prices, with innocent competitors following the price movements, so buyers of competing non-cartel members also suffered harm (“umbrella pricing”). The Court ruled that these persons should not be excluded from obtaining compensation for the loss caused by the cartel, even without having contractual links with the cartel members³⁰.

For those aspects of tort liability where the Court did not intend to develop EU law relying on general legal principles (that is, the causal link, limitation periods, the use of punitive damages), it referred to domestic legal system of each Member State to “prescribe the detailed rules governing the exercise of that right ... provided that the principles of equivalence and effectiveness are observed”³¹.

²⁶ *Manfredi*, para. 100.

²⁷ See, for example, Case T-13/92 *Moat v Commission* ECLI:EU:T:1993:22, para. 48, and Case T-47/93 *C v Commission* ECLI:EU:T:1994:262, para. 54.

²⁸ Case C-199/11 *Otis and Others* ECLI:EU:C:2012:684, para. 65.

²⁹ Case C-557/12 *Kone and Others* ECLI:EU:C:2014:1317, para. 29–34.

³⁰ The Court explained in *Kone* that “the victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it did not have contractual links with them, where it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently and that those circumstances and specific aspect could not be ignored by the members of the cartel”, *supra* note 29, para. 34.

³¹ *Manfredi*, para. 72.

2. The Directive

Establishing non-contractual (tort) liability involves complex issues, most of which are not clarified under EU law. According to the Green Paper, Member States take diverse approaches as regards the level of culpability required³². The White Paper envisaged a rule that any infringer undertaking would be liable for damages, unless it shows that it could not reasonably have been aware that its conduct had restricted competition. However, after the public consultation, the Commission omitted this rule from its proposal. The final text of the Directive mentions culpability as one of the conditions for compensation that Member States may maintain under national law, as long as this does not run counter to the principles of effectiveness and equivalence³³. The Commission did not propose to fully harmonize national rules on harm and the causal link, except for the availability of the passing-on defence, the presumption of passing-on of overcharges to indirect purchasers, and the presumption that cartel infringements cause harm.

Cartels necessarily involve a joint infringement of competition rules. As a result, there should be joint and several liability for the harm caused. Each cartel member is bound to compensate for the harm in full. This principle, common to most EU Member States, has now been codified in Article 11(1) of the Directive. There are two categories of infringers for whom the harsh consequences of joint and several liability were tempered. One of these relates to the specific focus of this paper – the interaction of public and private enforcement. Leniency applicants, companies that actively supported the investigation of the competition authority are exempt [from joint and several liability], just like small or medium-sized enterprises. The Directive also laid down rules on the internal relationship between cartel members by requiring Member States to ensure that a cartel member may recover a contribution from any co-infringer, the amount of which is to be determined in the light of their relative responsibility for the harm caused by the infringement.

The Directive also introduced new EU-wide rules allowing national courts to estimate the amount of the damage. At the time of the adoption of its Proposal, the Commission issued a *Communication on quantifying harm in damages actions based on competition law infringements*, accompanied by a detailed *Practical Guide* to assist national courts. Plaintiffs are encouraged by the presumption of harm in Article 17(2). However, this presumption applies only to cartels³⁴,

³² Green Paper, paras. 101–103.

³³ Directive, recital 11.

³⁴ Article 2(14) of the Directive gives an “official” definition for a cartel stating: “cartel means an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters

not to vertical distribution disputes or abuses committed by a dominant undertaking. The Directive requires Member States to allow national courts to estimate the amount of harm where it is practically impossible to quantify the damage precisely³⁵. Another issue where the interaction of public and private enforcement can be observed is that judges should also be able to request assistance from competition authorities, including the EU Commission, with respect to the determination of the quantum of the damage³⁶.

3. Hungarian law and jurisprudence

6:579. § of the Civil Code establishes the general rule of liability in damages caused outside contractual relations as follows: anyone causing damages to another person by infringement of law shall compensate them. He is exempted from liability if he proves that he behaved as it is generally expected in the given situation. Proving culpability is thus part of a successful damages action³⁷. Both intent and negligence can be a basis for liability for damages and there is no difference in their legal consequences.

According to 6:522. § of the Civil Code, full compensation comprises: (a) the loss of value of the property, (b) loss of expected property gain, and (c) the costs related to eliminating the detriment of property. If the amount of the damage cannot be calculated precisely, judges can also estimate an amount to achieve the aim of full compensation³⁸. Punitive damages cannot be imposed.

The Hungarian Competition Act includes bonus provisions for plaintiffs eager to seek compensation due to an infringement of competition law already in its present form. 88/C. § of the law provides for special rules intended to make the plaintiff's life more comfortable. When proving the extent of the influence that a cartel exercised on prices, it shall be presumed, unless the opposite is proven, that the infringement increased the price to an extent of 10%. This provision, introduced in 2009, comes close to a damage presumption

of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors”.

³⁵ Directive, Article 17(1).

³⁶ Directive, Article 17(3). It is unlikely that the GVH could be of much help to Hungarian judges, since it usually does not make efforts to quantify the harm caused by a cartel.

³⁷ However, the burden of proof is not on the plaintiff but rather on the party having caused the damage.

³⁸ 6:531. § of the Civil Code.

as foreseen in the Directive. The defendants should prove that the price increase did not occur, that it was smaller [than 10%], or that regardless of the price increase, the damage suffered by the plaintiff was not as high as the price rise itself, for example because the latter was passed on the vertical supply chain.

Despite this unique provision of Hungarian law, no judgment can be quoted where either the claim or the judgment relied on this rule³⁹. It clearly did not lead to more private litigations. When it comes to quantifying the damage of an unlawful action, experts, especially court appointed “official” experts, tend to play an important role. The expert can use whatever method he sees fit to [assess] the facts of the case. For example, in the one and only successful Hungarian damages action so far, a small taxi company operating in Győr collected a compensation of HUF 3 million (EUR 9,700), plus interests⁴⁰. This was an exclusionary conduct case based on both the prohibition of anti-competitive agreements and the abuse of dominance⁴¹. When calculating the amount of the damage (in the form of forfeited profit), the judges relied on the calculations provided by the court appointed expert. The plaintiff was also awarded interests, calculated from the year 2006, based on the average base interest rate of the Hungarian Central Bank⁴².

The new provisions of the Competition Act both supplement and modify the existing general substantive rules on damages found in the Civil Code. The new act will not overwrite the existing 10% price increase presumption; it will co-exist with the new damage presumption introduced according to the Directive.

Causality is not defined by the Civil Code. 6:521. § provides that there is a lack of causality when the damage was not foreseeable. Thus, objective predictability of damages triggered by an infringement should be a relevant factor. The alleged lack of a causal link was decisive for the Metropolitan Court, sustained by the Curia, when refusing to award damages to plaintiffs even though the GVH had established an unlawful cartel⁴³. The court set a fairly high standard demanding that the plaintiff ought to have relied on witnesses and documents to prove that the price set in the contract was higher due to the cartel activity. In another case of 2012, the Metropolitan Court

³⁹ The 10% presumption is applicable in court proceedings started after 1.06.2009 even if the unlawful action occurred before the entry into force of this provision.

⁴⁰ Pf.V.20047/2014/5.

⁴¹ However, EU law was not invoked by the parties, which is understandable, since the legal dispute related to the taxi market in one single town in Hungary.

⁴² According to calculations made for the purpose of this analysis, the interest roughly doubled the value of the original damages claim.

⁴³ Judgment of the Curia of 18.09.2012 in Gfv.30202, appeal against the judgment of the Metropolitan Court of Appeal No. 14.Gf.40.521/2011/9.

of Appeal sided with the first instance court in refusing to award damages despite an earlier GVH decision establishing a public procurement cartel⁴⁴. The court ruled that causality was not proven, since the GVH established a market allocation cartel, the court ruled that this does not prove that prices were raised by the undertakings. This case shows that even a follow-on law suit can be difficult to win.

As regards the *Kone* case law, the new section 88/I. (3) of the Competition Act will indirectly acknowledge the possibility of umbrella pricing based litigation. It does so when it mentions, in relation to the special joint and several responsibility of the successful leniency applicant, that a competition law harm may be caused not only to direct and indirect customers of the cartelists but also to third parties.

Finally, if two or more persons jointly cause the damage, they are jointly and severally liable for the harm⁴⁵. The Hungarian Competition Act already provides a solution to the problem that this strict liability standard should not discourage leniency applicants to come forward. Obviously, a leniency applicant would be an easy target for plaintiffs. According to 88/D. § of the Competition Act, a leniency applicant who received full immunity may refuse to pay damages as long as the claim can be recovered from other cartel members. To put it differently, the first leniency applicant is, at the moment, not even facing the immediate threat of paying for damages sustained by its own customers⁴⁶. This rule is without prejudice to the possibility of bringing a joint action against persons causing the harm. Lawsuits initiated to enforce claims against persons responsible for harm-causing behaviour, to which immunity from fine was granted, shall be stayed until the date when the judgment made in the administrative lawsuit initiated upon request for a review of the decision of the Hungarian Competition Authority establishing the infringement becomes legally binding.

The rules of the Directive are stricter, so changes have to be made to current Hungarian provisions. For example, after the completion of the implementation process the new 88/I. § of the Competition Act will provide that a successful immunity recipient shall pay for the damages caused to its own customers, but it shall be liable to other injured parties only where full compensation cannot be obtained from other undertakings involved in the same infringement.

⁴⁴ 14.Gf.40.600/2012/6.

⁴⁵ 6:524. § (1) of the Civil Code.

⁴⁶ Despite this rule, it cannot be said that many undertakings were applying for leniency.

V. Regulating the interaction of public and private enforcement

1. EU law

The Court clarified in *Zwartveld*, based upon the general principle of sincere co-operation as envisaged by the loyalty clause of Article 5 EEC, that every Community institution, including the Commission, shall give active assistance to a national court hearing proceedings on the infringement of Community rules⁴⁷. That may involve producing documents and authorizing its officials to give evidence in national proceedings. Although this case did not involve the application of competition rules, the co-operation obligation did extend to this legal field. Some years later, Article 15(1) of Regulation 1/2003 codified this obligation providing that national courts may pose questions to the Commission on both facts and its opinion on a case.

Article 15(3) of Regulation 1/2003 went a step further when it allowed both NCAs and the Commission to submit their views to national courts on their own initiative. This *amicus curiae* institution can also help achieve consistent law enforcement in Europe. Furthermore, Article 15(2) of the implementing regulation obliged national courts to send copies of judgments applying Articles 101 and 102 TFEU to the Commission. The Commission will thus be in the position to decide whether it intends to submit its observations at least during the appeal process.

One obvious problem with the co-existence of public and private enforcement is that the same anti-competitive conduct can be subject to two or even more parallel procedures. In order to avoid conflicting decisions, the EU Court clarified the relationship between the EU Commission and national courts in *Masterfoods*⁴⁸. National courts cannot adopt judgments running counter to a Commission decision dealing with same case. If a national court and the Commission are conducting their proceedings in parallel, the national judiciary shall avoid taking a decision contrary to the Commission's anticipated decision. As a result, the national court should consider suspending its procedure and await the outcome of the Commission's case. On the other hand, the Commission cannot be bound by a previous judgment of a national court, even if it applies EU competition rules. The revised implementing Regulation 1/2003 codified the *Masterfoods* case law mentioned above in its Article 16(1).

⁴⁷ *Zwartveld*, order of the Court in C-2/88, EU:C:1990:315.

⁴⁸ Case C-344/98 *Masterfoods and HB* ECLI:EU:C:2000:689, paras 48–52.

2. The Directive

Recital 6 of the Directive recalls that it is essential to ensure the interaction of private and public enforcement in order to ensure the maximum effectiveness of competition rules. It is necessary to regulate the coordination of those two forms of enforcement in a coherent manner so as to avoid divergence in applicable rules, jeopardizing the proper functioning of the internal market.

The Directive sets out the following rules coordinating the enforcement of competition rules by competition authorities, and the enforcement of the same rules in damages actions by national judges:

- disclosure of evidence included in the file of a competition authority (Article 6), and limits on the use of evidence obtained solely through access to the file of a competition authority (Article 7),
- the effect of decisions issued by NCAs on judges (Article 9 (1) and (2)),
- the limitation period is suspended or interrupted, if a competition authority takes action (Article 10(4)),
- a NCA may assist its judiciary with respect to the determination of the quantum of damages (Article 17(3))

3. Hungarian law and practice

Hungary introduced specific rules following the model of Regulation 1/2003 in 2005. The new rules implementing the Directive will not bring about major changes.

3.1. The friendly interaction: *Amicus Curiae*

In order to help the court interpret competition law norms, the GVH may act as *amicus curiae*, just like the European Commission⁴⁹. The GVH's annual report⁵⁰ presented to the Parliament about its activities in 2013 mentioned nine *amicus curiae* interventions, compared to six such cases in the previous year⁵¹, most of which involved questions of abuse of dominance and unfair

⁴⁹ According to 88/B. § (1) of the Competition Act, private lawsuits involving anti-competitive agreements or abuse of a dominant position, the provisions shall be notified to the GVH. The competition authority may decide to act as *amicus curiae* according to paragraphs (3)–(5) or “take over” the case to conduct its own competition supervision procedure according to paragraph (6).

⁵⁰ Available at: http://www.gvh.hu/data/cms1029344/gvh_ogy_pb_2013.pdf (17.11.2016).

⁵¹ Of these cases, four related to abuse of dominance, one concerned anti-competitive agreements and one the deception of consumers.

commercial practices. For example, in a case relating to the exclusion of a retailer from the distribution network of branded watches, the GVH argued for the lack of a dominant position, but advised that an unlawful resale price maintenance issue can be involved. Interestingly, each of these *amicus curiae* cases involved the interpretation of domestic competition rules. This can be seen as a sign of the general reluctance of Hungarian judges to apply non-Hungarian law.

The old-new chapter of the Competition Act will allow for *amicus curiae* interventions as regards the facts of the case, its legal evaluation, plus, and this will be new, the damage caused by the infringement. *Amicus curiae* observations, unlike a decision, are not binding. The novelty brought about by the implementation of the Directive lies in the possibility of a damage related intervention. The GVH may help courts by giving its opinion about the existence of damage, its size, and the existence of causality. Such intervention will remain optional for the GVH – the authority will be able to refuse to assist the court, even without giving reasons for its reluctance to give aid. It has to be argued here however that whenever a judge presents a genuine cartel case to the GVH, the authority will not be able to allow itself not to help the judge. This new provision may even push the GVH to specifically investigate the damage related facts of the case in the course of its own procedure, putting more details into the reasoning of its decisions, thereby making the *amicus curiae* procedure redundant.

3.2. The hierarchical interaction: the binding effect of competition authority's decisions

The vast majority of damages actions in Europe, unlike in the U.S., follow public enforcement actions by the EU Commission or by the NCAs. This makes the question of the effect of these administrative decisions crucial. According to Article 9(1) of the Directive, a competition law infringement should be “deemed to be irrefutably established for the purposes of an action for damages brought before their national courts”. Although the term “binding effect” is carefully avoided, the provision does not allow civil law courts to indirectly challenge the findings of a given Member State’s competition authority. Recital 34 of the Directive emphasizes that re-litigating competition law cases before civil courts would reduce legal certainty, and lead to inconsistency in the application of Articles 101 and 102 TFEU.

Traditionally, Hungarian judges are neither accustomed to being bound by decisions of an administrative body, nor by a judgment of an administrative review court. The special and central role played by the Commission in enforcing EU law and the EU Court’s subsequent review process may make

the *Masterfoods* approach reasonable. To extend the same principle to decisions by the NCAs demands a different explanation emphasizing the special knowledge of these institutions and their decision-making process integrated into the European Competition Network. Notably, the EU Commission can and does make its position known to the NCAs, so a judge can presume that the decision is in line, or at least not against the position of the EU Commission, whose decision would be binding on them. This policy choice also reflects that public enforcement stands higher in the hierarchy than private enforcement.

Hungary had already regulated the evidentiary effect of infringement decisions well before the Directive was adopted. These rules cover not only Articles 101 and 102 TFEU, but also their national equivalents. A separate chapter of the Hungarian Competition Act is dedicated to provisions to sustain a consistent application of the law. Section 88/B(6) provides that when the GVH notifies the court hearing a case relating to competition rules that it has decided to start its own investigation, the court shall stay its proceeding. Furthermore, national courts are bound by the final GVH decision irrespective of whether it establishes the existence or the lack of an infringement⁵².

However, this rule was interpreted narrowly by the Curia, the supreme court in Hungary, in one case⁵³. This made the legislator amend the provision making it clear that the binding effect cannot be limited to those cases where the judge had asked the GVH for its opinion on a given case. Now the Directive also strengthens this broader view on the binding nature of a NCA decision.

The new 88/R. § (1) repeats the existing provisions. The novelty lies in the fact that it also deals with the effects of decisions adopted by NCA of other Member States. The Directive acknowledged only their *prima facie* evidentiary value. The Hungarian version will imply that those parts of these decisions which explain the infringement shall be adopted as facts.

3.3. Discovery and leniency

In the seminal *Pfleiderer* judgment the Court stressed the need for balancing, on the one hand, the interest of victims of a competition law infringement to have access to crucial evidence and, on the other hand, the interest of maintaining the effectiveness of public enforcement of competition rules,

⁵² Orders from the GVH terminating the procedure due to lack of sufficient evidence, or approving commitments offered by an undertaking, have no binding effects on courts.

⁵³ Gfv.IX.30.152/2011/10, published as *EBH 2012.G.1*. The same approach was followed in case Gfv.IX.30.202/2012/9. Admittedly, this binding effect of a GVH decision is a unique phenomenon in the domestic legal system. As a rule, a court is never bound by the decision of an administrative authority (4. § of the Act on Civil Procedures).

including the leniency program⁵⁴. The Directive includes detailed rules regulating the relations between leniency and damages actions. Specifically, the Directive and its Hungarian implementing measures allow a limited access only to leniency related documents, which is also extended to settlement statements and witness statements in the course of a criminal procedure (88/N.§ (1)). Also, as described above, the burden of joint and several liability is eased for the immunity recipients.

VI. Beyond the Directive: the case for class actions

1. EU law and the Recommendation

Competition law infringements tend to cause harm to more than one undertaking or consumer. As a rule, several buyers may suffer an individual harm each of which is not that serious to make bringing legal proceedings a risk for a cartel member. Whenever a jurisdiction believes that wrongdoers should not retain their illicit profits, special procedural rules are adopted to combine small individual claims into one large lawsuit. The legislator may authorize consumer protection associations⁵⁵ or public bodies to sue on behalf of the public (representative actions). Another way to merge individual claims is to provide for class actions, where named plaintiffs would sue for damages suffered by a group of consumers. An ‘opt out’ class action is a favoured procedural tool in the U.S., whereas European jurisdictions seem to prefer the more conservative and less efficient ‘opt in’ version. The difference between these small words ‘in’ and ‘out’ is significant. If a jurisdiction chooses to go with the ‘opt out’ class action, the mega-suit would involve all unnamed individuals who purchased a product within a defined time period from the infringers. If a customer prefers to bring its own case, he or she can do that by expressly notifying the court at an early stage of the proceedings. Failing to do so will result in a judgment, or more often a settlement, binding that consumer even if he or she never ever entered the courtroom. An ‘opt in’ system means that a person will be bound by the judgment only if he or she expressly notifies the court initially about his or her intention to join the lawsuit as a party.

⁵⁴ C-360/09 *Pfeiderer AG v. Bundeskartellamt*, judgment of the Court (Grand Chamber) of 14.06.2011; (2011) ECR I-05161.

⁵⁵ Note worthy, well established consumer protection associations include Which? in the UK and Verbraucherzentrale Bundesverband in Germany.

Neither the Commission nor its co-legislators were enthusiastic about going with the U.S. type of class action, emphasizing its principal incompatibility with traditional European legal tradition as well as its potential for abuses⁵⁶. In the end, the Directive did not include rules on collective redress so that other rules of the new regime would not be delayed. Instead, the Commission adopted in June 2013 a Recommendation to provide for collective redress mechanisms. Along with the wishes of the EU Parliament, the recommendation applies not only to competition law infringements but also consumer and environment protection as well as financial services. This recommendation can be regarded as a soft form of harmonization. Concerning collective damages actions, the Commission recommends an ‘opt in’ system, unless another approach would be “duly justified by reasons of sound administration of justice”⁵⁷. Furthermore, the recommendation seems to protect the interests of large companies by discouraging Member States from admitting contingency fees and punitive damages.

The recommendation also invites Member States to ensure that collective redress actions should only be started once the procedure of the competition authority has been concluded⁵⁸. This delay will not lead to claims being time barred, since the Directive provides that limitation periods should be suspended or interrupted during the course of a public enforcement procedure⁵⁹.

The inadequacy of opt-in class actions is proven not only by the U.S. experience (Waller, and Popal, 2016, p. 2.). Poland introduced a law on collective actions in 2009 based on an opt-in model. Since then, no successful competition law cases have been brought (Jurkowska-Gomułka, 2016, p. 10; Piszcz, 2016, p. 203). In the UK, before October 2015, collective proceedings were allowed only for follow-on cases on an opt-in basis. Furthermore, the law named one pre-authorized representative party to bring such cases – the consumer association Which?. The new Consumer Rights Act 2015 allows both opt-in or opt-out proceedings, not only in follow-on cases but also in standalone cases⁶⁰. In the case of opt-out proceedings, class members domiciled in the UK are automatically included in the class, unless they opt-out. The Competition Appeal Tribunal (hereinafter, CAT) will play an important role

⁵⁶ European Parliament resolution of 02.02.2012 on ‘Towards a Coherent European Approach to Collective Redress’ (2011/2089(INI), point 2: “Europe must refrain from introducing a US-style class action system or any system which does not respect European legal traditions”.

⁵⁷ Recommendation on collective redress, point 21.

⁵⁸ Recommendation, point 33.

⁵⁹ Article 10(4).

⁶⁰ The previous system failed to produce cases. Only one collective action was brought by Which? on behalf of 130 consumers who had been overcharged by producers of replica football shirts.

in authorizing these classes to avoid any abuse of the system⁶¹. The new rules follow the law of the U.S. by creating high standards for representatives of the class of plaintiffs. The CAT should consider various factors including whether the proposed representative would fairly and adequately act in the interests of the members, whether the proposed class representative has a material interest that may conflict with the interests of the class members. Also the proposed representative's financial resources will be of importance, including the ability to pay its own as well as the opposing side's legal costs.

It should be noted that British law does not follow the Commission Recommendation as far as the requirement is concerned that the representative entity should have a non-profit making character⁶². As a result, not only consumer bodies but also law firms and third party funders can bring class actions.

2. Hungarian law and practice

In Hungary, the institution of class actions is not present in the civil procedure system, and would be considered as alien by most academics. Instead, 92. § of the Competition Act provides for a representative action, also extending to damages claims, with some opt-out features that can be initiated exclusively by the GVH. Paragraph (1) authorizes the GVH to file an action to enforce civil law claims of consumers where unlawful practices, belonging to the competence of the authority, concern a large, definable group of consumers. According to paragraph (2), this is a unique "follow-on" kind of action: the GVH is empowered to file such action only where it has already commenced its own investigation.

The problem is that this instrument has not been tested in antitrust cases yet. This shows that public authorities are not interested in launching such burdensome litigations falling outside their traditional duties. The GVH has initiated one single representative action so far in a misleading advertising case, where the claim concerned the declaration of nullity only and did not involve the award of damages⁶³.

The new Civil Procedure Code adopted in November 2016 will introduce some changes as regards collective actions. It will regulate representative actions more broadly. However, this will not be new for the competition law

⁶¹ Competition Appeal Tribunal's Rules 2015, especially Rules 75–97, available at: <http://www.legislation.gov.uk/uksi/2015/1648/made> (17.11.2016).

⁶² Recommendation, 4(a).

⁶³ The Municipal Court ruled in May 2012 that some provisions of the general terms of contracts drafted by Ingatlandepó, the operator of a real estate website, were null and void.

field since the GVH is even now empowered to take such actions. The code also provides for a special class action procedure on an opt-in basis. This, however, will be limited to disputes involving labour law, environmental law issues and consumer products related claims. All in all, the legislator still believes that authorities are best placed to bring public interest law suits, no 'privatization' of these claims is seriously envisaged.

VII. Conclusion

Hungary had already put in place procedural rules to encourage private enforcement of Hungarian and EU competition rules back in 2005 and later in 2009. As a result, the Directive will not bring about huge changes as regards the binding effect of final decisions issued by the GVH on civil courts⁶⁴, the favoured position of leniency applicants in terms of joint and several liability⁶⁵, or the assumption of damage caused by a cartel⁶⁶. The implementation of the Directive will bring about changes with respect to various procedural questions such as discovery, handling of confidential information, and access to the GVH's file. Hungary, just like many other Member States, will introduce the new rules not only for cases involving the application of EU but also domestic competition rules. Furthermore, Hungary decided to extend the implementation of the rules not only to damages claims, but also to any other civil law related claim.

A sceptical attitude has to be expressed as to the extent to which this reform streamlining existing rules will lead to more private enforcement in Hungary. Special rules introduced in the past did not have the desired impact either (Müller-Graf, 2016, p. 178, noting that the overall picture is mixed: while domestic legal systems provide for sufficient remedies, these are used to varying extents with various chances of success in Member States). Part of this may be the result of weak procedural rules, most of which will now be amended as a consequence of the Directive.

⁶⁴ Although the Supreme Court has ruled recently that this should be interpreted narrowly to apply only in cases where the civil court suspended its procedure seeking an *amicus curiae* opinion from the authority, there are legislative works underway on an amendment and to make the language of the act clearer. See: Szilágyi, 2012.

⁶⁵ Furthermore, Section 88/D. of the Competition Act provides that lawsuits filed to enforce claims against the leniency applicant shall be stayed until the date when the judgment made in the administrative lawsuit initiated upon a request for a review of the decision of the Hungarian Competition Authority establishing an infringement becomes legally binding.

⁶⁶ Section 88/C. of the Competition Act does not directly refer to the size of the damage but refers only to a presumed 10 per cent increase in prices.

However, it is likely that it will be hard for legislation to cure the main problems behind this passive attitude. Different tools and more time is needed if the aim is to counteract the unawareness of the combined application of competition rules and civil law by plaintiffs, or the reluctance of judges to apply a highly technical legal field such as competition law, especially when this would also involve the interpretation of “foreign” EU rules.

As far as consumer products are concerned, the lack of effective opt-out class actions will deter individual consumers from joining forces. Similar representative actions cannot fill the vacuum. The GVH has not used its existing toolkit over the past years to take a stance against enriched cartelists. Why should it do so in the future?

The lack of follow-on actions may exemplify a critique towards the enforcement record of the GVH: the competition authority might target perceived competition law infringements which did not really cause harm to anyone, at least not to an extent that would make them consider starting a litigation process lasting for years. From this point of view, the planned amendment of the Competition Act, expressly making the compensation of harm a factor that may reduce the fines imposed, could prove to be an extra motivating factor if not for litigation, than at least for settling the bills cartelists owe to their customers⁶⁷.

Literature

- Éless, T. and Németh, Á. (2004). *Hungary*. Retrieved from: http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/hungary_en.pdf (17.11.2016).
- Jurkowska-Gomułka, A. (2016). National Report – Poland. In Gy. Bándi, P. Darák, P. Láncoş, T. Tóth (eds), *Private Enforcement and Collective Redress in European Competition Law, Congress Proceedings, Vol. 2*. Budapest: Wolters Kluwer, 516–531.
- Kominos, A.P. (2008). *EC Private Antitrust Enforcement – Decentralised Application of EC Competition Law by National Courts*. Oxford: Hart Publishing.
- Müller-Graf, P.Ch. (2016). General report. In Gy. Bándi, P. Darák, P. Láncoş, T. Tóth (eds), *Private Enforcement and Collective Redress in European Competition Law, Congress Proceedings, Vol. 2*. Budapest: Wolters Kluwer, 66–132.
- Piszcz, A. (2016). Practical Private Enforcement: Perspectives from Poland. In M. Bergström, M. Iacovides, M. Strand (eds), *Harmonising EU Competition Litigation, The New Directive and Beyond*. Oxford and Portland: Hart Publishing, 203–220.
- Shapiro, M. (1981). *Courts, A Comparative and Political Analysis*. Chicago: University of Chicago Press.

⁶⁷ New 78. § (1) of the Competition Act. It should be added that the wording of this rule could have been stronger, obliging the Competition Council to take the fact of a compensation payment into account. Taking damages payments into consideration is an option already now under the existing rules on the imposition of fines.

- Szilágyi, P. (2012). Hungarian Competition Law & Policy: The Watermelon Omen. Retrieved from: <https://www.competitionpolicyinternational.com/hungarian-competition-law-policy-the-watermelon-omen-3/> (17.11.2016).
- Szilágyi, P. (2013). Private Enforcement of Competition Law and Stand-alone Actions in Hungary. *Global Competition Litigation Review*, 3, 136–142.
- Szilágyi, P. (2014). The Hungarian Experience on Private Enforcement and Class Actions. *Global Competition Litigation Review*, 3, 168–172.
- Tóth, T. (2016). National Report – Hungary. In Gy. Bándi, P. Darák, P. Láncoş, T. Tóth (eds), *Private Enforcement and Collective Redress in European Competition Law, Congress Proceedings, Vol. 2*. Budapest: Wolters Kluwer, 399–420.
- Van Nuffel, P. (2016). Institutional report. In Gy. Bándi, P. Darák, P. Láncoş, T. Tóth (eds), *Private Enforcement and Collective Redress in European Competition Law, Congress Proceedings, Vol. 2*. Budapest: Wolters Kluwer, 134–176.
- Waller, S.W. and Popal, O. (2016). The Fall and Rise of the Antitrust Class Action. *World Competition: Law and Economics Review*, 39(1), 29–55. Retrieved from: <http://dx.doi.org/10.2139/ssrn.2641867>.
- Wils, W.P.J. (2016). Private enforcement of EU antitrust law and its relationship with public enforcement. Forthcoming in *World Competition: Law and Economics Review*, 40(1), 2017. Retrieved from: available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2865728 (7.11.2016).

The Principle of Liability in Private Antitrust Enforcement in Selected European States in Light of the Implementation of the Damages Directive into the Polish Legal System

by

Dominik Wolski*

CONTENTS

- I. Introductory issues
- II. The interplay between EU and national laws
- III. The principle of liability in private antitrust enforcement – the case of Poland
- IV. The principle of liability in selected European states
 - 1. United Kingdom
 - 2. Germany
 - 3. Netherlands
 - 4. Austria
 - 5. Italy
 - 6. France
 - 7. Lithuania
- V. Principle of liability and the effectiveness of private antitrust enforcement
- VI. Conclusions

Abstract

In the vast majority of European countries, private antitrust enforcement falls under general rules of civil law. One of the issues to be discussed in relation to this type of litigation is the principle of liability, which exists in the given legal system, and

* PhD in law, attorney-at-law, member of the Centre of Antitrust and Regulatory Studies at the Faculty of Management, University of Warsaw, lecturer at Katowice School of Economics; dominik.wolski@wolski-legal.com. Article received: 28 June 2016; accepted: 2 September 2016.



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.

its presumed impact on private enforcement. This problem has been debated in the course of the implementation works on the Damages Directive into the Polish legal system. A discussion on the principle of liability has taken place at least twice in this context. First, the issue was considered by the Civil Law Codification Commission and expressed in its Assumptions behind the Draft Act on complaints for damages caused by the breach of competition law. Subsequently, the principle of liability was assessed again at the reconciliation conference held at the Ministry of Justice. This is but a part of a broader discussion about the relationship between the rule of liability existing in national laws being applied to private enforcement cases and EU law as well as limitations arising from the latter. After outlining this interplay, the paper will briefly introduce solutions adopted with respect to the principle of liability in the context of private enforcement in selected European countries. The selection is not random, despite the fact that a limited number of countries has been analysed – eight including Poland. These include the most advanced EU Member States when it comes to private antitrust enforcement (such as the UK, Germany or the Netherlands), along with less developed examples (such as Italy or France), and even underdeveloped countries when it comes to the number and popularity of private antitrust litigations (such as Lithuania and Poland). This sort of analysis paints a relatively comprehensive picture of the adopted solutions in relation to the principles of liability governing private enforcement cases in Europe. The same is true for the issue of the burden of proof and presumptions/binding power in civil proceedings of decisions issued by competition authorities. Furthermore, what seemed to be crucial for the drafters of the Damages Directive, this sort of analysis makes it possible to formulate certain conclusions with respect to the relationship between the effectiveness of private enforcement in a given State and the adopted principle of liability. The final conclusions understandably focus on the Polish example, that is, the implementation of the Damages Directive into the Polish legal system.

Résumé

Dans la grande majorité des pays européens l'application privée du droit de la concurrence relève des règles générales du droit civil. Un de problème qui exige l'analyse dans ce type de litige est le principe de la responsabilité qui existe dans le système juridique particulier, ainsi que son effet sur l'exécution privée du droit de la concurrence. Ce problème était discuté pendant les travaux concernant la transposition de la directive relative aux certaines règles régissant les actions en dommages («Damages Directive») dans le système juridique polonais. La discussion sur le principe de la responsabilité a eu lieu au moins deux fois dans ce contexte. Tout d'abord, la question a été examinée par la Commission de codification du droit civil et exprimée dans ses hypothèses concernant le projet de loi sur les actions en dommages pour les infractions aux dispositions du droit de la concurrence. Ensuite, le principe de la responsabilité a été évalué de nouveau lors de la conférence de réconciliation qui a eu lieu au Ministère de la Justice. C'est juste une partie de discussion plus large concernant la relation entre le principe de la responsabilité existant dans les législations nationales

appliquées dans des affaires d'application privée du droit de la concurrence et le droit de l'Union européenne, ainsi que les limitations qui en découlent. Après la présentation cette interaction, le document parlera brièvement des solutions adoptées dans certains pays européens afin de répondre au problème du principe de la responsabilité dans le contexte de l'application privée du droit de la concurrence. La sélection n'est pas aléatoire, malgré le fait qu'un nombre limité de pays a été analysé – huit pays dont la Pologne. Elle inclut les États Membres de l'Union européenne les plus avancés en ce qui concerne l'application privée du droit de la concurrence (comme le Royaume-Uni, l'Allemagne ou les Pays-Bas), ainsi que des exemples de juridictions moins développés (comme l'Italie ou la France) et même des pays sous-développés en ce qui concerne le nombre et la popularité des actions en dommages dans le domaine du droit de la concurrence (comme la Lituanie et la Pologne). Ce type d'analyse donne une vision relativement complète des solutions concernant les principes de responsabilité dans le domaine d'application privée du droit de la concurrence adoptées en Europe. C'est la même chose en ce qui concerne la question de la charge de la preuve et des présomptions/le pouvoir contraignant des décisions rendues par les autorités de la concurrence dans les procédures civiles. En outre, ce qui semblait crucial pour les rédacteurs de «amages Directive», ce type d'analyse permet de formuler certaines conclusions concernant la relation entre l'application privée du droit de la concurrence dans un État Membre particulier et le principe de responsabilité adopté dans cet État. Les conclusions finales se focalisent sur l'exemple polonais, c'est-à-dire sur la transposition de «amages Directive» dans le système juridique polonais.

Key words: private antitrust enforcement; litigations; principle of liability; burden of proof; presumptions; implementation; Damages Directive; effectiveness.

JEL: K13; K21; K42

I. Introductory issues

Private antitrust enforcement is often closer associated with antitrust enforcement as such, in its public dimension, than with private law and its principles. This realisation is not surprising seeing as antitrust enforcement was for many years clearly more public than private, maybe except the USA and its legacy. Even now, after the extensive efforts undertaken by the European Commission (hereinafter, EC) in order to trigger the private model of antitrust enforcement in Europe, the public pillar continues to remain the main form of EU competition policy. On the other hand, all the efforts exerted by EU institutions, including the Damages Directive¹, should ultimately bring

¹ 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

about a noticeable, albeit maybe not spectacular, strengthening of private antitrust enforcement. This should be true for those EU Member States in particular where private enforcement is still underdeveloped, such as Poland for instance.

According to the Damages Directive, EU Member States must implement the Directive into their domestic legal systems not later than by 27 December 2016. Among the number of issues discussed in Poland during the legislative works undertaken in order to implement the Directive², the principle of liability on which private antitrust enforcement should be based proved to be of consequence. The question that arises against the background of that discussion is – shall it be the principle of fault (fault-based liability) based on at least negligence (since an intentional act of a wrongdoer as an antitrust infringement is undisputable), or should a more rigorous type of liability like strict, objective or even an absolute liability apply (more about difference between strict liability – called in Polish law risk liability – and an absolute liability concept: Safjan, 2008, p. 1371). Indeed, the principle of liability to be introduced into future Polish legislation on private antitrust enforcement seemed to have been among the more pertinent issues being discussed during the preparations by the Civil Law Codification Commission of the Assumptions behind the Draft Act³ as well as at the meeting of the working group appointed by the Ministry of Justice (the so-called reconciliation conference)⁴.

The significance of that discussion emerges from the main aim of the Damages Directive, that is, a more effective private antitrust enforcement in EU Member States⁵. As a result, a key question arises here about the relationship between the effectiveness of private antitrust enforcement and the principle of liability. This discussion is also present with respect to the relationship between the concept of liability for an EU competition law infringement and the legal framework of liability applicable to private antitrust enforcement cases being brought before courts in EU Member States (Havu, 2014; Jones, 2016; Monti, 2001). It is justifiable to say that one of the ways to answer that question is to analyse solutions applied in several EU countries,

the competition law provisions of the Member States and of the European Union, OJ L 349, 05.12.2014, p. 1 (hereinafter, Damages Directive).

² See footnote 3 and 4.

³ The Civil Law Codification Commission (hereinafter, Codification Commission) prepared Assumptions behind the Draft of the Act on complaints for damages caused by the breach of competition law of 1 December 2015, hereinafter, the Assumptions behind the Draft of the Act (draft is accessible at: <https://bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-cywilnego>, accessed 02.09.2016).

⁴ The conference held 18th April 2016 at the Ministry of Justice. For more information about the consultation process see: <http://legislacja.rcl.gov.pl/projekt/12283303> (accessed 02.09.2016).

⁵ See motive 4 of the Damages Directive.

in particular those where private enforcement plays a significant role. On this basis, it is necessary to formulate some conclusions on the subject of the interplay between such solutions and the effectiveness of the private model of antitrust enforcement in those Member States. A wide range of solutions exists when it comes to the principle of liability in private antitrust enforcement in national legal systems of European and non-European countries. However, this is not only a question about the principle as such. It also relates to the issue of the burden of proof as well as to presumptions/binding force of the decisions issued by competition authorities. The latter plays a crucial role in follow-on claims and can significantly affect the shape of the principle of liability and its practical application.

Bearing in mind the aforementioned factors, the aim of this article is to first specify what type of solutions have been applied in selected European states. The methodological decision has been taken to not only analyse countries where private enforcement is well developed, but also those with a mid- or underdeveloped private model of antitrust enforcement as well. On this basis, the following analysis should not only facilitate a proper implementation of the Damages Directive in Poland, but be also useful to judges and legal practitioners who will soon face the need to use the new law in practice. It is worth stressing that Polish judges will very often be facing this challenge for the very first time in their professional life. Sharing practical experiences from private antitrust litigations in other countries, in particular more advanced ones, is particularly important for Poland. This is so because in light of the current version of the Assumptions behind the Draft Act, private enforcement cases will not be dealt with by a specialized judiciary but by ordinary, district courts.

As mentioned, the methodological decision has been taken to analyse models existing in several European States. For obvious reasons, the outcome of this analysis is based on the legal status before the implementation of the Damages Directive. Having said that, in some countries, the UK in particular, the adopted solutions applicable to private antitrust enforcement are further reaching than those in the Directive⁶. Thus, what selection criteria have been used to choose which countries to analyse in this article? Poland has obviously been chosen because of the Damages Directive's implementation context,

⁶ Department for Business, Innovations and Skills, *Consultation: Implementing the EU Directive on damages for breach of competition law*, January 2016. Retrieved from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/495757/BIS-16-6-consultation-implementing-the-EU-directive-on-damages-for-breaches-of-competition-law.pdf (02.09.2016); Slaughter and May, *Private enforcement of competition law in the UK*, October 2015. Retrieved from: <https://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/p/private-enforcement-of-competition-law-in-the-uk/> (02.09.2016).

especially because this particular issue appeared in the legislative works before both the Codification Commission and the working group appointed by the Ministry of Justice. The UK, Germany, the Netherlands and Austria were selected because private antitrust litigations are more developed there than in the rest of Europe (Jones, 2016, p. 4). Italy and France are examples of countries where private antitrust enforcement is relatively developed, but not as much as in the most advanced States. Lithuania is a country where the private enforcement model seems to be not yet developed enough, however its legal framework does not differ significantly from that found in Italy or France for instance. The aforementioned selection might not paint a full picture of private antitrust enforcement on the global scale (it does not include States with the biggest world economies like the USA, Japan, China or India). Yet it does make it possible to get a general idea, and sometimes a more detailed notion of the solutions applied with respect to the principle of liability in the biggest European States.

Last but not least, mentioned in this introduction must be the limitations placed on this analysis. Like the Damages Directive, this article mainly focuses on tortious liability in the context of damages complaints, with some references to contractual liability and other remedies like invalidity of contracts or unjust enrichment. The article focuses primarily on business-to-business antitrust actions (i.e. class-actions are not mentioned) albeit to some extent the issues discussed therein are of general nature, being applicable to consumer claims based on antitrust infringements also. Moreover, a look at the principles and other elements of civil liability in particular States (burden of proof, presumptions, etc.) has a general, illustrative nature. This is satisfactory for the purposes of this article but profound understanding of such liability doubtlessly requires a further, in-depth analysis. The latter goes beyond the aim and scope of this paper.

II. The interplay between EU and national laws

As mentioned above, the principle of liability in private enforcement cases is but one part of a wider discussion taking place against the background of the principle of efficiency in the private model of antitrust enforcement in EU Member States. Even if national private law is of primary relevance in damages actions, it must stay within the limits of acceptability set by European law. As a result, the question appears on the compatibility with EU law of national rules concerning liability being applied to private enforcement cases (Havu, 2014, p. 5–6). One of the issues discussed in this context is whether

liability for EU competition law infringements before Member States' courts should be based on negligent or intentional violations, or whether it should be shaped as more restrictive liability, that is, strict, objective or even an absolute one. This problem entails another question about possible limitations on the concept of liability in national law arising from EU competition law and case-law. Thus the issue here is how to frame national law on private enforcement of EU competition law (Jones, 2014, p. 14) as well as the applicability of fault in private enforcement actions based on infringements of EU law.

Yet EU law does not contain any rules on liability or guidelines on private antitrust enforcement, not to mentioned on the concept of fault (with some exceptions in the Damages Directive, see Havu, 2014, p. 8). The conclusions drawn from that fact vary considerably. Some commentators go as far as to say that the lack of fault as a condition for compensation in EU law must mean that there is no fault requirement at all, which means strict liability should be applied (*ibidem*). This means, in turn, that national law should not require such a condition (fault) either. This finding seems to be at least debatable. EU law focuses more on facilitating the possibility for private antitrust enforcement in Member States, with emphasis on procedures (Monti, 2001, p. 5), than on particular rules on liability. Moreover, it is worth mentioning that even if EU law, or EU case-law, deals to some extent with notions such as negligence or intentional act of a wrongdoer, they appear in quite a different context than liability based on private law. When it comes to an infringement of EU competition law, negligent infringement, as opposed to an intentional act of a wrongdoer, have been analysed in the context of the imposition of fines⁷. In turn being unaware of the law, as scrutinized in *Schenker*⁸, cannot matter in private enforcement of national rules at all, for the simple reason that legal ignorance would have never been taken into consideration as a reason for escaping liability. Moreover, as the Polish Supreme Court stated in one of its rulings, an undertaking's due care encompasses knowing the law and its consequences within the scope of its business activity⁹. As a result, neither EU competition law or case law nor the Damages Directive include any notion of fault (be it negligent or intentional) addressed to national laws being developed as legal frameworks for private antitrust enforcement. Effectiveness of private enforcement is the only requirement included in this context, which cannot

⁷ See opinion of AG Mayras in Case 26/75 *General Motors Continental NV*, ECLI:EU:C:1975:150, as well as how the intentional act was considered by the GC in case T-66/92 *Herlitz AG v. Commission*, ECLI:EU:T:1994:84.

⁸ Case C-681/11 *Bundeswettbewerbshörde and Bundeskartellanwalt v. Schenker & Co. AG and others*, ECLI:EU:C:2013:404.

⁹ See judgment of the Supreme Court of 17 August 1993, III CRN 77/93, OSN 1994, No. 3, sec. 69.

be limited to any extent by national rules. In other words, the principles of efficiency and equivalence are the main limits on the acceptability of national law in damages cases based on an infringement of EU competition law (Havu, 2014, p. 10).

Having said that, it has to be emphasized that there are still significant divergences in national rules on private enforcement, the principle of liability and the concept of fault (Jones, 2016, p. 20). It is also clear that such rules should comply with the principle of effectiveness which accompanied the drafters of the Damages Directive. Nevertheless, despite the aforementioned divergences in Member States, there is no reason to conclude that the requirement of fault that exists in the laws of several European countries in relation to their private antitrust enforcement cases would be incompatible with EU law. This is particularly obvious in cartel cases where an antitrust infringement is evidently intentional. As such, the requirement of fault to any extent cannot prevent private enforcement claims from being successful (Havu, 2014, p. 11, 22). This was probably the reason why the Damages Directive does not contain any rules regarding the principle of liability, other than that national law must follow the principles of effectiveness and equivalence. However, the discussion is still underway. It cannot be excluded that in the case of an infringement of EU competition law being enforced before a national court in a private action, a specific notion of fault or even strict or objective liability will be created and applied in the future (for more about the possible scenarios of EU law and national law developments as well as case-law see Havu, 2014, p. 12).

III. The principle of liability in private antitrust enforcement – the case of Poland

The Damages Directive does not impose a specific solution on Member States regarding the principle of liability on which private antitrust litigations should be based. According to motive 11 of its preamble, any adopted solution must however observe the principles of effectiveness and equivalence. There is a consequence of the main goal of the Damages Directive, that is, to strengthen private antitrust enforcement in EU Member States. Thus the aforementioned freedom of choice is limited and must respect those principles. For that reason, the issue of the principle of liability to be applied in Poland's future legislation on private antitrust enforcement has been widely discussed by the Codification Commission. Not without doubts, members of the Commission had adopted in the first version of the Assumptions behind the Draft Act a kind of objective liability, based on a breach of competition law that had no reference to fault,

neither intentional nor one committed negligently. As a result, an entity that breached competition law – except specified justifications such as acting on the basis of an act issued by an authority or court – would have been liable even if no form of negligence had occurred¹⁰. This kind of liability seemed even more restrictive than strict liability, in other words, a type of absolute or more precise than objective liability. This solution created doubts in particular in more complex cases, where an objective antitrust violation occurred in the market not necessarily meaning that all entities (businesses) involved in the given practice – consciously or unconsciously – have actually been acting contrary to competition law (Wolski, 2016, p. 41–44).

These doubts ultimately resulted in a shift in the approach of the Codification Commission towards the principle of liability. After discussions that took place at the meeting of the reconciliation conference held at the Ministry of Justice on 18th April 2016, it has been decided that the future Polish Act on private antitrust enforcement should, in fact, apply the principle of fault. Nevertheless, in order to be maximise compliance with the main aim of the Damages Directive, in particular with its motive 11, this principle should be accompanied by the presumption of fault. Thus, the burden of proof to the contrary should rest upon the defendant. As a result, the latter is not liable if it was proven that any form of negligence, even ordinary negligence, has not occurred. This brings about a situation when even if based on negligence, this solution meets the Directive's expectations in relation to measures aimed at ensuring the effectiveness of private antitrust enforcement in Member States. Moreover, it seems to be fully compliant with EU law requirements discussed above.

Based on said assumption, but bearing in mind that the final shape of the future act is still under consideration, it is worth knowing what kind of solutions exist in the laws of other European countries in this respect. This is even more interesting from the perspective of pending legislative works and arguments presented by the Codification Commission for the application of objective liability that have made reference to similar solutions adopted in other Member States¹¹. This research encompassing selected European countries may produce a set of conclusions which can be useful not only in the implementation process of the Damages Directive but for future legal practice too. To this extent, the distinction between objective liability and fault-based liability is important, in particular in stand-alone cases, which are not preceded by decisions issued by a competition authority acknowledging an antitrust

¹⁰ See current version Assumptions behind the Draft of the Act of 7th March 2016, p. 8 (retrieved from: <http://legislacja.rcl.gov.pl/projekt/12283303/katalog/12341840#12341840>, accessed 02.09.2016).

¹¹ Assumptions behind the Draft of the Act of 7th March 2016, p. 8.

violation. In the latter case, it is enough from a plaintiff's perspective to evoke that the antitrust breach has occurred and that the defendant was involved therein. Based on objective liability, the defendant is not able to successfully argue that there was no element of his negligence in such a breach. On the contrary, in the event of liability based on fault, the burden of proof will be on the defendant to show that there was no negligence on his part in the infringement. If the defendant fails to do so, taking into consideration the examination of evidences conducted by the court according to civil procedure, the defendant's antitrust infringement will be established. It is worth mentioning that in Polish civil law even the smallest degree of negligence entails liability based on either Article 415 (constitutes tort liability) or Article 471 of the Civil Code¹²(the basis of contractual liability). The Civil Code sets out in Article 355 § 2 a professional standard of due care in relation to activities being conducted by undertakings, which has been mentioned above in relation to the duty to know the law. In follow-on cases, it thus seems to be almost impossible for a company to prove that there was not even the smallest lack of due care (negligence) in the antitrust infringement in question. Thus the effectiveness of private antitrust enforcement has not been threatened to any extent.

In cases not preceded by a decision of a competition authority the situation is far more "complex". The breach of competition law is not acknowledged in an infringement decision and the aforementioned possibility of proving that the defendant has been acting with due care is therefore more probable. The court in turn, not using any findings arising from such a decision, must on its own consider if any negligence has occurred. If liability is based on a rebuttable presumption of fault of the defendant, the latter from the very outset of the proceedings – if he wants to cause a dismissal of the plaintiff's complaint – must prove that he has been acting with due care within the meaning of Article 355 § 2 of the Civil Code. If the defendant succeeds, he is not found liable for an antitrust infringement to any extent whatsoever neither based on tort law nor on the contractual regime. Otherwise, with no prejudice for the two remaining conditions of liability, namely damage and causation, the defendant is considered liable for damages suffered from the infringement in question. It thus turns out that not only the principle of liability but also the burden of proof and presumptions play a considerable role in successful antitrust litigations (for more information about legal grounds of private antitrust enforcement in Poland see i.a.: Jurkowska, 2008, p. 64–67; Stefanicki, 2014, p. 199–151).

¹² The Civil Code of 23 April 1964 (consolidated text Journal of Laws 2016, item 380 as amended), hereinafter, the CC.

IV. The principle of liability in selected European states

1. United Kingdom

The UK example is worthy of attention for many reasons. First of all, it goes without saying that private antitrust enforcement in Britain is among the most advanced and developed in Europe (Jones, 2016, p. 4)¹³. As early as 1984, English courts acknowledged in *Garden Cottage*¹⁴ (Clough and McDougall, 2004, p. 1) that damages should be available for an affected party in case of a breach of EU competition law. Furthermore, following the Enterprise Act 2002¹⁵, which somewhat amended the Competition Act of 1998¹⁶, the Competition Appeal Tribunal in London (hereinafter, CAT) was created as a specialized court to award damages in follow-on cases preceded by decisions of the National Competition Authority (hereinafter, NCA) or the EC. It is worth mentioning that despite some divergences between the legal systems and courts of England, Scotland, Northern England and Wales, British competition law, in particular the Competition Act as well as the jurisdiction of the CAT, apply throughout the UK. It is thus not by chance that one of the most important private antitrust enforcement cases finally decided by the European Court of Justice – the *Crehan* case – originates from the UK (the *Crehan* case was analysed in detail: Waterson, 2010; see also: Clough and McDougall, 2004, p. 1–2). As a result, a significant number of damages actions based on antitrust infringements are brought before British courts, the High Court and the CAT. Indeed, parties often choose the UK as their global litigation hub¹⁷. It is also worth mentioning that the CAT has a more commercial and less legalistic approach¹⁸.

Within the British legal framework, actions for damages arising from the infringement of EU competition law fall under the tort regime as a breach of statutory duty (Clough and McDougall, 2004, p. 2). Furthermore, even if a contractual relationship exists between the claimant and the defendant, claims of cartel victims in British law tend to be qualified as claims in tort rather than in contract (ibidem, p. 26). Domestic cases are based on the Competition Act of 1998 and are treated as a breach of statutory duty. Furthermore, according

¹³ See also Department for Business, Innovations and Skills, *supra* note 6, at p. 3.

¹⁴ *Garden Cottage Foods Ltd v. Milk Marketing Board* (1983) HL, 23/4/83. See also Slaughter and May, *supra* note 6, at p. 1.

¹⁵ Retrieved from: <http://www.legislation.gov.uk/ukpga/2002/40/contents> (02.09.2016).

¹⁶ Retrieved from: <http://www.legislation.gov.uk/ukpga/1998/41/contents> (02.09.2016).

¹⁷ Slaughter and May, *supra* note 6, at p. 9.

¹⁸ Ibidem, p. 5.

to Section 47A of the Competition Act, the CAT is bound since 2002 by an infringement decision issued under either British or EU competition law¹⁹. With respect to the principles of liability, to bring a claim successfully, the claimant should provide evidence that the aforementioned breach of statutory duty based either on EU or British law has occurred. However, there is no requirement of fault in the case law, but only a breach of relevant competition law rules. This means, in turn, that strict liability is applicable under British law in antitrust enforcement (Clough and McDougall, 2004, p. 9–10). The infringing party's conduct can be scrutinized by the court when the plaintiff's claim includes exemplary damages, which in very specific circumstances are available under British law (*inter alia* when the defendant acted intentionally to harm the plaintiff (*ibidem*, p. 25–26)²⁰).

In terms of the burden of proof of the infringement in question, as mentioned above, it rests on the claimant. A normal civil standard applies with respect to the standard of proof, that is, the balance of probabilities (Clough and McDougall, 2004, p. 9–12)²¹. However, decisions of the UK competition authority and the EC are binding before the CAT according to Section 47A of the Competition Act since 2002 when the Enterprise Act came into force. Decisions of the UK competition authority are also binding in ordinary courts according to Section 58A of the Competition Act. As the competition authority will have already proved that competition law had been breached, the claimant can rely on such decisions as proof of that infringement²². According to rulings of the Court of Appeal and the CAT, this means, in turn, that in follow-on cases, “the Tribunal’s jurisdiction in a follow-on claim is limited to questions of causation and quantum (quantification of loss)”²³. Hence in the latter cases, the principle of liability plays a merely symbolic role, regardless of what would have been strict or fault-based liability, because the infringement was already confirmed in the infringement decision issued by the competition authority. Nonetheless, under the British tort law regime, strict liability is applicable in private antitrust enforcement cases, instead of liability based on fault.

¹⁹ See also Department for Business, Innovations and Skills, *supra* note 6, at p. 8 and reasoning of judgments mentioned in footnote 23.

²⁰ See also reasoning of judgments mentioned in footnote 23.

²¹ The finding is more likely than not.

²² See Department for Business, Innovations and Skills, *supra* note 6, at p. 8.

²³ See e.g.: Case No. 1166/5/7/10, *Albion Water Ltd. v. DWR Cymru Cyfyngedig* (the CAT), Case No. C3/2011/1995, *Deutsche Bahn AG & Ors v. Morgan Crucible Co PLC & Ors* (the Court of Appeal) and Case No. C3/2010/0404, *Enron Coal Services Ltd. v. English Welsh & Scottish Rail Ltd.* (the Court of Appeal).

2. Germany

A number of interesting developments has taken place with respect to private antitrust enforcement in Germany. Although they were rather undermined (supposedly in order to strengthen the effect of the regulatory gap) in the EC's working papers preceding the Damages Directive, they seem quite significant. S. Peyer even says that "[t]he debate about the private rights to action is based on the assumption that private enforcement is completely underdeveloped in Europe" (Peyer, 2010, p. 6)²⁴. According to the report drafted by the German Federal Cartel Office (*Bundeskartellamt*) in 2005, German courts registered approximately 900 private enforcement cases between 2002 and 2005. Importantly, this number contained not only follow-on damages claims but also a significant amount of stand-alone cases (Buntscheck and Stichweh, 2015, p. 154)²⁵. The legal framework for private antitrust actions derives from the 1958 German Act Against Restraints of Competition (hereinafter, ARC), particularly from the 7th Amendment to this Act which came into force on 1 January 2005. This reform was meant to facilitate and improve the legal environment for private antitrust enforcement actions (Peyer, 2010, p. 9; Wach, Epping, Zinsmeister and Bonacker, 2004, p. 1). Following this amendments, all private enforcement actions in Germany, regardless of whether based on breaches of EU or German competition law, are submitted on the basis of Section 33(3) ARC. Moreover, Section 33(4) ARC stipulates that the court shall be bound by a final decision of the NCA, the EC, or the NCA of another EU Member State declaring that an infringement had occurred.

Unlike the UK, German civil law requires fault in relation to the antitrust violation. Fault in turn means that a person acts intentionally or negligently, namely he/she fails to observe his/her duty of due care, albeit even slight negligence is sufficient. Moreover, if the infringement of competition law has been proven, then it is upon the defendant to prove the absence of negligence. Thus the burden of proof that a person has fulfilled his/her duty of reasonable care is shifted to the defendant. Nevertheless, the court must be convinced that the facts presented by the plaintiff are true. This does not mean absolute

²⁴ The opinion of the author has to be supported, in particular in relation to some European countries; it does not seem to be true, in particular at the time when the Damages Directive was released, namely 2013.

²⁵ See also Bundeskartellamt, *Private Kartellrechtsdurchsetzung – Stand, Probleme, Perspektiven: Diskussionspapier für die Sitzung des Arbeitskreises Kartellrecht am 26 September 2005* (retrieved from: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/Bundeskartellamt%20-%20Private%20Kartellrechtsdurchsetzung.pdf?__blob=publicationFile&v=4, 02.09.2016).

certainty on the side of the court – yet a high level of plausibility is required, that is, beyond reasonable doubt (Buntscheck and Stichweh, 2015, p. 155). Similarly, there is a rebuttable presumption of fault in cases based on a breach of contract (Wach, Epping, Zinsmeister and Bonacker, 2004, p. 9–10). The standard of proof here requires a high level of plausibility (this requires that plausibility shall prevail over remaining doubts but without excluding them fully; *ibidem*, p. 11). German courts referred also to *prima facie* evidences in several cartel cases. This means that the fact in question (e.g. higher prices or the fact that some undertaking has been affected by the cartel agreement) can be assumed based on other facts and in connection with certain experiences (Kuijpers, Tuinenga, Wiskin, Dietzel, Campbell and Fritzsche, 2015, p. 8). With regard to the latter, it is worth mentioning that claims related to antitrust infringements do not necessarily have to be pursued in order to obtain compensation. A significant number of cases exist in Germany that are being pursued with the objective to nullify a contract on the basis of an antitrust violation. Once the court declares a contract as null and void, the plaintiff demands to recover unjust enrichment from the defendant based on German civil law. It thus turns out that contrary to common opinion, damages claims constitute only one part of private antitrust enforcement (Peyer, 2010, p. 48).

3. Netherlands

Private enforcement is not as developed in the Netherlands as it is in the UK. However, Holland is often mentioned as a place with a relatively advanced private antitrust enforcement model, unlike many other EU Member States (Kuijpers, Tuinenga, Wiskin, Dietzel, Campbell and Fritzsche, 2015, p. 1). Moreover, a number of private enforcement cases are being considered by Dutch courts. By contrast, merely a few years ago, the opinion about the popularity of private enforcement in the Netherlands was quite different (VerLoren van Themaat, Hetteema and Buruma, 2004, p. 1)²⁶. This could mean that Holland has come a long way in the last few years when it comes to antitrust litigation. It turns out that there is a rage of antitrust enforcement types in Holland nowadays, similarly to Germany, not only those that seek damages (damages claims), but also actions pertaining to the nullity of contracts or obtaining interim relief against antitrust violations too (*ibidem*, p. 1–2; Leeftang and Kuijper, 2013, p. 94).

²⁶ As the report even says: “Private litigation under antitrust rules was uncommon”, *ibidem*.

There are neither specific laws nor particular proceedings for private antitrust litigations in the Netherlands. Relevant legal ground can be found in EU competition law or Dutch competition law in conjunction with Dutch civil law. To this extent, there is no distinction between EU competition rules and national provisions (VerLoren van Themaat, Hetteema and Buruma, 2004, p. 2). Antitrust damages actions are based on tort law – specifically Article 6:162 of the Dutch Civil Code. Nonetheless, antitrust litigations can also include an action for unjust enrichment (Article 6:212 of the Dutch Civil Code) or undue payment (Article 6:203 of the Dutch Civil Code). There are five basic conditions to be fulfilled for a plaintiff to be awarded damages. The conditions are as follows: “an unlawful act, attribution of the unlawful act to the wrongdoer, damages, and causality between unlawful act and the damages” (Leeflang and Kuijper, 2013, p. 94). While the breach of competition law is considered an unlawful act, an antitrust violation should be attributable to the economic entity infringing competition law (*ibidem*). Dutch tort liability is based on fault, which is interpreted broadly and includes objective criteria. This means that to acknowledge fault in civil proceedings neither bad faith nor intentional act is required (VerLoren van Themaat, Hetteema and Buruma, 2004, p. 5). As a consequence, an antitrust violation entails “automatically” fault and negligence cannot be taken into consideration as a reason of a successful defence. However, that “strong” picture of civil liability of a person infringing competition law can be alleviated by the burden of proof of the facts constituting the violation, which rests on the plaintiff. In order to succeed, the claimant must thus provide relevant economic facts and circumstances of the breach (*ibidem*, p. 5–6; Kuijpers, Tuinenga, Wiskin, Dietzel, Campbell and Fritzsche, 2015, p. 10; Leeflang and Kuijper, 2013, p. 96). The evidence must be convincing and the unlawful act must be attributable to the defendant (*ibidem*, p. 96).

Bearing in mind those circumstances, it must be said that despite the fact that Dutch civil law almost “automatically” considers an antitrust violation as an unlawful act, and negligence cannot serve as a defence, objective criteria constituting fault must be satisfied. However, an unlawful act must be attributable to the defendant if the plaintiff is to succeed. The Dutch example shows that the fulfilment of such criteria in an antitrust litigation is feasible even in stand-alone cases. Suffice to mention here the *European Merchant Services B.V. v. Equens S.E.* case²⁷.

²⁷ Midden Nederland District Court, 30.12.2013 (court’s ruling available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBMNE:2013:7536>, 02.09.2016).

4. Austria

Austria is another EU Member State with an appreciable private antitrust enforcement. The national judiciary has dealt with several damages cases²⁸, some of which were adjudicated by the Court of Justice of the European Union. These included *Kone* (umbrella pricing effect)²⁹ or *Donau Chemie* (access to files)³⁰. Private enforcement in Austria has thus not only a relatively long tradition, but experienced significant developments in recent years (Elsner, Zandler and Kos, 2016, p. 49; Neumayr and Ablasser-Neuhuber, 2016). From 1st March 2013, Section 37a(1) of the Cartel Act stipulates that a claimant may seek damages from parties culpably violating the substantive provisions of Austrian or EU competition law, being the legal grounds for private antitrust litigations. Moreover, according to Section 37a(3) of the Cartel Act, a decision of the cartel court, the EC or a NCA of another Member States acknowledging the infringement is binding for Austrian civil courts with respect to the illegality and culpability. In follow-on cases, the plaintiff must, to succeed, only provide evidence of the damage suffered and causality between the infringement and the damage. Section 37a(3) of the Cartel Act provides therefore an exemption from the culpability condition which is normally required by Austrian tort law. Nevertheless, that relief is only accessible for the plaintiff if the antitrust violation occurred after 1 March 2013, that is, when the aforementioned section came into force (Elsner, Zandler and Kos, 2016, p. 50–51). By contrast, according to Section 37a(1) of the Cartel Act, evidence of culpability should be provided by the plaintiff for stand-alone cases. Here, the case is based on Section 37a(1) of the Cartel Act but in conjunction with general civil law principles without facilitation given by Section 37a(3) of the Cartel Act (Neumayr and Ablasser-Neuhuber, 2016).

The burden of proof rests on the plaintiff. Hence the latter should provide evidences for the infringement (with reservations for Section 37a(3) of the Cartel Act), the damage suffered, and the causal link between the infringement and the damage. The standard of proof applicable is a high degree of probability (Wollmann and Prisker, 2004, p. 8). This is to say that as a rule, according to Section 37a(1) of the Cartel Act as well as Section 1294 of the Austrian Civil Code (the latter with respect to the legal framework before 1 March 2013), the infringement of competition law implies fault (*ibidem*, p. 7). The burden of proof that the defendant's act did not, in fact,

²⁸ E.g. *Elevators and Escalators* cartel, OGH, 08.10.2008, 16 Ok 5/08.

²⁹ Case C-577/12 *Kone and others v. OBB Infrastruktur AG*, ECLI:EU:C:2014:1317.

³⁰ Case C-536/11 *Bundeswettbewerbshorde v. Donau Chemie and Others*, ECLI:EU:C:2013:366.

imply fault rests on the very defendant (Neumayr and Ablasser-Neuhuber, 2016). Nevertheless, for the time being, this rule can play an important role only in stand-alone cases seeing as in follow-on cases (preceded by a decision of the authorities indicated in Section 37a(3) of Cartel Act) the defendant cannot challenge the antitrust violation found in such decisions by any means (ibidem). In some cases, the rules governing the standard of proof can be alleviated by the concept of *prima facie* evidence well established in Austrian civil procedure (Wollmann and Prisker, 2004, p. 7).

5. Italy

Italy is not a country traditionally associated with the intense development of private antitrust enforcement. It is therefore interesting to find out how that development looks in reality. By contrast to common opinion, “[p]rivate antitrust litigation in Italy is significant and increasing (...)” (Siragusa, D’Ostuni and Rizza, 2014, p. 79). This, at first glance, surprising statement is confirmed by the number and variety of cases brought before Italian courts which vary greatly and involve telecom operators, cheese, travel agencies, software, gas operators, phone service providers and airport security services (ibidem, p. 80).

There is no specific legal ground for private antitrust actions in Italy and so the applicable general legal basis is that of Italian civil law and proceedings. Violations of both Italian (Law 287/90) and EU competition law are primarily classified as torts but contractual liability for this type of infringements is also quite common. By contrast, complaints based on infringements of competition law regarding merger control are very unlikely. Section 2043 of the Civil Code is applicable as regards tort law; Section 1372 of the Civil Code constitutes the legal basis for contractual liability for private antitrust enforcement actions (ibidem, p. 79–80; Tardella and Maggiore, 2004, p. 1–3). In the vast majority of cases, plaintiffs brought actions pursuing damages or the nullity of a contract. Actions for damages are governed by general rules of civil law (the Civil Code), mainly those based on torts, but to some extent on the contractual regime too. Liability arising from antitrust infringements is primarily considered as tort (ibidem, p. 2). Civil liability is based on fault. In the tort based regime, the plaintiff must prove the defendant’s fault. As a result, in damages actions the plaintiff must prove that the antitrust infringement has been committed at least negligently. He must also prove the damage and the causal link between the infringement and damage suffered (Siragusa, D’Ostuni and Rizza, 2014, p. 80). According to Section 2697 of the Civil Code, the burden of proof as regards all the above conditions of tort liability rests on the plaintiff apart

from fault, which does not need to be proven by the plaintiff (Tardella and Maggiore, 2004, p. 1–3, 14).

The aforementioned rules can be alleviated in follow-on cases. Despite the fact that decisions issued by a competition authority as well as those issued by administrative courts are not binding in antitrust litigations, they can have a significant impact on the result of such proceedings. This is because the Court of Cassation adjudicated that “the Authorities’ and the administrative courts’ findings have value as a preferred means of proof of the infringing conduct (i.e. they create a rebuttable presumption with respect to the existence of the infringement)” (Siragusa, D’Ostuni and Rizza, 2014, p. 83)³¹. In such circumstances, the defendant should provide evidences that the behaviour in question has not been unfavourably assessed by the authority. Moreover, in one of the cases not only the authority’s decision but even the statement of objections issued by the competition authority had evidential value (*ibidem*)³². This means that to assess how in the given legal system private antitrust enforcement works, all civil law rules and case-law developments have to be taken into consideration, mainly the principle of liability, the burden of proof as well as presumptions. The case law very often moderates these principles too. This leads to the softening of evidential rules in antitrust litigations in favour of the complainant.

6. France

Like Italy, France is rarely perceived as a country with a well-developed private antitrust enforcement but this situation has recently been changing (Lenoir, Plankensteiner and Truffier, 2015, p. 127). It is worth mentioning that as early as 1982, the French Constitutional Court has accepted the right to compensation in relation to legal breaches as a principle of constitutional value (*ibidem*)³³. As a result, while France is still behind the UK, the Netherlands or Germany in the number of private antitrust litigations, infringers became aware that antitrust breaches may result not only in administrative sanctions imposed by the NCA but private damages actions too. The number of the latter cases continues to increase (*ibidem*, p. 127).

The French approach to the legal grounds of private antitrust actions is based on traditional civil law principles (Thill-Tayara and Giner Asins, 2015, p. 169). There are therefore Articles L.420-1 and L.420-2 of the French Commercial

³¹ It refers to the ruling of the Court of Cassation, No. 3640/2009.

³² This time with reference to the Tribunale Milano of 10.11.2011.

³³ See also: decision of the Constitutional Tribunal No. 82-144 DC of 22.10. 1982; decision No. 2010-2 on a preliminary ruling on constitutionality of 11.06.2010.

Code (antitrust law) or EU competition law with reference to French tort law (Articles 1382 and 1383 of the Civil Code) or contract law (Article 1147 of the Civil Code) (Lenoir, Plankensteiner and Truffier, 2015, p. 127). To succeed, the plaintiff must prove the antitrust infringement committed by the defendant, the damage suffered and the causal link between the infringement and the damage (Thill-Tayara and Giner Asins, 2015, p. 169). Furthermore, the infringement must include fault. As a result, the claimant bears the burden of proof as to all of these conditions of liability, fault included.

Decisions issued by competition authorities do not have binding force in private litigations. This conservative approach is recently changing in the case law as courts are drawing more attention to the decisions issued by competition authorities by considering that an antitrust infringement constitutes “fault” (ibidem, p. 170; Lenoir, Plankensteiner and Truffier, 2015, p. 128). As early as 2010, the Supreme Court confirmed that a breach of competition law (anti-competitive behaviour) found by the competition authorities constitutes “fault” and a victim of that behaviour is entitled to claim damages³⁴. In another judgment, the Supreme Court also specified that it is not sufficient to establish fault by mere reference to an infringement decision, without any description of the behaviour concerned (Thill-Tayara and Giner Asins, 2015, p. 178)³⁵. However, it is worth noting that the judiciary’s approach becomes increasingly pragmatic and it is more willing to grant damages in cases based on antitrust infringements (ibidem, p. 169). An EC decision is binding on national courts on the basis of Regulation 1/2003³⁶. In spite of that, decisions of competition authorities, both national and foreign, do not have such binding force, but as mentioned above, they have high probative value (ibidem, p. 178). This approach has great importance in follow-on claims which are the most frequent way of private antitrust complaints in France. In stand-alone cases however, the burden of proof rests on the claimant. This means that to successfully bring an action before a court, a claimant must provide evidences of the antitrust infringement including fault. However, in practice sometimes courts even in stand-alone cases ask the competition authority for advice on the subject of the anti-competitive conduct (e.g. abuse of dominant position) or contract (ibidem, p. 169)³⁷. There is, however, a broad discretionary power of the court to decide on that matter (Lenoir, Plankensteiner and Truffier, 2015, p. 129).

³⁴ Case *Lectiel v. France Telecom*, judgment of the Supreme Court of 23.03.2010.

³⁵ Case *Subiteo v. France Télécom*, judgment of the Supreme Court, 25.03.2014.

³⁶ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 04.01.2003, p. 1).

³⁷ See also e.g. Paris Court of Appeal, 16.11.2011, No. 09/16817.

7. Lithuania

Lithuania is a place where the development of private antitrust enforcement is still almost unnoticeable, especially in comparison with the most advanced European Member States. This situation has not changed from the time when Lithuania joined the EU on 1 May 2004 (Gumbis, Juonys and Keserauskas, 2004, p. 1; Gudziunas, Audzevicius and Kozubowska, 2014, p. 93). Very few private cases are brought before Lithuanian courts based on antitrust infringements. However, this trend seems to be changing towards a growth of private enforcement including both the private as well as the public sector (*ibidem*).

A relatively small number of private antitrust litigations does not mean that there is no legal basis for such enforcement model. On the contrary, especially since the new Lithuanian competition law came into force (Gumbis, Juonys and Keserauskas, 2004, p. 1; Stanikunas and Burinskas, 2015, p. 239)³⁸, the latter has become, together with Lithuania's civil law, the legal grounds for such complaints. Briefly speaking, the legal framework of tortious liability is similar to most European legal systems (*ibidem*). Furthermore, the claimant can bring private actions based on a breach of national competition law as well as EU competition rules seeking compensation for damages or the invalidity of an agreement for antitrust reasons (Gudziunas, Audzevicius and Kozubowska, 2014, p. 93).

The main legal ground for private antitrust enforcement can be found in Article 43 of Lithuania's Law on Competition which stipulates, that "economic entities that violate this Law must compensate damage caused to other economic entities or natural and legal person (...)" (Stanikunas and Burinskas, 2015, p. 243). The following Article 47 permits two types of actions: on the termination of illegal activities or on the compensation for damage caused by an antitrust infringement (*ibidem*). Based on that general rules, in private antitrust enforcement cases, general civil rules apply, mainly tort law, but contract-based antitrust complaints are admissible too. According to Articles 6.245–6.249 of the Lithuanian Civil Code, the plaintiff who sues the wrongdoer must thus prove: the unlawful act, damages, causal link and fault. The latter is considered as an intentional act or negligence with reference to objective criteria. The unlawful act includes a rebuttable presumption of fault, meaning that the defendant can refute the presumption proving otherwise (*ibidem*, p. 244; Gumbis, Juonys and Keserauskas, 2004, p. 3). In case of contractual liability, this principle is even stricter because the non-performing party can

³⁸ Competition Law of Republic of Lithuania, VZ no. VIII-1099 adopted by the Parliament on 23.03.1999.

escape liability only if *force majeure* is established (ibidem, p. 3), which can be considered as a strict liability principle.

With respect to the burden of proof, in order to succeed, the claimant must prove all of the aforementioned elements constituting civil liability, except fault, which is presumed once an unlawful act is proven. Requirements concerning the standard of proof are met when there are no reasonable doubts as to whether the available evidence is substantial, relevant and admissible (ibidem, p. 4). This is based on the balance of probabilities (Gudziunas, Audzevicius and Kozubowska, 2014, p. 95), while some say that it is even more than that but less than certainty (Gumbis, Juonys and Keserauskas, 2004, p. 4). As a result, the standard of the burden of proof is seen to be a deterrent to private enforcement in Lithuania, in particular due to the difficulty in proving attributable loss (Stanikunas and Burinskas, 2015, p. 246). It must be noted in relation to follow-on cases that a decision of the Lithuanian NCA has specific evidential (probative) value, as do its opinions in private antitrust cases. Both decisions and opinions have *prima facie* value in relation to the unlawful act, which means that the defendant can disprove them (Gumbis, Juonys and Keserauskas, 2004, p. 6; Gudziunas, Audzevicius and Kozubowska, 2014, p. 95). This rule reasonably applies to the decisions issued by NCAs from other Member States. However, it does not arise directly from Lithuanian law (Gumbis, Juonys and Keserauskas, 2004, p. 6; Stanikunas and Burinskas, 2015, p. 245).

V. Principle of liability and the effectiveness of private antitrust enforcement

Bearing in mind the relation between EU law and national laws discussed in part II of this paper and the short review included in part IV, it is now time to formulate some conclusions concerning the presumed interplay between the principle of civil liability in the given legal system and the development of its private antitrust enforcement. This issue is of interest at least for two reasons. First, the main goal of the Damages Directive is to strengthen, or even to trigger the private enforcement model in those States where the EC believes it to be underdeveloped, or even not developed at all. The principle of liability can play here an important role as the focal element of civil liability. Second, as mentioned in part I, the principle of liability was part of the discussions on the optimal manner of implementing the Damages Directive in Poland. In fact, it is still being debated, even if its shape has preliminarily been decided upon during the reconciliation conference held at the Ministry

of Justice. Since the drafters of the forthcoming Polish law continue to keep an eye on the effectiveness factor, it is worth knowing if there really is a relationship between the development of private antitrust enforcement and the principle of liability. Although the following conclusions are not based on an in-depth analysis of the assessed legal systems, the available data makes it undoubtedly possible to formulate some notion about this relationship.

Looking at the above seven countries from a statistical point of view, it is noticeable that civil liability in case of tort is based on fault (with variations with respect to presumptions, *prima facie* evidence and the burden of proof) in almost all of them, except the UK. Contractual liability is to some extent stricter than torts, but roughly speaking it is also fault-based. Still, contractual liability seems often to be underestimated as a legal basis for private antitrust enforcement actions. There are thus three main conditions of liability based on antitrust infringements: (1) the breach of competition law including fault (even if presumed), (2) damage and its quantum and, (3) a causal link between damage and the infringement. It is worth noting that those conditions are common not only for European countries but also for those outside Europe such as Korea or China, with exception, *inter alia*, of Japan where it is based on a strict liability rule³⁹.

In the vast majority of countries, this time including the UK, decisions issued by NCAs as well as of the EC have binding force in private antitrust litigations when it comes to the antitrust infringement at hand. In follow-on cases therefore, fault does not play any role unless the above mentioned decisions have “merely” *prima facie* evidential value. Then the defendant can prove the case to the contrary, in particular that his behaviour does not imply fault in any form (neither intended nor by negligence). Undoubtedly, in countries where the decisions of the authorities have binding force before the courts as regards to the antitrust infringement – where proving the contrary by the defendant is not admissible – the plaintiff is in an advantageous position from the very outset of the civil proceedings.

The liability principle exists in various combinations with the burden of proof and presumptions. This brings about a situation where even in fault-based liability, it is not the complainant that must provide evidences of the faulty act of the defendant, but the defendant must instead prove that he was not at fault, if he wants to successfully dismiss the plaintiff’s complaint. There is no single, universal model of civil liability in private antitrust enforcement in the analysed European countries since a universal model of civil liability

³⁹ See report drafted by the OECD, *Relationship between public and private antitrust enforcement*, 11.06.2015, p. 8–12 (retrieved from: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD\(2015\)14&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2015)14&docLanguage=En), 02.09.2016).

does not exist at all (see remarks regarding the harmonization of private law in the EU and draft of regulation on common European sales law: Wolski, 2012a; Wolski, 2012b; Wolski 2012c). However, in the vast majority of States, private antitrust actions are being brought based on general rules of civil liability dominated by fault-based liability with its modifications.

While the fault-based model of liability in private antitrust enforcement prevails among the aforementioned countries, the development level of antitrust litigations is not equal among them. Some countries, like the UK, the Netherlands or Germany, have great degree of experience in this regard. Special emphasis has to be placed here on the UK and its Competition Appeal Tribunal, which has become the focal point of private antitrust litigations in Europe in recent years. In spite of the conclusions arising from the EC's reports on the condition of private enforcement in Europe, Holland and Germany do not lag behind with their level of development. Austria seems to be mid-range in its development in terms of antitrust litigations, while France and Italy are somewhat less advanced, but showing notable potential for the future. Lithuania and Poland, the latter as the eighth state under analysis here with a fault-based liability and a presumption of fault in contractual liability, are located at the end of the spectrum with a marginal number of private enforcement cases.

Is it possible to formulate even a rough conclusion based on this brief analysis with respect to the interplay between the principle of liability and the status of the development of private antitrust enforcement in these EU Member States? Yes, it is, in particular because the chosen eight countries stretch across the whole spectrum of the EU when it comes to both antitrust enforcement and economic developments. This makes them a representative group, at least for the purposes of this article. Even at first glance, without having analysed the exact number of private antitrust enforcement cases, it is noticeable that there is no specific link between the principle of liability and the status of private enforcement in particular countries. In truth, the UK has the most developed private enforcement system in the EU while employing a strict liability principle instead of the more usual fault-based liability. Yet the exception of the UK is actually not an exception at all if we compare its achievements with those of Germany or the Netherlands, which are less impressive but of comparable scale (see in particular German development in: Peyer, 2010). Moreover, Britain's popularity as the centre of antitrust litigations, as well as its very successful track record in this area, seem to be mainly due to the creation of a specialized, professional, efficient court that has an economic background – the Competition Appeal Tribunal in London. Since in the other countries with fault-based liability (unlike the strict liability in the UK) private antitrust enforcement is far more than

appreciable, it is impossible to find any causal link between those principles and the number of private antitrust cases or successful private enforcement. In Lithuania, which has a similar legal framework for antitrust litigations to France, such enforcement actually does not exist. It can be said that the reason for such difference between France and Lithuania lies in a huge disproportion in the economies of both countries and their respective size too. Yet Poland, a country comparable in size to France which also has a successful and developed economy, is at a similar stage when it comes to its private antitrust enforcement than Lithuania. Furthermore, over the past twenty years, the Polish NCA issued a number of decisions on competition law infringements⁴⁰ as well as imposed a huge amount of fines based on Article 6 and Article 9 of the Polish Act on Competition and Consumer Protection⁴¹. In other words, public enforcement of competition law in Poland is very much active. Unlike its public legacy in antitrust enforcement, it did not however, entail the same number of private cases, which remain until now almost unnoticeable.

All the above facts strongly suggest that there is no actual interplay between the principle of liability and the stage of the development of private antitrust litigations in a given country. This conclusion has significance in the context of the interplay between EU and national laws discussed in part II in light of the principles of efficiency and equivalence. It is thus fair to say that what is more important for efficiency is better awareness of the private antitrust enforcement model among undertakings as well as an efficient, specialized judiciary disposing of an economic background competent to deal with private enforcement cases. The binding force of decisions issued by competition authorities plays a supportive role in this context also. Those are the key factors determining success in the development of private enforcement.

VI. Conclusions

As emphasized at the beginning of this paper, this discussion should be considered against the background of the implementation works concerning the Damages Directive into the Polish legal system. The final part of this paper should thus be devoted to this very issue. Bearing in mind the results of the analysis conducted in part IV, it turns out that the fierce discussions surrounding

⁴⁰ See website of the Polish competition authority <https://www.uokik.gov.pl/>.

⁴¹ Consolidated text Journal of Laws 2015, item 184 as amended. Article 6 and 9 PCCPA are similar to Article 101 and 102 TFEU.

the principle of liability that took place in the course of the implementation works on the Damages Directive overestimated the implications of this issue. The effectiveness of antitrust litigations depends to a very small extent on the type of the liability principle used – in other words, whether it is fault-based or strict liability. Such effectiveness and, as a result, the level of the development of private antitrust enforcement is far more affected by the burden of proof and presumptions. What proved most relevant is the binding power of decisions issued by competition authorities (NCAs and the EC) confirming an antitrust breach by defendant in the civil case. The latter factor seems to be key for successful antitrust litigations and is also the reason why follow-on actions supersede stand-alone cases. On the other hand, and by contrast to common opinion, stand-alone cases are more than an exception.

All in all, the solution preliminarily reached in Poland seems to be quite reasonable – fault-based liability but with a rebuttable presumption of fault of the defendant. This approach is in line with liability rules in private antitrust enforcement adopted in the vast majority of the analysed EU Member States, in particular Germany or the Netherlands, which both have great experiences in antitrust litigations.

Bearing in mind effective private antitrust enforcement and its relationship to the principle of liability, it is also worth noting that setting this goal in the Damages Directive in the context of damages actions, the EC presumably failed and for two reasons. First, compensation as one of the main goals of private antitrust enforcement does not work at all because the true victims of anticompetitive behaviour, usually consumers, are “too numerous and too remote from violation to locate and compensate” (Crane, 2010, p. 677). This inevitably brings about the second mistake of the Commission. The EC focused overly on the compensatory role of the Damages Directive and on the measures meant to help victims get compensation *such as*: the concept of overcharge, direct and indirect purchaser, limitation period, passing-on defence, calculation of damage etc. By so doing, the EC almost completely disregarded a number of more important obstacles on the path to effective private enforcement. According to commentators these include issues such as legal costs, cost shifting or claim aggregation (Peyer, 2015, p. 29). For obvious reasons it is too late now to rethink the main goals and measures of the Directive. There is still time, however, to analyse why private antitrust enforcement works in some States, despite the lack of measures included in the Damages Directive, but it does not in others. This is even more interesting because, as can be seen from the review in this article, both successful and unsuccessful States have almost identical legal regimes for antitrust litigations.

Literature

- Buntscheck, M. and Stichweh, H. (2015). Germany: Private Antitrust Litigation, *The European Antitrust Review*, 154–158.
- Clough, M. and McDougall, A. (2004). *United Kingdom*. London: Ashurst. Retrieved from: http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/united_kingdom_en.pdf (02.09.2016).
- Crane, D.A. (2010). Optimizing Private Antitrust Enforcement, *Vanderbilt Law Review*, 63(2), 675–723.
- Elsner, B., Zandler, D. and Kos, M. (2016). Austria. In: I. Knable Gotts (ed.), *The Private Competition Enforcement Review*. London: Law Business Research Ltd, 49–59.
- Gudziunas, M., Audzevicius, R. and Kozubowska, B. (2014). Lithuania, *Private Antitrust Litigation*, 93–98.
- Gumbis, J., Juonys, M. and Keserauskas, S. (2004). *Lithuania*. Vilnius: Lideika, Petrauskas, Valiūnas ir partneriai. Retrieved from: (http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/lithuania_en.pdf) (02.09.2016).
- Havu, K. (2014). Fault in EU law based competition restriction damages cases, *Maastricht European Private Law Institute Working Paper No. 2014/16*, July 2016. Retrieved from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2465912 (02.09.2016).
- Jones, A. (2016). Private Enforcement of UE Competition Law: A Comparison with, and Lessons from, the US. *A Dickson Poon Transnational Law Institute, King's College London, Research Paper Series*, Paper No. 10/2016. Retrieved from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2715796 (02.09.2016).
- Jurkowska, A. (2008). Private Antitrust Enforcement – Case of Poland. *Yearbook of Antitrust and Regulatory Studies*, 1(1), 59–79.
- Kuijpers, M., Tuinenga, S., Wiskin, S., Dietzel, K., Campbell, S., Fritzsche, A. (2015). Actions for Damages in the Netherlands, the United Kingdom, and Germany, *Journal of European Competition Law & Practice* 6(2), 1–14. Retrieved from: <https://www.stibbe.com/~media/03%20news/publications/amsterdam/stefan%20tuinenga/journal%20of%20european%20competitionlaw%20%20practice-2015--jeclap-lpu125.pdf> (02.09.2016).
- Leeflang, F. and Kuijper, M. (2013). Netherlands, *Private Antitrust Litigation*, 94–99. Retrieved from: http://www.boekel.com/media/617927/private_antitrust_litigation_in_the_netherlands_-_2013.pdf (02.09.2016).
- Lenoir, N., Plankensteiner, M. and Truffier, M. (2015). France: Private Antitrust Litigation, *The European Antitrust Review*, 127–133. Retrieved from: http://www.kramerlevin.com/files/Publication/a41298ed-1a62-4ff0-8cb4-fa825d8c08e7/Presentation/PublicationAttachment/38d554af-0c20-47a3-b35b-fb2c51b7cc97/1408_GCR_Private%20Antitrust%20Litigation%202015_French%20Chapter_Private%20Enforcement.pdf (02.09.2016).
- Monti, M. (2001). *Effective Private Enforcement of EC Antitrust Law*. Speech delivered at Sixth UE Competition Law and Policy Workshop, Florence. Retrieved from: ec.europa.eu/rapid/press-release_SPEECH-01-258_en.pdf (02.09.2016).
- Neumayr, F. and Ablasser-Neuhuber, A. (2016). Austria – Competition Litigation 2017, *International Comparative Legal Guides* Retrieved from: <http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2017/austria#chaptercontent1>.

- Peyer, S. (2010). Myths and Untold Stories – Private Antitrust Enforcement in Germany, *University of East Anglia, Centre for Competition Policy*, Working Paper 10–12. Retrieved from: https://ueaeprints.uea.ac.uk/29237/1/Peyer_-_Myths_and_Untold_Stories-Private_Antitrust_Enforcement_in_Germany.pdf (02.09.2016).
- Peyer, S. (2015). Compensation and the Damages Directive, *University of East Anglia, Centre for Competition Policy*, Working Paper 15-10. Retrieved from: <http://competitionpolicy.ac.uk/documents/8158338/8368036/15-10+CCP+Working+Paper/78f92b0e-6f92-4538-bca7-4f45e8de7b2b> (02.09.2016).
- Safjan, M. (2008). In: K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz. Tom I*. Warszawa: CH Beck.
- Siragusa, M., D'Ostuni, M. and Rizza, C. (2014), Italy, *Private Antitrust Litigation*, 79-87. Retrieved from: <https://www.clearyogottlieb.com/~media/cgsh/files/other-pdfs/private-antitrust-litigation-italy-2014.pdf> (02.09.2016).
- Stanikunas, R.A. and Burinskas, A. (2015). The Interaction of Public and Private Enforcement of Competition Law in Lithuania. *Yearbook of Antitrust and Regulatory Studies*, 8(12), 237–257.
- Stefanicki, R. (2014). *Prywatnoprawne środki dochodzenia roszczeń z tytułu naruszenia reguł konkurencji*. Warszawa: CH Beck.
- Tardella, E. and Maggiore, M. (2004). *Italy*. Milan: Ashurst. Retrieved from: http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/italy_en.pdf (02.09.2016).
- Thill-Tayara, M. and Giner Asins, M. (2015). France. In: I. Knable Gotts (ed.), *The Private Competition Enforcement Review*. London: Law Business Research Ltd, 170–184.
- VerLoren van Themaat, W., Hetteema, J. and Buruma, H. (2004). *Netherlands*. Brussels: Ashurst. Retrieved from: http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/netherlands_en.pdf (02.09.2016).
- Wach, K., Epping, M., Zinsmeister, U. and Bonacker, E. (2004). *Germany*. München: Ashurst. Retrieved from: http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/germany_en.pdf (02.09.2016).
- Waterson, M. (2010). Beer – the ties that bind, *Warwick Economic Research Papers, University of Warwick*, Paper No. 930. Retrieved from: https://www2.warwick.ac.uk/fac/soc/economics/research/workingpapers/2010/twerp_930.pdf (02.09.2016).
- Wollmann, H. and Prisker, A. (2004). *Austria*. Wien: Schönherr Rechtsanwälte OEG. Retrieved from: http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/austria_en.pdf (02.09.2016).
- Wolski, D. (2012a). Harmonizacja a ujednoczenie norm prawa prywatnego – wybrane zagadnienia. In: C. Mik (ed.), *Unia Europejska: zjednoczeni w różnorodności*. Warszawa: Wydawnictwo Sejmowe, 315–346.
- Wolski, D. (2012b). Projekt rozporządzenia Parlamentu Europejskiego i Rady w sprawie wspólnego europejskiego prawa sprzedaży, *Kwartalnik Prawa Prywatnego XXI*(3), 809–827.
- Wolski, D. (2012c). Wątpliwości dotyczące podstaw traktatowych projektu rozporządzenia w sprawie europejskiego prawa sprzedaży, *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, X, 138–152.
- Wolski, D. (2016). Zasada i przesłanki odpowiedzialności odszkodowawczej, ustalenie wysokości szkody, przerzucanie nadmiernych obciążeń. In: D. Wolski, A. Piszczyk (eds), *Dochodzenie przed sądem polskim roszczeń odszkodowawczych z tytułu naruszenia reguł konkurencji*. Warszawa: Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 39–62.

Effectiveness of Judicial Review in the Polish Competition Law System and the Place for Judicial Deference

by

Maciej Bernatt*

CONTENTS

- I. Introduction
- II. The Principal Characteristics of Judicial Review in Poland
- III. The Effectiveness of Judicial Review in the Polish Competition Law System
- IV. Judicial Deference to UOKiK's Determination of the Relevant Market
 1. Introduction
 2. *Emitel*: UOKiK Needs to Prove Its Expertise
 3. *Marquard Media*: Novel Cases Should be Decided and Reviewed Carefully
 4. *Telekomunikacja Polska*: Readiness of the Supreme Court to Substitute UOKiK's Determination of the Relevant Market with its Own
 5. *Autostrada Małopolska*: Narrow Definition of the Relevant Market Can Be Upheld
- V. The Variables of Judicial Deference – Is There a Place for Respect to UOKiK's Findings?
 1. Introduction
 2. Due Process Guarantees
 3. Institutional Impartiality
 4. UOKiK's Expertise
- VI. Conclusions

* Assistant Professor, University of Warsaw, Faculty of Management, Department of European Economic Law (Jean Monnet Chair) and Scientific Secretary of the Centre for Antitrust and Regulatory Studies at the University of Warsaw; e-mail: mbernatt@wz.uw.edu.pl. This article reflects author's broader research on judicial deference in administrative and competition law funded by Poland's National Science Centre (decision 2014/15/D/HS5/01562). Article received: 17 November 2016; accepted: 30 November 2016.



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.

Abstract

The article discusses the effectiveness and the intensity of judicial review in the Polish competition law system. First, it studies whether the judicial review offered by the 1st instance Court of Competition and Consumer Protection in Warsaw (SOKiK) is effective in practice. Next, the article analyzes whether Polish courts tend to defer to the findings of the Polish competition authority, UOKiK. Judgments of the Supreme Court concerning relevant market definition serve as case studies. Finally, the article discusses whether proceedings before the Polish competition authority ensure sufficient due process guarantees, the impartiality of decision-makers, and the overall expert character of UOKiK's decision-making process. On this basis the article examines whether there are grounds for the reviewing courts to defer to UOKiK's findings. The article concludes that currently the review undertaken by SOKiK happens to be superficial and thus ineffective. At the same time, the Supreme Court's review of the determination of the relevant market is not deferential towards UOKiK's findings. The Supreme Court substitutes its own definition of the relevant market for that of UOKiK and that of the lower courts. However, the article shows that there are no grounds at the moment for arguing for greater judicial deference. Proceedings held before UOKiK, despite recently introduced improvements, still do not offer sufficient due process guarantees or a division between investigatory and decision-making functions. In addition, UOKiK's expertise is not sufficient for both institutional and practical reasons.

Résumé

L'article analyse l'efficacité et de l'intensité du contrôle juridique dans le droit de la concurrence en Pologne. Premièrement, il examine si le contrôle juridique mené par la cour de première instance, la Cour de la concurrence et de la protection des consommateurs à Varsovie (SOKiK), est efficace. Ensuite, l'article analyse si les tribunaux polonais ont tendance à se référer aux décisions de l'Autorité polonaise de la concurrence (UOKiK). Les arrêts de la Cour suprême concernant la définition du marché pertinent font l'objet d'études de cas. Enfin, l'article examine si les procédures devant l'Autorité polonaise de la concurrence assurent des garanties du procès équitable, l'impartialité des décideurs et le caractère expert du processus décisionnel de l'UOKiK. Par cette analyse, l'article tente à déterminer s'il existe des motifs que les tribunaux font preuve de déférence à l'égard des décisions de l'UOKiK. L'article conclut que la révision par le SOKiK est actuellement superficielle et inefficace. En même temps, la révision judiciaire de la détermination du marché pertinent par la Cour suprême ne fait pas preuve de déférence à l'égard des décisions de l'UOKiK. La Cour suprême change sa propre définition du marché pertinent par celle de l'UOKiK et des tribunaux inférieurs. Toutefois, l'article montre qu'il n'existe actuellement aucun motif de plaider pour une déférence judiciaire plus importante. Les procédures devant l'UOKiK, malgré les améliorations récemment introduites, n'offrent pas encore suffisamment de

garanties du procès équitable, ainsi que la répartition des fonctions d'enquête et des fonctions décisionnelles. De plus, l'expertise de l'UOKiK n'est pas suffisamment présente autant que pour des raisons institutionnelles tant que pour des raisons pratiques.

Key words: competition law; antitrust; judicial review; judicial deference; due process; procedure; courts; administration; EU; Central and Eastern Europe; Poland.

JEL: K21; K23; K49; L41; L42

I. Introduction

The judicial review of the decisions issued by Poland's National Competition Authority is exercised by civil courts in *de novo*, contradictory judicial proceedings. From a law in books viewpoint, such review model differs significantly from the cassatory, administrative model operating in EU competition law. The adequacy of judicial review in competition law has been widely discussed in the EU by many scholars and practitioners (Bailey, 2004; Vesterdorf, 2005; Schweitzer, 2009; Castillo de la Torre, 2009; Gerard, 2011; Forrester 2011, Van Cleynenbreugel, 2011–2012; Nazzini 2012; Wils 2014; Nagy, 2016; Bernatt, 2016b; Kalintiri, 2016). Some of them argue for a more intense judicial review (see in particular Gerard, 2011; Forrester, 2011). In Poland's neighbouring Visegrad countries – Hungary, Slovakia and the Czech Republic – the adequacy of judicial review is also discussed in different contexts (Šramelová, Šupáková, 2012; Cseres, Langer, 2009; Neruda, Barinka, 2015). From this perspective, a closer study of the Polish model of judicial review has the potential to enrich this debate. The question is whether a formally broader judicial review offers, in practice, better room for handling competition law disputes – provides the space for effective judicial review while preserving the competition authority's ability to enforce competition law.

This article focuses on the effectiveness and the intensity of judicial review of the decisions issued by Poland's National Competition Authority (*Prezes Urzędu Ochrony Konkurencji i Konsumentów*, hereinafter: UOKiK) as well as the permissibility of judicial deference to UOKiK's findings under the current Polish enforcement framework. The article assumes that the effectiveness of judicial review and judicial deference are interrelated. This is because the concept of judicial deference is not about imposing limits on the scope of judicial review (by distinguishing the areas that are beyond judicial review) and so it should not be understood as an excuse for courts to abdicate their

role of providing effective review of administrative action¹. Only after courts exercise effective review (in particular, they check whether the law was interpreted and applied correctly by the administrative authority, and whether evidence collected supports the conclusion of the administrative authority²), may they defer to the conclusion reached by the administrative authority³. Judicial deference is about proper inter-institutional balance (founded on such rationales as separation of powers, respect for the expertise of administrative authorities and their primary responsibility for conducting a State's policy in a given field, Bernatt, 2016a, p. 279–282) and not about the courts subordination to administration. At the same time, it assumes that courts should not overstep their role of those that review administrative action (rather than decide the case). Courts reviewing administrative decisions are not primarily responsible for the enforcement of administrative laws and so they may be expected to respect (after reviewing the way in which they were reached) the findings of an administrative body that required expert knowledge. At the same time, judicial deference may be considered permissible (for the reasons of procedural fairness and appropriateness of the conclusions reached) only if certain variables are present (Bernatt, 2016a, p. 324–325). This is supported by ECHR standards and foreign experiences. First, due process guarantees have to be provided in administrative proceedings (Bernatt, 2016a, p. 325). Second, the impartiality of administrative decision-makers (the division of prosecutorial and investigative functions from decision-making ones) has to be present (Bernatt, 2016a, p. 325). Third, the administrative authority should possess an established expertise proven in the justification of its decisions (Bernatt, 2016a, p. 325). The greater the presence of these variables, the more deferential judicial review can be (Bernatt, 2016a, p. 324–325).

The article has the following structure. After analyzing the structure and competences of courts reviewing UOKiK decisions (section II), the article

¹ It is argued that an adequate model of judicial review is one preserving positive aspects of judicial deference (especially the need for expertise and flexibility in administrative decision-making) while providing sufficient safeguards against the abuse of power by administration (see Bernatt, 2016a, p. 321–322).

² The CJEU accepts the existence of the EU Commission's margin of appreciation to the European Commission's complex economic assessment only if the General Court reviews whether the evidence relied on by the Commission is factually accurate, reliable and consistent and whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it, see case C-12/03 P *Commission v Tetra Laval*, EU:C:2005:87, para. 39. Such formula was confirmed by CJEU Grand Chamber in case C-199/11 *Europese Gemeenschap v Otis and Others*, EU:C:2012:684, para. 59.

³ The ECtHR does not exclude a deferential character of judicial review as long as the individuals or firms involved are offered effective procedural protection (Bernatt, 2016a, p. 321–322).

considers whether the judicial review offered by civil courts, in particular by the 1st instance Court of Competition and Consumer Protection in Warsaw (*Sąd Ochrony Konkurencji i Konsumentów*, hereinafter: SOKiK) is effective in practice (section III). Next, the article studies whether courts tend to defer to UOKiK's findings (section IV). Judgments of the Supreme Court concerning the issue of relevant market definition serve as case studies. Finally, the article analyses whether variables of judicial deference mentioned above are present in Poland's competition law system (section V). The article ends with conclusions and suggestions of improvements for Polish competition law.

II. The Principal Characteristics of Judicial Review in Poland

At the outset, it is important to understand the rather unique structure of the judicial review system of the decisions issued by the Polish competition authority. This review is exercised by civil courts and not administrative courts (which is a rule in Poland when it comes to the review of administrative action). As the law stands, the review has a *de novo* and reformatory character in all respects (law, facts and fines), rather than being of a merely cassatory nature. Hence, it is not limited to the review of legality only (which is a rule in Poland when it comes to the review of administrative action). The Court of Competition and Consumer Protection (the XVII division of the Regional Court in Warsaw, SOKiK) acts as the 1st instance court. Under Article 479^{31a} of the Code of Civil Procedure, it is either entitled to dismiss the action brought against a UOKiK decision and uphold the contested decision, or to accept the action and rule on its merits by changing the UOKiK decision (fully or in part). The appeal against a SOKiK judgment is heard by the Court of Appeal in Warsaw (its general civil VI Division). On the basis of an extraordinary cassation complaint, the case can reach the Supreme Court (the Division of Labour, Social Securities and Public Affairs). Since antitrust and market regulatory cases often involve novel or not-yet-settled legal issues, the Supreme Court is quite open for accepting cassation complaints and issuing judgments on the merits. Thus, it often provides interpretive guidance to lower instance courts on both substantive law issues as well as procedural ones.

The nature of the review of UOKiK's decisions by SOKiK is not free from controversies. In the late 1990s and early 2000s, the question whether SOKiK is a 1st instance court or a court merely reviewing UOKiK's decisions was disputed (at that time, an appeal to the Court of Appeal in Warsaw from SOKiK's judgments was not available). In the judgment of 12 June 2002, P 13/01, the Constitutional Court clearly ruled that SOKiK should be deemed

to be a 1st instance court⁴. For this reason, an appeal from its judgment should be available. The provisions of the Civil Procedure Code that excluded such possibility were found to be unconstitutional. In addition, in the judgment of 31 January 2005, SK 27/03, the Constitutional Court ruled also that SOKiK should be entitled not only to uphold or change a UOKiK decision but also to repeal it. The provision of the Code of Civil Procedure depriving an addressee of a UOKiK decision of the right to file such submission was found to violate the Constitution.

Another related line of controversies concerned, and still concerns, the role of SOKiK in practice. Facing the problem of a superficial and rather formalistic review of UOKiK's decisions by SOKiK, the Supreme Court started insisting that SOKiK should not refrain from deciding on the merits of the reviewed cases⁵. In other words, delivering judgments on the merits (facts included) was considered to be the role of SOKiK as the 1st instance court⁶. The Supreme Court held also that a change of a UOKiK decision (judgment on the merits) rather than its annulment should be the rule when SOKiK concludes that UOKiK's findings had not been supported by evidence⁷. The Court of Appeal in Warsaw went even further by stating that SOKiK is obliged to adjudicate on the case from the beginning and that it is precluded from basing its judgments on the findings of the administrative authority⁸.

⁴ The 1st instance character of the proceedings before SOKiK was confirmed also in many Supreme Court judgments, see the judgments of: 7 April 2004, III SK 27/04; 13 May 2004, III SK 44/04; 13 May 2004, III SK 46/04; 25 May 2004, III SK 50/04; 20 September 2005, III SZP 2/05; 10 May 2007, III SK 18/06; 10 April 2008, III SK 27/07; 19 August 2009, III SK 5/09; 3 October 2013, III SK 67/12; 28 January 2015, III SK 29/14.

⁵ See the Supreme Court judgments of: 18 September 2003, I CK 81/02; 13 May 2004, III SK 44/04; 20 September 2005, III SZP 2/05. See also the Supreme Court judgment of 17 March 2010, III SK 40/09 and the judgment of the Court of Appeal in Warsaw of 20 December 2006, VI ACa 620/06. For such conclusion in market regulation cases see the judgment of the Supreme Court of 28 January 2015, III SK 29/14.

⁶ The side-effect of this line of judgments was the complete lack of review of alleged procedural violations committed by the UOKiK during administrative proceedings. See for example the judgment of the Court of Appeal in Warsaw of 9 October 2009, VI ACa 86/09, finding that SOKiK was right in denying to rule on alleged procedural violations by UOKiK. See also the judgment of the Supreme Court of 19 August 2009, III SK 5/09 and the judgment of the Court of Appeal in Warsaw of 20 March 2012, VI ACa 1038/11. See more Bernatt, 2013, p. 94–98 and Bernatt, 2016b, p. 13–14. Positive changes in this respect were brought about by the Supreme Court judgment of 3 October 2013, III SK 67/12, see more Aziewicz, 2015, p. 261. For a study of the PKP Cargo abuse of dominance case see Gac and Bernatt, 2016.

⁷ See the Supreme Court judgment of 10 April 2008, III SK 27/07. See also the Supreme Court judgment of 5 November 2015, III SK 55/14 and 5 November 2015, III SK 7/15.

⁸ The judgment of the Court of Appeal in Warsaw of 31 May 2011, VI ACa 1299/10. See also the judgment of the Court of Appeal in Warsaw of 20 March 2012, VI ACa 1038/11.

At the same time, stating that it is the primary role of SOKiK to decide the case on the merits did not limit the Supreme Court from saying that SOKiK is entitled to base its decision on evidence collected during the administrative phase of the proceedings and verified during the judicial proceedings⁹. Moreover, the Supreme Court has stressed in its newer judgments that the role of SOKiK is to verify a UOKiK decision (rather than adjudicate the case from the beginning)¹⁰. In the judgment of 12 April 2013, III SK 28/12 and in the judgment of 5 November 2015, III SK 7/15, the Supreme Court clearly held that courts reviewing a UOKiK decision are obliged to verify the facts established by UOKiK and their legal assessment as to whether the conditions for finding the anticompetitive practice have been met. If the evidence collected during administrative and judicial proceedings does not confirm that all the conditions for finding the practice are satisfied, the court should overturn the UOKiK decision or repeal it. These judgments confirm also that judicial proceedings are run within the limits of the scope of the UOKiK decision¹¹. For this reason, the reviewing courts have to assess the practice in the light of the charges formulated by UOKiK in the original resolution on the opening of the competition proceedings¹².

It is therefore possible to conclude that the role of SOKiK is to verify UOKiK decisions by providing a full review on the merits. This review concerns both legal and factual questions as well as fines. Still, this is judicial review rather than judicial decision-making completely independent from UOKiK's findings.

III. The Effectiveness of Judicial Review in the Polish Competition Law System

The previous part has shown that as the law stands SOKiK is entitled to provide full review on the merits of the decisions issued by UOKiK. This part of the article confronts law in books with reality – it presents the practice

⁹ The judgment of the Supreme Court of 19 August 2009, III SK 5/09 and of 13 July 2012, III SK 44/11. See also the judgments of the Court of Appeal in Warsaw of 9 October 2009, VI ACa 86/09 and of 17 June 2015, VI ACa 1475/14.

¹⁰ See the judgments of the Supreme Court of: 16 April 2015, III SK 7/14; 6 May 2015, III SK 33/14; 4 March 2014, III SK 35/13; 21 June 2013, III SK 36/12; 18 May 2011, III SK 37/11; and the resolutions of the Supreme Court of: 20 February 2014, III SK 60/13; 14 January 2014, III SK 29/13; 3 October 2013, III SK 9/13; 13 August 2013, III SK 64/12. See also the judgment of the Court of Appeal in Warsaw of: 8 March 2012, VI ACa 1150/11; 17 June 2015, VI ACa 1475/14.

¹¹ See also the judgment of the Court of Appeal in Warsaw of 17 May 2016, VI ACa 630/15.

¹² See more the Supreme Court judgment of 3 October 2013, III SK 67/12.

of judicial review in Poland. The main question to be answered is whether SOKiK makes use of its powers and whether it provides full review of UOKiK decisions in practice.

At the outset, statistics suggest that SOKiK tends to uphold the majority of UOKiK's decisions. This was the case with 63–64% of UOKiK's decisions in the field of anticompetitive practices in 2015 and 2014. At the same time, statistics suggest that SOKiK has, in fact, become more aggressive lately – it upheld 86%¹³ and around 80% of UOKiK's decisions in 2013 and 2012 respectively¹⁴. Still, the true question is whether UOKiK's decisions are upheld after proper, effective review by SOKiK, or is the latter providing a formalistic and superficial review only.

The question whether SOKiK provides a full review on the merits has been an issue ever since the Supreme Court and the Constitutional Court dispelled the doubts regarding the 1st instance character of the proceedings before SOKiK. In particular, SOKiK was criticised before 2004 for focussing only on formal aspects of UOKiK's decisions. In the judgment of 13 May 2004, III SK 44/04, the Supreme Court obliged SOKiK to focus on the merits of the reviewed cases. Despite the passage of time, a number of recent judgments of the Court of Appeal in Warsaw suggest that a review on the merits remains SOKiK's weak point. Several cases illustrate that.

In a RPM case concerning the pricing policy of Sphinks, a restaurant chain franchisor, the Court of Appeal in Warsaw held in 2015 that SOKiK did not examine the essence of the case and limited itself to the assessment of the course of the administrative proceedings before UOKiK¹⁵. In particular, SOKiK did not address the issue whether the agreements at stake could have been exempted from antitrust scrutiny under Article 8 of the Polish Competition Act of 2007 (a counterpart of Article 101(3) TFEU). Therefore, the Court of Appeal in Warsaw repealed the SOKiK judgment.

In another RPM case concerning a vertical agreement between the producer of paints and varnishes Polifarb Cieszyn and its distributors, the Court of Appeal in Warsaw accepted the use by SOKiK of presumptions of fact to prove the existence of the vertical agreement¹⁶. In particular, an agreement can be inferred from tacit adherence to the proposal of the other firm. Still, the Court of Appeal in Warsaw was not satisfied with SOKiK's review. It held that SOKiK did not establish how the participation of each of the firms concerned

¹³ See UOKiK Report on Activities in 2015, p. 40, available at <https://www.uokik.gov.pl/download.php?plik=18519> (17.11.2016).

¹⁴ See UOKiK Report on Activities in 2012, p. 17, available at <https://uokik.gov.pl/download.php?plik=13679> (17.11.2016).

¹⁵ The judgment of the Court of Appeal in Warsaw of 16 December 2015, VI ACa 1799/14.

¹⁶ The judgment of the Court of Appeal in Warsaw of 9 October 2009, VI ACa 86/09.

in the reaching and the realization of the agreement looked like, and so it did not check whether any evidence confirms the tacit acceptance of the pricing policy proposed by Polifarb Cieszyn. The Court of Appeal in Warsaw found that SOKiK failed to provide such analysis by dismissing parties' motions to admit evidence on the lack of their participation in a given agreement. In consequence, the limited scope of SOKiK's evidentiary proceedings and low quality of the justification of its judgment in this respect caused the Court of Appeal in Warsaw to repeal SOKiK's judgment and to send the case back for a more elaborate evidentiary hearing.

A similar conclusion was reached by the Court of Appeal in Warsaw in its first judgment in an abuse of dominance case concerning *Emitel*¹⁷. It found that SOKiK did not provide sufficient judicial review. The Court of Appeal in Warsaw found that SOKiK's disagreement with UOKiK as to its definition of the relevant market (leading to the annulment of UOKiK's decision by SOKiK) should be based on SOKiK's own analysis of the relevant market and the specific facts established by SOKiK. The latter should not have limited itself to invoking relevant legal provisions without applying them to the facts of the case¹⁸.

A similar situation can be observed in regulatory cases that are reviewed by SOKiK by means of identical procedural provisions¹⁹. In regulatory case concerning the energy sector involving *Polska Grupa Energetyczna*, the Court of Appeal in Warsaw found that SOKiK abstained from reviewing the facts of the case, which is an indispensable prerequisite in order to correctly apply the substantive provisions²⁰. In particular, the justification of the SOKiK judgment did not contain any factual analysis and merely reported the course of the administrative proceedings. In addition, the Court of Appeal in Warsaw criticized SOKiK for not taking its own evidentiary initiative to supplement the evidence lacking from the administrative proceedings²¹. Similarly, this time in a telecoms case, the Court of Appeal in Warsaw observed in 2011 that the justification provided in the SOKiK judgment should have contained an analysis of the facts which the court had found to be proven, an analysis of the evidence that had enabled the court to reach its conclusion and should have presented

¹⁷ The judgment of the Court of Appeal in Warsaw of 13 May 2010, VI ACa 126/10 repealing the SOKiK judgment of 19 October 2009, XVII Ama 66/08. For a more elaborate analysis of this case see section IV of this article.

¹⁸ The judgment of the Court of Appeal in Warsaw of 30 April 2015, VI ACa 904/14, is another example in the abuse of dominance field of the criticism of a SOKiK judgment for an insufficient review on the merits.

¹⁹ See section II of this article.

²⁰ The judgment of the Court of Appeal in Warsaw of 7 January 2016, VI ACa 1891/14 repealing the SOKiK judgment of 6 October 2014, XVII Ama 126/12.

²¹ The judgment of the Court of Appeal in Warsaw of 7 January 2016, VI ACa 1891/14.

the way in which substantive provisions had been applied²². The mere repetition by SOKiK of the content of the administrative decision failed to meet such requirement. A very similar assessment of a SOKiK judgment can be found in the judgment of the Court of Appeal in Warsaw in *Orange Polska*²³.

The aforementioned cases do not mean that SOKiK judgments are repealed by the Court of Appeal as a rule. This does also not mean that SOKiK always upholds UOKiK's findings on anticompetitive practices²⁴. Still, the discussed judgments show that SOKiK's review on the merits can in many instances be unsatisfactory. Parallel studies proved that SOKiK's attention is often limited to the amount of the fine imposed by UOKiK (Bernatt, 2016e, p. 147–152)²⁵. The courts take an aggressive stance towards UOKiK's fining policy and tend to significantly reduce the fines imposed (very often by 50–90%) while upholding UOKiK's findings concerning the infringement (Bernatt, 2016e, p. 147–152). Such approach may produce counter-effects. It may bring risks to the deterrence of UOKiK's fining policy while, at the same time, failing to provide effective judicial review on the merits (Bernatt, 2016d, p. 22–24; for a discussion in this respect see also: Piszcz, 2013, p. 327–328; Szydło, 2016, p. 92).

IV. Judicial Deference to UOKiK's Determination of the Relevant Market

1. Introduction

If the review of UOKiK's decisions by SOKiK is only formal and superficial, it falls short of ECHR standards²⁶. This kind of review does not give basis for judicial deference. As noted in the Introduction, judicial deference should be

²² The judgment of the Court of Appeal in Warsaw of 31 May 2011, VI ACa 1299/10.

²³ The judgment of the Court of Appeal in Warsaw of 14 July 2015, VI ACa 1171/14.

²⁴ For example, in the controversial judgment of 19 June 2015, XVII Ama 112/12, SOKiK repealed the important UOKiK decision of 23 November 2011, DOK-8/2011 where UOKiK had found a violation of competition law by Polish mobile network operators. The latter colluded on how to deal with the undertaking that in an answer to a tender offer by the President of the Office of Electronic Communications was willing to provide reception services for TV broadcasting on mobile phones via DVB-H technology. According to UOKiK, the agreement impeded the development of the wholesale DVB-H television market in Poland. See also the SOKiK judgment of 17 December 2013, XVII Ama 178/11 in case *Zakłady Tworzyw Sztucznych Gamrat S.A.*

²⁵ See also the reports by Anna Piszcz and Monika Namysłowska prepared in the framework of the University of Warsaw Centre for Antitrust and Regulatory Studies research project on the judicial review on fines in competition and consumer law, see http://www.cars.wz.uw.edu.pl/badania_gb-10.html (17.11.2016).

²⁶ See *Albert and Le Compte v. Belgium*, no. 7299/75, CE:ECHR:1983:1024JUD000729975, para. 29.

seen as permissible only after effective judicial review is put in place. Still, putting aside the weaknesses of SOKiK's review (remedied often – in lengthy proceedings – by the Court of Appeal in Warsaw and the Supreme Court), one can ask whether Poland's higher courts, and in particular the Supreme Court, tend to defer to the expert findings put forward by UOKiK. This may be illustrated by studying whether Polish courts, and in particular the Supreme Court, are ready to defer to UOKiK's determination of the relevant market. Four important abuse of dominance cases which reached the Supreme Court in the last six years are chosen for a case study analysis.

The study of whether the courts defer to UOKiK's definition of the relevant market is justified because the concept of the relevant market is an open-ended, ambiguous legal term²⁷. It is prone to different interpretations in particular factual contexts. To establish what is the relevant market, the competition authority must perform a complex fact-finding process and to assess evidence of an economic nature. This is true for both the relevant product market and the relevant geographic market. Therefore, different and at least potentially equally correct determinations of the relevant market can often be made and so the choice made by the competition authority is apt to judicial deference. The courts may be ready to defer to the determination of the relevant market made by the competition authority, even if alternative conclusions could be reached²⁸. The following analysis is going to check whether this hypothesis is true for Poland.

2. *Emitel*: UOKiK Needs to Prove Its Expertise

In 2007, UOKiK found that TP EmiTel – the owner of transmission masts broadcasting radio and television signal – had abused its dominant position by charging different rates for broadcasting radio and television signal via its terrestrial broadcasting network to the publicly owned TV/radio stations and different, lower prices to private ones²⁹. The question whether UOKiK was

²⁷ Art. 4(9) of the Polish Competition Act of 2007 provides that the term relevant market “shall mean a market of goods which by reason of their intended use, price and characteristics, including quality, are regarded by the buyers as substitutes, and are offered in the area in which, by reason of the nature and characteristics of such goods, the existence of market barriers, consumer preferences, significant differences in prices and transport costs, the conditions of competition are sufficiently homogeneous”. Banasiński stresses that the determination of the relevant market involves UOKiK's discretionary assessment as the elements of the legal definition of that term provide general guidance only, see Banasiński, 2015, p. 256.

²⁸ For such situation in the US see the opinion of the U.S. Court of Appeal for 11th Circuit in *McWane* exclusive dealing case, *McWane, Inc. v. F.T.C.*, 783 F.3d 814, 831-832 (11th Cir. 2015).

²⁹ See the UOKiK decision of 25 October 2007, DOK-95/2007.

right in its determination of the relevant market defined as a national market of both radio and television terrestrial broadcasting services was a crucial issue in this case³⁰. It was addressed by all courts deciding the case: SOKiK³¹, the Court of Appeal in Warsaw³² and the Supreme Court³³.

In defining the relevant market, UOKiK included an analysis of supply-side substitutability. It observed that the providers of broadcasting services buy from Emitel access to its transmission masts in order to transmit both radio and TV channels and then use the same infrastructure for this purpose. By contrast, SOKiK found – without according deference to UOKiK’s approach – that the complete lack of demand-side substitutability of TV and radio services excludes the possibility of finding that these two services are substitutes on the supply side³⁴. In addition, SOKiK referred to the opinion of expert witness submitted during judicial proceedings to argue that costs of switching from transmitting radio signal to transmitting TV signal are high and this may require significant investments of the owner of the transmission masts. The high cost and in consequence time needed to switch from providing one service to another precludes the existence of supply substitutability. In consequence, SOKiK found that two separate relevant markets exist – one for radio broadcasting services and one for TV broadcasting services. The incorrect definition of the relevant market led SOKiK to the annulment of the UOKiK decision. The SOKiK judgment was upheld by the Court of Appeal in Warsaw in its entirety³⁵. The Court of Appeal in Warsaw agreed with UOKiK that supply substitutability can be taken into account when defining the relevant market. Still, it found that SOKiK was correct in its negative assessment of UOKiK’s analysis in this respect. When the *Emitel* case reached the Supreme Court³⁶, the latter took the opportunity to provide the lower courts with guidance on how to review UOKiK’s determination of the relevant market.

The Supreme Court in principle confirmed the lower courts assessment of the relevant market. At the same time, the Supreme Court made important observations of a general nature. After taking into account the *de novo* character of the judicial proceedings, it ruled that SOKiK is not bound by

³⁰ UOKiK found that Emitel held a clear dominant position on such market (87% market share) and that entry barriers were high.

³¹ See in particular the analysis provided in SOKiK’s second judgment in the *Emitel* case, the judgment of 18 December 2012, XVII Ama 172/08.

³² See, in particular, the analysis provided in the second judgment of the Court of Appeal in Warsaw in the *Emitel* case, the judgment of the Court of Appeal in Warsaw of 26 May 2014, VI ACa 1260/13.

³³ The Supreme Court judgment of 5 November 2015, III SK 7/15.

³⁴ The SOKiK judgment of 18 December 2012, XVII Ama 172/08.

³⁵ The judgment of the Court of Appeal in Warsaw of 26 May 2014, VI ACa 1260/13.

³⁶ The Supreme Court judgment of 5 November 2015, III SK 7/15.

UOKiK's determination of the relevant market. Still, any modification of the relevant market by the reviewing courts requires a change of the operative part of the UOKiK decisions also. On this basis, it is legitimate to argue that the Supreme Court sees SOKiK's role as a verification of the correctness of the findings made by UOKiK. This means that SOKiK cannot simply disregard UOKiK's definition of the relevant market – it needs to base its potentially different findings in the frame of the initial assessment made by UOKiK. Thus, there are no legal obstacles for the reviewing courts to accord due respect to this assessment.

The final judgment in the *Emitel* case may suggest that the Supreme Court – in a different case – would be ready to agree to some deference to UOKiK's determination of the relevant market. There are two reasons for that. First, the Supreme Court directly acknowledged that the definition of the relevant market involves a certain margin of appreciation. Thus, one could argue that the choice made by the competition authority in the frame of such margin should be entitled to judicial respect³⁷. Second, the judgment suggests that respect given to the assessment of the relevant market made by the competition authority may be conditioned with the persuasiveness of UOKiK's reasoning and, in particular, the extent to which this assessment is based on market studies. Their importance grows when the UOKiK decision addresses new markets, not yet defined in its enforcement practice. In addition, UOKiK is expected to play an active role during judicial proceedings – this may include its readiness to modify its assessment of the relevant market while defending its finding that the firm at stake holds and abuses its dominant position on such market. This may be required from UOKiK due to the *de novo*, contradictory character of the proceedings before SOKiK.

Having this reasoning in mind, the Supreme Court analysed the extent to which UOKiK's decision in the *Emitel* case was based on market studies. The activeness of UOKiK during judicial proceedings was assessed as well. The Supreme Court concluded that UOKiK failed in both respects. In particular, the Supreme Court observed that UOKiK did not provide either in the justification of its decision or in the judicial proceedings any economic proof as to the existence of supply substitutability of the offers of broadcasting radio and TV services. The competition authority did not show that reciprocal pressure from the providers of these services existed. In addition, according to the Supreme Court, UOKiK did not provide a market analysis on how the

³⁷ Still, the courts should review how UOKiK reached the stage of making the choice out of many possible definitions of the relevant market. The courts should review whether the interpretation of the law was correct, whether UOKiK assessed the collected evidence correctly and whether the facts were subsumed correctly to the established law, see the discussion in section I of this paper.

market on which Emitel acted actually operated. Instead, UOKiK presented its own narrative of how this market looked like in its opinion only.

The *Emitel* case suggests that common courts reviewing UOKiK decisions – when they eventually end up reviewing the case on its merits³⁸ – are not inclined to accord deference to UOKiK's definition of the relevant market³⁹. They are ready to rely on alternative findings of judicial expert witness⁴⁰ and to change UOKiK's assessment as a result. On the other hand, the Supreme Court's *Emitel* judgment may suggest that there is potentially some space for judicial deference to UOKiK's assessment of the relevant market. However, in order to deserve it, UOKiK needs to do its homework first – it must provide a market analysis and take initiative during the judicial proceedings.

3. *Marquard Media*: Novel Cases Should be Decided and Reviewed Carefully

Marquard Media is another case where UOKiK's determination of the relevant market was a crucial issue disputed by the parties. The case reached the Supreme Court twice; in both judgments the Supreme Court assessed the correctness of the analysis performed by the lower instance courts in their review of UOKiK's determination of the relevant market⁴¹. The case started in 2006 when UOKiK found that the investigated company's pricing policy had an anticompetitive character. The company, Marquard Media Polska, charged a very low retail price (1 PLN) for its national sports newspaper 'Przegląd Sportowy' but only in the Silesia province where its paper had a very popular competitor, the newspaper 'Sport'⁴².

The competition authority defined the relevant market in this case as a national market of daily sports newspapers. It took into account the fact that 'Przegląd Sportowy' is published nationally, while 'Sport' is published in most Polish regions. Even if 80% of the sales of 'Sport' took place in Silesia, both 'Sport' and 'Przegląd Sportowy' were present on the majority

³⁸ The first UOKiK judgment in *Emitel* (the judgment of 19 October 2009, XVII AmA 66/08) was an example of a cursory, formal review only. See more sec. 3 of the article.

³⁹ The Supreme Court judgments of 19 August 2009, III SK 5/09 and of 12 April 2013, III SK 28/12.

⁴⁰ General standards of civil procedure dictate that when complex economic questions are raised before the court, the latter can order an expert opinion *ex officio* (without the motion of parties in this respect), see the Supreme Court judgment of 27 August 2003, I CK 184/03.

⁴¹ See the Supreme Court judgments of 19 August 2009, III SK 5/09 and of 12 April 2013, III SK 28/12.

⁴² The UOKiK decision of 2 June 2006, RKT-35/2006. See more about case: Kohutek, 2010, p. 294–299; Bernatt, 2010b, p. 300–305, available at <http://ssrn.com/abstract=1874797> (17.11.2016).

of the Polish territory and consumers had access to both. There were also no barriers for 'Sport' to enter the two Polish regions where it was not yet available. In addition, UOKiK found that general national newspapers that contained parts dedicated to sports could not be seen as substitutes to national sports newspapers as the latter contain more specific, broader and up-to-date information on sports. The competition authority rejected therefore alternative determinations of the relevant market where 'Przegląd Sportowy' could not have been deemed to hold a dominant position. These would include a regional, Silesian market of daily sports newspapers or a national market of daily sports newspapers including general newspapers containing sports news.

At the review level both SOKiK and the Court of Appeal of Warsaw confirmed the UOKiK decision. They fully upheld UOKiK's determination of the relevant market. By contrast, the Supreme Court took a different view. It agreed that general daily newspapers are not substitutes to daily sports newspapers (as they meet different consumer needs). The Supreme Court held however that the lower instance courts reviewing the UOKiK decision did not offer a sufficient analysis of the competitive relations between 'Przegląd Sportowy' and 'Sport'. In particular, their analysis lacked the comparison of the subject-matter and the content of the two dailies. In the opinion of the Supreme Court, such study could potentially show that 'Sport's news are limited to Silesian sports only, a fact that could suggest – in the light of its marginal level of sales in other Polish regions – that 'Sport' is not and does not want to become the substitute of 'Przegląd Sportowy' for consumers from regions other than Silesia. Such finding could bring the lower instance courts to the conclusion that the geographic market is limited to Silesia only. The Supreme Court did not express its own opinion in this respect and sent the case back for a more elaborate analysis. At the same time, it did not suggest (directly or indirectly) that courts should attach any special importance to the way in which UOKiK determined the relevant market.

In the re-established proceedings, SOKiK in its judgment of 11 March 2011 re-confirmed UOKiK's determination of the relevant market as a national market of sports dailies. It compared the content of 'Przegląd Sportowy' and 'Sport' and found that they contained information both about Silesian and national sports. In addition, SOKiK found that no data existed suggesting that 'Sport' plans to limit its exposure to the Silesian market only. On 8 February 2012, the Court of Appeal in Warsaw upheld the SOKiK judgment. It referred to evidence collected during the proceedings before UOKiK and found that both newspapers covered sports news of the same type (national and international).

The case reached the Supreme Court once again. In the judgment of 12 April 2013, the Supreme Court underlined that UOKiK's determination of the relevant

market in complex, precedential cases involving antitrust axiology should be based on market analysis of an economic nature⁴³. The Marquard Media case had such character⁴⁴. Therefore, the Supreme Court expected from UOKiK a sensitive and prudent approach involving economic studies of the relevant market. On the other hand, the Supreme Court held also that courts should attach special attention in such cases to UOKiK's reasoning and carefully scrutinize the determinations made by the competition authority.

Assessing the judgments of SOKiK and the Court of Appeal in Warsaw, the Supreme Court found that both courts failed to apply the instructions of the earlier Supreme Court *Marquard Media* judgment. The Supreme Court found that a superficial analysis of the content of the two dailies is insufficient to substantiate the conclusion that both dailies have a national character. In particular, the lower instance courts failed to identify consumer preferences and to find out whether they considered both dailies to be substitutes. For these reasons, the lower instance courts failed to determine the relevant market correctly. In consequence, the Supreme Court repealed the judgment of the Court of Appeal in Warsaw. At the same time, it changed the SOKiK judgment by repealing the UOKiK decision. It believed that Marquard Media could not have been considered to have abused a dominant position as the relevant market was not established correctly.

Several conclusions stem from the *Marquard Media* case. The competition authority needs to base its determination of the relevant market on a market analysis of an economic character. A superficial, descriptive determination of the relevant market will not satisfy the Supreme Court. In addition, a novel and complex nature of a case is seen by the Supreme Court as an argument for special diligence and more vigilant checks at the judicial level (rather than judicial deference) when it comes to overseeing the performance of the competition authority. If judicial review by lower instance courts is found lacking, the Supreme Court is ready to intervene directly in the case by imposing its own views and interpretations on lower instance courts. When they fail to implement them, the Supreme Court may annul a UOKiK decision by itself (if it finds the decision to be unsupported by sufficient analysis). Still, questions remains open whether the Supreme Court would accept UOKiK's determination of the relevant market (determination upheld by reviewing courts) if it was supported by sufficient economic analysis even if other alternative solutions could have been reached by the Supreme Court

⁴³ The judgment of 12 April 2013, III SK 28/12.

⁴⁴ According to the Supreme Court, the *Marquard Media* case had such a character because it involved a definition of the relevant product market and concerned a practice of a nationally dominant firm limited to the part of the market on which it operated.

itself. *Marquard Media*, differently than *Emitel*, does not provide much hints in this respect.

4. *Telekomunikacja Polska*: Readiness of the Supreme Court to Substitute UOKiK's Determination of the Relevant Market with its Own

The Supreme Court judgment in the *Telekomunikacja Polska* case is yet another example of the Court's readiness to put forward its own definition of the relevant market⁴⁵.

The *Telekomunikacja Polska* case concerned the unfair pricing policy of the incumbent telecommunication company concerning the lease of its infrastructure on the market for the cable ducting system (product market). In its decision, UOKiK believed that the adoption by *Telekomunikacja Polska* (hereinafter, TP) of one uniform pricing policy on different local markets, despite their different technical, topographical and economic character, amounted to an abuse of a dominant position⁴⁶. The competition authority and the reviewing courts considered TP's cable ducting system to be an essential facility – telecom firms competing with TP could not offer their services profitably without access to that system. At the same time, neither UOKiK nor the reviewing courts precisely determined each of these local markets. In particular, the Court of Appeal in Warsaw in its judgment of 27 May 2009 described the relevant geographic market as a national market consisting of numerous undefined local markets.

The Supreme Court found such approach to be incorrect because the definition of the relevant geographic market was pre-determined by the alleged anticompetitive practice – a uniform pricing policy all across Poland. It sent the case back to the Court of Appeal in Warsaw. At the same time, the Supreme Court offered its own definition of the relevant market. It held that in this case the relevant market is one national market of the supply of the cable ducting system (rather than a national market seen as a conglomerate of local markets). This is dictated, in the view of the Supreme Court, by the fact that TP is present on the whole territory of Poland, it provides access to the cable ducting system all across the country, and it unifies the method of calculating the lease fee for such access.

Thus, *Telekomunikacja Polska* is an example of the Supreme Court substituting its own definition of the relevant market for that of UOKiK and of the lower courts. It does not follow from the Supreme Court's judgment

⁴⁵ The Supreme Court judgment of 17 March 2010, III SK 40/09.

⁴⁶ The UOKiK decision of 24 May 2004, RPZ 10/2004.

that UOKiK's determination of the relevant market (even if it was supported by complex economic analysis) merits courts' special respect⁴⁷.

5. *Autostrada Małopolska*: Narrow Definition of the Relevant Market Can Be Upheld

Autostrada Małopolska shows that the Supreme Court might uphold UOKiK's definition of the relevant market even if this definition is very narrow and open to disputes (alternative definitions are available)⁴⁸.

The case concerned the practice of Stalexport, the operator of the A-4 highway between Katowice and Cracow. Stalexport charged car drivers a fixed fee of 13 PLN for the use of that toll road despite the fact that a substantial part of that road was periodically subject to roadworks, leading to numerous traffic problems and reduced utility for drivers. The competition authority found that Stalexport abused its dominant position by maintaining a set service fee despite a decrease in the quality of the services provided (imposition of unfair prices)⁴⁹. The UOKiK decision was upheld first by the reviewing lower instance courts and later by the Supreme Court⁵⁰.

Interestingly, the Supreme Court confirmed UOKiK's definition of the relevant market as the market for paid driving on the A-4 highway between Katowice and Cracow (for broader analysis of the case see Krajewska, 2013, p. 246–250). Both the defendant as well as outside commentators (Kohutek, 2012) claimed that the relevant market was defined too narrowly. They referred to an analysis of the product market in view of the objective of the service. They argued that the market should be defined more broadly to include alternative roads between Katowice and Cracow as well as rail and bus connections (Krajewska, 2013, p. 249). They believed that these services should be seen as substitutes to the A-4 highway. In particular, because of the roadworks on the A-4 highway, the travel time and conditions (one-lane road only) were similar by means of the A-4 highway and alternative ordinary roads (Kohutek, 2012; Krajewska, 2013, p. 249).

The Supreme Court did not share this view. According to the Supreme Court, what distinguishes the two kinds of roads is the fee that has to be paid by drivers using the A-4 highway (commercial character of the service) and the ordinary characteristics of a highway (such as the possibility to drive faster,

⁴⁷ For the Supreme Court substituting its own assessment for this of UOKiK and of the lower instance courts in the field of the abuse of dominance see also the Supreme Court judgment of 19 February 2009, III SK 31/08.

⁴⁸ The Supreme Court judgment of 13 July 2012, III SK 44/11.

⁴⁹ The UOKiK decision of 25 April 2008, RKT-09/2008.

⁵⁰ See the Supreme Court judgment of 13 July 2012, III SK 44/11.

freely overtake, lack of road crossings). As a result, only another toll highway between Katowice and Cracow, with similar quality parameters to the A-4 highway, could thus be a substitute for the scrutinized toll dual-carriageway between Katowice and Cracow (Krajewska, 2013, p. 248–249).

Even if UOKiK won the case and had its narrow definition of the relevant market upheld by the Supreme Court, the language of the Supreme Court judgment in *Autostrada Małopolska* does not suggest that any implied judicial deference was a reason for that. The Supreme Court offered its own analysis of the relevant market (especially as to the paid and commercial character of the highway) and reached the same conclusions as UOKiK.

V. The Variables of Judicial Deference – Is There a Place for Respect to UOKiK’s Findings?

1. Introduction

The previous part has shown that Polish courts, and the Supreme Court in particular, are not necessarily inclined to accord deference to UOKiK’s findings involving the application of an ambiguous legal term in a given factual context. Arguing for more judicial deference to an administrative authority’s expert findings is justified when three variables are present: due process guarantees within the administrative proceedings; institutionally guaranteed impartiality of the administrative decision-makers (the division of prosecutorial and investigative functions from decision-making ones); and the expertise of the administrative decision-maker⁵¹. The greater the degree of the presence of these variables, the more deferential judicial review can be. This part of the paper aims to briefly analyse the extent to which these variables are present in the proceedings held before UOKiK. Their significant presence could justify greater than at present judicial deference to UOKiK’s findings.

2. Due Process Guarantees

The question whether proceedings before UOKiK offer sufficient procedural guarantees to the firms involved had attracted widespread attention in literature in recent years (see for example Turno, 2008; Kolasiński 2010; Bernatt, 2011a). Authors were arguing that the level of procedural rights’

⁵¹ See the Introduction and the literature invoked there.

protection is insufficient and that improvements are very much needed. In particular, the broad procedural amendment of the Competition Act of 2014⁵² was considered a lost opportunity to improve the system (Martyniszyn, Bernatt, 2015, p. 8; see also Kowalik-Bańczyk, 2014; Skoczny, 2015). Calls formulated during the legislative consultation process were ignored and the amendment focused on instruments bringing more effectiveness to competition protection in Poland (such as settlements, remedies, leniency plus and individual liability of managers).

Eventually, the new UOKiK presidency offered in 2015 several improvements by means of soft law guidelines. The Polish competition authority introduced an EU-like statement of objections, new rules regulating direct contacts between undertakings and UOKiK representatives, new policy concerning the publication of all judicial rulings reviewing UOKiK's decisions, and a new policy concerning public access to UOKiK's market analysis. In addition, an internal evaluation committee inside UOKiK was established (Bernatt, 2016c, p. 247–252; Laszczyk, 2016, p. 141–156).

Still, even in light of these improvements, proceedings before UOKiK are characterized by some shortcomings. The Competition Act lacks clear grounds for the protection of legal professional privilege and the privilege against self-incrimination in proceedings before UOKiK (Bernatt, 2012, p. 264). In addition, uncertainties exist as to the far reaching protection of business secrets and the scope of parties' right to be heard (Bernatt, 2010a, p. 53–70). Further problems relate to the question of the proportionality of UOKiK inspections and the scope of judicial control over these inspections (Bernatt, 2011b, p. 47–66; see also Materna, 2012) as well as a near-complete exclusion of third parties' access to UOKiK proceedings (Bernatt, 2012, p. 264). Moreover, a UOKiK decision whether to organize an oral hearing or informal, direct meetings between the representatives of UOKiK and undertakings is fully discretionary (Bernatt, 2016c, p. 252). From a comparative point of view, it is fair to say that the level of protection of procedural rights is arguably lower than in the proceedings before the European Commission or in other countries of the region such as Hungary (in respect of Hungary see Domotorfy, Simon 2016; Toth 2015). It is certainly different from standards offered in proceedings before the US Federal Trade Commission – an administrative agency that under US administrative law standards is arguably entitled to judicial deference (Zeisler, 2015, p. 287–93; Bernatt, 2016a, p. 315–320)⁵³.

⁵² The Act of 10 June 2014 amending the Act on the Protection of Competition and Consumers and the Code of Civil Procedure [2014] OJ 945.

⁵³ For the analysis of judicial deference in the context of FTC administrative decision issued under sec. 5 of the FTC Act see also Crane, 2008, p. 1159; Hemphill, 2009, p. 628; Marshak, 2011, p. 1121; Hurwitz, 2014, p. 208.

It is therefore possible to conclude that the scope of procedural guarantees offered to the parties in proceedings held before UOKiK – while improving – still remains insufficient.

3. Institutional Impartiality

Even greater challenges concern the institutional impartiality of UOKiK. Inside UOKiK, there is no division of prosecutorial and investigative functions on the one hand, from decision-making ones on the other. It is possible that the same case handlers that work for UOKiK's Competition Protection Division, who were involved in the investigatory *ex-parte* phase of the proceedings and then in its main phase on the merits, will later draft the UOKiK decision. Such draft decision before being signed by the UOKiK President will be consulted with other departments (including the legal department and the market analysis department) and so the modification of the draft is possible. Still, this safeguard is too weak to eliminate the risk of prosecutorial bias. In particular, there is no one inside UOKiK who is independent from the UOKiK President who could remedy these shortcomings (someone like the EU Commission's hearing officer). The Internal Evaluation Committee established in 2015 is responsible for the coherence of UOKiK departments and local offices and the overall quality of its decisions (Bernatt, 2016c, p. 251). It does not address directly problems surrounding the lack of institutional impartiality.

In addition, the impartiality of the person holding the position of the UOKiK President may be at potential risk also since there are no guarantees of his/her independence. The position of the Polish competition authority has no term – the UOKiK President can be revoked at the Prime Minister's discretionary will at any time (Bernatt, Skoczny, 2011, p. 5; Jaroszyński, 2014, p. 833). For these reasons he/she may opt for not taking actions that would raise political concerns or conclude specific proceedings in a way he/she believes is expected by the Government.

Poland's model may differ from solutions employed in other Central European Countries such as Hungary (the President of the Hungarian Competition Authority does not perform decision-making functions as this is the task of the independent, collegial Competition Council, see Domotorfy, Simon, 2016). It is very different from the Federal Trade Commission institutional and procedural model (Bernatt, 2016a, p. 315–316).

For all these reasons, it is possible to conclude that institutional impartiality is insufficient in the Polish competition law model.

4. UOKiK's Expertise

The level of actual expertise of UOKiK as an institution is difficult to measure in abstract terms. It depends very much on the level of expertise of particular case-handlers involved in a given decision-making process, the level of expertise of the people responsible for the management of UOKiK departments in a particular period of time, and the level of expertise of the person serving as the UOKiK President. Still, one can hypothesize that the following factors can adversely affect the level of UOKiK's expertise.

First, the Competition Act regulates only generally the expected skills of the person to become the UOKiK President. Article 29(3a) states that the UOKiK President should possess qualifications and knowledge in the fields for which the President of the Office is responsible. Practice suggests that this criterion was not always interpreted very strictly and that a university degree in a legal or economic field was considered to be sufficient. Still, the fact that the Nominating Commission of an expert character is responsible for proposing three candidates to the Prime Minister largely guarantees that a layman of a merely political background will not be proposed. The experience of other Central European countries – such as the Czech Republic and Slovakia suggests that a political nominee is not necessarily an unreality (Blazo, 2016).

Second, the fact that the UOKiK President can be revoked at any time by the Prime Minister creates the potential risk that drafts of merit-based, technocratic decisions can be influenced during the decision-making process by political considerations.

Third, the monocratic and hierarchical character of UOKiK poses the danger that UOKiK employees, in particular those on executive positions, can be changed every time the President changes. Experienced people may be directly or indirectly forced to leave⁵⁴ to be replaced by the incoming President's colleagues with a far more limited experience.

Fourth, as it has been noted recently by a UOKiK official, the employees of this Department (primarily responsible for antitrust enforcement) are usually very young (often employed just after university) and inexperienced⁵⁵. Due to relatively low salary levels, many of them leave the authority to work in the private sector after gaining some experience at UOKiK. A movement in the opposite direction does not take place.

⁵⁴ The rules guaranteeing the stability of employment in the civil service in Poland changed significantly in 2016.

⁵⁵ See the opinion of A. Zawłocka-Turno, the director of the UOKiK Department of Competition Protection at the international seminar on combating cartels held in Warsaw in October 2016, <http://www.lex.pl/czytaj/-/artykul/uokik-szuka-sposobow-pozyskiwania-informacji-ws-karteli> (17.11.2016).

Fifth, most of the case-handlers are lawyers. Even if UOKiK has a separate Department of Market Analysis (employing economists), its focus is on preparing market studies. Its role in adjudication is limited, external. The department only “assists other UOKiK departments by means of preparing economic analyses for the purposes of proceedings carried out by the Office”⁵⁶. In other words, economic knowledge is not necessarily directly present during antitrust proceedings, and so decisions are drafted by lawyers. They do not work hand in hand with economists, a fact that is true for other competition agencies such as the Federal Trade Commission (First, Fox, Hemli, 2012, p. 43–44).

Sixth, the quality of the justification of UOKiK decisions may be insufficient. The decisions issued by UOKiK in abuse of dominance cases analysed in section IV of this article show a weakness in their economic analysis when it comes to the determination of the relevant market – the principal reason for the Supreme Court to have rejected them. Actually, studies or calculations prepared by the Department of Market Analysis, which support UOKiK’s findings of an economic nature, are not necessarily revealed in the justification of its decisions⁵⁷.

VI. Conclusions

The analysis provided in this article brings about the following conclusions.

First, SOKiK – the court responsible for the 1st instance review of the decisions issued by the Polish competition authority, UOKiK – is entitled by statute to provide a full review on the merits of such decisions covering both legal and factual questions. In practice however, SOKiK’s review often falls short of providing effective judicial review on the merits. Instead, the review provided by SOKiK tends to be superficial and formal. The judgments of SOKiK often do not offer its own analysis on the merits, and its focus tends to be on fines rather than on substantive issues of the case before it. The shortcomings of SOKiK’s review can be remedied by the 2nd instance review offered by the Court of Appeal in Warsaw as well as, most importantly, by the Supreme Court equipped with expert knowledge in the competition law field⁵⁸. Still, this kind of

⁵⁶ <https://uokik.gov.pl/departments.php#faq500> (17.11.2016).

⁵⁷ This opinion derives from the opinion expressed by UOKiK economists during the 1st Polish Congress of Competition Law in 2015, see more http://www.1pkpk.wz.uw.edu.pl/working_papers/Ekonomika_ekonomizacji.pdf (17.11.2016).

⁵⁸ Most of the judgments are delivered by the bench of the court consisting of Polish leading scholar in the field of antitrust acting as judge rapporteur. In the past, leading EU law scholar was often responsible for deciding antitrust cases in the Supreme Court.

review process is inefficient – it is characterized by its extensive length making the execution of UOKiK decisions suspended (fines included) until they are ultimately confirmed by the courts.

Second, the case law of the Supreme Court concerning the abuse of a dominant position (relevant market definition) does not suggest that there is much space for judicial deference to UOKiK's determinations of ambiguous legal terms in a particular factual context. In particular, the Supreme Courts expects the lower instance courts to carefully review UOKiK decisions involving novel issues that have not yet been settled. The Supreme Court's own review is intense and, even if barred from deciding on facts, the Court is ready to substitute both UOKiK's and the lower courts' determinations with its own, taking into account the factual context established by UOKiK and the lower instance courts. At the same time, the case law of the Supreme Court may suggest that there might be more place for judicial deference if UOKiK decisions contained broader, economically sound market analyses and UOKiK were to play an active role during contradictory judicial proceedings (rather than remained a passive defendant of its decisions).

Third, according greater judicial deference to UOKiK does not seem justifiable at the moment. The proceedings held before UOKiK do not show the presence of the identified variables to a sufficient extent. Shortcomings with respect to the due process rights of the parties are still not fully resolved. Inside the UOKiK structure, there is no division between investigatory and prosecutorial functions from decision-making functions (no internal walls). The expertise and sufficient level of experience of the UOKiK President and UOKiK's employees involved in competition proceedings is not fully guaranteed by it by the law or by UOKiK's institutional organization. This is particularly true when it comes to knowledge in the field of economics.

Setting-up a better system of judicial review in Poland requires practical changes on both the judicial and the administrative level, as well as some legal reforms of an institutional and procedural nature. To provide effective judicial review, SOKiK judges need to improve their expertise. Since SOKiK has now less consumer cases to deal with⁵⁹, its judges have the chance to develop their competences in the antitrust field. There is also a need for SOKiK judges to be supported with expert assistant-staff. In addition, further improvements regarding due process rights in the proceedings held before UOKiK are required. Changes may well be brought at first by means of soft law. More controversially, there is a need for reshaping the institutional structure of UOKiK. Different people and different units should be responsible for running investigations and proceedings to those responsible for the drafting of UOKiK

⁵⁹ Abusive contractual terms suits are no longer part of SOKiK's mandate.

decisions. Internal walls between such units should be created. In addition, UOKiK management should work on including more economic knowledge in their decision-making process and on creating incentives for experienced antitrust experts to work for the competition authority. There is also a need for a legal amendment that would guarantee the independence of the UOKiK President from the Government and would secure his/her expertise in the antitrust field. The Polish competition authority needs also to focus greatly on the quality of the justifications of its decisions. If these changes happen to be implemented, UOKiK will have a valid reason to ask courts for greater deference to its findings even if alternative ones were to exist. This could serve effective enforcement of competition law in Poland.

To finish, Polish experiences with reviewing courts equipped with all powers to fully review the decisions issue by the competition authority shows – not surprisingly – that the problems with the adequate model of judicial review are not necessarily connected with the legal competences of the courts (law in books) but rather with practical constraints concerning both courts and the competition authority. Building a model of judicial review where both effective review and respect to the administration's competition policy is put in place requires far more than a good statute.

Literature

- Aziewicz, D. (2015). Due Process Rights in Polish Antitrust Proceedings. Case comment to the Judgment of the Polish Supreme Court of 3 October 2013 – PKP Cargo S.A. v. President of the Office of Competition and Consumers Protection (Ref. No. III SK 67/12). *Yearbook of Antitrust and Regulatory Studies*, 8(11), 261–267.
- Bailey, D. (2004). The Scope of Judicial Review under Art. 81 EC. *Common Market Law Review*, 41, 1327–1360.
- Banasiński, C. (2015). *Dyskrecjonalność w prawie antymonopolowym*. Warszawa: Wolters Kluwer.
- Bernatt, M. (2016a). Transatlantic Perspective on Judicial Deference in Administrative Law. *Columbia Journal of European Law* 22(2), 275–325. Retrieved from <https://ssrn.com/abstract=2648232> (17.11.2016).
- Bernatt, M. (2016b). Between Menarini and Delta Pekarny – Strasbourg view on intensity of judicial review in competition law. In: C. Nagy (ed.), *The procedural aspects of the application of competition law: European frameworks – Central European perspectives*. Europa Law Publishing 2016. Retrieved from: https://www.academia.edu/26014468/Between_Menarini_and_Delta_Pekarny_Strasbourg_view_on_intensity_of_judicial_review_in_competition_law (17.11.2016).
- Bernatt, M. (2016c). Catching-up with EU due process standards? A case of Poland's soft law guidelines. *European Competition Law Review*, 37(6), 247–252. Retrieved from: <https://ssrn.com/abstract=2790910> (17.11.2016).

- Bernatt, M. (2016d). Między pełną kontrolą sądową a poszanowaniem polityki karania organu administracji – o sądowej kontroli kar nakładanych w sprawach konkurencji. *Europejski Przegląd Sądowy*, 9, 18–24.
- Bernatt, M. (2016e). Czy Polska oferuje więcej niż wymaga Konwencja? O konwencyjnym wymogu pełnej jurysdykcji i polskim modelu sądowej kontroli kar nakładanych przez Prezesa UOKiK. In: W. Jasiński (ed.), *Między prawem administracyjnym a prawem karnym. Standardy rzetelności postępowania w sprawach ochrony konkurencji i konsumentów*. Warszawa: Wolters Kluwer. Retrieved from: https://www.academia.edu/24326042/Czy_Polska_oferuje_wiecej_niz_wymaga_Konwencja_O_konwencyjnym_wymogu_pe%C5%82nej_jurysdykcji_i_polskim_modelu_s%C4%85dowej_kontroli_kar_nak%C5%82adanych_przez_Prezesa_UOKiK (17.11.2016).
- Bernatt, M. (2013). W sprawie kontroli sądowej postępowania przed Prezesem UOKiK. *Państwo i Prawo*, 805(3), 89–99.
- Bernatt, M. (2012). Convergence of Procedural Standards in the European Competition Proceedings. *Competition Law Review*, 3(8), 255–283. Retrieved from: <http://ssrn.com/abstract=2240899> (17.11.2016).
- Bernatt, M. (2011a). *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa: Wydawnictwo Naukowe Wydziału Zarządzania UW. Retrieved from: <https://ssrn.com/abstract=1982596> (17.11.2016).
- Bernatt, M. (2011b). The Powers of Inspection of Polish Competition Authority. The Question of Proportionality. *Yearbook of Antitrust and Regulatory Studies*, 4(5), 47–66. Retrieved from: <http://ssrn.com/abstract=2008725> (17.11.2016).
- Bernatt M., Skoczny T. (2011). Publicznoprawne wdrażanie reguł konkurencji w Polsce. Czas na zmiany? In: H. Gronkiewicz-Waltz, K. Jaroszyński (eds), *Europeizacja publicznego prawa gospodarczego*. Warszawa: C.H. Beck.
- Bernatt, M. (2010a). Right to Be Heard Or Protection of Confidential Information? Competing Guarantees of Procedural Fairness in Proceedings before the Polish Competition Authority. *Yearbook of Antitrust and Regulatory Studies*, 3(3), 53–70. Retrieved from: <http://ssrn.com/abstract=1874796> (17.11.2016).
- Bernatt, M. (2010b). The control of Polish courts over the infringements of procedural rules by the national competition authority. Case comment to the judgment of the Supreme Court of 19 August 2009 – Marquard Media Polska (No. III SK 5/09). *Yearbook of Antitrust and Regulatory Studies*, 3(3), 300–305. Retrieved from: <http://ssrn.com/abstract=1874797> (17.11.2016).
- Blazo, O. (2016). Judicial Review of Competition Cases in Czech Republic and Slovakia. Report prepared in frame of the project funded by Poland's National Science Centre (decision 2014/15/D/H55/01562).
- Castillo de la Torre, F. (2009). Evidence, Proof and Judicial Review in Cartel Cases. *World Competition*, 32, 505–578.
- Crane, D. (2008). Technocracy and Antitrust. *Texas Law Review*, 86, 1159–1221;
- Cseres, K., Langer, J., (2009). Judicial Review in Hungarian Competition Law – Tetra Laval Á La Hongroise. Amsterdam Center for Law & Economics Working Paper No. 2009-07.
- Domotorfy, B, Simon, S. (2016). Judicial Review of Competition Cases, report prepared in frame of the project funded by Poland's National Science Centre (decision 2014/15/D/H55/01562).

- Editorial Comments (2011), Towards a More Judicial Approach? EU Antitrust Fines under the Scrutiny of Fundamental Rights. *Common Market Law Review*, 48, 1405–1416.
- First, H., Fox, E., Hemli, D. (2012). Procedural and Institutional Norms in Antitrust Enforcement: The U.S. System, 303 New York University Law and Economics Working Papers, 8. Retrieved from: http://lsr.nellco.org/nyu_lewp/303 (17.11.2016).
- Forrester, I. (2011). A Challenge for Europe's Judges: The Review of Fines in Competition Cases. *European Law Review*, 36, 185–207.
- Gac, M., Bernatt, M. (2016). Rail Freight: How Does Poland Assess Alleged Abuses by Dominant Firms. *Journal of European Competition Law and Practice*, first published online September 9, 2016.
- Hemphill, S. (2009). An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition. *Columbia Law Review*, 109, 628–669.
- Hurwitz, G. (2014). Chevron and the Limits of Administrative Antitrust. *University of Pittsburgh Law Review*, 76, 208–275.
- Gerard, D. (2011). Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts? *European Law Review*, 36, 457–479.
- Kalintiri, A. (2016). What's in a name? The marginal standard of review of "complex economic assessments" in EU competition enforcement. *Common Market Law Review*, 53, 1283–1316.
- Jaroszyński, K. (2014). Commentary to Article 29. In: T. Skoczny (ed.) *Ustawa o ochronie konkurencji i konsumentów. Komentarz*. Warszawa: CH Beck.
- Kohutek, K. (2010). Shall selective, above-cost price cutting in the newspaper market be qualified as anticompetitive exclusion? Case comment to the judgment of the Supreme Court of 19 August 2009 – *Marquard Media Polska* (Ref. No. III SK 5/09). *Yearbook of Antitrust and Regulatory Studies*, 3(3), 294–299.
- Kohutek, K. (2012). Glosa do wyroku SN z dnia 13 lipca 2012 r., III SK 44/11, Lex/el. 2012.
- Kolasiński, M. (2010). Influence of the General Principles of Community Law on Polish Antitrust Procedure. *Yearbook of Antitrust and Regulatory Studies*, 3(3), 29–51.
- Kowalik-Bañczyk, K. (2014). Reforms of Polish Antitrust Law: Closer to, or Further From, the European Model? *Journal of European Competition Law & Practice*, 5(10), 703–710.
- Krajewska, E. (2013). Lack of a Price Reduction Despite a Decrease in Service Quality as an Unfair Price and Abuse of a Dominant Position. Case Comment to the Judgment of the Supreme Court of 13 July 2012, *Autostrada Malopolska* (Ref. No. III SK 44/11). *Yearbook of Antitrust and Regulatory Studies*, 6(8), 245–250.
- Laszczyk, A. (2016). What Are the Directions in the Enforcement of Polish Competition Law – Review of a Series of New Polish Soft Law Guidelines. *Yearbook of Antitrust and Regulatory Studies*, 9(13), 141–156.
- Marshak, A. (2011). The Federal Trade Commission on the Frontier: Suggestions for the Use of Section 5. *New York University Law Review*, 86, 1121–1159.
- Martyniszyn, M., Bernatt, M. (2015). On Convergence with Hiccups. Recent Amendments to Poland's Competition Law. *European Competition Law Review*, 36(1), 8–14, <https://ssrn.com/abstract=2556231> (17.11.2016).
- Materna, G. (2012). Sądowy nadzór nad wykonywaniem kontroli (przeszukania) u przedsiębiorcy w toku postępowania przed Prezesem UOKiK. *Przegląd Ustawodawstwa Gospodarczego*, 7.
- Nagy, C. (2016). EU Competition Law's Fair Trial Revolution: Much Ado About Nothing? *European Competition Law Review*, 37(6), 232.

- Nazzini, R. (2012). Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective. *Common Market Law Review*, 49, 971–1006.
- Nazzini, R. (2015). Judicial Review after KME: An Even Stronger Case for the Reform That Will Never Be. *European Law Review*, 40, 490–508.
- Neruda, R., Barinka, R., (2015). Delta Pekarny v Czech Republic: European Court of Human Rights on Dawn Raids and Prior Judicial National Authorization. *Journal of European Competition Law & Practice*, 6(6), 411–413.
- Piszcz, A. (2013). *Sankcje w polskim prawie antymonopolowym*, Białystok: Wydawnictwo Temida2.
- Schweitzer, H. (2009). The European Competition Law Enforcement System and the Evolution of Judicial Review. *European Competition Law Annual*, 79–146.
- Šramelová, S., Šupáková, A. (2012). Development of the Judicial Review of the Decisions of the Antimonopoly Office of the Slovak Republic. *Yearbook of Antitrust and Regulatory Studies*, 5(7), 105–123.
- Skoczny, T. (2015). 2014 Amendment of the Polish Competition and Consumers Protection Act 2007. *Yearbook of Antitrust and Regulatory Studies*, 8(11), 105–123.
- Szydło, M., (2016). Judycjalizacja unijnej i polskiej polityki konkurencji: w kierunku rewizji obecnego paradygmatu. In: T. Skoczny (ed.), *Prawo konkurencji 25 lat*. Warszawa: Wolters Kluwer.
- Tóth, A. (2015). Human Rights Aspects of the Hungarian Competition Enforcement in the Practice of the Courts, 2 CLWP, Working paper.
- Turno, B. (2008). Termin na wniesienie odwołania od decyzji Prezesa UOKiK. *Przegląd Prawa Handlowego* 6.
- Van Cleynenbreugel, P. (2011–2012). Constitutionalizing Comprehensive Tailored Judicial Review in EU Competition Law. *Columbia Journal of European Law*, 18, 519–545.
- Vesterdorf, B. (2005). Judicial review in EC competition law: Reflections on the role of the Community courts in the EC system of competition law enforcement. *Competition Policy International*, 1, 3–27.
- Wils, W. (2014). The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker. *World Competition*, 37, 1.
- Zeisler, R. (2014). Chevron Deference and the FTC: How and Why the FTC Should Use Chevron to Improve Antitrust Enforcement. *Columbia Business Law Review*, 226, 266–311.

A Comparative Analysis of the Collective Dominance Definition in Ukrainian and European Law – the Electricity Market Case

by

Kseniia Smyrnova *

CONTENTS

- I. Introduction
- II. The concept of dominance: a comparative approach
- III. Attempts at collective dominance definition in Ukrainian legislation with its comparison to EU practice
- IV. Conclusions

Abstract

This paper follows a comparative approach to the analysis of collective dominance doctrine and practice in the EU and the enforcement practice in Ukraine. The aim of this paper is to assess the compliance of the Ukrainian competition authority's (AMCU) analysis of the national electricity market with EU law enforcement practice. The latter arises from Ukraine's wider duty to fulfil its international law obligation to comply with EU competition rules, based on Article 18 of the Treaty establishing the Energy Community also taking into account the interpretative criteria developed in EU case law (according to Article 94 of the Association Agreement between Ukraine and the EU). Article 255 of the Association Agreement, which clearly provides for the use of the principle of transparency, non-discrimination and neutrality when complying with the procedures of fairness, justice and the right of defence, also illustrates the necessity of carrying out research in this field.

* Doctor of Jur. Sciences (Dr. hab.), Associate Professor of the Chair of Comparative and European Law, Institute of International Relations, Kyiv National Taras Shevchenko University, Ukraine; ksenya.smyrnova@gmail.com. Article received: 30 May 2016; accepted: 26 September 2016.



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.

The paper examines notions such as: the dominance doctrine, market power definition, economic strength and collective dominance in the EU enforcement practice. Special attention is placed on enforcement practice in the electricity market. Since the scrutinised market inquiry constitutes the first investigation into the Ukrainian electricity market, there is no national practice on this issue yet. For this reason, the analysis follows a wide comparative approach towards the principles of collective dominance in the electricity market in Ukraine.

The paper concludes that the AMCU's approach to the regulation of the electricity market in Ukraine confirms the necessity to reform the system of state regulation in the wholesale electricity market and in the market of services for electricity transmission. In order to develop competition in the electricity market, it is also necessary to change the system for tariff and pricing policy formation on the part of the National Energy and Utilities Regulatory Commission of Ukraine and the Ministry of Energy and Coal-Mining Industry of Ukraine. Stressed is also the necessity to follow the approach and criteria of EU competition law with regard to the determination of market dominance. This requirement is stipulated by Ukraine's international legal obligations arising from Articles 18 and 94 of the Treaty establishing the Energy Community and Article 255 of the Association Agreement between the EU and Ukraine.

Résumé

Le présent article utilise une approche comparative afin d'analyser la doctrine et la pratique de la dominance collective dans l'Union européenne, ainsi que la pratique d'application du droit de la concurrence en Ukraine. L'objectif de l'article est d'évaluer la conformité de l'analyse de l'autorité ukrainienne de la concurrence ("AMCU") concernant le marché national de l'électricité avec la pratique de l'Union européenne dans cette matière. La conformité mentionnée ci-dessus découle de l'obligation internationale de l'Ukraine d'assurer la cohérence avec les règles européennes du droit de la concurrence, basée sur l'article 18 du Traité instituant la Communauté de l'énergie, en tenant compte également des critères interprétatifs développés dans la jurisprudence de l'Union européenne (l'article 94 d'Accord d'association entre l'Ukraine et l'Union européenne). L'article 255 de l'Accord d'association, qui prévoit clairement l'obligation d'application du principe de transparence, de non-discrimination et de neutralité dans le respect des procédures d'équité, de justice et de défense, démontre également la nécessité de mener des recherches dans ce domaine. Le document examine des notions telles que: la doctrine de la domination, la définition du pouvoir de marché, la force économique et la domination collective dans la pratique européenne de l'application du droit de la concurrence. Une attention particulière est accordée à la pratique d'application dans le domaine de marché de l'électricité. Vu que c'est la première analyse détaillée du marché ukrainien d'électricité, il n'existe pas encore la pratique nationale concernant ce sujet. Pour cette raison l'article utilise une approche comparative aux principes de dominance collective sur le marché de l'électricité en Ukraine.

L'article conclut que l'approche de l'AMCU à la réglementation du marché de l'électricité en Ukraine confirme la nécessité de réformer le système de réglementation étatique sur le marché de gros de l'électricité et sur le marché des services de transmission d'électricité. Afin de développer la concurrence sur le marché de l'électricité, il est également nécessaire de modifier le système de formation des prix et tarifs par la Commission nationale de réglementation de l'énergie et des services publics d'Ukraine et par le Ministère de l'Énergie et de l'Industrie minière du charbon de l'Ukraine. L'article souligne également qu'il est nécessaire de suivre l'approche et les critères du droit européen de la concurrence en ce qui concerne la détermination de la dominance. Cette obligation découle des articles 18 et 94 du traité instituant la Communauté de l'énergie et de l'article 255 de l'Accord d'association entre l'Union européenne et l'Ukraine.

Key words: competition; collective dominance; EU; Ukraine; Antimonopoly Committee of Ukraine; wholesale electricity market.

JEL: K21; K23

I. Introduction

Ratified in September 2014, the EU-Ukraine Association Agreement¹ is meant to ensure an effective competitive environment within the established free-trade area (Articles 253–267), it reproduces rules of EU competition law and contains provisions strictly referring to those rules (Smyrnova, 2015). Ukraine is a member of the Energy Community² and has to fulfil obligations concerning the implementation of *acquis*, particularly in the electricity sector. More specifically, Article 18 of the Treaty establishing the Energy Community provides for the adherence with competition rules in this market (detailed in Appendix III which, in fact, reproduces EU competition rules found in Articles 101, 102, 106 and 107 TFEU). At the same time, the Association Agreement determines the compliance between its provisions and the

¹ The Law of Ukraine “On the Ratification of the Association Agreement between Ukraine, on the One Part, and the European Union, the European Atomic Energy Community and Their Member States, on the Other Part”, Gazette of the Verkhovna Rada of Ukraine 2014, No. 40, p. 2021.

² On 18 December 2009, the Government Council of the Energy Community has made the decision of Ukraine’s full-fledged membership in this international organization. The protocol of Ukraine’s entering the Energy Community was signed on 24 September 2010 and ratified by the Verkhovna Rada of Ukraine in December 2010. The protocol provides for the inclusion of Ukraine into the members of Energy Community (Article 1) and contains the schedule of *acquis* implementation by Ukraine in the energy industry (Article 2) until 1 January 2018.

provisions of the Treaty establishing the Energy Community, giving priority to the rules of the latter in case of a conflict. Accordingly, the rules of the Association Agreement cannot contravene EU law which is used in compliance with the provisions of this Agreement.

The Antimonopoly Committee of Ukraine (hereinafter, AMCU) presented on 24 December 2015 a Report on the investigations conducted between August and December 2015 into this sector of the economy (wholesale electricity market). This was the first in-depth analysis of this market³, and the first publicly available assessment of an investigation of the electricity market in Ukraine since the country gained its independence. Unfortunately, there is neither other enforcement practice, nor any doctrine in this sphere in Ukraine yet. In this Report, the AMCU stated that a dominant position exists in Ukraine held by the State Enterprise Energorynok (hereinafter, SE Energorynok) acting as the sole purchaser. At the same time, the AMCU prematurely declared the presence of a collective dominant position of three electricity generating companies on the basis of the sum of their market shares.

Upon implementing the provisions of the Association Agreement regarding the cooperation of the parties in the energy industry, the parties (in this case Ukraine) assume the duty to give priority to the legal or other acts complying with the Treaty establishing the Energy Community and effective EU law in this field. The compliance assessment should take into account all the decisions approved under Article 91 of the Treaty establishing the Energy Community⁴.

It should thus be mentioned that Ukrainian authorities should implement in their work not only the legislative acts and law enforcement practice of EU institutions, but also the judicial practice of European courts⁵ (for more information, see Smyrnova, 2014), seeing as it is ultimately the jurisprudence of European courts where the unified law enforcement practice of the EU is reflected.

The main aim of this article is to analyze in a comparative manner the concepts of dominance and collective dominance in the EU and how they were represented in the enforcement practice of the AMCU. Due to the complete absence of any enforcement practice in this sphere in Ukraine, it seems essential to provide a comparative analysis here based on EU practice in the relevant electricity market and the collective dominance definition.

³ The text of AMCU's presentation of the Report (text available only in Ukrainian) can be accessed at: <http://www.amc.gov.ua/amku/doccatalog/document?id=119661&schema=main> (26.09.2016).

⁴ Article 278 of the Association Agreement.

⁵ Reference to EU courts means that the EU judicial system comprises the CJEU which includes the CJ and the GC under the TFEU. Hereinafter, EU court means ECJ or GC or CFI in accordance with the pre-Lisbon treaties.

II. The concept of dominance: a comparative approach

The concept of a dominant position itself is not defined in the Treaty on the Functioning of the European Union (hereinafter, TFEU). The definition given by the European Court of Justice (hereinafter, ECJ) in the *United Brands* case is repeatedly quoted in the majority of European Commission (hereinafter, EC or Commission) decisions and EU judgments concerning the implementation of Article 102 TFEU. The ECJ stated that it is “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors and ultimately of its consumers”⁶.

The definition of a dominant position according to EU law was given by the ECJ in the *Continental Can* case: an undertaking holds a dominant position when it has the power to behave independently, which lets such companies to act without regard of their competitors, customers and sellers; it is a situation when they, due to their market share or their market share together with ownership of technological knowledge, raw material resources or capital, have the power to set prices or control the production or distribution of a significant portion of the relevant product⁷.

Later the ECJ confirmed and extended this definition in the *Hoffman-La Roche* case: “An undertaking which has a very large market share and holds it for some time (...) is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, already because of this secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position”⁸.

The concept of dominance consists of three basic mutually related elements⁹: “(a) there must be a position of economic strength on a market which (b) enables the undertaking(s) in question to prevent effective competition being maintained on that market by (c) affording it the power to behave independently to an appreciable extent”.

⁶ ECJ judgment of 14.02.1978, Case 27/76 *United Brands*, ECLI:EU:C:1978:22, para. 65, and ECJ judgment of 13 February 1979, Case 85/76 *Hoffmann-La Roche*, ECLI:EU:C:1979:36, para. 38.

⁷ ECJ judgment of 21.02.1973, Case 6/72 *Europeemballage Corp and Continental Can Company Inc v. Commission*, ECLI:EU:C:1973:22.

⁸ ECJ judgment of 13.02.1979, Case 85/76 *Hoffmann-La Roche*, ECLI:EU:C:1979:36, para. 41.

⁹ DG Competition discussion paper of 2005 on the application of Article 82 of the Treaty to exclusionary abuses, <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> (26.09.2016), paras 21–23.

First, dominance exists in relation to a market; it cannot exist in the abstract. It also implies that an undertaking either on its own, or together with other undertakings, must hold a leading position on that market compared to its rivals either independently or jointly with other enterprises. The second and third elements concern the link between the position of economic strength held by the undertaking concerned and the competitive process – the way in which the undertaking and other players act and inter-act on the market.

Both practice and doctrine prove that the size of the market share is not decisive in the definition of dominance. This aspect differs significantly from the formalized legislative approach of Article 12 of the Law of Ukraine on the Protection of Economic Competition (hereafter, LPEC)¹⁰, where the analysis of the existence of market power is weakly defined and directed to the right of undertakings to prove that they are subjected to competition. The ability to act independently from one's competitors, customers and consumers is the key distinguishing feature of this concept. While defining market dominance, both the EC and EU courts pay special attention to how effectively the enterprise blocks competitors from entering the market, as well as what is its market share, its economic potential and its access to the capital market.

Accordingly, while studying the electricity market and the features of dominance, the AMCU should have studied and substantiated its findings on the market power of the scrutinised undertakings, their opportunities to act independently from their competitors, consumers, suppliers and customers, the opportunity of the potentially dominant companies to prevent effective competition and to establish and maintain prices above the competitive level.

Summarising the EU experience, it should be mentioned that the fact of dominance in the market is proven by detecting the relative share of the dominant undertaking by establishing the fact of its contractual relations with its potential competitors (rivals) – a special system of relations with customers and suppliers that does not comply with the principles of fair competition in the relevant market. While determining market dominance, several issues are taken into account: the financial potential of the monopolist, lack of competitors, and the existence of potential dependence of third parties on the monopolist. Among other factors considered when defining a dominant position are: the proportion of shares of the undertaking and its closest competitors, the technological advantage of the enterprise over its competitors, the existence of a highly developed sales system and the lack of potential

¹⁰ Article 12 para. 3 stipulates that: "Monopoly (dominant) position is considered to be the entity whose market share exceeds 35 percent of the goods if he proves experiencing considerable competition".

competitors. However, while studying all of these factors, their relation to the above elements of the dominant position must be considered (market power, prevention of competition etc.). In other words, it is not sufficient to only highlight certain features or factors, it is necessary to also examine whether they actually result in market power of the undertaking.

Procedurally, the examination of the abuse of a dominant position is usually performed by the EC and can then be reviewed by EU courts. According to Article 102 TFEU, one more issue has to be considered: if an enterprise (undertaking) occupies a dominant position, how significant is its market share? Some parts of the market may only be controlled in terms of supplies of a certain type of products or services. This is why it is important to determine the product market. As established in the *Continental Can* case, the definition of the market is crucial for the assessment of a dominant position, as “the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products”¹¹. It is extremely significant that the ECJ annulled the Commission decision in this case because it lacked arguments and evidences regarding the definition of the relevant market. The ECJ also supports the approach whereby “(...) the separation of the market object allows for establishing the space within which certain competition conditions are functioning and a predictable dominant enterprise is operating”¹².

Unlike in Ukrainian law¹³, there are no certain mathematical criteria for the definition of dominance in EU law. Many criteria on the basis of which the decision is made are considered in each specific case. However, the market share of the dominant undertaking has to be rather large, usually over 50% (Jones and Sufrin, 2014, p. 298–303; Ortiz Blanco, 2012, p. 47; Vickers, 2006, p. 11; Monti, 2006, p. 45–46).

At the same time, according to EU practice, the existence of a large enterprise in the market does not mean in itself that it occupies a dominant position at all. An enterprise gains a dominant position if it can act in the market of the specified product independently from its competitors. In other words, an enterprise occupies a dominant position if it has market power (for more detail, see: Rosen and Williams, 1999; Jones and Sufrin, 2014, p. 298–303; Ortiz Blanco, 2012, p. 47; Vickers, 2006, p. 11; Monti, 2006,

¹¹ ECJ judgment of 21.02.1973, Case 6/72 *Europeemballage Corp and Continental Can Company Inc v. Commission*, ECLI:EU:C:1973:22, para. 32.

¹² ECJ judgment of 26.11.1998, Case C-7/97 *Oscar Bronner GmbH & CoKG v. Mediaprint*, ECLI:EU:C:1998:569.

¹³ Article 12 of the Law of Ukraine on the Protection of Economic Competition.

p. 45–46). It is hard to measure this power quantitatively. The market share held by the enterprise serves as the first indicator when considering the market dominance issue. It is clear that if the enterprise has a relatively small market share than its position cannot be dominant. In this regard, the Commission considers roughly that a market share below 40% is unlikely to be an indicator of market dominance¹⁴.

Barriers to market entry are another important factor that facilitates defining the existence of market dominance. Unfortunately, the AMCU did not apply the existing experience of the Commission and EU courts¹⁵ regarding the definition and assessment of entry barriers and their influence on competition and market power. In particular, the authority failed to take into account the influence exercised on market competition by electricity imports. Moreover, the existence of economic barriers for market entry and their impact on market power was not justified economically. Several additional issues were not analysed in this context either: the actual existence of entry barriers, factors leading to their appearance, their influence on the level on market competition and the activity of market participants, as well as entry barriers leading to the appearance or absence of market power. All this proves that the conclusions reached by the AMCU were unjustified and careless, and that the analysis was not in compliance with European standards and rules in the field of competition protection.

While analysing the position of the single customer (SE Energorynok) active in the nationwide electricity market, a number of issues should have been considered. These include the legislative features of the pricing policy undertaken by the National Energy and Utilities Regulatory Commission of Ukraine (hereafter, the NEURC), which has the authority to set prices in the electricity market. Directly relevant are also statutory solutions applicable in this field with respect to the Ministry of Energy and Coal-Mining Industry of Ukraine and the restrictions deriving from the law of Ukraine regarding the freedom to act and independence in decision-making binding SE Energorynok¹⁶. This factor was not reflected in the conclusions presented by the AMCU. Under such legislative conditions, it would be more appropriate

¹⁴ DG Competition discussion paper of 2005 on the application of Article 82 of the Treaty to exclusionary abuses, *supra* note 9.

¹⁵ ECJ judgment of 6.04.1995, Cases C-241/91 P and C-242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications LTD (ITP) v. Commission (Magill)*, ECLI:EU:C:1995:98; CFI judgment of 6.10.1994, Case T-83/91 *Tetra Pak International v. Commission (Tetra Pak II)*, ECLI:EU:T:1994:246; ECJ judgment of 14.02.1978, Case 27/76 *United Brands*, ECLI:EU:C:1978:22.

¹⁶ Agreement between the Wholesale Electricity Market of Ukraine participants (AWEMP) of 15.11.1996, the Resolution of the Cabinet of Ministers of Ukraine on the Formation of SE Energorynok of 5.05.2000, No. 755, The Official Bulletin of Ukraine 2000, No. 19, p. 49.

to say that the monopsony of SE Energorynok in the electricity market is of a limited nature, created by the existing market model and the statutory acts governing the relations in this market. As such, the AMCU should not have declared that SE Energorynok holds a monopoly based solely on the fact that it occupies a 100% share of the market. The authority should have studied the functions and role of SE Energorynok not only as that of a “unified customer”, but also as an element of the institutional monopoly of the State, represented by the authorities defining the conditions of product trade in this market. Such approach would comply with the main principles of defining a dominant position in EU law whereby the market share is not decisive in and of itself, and other factors defining the position of the undertaking in the market should be studied also.

III. Attempts at collective dominance definition in Ukrainian legislation with its comparison to EU practice

The European Union started applying the provision on collective dominance while analysing mergers and later transferred this assessment to Article 102 TFEU cases in the review of *Nestlé/Perrier*¹⁷ in 1992. At the same time, the collective dominance concept has been actively applied and used in view of current Article 102 TFEU (in *Flat Glass* case¹⁸).

TFEU pays special attention to the concept of collective dominance which, in turn, is specified in EU judicial practice dedicated to the application of Article 102 TFEU.

European case law elaborated the following three conditions which give grounds to find the existence of collective dominance:

- 1) each entity that is a member of the collectively dominant entity shall be able to obtain, at a low cost, information on the behaviour of other members of the collective dominance;
- 2) members of the collective dominance shall have influence on the undertaking which: in case of any agreement between them – restricts competition, and in case of coordinated actions – deviates from the general policy on the given market;
- 3) the expected reaction of competitors, both existing and potential, shall not have any noticeable effect on the expected results of coordinated

¹⁷ Commission Decision of 22.07.1992 relating to a proceeding under Council Regulation (EEC) No. 4064/89 (Case No. IV/M.190 – *Nestlé/Perrier*), OJ L 356, 05.12.1992, p. 1.

¹⁸ CFI judgment of 10.03.1992, joined cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro et al. v. Commission (Flat Glass)*, ECLI:EU:T:1992:38.

actions (general policy of the members of a collective dominance on the target market).

Moreover, as further analysis of EU judicial practice shows, the necessary conditions of collective dominance also include links between members of such dominance, joint policy on price increases etc., which allows them to act as a “single” economic unit in relations with customers. Collective dominance shall not be considered in the context of a single undertaking doctrine (a group of enterprises connected through relations of control) since the members of collective dominance are separate legal entities. According to the doctrine on a single economic entity, the EC shall decide on the dominant position of the parent company and shall address its decision to this company.

Article 102 TFEU refers to the abuse of collective dominance condition by one or more undertakings. The Court of First Instance (hereinafter, CFI) explained this concept in *Flat Glass*¹⁹. At the origin of this case, the EC accused two legally independent Italian manufacturers of creating a price cartel and setting the relevant production volume contrary to Article 101(1) TFEU. The Commission accused them also of violating Article 102 TFEU without, however, giving any particular justification of this aspect of its decision. The EC decided that the scrutinised companies, acting as a single entity on the market and establishing structural links through a systematic exchange of products, actually created a dominant position therein (as well as concluded agreements violating Article 101 TFEU) that had constituted a violation by itself. The CFI did not agree with this logic stating that it was not enough to use the same facts several times to transfer from Article 101 to Article 102 TFEU. However, it is possible that two or more undertakings connected through certain economic market structures actually hold a collective dominant position in relation to their competitors. The Commission in this case assumes that technological leadership obtained due to cooperation agreements and licenses eventually makes the behaviour of these companies independent of competitors, customers and consumers.

Another case worth mentioning is *French-West African Shipowners Committees*²⁰. The fact that the undertakings (ship owners) voluntarily united to coordinate their joint policy is a special feature of this case. In the decision of the Commission, the way of holding the Maritime Conference, which is a cartel by nature, can be referred to as a collective dominant position. In this particular case, such conclusion was based on the structural ties between ship owners as well as on complete exclusion of competition between them due to conference procedures, which led to strict centralised cargo control.

¹⁹ Ibidem.

²⁰ Decision of French-West African Shipowners Committees, Re: Association of Danish Shipowners & Denmark v. Navale Delmas Afrique, OJ L 134, 1992, p. 1.

Yet attention should also be paid here to the fact that ship owners united and coordinated their policy, including pricing, on the basis of commercial agreements rather than legislative provisions and statutory conditions.

*Compagnie Maritime Belge*²¹ remains the most interesting case in this context. Following its results, the ECJ established a two stage analysis in order to find collective dominance: first, establishing the existence of a collective entity and second, proving that the undertaking is dominant in the market.

According to the opinion of the ECJ in the above case, collective dominance can be held by two or more undertakings which are legally independent of each other, provided that from an economic point of view they present themselves or act together as a collective undertaking. It is necessary to establish economic links or factors that may contribute to such links. An economic assessment and, in particular, an evaluation of the relevant market structure is of significance here. Apparently, this judgment seems to extend the concept of collective dominance by taking into account potential opportunities (those that have not yet appeared quite clearly) – it is another example of the tendency to substitute formal legal criteria by an economic approach. This case has thus settled a necessary element of collective dominance, namely the legal and economic links between the members of collective dominance. It confirmed that these undertakings can act as a single “collective” undertaking, adopt a joint policy and perform joint market behaviour, particularly with respect to prices.

In case of collective dominance, the approach of the Commission on the definition of the inter-relationships in the group, which was applied in the case of *France v. Commission*²², was supported in subsequent cases. In *Gencor*²³ in particular, the ECJ found that “the relationships of interdependence existing between the parties” create potential coordination between them in the sense of forming collective dominance. The ECJ based its *Gencor* judgment on the interpretation of the concept of collective dominance, which was set out in *Flat Glass*²⁴. Like in *Irish Sugar*²⁵, the ECJ based its judgment on the arguments in the case *France v. Commission*²⁶ and determined that

²¹ ECJ judgment of 16.03.2000, Joined cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports SA et al. v. Commission*, ECLI:EU:C:2000:132.

²² ECJ judgment of 31.03.1998, Joined cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v. Commission*, ECLI:EU:C:1998:148.

²³ CFI judgment of 25.03.1999, Case T-102/96 *Gencor Ltd v. Commission*, ECLI:EU:T:1999:65.

²⁴ CFI judgment of 10.03.1992, Joined cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro et al. v. Commission (Flat Glass)*, ECLI:EU:T:1992:38.

²⁵ CFI judgment of 7.10.1999, Case T-228/97 *Irish Sugar plc v. Commission*, ECLI:EU:T:1999:246.

²⁶ Cases C-68/94 and C-30/95, *supra* note 21.

collective dominance consists of a number of undertakings, which are together in this position, in particular due to factors contributing to links between them, in order to develop a joint policy on the market and actions far more independently of their competitors, their customers and ultimately their consumers²⁷.

In *Airtours*²⁸, the CFI established that collective dominance exists where each member of the collectively dominant entity applies a conscious joint policy on the market on a long-term basis with the aim to sell even without entering into any agreement or acting jointly in the meaning provided for in Article 101 TFEU. This test was applied by the Commission and EU courts in a highly liberalised market, with established, transparent and competitive market conditions, and under conditions of information exchange, characterised also by the inability of sellers and consumers to influence the market.

All of the above mentioned cases reflect the behavioural approach of the Commission on defining collective dominance (see more: Petit, 2013, p. 325–332; Petit and Neyrinck, 2011; Monti, 2001, p. 131). European competition law doctrine, which is the basis for the approach of the Commission and EU courts, states that a structural analysis of the market is not sufficient to analyse collective dominance. The behavioural component in this case shall be the decisive factor (Joilet, 1970, p. 239–245). This opinion is defended by F. Mezzanotte in particular, who states that the EC shall prove the fact of coordinated (parallel) behaviour of the participants when justifying the finding of collective dominance. Otherwise, national competition authorities shall refrain from the collective dominance regime (Mezzanotte, 2010, p. 77–102).

In cases of collective dominance, it is not only the amount of quantitative indicators of the corresponding market shares that is calculated²⁹. According to A. Jones and B. Sufrin, market share is not the only or the decisive factor in finding a dominant or collective dominant position (Jones and Sufrin, 2014, p. 305). A clear example is the judgment in *France v. Commission* where it was proven that the market share of two independent undertakings amounting to approximately 60% cannot conclusively mean the existence of a collective dominant position³⁰.

²⁷ Case T-228/97, *supra* note 24.

²⁸ CFI judgment of 28.06.2004, Case T-342/99 *Airtours plc v. Commission*, ECLI:EU:T:2004:192. This was also established in: CFI judgment of 13 July 2006, Case T-464/04 *Independent Music Publishers and Labels Association (Impala) v. Commission*, ECLI:EU:T:2006:216.

²⁹ For example, Case T-228/97, *supra* note 24, paras 70–71.

³⁰ Joined cases C-68/94 and C-30/95, *supra* note 21, para. 226.

In *Airtours*³¹, a three-component structural test was developed for determining collective dominance. First, each firm should know how other members are behaving (they could monitor the market to see if others were adopting possible policy changes); second, there should be evidences of tacit coordination, which is stable and non-transitory (no incentive to depart from the common policy); and third, foreseeable reactions of competitors (actual and potential), as well as consumers and customers would not jeopardise the results expected from the generally accepted policy.

However, the *Impala*³² judgment not only confirmed the existence of these three criteria for identifying collective dominance but also clearly stated the necessity to evidence them as well as evidence the characteristics of the market³³. The definition of such criteria is the result of having considered the issue of collective dominance in previous cases. Hence, in particular in *TACA*³⁴, the Commission analysed the relationship between enterprises as far as the coordination of their activities for the assessment of collective dominance. Later in the same case, the CFI clearly stated that in order to prove collective dominance there must be evidence of “factors of economic correlation between the enterprises”³⁵.

Moreover, these criteria have been repeatedly used by the ECJ in various collective dominance judgments. For example, in *Compagnie Maritime Belge Transports SA, Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission*, the ECJ confirmed that the term “one or more undertakings” means that the dominant position may be held by two or more undertakings legally independent of each other. In other words, from the economic point of view, they represent a collective entity or work together as one on the relevant market³⁶.

European practice also notes that such necessary element as coordination of actions of members of a collectively dominant entity may take

³¹ Case T-342/99, *supra* note 27.

³² Case T-464/04, *supra* note 27.

³³ In an appeal from this case, ECJ expressed the conditions in slightly different terms. The substantive criteria were, however, in line with the views expressed by CFI; ECJ judgment of 10.07.2008, Case C-413/06 P *Bertelsmann AG and Sony Corporation of America v. Independent Music Publishers and Labels Association (Impala)*, ECLI:EU:C:2008:392.

³⁴ Commission Decision of 16.09.1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No. IV/35.134 – *Trans-Atlantic Conference Agreement*), OJ L 095, 09.04.1999, p. 0001.

³⁵ CFI judgment of 30.09.2003, Joined cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line AB and Others v Commission*, ECLI:EU:T:2003:245, para. 583.

³⁶ Joined cases C-395/96 P and C-396/96 P, *supra* note 20, para. 32.

various forms, in particular forms of direct coordination of a pricing policy³⁷.

When it comes to the energy industry, both European doctrine (Scholz and Purps, 2011, p. 449) and judicial practice are currently in compliance with the criteria determined in the *Amelo*³⁸ case when proving collective dominance. The ECJ determined therein that in order to prove collective dominance, members of such group shall be connected in such a way as to adopt the same behaviour on the market.

The aforementioned confirms that the existence of collective dominance can be proven only on the basis of parallel cooperation. Moreover, the ECJ took this position in the case of *Laurent Piau*³⁹. In the analysis of the doctrine and the national laws of EU Member States, it is also possible to assert that there is a synchronisation of the approaches between the EU judiciary and national competitive agencies⁴⁰. As a result, the most common evidences of collective dominance are those of close parallel behaviour.

What can be seen in the legislation and enforcement practice in Ukraine in the sense of a comparative analysis? When applying Article 12 LPEC⁴¹, the AMCU used a narrow, formalistic approach to existing domestic legislation and ignored the legislative requirements whereby market dominance should be determined using the criteria applied in such cases under EU law, in particular the criteria used in the law enforcement and judicial practice in the EU. Unlike the aforementioned examples of the use of the “collective dominance” concept by the Commission and EU courts, the AMCU’s Report contains no justification when it comes to the composition of the “collective dominance”. The same can be said about the lack of evidence of the existence of any joint (coordinated) policy, in particular concerning prices, as well as the

³⁷ DG Competition discussion paper of 2005 on the application of Article 82 of the Treaty to exclusionary abuses, *supra* note 9, para. 47.

³⁸ ECJ judgment of 27.04.1994, Case C-393/92 *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij*, ECLI:EU:C:1994:171.

³⁹ CFI judgment of 26.01.2005, Case T 193/02, *Laurent Piau v. Commission*, ECLI:EU:T:2005:22.

⁴⁰ For example: *Brannigan v. OFT* (2007) CAT 23 (106); OFT/CC, *Market Investigation References* (Ref: OFT511) (2002). The Guidance has since been adopted by the CMA and is available on the CMA website; *Interbrew SA/Bass plc* Cm 5014 (2001) and *Lloyds TSB Group plc/Abbey National plc* Cm 5208 (2001); the Italian Antitrust Authority’s approach in the *AEM/ASM Brescia* Case (2007).

⁴¹ Article 12 LPEC provides that the monopoly (dominant) position is considered to be the entity whose market share exceeds 35 percent of the goods if it proves experiencing considerable competition. And also it provides that the monopoly (dominance) may also be recognized position of an entity if the market share of goods is 35 percent or less, but it does not undergo considerable competition, particularly because of the relatively small size of the market shares that belong to competitors.

ability and motivation of the members to implement such policy (conditions of market transparency and information awareness of its participants, possibility to coordinate their actions and punish those that try to avoid such coordination etc.). Accordingly, the conclusions of the AMCU are in conflict with Ukrainian law with regard to its international obligations to apply *acquis*. They are also incorrect as far as the existence of “collective dominance” is concerned in the electricity market of Ukraine as they contradict the actual circumstances of this market.

It is essential to note that the behavioural aspect of collective dominance also appears from the analysis of the provisions of Articles 1 and 12 LPEC and the provisions of AMCU’s special Act on methodology concerning the determination of the monopoly (dominating) position of undertakings⁴². In particular, Part 5 of Article 12 LPEC is a special qualifying provision that stipulates such situation on the market when, in contrast to individual dominance of a given undertaking, the ability to determine (or fundamentally influence) the conditions of market trade in goods belongs to an undertaking not independently but jointly with other undertakings – in other words, to a group of undertakings as a collective entity. The provisions of Article 12 also indicate that the aggregate share of undertakings formed jointly (but not cumulative, i.e. the share obtained arithmetically), is a structural indicator that serves as a base for the determination of dominance. It means that the market (monopoly) power belongs precisely to the undertakings taken together – so called “collective dominant entity” – and this power exists because of their common (joint) behaviour. The “object” of the analysis in this case is a “collectively dominant entity”, and its market power as a collective entity that acts as opposed to other participants of the market. “Collectiveness” is expressed by the aggregated market power of all members of the collective entity demonstrated in a specific coordination and, similarity, parallelism of competitive behaviour among the members of the group. Precisely due to such combination, a collective entity has the possibility to obtain supra-competitive advantages, determine conditions of trade, block or limit competition, in particular increase prices, all of which would be impossible individually for the separate members of the collectively dominant entity.

Accordingly, in this case any abuse of such monopolistic position shall be also considered with respect of all members of the “collectively dominant entity” taken together because in this case any dominance and market (monopoly) power are impossible beyond the boundaries of such group. Accordingly, any negative influence on competition in the form of any

⁴² Order of the Anti-Monopoly Committee of Ukraine No. 49-p of 05.03.2002 on the Approval of the Methods of Defining the Monopoly (Dominant) Position of Undertakings in the Market, The Official Bulletin of Ukraine 2002, No. 14, p. 396.

abuse of the monopolistic position (dominance) can be a consequence of the joint behaviour of precisely the united “collective entity”, but cannot be a consequence of the activity/inactivity of its individual members. Since the market power and the monopolistic position (dominance) belong in this case precisely to the “collective entity”, it is possible to use the advantages exclusively in favour of all members of such entity, but not unilaterally in favour of any of its separate members.

So the necessity to prove the links and coordination of the competitive behaviour among the members of a “collectively dominant entity” in order to apply the qualification criterion specified in paras 4–5 of Article 12 LPEC is a compulsory element of the structural analysis of “collective dominance”. Its absence proves the absence of a legal basis for the qualification of the undertakings’ position as a “collective dominance” – a fact not taken into account by the AMCU in its investigation. In its Report, the AMCU did not present proofs or evidences that the three electricity generating companies which the authority saw as holding a collective dominance had been, in fact, linked by agreements or ownership interests. As a result, no “structural links” were identified that could underpin a finding of collective dominance.

Moreover, in light of the AMCU’s market inquiry findings of 24 December 2015⁴³, it would seem that the AMCU had not conducted a comprehensive market analysis or found the existence of tacit collusion before ultimately concluding that the three generators concerned hold a collective dominant position on the Ukrainian electricity generation market. It did so despite the fact that these three companies have significantly different cost structures and fluctuating market shares. In fact, the three generators have inherently different cost structure because of the composition of their generation technologies and resources.

These facts strongly suggest that the generators concerned would have no incentive to engage in tacit collusion⁴⁴ and there is no indication in the AMCU’s market inquiry findings that they have actually done so. Indeed, there is no discussion of the generators acting as a collective entity independently of competitors, customers and consumers. It would seem that dominance is

⁴³ The text of AMCU’s presentation of the Report (text available only in Ukrainian) can be accessed at <http://www.amc.gov.ua/amku/doccatalog/document?id=119661&schema=main> (26.09.2016).

⁴⁴ In Case COMP/M.5224 – *EDF/British Energy* (2008), para. 29, the Commission made clear that the merger raised concerns because it would bring together British Energy’s mostly baseload production with EdF’s flexible production, raising the potential concern that the combined entity would, as a result of the merger, withdraw production to increase prices that it gets on the plants that it is producing. It is clear from the Commission’s analysis, the incentives are fundamentally different when baseload and flexible capacity belongs to distinct undertakings as in the Ukrainian generation sector.

found on the basis of their combined market shares alone, without regard to the actual functioning of the markets or an analysis whether the undertakings concerned have actually engaged in a joint market policy. As explained further below, this approach falls far short of the requirements of EU competition law.

IV. Conclusions

According to European experts (Chauve, Godfried, Kovács, Langus, Nagy and Siebert, 2009, p. 51–54), the electricity sector as a whole is characterised by its uniformity (homogeneity) with a low elasticity of demand, which deprives customers of usual instruments to regulate prices and supplies. When it comes to the supply side of the industry, the latter is also characterised by significant discrepancies between expenses for the implementation of different manufacturing technologies, which are not reflected in the price formation of the supplier.

In European practice, there are single cases connected with competition rules in the electricity market⁴⁵, most of which relate to concentrations⁴⁶ and state aid procedures⁴⁷. However, some cases on the abuse of dominance can be identified also. In this context, it is essential to refer to the analysis of the *E.ON* case (2008)⁴⁸.

Significant governmental influence on the pricing in the Wholesale Electricity Market and administrative regulation of production volumes are in fact two of the most important factors influencing the competitive functioning of the electricity market in Ukraine. The 2008 decision of the European Commission in *E.ON* was based on the particular features of the German

⁴⁵ In the whole history of the EU, the Commission examined only 17 cases connected with different violations of competition rules in the field of power engineering: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&nace_code=96100,96060,96110,96120,96130,96140&policy_area_id=1 (26.09.2016).

⁴⁶ For example, *EDF/London Electricity*, OJ C 387 of 12.12.1998; *Electrabel/Epon*, OJ C 13 of 18.01.2000; *E.ON Energie/Energie Oberösterreich/JCE+JME*, OJ C 16 of 18.01.2001; *Macquarie/Wren House/E.ON Spain*, OJ C 51 of 13.02.2015.

⁴⁷ Modification of Electricity Production Grant (DK), OJ C 292, 04.09.2015; Förderschwerpunkt Elektromobilität des BMVBS, OJ C 296, 07.10.2011; Green Deal for Electric Vehicle Charging Infrastructure (http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38769, 26.09.2016).

⁴⁸ Commission Decision of 26.11.2008 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Cases COMP/39.388 – *German Electricity Wholesale Market* and COMP/39.389 – *German Electricity Balancing Market*), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39388/39388_2796_3.pdf (26.09.2016).

market (Section 4.2. of the Decision), namely its structural and behavioural parameters (ability to adopt a common policy concerning prices).

According to European practice, it is possible to conclude that the AMCU Report and its conclusions on the issue of collective dominance do not contain an analysis of the conditions that should have been taken into account when deciding on the existence of collective dominance. These include question such as: (i) under which conditions can members of a collectively dominant entity obtain information on the behaviour of other market participants; (ii) under which conditions can members of a collectively dominant entity influence an undertaking which, in the case of an agreement between them – can restrict competition, and in case of coordinated activities – avoid the common policy in this market; (iii) under which conditions shall the expected reaction of competitors (existing and potential) not significantly influence the expected result of the agreed actions (jointly implemented by members of the collectively dominant entity in the targeted market); (iv) under which conditions are there economic, legal and structural links present between the members of the collectively dominant entity that provide an opportunity to implement the joint policy, in particular on prices; (v) under which conditions do members of the collectively dominant entity hold market power (that is, can they act independently from buyers, customers and competitors). It is obvious that a sufficient link or connection between them should have been the core concept of the analysis of this case.

Due to the fact that the national electricity market of Ukraine is rigorously shaped by legislation, any assessment of its separate elements should have been carried out with consideration of all its dependences and an analysis of the potential market power of its participants should have first of all considered their relations with public regulatory authorities. A statement that declares the existence of collective dominance held by the three electricity generators, without proving the existence of a coordinated policy and parallelism between them, is thus superficial. This realisation is especially valid taking into account the fact that they act in the strictly legislated field of electricity demand and supply pricing, the policy on which is formed unilaterally by NEURC.

Thus it can be stressed that competition is absent on the Ukrainian electricity market. The model market, where the cost of electricity does not affect the volume of purchases, where buying/selling takes place only through GP “Energy”, and 70% of all electricity is sold at pre-set NEURC tariffs, require a fundamental reform that is provided by the third EU energy package⁴⁹.

⁴⁹ It was officially confirmed by an AMCU representative, as can be seen from the slides presented (text available only in Ukrainian) at <http://www.slideshare.net/EnergyReformUA/ss-63563443> (26.09.2016).

So it can be concluded that the “single buyer” market model, combined with governmental regulations represented by SE Energorynok and NEURC, illustrates the actual absence of market power of the electricity producers (generation companies) and, as a result, the absence of a level of independence required for the determination of dominance according to EU law. So the wholesale electricity market can be characterised by a state of institutional monopoly, depriving the participants of their market power as a result of governmental control. It is so also because the conditions of market trade are regulated and determined by governmental authorities.

As a result, the AMCU’s approach to the regulation of the electricity market in Ukraine confirms the need to reform the system of governmental regulation in the domestic wholesale electricity market and in the market of services for electricity transmission. It also highlights the necessity to change the system for tariff and price-policy formation on the part of NEURC and the Ministry of Energy and Coal-Mining Industry of Ukraine in order to develop competition in the national electricity market. The need to follow the approach and criteria of EU competition law is also apparent with regard to the determination of market dominance. The latter is stipulated by international law duties bidding Ukraine under Articles 18 and 94 of the Treaty establishing the Energy Community and Article 255 of the EU-Ukraine Association Agreement.

Literature

- Chauve, P., Godfried, M., Kovács, K., Langus, G., Nagy, K. and Siebert S. (2009). The E.ON electricity cases: an antitrust decision with structural remedies. *Competition Policy Newsletter*, 1, 51–54.
- Joilet, R. (1970). *Monopolisation and abuse of dominant position – a comparative study of the American and European approaches to the control of economic power*. The Hague: Martinus Nijhoff.
- Jones, A. and Sufrin, B. (2014). *EU Competition Law. Text, cases and materials*. Oxford: Oxford University Press.
- Mezzanotte, F. (2010). Using Abuse of Collective Dominance in Article 102 TFEU to Fight Tacit Collusion: The Problem of Proof and Inferential Error. *World Competition*, 33(1), 77–102.
- Monti, G. (2001). The Scope of Collective Dominance Under Article 82. *Common Market Law Review*, 38, 131–157.
- Monti, G. (2006). The Concept of Dominance in Article 82. *European Competition Journal*, 2(31), 31–52.
- Ortiz Blanco, L. (2012). *Market Power in EU Antitrust Law*. Oxford: Hart Publishing.

- Petit, N. (2013). Collective dominance as effective tacit collusion. In: I. Lianos, D. Geradin (eds.), *Handbook on European Competition Law, substantive aspects*. Cheltenham: Edward Elgar, 325–332.
- Petit, N. and Neyrinck, N. (2011). Collective Dominance: an overview of national case law. *e-Competitions*, 39129, October 2011.
- Rosen, R. and Williams, E. (1999). *A Better Approach to Market Power Analysis*. Boston: Tellus Institute.
- Scholz, U. and Purps, S. (2011). The application of EC Competition law in the Energy Sector. *World Competition*, 34, 62–77.
- Smyrnova, K. (2014). Enforcement of Competition Rules in the Association Agreement between EU & Ukraine. *Yearbook of Antitrust & Regulatory Studies*, 7(10), 263–278.
- Smyrnova, K.V. (2015). The implementation of the competition provisions in the Association Agreement between Ukraine and the European Union. *Law of Ukraine*, 8, 75–82.
- Vickers, J. (2006). Market Power in Competition Cases. *Competition Law Journal*, 2(3), 3–14.

Competition Law and State Aid for Failing Banks in the EU and its Specific Implications for CEE Member States

by

Virág Blazsek*

CONTENTS

- I. Introduction
- II. EU State Aid Rules and their Interplay with EU Competition Law
- III. Changing Interpretation of State Aid Rules and its Impact
- IV. CEE Specific Implications of the Changing Interpretation of State Aid Rules
- V. Conclusions

Abstract

The bank bailouts following the global financial crisis of 2008 have been subject to prior approval of the European Commission (EC), the competition authority of the European Union. The EC was reluctant to reject rescue efforts directed at failing banks and so it consistently approved all such requests submitted by Member States. Out of the top twenty European banks, the EC authorized State aid to at least twelve entities. In this context, the paper outlines the gradually changing interpretation of EU State aid rules, the “temporary and extraordinary rules” introduced starting from late 2008, and the extension of the “no-State aid” category. The above shifts show that the EC itself deflected from relevant EU laws in order to systemically rescue important banks in Europe and restore their financial stability.

* Virág Blazsek, Doctoral Candidate, Department of Legal Studies, Central European University, Budapest, Hungary; e-mail: blazsek_virag@phd.ceu.edu or blazsek@gmail.com. Article received: 28 June 2016; accepted: 3 September 2016.



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.

The paper argues that bank bailouts and bank rescue packages by the State have led to different effects on market structures and consumer welfare in the Eurozone and non-Eurozone areas, mostly the Eastern segments of the European Union. As such, it is argued that they are inconsistent with the European common market. Although the EC tried to minimize the distortion of competition created as a result of the aforementioned case law primarily through the application of the principle of exceptionality and different compensation measures, these efforts have been at least partially unsuccessful.

Massive State aid packages, the preferential treatment of the largest, or systemically important, banks through EU State aid mechanisms – almost none of which are Central and Eastern European (CEE) – may have led to the distortion of competition on the common market. That is so mainly because of the prioritization of the stability of the financial sector and the Euro. The paper argues that State aid for failing banks may have had important positive effects in the short run, such as the promotion of the stability of the banking system and the Euro. In the long-run however, it has contributed to the unprecedented sovereign indebtedness in Europe, and contributed to an increased economic and political instability of the EU, particularly in its most vulnerable CEE segment.

Résumé

Les sauvetages bancaires consécutifs à la crise financière mondiale de 2008 ont été soumis à l'approbation préalable de la Commission européenne (CE), l'autorité de la concurrence de l'Union européenne. Les CE étaient réticentes à rejeter les efforts de sauvetage dirigés contre les banques défailtantes et ont donc approuvé de manière cohérente toutes les demandes présentées par les États membres. Sur les vingt premières banques européennes, la CE a autorisé des aides d'État au moins douze entités. Dans ce contexte le document souligne l'évolution progressive de l'interprétation des règles de l'UE en matière d'aides d'État, les «règles temporaires et extraordinaires» introduites à partir de la fin de 2008 et l'extension de la catégorie «sans aides d'État». Les changements susmentionnés montrent que la CE elle-même a dévié des lois pertinentes de l'UE afin de sauver systématiquement d'importantes banques en Europe et de rétablir leur stabilité financière.

L'article soutient que les plans de sauvetage bancaire et les plans de sauvetage bancaire de l'État ont eu des effets différents sur les structures du marché et sur le bien-être des consommateurs dans les zones de la zone euro et hors zone euro, principalement dans les segments orientaux de l'Union européenne. En tant que tel, il est soutenu qu'ils sont incompatibles avec le marché commun européen. Bien que les CE aient essayé de minimiser les distorsions de concurrence créées par la jurisprudence susmentionnée, principalement par l'application du principe d'exception et des mesures de compensation différentes, ces efforts ont été au moins partiellement infructueux.

Les paquets massifs d'aides d'État, le traitement préférentiel des banques les plus importantes ou systématiquement importantes par le biais des mécanismes d'aide

de l'UE – presque aucun d'Europe centrale et orientale (CEE) – ont entraîné une distorsion de concurrence sur le marché commun. Cela est dû principalement à la priorité accordée à la stabilité du secteur financier et de l'euro. Le document fait valoir que les aides d'État pour les banques en faillite peuvent avoir eu des effets positifs importants à court terme, comme la promotion de la stabilité du système bancaire et de l'euro. Toutefois, à long terme, elle a contribué à l'endettement souverain sans précédent en Europe et a contribué à accroître l'instabilité économique et politique de l'UE, en particulier dans son segment d'Europe centrale et orientale le plus vulnérable.

Key words: EU Competition Law; Central and Eastern Europe (CEE); financial crisis; State aid; bank bailouts; Eurozone; sovereign debt; European Stability Mechanism (ESM).

JEL: K21

I. Introduction

The bank bailout cases following the financial crisis of 2008 were subject to prior approval of the European Commission (hereinafter, EC or Commission), the competition authority of the European Union. The Commission was reluctant to reject the rescue efforts directed at failing banks and consistently approved all related requests submitted by EU Member States. Out of the top twenty European banks, the EC ended up authorizing State aid to at least twelve financial institutions (Adamczyk and Windisch, 2015, p. 1).

State aid – the intervention of the State into the market economy – is a matter of a policy decision and is highly controversial because of its short and long term effects on market competition (Adler, Kavanagh and Ugryumov, 2010, p. 66; Lipinsky and Wolters, 2016, p. 193). It is only one of the at least three methods of providing financial assistance to financially distressed corporations, and it involves taxpayer's money. The two alternatives methods include “private money solutions” (where financial aid is provided by private investors, other financial institutions or banks) and “monetary policy solutions” implemented by central banks, which are basically liquidity assistances either in ordinary or in emergency situations¹. As compared to the pre-crisis years, the role of central banks as “lenders of last resort” has

¹ See Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and

increased as a result of the 2008 financial crisis on both sides of the Atlantic (Squire, 2014, p. 1; Bernanke, 2010, p. 35–36).

The most common arguments in favour of State aid packages are the maintenance of systemic stability, restoring trust on the markets, risk reduction and the balancing of interests of investors, financial institutions and the society (Lastra, 2015, p. 4; Cordella and Yeyati, 2003, p. 300). The counterarguments are numerous: State aid measures can diminish competition, preferential treatment of larger banks is often noticeable – they are either too big to fail or systemically relevant. State aid packages can also be considered a form of freebie to shareholders. Additionally, State aid packages might remove incentives for private initiatives (Woll, 2014, p. 2). A moral hazard issue is worth stressing here as well – if big corporations know in advance that in case of a major financial failure they can expect to be bailed out by the State, this may increase their risk-taking attitude. On the other hand, economic analysis indicates that the risk-reducing “value effect” of ex-ante commitment to bailouts outweighs the moral hazard component of such policy (Cordella and Yeyati, 2003, p. 300).

As a consequence of the 2008 global financial crisis, States intervened in the economy on both sides of the Atlantic. The study of the efficiency and effects of State aid is an interdisciplinary area, seeing as granting State aid is based on policy decisions (Squire, 2014, p. 1) and their effects can be measured by economic analysis. The interdisciplinary nature of this matter reveals itself within the legal science too – competition law, State aid rules, central banking, monetary and fiscal regulation, corporate law and insolvency law are all relevant here. Finance or banking are among the sectors most affected by this matter. Although most bailouts took place in the car, airline and railroad industries, State interventions in the financial sector received more attention due to its special intermediary position than State aid measures received by other industry sectors.

In the most difficult years of the financial crisis – in 2008–2014 – 671 billion Euro was used in the EU in the form of capital and repayable loans; an additional 1288 billion Euro was provided in the form of guarantees². Over 450 State aid decisions were issued by the EC, which approved the restructuring or orderly resolution of 112 European banking institutions. Around 25% of the entire European banking sector was ultimately restructured under EU State aid rules during that time. Out of the top 20 European banks, the Commission approved aid to 12: six were restructured, five received aid through approved aid schemes and one was liquidated (Adamczyk and Windisch, 2015, p. 1).

Regulations (EU) No. 1093/2010 and (EU) No. 648/2012, of the European Parliament and of the Council (OJ L 173, 12.06.2014, p. 190).

² See Commission Competition Scoreboard, 2014, available at http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html (last accessed on 10.08.2016).

According to the national expenditure reports for 2014, Member States spent 101.2 billion Euro (0.72% of GDP) on State aid. Some Central and Eastern European (hereinafter, CEE) Member States granted significant amounts of State aid to their financial sectors. In 2014 for example – aside from Germany – Poland, the Czech Republic and Hungary spent the most on State aid measures related to their financial sectors³. However, apart from the aforementioned three of the 12 CEE Member States – the available data shows that most of the State aid cases were submitted by non-CEE members of the EU and specifically, by Eurozone members and by the UK⁴. Importantly also, GDP-based statistical data shows that the volume of State aid was more significant in the latter regions as well (Adler, Kavanagh and Ugryumov, 2010, p. 66).

As a consequence of the above State aid measures, significant improvements were made – operational and risk indicators of the affected financial institutions were improved, as were their funding and solvency positions. In the Eurozone, the European Central Bank (hereinafter, ECB) developed more frequent and stricter review mechanisms and stress tests, and the Single Supervisory Mechanism (SSM) was set up. On the other hand, the lack of a full banking union in the EU, the fact that the monetary union is limited to the members of the Eurozone only, in combination with the lack of a fiscal union (coordination of budgetary revenues (taxes) and expenses (social redistributive systems)), has led to far-reaching consequences.

Member States not party to the Eurozone have had more flexibility because they can conduct their own monetary policy, even if strictly coordinated and supervised by the ECB. Countries like Spain got into a difficult financial situation because they also undertook the obligations put forward in the Fiscal Compact. The fact that Spain does not have a separate monetary policy has limited its options as to the management of the financial crisis. In other words, the Bank of Spain could not function as a lender of last resort, and the ECB has not used the available monetary policy tools as much as it could have done⁵. It would be too early to make final conclusions as to the long-term effects of State aid measures in the EU.

³ Ibidem.

⁴ Statistical data available at the State aid register of the EC, available at http://ec.europa.eu/competition/state_aid/register/ (last accessed on 10.08.2016). The followings are the most important, financial sector-related State aid cases approved by the EC. UK: C14/2008, N1/2014, NN41/2008, N194/2009, N1/2014, SA.38304, N422/2009, N621/2009, SA.29834, N428/2009, NN19/2009, SA.33683. Spain: N202/2010, N392/2010, NN61/2009, SA.33095, SA.33733, SA.33733, SA.33096, SA.33734, SA.33734, SA.38143, SA.33103, SA.33402, SA.34255, SA.33735, SA.33735, SA.39402, SA.33917, SA.33917, SA.34053, SA.34536, SA.36249, SA.34820, SA.35253, SA.35369, SA.35488, SA.35489, SA.35490, SA.36500. Hungary: C37/2010, SA.40441.

⁵ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

This is so especially because a sovereign debt crisis (the inability of a significant number of EU member states, mostly Eurozone member states, to fulfil the criteria set by the EU as to State budget and deficit) has developed as of 2011 that has further led to a political crisis in several EU countries, especially in Greece, the UK and Spain. These problems are connected to the State aid measures under review in this paper seeing as they have contributed to the unprecedented increase of the sovereign debt in most EU Member States. The outcome of the relevant State measures could have been different in Europe (more similar to US developments), if the banks had paid back the aid which they had received (with interest rates). It can be concluded therefore that the assistance given to failing banks proved even more controversial in Europe than in the US.

II. EU State Aid Rules and their Interplay with EU Competition Law

State aid rules are interlinked or rather based on the competition law of the European Union. In the internal market, a distortion of competition is not permitted since that would lead to the worsening of the situation of European consumers. Based on the Treaty on the Functioning of the European Union (hereinafter, TFEU)⁶, State aid is, as a general rule, incompatible with the internal market with two groups of exceptions. The first is provided directly in the TFEU which states that some types of aids are in fact compatible with the internal market. The second group of exemptions covers measures that may be considered compatible with the internal market. Here, the Commission is authorized to evaluate which State aid may be considered compatible. From the point of view of this article, the category “aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State”⁷ has been most frequently referred to in State aid cases proliferated as a consequence of the 2008 financial crisis.

The law on this area should foster economic and policy goals. One of the most important questions as to State aid policy is therefore related to its effects on market structure, on competition and on consumer welfare. In the EU, State aid is permitted as long as it does not lead to a distortion of competition on the relevant market, and, if it is *a priori* approved by the Commission. The EC may attach conditions to the State aid in order to clear it. The authority may also provide adequate compensation for other market players affected by the measure.

⁶ TFEU, Articles 107–109.

⁷ See TFEU, Article 107(3)(b).

In other words, European State aid rules aim to limit the distortions of competition created by the measure to the necessary minimum, and give strict conditions for granting permission to a State aid measure. They include the “one time – last time” principle, which ensures that State aid measures are used exceptionally, only in a situation of a systemic risk. The State requesting an approval from the EC has to prove that there will be a limited distortion of trade between Member States and that the compensatory measures imposed by the Commission – such as a duty to sell part of the assets of the beneficiary to a competitor or changing its management – will together ensure the limitation of the distortion.

The TFEU allows for State aid exceptionally and in order to remedy a serious disturbance in the economy of a Member State of the EU⁸. Any measures – above a certain threshold, in other words, excluding *de minimis* measures⁹ – that are qualified as State aid, must be approved by the Commission before they can take place (Whish, 2010, p. 240–241)¹⁰.

The Commission makes a case by case assessment and issues its approval. First, it analyses whether the measure constitute “aid” at all. In this respect, it applies the “private market economy investor test” (hereinafter, PMEIT). If the State acts like a private investor, then the measure is not categorised as State assistance. On the other hand, if normal return on the investment cannot be expected within a reasonable timeframe, the PMEIT is not met. The following question in the Commission’s analysis is whether the State aid measure is compatible with the provisions of the TFEU, that is, with EU competition law.

III. Changing Interpretation of the State Aid Rules and its Impact

The “temporary and extraordinary rules” introduced starting from 2008¹¹ and the extension of the “no-State aid” category¹² created an area where the Commission itself deflected from relevant EU laws (Ghazarian, 2016, p. 228).

⁸ Article 107(1) and Article 107(3)(b) TFEU.

⁹ The *de minimis* regulation allows State aid without authorization when the total amount of aid does not exceed EUR 200 000 during the period of three fiscal years (Art. 3 of Commission Regulation (EU) No. 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1).

¹⁰ Private market economy investor test (PMEIT) – there is no State assistance if a private investor would act in the same way.

¹¹ In Communications of the Commission (2009-2013) about the principles of granting state aid to financial institutions; available at http://ec.europa.eu/competition/publications/reports/working_paper_en.pdf (last accessed on 10.08.2016).

¹² In 2013 Banking Communication of the Commission (Communication of 10 July 2013 on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in

The idea behind European competition law and State aid rules is that the economic advantages of the common market, increasing efficiency and competition lead to growing consumer welfare in the long run (Korah, 2009, p. 3). Based on relevant European jurisprudence, EU competition law provisions apply to the banking sector as well¹³. But in times of crisis, more urgent aims must take precedence – such as systemic stability. The EU solved this conflict of priorities so as for EU competition rules to prevail and to be respected even in times of crisis¹⁴. At least this is the declared intention of the EU and the fundamental principle underlying the policy of DG Competition of the EU Commission.

However, an analysis of the enforcement practice of the EC post-2008 shows that the Commission has in fact applied a far more flexible approach in this area than in its previous cases. Indeed, almost all State aid applications submitted by Member States have been approved in this time period. The EC issued six relevant Communications in 2008–2013 about compatibility requirements and the importance of consistency¹⁵. Also in the bailout of Northern Rock in late 2007, the Commission decided that interest-bearing State-liquidity assistance with sufficient collateral in emergency is not in fact distortive (Lastra, 2015, p. 4.31)¹⁶.

the context of the financial crisis, OJ C 216, 30.07.2013, p. 1); available at [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013XC0730\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013XC0730(01)) (last accessed on 10.08.2016).

¹³ CFI judgment of 14 July 1981, Case 172/80 *Gerhard Züchner v Bayerische Vereinsbank AG*, ECLI:EU:C:1981:178.

¹⁴ In Communications of the Commission (2009-2013) about the principles of granting state aid to financial institutions, available at http://ec.europa.eu/competition/publications/reports/working_paper_en.pdf (last accessed on 10.08.2016).

¹⁵ See Banking Communication; Communication from the Commission of 1 December 2011 on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 356, 06.12.2011, p. 7; Communication from the Commission of 1 December 2010 on the application, after 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 329, 07.12.2010, p. 7; Communication from the Commission of 23 July 2009 “The return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules”, OJ C 195, 19.08.2009, p. 9; Communication from the Commission of 25 February 2009 on the Treatment of Impaired Assets in the Community Banking sector, OJ C 72, 26.03.2009, p. 1; Commission Communication of 5 December 2008 – Recapitalisation of financial institutions in the current financial crisis: limitation of the aid to the minimum necessary and safeguards against undue distortions of competition, OJ C 10, 15.01.2009, p. 2.

¹⁶ See also “Approval of the rescue package of UK Northern Rock (05.12.2007)”, IP/07/1859 (05.12.2007); CFI judgment of 14 July 1981, Case 172/80 *Gerhard Züchner v Bayerische Vereinsbank AG*, ECLI:EU:C:1981:178; Commission Communication of 13 October 2008 – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270, 25.10.2008, p. 2, para. 51.

Since late 2008, the Commission introduced “temporary and extraordinary” State aid rules specifically for the financial sector concerning the principles of granting State aid to financial institutions¹⁷. These rules include various Communications (2009-2013); they are quite unique in the legal sense. The EC has argued that its Communications have not shown a significant departure from State aid or competition law rules, but that they facilitate a faster decision-making process and more flexible procedures¹⁸.

The first rule stressed by the Commission in these Communications is the principle of non-discrimination. Second, an application for State aid can only be granted if the State aid measure is clearly defined, limited in time and scope, adequately paid for by the beneficiaries that should bring an appropriate contribution towards their own need, and subject to behavioural constraints so as to prevent any abuse of the State support, such as aggressive expansion riding on the back of the State guarantee. The remuneration for a capital injection made by a State into a bank should reflect the price that a normally functioning market would require for the relevant capital (Commission). Finally, the planned State aid measure should demonstrate strategies to remedy unsustainable business models and achieve long-term viability without the State support under adverse economic conditions (structural adjustment measures).

The second shift in the approach of the EC in this area is visible in its interpretation of the “no-State aid” category. The latter has been extended as a result of the 2008 financial crisis, in other words, the Commission gave the term a wider interpretation as compared to that found in its pre-crisis case law. A measure falls now into the category of “no-State aid” if: the aid is provided for a temporarily illiquid yet solvent entity, the aid is not part of a large rescue package, it is fully collateralized, if an interest rate is charged from the beneficiary, if it is initiated by the central bank and not backed by any counter-guarantee of the State¹⁹. Importantly, these are cumulative conditions. Also, the reimbursement of depositors by the deposit insurance fund is not considered to be State aid²⁰.

¹⁷ State aid temporary rules established in response to the economic and financial crisis, available at http://ec.europa.eu/competition/state_aid/legislation/temporary.html (last accessed on 10.08.2016).

¹⁸ Commission Communication of 13 October 2008 – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270, 25.10.2008, p. 2, para. 51.

¹⁹ See the Commission Communication of 2013.

²⁰ *Ibidem*.

IV. CEE Specific Implications of the Changing Interpretation of State Aid Rules

The aforementioned tendencies were coupled with the pre-crisis differences in market structure and variations in regulatory framework. Together, they have led to different effects on market structures and consumer welfare in the Eurozone and non-Eurozone areas, mostly the Eastern segments of the European Union. As such, they are thus inconsistent with the European common market. The Commission tried to minimize the resulting distortion of competitions through the application of the principle of exceptionality and different compensation measures, but these efforts have proven at least partly unsuccessful. Case statistics show that there were 86 State aid cases after 2008 in the CEE region designed to remedy serious disturbances in the economy that related to the financial services industry. By contrast, there were as many as 385 similar cases in the rest of the EU (Lastra, 2015, p. 4.31). Importantly also, not only was the number of approved State aid packages far greater in Western EU countries than in their CEE neighbours, but so was the amount of money at stake and the amount of financial assistance given to their failing banks. It is relevant to note however that there were more guarantee and liquidity schemes provided for the financial system as a whole than individual bank bailout cases. In other words, EU Member States' governments preferred to request Commission approvals for overall aid schemes, rather than the assessment of bailouts of specific banking entities.

Massive State aid packages, the preferential treatment of the largest financial institutions through EU State aid mechanisms – none of which were CEE in origin²¹ – have led to the distortion of competition on the common market, mainly because of the prioritization of the stability of the financial sector and the common currency. In the long-run, this approach has led to unprecedented sovereign indebtedness and contributed to an increased economic and political instability of the EU, particularly in its most vulnerable CEE segment.

Most of the non-Eurozone Member States of the EU are in fact located in the CEE region²². There are some specific characteristics of the financial crisis in this part of Europe. Its deep dependence on foreign investments implied, for instance, that any major economic disturbance would have had

²¹ Central and Eastern European Countries (CEECs) is an OECD term for the group of countries comprising Albania, Bulgaria, Croatia, the Czech Republic, Hungary, Poland, Romania, the Slovak Republic, Slovenia, and the three Baltic States: Estonia, Latvia and Lithuania. See at <https://stats.oecd.org/glossary/detail.asp?ID=303> (last accessed on 10.08.2016).

²² Bulgaria, Romania, Hungary, Czech Republic, Poland, Lithuania and Latvia.

even more serious consequences for the economies of CEE countries. In the banking sector, the subsidiaries of foreign banks limited or stopped financing their own subsidiaries located in CEE when they, themselves faced liquidity-related problems starting from late 2008. Another major source of problems and financial risk in the CEE region derived from the use of foreign exchange denominated loans. This was true especially in Hungary and Croatia but also in several other CEE countries.

The lack of confidence in the market has led to another problem starting from late 2008. Banks changed, or rather limited their lending activities. Governments tried to use several incentives to boost lending once again but with very limited success. As the financial crisis led to an economic crisis, the crisis caused by the lack of trust on the markets has only gotten deeper in the following years. This explains why most of the State aid measures approved by the Commission took the form of liquidity or guarantee schemes, rather than direct loans or tax releases. In general, financial institutions remained solvent, albeit struggling with liquidity issues. There has, however, been a perceivable lack of confidence among market players themselves and towards the financial sector as a whole.

V. Conclusions

It can be concluded that State aid measures need to be properly regulated and limited in order to avoid their distortive effects. Market players should also not be able to predict them in order to prevent the aforementioned moral hazard issues. The paper argues that State aid for failing banks may have had important positive short term effects in the EU, such as promoting the stability of the banking system and the common currency. In the long-run however, it has contributed to unprecedented sovereign indebtedness and to an increased economic and political instability of the EU, particularly in its most vulnerable CEE segment.

State aid measures are part of early intervention measures, along with the enforcement of prudential regulations. Their argued aim is to reduce loss and avoid financial contagion in the highly interlinked financial sector. If government rescue measures are predictable, it can create a “moral hazard” whereby banks may engage in more risky business activities safe in the knowledge that they will get bailed out by the public hand if things turn out badly. Therefore, more tailor-made regulatory solutions are needed (Hüpkes, 2000, p. 15–16).

State aid measures are subject to extensive debate in economic literature for a number of reasons too. Their economic effects depend on the size

of the country at stake as well as a number of other factors. Some argue that the Commission should ban subsidies granted by small countries since these will most likely result in a price rise and productive efficiency increase (Głowicka, 2008, p. 62). Moreover, if countries grant subsidies strategically, they can improve the position of the subsidized home firm at the expense of a foreign company (Brander and Spencer) (Głowicka, 2005, p. 1). In truth, measuring the effects of State aid packages is complicated partially because of the inherently limited transparency of public finances (Acemoglu and Verdier, 2000, p. 194). It is also complicated by the fact that a State can apply numerous types of direct and indirect financial, economic and legal methods and policies in this context.

The role of the government in correcting market failures is unquestionable. In reality however, many government failures or imperfections can be observed also (Baldwin and Robert-Nicoud, 2007, p. 21). Government interventions in the CEE region were extensive, including not only State aid schemes but also nationalization, sometimes of as much as 60% of the financial sector in certain jurisdictions (especially in Hungary). Based on the case statistics and data gained from the State aid register of the Commission, this article demonstrated that the flexibility of the Commission in the area of State aid assessment – combined with economic and policy-related circumstances – have contributed to a dilution of competition law and an increasing presence of uneven market conditions.

Literature

- Acemoglu, D. and Verdier, T. (2000). The choice between market failures and corruption. *American Economic Review*, 90(1), 194–211.
- Adamczyk, G. and Windisch, B. (2015). State aid to European banks: returning to viability. *Competition: State aid brief. Occasional papers by the Competition Directorate – General of the European Commission*, 1, 1–7. Retrieved from: http://ec.europa.eu/competition/publications/csb/csb2015_001_en.pdf (10.08.2016).
- Adler, E., Kavanagh, J. and Ugryumov, A. (2010). State Aid to Banks in the Financial Crisis: The Past and the Future. *Journal of European Competition Law & Practice*, 1(1), 66-71, <http://dx.doi.org/10.1093/jeclap/lpp006>.
- Baldwin, R.E. and Robert-Nicoud, F. (2007). *Entry and Asymmetric Lobbying: Why Governments Pick Losers*. CEP Discussion Paper No. 791. London: Centre for Economic Performance. Retrieved from: <http://cep.lse.ac.uk/pubs/download/dp0791.pdf> (10.08.2016).
- Bernanke, B.S. (2015). *The Courage to Act: A Memoir of a Crisis and Its Aftermath*. New York: W.W. Norton & Company.

- Cordella, T. and Yeyati, E.L (2003). Bank bailouts: moral hazard vs. value effect. *Journal of Financial Intermediation*, 12(4), 300–330.
- Ghazarian, L. (2016). The Obligations of Member States, National Courts and National Authorities in State Aid Recovery and Recent Developments in the Case-Law of the Court of Justice of the European Union. *European State Aid Law Quarterly*, 15(2), 228–234.
- Głowicka, E. (2005). *Rescue and Restructure Subsidies in the European Union*. Berlin: Social Science Research Center Berlin (WZB). Retrieved from: <http://www.etsg.org/ETSG2005/papers/glowicka.pdf> (10.08.2016).
- Głowicka, E. (2008). *State Aid and Competition Policy: The Case of Bailouts in the European Union*. Berlin: Humboldt-Universität zu Berlin. Retrieved from: <http://edoc.hu-berlin.de/dissertationen/glowicka-elzbieta-2008-05-08/PDF/glowicka.pdf> (10.08.2016).
- Hüpkens, E.H.G. (2000). *The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States and Canada (Studies in Comparative Corporate and Financial Law)*. The Hague: Kluwer Law International.
- Korah, V. (2009). *An Introductory Guide to EC Competition Law and Practice*. Oxford: Hart Publishing.
- Lastra, R.M. (2015). *International Financial and Monetary Law*. Oxford: Oxford University Press.
- Lipinsky, J. and Wolters, J. (2016). Time will Tell – A Brief Contemplation on the Temporal Application of Substantive State Aid Rules in the Light of the Recent Andersen-Judgment of the CJEU. *European State Aid Law Quarterly*, 15(2), 193–198.
- Squire, R. (2014). Insolvency vs. Illiquidity in the 2008 Crisis and the Congressional Imagination. *Fordham Law Legal Studies*, Research Paper No. 2392914, February 8, 93–116. Retrieved from: <http://ssrn.com/abstract=2392914> (10.08.2016).
- Whish, R. (2010). *Versenyjog [Competition Law]*. Budapest: HVG-ORAC.
- Woll, C. (2014). *The Power of Inaction: Bank Bailouts in Comparison*. Ithaca: Cornell University Press.

So Close, So Different – Regional Rail Transport in Poland, the Czech Republic and Slovakia

by

Marcin Król*, Jakub Taczanowski**

CONTENTS***

- I. Introduction
- II. Historical, spatial and socio-economic context
- III. Poland, the Czech Republic, Slovakia: the three models. Experiences and results
 - 1. Poland
 - 2. The Czech Republic
 - 3. Slovakia
- IV. Conclusions

Abstract

The objective of this paper is to present three different models of regional railway passenger transport that emerged in the process of post-communist transition after 1989 in neighbouring countries: Poland, the Czech Republic and Slovakia. After an introduction, the second section of the paper shows the historical, spatial and socio-economic context of the analysis. The three resulting models are presented in the following section. This part of the paper is also devoted to the discussion of the developments, experiences and results obtained in Poland, the Czech Republic and Slovakia. The final section provides conclusions.

* Dr. Marcin Król, Collegium of World Economy, Warsaw School of Economics; mkrol2@sgh.waw.pl.

** Dr. Jakub Taczanowski, Institute of Geography and Spatial Management, Jagiellonian University in Cracow, jakub.taczanowski@poczta.onet.pl.

*** Article received: 20 July 2016; accepted: 2 October 2016.



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.

Résumé

L'objectif de cet article est de présenter trois modèles différents de transport ferroviaire commun au niveau régional qui sont apparus pendant le processus de transition post-communiste après 1989 dans les pays voisins: la Pologne, la République tchèque et la Slovaquie. Après l'introduction, l'article présente dans la deuxième section un contexte historique, spatial et socio-économique de l'analyse. Les trois modèles différents sont présentés dans la section suivante. Cette partie de l'article est aussi consacrée à la discussion des développements, des expériences et des résultats obtenus en Pologne, en République tchèque et en Slovaquie. La section finale présente des conclusions.

Key words: railway transport; regional transport; public service.

JEL: R40; R50; P50; L92

I. Introduction

Poland, the Czech Republic and Slovakia are neighbouring Central-European countries. They have a common historical, social and cultural identity. As the aftermath of World War II, they fell together into the Soviet sphere of influence¹. After the historic year of 1989, they simultaneously started post-communist transformation (also referred to as transition) towards capitalism and democracy. Fifteen years later, in 2004, they joined the European Union altogether.

So close to each other and alike, in many areas of the economy they have adopted surprisingly different transformation models. This can be seen very well on the example of regional passenger rail transport systems.

Regional passenger rail transport is a specific segment of the railway system. It meets societal needs for public transport at the lowest – local and regional levels. It has special attributes that have traditionally encouraged government involvement, in Europe and elsewhere. Railway infrastructure, itself, has economic characteristics, mostly related to so-called natural monopoly, that have attracted substantial regulation. Moreover, local railway networks are expensive to build and maintain and yet in regional passenger transport they are served at a relatively low intensity of traffic. This means that such transport services are *per se* non-profitable and would not be supplied without public intervention. In other words, they have the characteristics of public

¹ Until 1993, when they split into two sovereign states, the Czech Republic and Slovakia existed as one country – Czechoslovakia.

services. Governments choose to subsidize them due to both efficiency and equity considerations. On the one hand, regional public transport is seen as an important factor of local economic development. Often, it is considered to be an example of a so called merit good, creating positive and long-term benefits for society. On the other hand, providing universal access to a given level of infrastructure services, including regional passenger transport, is often viewed as an important element of ensuring equal opportunities for individual citizens. As J.A. Gómez-Ibáñez writes, “[i]nfrastructure may not be deemed as essential to development and equal opportunity as education or health, but it is often just behind” (Gómez-Ibáñez, 2003, p. 9).

Post-communist transformation of the economy has not been an easy task. When it comes to railway transport, this has been further complicated by the fact that the systemic change in Central-European countries was accompanied by a paradigm shift in Western economies concerning government involvement in network industries. However, the new model – with a fundamental change: liberalization of downstream markets – spread in the Western European railway sector (since the 90’s) relatively slowly, with many hesitations and controversies, especially in public passenger transport including its regional branch. In the traditional model, public transport was provided by a monopolistic, vertically integrated railway undertaking with a so-called national carrier status. Public service was often cross-subsidized through a profitable business activity. It is worth noting that this paradigm did not differ significantly from the model used in pre-transition Poland and Czechoslovakia. The new model proposes to buy public transport services in a competitive market. No longer cross-subsidized, they should be subject to competitive bidding for a public service contract (which means competition for the market). Importantly, in the case of regional passenger transport, public services should be organized and financed at the regional level (by regional authorities)².

However in practice, the new model has been so far fully adopted only in Great Britain and Sweden. On the other hand, some countries, such as France, have continued to persist with the traditional model based on a monopolistic national carrier. Other countries are somewhere in the middle between the two models. Thus, the shape of rail public passenger transport varies across European countries – including Central-European ones. This paper provides an overview of evidence on regional passenger rail transport in Poland, the Czech Republic and Slovakia.

² Much has been written about what is referred here as “the new model” for the railway sector in Europe, or – in other words – about the European approach to liberalization and deregulation of railways. It is thus believed that there is no need to even briefly discuss this subject in this paper. A comprehensive look on this issue can be found e.g. in: Finger and Messulam, 2015.

II. Historical, spatial and socio-economic context

The railway systems found in Poland, the Czech Republic and Slovakia were basically formed between mid 19th century and World War I in different historical circumstances. What they all have in common is the fact that when their networks were being built, neither of these countries existed on the European map as an independent state. The territory of present day Czech Republic, Slovakia and South-Eastern Poland belonged to Austria-Hungary, Central-Eastern Poland was part of Russia and its North-Western provinces were under German rule. All three empires had their own economic and transport policies, and so railway networks developed in completely different ways on these territories. Poland illustrates this situation best with a very dense network of regional lines serving local industry and agriculture in the German controlled part and a poor system of military oriented straight trunk lines, which ignored many important towns, in the Russian partition. This situation changed in 1918 when – alongside the development of own national structures in Poland and Czechoslovakia – national railway networks were created and first investments were launched in order to reintegrate the three parts of Poland. Similar developments were observed in Czechoslovakia where the most urgent need was to connect Slovakia (which had been part of Hungary) with Moravia and Bohemia (which used to belong to Austria).

After World War II, both Poland and Czechoslovakia developed their transport systems according to the particular needs of centrally planned economies with their focus on heavy industry and military demands. National railway companies – PKP in Poland and ČSD in Czechoslovakia, fully controlled by the governments already since 1918/19 – obtained the legal monopoly on rail transport of passengers and goods. All private companies and those owned by local governments were nationalized. Giving priority to the requirements of an ineffective industry, irrational cooperation links among industrial plants and very long commuting distances resulted in a complete lack of balance between transport demand patterns as well as in the actual possibilities of the railway system to answer to the increasing transport needs (Kubáček, 2007, p. 178).

These factors were present both in Czechoslovakia and Poland but their influence and importance were somewhat different in these countries. It seems that there were three main reasons for this. First, the general economic structure of the country – mainly rural and agricultural in Poland (except ex-German territories and big cities) versus urbanized and industrialized in Czechoslovakia (especially in Bohemia and Moravia, not as much in Slovakia). The second factor was connected to the first and related to the character of

the railway network. The differences between Poland's former partitions were very significant and some inter-regional connections (e.g. Warsaw-Wrocław) were still missing³. By contrast, Czechoslovakia (in particular, once again in Bohemia and Moravia) was characterized by a well-developed and integrated system, with many local lines that served almost all towns in the country. Finally, there was the third factor – the geopolitical one. Poland was situated on the main trunk line from Moscow to Berlin, which resulted in its importance for military and freight transit between the Soviet Union and East Germany. In fact, one of the first investments made after the reconstruction of train lines damaged during World War II in 1955 was the long Warsaw bypass designed for heavy freight trains down the East-West line (Skierniewice-Łuków). This does not mean that this problem did not exist in Czechoslovakia but its scale was less significant.

Many new investments were launched in Poland after 1945 because of its generally low scale of prior industrialization. The government preferred coal mining, metallurgy, the chemical industry as well as fossil-fuel electricity generation. Most new railway lines which were constructed in the socialist period were designed to serve these plants. The best examples are the bypass of Kraków via Nowa Huta (1952–55), the line Kielce – Tarnobrzeg (1973) and in particular the broad gauge Metallurgy-Sulfur Line (in Polish: *Linia Hutniczo-Siarkowa*) from the Soviet border to the largest steel mill in Poland, which also served new sulfur mines in the vicinity of Tarnobrzeg (1979) (Koziański, 1993, p. 92). Even the most important railway investment made after 1945 – the Central Rail Line (in Polish: *Centralna Magistrala Kolejowa*) from Warsaw to Katowice (1977), today serving exclusively passenger traffic – was designed for heavy coal trains and started to be used by express trains only some years after its construction (Basiewicz, Łyżwa and Modras, 1977, p. 12). Also electrification – certainly one of the most significant achievements in the history of Polish railways – was freight-oriented, especially in its earlier days of the 1950s and 1960s⁴ (Taylor, 2007, p. 92).

By contrast, Czechoslovakia could already in 1945 be described as an industrialized country, although the character of its industry was often quite different from the expectations of socialist planners. Nevertheless, the existing industrial and transport infrastructure was certainly well developed, and so it was more the case of adjusting existing infrastructure to the new socialist demands than building it from scratch. This is why the scale of rail investments

³ The direct line from Warsaw to Wrocław has not been built till recently although the section from Wrocław to the Prussian-Russian border near Wieruszów was constructed in 1871–72.

⁴ This situation changed completely during wide-scale electrification in the 1980s when many purely regional lines were modernized.

in new lines was much smaller here than in Poland. In fact, only three longer sections were built, of which two in Slovakia: a broad gauge freight line from the Soviet border to the steel mill in Košice (1965) – similar to the Polish Metallurgy-Sulfur Line, and section Turňa nad Bodvou – Rožňava (1955), which constituted the last part of the so-called Southern Rail Line that connected Central and Eastern Slovakia (Kubáček, 2007, p. 194). The only important new line in the Czech part of the country was the section Brno – Havlíčkův Brod (1958) – part of the new connection between Prague and Brno (Schreier, 2010, p. 118). Furthermore, some new sections had to be built as pre-existing lines formed obstacles to mining activity – in particular, in the North Bohemian brown coal basin. It was electrification rather than the construction of new train lines that highlighted the industrial character of socialist Czechoslovak railways.

However, the differences between Poland and the Czech Republic seem to have been even more significant in regional transport. Poland can be described as a country where regional rail transport has always been quite underestimated and neglected. Factors listed above – regional disparities in the density of the network, primarily rural character of vast areas of the country, focus on new industrial and strategic needs – were clearly present. Moreover, a scattered settlement structure, typical for many parts of Poland, has always been unfavourable for regional railways development. This explains why little attention has been paid to this sector of rail services in socialist Poland. This became evident after the large-scale private motorization programme was launched by the government in the 1970s. The appearance of the first, relatively affordable Polish Fiats showed the poor state of the railways much clearer than before. The services of the PKP started to be perceived as rather unattractive, slow and unreliable (Jarzabek, 2012, p. 58).

In Czechoslovakia, by contrast, the important role of regional railway connections was maintained at least till the end of the communist era. Local rail services were characterised by relatively intense traffic and the usage of light railcars whereby Czechoslovakia had a long tradition in their manufacturing⁵ (Bittner, Křenek, Skála and Šrámek, 2010, p. 205). State railway policy on this issue was completely different from Poland, where heavy diesel locomotives produced for freight or intercity trains were used on local lines also. It is clear that the aforementioned spatial and economic factors facilitated the maintenance of the strong position of local rail services in Czechoslovakia. However, it cannot be sufficiently stressed how crucial the consistent and rational policy of the Czechoslovak State Railways was. In fact, when the transformation started in 1989, these different approaches in both

⁵ In 1948, albeit freight traffic had priority, a new railcar M131.1 was designed. Over 500 units were built in order to provide rational services and local lines.

neighbouring countries quickly resulted in completely dissimilar development of its regional services.

III. Poland, the Czech Republic, Slovakia: the three models. Experiences and results

1. Poland

Although the transformation began in 1989, the Polish railway sector did not see too many real symptoms of the wind of change until 2001. The Railway Transport Act of 1997⁶ formally launched the liberalization process, and yet it had virtually no effects on the market situation. Instead, it was rather a step towards the implementation of *acquis communautaire* (Directive 91/440/EEC followed by Directives 95/18/EC and 95/19/EC) needed for Poland's accession to the EU. In 2001, however, as a result of the Act of 8 September 2000 on the Commercialization, Restructuring and Privatization of PKP⁷, the incumbent was divided into 24 smaller companies, creating a holding structure called the PKP Group. These newly-created companies included an infrastructure manager (PKP PLK) and several operator companies including PKP *Przewozy Regionalne* (Polish for Regional Services). PKP *Przewozy Regionalne* (hereinafter, PKP PR) was the incumbent company on the regional passenger rail market in Poland. The latter market – albeit still monopolistic – quickly became subject to devolutionary efforts of the government.

Organizing and subsidizing regional passenger rail services became part of the list of mandatory tasks and functions of local authorities as early as 2000⁸. Yet over the first three years, the subsidizing activity was carried out exclusively by means of a state budget grant given to regional authorities⁹. In practice, the grant turned out to be much lower than previously promised¹⁰. This had far-reaching consequences for regional transport. First-off, it was necessary to significantly reduce the number of trains run in the regions. As a result, over the years 2001–2003, the number of passengers and performance in regional

⁶ Journal of Laws 1997, No. 96, item 591.

⁷ Journal of Laws 2000, No. 84, item 948, as amended.

⁸ Based on the above Act of 8 September 2000 on the Commercialization, Restructuring and Privatization of PKP.

⁹ Since 2004, regions were obliged to co-finance public rail transport. They were also given an instrument to do this. From then on, local authorities could keep more of what they collected as income taxes.

¹⁰ Respectively, in 2001-2003, 66%, 52% and 31% of what was previously agreed.

traffic visibly dropped. This had important spatial consequences as several lines were closed for passenger services. In fact, the reduction of the Polish railway network¹¹ continued in following years also. According to Komusiński (2010), over 500 km of lines were closed for passenger trains between 2003 and 2008. Furthermore, the insufficiency of the state budget grants contributed to the loss of financial stability and acute financial crisis of PKP PR, its only and final beneficiary. This, in turn, had significant repercussions for the sector in the coming years.

The new Railway Transport Act of 2003¹² (together with a relevant implementing act¹³) confirmed the responsibility of regional governments for the provision of public services in rail transport in Poland. From then on, they had to be delivered on the basis of competitive bidding for public contracts. In theory, therefore, it was a courageous step in the right (or at least advised) direction – towards what was described in Section I of this paper as a new model of public services provision. In practice, however, barriers to entry were too high for new entrants and the incumbent PKP PR was bound to win the tenders.

The fundamental barrier stemmed from the short duration of a typical contract – 1-2 years in the initial period. Such duration was not long enough to justify the purchase of rolling stock – a crucial question for a company engaging in railway transport as a business, which every potential new entrant would be. This fundamental barrier naturally led to another. The short duration of contracts resulted in a short bidding and mobilization time. In case of an annual contract, it was usually only a few months. This meant that service provision had to begin almost immediately. It was another very serious barrier to entry for non-incumbent players that needed to order trains and to recruit staff first.

The combination of the above barriers was fatal for the development of a competitive market and made tenders a *de facto* fiction in Poland. The most important research question seems to be here: why did regional authorities decide for such a short duration of public concessions, with the consequence that they had to use the monopolistic incumbent and buy its expensive services? The possible answer is quite surprising.

Paradoxically, the main reason for this seems to be the aforementioned acute financial crisis of the incumbent PKP PR. The government decided to refrain from restructuring PKP PR and so the company was left alone.

¹¹ A large-scale regression of the Polish railway network began immediately after the transformation. About 10% of the entire network was closed between 1988 and 1993 (Komusiński, 2010).

¹² Journal of Laws 2003, No. 86, item 989, as amended.

¹³ Journal of Laws 2004, No. 95, item 953.

Its increasing demand for regional subsidies could be clearly seen. Regional authorities feared that in case of concluding a contract for a longer duration, PKP PR would seek to renegotiate it continually to obtain more and more funds. Due to the underdevelopment of the market, it seemed fair to assume that even a tender for a longer than before contract could in many cases attract nobody but the incumbent. The contract would thus be awarded to the foregoing (incumbent) operator but for a longer duration. As a result, a regional government would be even more exposed to the opportunistic behaviour of the incumbent.

An attempt to change the *status quo* in search for an operator other than PKP PR might seem too risky. Announcing another tender for a short-term contract could thus be considered a reasonable choice of a lesser evil.

The government's devolutionary efforts gained momentum in 2008. PKP PR was passed on to regional governments. Surprisingly, it did not change too much. The term "PKP" was quickly removed from the name of the company, which since then began operating under the "PR" logo. There was no longer the need to continue the fiction of "unnecessary" tenders. The company was now technically regions-owned, which made it possible to award public contracts "in house", in accordance with EU and Polish law. Yet the relations between the regions and the incumbent operator did not change greatly.

Sixteen regional governments or shareholders, who were given the company against their will, did not consider it to be their own. In actuality, they did not have too much influence over the operator's actions. The stock ownership was too dispersed¹⁴. Moreover, due to demographic, spatial and socio-economic differences among individual regions, regional governments did not have a sense of common interests in the company. Lack of financial transparency and unclear settlement system added to the picture.

It was also not without significance that the largest shareholder – Mazovia – did not use the services of PR. In order to avoid awkward cooperation with the incumbent company, Mazovia had created its own operator *Koleje Mazowieckie* (Polish for Mazovian Railways) as early as in 2004. It then awarded to that operator a direct (in house) concession for public rail transport in its own region. This model has been imitated by other regions and the mandatory "devolution" of PKP PR has not stopped this process. Region-owned railways have been also created by Lower Silesia (*Koleje Dolnośląskie*, Polish for Lower Silesian Railways, operating since 2008), Silesia (*Koleje Śląskie*, Polish for Silesian Railways, operating since 2011), Wielkopolska (*Koleje Wielkopolskie*, operating since 2011), Małopolska (*Koleje Małopolskie*, operating since 2014) and Łódzkie (*Łódzka Kolej Aglomeracyjna*, Polish for Agglomeration Railway

¹⁴ The shares ranged from 3% for Świętokrzyskie to 13,5% for Mazovia. Only in three regions did their shares exceed 9%, and only six regions had a share higher than 6%.

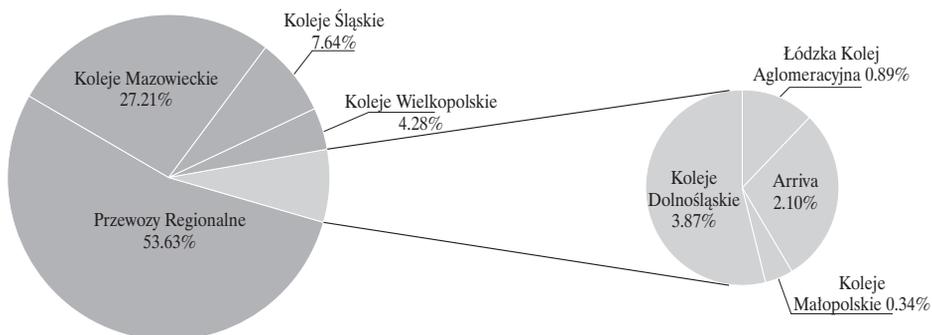
of Łódź, operating since 2014). The appearance of these new carriers has facilitated the reopening of some lines which had previously been closed, in particular in Lower Silesia.

As of today (mid-2016), two regional governments, Mazovia and Silesia, buy public rail services exclusively from their own operators. Given the important role of railway transport in these regions, *Koleje Mazowieckie* and *Koleje Śląskie* transport more passengers than PR in the rest of the country. The regions of Lower Silesia, Wielkopolska, Małopolska and Łódzkie share their public contracts between their own operators and PR – yet the market share of the later is dropping and the regional authorities declare that they intend to eventually abandon cooperation with the incumbent company.

The PR incumbent company remains responsible for the provision of regional rail services in other regions. The only and important exception is found in the Kujawsko-Pomorskie Region where DB-owned Arriva started operations in 2007 by winning a tender for non-electrified sections (a 3-year contract). This tender showed Polish regional authorities how important savings on subsidies in public services can be when competition takes place. The Arriva offer stood at PLN 12.93 per train km while PR offered 18.36 per train km. After three years, Arriva was the successful bidder again (PLN 17.99 v. PLN 35.48), yet this time obtaining the concession for a 10-year period (2010–2020) (Arriva, 2013, p. 12). Arriva also managed to win a 3-year contract (2013–2015) for a set of electrified lines in the Kujawsko-Pomorskie Region.

Arriva is the only market player in Poland that is independent from public service organizers (i.e. that is not owned or co-owned by regional authorities). However, due to the local nature of its activities, Arriva's market shares are almost negligible (what can be seen on Figure 1). Ironically, creating their own railways appears to regions as a safer and more comfortable weapon against

Figure 1. Market shares of operators active on the market for regional rail transport in Poland (% of passenger-km, 2015)



Source: authors' own calculations based on UTK data.

the monopoly of PR than putting services out to tender. That is, region-owned railways are, paradoxically, a local response to the underdevelopment of the market for public rail services. Monopolistic by its very nature, their services are almost as expensive as the services offered by the incumbent PR operator. The advantage of having its own rail operator is, however, financial stability and transparency, and responsiveness to the owner's needs¹⁵. Clearly, regions prefer quite expensive tranquillity over the uncertainty associated with the promises of competitive bidding on the underdeveloped market.

The Polish government finally recognized the fiasco of the idea to “devolute” PKP PR. The controlling interest in the company has been taken over by a governmental agency in 2015 and its restructuring has been announced. The immediate result of this is, however, rather unfavourable. PR became again a sort of a “national carrier” and the government began to care about it again: regional authorities cooperating with PR have been kindly asked to sign longer-than-before contracts with PR in order to secure some financial stability for the company, and so they have. Accordingly, Kujawsko-Pomorskie Region has not re-tendered its electrified lines after the concession to Arriva expired in 2015. The new concession has been directly awarded to the government-owned PR. Figure 1 shows the market shares of operators active in the Polish market of regional rail public services by the end of 2015.

2. The Czech Republic

The existing model of regional railway organization in the Czech Republic is certainly a result of the aforementioned historical developments. It has to be described as rather stable, both in the institutional and spatial sense. However, the fact cannot be sufficiently stressed that it has taken its shape in the aftermath of the transformation of 1989 and the dissolution of Czechoslovakia in 1993. The first reforms of the ČSD were launched in 1991 in accordance with the *Program Strategy of Rail Transport till 1995 in the circumstances of the economic reform* (*Programová strategie železniční dopravy do roku 1995 v podmínkách ekonomické reformy* of 8 May 1991) and the *Principles of National Transport Policy* (*Zásady státní dopravní politiky* of 26 September 1991). As a consequence of the dissolution of the common state, new national railway companies, *České dráhy* (ČD) in the Czech Republic and *Železnice Slovenskej republiky* (ŽSR) in Slovakia, were created in 1993. The first reforms of the newly formed ČD company were launched in 2002. They were meant to adjust

¹⁵ Accordingly, regional governments are typically eager to sign long-term contracts with them – e.g. Koleje Śląskie has a 10-year contract with Silesia (2015–2025), Koleje Dolnośląskie has a 8-year contract with Lower-Silesia (2015–2022).

the organizational structure of the Czech railways to European guidelines, which foresaw a division between infrastructure managers and operators. As a result, two new companies were created in the Czech Republic: *České dráhy* (ČD) as a passenger and freight operator¹⁶ and *Správa železniční dopravní cesty* (SŽDC) as an infrastructure manager¹⁷. Hence, the new operator retained the name of the former vertically integrated Czech Railways.

It should be emphasized that a clear distinction between national and regional railway lines existed already in the first official documents published in the 1990s. The Railway Law of 1994 defines the latter as lines of local or regional importance, which are used to provide public services and which are connected with a national or another regional line¹⁸. Moreover, 128 regional lines were formally excluded from the national network in 1995. This decision was at the beginning purely bureaucratic, although the original plan was to prepare the privatization of these lines (Zlinský, 2012). Yet after regional governments were burdened with the responsibility for regional railway services in 2010, this issue gained in importance¹⁹.

One of the most important documents for the present organizational model of regional railways in the Czech Republic is the Law about Public Services in Passenger Transport from 2010²⁰. According to this law, it is the communities and regions which are responsible for organizing and financing regional transport on their territories²¹. Interregional connections, by contrast, are an area of responsibility of the state. However, it should be emphasized that the national government subsidizes the regions in financing regional rail transport. Based on an agreement which was signed by the Prime Minister, the Ministry of Transport and heads of the regions in 2009, 2.649 billion Czech crowns, CZK (50.4283 billion EUR) should be allocated every year between 2009 to 2019 to the regional governments for this purpose²². Thanks to this decision,

¹⁶ The division into a passenger carrier (ČD) and a freight carrier (ČD Cargo) took place only in 2007.

¹⁷ *Předpis č. 77/2002 Sb., Zákon o akciové společnosti České dráhy, státní organizaci Správa železniční dopravní cesty a o změně zákona č. 266/1994 Sb., o dráhách, ve znění pozdějších předpisů, a zákona č. 77/1997 Sb., o státním podniku, ve znění pozdějších předpisů.*

¹⁸ *Zákon o dráhách č. 266/1994 ze dne 14. prosince 1994.*

¹⁹ At present (2016), 161 lines are classified as regional lines. This status makes it possible to reduce the costs of service as a train-kilometre on regional lines costs 5.32 crowns (0.1968 EUR) plus 29.20 crowns (1.0802 EUR) for 1,000 gross tonne-kilometres whereas on national lines the costs goes up to 6.28 crowns (0.2323 EUR) and 34.45 crowns (1.2745 EUR) respectively.

²⁰ *Předpis č. 194/2010 Sb. Zákon o veřejných službách v přepravě cestujících a o změně dalších zákonů.*

²¹ Actually, regional governments were saddled with the responsibility for these issues already in 2005.

²² *Memorandum o zajištění stabilního financování dopravní obslužnosti. veřejnou regionální železniční osobní dopravou* of 2009.

it is possible to provide a stable regional transport offer. In fact, over the last two decades, the Czech railways have managed to maintain a well-developed system of regional and local lines, which has been used quite intensely in terms of trains and passengers.

However, stability does not mean the lack of any change. An important novelty, foreseen already in the 1990s, appeared: the entry of new carriers that are independent from the state. Open access competition was introduced in 2011 in inter-regional connections on the Czech Republic's main trunk line from Prague to Ostrava. Apart from ČD, two private companies offer their services on that line.

Regional governments have started to open their railway markets as well. These attempts are usually the result of the fact that regional governments struggle to obtain information from the incumbent national railway company about the actual train costs on given lines. Hence, they question whether the demanded subsidy is not in fact much higher than the real costs incurred by the incumbent. This problem stimulates the decision-makers to take into consideration an alternative solution, that is, to launch a tender for public railway services. This has been the case on the line Karlovy Vary – Mariánské Lázně (53 km) in Western Bohemia in 2005. Costs according to the demands of the ČD and the winner of the tender – a private company called Viamont (present name: GW Train Regio) as well as ticket prices are compared in Table 1.

Table 1. Comparison of costs of services on the regional line Karlovy Vary – Mariánské Lázně

| | ČD | Viamont / GW Train Regio |
|---|-----------------|--------------------------|
| Costs of train-kilometre in 2005 [CZK/EUR] | 80.41 2.7528 | 64.63 2.2126 |
| One way ticket price for 53 km distance in 2016 [CZK/€UR] | 80.00 2.9597 | 66.00 2.4417 |

CZK to EUR exchange rate is given for 2005 and 2016 respectively.

Source: authors' own elaboration on the basis of: Bocková, 2005; www.cd.cz (16.07.2016); www.gwtr.cz (16.07.2016).

The most important result of the tender has thus been the decrease by 20% in the cost of the train-kilometre. Furthermore, also the price of the ticket in the GW Train Regio trains is about 20% lower than in those of the ČD²³. At present, GW Train Regio is the most important regional railway carrier apart from the ČD. It operates five local lines in the Ore Mountains and the Sudets: Karlovy Vary – Mariánské Lázně, Sokolov – Klingenthal (Germany),

²³ However, the ČD offers a very well-developed discount system (e.g. for groups), one-day network tickets as well as loyalty programmes.

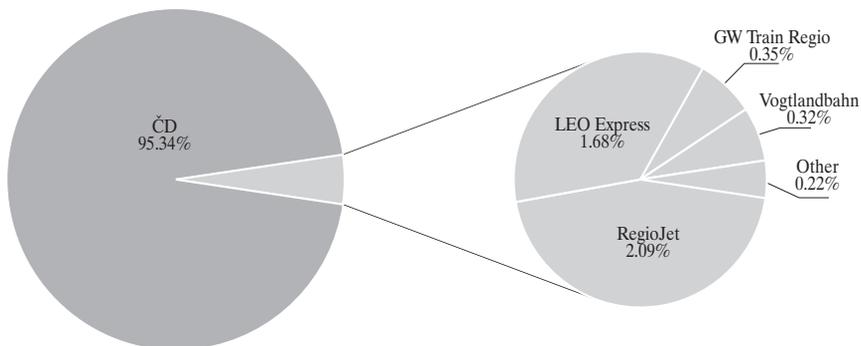
Trutnov – Svoboda nad Úpou, Trutnov – Královec – Jelenia Góra (Poland) and Milotice nad Opavou – Vrbno pod Pradědem²⁴.

Another reason for the appearance of new carriers has been the fact that the state-owned ČD was reluctant to reconstruct some of the local lines damaged in the 1997 flood, while local governments were interested in maintaining their train services. This applies to two lines: Milotice nad Opavou – Vrbno pod Pradědem and Šumperk – Kouty nad Desnou/Sobotín (all in the Sudets). The service on the former line has been taken over by Viamont (GW Train Regio); the latter was at first operated by the construction firm which had rebuilt the train infrastructure and later taken over by Connex (later Arriva). Paradoxically, after the electrification of 2015, the regional government decided to entrust the service to the ČD since – unlike Arriva or GW Train Regio – it owned electric rolling stock. Since then Arriva has been active only on a short branch line to Sobotín (Jirásek, 2016).

A small, but interesting element of the Czech railway market lies in regional train services which are organized at the sole risk of the provider. So far, only Arriva has entered this sector. After having operated suburban trains on the Kralupy nad Vltavou – Prague – Benešov line for three months in 2012, Arriva decided to come back in 2016 with connections from Prague to Benešov and weekend trains to Trenčín in Slovakia²⁵.

Still, the scale of the opening of the Czech railway market can be still described as small (Figure 2). It does not seem that the monopolistic position of the ČD is going to change any time soon. This is because in 2009 – just before the new Law on Public Services in Passenger Transport was passed –

Figure 2. Market shares of operators active in passenger rail transport in the Czech Republic (% of passenger-km, 2015)



Source: authors' own elaboration based on SŽDC data (Výroční zpráva, 2014).

²⁴ www.gwtr.cz (06.07.2016).

²⁵ www.arriva-vlakky.cz (16.07.2016).

all 14 regions decided to sign a contract with the ČD which foresees that the national carrier will be operating regional lines till 2019 with a prolonging option for the next five years (Tomeš, Kvizda, Nigrin and Seidenglanz, 2014, p. 275). This means the ČD were given 150 billion CZK (5.8754 billion EUR) without the use of a tender (Šúra, 2009).

In conclusion, the Czech model of regional railway organization can be described as a stable and conservative one. The stability of the well-developed network of regional and local railway lines, which has not changed significantly after it was constructed at the end of the 19th century, is certainly particular. In fact, the Czech Republic is one of the very few European countries where almost the entire railway system, as it was created over 100 years ago, is still in operation. The adjective “conservative” stands not only for the maintenance of the old spatial structures, however, but also for the predominance of the national railway company in the service.

3. Slovakia

The model of organizing the passenger railway system in Slovakia was up to 1993 the same as in the Czech Republic as they both formed one country. After the dissolution of Czechoslovakia, a new national company was formed – the ŽSR. However, no structural modifications were made to the incumbent till 2001 when the ŽSR was divided into: the infrastructure manager (ŽSR) and the carrier (ZSSK). Three years later, the ZSSK was separated once gain into a passenger and a freight transport company – ZSSK and ZSSK Cargo respectively²⁶.

The institutional aspect of the passenger railway sector in Slovakia can be described as very conservative because it is still the national government which decides and finances the entire sector – including regional connections (Nemeth, 2012, p. 60). Regional bus transport, by contrast, is in the competence of regional governments (Gnap and Poliak, 2005). Another reason to call the Slovak passenger railway system – and especially its regional part – conservative is its particularly low liberalization level. In fact, apart from open access competition in international long-distance connections to the Czech Republic (which is, *de facto*, the result of prolonging domestic Czech services to Žilina, Košice and Prešov) and the weekend Arriva train from Prague to Trenčín (see the section about the Czech Republic above), activities of new carriers, which are independent from the ZSSK, are limited to one line only. This sole example of regional railway market opening is the line from Bratislava to Komárno (100 km long).

²⁶ *Uznesenie vlády SR č.662/2004 zo dňa 7.7.2004.*

In 2011, the Ministry of Transport, Construction and Regional Development entrusted the company RegioJet (the aforementioned new entrant) with the provision of the service on this line for the next nine years. The decision to commission a carrier other than the ZSSK with railway services without any tender was treated as an experiment in order to test whether the new company was able to attract new passengers. The Ministry of Transport, Construction and Regional Development had the intention to apply to the Ministry of Finances for an increase in the subsidy to railways, if more people switched from individual to rail transport (Petrák, 2012). However, the argument was also present that the appearance of a new carrier would result in a decrease of the subsidy. In fact, the costs demanded by RegioJet turned out to be about 16% lower than those paid to the ZSSK (Table 2).

Table 2. Comparison of costs of services on the regional line Bratislava – Komárno

| | ZSSK | RegioJet |
|---|------|----------|
| Costs of train-kilometre in 2011 [Euro] | 6.60 | 5.70 |
| Subsidy from the national government [million Euro] | 8.40 | 7.10 |
| One way ticket price for 100 km distance in 2016 [Euro] | 5.25 | 5.25* |

* there is a special offer for tickets from Bratislava to Komárno. The tickets can be purchased in customer centres only and cost 4.50 instead of 5.25 Euro.

Source: authors' own elaboration on the basis of: Kováč, 2011; Valček, 2011; www.regiojet.sk (17.07.2016) and www.slovakrail.sk (17.07.2016).

The introduction of the new carrier was connected with the modernization of the line Bratislava – Komárno. The result of that modernization as well as the purchase of new diesel units, replacing trains made up from heavy locomotives and carriages, cut travel time from about 2 h 20 m – 2 h 30 m to 2 h 8 m. Moreover, the frequency of trains increased from 10 to 12 pairs of trains between Bratislava and Komárno. The reaction of passengers was quick. In four years of RegioJet service, the number of passengers increased by 300% (RegioJet, 2016).

The stability of the organizational aspect of Slovak railways does not apply to its spatial structure. Unlike in the Czech Republic, a vast regression of the passenger network can be observed after 2003. The decision was made at that point in time to close 21 sections for passenger trains (total length of 482 km) – that is about 13% of the entire Slovak network. This was part of a more complex austerity programme including the cancellation of over 100 other trains and employee redundancy (Gulík, 2013). Although after large-scale protests nine lines were reopened after a few months, most of the closed sections were never reopened.

To sum up, Slovakia combines a very conservative organizational scheme of passenger railways, where the state plays the predominant role as the sole service purchaser and the owner of the *de facto* monopolistic national company, with a large-scale reduction of its railway network. There might be a link between these two elements because the lack of influence of the regional and local governments on railways was probably a factor which facilitated the closure of so many lines. National governments are often not sufficiently informed about the needs of local people. A question arises here whether this particular organizational model is able to continue. The experiment to open one regional line to a carrier independent form the ZSSK might be the first step towards liberalization on a larger scale.

IV. Conclusions

Poland, the Czech Republic and Slovakia provide three different models of regional railway organization. The historical, socio-economic and spatial factors of railway network development in the three neighbouring Central-European countries have been diverse. Whereas the present Czech Republic has always been characterised by a well-developed system of local and regional railways, which served a dense network of towns and industrial plants, Poland had to suffer the consequences of the partition of its territory between three different countries until 1918. Slovakia, by contrast, developed its railways as part of the Kingdom of Hungary. The pre-war and communist Poland and Czechoslovakia were characterised by different railway development as well. Their differences did not disappear even after 1945 under the common rule of communism. Although the transport demands of Soviet-style heavy industry were similar, the scale of new infrastructural investments was different in the already highly industrialized Czechoslovakia and still predominantly rural Poland. Despite the priority of freight-oriented railway investments in both countries, Czechoslovak railways managed to maintain the tradition of rational and economic organisation of regional services, not least because of a large-scale programme of railcar manufacturing – a feature absent in Poland.

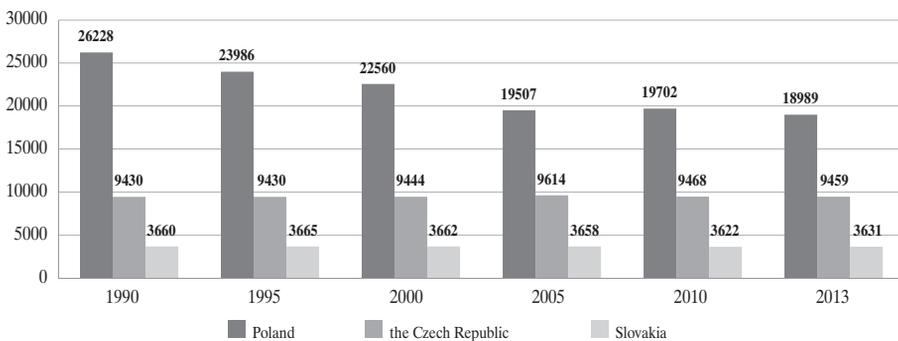
These factors set the stage for the railway development schemes after the transformation. In fact, whereas the Czech Republic has maintained a particularly dense network of regional and local railways, Poland has faced a vast-scale railway regression (Figure 3²⁷). The general role of railways in the transport

²⁷ The data in fig. 3 present the total length of all railway lines in the three analysed countries, hence they include also the sections on which only freight trains were in operation. This is why they do not reflect very well the changes in the passenger railway network, in particular in Slovakia.

systems, reflected in their “passenger-distance” performance (Figure 4), has been generally in line with network development. The position of Slovakia can be described as an intermediate one, with network changes more similar to the Czech Republic and passenger-distance reduction that resembles Poland.

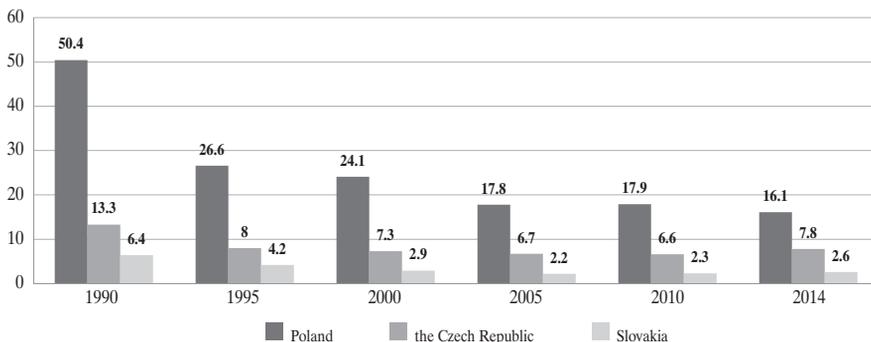
The organisational models that emerged in the three analysed countries also differ significantly from each other. Interestingly, the initial development after the transformation had begun was quite similar: the first transport strategies and new laws on railways were introduced in the 1990s, and the first modest steps towards market liberalisation were made about 2001. The main goal of the reforms of the early 2000s was to adjust the organizational structures of railways to European guidelines that foresaw a division between infrastructure managers and service operators. However, the actual models which have emerged in the aftermath of these reforms had different results.

Figure 3. Length of railway lines in Poland, the Czech Republic and Slovakia in 1990–2013 (km)



Source: authors' own elaboration based on Eurostat data.

Figure 4. Transport performance of railways in Poland, the Czech Republic and Slovakia in 1990–2014 (billions of passenger-km)



Source: authors' own elaboration based on Eurostat data.

Poland has been the only country which has decided to create a separate operator to be responsible solely for regional transport – PKP PR. Although Polish regional governments were obliged to organize regional railway services as early as 2000, the subsidy for regional transport was carried out in the first three years exclusively by means of a state budget grant, which turned out to be much lower than previously promised. The far-reaching consequences of this situation included a large-scale network reduction and acute financial crisis of the PKP PR incumbent. The subsequent bizarre development of the regional railways organization toward a fictional “competition for the market” model was quickly followed by the complete withdrawal of the state from regional transport organization and the “devolution” of PKP PR. However, the incumbent company was still perceived as “alien”. In order to shield themselves from the incumbent’s opportunistic behaviour, several regional governments decided to create their own regional railway operators and to award public contracts to them “in-house”. Thus, creating local monopolies as a tool to combat the monopolistic practices of a national incumbent is emblematic to the Polish model. The recent decision of the government to make the incumbent into a national operator once again, adds to a rather chaotic sequence of domestic experiments.

The Czech and Slovak models, by contrast, are much more traditional and stable with the predominant role of the incumbent ČD and ŽSR respectively, which are still in the hands of the state and hold positions of national operators. The Slovak model can be described as particularly conservative. Apart from some open access Czech companies which are active on the long-distance lines to Prague, only one external carrier is present in Slovakia. Moreover, the organization and financing of regional railway services remains the responsibility of the national government. While the scale of market opening in the Czech Republic is larger than in Slovakia, if compared with some Western-European countries it can be described as very small still. The role of the incumbent is absolutely predominant and it does not seem that this is going to change any time soon as all Czech regions have decided to sign long-term direct contracts with ČD.

A question arises whether, and for how long, the analysed Central-European countries are able to maintain their own – quite particular and varied – models of regional railway organization. Only time will tell. Without any doubts, however, the postponed prospects of the full introduction of the Fourth Railway Package will not induce governments to any decisive actions²⁸.

²⁸ The Fourth Railway Package is a set of legislative measures aimed at creating the single European railway market. One of its features is to introduce obligatory competition for public service contracts in the railway sector. As of the time of writing of this paper, it has been negotiated that competitive bidding for public contracts would become the norm from 2023. However, any contract awarded directly before 2023 would need to expire only in 2033.

Literature

- Arriva (2013). *Liberalisation and competition in the European regional rail market*. Retrieved from: <http://www.arriva.co.uk/~media/Files/A/Arriva-Corporate-V2/press-release/2013/29-10-2013-2.pdf> (01.10.2016).
- Basiewicz, T., Łyżwa, J. and Modras, K. (1977). *Centralna Magistrala Kolejowa Śląsk-Warszawa*. Warszawa: Wydawnictwa Komunikacji i Łączności.
- Bittner, J., Křenek, J., Skála, B. and Šrámek, M. (2010). *Malý atlas lokomotiv 2011*. Praha: Gradis Bohemia.
- Bocková, A. (2005). Krajští radní schválili nového dopravce na železniční trati Karlovy Vary – Mariánské Lázně. *Krajské listy, Karlovarský kraj*, http://www.kr-karlovarsky.cz/krajske_listy/Stranky/251005_KV-ML.aspx (01.10.2016).
- Finger, M. and Messulam, P. (eds.) (2015). *Rail Economics, Policy and Regulation in Europe*. Cheltenham-Northampton: Edward Elgar Publishing.
- Gnap, J. and Poliak, M. (2005). Financovanie verejnej hromadnej osobnej dopravy. *Doprava a spoje 1*, <http://fpedas.uniza.sk/dopravaaspoje> (01.10.2016).
- Gómez-Ibáñez, J.A. (2003). *Regulating Infrastructure. Monopoly, Contracts, and Discretion*. Cambridge-London: Harvard University Press.
- Gulík, J. (2013). *2003–2013*, www.vlaky.net (01.10.2016).
- Jarząbek, M. (2012). Społeczny odbiór kolei. In: D. Keller (ed.), *Dzieje kolei w Polsce*. Rybnik: Eurosprinter, Muzeum w Rybniku, 58–59.
- Jirásek, J. (2016). *Arriva skončí na trati do Kout nad Desnou. Kraj si vybral České dráhy*, <http://www.firenet.cz/specialy/118-lokalka-tour/2556-arriva-skonci-na-trati-do-kout-nad-desnou-kraj-si-vybral-ceske-drahy> (21.05.2016).
- Komusiński, Sz. (2010). Przekształcenia przestrzenne sieci pasażerskiego transportu kolejowego w Polsce w latach 1988-2008. *Prace Komisji Geografii Komunikacji PTG, XVIII*.
- Kováč, J. (2011). *RegioJet na Slovensku nasadí jednotky Bombardier Talent*, <http://www.zelpage.cz/zpravy/7980> (01.10.2016).
- Koziarski, S. (1993). *Sieć kolejowa Polski w latach 1918-1992*. Opole: Państwowy Instytut Naukowy Instytut Śląski w Opolu.
- Kubáček, J. (2007). *Dejiny železníc na území Slovenska*. Bratislava: Železnice Slovenskej Republiky.
- Nemeth, F. (2012). Strategická pozícia a výkonnosť železničných podnikov v SR. *Trendy v podnikání – Business Trends, 4*, 57–64.
- Petrák, J. (2012). *RegioJet predstavil nabídku pro osobní vlaky Bratislava – Komárno*, <http://www.zelpage.cz/zpravy/8370> (01.10.2016).
- RegioJet (2016). *Intenzívne riešime preplnenosť súprav*, <https://www.regiojet.sk/nase-trasy/bratislava-komarno/plne-vlaky> (17.07.2016).
- Schreier, P. (2010). *Naše dráhy ve 20. století. Pohledy do železniční historie*. Praha: Mladá fronta.
- Sůra, J. (2009). *Kraje dají drahám 150 miliard bez soutěže*, http://ekonomika.idnes.cz/kraje-daji-draham-150-miliard-bez-souteze-d92-/ekonomika.aspx?c=A091110_214303_ekonomika_mmb (01.10.2016).
- Taylor, Z. (2007). *Rozwój i regres sieci kolejowej w Polsce*. Warszawa: Instytut Geografii i Przestrzennego Zagospodarowania im. S. Leszczyckiego PAN.

- Tomeš, Z., Kvizda, M., Nigrin, T. and Seidenglanz, D. (2014). Competition in the railway passenger market in the Czech Republic. *Research in Transportation Economics*, 48, 270–276.
- Valček, A. (2011). *Ludia si vyskúšali súkromný vlak od RegioJetu*, <http://ekonomika.sme.sk/c/5870379/ludia-si-vyskusali-sukromny-vlak-od-regiojetu.html> (01.10. 2016).
- Zlinský, Z. (2012). *Lokálky štátem nemilované*, <http://www.vlaky.net/zeleznice/spravy/4410-Lokalky-statem-nemilovane/>, (01.10.2016).

NATIONAL LEGISLATION & CASE LAW REVIEWS

Merger Control in Georgia – National Legislation and Case Law Review

by

Solomon Menabdishvili*

CONTENTS

- I. General overview of merger rules
- II. Concentrations examined by the Competition Agency of Georgia
- III. Merger between LLC “Alta” and LLC “Eurotechnics Georgia”
- IV. Acquisition of 100% of shares of “Nugeshi” Ltd by “Nikora Trade” Ltd
- V. Conclusions

Abstract

Georgia has amended its Law on Competition in 2014 in order to fulfil its obligations set out by the Association Agreement with the European Union. Despite further approximations of its laws with those of the EU, some serious flaws remain. Merging parties are obliged to submit a prior notification to the Competition Agency of Georgia if their total turnover exceeds 20 million Georgian lari (GEL) or if the value of their assets exceeds 10 million GEL (7,692,307 EUR). One of the most interesting aspects of the Georgian merger control system rests in what the Competition Agency is authorised to do in case of a failure to fulfil the notification duty. This paper will discuss Georgian rules on concentrations as well as two of its recent merger cases.

* Lecturer at Tbilisi State University in Georgia; head of the Centre for Competition Law and Consumer Protection in Georgia; smenabdishvili@gmail.com. Article received: 15 July 2016; accepted: 26 September 2016.



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.

Résumé

La Géorgie a modifié sa loi sur la concurrence en 2014 afin de remplir ses obligations imposées par l'Accord d'association avec l'Union européenne. Malgré des rapprochements de la loi géorgienne avec la loi de l'Union européenne certains défauts persistent. Les parties de la concentration sont obligées de notifier l'Autorité de la concurrence géorgienne si leur chiffre d'affaires total dépasse 20 millions de lari géorgien (GEL) ou si la valeur de leurs actifs dépasse 10 millions de GEL (7.692.307 EUR). L'un des aspects les plus intéressants du système géorgien de contrôle des concentrations concerne les compétences de l'Autorité de la concurrence en cas de la violation de l'obligation de notification par l'entreprise. Cet article va analyser les règles de la loi géorgienne concernant les concentrations, ainsi que les deux affaires de concentration récentes.

Key words: competition; concentration.

JEL: K21

I. General overview of merger rules

The Parliament of Georgia has adopted a new Law on Competition in 2012 (hereinafter, LC). However, to meet the EU' criteria for signing the Free Trade Agreement, a further approximation of the LC with European competition rules was necessary. The new Georgian Government initiated in 2014 an amendment act, which was adopted on 27 March 2014. In light of these developments, all key domestic competition rules can now be found in the LC of Georgia. However, the LC contains a number of serious flaws which must be rectified as soon as possible. This review will discuss one of them namely Georgia's provisions on merger control.

According to paragraph 1 of Article 11 LC, a concentration includes:

- a) merger of two or more independent undertakings resulting in the formation of a single undertaking;
- b) gaining of direct or indirect control over an undertaking or its business share through the purchase of securities or interests, or through an agreement or otherwise, by a person already controlling at least one undertaking;
- c) participation of one and the same person in the management boards of different undertakings;
- d) the establishment of a joint venture, provided that it performs all the functions of an independent undertaking for a long period¹.

¹ See Georgian Law on Competition at: <http://competition.ge/en/page2.php?p=4&m=62> (15.07.2016).

Paragraph 3 of Article 11 LC defines the term “control” as rights, agreements or other means that separately or together create the possibility to substantially influence an undertaking or its part, in particular:

- a) ownership of an undertaking and/or the right to use its assets, fully or partially;
- b) the right (including contractual rights) that gives substantial influence over the composition of the management boards, voting rights, and decisions of an undertakings².

Therefore, the LC provides that any positive or negative control³ over a decision of an undertaking that has a substantial influence upon it can be regarded as concentration. According to the provision, any agreement or right that allows an undertaking to exercise control (positive, as well as negative control) over another undertaking’s decisions is regarded as a concentration.

Paragraph 4 of Article 11 LC declares that a concentration is compatible with a normal competitive environment if it does not substantially distort effective competition in the goods or services market of Georgia, or of any significant part of Georgia, and if it does not result in the gaining or strengthening of a dominant position. On the other hand, according to paragraph 5 of Article 11 LC, a concentration is inadmissible if it substantially distorts effective competition in the goods or services market of Georgia, or any significant part of Georgia, and if it results in the gaining or strengthening of a dominant position.

The Chairman of the Competition Agency of Georgia has approved on 30 September 2014 Order #30/09-4 on the Procedure on Submission and Consideration of Notification about Concentration⁴. Article 3 of the Order sets out the rules on pre-merger notifications. Advance notification of mergers to the Agency is compulsory when the merging parties meet one of the following criteria:

- 1) aggregate annual turnover of the merging parties on the territory of Georgia exceeds 20 million Georgian lari (hereinafter, GEL), and an annual turnover of at least two members of the concentration from each economic agent exceeds 5 million GEL (1.923,076 EUR);
- 2) joint value of the operating assets of the merging parties on the territory of Georgia exceeds 10 million GEL and the value of the operating assets

² Ibidem.

³ So-called negative control exists where a shareholder is able to veto strategic decisions in an undertaking. See: Directorate for Financial and Enterprise Affairs, Competition Committee, *Working Party No. 3 on Co-operation and Enforcement: Definition of Transaction for the Purpose of Merger Control Review*, 18 June 2013, para. 2.2.2; retrieved from: http://ec.europa.eu/competition/international/multilateral/2013_june_definition_transaction_en.pdf (25.09.2016).

⁴ See the Procedure on Submission and Consideration of Notification about Concentration at: <http://competition.ge/en/page2.php?p=4&m=141> (15.07.2016).

on the territory of Georgia of at least two members of the concentration from each economic agent exceeds 4 million GEL⁵ (1,538,461 EUR).

According to Article 4 LC, when calculating the annual turnover of the merging parties, account should be taken of the income from the previous year received from the sales of goods and services excluding taxes. Article 4(3) LC defines the list of entities whose turnovers should be taken into account in the calculation of the turnover of the merging parties, that is:

- direct parties to the concentration;
- undertakings directly or indirectly controlled by the merging parties or directly or indirectly controlling the merging party;
- other undertakings controlled by the undertaking controlling one of the merging party;
- undertakings jointly controlled by the merging parties.⁶

After the submission of a notification, the Agency has one month to carry out an examination of the proposed operation and to adopt a decision either on the conformity of the proposed concentration with the competitive environment, or on its inadmissibility. Depending on the complexity of the case, this time limit may be extended no further than by an additional two weeks. An absence of a reply within the indicated time limit shall be deemed as a positive response.

II. Concentrations examined by the Competition Agency of Georgia

According to the Annual Report of the Competition Agency of Georgia⁷, the latter received three notifications and one application concerning concentrations in 2015:

- 1) a notification of the acquisition of the operational assets of “Tbilcement Group” Ltd by “Heidelberg Georgia” Ltd;
- 2) a notification of the acquisition of 95% of the assets of “Deka” Ltd by “Medical Corporation Evex” JSC;
- 3) a notification of the acquisition of 50% of the assets of “GN- KO” Ltd by “Medical Corporation Evex” Jsc;
- 4) an application made by the N(N)LE⁸ “Center for Competition Law and Consumer Protection” concerning the acquisition of 100% of the

⁵ Ibidem.

⁶ Ibidem.

⁷ See the Report, p. 26, <http://competition.ge/images/upload/Annual%20Report-2015.pdf> (15.07.2016).

⁸ Non-entrepreneurial (non-commercial) legal entity.

shares of “Nugeshi” Ltd by “Nikora Trade” Ltd and its compliance with competition legislation.

Two further merger notifications were submitted before 1 June 2016 according to the website of the Competition Agency of Georgia:

- 1) the notification of the merger of LLC “Alta” and LLC “Eurotechnics Georgia”;
- 2) the notification of the acquisition of a 100% equity stake in JSC GPC (“GPC”) by JSC “Georgia Healthcare Group”; GPC is one of the top three pharmaceutical wholesalers and retailers in Georgia; according to the information provided by the acquirer’s own website, the GPC pharmacy chain has a 15% market share by sales, with 96 pharmacies across Georgia⁹.

This paper will focus on two of the abovementioned cases – the notification of the merger between LLC “Alta” and LLC “Eurotechnics Georgia” and the application concerning the acquisition of “Nugeshi” Ltd by “Nikora Trade” Ltd.

III. Merger between LLC “Alta” and LLC “Eurotechnics Georgia”

LLC “Alta” and LLC “Eurotechnics” decided to merge into a single company. Before the operation, both companies were known to be selling electric goods, albeit differentiated ones. The Competition Agency in its decision¹⁰ divided the products being sold by the two parties into two categories: “white” and “black” electric goods. The list of “black” electric goods comprised computers and mobiles; the “white” list it included household appliances.

According to the Agency, the product market comprised three markets:

- 1) black electric goods;
- 2) white electric goods and
- 3) installation services for electric goods¹¹.

176 importers and only two local producers of electric goods were said to have been active in Georgia at the time of the merger.

The parties stated in the notification that they planned to unite their marketing and trademarks, introduce a full assortment of electric goods, carry

⁹ See <https://evex.ge/en/media-center/news/georgia-healthcare-group-plc-ghg-announces-the-acquisition-of-gpc-one-of-the-largest-retail-and-wholesale-pharmacy-chains-in-georgia.page> (15.07.2016).

¹⁰ Order #32 of 7 March 2016 – the order is not officially published on the Agency’s website but it is provided upon request.

¹¹ The Decision of the Agency, p. 8.

out joint advertising campaigns, optimize costs and etc. They also intended to open stores in those Georgian cities where they were not yet present¹².

According to the information provided by the parties, both had narrow sales profiles – LLC “Alta” sold mainly “black electric goods” (such as computers, mobile phones, etc.) while LLC “Eurotechnics” offered mainly household appliances (such as freezers, washing machines, gas-stove, etc)¹³.

The parties argued that the intended merger complied with the competitive environment and would not generate a negative effect on the market for the following reasons:

- 1) the Georgian electric goods market was not very concentrated;
- 2) the merger would develop the market and result in an enhancement of competition by offering a wider selection of products to consumers;
- 3) concentration would result in the optimization of costs;
- 4) merging parties are active in different segments of electric goods and so the merger would not appreciably increase the market concentration level;
- 5) opening of new stores in different regions of Georgia would promote local employment;
- 6) the merging parties believed themselves to be in competition not only with local retail stores but also with other countries’ producers, a fact that ruled out a restriction of competition in any form;
- 7) according to the data presented by the parties on the participation of their shareholders in other companies, it was clear that they did not participate in competing companies (there were not inter-dependent economic agents) and their influence on such companies’ decisions was not material (because their participation did not exceed 20% of their shares¹⁴).¹⁵

According to the information provided in the decision of the Agency, LLC “Alta” would hold 60% of the shares in the new company while the remaining 40% would go to LLC “Eurotechniques Georgia”. The parties were planning to decrease, or completely stop retail sales – their activities would mainly relate to the import and wholesale trade of electric goods¹⁶.

During its investigation, the Agency conducted a survey with the competitors of the merging parties. It sent out questionnaires to around 176 undertakings, although only around 43 responded. Only 74% of them answered the question regarding which economic agents did they consider as direct competitors?

¹² Ibidem, p. 7.

¹³ Ibidem, p. 8–9.

¹⁴ Ibidem, p. 11.

¹⁵ Ibidem, p. 9–10.

¹⁶ Ibidem, p. 12.

Only 30 of the surveyed companies saw LLC “Alta” and LLC “Eurtechniques Georgia” as each others’ competitors, although the majority of them (58%) did not see them as each others’ direct competitors.

It is interesting to note the answers regarding the presumable effects of the intended merger. Only 29 of the surveyed undertakings submitted their views on this question. Most of them stated that the merger would have no effect on existing market competition. They noted that the merger may enhance competition in the long run. One of the respondents stated that mergers of large companies have taken place worldwide and introduced goods with unified trademarks. This practice leads, on the one hand, to a price reduction and, on the other, intense competition that aims to improve product quality. Yet some of the competitors were of the opinion that the merger could have a negative impact on competition. They stated that after the concentration the parties would have market power, the number of market players would shrink and the competitive environment would diminish. According to the data provided by the Agency, 38% of the surveyed companies thought that the intended operation would not impact existing competition, 17.2% thought that the merger would have a pro-competitive effect, and only 10.3% had a negative attitude towards the merger¹⁷.

The Agency mentioned in its decision the European Commission’s opinion on electric goods, saying that the EU authority considers that the market of electric goods is a single integral market, and that it is not advisable to divide it into categories¹⁸. Nevertheless, the Georgian Competition Agency divided the domestic market into “black” and “white” electric equipment¹⁹. In fact, the Agency included also in the relevant product market installation services for electric goods²⁰.

In the opinion of the Agency, the relevant geographic market covers the whole territory of Georgia while product sales were not characterized by seasonal trends²¹. In its decision, the authority discussed issues relating to barriers to entry, expansion and exit.

According to the information gathered by the Agency, LLC “Alta” was the leading importer of “black electric goods” in 2014, enjoying the same position in 2015. Although the Agency said that the merging parties were selling different categories of electric goods, the decision stated that LLC “Eurotechnics

¹⁷ The Decision of the Agency, p. 24.

¹⁸ EC Decision, Case No. COMP/M.4226 *DSGI/FOTOVISTA*, http://ec.europa.eu/competition/mergers/cases/decisions/m4226_20060629_20310_en.pdf (15.07.2016).

¹⁹ The Decision of the Agency, p. 26.

²⁰ Ibidem.

²¹ Ibidem, p. 27.

Georgia” sold “black electric goods” in 2014–2015²² as well. Still, the decision did not specify the amount of “black electric goods” the latter managed to sell, or what its market position was in terms of percentages. According to diagram #10 reflecting the sales of black electric goods in 2014–2015 provided in the decision of the Georgian Competition Agency, LLC “Alta” held the 1st position while LLC “Eurotechnics Georgia” was in the 3rd position in that time frame²³.

The Agency used the HHI index and arrived at an overall HHI reaching 426,875. The merging parties’ common share in the total HHI was 14,924 with a delta of 104,314 after the concentration²⁴.

There were around 466–462 importers of “white electric goods” in Georgia in 2014–2015. The HHI was correspondingly 675,048 and 666,175, the merging parties’ common share in the total HHI was 8,864 with a delta of 18,068 after the merger. Diagram #11 provided in the Agency’s decision shows that LLC “Eurotechnics Georgia” was in the 2nd position in 2014 and 3rd position in 2015²⁵ in the import market of the goods. As for the sales of white electric goods, diagram #13 shows that LLC “Eurotechnics Georgia” was in the leading position in 2014 and moved to the 2nd position in 2015. LLC “Alta” had a small market share in the market for selling white electric goods in 2015²⁶.

Another relevant product market delineated in this case related to installation services for electric goods. The HHI for this market reached 8599,84 in 2014 showing that the market was highly concentrated. Although the HHI dropped to 7245,504 in 2015, this figure marked it as highly concentrated. After the merger, the parties’ share in the total HHI would be 94.63%, the HHI index would be 8996,910 with a delta of 1721,407. According to diagram #14, LLC “Alta” had a leading position in the installation services’ market, followed by LLC “Eurotechnics Georgia”²⁷.

In summary, although the markets for both black and white electric goods were characterised by low concentration levels, the installation services’ market was already highly concentrated even before the merger. Yet the Agency cleared the merger unconditionally, merely obliging the parties to submit to the authority a yearly report on new deals having the ability to significantly restrict competition. Importantly however, the Agency is not entitled to abolish an already implemented concentration *ex post*, provided it had cleared the operation according to applicable competition rules. There is

²² Ibidem, p. 31–32

²³ Ibidem, p. 33.

²⁴ Ibidem, p. 32.

²⁵ Ibidem, p. 34–35.

²⁶ Ibidem, p. 36.

²⁷ Ibidem, p. 37.

no legal instrument to control already implemented mergers *ex post* whether they had been cleared by the Agency earlier or not.

There is a number of requirements in EU competition law for a merger to be cleared. For instance, one of the criteria is the efficiency that can be achieved by the intended merger. In the view of the European Commission (hereinafter, EC), efficiencies resulting from a merger might outweigh its negative effects on competition and, in particular, the potential harm to consumers that it might otherwise have²⁸. In order to declare a merger compatible with the common market, the EC requires sufficient evidence proving that the efficiencies generated by the merger are likely to enhance the ability and the incentive of the merged entity to act pro-competitively to the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have²⁹.

When the EC takes account of the efficiencies stemming from a planned merger, it pays attention to the following factors:

- first, the efficiencies must benefit consumers;
- second, the efficiencies must be merger-specific;
- third, the efficiencies must be verifiable³⁰.

Other types of efficiencies might be found in new or improved products or services.

It is important to note that claimed efficiencies have to be substantial, timely, likely to be realized and to be passed on to a sufficient degree to consumers³¹.

In the EC's view, mergers may generate various types of efficiency gains that can lead to lower prices or other benefits to consumers. One of them might be cost savings in production or distribution, which incentivises merging parties to cut prices. The EC argues that cost efficiencies that generate reductions in variable or marginal costs are more likely to be relevant to the assessment of efficiencies than reductions in fixed costs³².

In the context of merger specificity, the EC argues that efficiencies claimed by the parties must be a direct consequence of the merger and cannot be achieved to a similar extent by less anti-competitive and realistic alternatives. It is up to the merging parties to demonstrate that there are no less restrictive, realistic and attainable alternatives of a non-concentrative nature, or of

²⁸ Guidelines on the Assessment of horizontal mergers under the Council Regulation on the Control of the concentrations between undertakings, para. 76, [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004XC0205\(02\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004XC0205(02)) (15.07.2016).

²⁹ Ibidem, para. 77.

³⁰ Ibidem, para. 78.

³¹ Ibidem, para. 83–84.

³² Ibidem, para. 80.

a concentrative nature than the notified merger which preserve the claimed efficiencies³³.

As for the verifiability, the EC has to be reasonably certain that the claimed “efficiencies are likely to materialize and be substantial enough to counteract a merger’s potential harm to consumers”³⁴.

In the decision of the Agency on the intended merger of LLC “Alta” with LLC “Eurotechnics Georgia”, the authority only mentioned the efficiencies claimed by the merging parties. However, it did not examine whether they were merger-specific and verifiable. The decision does not state what type of costs savings would be generated or whether the efficiencies would be substantial, timely, likely to be realized and passed on to consumer to a sufficient degree. The merging parties held leading positions in different types of electric goods and could individually generate some of the claimed efficiencies, for instance, open stores in new cities, offer consumers a variety of electric goods, increase local employment, etc. Besides, it should be noted that the Agency thought that interdependence cannot be generated if a company holds a 20% share in a competing firm³⁵. In practice, even a holder of a 5% share may substantially influence the decisions of an undertaking if the holder has special rights, for instance, the right to appoint a director or veto the decisions of the directors. Another important factor that the Agency failed to pay enough attention to is that the majority of competitors stated that the intended merger would be pro-competitive. In practice, competitors tend to express a positive attitude towards mergers with anti-competitive effects when they know that they can gain from it. For instance, in the case of a merger generating anti-competitive unilateral effects, a 3rd party can benefit from both a higher price and higher volumes (Majumdar, 2015-2016, p. 13). Besides, mergers in the EU are usually examined by competition authorities with respect to different types of harms they can generate, such as unilateral effects or coordinated effects. In addition, there are so-called gap cases, which at first glance seem pro-competitive but in fact also require an in depth examination. It is thus fair to say that the Competition Agency of Georgia has failed to conduct a substantive analysis of the proposed merger.

Despite the incomplete examination and incorrect assessment of the risks stemming from this merger, the Agency declared this operation compatible with the normal competitive environment.

³³ Ibidem, para. 85.

³⁴ Ibidem, para. 86.

³⁵ The Decision of the Agency, p. 11.

IV. Acquisition of 100% of shares of “Nugeshi” Ltd by “Nikora Trade” Ltd

This operation concerned two large supermarket chains active in Georgia. Before the merger, “Nikora Trade” Ltd had 120 stores while “Nugeshi” Ltd had 25 stores and 63 stalls (booths)³⁶ – they were each other’s direct competitors selling groceries.

It is clear from the LC of Georgia that merging parties are obliged to submit a prior notification on an intended merger to the Competition Agency if they fulfil the notification requirements specified in Article 3 of the Order #30/09-4 on the Procedure of Submission and Consideration of Notification about Concentration³⁷. The authority carries out a competitive assessment of the notified merger on the basis of Article 11 LC¹, prepares its conclusions and issues its opinion. A negative opinion of the Agency on the intended merger shall be taken into account by the National Agency of the Public Registry upon the registration of the concentration. The notification duty placed on the merging parties is not dependent on the market shares of the merging parties but on their annual turnover or the value of their assets.

Specifically with regard to this concentration, the aforementioned parties failed to notify the intended merger in advance to the Agency. As a result, the Public Registry registered the operation without a pre-emptive opinion of the Agency.

The N(N)LE the “Center for Competition Law and Consumer Protection” (for more information on the Center see: Menabdishvili, 2016, p. 246–247) lodged an application to the Agency to review the legality of the acquisition of 100% of the shares of “Nugeshi” Ltd by “Nikora Trade” Ltd on 31 December 2015. The Agency started administrative proceedings on the basis of this application and held consultative meetings with the merging parties.

The Agency issued on 26 February of 2015 Order #27 on the said concentration and concluded that the parties had in fact been obliged to notify the merger before its implementation. The Agency argued that all formal requirements had been fulfilled – that is, individual and aggregate annual turnover of the merging parties within the territory of Georgia before the merger had exceeded the limit established by Georgia’s existing

³⁶ Small shops that are placed on the street, example can be found via the following link: <http://www.panoramio.com/photo/86327802> (15.07.2016).

³⁷ See the Procedure on Submission and Consideration of Notification about Concentration at: <http://competition.ge/en/page2.php?p=4&m=141> (15.07.2016).

competition rules. The undertakings involved in the concentration had thus been obliged to get the Agency's prior approval of the concentration before its registration. "Nikora Trade" Ltd contended that the acquisition of shares cannot be qualified as a concentration within the meaning of Article 11(1(b)) LC because it did not control any additional companies before the operation. By contrast, the Agency found that the company already controlled an additional undertaking – "Lazi Holding" Ltd – within the meaning of Article 11(1(b)) LC. In fact, "Nikora Trade" Ltd owned 67% of the shares of "Lazi Holding" Ltd, which enabled the owner, in the opinion of the Agency, to exercise direct control over "Lazi Holding" Ltd. The Agency concluded therefore that:

- 1) the acquisition of the shares is a concentration within the meaning of Article 11(1(b)) LC and the parties infringed Articles 11 and 11¹ LC;
- 2) the parties to the concentration were under the obligation to notify in advance the intended merger to the Agency, which they failed to do.

An interesting point to stress in the context of this concentration is that even though the notification duty was breached, the Agency has no authority to impose any type of fines on the infringing parties. Neither does it have the power to abolish the transaction *ex post*, unlike in the EU where it is an offence to consummate a merger without a prior clearance from the EC (Whish and Bailey, 2012, p. 829). The EC, on the basis of Article 14 of the Council Regulation No. 139/2004 on the control of concentrations between undertakings³⁸, has in such cases the right to impose fines not exceeding 10% of the aggregated turnover of the undertaking that had failed to notify a concentration prior to its implementation.

Article 33 LC provides sanctions that can be imposed by the Agency on economic agents. The fine cannot exceed 5% of the turnover achieved in the preceding business year by the undertaking concerned. In the case of a failure to eliminate the legal basis of a violation or a repeated violation, the Agency is entitled to impose a fine in the amount not exceeding 10% of the annual turnover for the previous financial year³⁹. The serious flaw of this Article lies in the fact that the Agency is only entitled to impose fines on undertakings breaching Article 6 LC (abuse of dominance) or Article 7 LC (cartel). Therefore, if parties of a concentration fail to pre-notify their intended operation, the Agency is at the moment not entitled to fine them at all. On the one hand therefore, the LC of Georgia has

³⁸ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1.

³⁹ See the Law on Competition of Georgia at <http://competition.ge/en/page2.php?m=62> (15.07.2016).

imposed a pre-emptive merger notification duty but on the other, it has failed to enshrine any type of penalties on undertakings breaching this obligation.

V. Conclusions

One of the main goals of the Law on Competition of Georgia is to prevent unlawful competition restrictions between economic agents⁴⁰. The Competition Agency of Georgia should therefore be in charge of monitoring the activities of its economic agents. In discharging its mission, the Agency has the right to:

- monitor markets;
- start an investigation on its own initiative and as a result of an application or complaint if a reasonable suspicion exists of an infringement of competition rules; and
- impose fines on undertakings according to Article 33 LC if they infringed Article 6 LC (abuse of dominance) or Article 7 (cartels) LC.

However, the LC of Georgia provides for financial penalties only in cases of breaches of Articles 6 and 7 LC – existing legislation does not provide for fines for merging parties subject to the notification duty when they fail to pre-notify their intended concentration. Moreover, the competition authority is not entitled to annul such transaction *ex post*. Unfortunately, the Agency has not tried to apply other competition rules to concentrations that had not been pre-notified, particularly Article 6 or Article 7 LC, along the same lines as it was the case in the EU before the merger regulation came into force.

The above case law and legislation review shows that the Competition Agency of Georgia does not have at its disposal the appropriate instruments that are necessary to ensure the effective control of concentrations. This is so despite the fact that according to Article 204 of the Association Agreement, Georgia is obliged to have comprehensive competition rules providing effective concentration control to avoid significant impediment to effective competition. Besides, it is important to note that Georgia has the duty to maintain an authority responsible and appropriately equipped for the effective enforcement of competition rules.

So called “gun-jumping” (Whish and Bailey, 2012, p. 858) is thus not penalized by the Law on Competition of Georgia. This situation must be seen as a very serious flaw of Georgia’s existing legislation because without

⁴⁰ Ibidem, Article 2.

the imposition of penalties on undertakings failing to fulfil a mandatory pre-notification duty, effective merger control cannot be maintained. Furthermore, cartel members can easily evade antitrust responsibility that arises under anti-cartel provisions if they are able to easily merge if the latter are not subject to any public control. Importantly also, without effective merger control, it is impossible to regulate changes in market structure, which may in turn raise serious competition concerns.

Literature

- Majumdar, A. (2015-2016). *Economics for Competition Law*. London: King's College.
- Menabdishvili, S. (2016), Center for Competition Law and Consumer Protection, Tbilisi (Georgia), *Yearbook of Antitrust and Regulatory Studies* 9(13), 246–247.
- Whish, R. and Bailey, D. (2012). *Competition Law*. Oxford: Oxford University Press.

Overview of Kazakhstani New Anti-monopoly Regulation

by

Alexander Korobeinikov*

CONTENTS

- I. Competition laws and enforcement
- II. Restrictive agreements and practices
 - 1. Horizontal agreements
 - 2. Vertical agreements
 - 3. Concerted practices
- III. Abuse of dominant market position
- IV. Control over economic concentration
- V. Protection from unfair competition
- VI. Liability for violating competition laws

Abstract

The main statute governing competition in Kazakhstan is the Entrepreneurial Code, first adopted in October 2015. Section 4 of the Code in particular is aimed at the protection of competition in Kazakhstan. It primarily deals with anti-competitive agreements and conduct, provides for a control system over economic concentrations, and regulates anti-monopoly investigations. The anti-monopoly provisions of the Code are enforced by the Committee on the Regulation of Natural Monopolies and Protection of Competition within the Ministry of the National Economy of the Republic of Kazakhstan and its regional departments located in each Kazakhstani region and its two main cities (Almaty and Astana). The

* Lawyer, Baker & McKenzie – CIS Ltd, Almaty, Kazakhstan; Alexander.Korobeinikov@bakermckenzie.com. Article received: 22 November 2016; accepted: 2 December 2016. It is based on Kazakhstani legislation which is in force as of 22 November 2016.



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.

Committee has a broad range of powers and duties ranging from investigating anti-competitive conduct and imposing administrative sanctions to regulating natural monopolies. The Code generally prohibits horizontal and vertical agreements and concerted actions that lead (or can lead) to restriction of competition, albeit it also provides certain exemptions. The Code includes an exhaustive list of conduct which is prohibited for dominant entities. The Anti-monopoly Committee exercises control over economic concentrations by overseeing mergers, consolidations, acquisitions and certain other transactions.

Résumé

La loi principale régissant la concurrence au Kazakhstan est le Code de l'entreprise, adoptée en octobre 2015. Notamment la section 4 du Code de l'entreprise vise à protéger la concurrence au Kazakhstan. Elle stipule des dispositions concernant des ententes anticoncurrentiels et des pratiques concertées, elle prévoit un système de contrôle des concentrations et régleme des enquêtes concernant les violations du droit de la concurrence. Les dispositions du Code de l'entreprise concernant la concurrence sont appliquées par le Comité sur la réglementation des monopoles et la protection de la concurrence, au sein du Ministère de l'économie nationale de la République du Kazakhstan et dans ses départements régionaux situés dans chaque région du Kazakhstan et dans ses deux principales villes (Almaty et Astana). Le Comité possède de multiples prérogatives et de fonctions allant de l'examen de comportement anticoncurrentielle et l'imposition de sanctions administratives à la réglementation des monopoles naturels. Le Code interdit généralement les accords horizontaux et verticaux ou les actions concertées qui conduisent (ou peuvent conduire) à la restriction de la concurrence, mais il prévoit aussi certaines exemptions. Le Code contient une liste exhaustive de comportements interdits aux entités dominantes. Le contrôle de concentrations est exercé par le Comité anti monopole et il s'agit de contrôle des fusions, des regroupements, des acquisitions et des certaines autres transactions.

Key words: Kazakhstan; antitrust law; Entrepreneurial Code; anti-competitive agreements; economic concentration; restrictive agreements; dominant market position; unfair competition; violating competition laws.

JEL: K21

I. Competition laws and enforcement

The main statute governing competition in Kazakhstan is the Entrepreneurial Code¹ (hereinafter, the Code), first adopted in October 2015. Moreover, several other acts² were adopted to add detail to the main requirements set forth in the Code.

Section 4 of the Code in particular is aimed at the protection of competition in Kazakhstan. It primarily deals with anti-competitive agreements and conduct, provides for a control system over economic concentrations and regulates anti-monopoly investigations.

The Code uses the principle of extraterritoriality of Kazakhstani anti-monopoly rules. This means that the actions of companies and individuals conducted outside Kazakhstan are subject to the anti-monopoly provisions of the Code if (i) these actions directly or indirectly affect companies, their shares or their assets in Kazakhstan, or (ii) these actions result in a restriction of competition in Kazakhstan.

The anti-monopoly provisions of the Code are enforced by the Committee on the Regulation of Natural Monopolies and Protection of Competition within the Ministry of the National Economy of the Republic of Kazakhstan (hereinafter, the Committee), as well as its regional departments in each Kazakhstani region and its two main cities (Almaty and Astana).

The Committee has a broad range of powers and duties ranging from investigating anti-competitive conduct and imposing administrative sanctions to regulating natural monopolies.

II. Restrictive agreements and practices

The Code generally prohibits horizontal and vertical agreements and concerted actions that lead (or can lead) to the restriction of competition, albeit it also provides certain exemptions.

1. Horizontal agreements

Certain types of horizontal agreements are classified as cartels and are presumed to pose the greatest threat to competition. Therefore, cartels cannot benefit from an exemption. They include agreements aimed at:

¹ <http://cis-legislation.com/document.fwx?rgn=80123> (22.11.2016).

² <http://adilet.zan.kz/eng/docs/Z080000112> (22.11.2016).

- establishing prices (tariffs), discounts, surcharges (add-on payments) and mark-ups;
- increasing, reducing or supporting prices at auctions;
- dividing a market according to a territorial principle, according to sales volume or purchase volume, or providing for a product range of goods to be sold according to the composition of sellers or buyers (customers);
- reducing or ceasing the production of goods;
- forming block agreements with specific sellers or buyers (customers); and
- boycotting certain suppliers or customers.

The presumption that the above types of horizontal agreements pose the greatest threat to competition does not apply to intra-group agreements.

2. Vertical agreements

Agreements between business actors acting at different levels of the supply and production chains (e.g. distribution agreements) are prohibited if they may restrict competition. The following vertical agreements are specifically prohibited by the Code:

- agreements regulating product resale prices by establishing fixed prices (an exception is made for agreements that set maximum prices);
- agreements prohibiting a buyer from selling goods of the seller's competitor (an exception is made for arrangements involving the use of trademarks or similar arrangements); and
- agreements prohibiting a seller from selling goods to the buyer's competitor.

Examples of other anti-competitive agreements prohibited by the Kazakhstani anti-monopoly rules include agreements that:

- establish or maintain discriminating terms for equivalent agreements with other market participants, including the establishment of coordinated terms for the purchase and/or sale of goods;
- distort the results of bidding, auctions and tenders by violating established procedures, including dividing them up by lots;
- unjustifiably restrict or terminate sales;
- restrict access to a goods market or exclude other market participants from a market (either sellers of certain goods or their buyers); or
- conclude agreements that place additional obligations on counterparties that, according to standard business practices, do not relate to the subject matter of these agreements (including unjustified requirements

to transfer financial funds or other property, as well as property or non-property rights).

Exceptions can include (although these exceptions do not apply to every kind of agreement):

- agreements within a group of entities;
- agreements on the use or transfer of intellectual property (hereinafter, IP) rights;³
- vertical agreements that are concession agreements or comprehensive business licences (franchising);
- agreements in which the total market share of a market participant in the market for goods does not exceed 20%; and
- agreements where the market participants have proven that the agreements have resulted or could result in:
 - (i) improvements in the manufacturing or sales of goods, stimulation of technical or economic progress, or an increase in the competitiveness of the manufactured goods in the world market; or
 - (ii) a benefit to consumers that is equal to or greater than the benefit to the parties executing the agreement.

3. Concerted practices

The prohibition under the Code applies equally to concerted practices between competitors that lead to a restriction of competition. Concerted practices are situations of informal co-operation, such as parallel behaviour on a market between parties without any formal agreement, or a decision that meets the following criteria:

- (i) the outcome of the action is in the interest of each market player;
- (ii) each market player is aware of the actions of other market players;
- (iii) the actions of each market player are based on the actions of other market players and do not result from circumstances equally affecting all market players; and
- (iv) the aggregate market share of market players is equal to or exceeds 35%.

Certain concerted actions may be permitted, provided they are aimed at implementing advanced technologies or developing small and medium businesses.

³ Please note that the Kazakhstani Government is considering amendments to the Kazakhstani anti-monopoly law which, among other things, are aimed at restricting the application of the IP exemption. The main reason for the Government's decision to adopt these amendments is the fact that market players often abuse their right to use this exemption.

III. Abuse of dominant market position

The Code defines a dominant market position as the ability of one or several business players to control the relevant market. The following entities are considered to be dominant: a market player holding a 50% or more market share; and jointly dominant entities where three or four business entities have market shares of 50% or 70% respectively and none of them have a market share of less than 15%. In addition, an entity holding a 35%–50% market may be deemed dominant based on criteria such as market share, market power and barriers to market entry.

The Code includes a list of conduct which is considered as abuse of a dominant market position. Examples include the following types of prohibited conduct:

- establishing and maintaining monopolistically high (low) or monopsony low prices;
- setting different prices or different conditions to equivalent contracts with market entities without a legitimate reason;
- setting limitations on the resale of goods purchased from the dominant entity on the grounds of location, range of customers, terms and conditions of purchase, quantity or price;
- concluding agreements that place additional obligations on counterparties that, according to standard business practices, do not relate to the subject matter of these agreements;
- without a legitimate reason, refusing to deal with certain market entities;
- conditioning the supply of goods by setting restrictions on the purchase of goods produced or sold by competitors; and
- without a legitimate reason, reducing production and/or supply volumes or terminating the production and/or supply of goods for which there is demand, while being able to produce or supply such goods.

IV. Control over economic concentration

The Anti-monopoly Committee exercises control over economic concentration by overseeing mergers, consolidations, acquisitions and certain other transactions. If the relevant transaction achieves the thresholds established by the Code, it will be subject to pre-approval or post-transaction notification formalities.

Particularly, the following actions require pre-approval from the anti-monopoly authorities:

- reorganisation of a company by means of a merger or takeover;
- acquisition of more than 50% of the shares in a company; and
- acquisition a company's assets, the value of which is more than 10% of the total net book value of the company's assets.

Achievement of rights to influence a company's management decisions by executing the relevant arrangements or by being elected/appointed as a member of a company's management body only requires post-transaction notification.

Failure to obtain such approval or to notify may result in the unwinding of the relevant transaction.

A foreign-to-foreign transaction (e.g. an acquisition of shares in a foreign entity that takes places outside of Kazakhstan) is subject to Kazakhstani merger clearance if:

- it directly or indirectly involves/affects production fixed assets or intangible assets located in Kazakhstan, or shares in Kazakhstani market entities, or property rights in respect of Kazakhstani legal entities; or
- it adversely affects competition in Kazakhstan.

V. Protection from unfair competition

Under the Code, the following activities constitute unfair competition:

- use of trademarks or packaging without authorisation;
- use of goods of another manufacturer without authorisation;
- copying an article's appearance;
- discrediting a competitor;
- advertising flagrantly false, improper or unreliable information;
- demanding the sale of goods in compulsory assortment;
- a call to boycott a seller (supplier);
- a call to discriminate against a buyer (supplier);
- a call to break a contract with a competitor;
- bribing a seller's (supplier's) employee;
- bribing a buyer's employee; and
- use of trade secrets without authorisation.

VI. Liability for violating competition laws

Violations of anti-monopoly legislation (including acts of unfair competition, failure to obtain approval of a merger when required, failure to obey the orders of the competition authority or monopolistic activity) may entail civil, administrative and criminal sanctions.

Abuse of dominance and anti-competitive agreements or actions are punishable by fines of up to 10% of the income received by a relevant market player from the illegal activity in addition to the potential confiscation of all such income.

Fines may be reduced in certain circumstances, such as when an offender has informed the Committee of the offence itself and cooperated with the investigations.

In addition to that, the competition authority may seek the invalidation of anti-competitive transactions in the framework of civil court actions.

Finally, if anti-competitive actions/arrangements result in significant losses for other market players and/or customers, the management of companies which breach anti-monopoly rules may be sentenced by criminal courts to up to 6 years of imprisonment.

A Note on 2015 Developments in Polish Competition Law: Is it Really a Drive Towards the European Model?

by

Anna Piszcz*

CONTENTS

- I. Introduction
- II. Remedies in infringement decisions
- III. Fines
- IV. Leniency program
- V. Settlements
- VI. Concentrations between undertakings
- VII. Conclusions

Abstract

Modern Polish competition law has become highly regulated and codified over the twenty five years of its existence and this article will provide readers with information relating to its recent developments of 2015. Separate subsections present a review of provisions on remedies in infringement decisions as well as settlements. A considerable part of this paper is designed to outline the peculiarities that characterize Poland's new provisions on fines. Further on, the paper introduces readers to newest trends in the area of concentration control between undertakings. In addition, an assessment of recent developments and suggestions for a further development of Polish competition law are reviewed in the EU context. The conscious intention of the author is to analyse whether the EU competition law pattern, often regarded as a model for Member States, has been used to develop

* Dr. Hab., Professor at the University of Białystok, Faculty of Law, Department of Public Economic Law; legal advisor; piszcz@uwb.edu.pl. Article received: 27 October 2016; accepted: 7 November 2016.



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.

Polish competition law. Has the latter been amended to look more, or less like EU competition law? Has Polish competition law shown the capacity to absorb the best elements of EU competition law into itself? How is the outcome aligned with the declared direction of these amendments?

Résumé

Le droit de la concurrence polonais moderne est devenu très réglementé et codifié au cours des vingt-cinq années de son existence et cet article fournit aux lecteurs des informations relatives à ses développements récents de 2015. Des sous-sections séparées présentent un examen des dispositions concernant les recours dans les décisions d'infraction ainsi que dans la procédure de transaction. Une grande partie de cet article vise à présenter les particularités qui caractérisent des nouvelles dispositions de la loi polonaise concernant les sanctions. Ensuite, l'article présente aux lecteurs les tendances les plus récentes dans le domaine du contrôle des concentrations entre entreprises. De plus, une évaluation des développements récents et la proposition des réformes possibles du droit polonais de la concurrence sont examinées dans le contexte de l'Union européenne. L'idée d'auteur est d'analyser si le modèle européen du droit de la concurrence, souvent considéré comme un modèle pour les Etats Membres, a été utilisé pour développer le droit polonais de la concurrence. Est-ce que le droit polonais de la concurrence a été modifié afin de rassembler le droit de l'Union européenne ou non? Est-ce que le droit polonais de la concurrence a démontré sa capacité à intégrer les meilleurs éléments du droit européen de la concurrence? Comment les résultats des modifications de la loi polonaise sur la concurrence correspondent avec les objectifs des changements?

Key words: remedies; settlements; fines; individuals; leniency plus; control of concentrations.

JEL: K21

I. Introduction

Over a quarter of a century has passed since the establishment of the first modern Polish Antimonopoly Act (1990) as well as the creation of the Office for Competition and Consumer Protection – originally called the Antimonopoly Office. For the first time, at least to such an extent, an institutional focus for addressing matters concerning competition policy was provided¹. The 1990

¹ Under the 1987 Antimonopoly Act, the Finance Minister was responsible for the protection of competition.

Act prohibited certain types of agreements and practices, including certain practices of dominant undertakings and undertakings in a monopolistic position, among other things, the so-called abuse of a dominant position. Furthermore, it contained provisions on the control of concentrations between undertakings. In many respects, the provisions of the 1990 Act were dissimilar from those in the European Community.

On 16 December 1991, Poland signed the Association Agreement with the European Community. The pre-accession strategy placed a specific emphasis on the promotion of the progressive harmonization of Polish laws with the legal regime of the European Community, especially in the areas of competition law and state aid. As a result of painstaking work to draft a new Polish competition law, the Act on Competition and Consumer Protection was finally adopted on 15 December 2000. The new law included substantive rules which resembled the legal rules contained in Articles 81 and 82 of the Treaty Establishing the European Community². They were also approximated to Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings³, and Commission Notice on agreements of minor importance which do not fall within the meaning of Article 85(1) of the Treaty establishing the European Community⁴, a soft law document. The 2000 Act provided a legal basis for the *de minimis* exclusion and rule of reason exemptions with regard to competition restricting agreements. It also remodelled provisions on the control of concentrations, narrowing their scope and attempting to make them a bit more “Europeanized”. The 2000 Act was amended several times. Worth mentioning here, in particular, are important amendments which came into force on 1 May 2004, the date of Poland’s accession to the European Union. The amendments adopted in 2004 were an attempt to bring the Act in line with Council Regulation (EC) No. 1/2003⁵ and certain EU soft laws (including the rules resulting from the establishment of

² Rome Treaty of 1957. Currently Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter, TFEU).

³ OJ L 395, 30.12.1989, p. 1–12. It was replaced by the current Council Regulation (EC) No. 139/2004 of 20.01.2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, p. 1–22 (hereinafter, Regulation 139/2004).

⁴ The Notice was published in OJ C 372, 9.12.1997, p. 13–15. It was replaced by Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ C 368, 22.12.2001, p. 13–15. Currently in force is Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (OJ C 291, 30.08.2014, p. 1–4).

⁵ Council Regulation (EC) No. 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p. 1–25 (hereinafter, Regulation 1/2003).

the European Competition Network⁶ and the rules on the leniency program⁷). They extended the role of the competition authority to include the performance of functions and responsibilities expected of a national competition authority⁸ within the meaning of Regulation 1/2003. Other than that, developments in three particular fields were evident: provisions on commitment decisions, interim measures and leniency program were introduced.

In 2007, the 2000 Act was replaced with the Act on Competition and Consumer Protection (16 February 2007)⁹, even though it was not, in fact, necessary to adopt a new Act due to the limited scope of the changes. However, Polish legislators opposed the idea of introducing further amendments to the 2000 Act. As a result, the (2007) Act was not materially amended until its recent general revision of 2015. It is worth noting, however, that the President of the Office for Competition and Consumer Protection, in Polish *Prezes Urzędu Ochrony Konkurencji i Konsumentów*¹⁰, has mirrored the approach of the European Commission and produced, under the (2007) Act, several acts of non-binding guidance on a wide range of issues – from methods of calculating fines to commitment proceedings.

After the Act was in operation for a sufficiently long time (about five years), necessary preparatory legislative activities were undertaken in 2012 by the government, represented by the UOKiK President. As a result, the Amendment Act of 10 June 2014 was produced¹¹ two years later, which came into force on 18 January 2015. The changes made by the Amendment Act to the (2007) Act can be seen as conscious efforts to increase the effectiveness of competition law enforcement in Poland. It is true, however, that some of these shifts appear to be very far-reaching. The explanatory notes accompanying the draft Amendment Act (performing a largely justificatory function) state that several of its new legal concepts reflect lessons learned from the experiences of other jurisdictions, including the EU. It is fair to say that the above statement is likely to have been made in order to avoid the accusation that some of the amendments perhaps go too far in an attempt to protect competition to the detriment of the freedoms of undertakings.

⁶ Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.04.2004, p. 43–53.

⁷ Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 45, 19.02.2002, p. 3–5. It was replaced by Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17–22.

⁸ Hereinafter, the NCA.

⁹ Consolidated text Journal of Laws of the Republic of Poland 2015, item 184 (hereinafter, the Act).

¹⁰ Hereinafter, the UOKiK President.

¹¹ Journal of Laws of the Republic of Poland 2014 item 945 (hereinafter, the Amendment Act).

It is worth noting here that whereas national substantive competition rules, modelled very closely on Articles 101 and 102 TFEU, are relatively convergent throughout the EU, considerable divergences exist in procedures and, in some cases, in fining powers¹². The most common model of competition proceedings within the EU is the administrative model, where a single administrative authority investigates cases and takes enforcement decisions subject to judicial control. A minority of Member States operates a judicial model where, in essence, an administrative authority carries out the investigation and then brings the cases before a court, either for a decision on substance and on sanctions¹³, or in relation to the imposition of sanctions only¹⁴. National competition law systems deviate on important aspects such as fines, criminal sanctions, liability within groups of undertakings, liability of associations of undertakings, succession of undertakings, prescription periods and the standard of proof, as well as the power to impose structural remedies (Cseres, 2014, p. 53).

With this being noted, this article poses the research problem, apart from exploring the amendments of 2015, whether the Polish competition law system achieved a higher degree of convergence with EU competition law than before thanks to the reviewed Amendment Act. In light of the above, a question to be addressed is that of the scope of the amendments, covered in more detail later in this article. The Amendment Act contains a broad range of amendments to the Polish legislative framework for the protection of competition and consumers. They lead to wider questions surrounding the effectiveness of competition law enforcement. However, not all amendments of 2015 can receive the same level of attention (if any) in this paper. Minor, non-material changes as well as amendments to competition rules considered non-challenging in terms of convergence have been omitted. Their inclusion would considerably lengthen the article and make it less tractable. Moreover, the discussion of amendments introduced by the Amendment Act of 31 August 2015, which came into force as of 17 April 2016¹⁵, is outside the scope of this article, since they primarily concern consumer protection. This article attempts to shed light on changes made to those aspects of Polish competition law that remained the most divergent from EU law until now. They include: the power to impose remedies in infringement decisions, fines (including issues

¹² See the Communication from the Commission to the European Parliament and the Council – Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM(2014)453, p. 3.

¹³ Austria and Estonia operate this model in criminal proceedings; Ireland and Sweden – in cases involving the imposition of a fine.

¹⁴ Denmark, except for administrative fines, and Finland.

¹⁵ Journal of Laws of the Republic of Poland 2015 item 1634.

such as settlements and the leniency program) and merger (concentration) control proceedings. Each of these amendments merits research attention. However, the focus of this paper is directed toward the most interesting ones from the convergence/divergence perspective. Although each section deals with a separate issue, when viewed from this perspective, none of them can be addressed in isolation, without consideration of the others.

It would be fair to assume that the amendments were based on input from Polish jurisprudence, but this was not the case. It should be emphasized first that the explanatory notes do not note the impact of jurisprudence. Second, although over one hundred judgments were adopted and published on the basis of the (2007) Act in the five years of its applicability, they appeared to pay little attention to EU law or jurisprudence as the sources of inspiration for the interpretation of Polish law or propositions *de lege ferenda*. Jurisprudence research conducted for the purposes of this article confirms, rather than disproves, that Polish courts discussed at some length issues relating to solutions subject to amendments presented in this paper. The time-frame for jurisprudence examination strictly adhered to the five-year period mentioned above, after which the government decided to proceed with the amendment process. The examination of jurisprudence covers various jurisdictional levels: the Regional Court of Warsaw – the Court of Competition and Consumer Protection (SOKiK), the Appellate Court of Warsaw (SA) and the Supreme Court (SN).

II. Remedies in infringement decisions

Until the Amendment Act, the Act did not provide for any behavioural or structural remedies when it comes to infringement decisions regarding anticompetitive practices (Article 10 of the Act). Polish jurisprudence for the relevant time-frame and jurisdictional levels has not offered any judicial opinion on the subject of this “lacuna” in Article 10 of the Act¹⁶. Although the explanatory notes accompanying the Amendment Act do not refer to EU law as a point of reference with respect to the newly introduced remedies, it is clear that the provisions of Article 7 sentences 2 and 3 of Regulation 1/2003,

¹⁶ It is, however, worth mentioning a SOKiK judgment (adopted before the time-frame of this jurisprudence examination and even before the adoption of the (2007) Act) where the court had emphasized that legal provisions only allowed the UOKiK President to require in an infringement decision that an infringement be brought to an end and not require an undertaking to act in a specified manner or apply structural remedies. See SOKiK judgment of 24.04.2002, XVII AmA 73/01.

were intended (to some extent at least) to be a model for Poland. The assumptions behind the draft Amendment Act, published and submitted for public consultation in 2012, admitted this fact¹⁷. However, under the Act (after the amendments of 2015) the label of “remedies” or rather “means”¹⁸ is attached to means which in fact are regulated in a way suggesting not only a link between the Polish provisions and the EU model, but also divergences.

First of all, Polish provisions do not use phrases such as “behavioural remedies” and “structural remedies”. There are two groups of remedies and each of them is now regulated by a specific paragraph in Article 10 of the Act paragraphs 4 and 5. The list of remedies mentioned in paragraph 4 is not exhaustive. It contains remedies such as the grant of a license, the grant of access to infrastructure, the obligation to supply a product or service to certain entities, the change of a contract¹⁹. It results from paragraph 4 that the first three remedies mentioned must be implemented on non-discriminatory terms. On the other hand, paragraph 5 exhaustively provides for remedies in the form of an obligation to delegate certain business activities (including business activities at different points in the distribution chain) to various members of the capital group or separate organizational units within the structure of the business.

The above-discussed provisions give priority to remedies of the first type. Remedies of the second type can only be imposed where remedies of the first type might prove to be either ineffective or effective, but more burdensome for the undertaking concerned than a remedy of the second type. These are circumstances similar to those specified in Regulation 1/2003. Moreover, remedies should be proportionate to the type and significance of the infringement committed as well as necessary to bring the infringement to an end or eliminate its effects (paragraph 6). Commentators would wish to see these provisions as associated with the EU model (Jurkowska-Gomułka, 2014, p. 546).

However, an important difference is manifested in the purposes of the remedies. The Commission may impose remedies on infringers in order to bring an infringement to an end. By contrast, the UOKiK President may impose remedies in order to cause the infringement to cease, or in order to eliminate its effects. Second, it is argued that under the Act it is impossible to distinguish behavioural remedies and structural remedies on the very basis of placing them in separate paragraphs, dissociated from each other with criteria

¹⁷ Polish version available at: www.uokik.gov.pl/download.php?plik=11761 (all Internet references in this article were last visited on 7 October 2016).

¹⁸ In Polish “remedies” are called *środki zaradcze* and “means” are called *środki*; the Amendment Act uses the second term.

¹⁹ However, prohibited agreements are null and void (Article 6 paragraph 2 of the Act).

of effectiveness and burdensomeness. Remedies specified in paragraph 5 shall not necessarily be of structural nature as they shall not necessarily consist of changes in the structure of the business (Sroczyński, 2015b, p. XIII).

The explanatory notes accompanying the Amendment Act state that the introduction of a legal basis for remedies has been requested by undertakings. They allegedly used to report the need for detailed information from the UOKiK President on how to comply with infringement decisions because they had doubts about it and were afraid of sanctions for non-compliance. It is doubtful that such cases were frequent. Undertakings (or at least their lawyers) understand that remedies are intended to discipline rather than to support an infringer.

The introduction of the UOKiK President's power to impose remedies is, in the author's opinion, one of the most significant amendments contained in the Amendment Act. The latter brings about changes in the role of the NCA – from merely a policing role, to a more proactive role in the enforcement of competition law. From the UOKiK President's perspective, it can be argued that his new power to impose remedies can help improve the effectiveness of his decisions (Skoczny, 2015, p. 169; Kowalik-Bańczyk, 2014a, p. 706-707). There has never been a more comprehensive model of antitrust control in Poland than now when remedies exist. However, the first 18 months of the new provisions have not shown practical examples of the use of remedies. It remains to be seen whether the UOKiK President will follow the European Commission's approach with respect to the application of remedies.

The extent to which Polish provisions are inspired by similar provisions found in Regulation 1/2003 is far from being accidental. But, indeed, they deviate from the EU's original conceptualization of remedies. However, it is important to note that technically Poland left that group of Member States, which has NCAs with no power to impose any kind of remedies, either of a behavioural or structural nature (Finland, Slovakia)²⁰. Unlike in those Member States where a competition authority may not impose structural remedies (Denmark, Sweden, Lithuania), the Polish NCA was granted full power to impose remedies. This shift should be considered correct, efficient and approximating Polish solutions to the level of competences of the European Commission.

²⁰ ECN Working Group Cooperation Issues And Due Process, *Decision-Making Powers Report*, 31.10.2012, available at: www.ec.europa.eu/competition/ecn/decision_making_powers_report_en.pdf, p. 11, 15.

III. Fines

Before discussing amendments made to the provisions on fines, a related issue must be noted first. An important dimension of the enforcement of the prohibitions of anticompetitive practices in Poland is that statutory grounds for the initiation by the NCA of proceedings upon a complaint (upon request) ceased to exist after the adoption of the (2007) Act. Under the Act, the UOKiK President only commences proceedings – in which he imposes fines – on his own initiative. Hence, the status of a party to the proceedings is reserved to those to whom the infringement is, rightly or wrongly, attributed by the UOKiK President²¹. This seems to have been the cause, or one of the causes, of a gradual fall in the number of proceedings regarding anticompetitive practices conducted by the UOKiK President. The numbers hit an unprecedentedly low figure of 128 in 2011, compared to 361 in 2006 and 248 in 2007. At the same time, fines imposed on undertakings have risen dramatically from about PLN 171 million (approx. EUR 41.71 million) in 2007 to around PLN 325 million in 2011 (approx. EUR 79.27 million)²². As such, a few years ago fines have become central to Polish ways of talking about deterrence for undertakings' participating in anticompetitive practices (for more, see: Piszcz, 2013, p. 324 et seq.; Molski, 2009, p. 73; a range of issues is debated here, among other things the nature of fines, criminal or non-criminal, in eg Król-Bogomilska, 2001, p. 184–202; here the emphasis is placed on fundamental rights in the debate surrounding competition law sanctions eg: Król-Bogomilska, 2012, p. 23–26; Doniec, 2015; see also Martyniszyn and Bernatt, 2015, p. 10²³).

Prior to the Amendment Act, fines for anticompetitive practices could reach up to 10% of the party's revenue in its fiscal meaning. Following its adoption, they can now reach up to 10% of the party's turnover in its accountancy meaning. This has marked a shift to the European model. However, divergences still exist with regard to the principles of calculating fines, in particular the base used for calculating the basic amount of the fine and the method for taking into account gravity and duration of the infringement.

²¹ This difference found between the Polish procedure and the procedure before the Commission laid down in Regulation 1/2003 has not been addressed by the Amendment Act at all.

²² See: the UOKiK President's reports on activities; available at http://www.uokik.gov.pl/reports_on_activities.php.

²³ The authors say that “in the Polish cultural and procedural contexts criminalization of (only) hard-core horizontal agreements would bring about greater deterrence, giving at the same time the individuals concerned fully-fledged procedural guarantees”.

On the other hand, Polish periodic penalty payments of up to EUR 10,000 per day have always been crucially different from those imposed by the European Commission. The latter were designed to compel the addressee to comply with a decision. Polish periodic penalty payments may not only be imposed for the aforementioned purpose, but may also be used *ex post*, after the decision has already been complied with, in order to punish the addressee for delayed compliance. Before the Amendment Act, the delay in compliance was described with the Polish word *zwłoka*, which means (at least under private law) culpable delay. After the Amendment Act, there is no doubt that delay in compliance should be assessed by objective standards (the Polish word *opóźnienie* is used). The question of standards for the assessment of delay was canvassed extensively by Polish courts, which delivered several judgments on periodic penalty payments in the relevant time-frame. The prevailing opinion held in the vast majority of the analysed judgments was that for the purpose of applying such sanctions, the UOKiK President was directed, when assessing the conduct of a party as a professional, to prove a period of culpable, intentional or negligent delay²⁴. However, in a minority of the judgments, courts supported the contradicting view that under public law, the Polish word *zwłoka* was a synonym of the word *opóźnienie* and it was sufficient to only apply objective standards²⁵. The amendment was considered to address the problem of this divergent jurisprudence.

The amended provisions on fines show dissimilarities from EU law apparent in some other aspects also. At least in the EU, legal provisions do not seem preoccupied with the risks posed by situations where an undertaking has a low turnover. Such provisions have emerged in Poland after the adoption of the Amendment Act. It is fair to say that the change was not inspired by judicial input. The latter did not have an opportunity to argue the issue of the effectiveness of sanctions imposed on undertakings with a low turnover, since decisions imposing low fines are very seldom appealed by their addressees. However, the reason for the introduction of new provisions on this issue might be that the UOKiK President, who prepared the draft Amendment Act, knew perfectly well that a portion of his decisions could not include any fines for reason of a low turnover alone. This is so because a low fine

²⁴ See SN judgment of 11.08.2009, III SK 17/09; SA judgment of 29.09.2008, VI ACa 527/08; SOKiK judgment of 16.01.2008, XVII AmA 73/08; SOKiK judgment of 29.06.2010, XVII AmA 95/09; SA judgment of 3.04.2012, VI ACa 998/11; SOKiK judgment of 11.05.2011, XVII AmA 37/10; SA judgment of 30.11.2009, VI ACa 1039/09; SN judgment of 2.07.2009, III SK 10/09; SA judgment of 17.09.2008, VI ACa 344/08; SOKiK judgment of 30.10.2007, XVII AmA 62/06; SN judgment of 3.10.2013, III SK 51/12.

²⁵ SA judgment of 17.05.2012, VI ACa 1428/11; SOKiK judgment of 3.10.2011, XVII AmA 8/10.

would not be capable of performing its functions, and a higher fine would not be proportionate in the circumstances of the case²⁶. The new provisions seem able to contribute to the effectiveness of Polish competition law, yet on the other hand they increase the level of divergence between the Polish legal system and that of the EU. If an undertaking had a low turnover or no turnover at all in the preceding business year, the UOKiK President may impose thereon a fine based on the average turnover achieved over the three preceding business years. If also such average turnover is low, a fine may be up to EUR 10,000. The upper limit of low turnover is defined as EUR 100,000 (Article 106 paragraphs 5 and 6 of the Act).

One of the features of the current Polish legal framework (once again not inspired by jurisprudence) is that managers are beginning to think of themselves as subjects of control by the UOKiK President; albeit, no proceedings have yet been initiated against a manager under the new regime. Managers may be brought to account if they, in the performance of their tasks, intentionally let the undertakings they manage to infringe the prohibition of anticompetitive agreements contained in Article 6 paragraph 1 points 1-6 of the Act or Article 101(1)(a)-(e) TFEU. The need to extend the NCA's sanctioning powers in this manner was identified by commentators (Syp, 2012, p. 15). However, the pervasive feature of this discussion was that policy makers from the very beginning focused not on criminal sanctions as a possible solution, but on administrative fines. Criminalization of competition law enforcement was not considered an alternative way of achieving an equivalent result. Poland did not choose to criminalize competition law enforcement, although this is not the case with all countries in Central and Eastern Europe. Estonia (Svetlicinii, 2014, p. 72–73), the Czech Republic (Pipková and Šimeček, 2015, p. 189) and Slovakia (Blažo, 2012, p. 82–83) provide examples of states where the trend has been towards criminalization. However, it is worth noting that Polish proponents of criminal accountability, as an alternative form of managers' accountability, want administrative fines to be just a stop on the way to the criminalization of competition law enforcement (Bernatt and Turno, 2015, p. 88; Sroczyński, 2015a, p. 2). Will the new UOKiK President's sanctioning powers contribute to the effectiveness of competition law enforcement? Despite the fact that fines of up to PLN 2 million (approx. EUR 482,000) seem very deterring, it is questionable whether they give managers a sufficient reason not to engage in a prohibited activity. First, it may be that provisions on

²⁶ See UOKiK President decision of 6.09.2011, DOK-7/2011; UOKiK President decision of 30.12.2010, RGD-31/2010; UOKiK President decision of 12.08.2011, RKT-22/2011; UOKiK President decision of 8.07.2011, RLU-9/2011; UOKiK President decision of 27.09.2010, RLU-16/2010; UOKiK President decision of 16.11.2010, RŁO-34/2010; UOKiK President decision of 31.08.2010, RPZ-20/2010.

such a severe sanction, if questioned before the Constitutional Tribunal, would be found excessive for what might be regarded as an administrative delict rather than a criminal offence (Skoczny, 2015, p. 176). Second, it seems that administrative fines are not personal enough, and that they may be financed by the manager's undertaking, which enjoyed a profit boost thanks to the managers' prohibited activities.

IV. Leniency program

The concept of leniency, which originated in the United States²⁷ and seems still less prominent in Europe²⁸, is an integral part of the Polish legal framework on fines. Amendments to the leniency program are thus going to be considered following the above deliberations on fines. As already mentioned, the leniency program was introduced in Poland as of 1 May 2004. It took shape as a result of works aimed to bring the Polish legal system up to European standards, including the ECN Model Leniency Program. Still, the attitude of the Polish legislature to the tailoring of the conditions of the domestic leniency program has been, however, far from mere fascination with the European model of leniency. Whereas under the EU's leniency program, as well as leniency programs used by the vast majority of Member States²⁹, vertical restrictions are considered ineligible for leniency, in Poland leniency is available with respect of both horizontal and vertical agreements (Rumak and Sitarek, 2009, p. 102–103; Kulesza, 2015, p. 94; Molski, 2009, p. 64). Scholars have found this approach to be incompatible with the principles of necessity and of the effective application of Article 101 TFEU (Sitarek, 2014, p. 210). Hence, one might have expected the Amendment Act to become a developmental milestone also with regard to the scope of the applicability of the Polish leniency program, and yet it was not to be. Several other solutions have been changed instead. Unsurprisingly, the amendments have not been inspired by courts. There have been very few published judgments of Polish

²⁷ The contemporary practice of leniency in competition law enforcement is generally considered to have been started by the US Department of Justice in 1978, when it adopted its first Corporate Leniency Policy; see Wils, 2007, p. 213–214.

²⁸ Because whereas in the US the cartel prohibition is enforced not only with fines on undertakings but also with imprisonment of individuals, the Commission and the NCAs of most EU Member States can currently impose fines on undertakings; see Wils, 2007, p. 238–241.

²⁹ See Pipková and Šimeček, 2015, p. 186–192; Neruda, Gachová and Světnický, 2013, p. 161–163. A broad definition of the leniency program, similar to the Polish one and covering also agreements other than cartels, can be found in Sweden; Karlsson and Hansson, 2012, p. 302.

courts regarding leniency during, and even after the relevant time-frame³⁰; furthermore, they overlooked the drawbacks of the applicable provisions addressed by the Amendment Act. On the other hand, the described package of the improvements to the Polish leniency program can bring benefits to the effectiveness of the program.

First, prior to the Amendment Act, an immunity applicant has had to end its involvement in the alleged agreement no later than on the day of the leniency application. Similarly to the EU, the applicant must do so now immediately following the application, unless the involvement has ceased already. Another aspect in which the Polish leniency program has been brought closer to that of the EU is the scope of the eligibility of undertakings for immunity from fines. In Poland, initiators of agreements and parties which induced others to participate in the agreement were not used to be eligible for immunity from fines, whereas under the EU's program this refers only to undertakings which took steps to coerce other undertakings to join the cartel or to remain in it³¹. The Amendment Act has removed initiators of agreements from the above-mentioned circle of entities. Third, it has added an obligation of the applicant not to disclose the fact of the application without the consent of the UOKiK President. Fourth, the scope of the fine reduction has been amended. Previously, the level of the reduction was relative to the turnover of the applicant. Fines could not exceed 5% of the turnover of the first beneficiary of a reduction, 7% of the turnover of the second, and 8% of the turnover of each subsequent one. The level of the reduction is now relative to the fine which would otherwise be imposed. Similarly to the EU's program, Polish rules provide for a reduction of 30–50% for the first beneficiary, 20–30% for the second, and up to 20% for subsequent ones.

On the other hand, the leniency *plus* option introduced by the Amendment Act – briefly outlined in this article – signifies the willingness of Polish legislature to accept greater divergence of Polish competition law from the EU model, which does not contain a provision for what is known as leniency *plus*. It is also worth adding that after the Amendment Act, the Polish leniency program applies to managers. This amendment results from the aforementioned introduction of managers' accountability. However, the new

³⁰ SA judgment of 5.08.2010, VI ACa 116/10; SOKiK judgment of 27.10.2009, XVII AmA 104/08; SN judgment of 24.09.2014, III SK 90/13; SA judgment of 10.05.2013, VI ACa 1362/12; SOKiK judgment of 11.06.2012, XVII AmA 197/10; SN judgment of 3.10.2013, III SK 13/13; SA judgment of 27.06.2012, VI ACa 1339/11; SOKiK judgment of 27.04.2011, XVII AmA 44/09. In the last case, the SN was asked by the applicant to clarify provisions on the latest time to end an involvement in the agreement but the SN refused to answer this question.

³¹ Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17–22, at (13).

provisions on leniency for managers cause new doubts. For instance, it is not completely clear if there is only one common “immunity queue” for both undertakings and managers.

The new leniency *plus* option means a reduction of 30% of the fine which would otherwise be imposed on the participant in the first agreement, if such an applicant is the first to disclose a different agreement (Article 113d of the Act). The new provisions give rise to serious doubts about how to interpret them. Not surprisingly, the new provisions on the leniency *plus* option have not been reported to have been successfully applied yet; instead, they have been the subject of extensive critical commentary (for more see: Martyniszyn and Bernatt, 2015, p. 11; Semeniuk and Syp, 2013, p. 33–41; Skoczny, 2015, p. 172). Much of the debate has focused on the problem of what the notion of the “other agreement” means. Is it an agreement regarding another market, other parties, another period of time, or not necessarily? Second, one may find it hard to explain how to calculate the fine in case the applicant discloses two or more “other agreements”.

The introduction of the leniency *plus* option seems to result from concerns about the effectiveness of competition law enforcement in Poland and is driven by demands for greater access of the NCA to information on anticompetitive agreements, particularly secret cartels and tacit collusions. Where regular leniency has again seemed to fail (only five applications in 2013)³², the response has been to introduce a different leniency option, rather than to question why the existing leniency program is at an impasse again. The key point about the choice between introducing the leniency *plus* option or taking other actions should be that the UOKiK President must be not only a passive recipient of leniency information, but also someone actively seeking to find anticompetitive agreements.

After all, it is worth emphasizing at this point that the recent reform has also covered the introduction of provisions on the protection of leniency documents. They have little in common with the EU model. What marks their divergence from EU law is the fact that they do not give national courts the possibility to conduct the weighing exercise mandated by *Pfleiderer*³³ and *Donau Chemie*³⁴ jurisprudence of the Court of Justice of the EU (hereinafter,

³² Over the last decade, Poland had about sixty leniency applications – certainly not a very impressive number. There were several applications per year; only once did the number of applications rise unprecedentedly, from two in 2011 to 16 in 2012. It is also worth noting that there were only two leniency applications in 2015. See: the UOKiK President’s reports on activities available at: http://www.uokik.gov.pl/reports_on_activities.php.

³³ *Pfleiderer AG v. Bundeskartellamt*, CJEU judgment of 14.06.2011, C-360/09, ECR [2011] I-05161.

³⁴ *Bundeswettbewerbshbehörde v Donau Chemie AG and others*, CJEU judgment of 6.06.2013, C-536/11, ECR [2013] ECLI:EU:C:2013:366.

CJEU). While working on the Amendment Act, Polish legislature was reluctant to assume obligations that might result from the *Pfleiderer* and *Donau Chemie* jurisprudence. Instead, it opted for strengthening the level of protection of leniency documents. Undoubtedly, low level of protection given to leniency documents may endanger the leniency program. Leniency decisions may be followed by actions for damages on the grounds that an undertaking has acknowledged its liability for an infringement. On the other hand, an almost absolute protection of all leniency documents, such as that now granted in Poland, does not fit well with the *Pfleiderer* and *Donau Chemie* jurisprudence nor with the newly adopted Damages Directive. That is so even though the latter is “rolling back” *Pfleiderer* and *Donau Chemie* to some extent³⁵. Polish legislature seems to have paid attention only to one side of the problem of the tensions surrounding the relationship between public and private enforcement. But in the end, it will have to address it once more when transposing the Damages Directive. Notwithstanding the above, it is worth noting that private enforcement of competition law has not gained popularity in Poland so far (Piszczyński, 2012, p. 58–76).

V. Settlements

Another significant issue relating to fines for anticompetitive practices (anticompetitive agreements and abuses of a dominant position) has been the introduction of a formal settlement procedure. As mentioned in the introduction, the UOKiK President has had the competence to adopt commitment decisions on his own initiative as well as the obligation to accept leniency applications compliant with statutory requirements since 1 May 2004. Despite these developments, there was no tool in-between commitment decisions and leniency under the (2007) Act. Prior to the Amendment Act, this “lacuna” was not at all mentioned by the courts interpreting the (2007) Act.

The Amendment Act introduced the so-called procedure of a voluntary acceptance of a fine (Article 89a of the Act). However, the new rules have not been applied within the first six months after their introduction. The explanatory notes accompanying the Amendment Act call the procedure “settlements”, even though the Act does not recognize the possibility of settlement between an authority and a procedural party, as is the case of all Polish administrative

³⁵ Directive of the European Parliament and of the Council 2014/104/EU of 26.11.2014 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, 5.12.2014, p. 1–19. See also Pais and Piszczyński, 2014, p. 209–234.

provisions. The assumptions behind the draft Amendment Act, published and submitted for public consultation in 2012³⁶, declared that the Polish provisions were planned to rely upon the EU's settlement scheme³⁷. Even if that was the case, the original ideas have been used outside their context, as explained below.

In the context of EU law, it is typical to view settlements in terms of their procedural qualities, that is, shortening the proceedings and achieving procedural efficiencies (Dekeyser, Becker and Calisti, 2010, p. 684–686; Gheur and Petit, 2009, p. 241–244). Similarly, Member States introduce settlement measures designed to achieve procedural efficiencies³⁸. The Polish provisions state that the UOKiK President may, upon request or on his own initiative, invite all parties to the proceedings to engage in the procedure of voluntary acceptance of a fine, provided that the UOKiK President considers that this will facilitate the shortening of the proceedings (Article 89a paragraph 1 of the Act). However, as a rule in Poland, it will be impossible to accelerate proceedings for a number of procedural reasons. First, the procedure may be initiated prior to the completion of proceedings, and the UOKiK President will be obliged to provide proof of the infringement anyway (Kowalik-Bańczyk, 2014a, p. 706; but see Skoczny, 2015, p. 174). Second, the first letter of the UOKiK President and the parties' responses to it declaring if they agree to the proposal or not, are followed by a series of three further letter of the UOKiK President and the parties' responses expected within 14 days (paragraphs 5 and 6) or at least 14 days (paragraph 7). Third, the procedure does not result in the possibility to adopt a streamlined final decision similar to that of the European Commission³⁹. Fourth, the procedure does not lead to the restriction of the party's right to access the case file. It seems that the procedure will last many months, while the entire proceedings should last no longer than five months (Article 92 of the Act is of instructive nature). This may give this procedure the reputation of a very time consuming one that leads to the

³⁶ Polish version available at: www.uokik.gov.pl/download.php?plik=11761.

³⁷ The Polish provisions are partly also modeled on the German system (the same level of fine reduction) and the French system (similar scope of coverage, that is, not only cartels but prohibited anticompetitive practices in general). See Krajewska, 2012, p. 59, 63. On the German and French systems see generally Waelbroeck, 2009, p. 242–243.

³⁸ Interestingly, the Czech competition authority used the settlement procedure as a means of procedural economy as well as a means of investigating and proving anticompetitive behavior (together with leniency). The new legal provisions on settlement assign this procedural instrument – in the manner of other European countries – solely to the category of procedural economy; see Pipková and Šimeček, 2015, p. 192–193.

³⁹ Issued in line with the acknowledgements made by the settling companies in their settlement submissions. See Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases, OJ C 167, 2.07.2008, p. 1–6.

extension of proceedings⁴⁰. Therefore, one may fear that the procedure could worsen some of the very problems it was meant to resolve.

Differences in the importance of the Polish procedure of a voluntary acceptance of a fine and EU settlement may arise from the fact that while the latter requires an acknowledgement of the parties' liability for the infringement, the Polish procedure does not. The party's position should contain the declaration that the party: (1) submits to a fine voluntarily, (2) confirms the amount of the fine and (3) confirms that the party was: (a) informed of the objections, (b) afforded the opportunity to communicate their views to the UOKiK President, and (c) informed of the consequences of appealing the decision. In return, the UOKiK President grants the party a reduction of the fine by 10%. The Commission specifies the same level of reduction of the fine to the parties⁴¹.

If the party appeals the decision of the UOKiK President, it will lose the right to the reduction (Article 81 paragraph 3a of the Act); in literature it is more than hinted that this solution may clash with Article 6 of the European Convention on Human Rights and Fundamental Freedoms (Kowalik-Bańczyk, 2014a, p. 706; but see Martyniszyn and Bernatt, 2015, p. 12–13). Article 6(1) ECHR first sentence states that a fair trial within the meaning of the Convention must guarantee for defendants a “fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. At the same time Article 6(2) provides for the presumption of innocence in criminal cases. Article 81 paragraph 3a of the Act may create concerns regarding whether there is undue pressure on undertakings to settle and not to defend themselves. Procedural parties have a viable alternative to a settlement. It has been suggested in literature relating to EU settlements that the judge should control in all circumstances the final decision particularly where settlements with fines are at stake (Waelbroeck, 2009, p. 259). The proposal to leave the final decision to the judge should be re-examined in light of procedural justice considerations. However, unlike under EU law, in Poland the scope for such concerns is limited, as the parties retain the right of access to the file and do not have to admit liability. In addition, it is worth noting that while the EU provisions on settlements refer only to cartel cases, Polish provisions cover all anticompetitive practices, including also vertical agreements and abuses of a dominant position⁴². On the other hand, similarly

⁴⁰ Ibidem.

⁴¹ Not all Member States reduce fines as a result of settlements to the same degree. For instance, in the Czech Republic, parties are granted a reduction of the fine of 20%. See Neruda, Gachová and Světnický, 2013, p. 164.

⁴² The same scheme can be found in the Czech Republic. See Pipková and Šimeček, 2015, p. 193. On the other hand, in Slovakia, the first cases ever to be settled dealt with vertical restraints and the fine reductions imposed reached up to 50%; see Blažo, 2014, p. 121–122.

to the EU context, it is entirely up to the UOKiK President as a policy maker if and when to propose the procedure of a voluntary acceptance of a fine. It is up to him and the parties to decide whether they are willing – respectively – to initiate the procedures and to participate therein, as well as to make them work in practice. In this context, it is worth mentioning that both the UOKiK President and a party are allowed to quit the procedure (Article 89a paragraphs 10 and 11 of the Act) (Piszc, 2015, p. 48). The importance of the new development lies in that it can ultimately contribute to improvements in the enforcement of competition law in Poland, even if it is substantially different to what is being promoted by the European Commission.

VI. Concentrations between undertakings

The prohibition of anticompetitive practices referred to above is one broad theme. The second, quite separate, but equally important theme is the control of concentrations between undertakings. As to the latter, two different models of proceedings have been generated in Poland. Differences between the previous model and the new one can be summarized in the following lists:

| AS OF 18 JANUARY 2015 | BEFORE 18 JANUARY 2015 |
|--|--|
| – proceedings of up to one month (as a rule) | – proceedings of up to two months (as a rule) |
| – the UOKiK President’s obligation to increase the above maximum period to five months (1 + 4 months) in very complicated cases, cases where market testing is needed and cases where a significant impediment to competition in the market as a result of the concentration is plausible; the form – an order that is not subject to a complaint | – there was no such possibility |
| – in cases where a significant impediment to competition in the market as a result of the concentration is plausible, the UOKiK President presents reasoned “competition concerns” which can be responded to by the parties within 14 days (as a rule) | – there was no specific legal basis for this |
| – time limits for the implementation of commitments are kept secret by the UOKiK President within those time limits provided an undertaking makes a request to that effect | – there was no legal basis for this |

After recent amendments, the Slovak procedure shall be applicable to all competition law infringements including restrictive agreements, abuse of dominance, infringements relating to merger control and other forms of unlawful restrictions of competition; see Šabová, Fodorová and Lukáčová, 2013, p. 230.

Traditionally, the maximum length of proceedings with respect of a notified concentration was two months. The new system of “1 plus 4 months” is still not largely oriented on the model established in EU law found in Regulation 139/2004. The major characteristic of the current Polish legal regime is described by certain authors as two-phase proceedings (Wolski, 2013, p. 9; Skoczny, 2015, p. 180). In fact, however, the proceedings appear to be just a shorter and a longer version of the same⁴³. Two important arguments have been made in support of the latter position (Dudzik, 2015, p. 30–34). First, various procedural standards do not apply to the different phases; quite the contrary, uniform standards exist for the entire process. In particular, the first part of the proceedings, that is, as a rule the first month, cannot be regarded as a simplified procedure for the treatment of concentrations (which is regulated through soft law in the EU). The explanatory notes accompanying the Amendment Act declared that it would be possible to decide 80% of the cases within that one month (first phase). If so, then why was the average length of concentration proceedings in Poland 58 days in 2013?⁴⁴ Shortening the length of proceedings could be achieved in particular by the introduction of a simplified procedure for certain concentrations, yet so far the Polish legislature has been resistant to such a truly far-reaching change. Will the promise of a sharp reduction in the length of proceedings materialize or, quite to the contrary, turn into an overwhelming focus on the search for reasoned causes for the prolongation of proceedings? The heart of the matter seems to rest in the future activities of the UOKiK President.

In parallel, there is a second argument that interested third parties do not have the opportunity to be heard by the UOKiK President neither in the first nor in the second part of merger (concentration) proceedings. This last argument seems to refer to the rhetoric of procedural fairness. The reformers appeared to offer a change in the field of the standards of procedural fairness; however, they focused on its other aspect and it is probable that the underlying motive of the change was not procedural fairness itself but, judging from the explanatory notes accompanying the draft Amendment Act, better communication between the UOKiK President and the parties. Statements of objections were not used in any of the UOKiK President's procedures before the amendment; this makes them not necessarily conform to the need to maintain equality of arms. However, as of 18 January 2015, in cases where a significant impediment to competition in the market as a result

⁴³ On the other hand, two-phase proceedings are a standard not only in case of concentration control by the Commission but also in some Member States, for instance Slovakia; Šabová, Fodorová and Lukáčová, 2013, p. 227.

⁴⁴ See: the UOKiK President's reports on activities; available at: http://www.uokik.gov.pl/reports_on_activities.php.

of a concentration is plausible, the UOKiK President shall issue so-called “reasoned competition concerns”, which can be responded to by the parties within 14 days (as a rule) starting from their receipt. The role and relevance of this kind of statement of objection may be called into question. The essential premise of competition concerns is the same as one of the premises for the prolongation of proceedings. Second, competition concerns cannot be responded to by third parties and participants of the concentration other than parties to the concentration case (notifying parties).

To sum it up, it seems that the Polish legislature might do far more to reform its legal provisions on the control of concentrations than improving communication methods between the UOKiK President and the parties. The legislature was not even encouraged by the opinions of courts to do so. The latter very seldom examined cases based on concentrations of undertakings⁴⁵ since the UOKiK President rarely refused his consent to planned and notified concentrations. As a result, there were very few appeals from his decisions regarding concentrations and courts did not receive a sufficient opportunity to inspire revisions of the provisions on concentrations to be proposed.

VII. Conclusions

What can be said about these developments in general? The scrutiny of jurisprudence led to the conclusion that irrespective of the importance of the topics discussed by the courts, judges kept as a rule silent on the disadvantages of the (2007) Act, which were later addressed by the reform. The vast majority of judgments can thus not be considered an inspiration for the reformers. A review and legal analysis of the relevant provisions of national and EU laws show that, after the recent Polish reforms, both the EU and Poland remain divergent on a number of key issues in terms of the enforcement of competition rules. They include the design of remedies, fines and periodic penalty payments, leniency *plus* and settlements as well as merger (concentration) proceedings. In the case of the latter, one may regret that the work of the Polish legislature seemed to be a matter of running quite fast in order to stay almost in the same place. The reform of the domestic merger control regime would have been more successful if it derived more inspirations from EU law. In a few instances, legislators have declared that they drew inspiration from provisions of EU law, but it is noticeable that the

⁴⁵ SA judgment of 13.10.2011, VI ACa 381/11; SOKiK judgment of 29.10.2009, XVII AmA 153/09; SOKiK judgment of 9.08.2010, XVII AmA 83/09; SOKiK judgment of 5.04.2011, XVII AmA 213/09; SOKiK judgment of 13.04.2011, XVII AmA 78/09.

final result ultimately embodied in Polish legal provisions contradicts what is known in the EU by the very conception of a given legal phenomenon (as in the case of settlements).

Yet, in all their diversity, these provisions do still possess a certain resemblance. As has been observed above, in some respects the recent developments in Poland have tended toward greater convergence with the European model (for example, the regular leniency program). Several of the presented developments (provisions on remedies and fines) seem to reflect a determination of the Polish legislature to subject undertakings, associations of undertakings and managers to increased discipline, irrespective of whether these changes are regarded as convergent or divergent with the EU model. The general revision of the Act has been neither comprehensive nor systemic. This is one of the central arguments for launching further legislative works regarding the enforcement of competition law in Poland. In the course of these works legislators should remember that both copying the EU (convergence) and developing a separate Polish model (divergence) would provide a bundle of gains and losses. Legislative works should thus be accompanied by careful scrutiny of the proposals with respect to both their pro-EU aspects and their prospective effectiveness.

To some extent, national competition laws undergo a spontaneous (soft) harmonization without any formal obligations being placed on Member States in that respect. In particular, there is no duty to refer to procedural *acquis* in purely internal situations (see Kowalik-Bańczyk, 2014b, p. 145–151). In any event, there seems to be no reason why – subject to Article 3 of Regulation 1/2003 and except for those instances where the obligation of implementing EU law is placed on Poland as a member state – Polish provisions should be spontaneously adapted to less effective EU rules. Fines imposed on parties with a low turnover can be used as an example here. The new Polish provisions cannot be considered perfect, and yet the Polish legal framework can be deemed more effective than its EU counterpart. This may well prove to be one of the most valuable lessons to be learnt by the EU from Poland's development of its legal framework.

Literature

- Bernatt, M. and Turno, B. (2015). O potrzebie doskonalenia rozwiązań procesowych w znowelizowanej z dniem 18 stycznia 2015 r. ustawie o ochronie konkurencji i konsumentów. *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 2, 75–92.
- Błażo, O. (2012). What Do Limitation Periods for Sanctions in Antitrust Matters Really Limit? *Yearbook of Antitrust and Regulatory Studies*, 5(7), 79–103.

- Blažo, O. (2014). Twenty Years of Harmonisation and Still Divergent: Development of Slovak Competition Law. *Yearbook of Antitrust and Regulatory Studies*, 7(9), 109–123.
- Cseres, K.J. (2014). Accession to the EU's Competition Law Regime: A Law and Governance Approach. *Yearbook of Antitrust and Regulatory Studies*, 7(9), 31–66.
- Dekeyser, K., Becker, R. and Calisti, D. (2010). Impact of public enforcement on antitrust damages actions: Some Likely Effects of Settlements and Commitments on Private Actions for Damages. In: C.-D. Ehlermann, M. Marquis (eds), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law*. Oxford and Portland Oregon: Hart Publishing.
- Doniec, A. (2015). *Stosowanie kar pieniężnych w unijnym i polskim prawie konkurencji w świetle wymogów ochrony praw człowieka*. Warszawa: Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego.
- Dudzik, S. (2015). Kontrola koncentracji w świetle ostatnich zmian ustawowych. *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 2, 27–41.
- Jurkowska-Gomułka, A. (2014). Art. 10. In: T. Skoczny (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*. Warszawa: Wydawnictwo C.H. Beck.
- Karlsson, K. and Hansson, P. (2012). Sweden. In: J. Buhart (ed.), *Leniency Regimes: Jurisdictional Comparisons*. London: Sweet & Maxwell.
- Kowalik-Bańczyk, K. (2014a). Reforms of Polish Antitrust Law: Closer to, or Further From, the European Model? *Journal of European Competition Law & Practice*, 5(10), 703–710.
- Kowalik-Bańczyk, K. (2014b). Ways of Harmonising Polish Competition Law with the Competition Law of the EU. *Yearbook of Antitrust and Regulatory Studies*, 7(9), 141–159.
- Krajewska, E. (2012). Settlement w świetle doświadczeń europejskich – w poszukiwaniu najlepszych rozwiązań. *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 4, 57–76.
- Król-Bogomilska, M. (2001). *Kary pieniężne w prawie antymonopolowym*. Warszawa: KiK Konieczny i Kruszewski.
- Król-Bogomilska, M. (2012). Standards of Entrepreneur Rights in Competition Proceedings – a Matter of Administrative or Criminal Law? *Yearbook of Antitrust and Regulatory Studies*, 5(6).
- Kulesza, M. (2015). Leniency – the Polish Programme and the ‘Semi-formal’ Harmonisation in the EU by the European Competition Network. *Yearbook of Antitrust and Regulatory Studies*, 8(11), 83–100.
- Martyniszyn, M. and Bernatt, M. (2015). On Convergence with Hiccups: Recent amendments to Poland's Competition Law. *European Competition Law Review*, 1, 8–14.
- Molski, R. (2009). Polish Antitrust Law in its Fight Against Cartels – Awaiting a Breakthrough. *Yearbook of Antitrust and Regulatory Studies*, 2(2), 49–76.
- Neruda, R., Gachová, L. and Světnický, R. (2013). 9th Amendment to the Czech Competition Act. *Yearbook of Antitrust and Regulatory Studies*, 6(8), p. 159–172.
- Pais, S.O. and Piszcz, A. (2014). Package on Actions for Damages Based on Breaches of EU Competition Rules: Can One Size Fit All? *Yearbook of Antitrust and Regulatory Studies*, 7(10), 209–234.
- Pipková, P.J. and Šimeček, I. (2015). New Procedural Notices of the Czech Office for the Protection of Competition: Leniency, Settlement, and Alternative Problem Resolution. *Yearbook of Antitrust and Regulatory Studies*, 8(11), 185–203.

- Piszcz, A. (2012). Still-unpopular Sanctions: Developments in Private Antitrust Enforcement in Poland After the 2008 White Paper. *Yearbook of Antitrust and Regulatory Studies*, 5(7), 58–76.
- Piszcz, A. (2013). *Sankcje w polskim prawie antymonopolowym*. Białystok: Wydawnictwo Temida2.
- Piszcz, A. (2015). Nowe elementy regulacji prawnej kar pieniężnych w ustawie o ochronie konkurencji i konsumentów. *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 2.
- Rumak, E. and Sitarek, P. (2009). Polish Leniency Programme and its Intersection with Private Enforcement of Competition Law. *Yearbook of Antitrust and Regulatory Studies*, 2(2), 99–123.
- Šabová, Z., Fodorová, K. and Lukáčová, D. (2013). Recent Developments in Slovak Competition Law – Legislation and Case Law Review. *Yearbook of Antitrust and Regulatory Studies*, 6(8), 223–243.
- Semeniuk, P. and Syp, S. (2013). „Wylanie dziecka z kąpielą” – czyli o leniency plus w Polsce. *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 7, 31–41.
- Sitarek, P. (2014). The Impact of EU Law on a National Competition Authority’s Leniency Programme – the Case of Poland. *Yearbook of Antitrust and Regulatory Studies*, 7(9), 185–216.
- Skoczny, T. (2015). 2014 Amendment of the Polish Competition and Consumers Protection Act 2007. *Yearbook of Antitrust and Regulatory Studies*, 8(11), 165–183.
- Sroczyński, J. (2015a). *O potrzebie (i pułapkach) ‘bardziej interdyscyplinarnego podejścia’ do publicznego i prywatnego prawa konkurencji*. Paper presented at the 1 Polish Congress for Competition Law, Warszawa, 13–15 April.
- Sroczyński, J. (2015b). Tzw. środki zaradcze (*remedies*) w znowelizowanej ustawie antymonopolowej: istotny wzrost uprawnień Prezesa UOKiK. *Przegląd Ustawodawstwa Gospodarczego*, 2, IX–XIX, at XIII.
- Svetlicinii, A. (2014). Enforcement of EU Competition Rules in Estonia: Substantive Convergence and Procedural Divergence. *Yearbook of Antitrust and Regulatory Studies*, 7(9), 67–85.
- Syp, S. (2012). O odpowiedzialności osób fizycznych w polskim prawie konkurencji – *de lege lata i de lege ferenda*. *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 4, 17–19.
- Waelbroeck, D. (2009). The development of a new ‘settlement culture’ in competition cases. In: C. Gheur, N. Petit (eds), *Alternative enforcement techniques in EC competition law: Settlements, commitments and other novel instruments*. Bruxelles: Bruylant.
- Wils, W.P.J. (2007). Leniency in Antitrust Enforcement: Theory and Practice. In: D. Schmidtchen, M. Albert, S. Voigt (eds), *The More Economic Approach to European Competition Law*. Tübingen: Mohr Siebeck.
- Wolski, D. (2013). Kierunek zmian w zakresie kontroli koncentracji przedsiębiorców w projekcie nowelizacji ustawy o ochronie konkurencji i konsumentów. *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 1, 8–16.

2016 Amendment of the Czech Significant Market Power Act of 2009

by

Petr Frischmann, Václav Šmejkal*

CONTENTS

- I. Introduction
- II. Protection of competition or of small local suppliers?
- III. Practical application of the SMPA and its pitfalls
- IV. 2016 amendment of the SMPA
- V. New scope of the regulation
- VI. Amended definition of significant market power
- VII. Restricted forms of behaviour
- VIII. New procedural rules
- IX. Mandatory requirements of purchase contracts
- X. Sanctions
- XI. Expected effects of the 2016 amendment of the SMPA

Abstract

The Significant Market Power Act (SMPA) adopted in 2009 regulates the assessment of, and the prevention of, the abuse of market power in the sale of agricultural and food products. The Act generated many controversies from the outset, survived legislative proposals for its abolition, to be finally amended in 2016. However, this kind of legislation failed to solve most of the problems and even managed to create additional controversies. The new amendment formally simplified the actual wording of the SMPA by transposing its numerous earlier

* Škoda Auto University, Department of Economics and Law, Mladá Boleslav, Czechia; petr.frischmann@savs.cz, vaclav.smejkal@savs.cz. Article received: 11 June 2016; accepted: 26 September 2016.



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.

appendixes, which contained an exemplary list of prohibited forms of SMP abuse, to the actual text of the Act. It also improved transparency and clarity with respect to its earlier vague and ambiguous terminology. At the same time, the amendment seriously modified the scope and principal philosophy of the SMPA by removing the previously required “substantial detriment to economic competition” as the pre-condition of the applicability of the Act. However, since the enforcement of the SMPA falls into the scope of the activities of the Czech Office for Protection of Economic Competition (in Czech *Úřad pro ochranu hospodářské soutěže*, UOHS), the concerns and doubts of the business community continue to grow whether this form of regulation is appropriate after the modification of the concept.

Résumé

La Loi sur les pouvoirs de marchés significatifs («SMPA») adoptée en 2009 réglemente l'évaluation et la prévention de l'abus de pouvoir de marché dans la vente de produits agricoles et alimentaires. Cette loi a provoqué de nombreuses controverses dès le début, a survécu les propositions législatives pour son abolition pour être finalement modifiée en 2016. Cependant, cette législation non seulement n'a pas réussi à résoudre la plupart des problèmes, mais a provoqué des controverses supplémentaires. Le nouvel amendement a simplifié le langage du «SMPA» par la transposition de ses nombreuses annexes antérieures, qui ont contenu la liste exemplaire des abus interdites de «SMPA» au texte de la Loi. Il a également amélioré la transparence et la clarté par rapport à la terminologie vague et ambiguë antérieure du «SMPA». En même temps, l'amendement a modifié sérieusement la portée et la philosophie principale du «SMPA» par la suppression de notion de «préjudice substantiel à la concurrence économique» qui a constitué précédemment une condition préalable de l'application de la Loi. Toutefois, vue que l'application du “SMPA” entre dans le cadre des compétences de l'Autorité de la concurrence tchèque (en tchèque: *Úřad pro ochranu hospodářské soutěže*, UOHS), les préoccupations et les doutes du business si cette réglementation est appropriée après la modification du concept continuent à monter.

Key words: significant market power; retail chains; protection of suppliers; antitrust.

JEL: K23; K42

I. Introduction

The regulation of so-called “buying power” of large retail chains, especially in the agro-food sector, has been a topic of lively debate in the Czech Republic both in the political and legal-theory field for quite a long time now. Discussions on the need for some regulation of retail chains began before the

year 2000, and eventually resulted in the adoption of the Act on Significant Market Power in the Sale of Agricultural and Food Products and Abuse thereof (hereinafter, SMPA or Act) in September 2009 and its subsequent coming into force in February 2010¹. The Act was openly politically motivated – it was enforced by deputies of the Social democratic party with the support of communist and green MPs yet against the scepticism of governmental law experts and the veto of the President of the Czech Republic. In light of such origins, the final form of this Act was not only ideologically questionable but also flawed in technical legislative terms, even supposedly anti-constitutional due to its ambiguity and uncertainty. The SMPA became therefore the target of much critical legal analysis and comments (Bejček, 2012, p. 16–18; Bejček, 2015, p. 2). Practically from the moment of its entry into force, the SMPA had to cope with continued efforts aimed at its revocation, replacement, or at least major amendments. After six years, these efforts finally led to a major change effective as of 6 March 2016. However, before analysing the new content of the SMPA, it is necessary to focus on the initial wording of the Act in order to illustrate its original shortcomings that necessitated the recent change.

II. Protection of competition or of small local suppliers?

The SMPA, as a novel piece of market regulation, was problematic from the beginning because of its fundamentally unclear purpose and objective. There certainly was a social demand for such a law expressed by the Food Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic, acting as representatives of local suppliers. Complaints of suppliers against large retail chains are commonplace elsewhere in Europe as well as in the USA. They are substantiated by empirical data testifying to regular payment delays for deliveries, charges imposed for the introduction of products into distribution, marketing contributions as well as other questionable practices used by retail chains that squeeze out suppliers². At the same time, it is very unlikely that the negative effects of such an asymmetry in customer-supplier relationships can be effectively solved by instruments of private law such as actions against unfair competition or damages actions. This is clear, for instance, from the fact that suppliers frequently refused to speak up to

¹ Act No. 395/2009 Coll. can be accessed in English at: <https://www.uohs.cz/en/legislation.html>.

² For a summary identification of such practices see the 2009 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A better functioning food supply chain in Europe, COM/2009/0591 final.

the Czech Office for the Protection of Competition (hereinafter, Office or National Competition Authority, NCA) against retail chains during general sector investigations (Úřad, 2010). Their refusal to complain about the practices of retail chains was based on the fear of reprisals in the form of a termination of cooperation. This situation attests to the need for public intervention also because of its supposed wider societal impact – suppliers may be forced to make savings that have a negative impact on product quality, they may be pushed out of the market if an individual supplier defends its interests, the diversity of local supplies can be replaced by international brands or own brands of the retail chains, the local agricultural production and food industry, especially in smaller countries, may be severely compromised and so on.

Despite such compelling arguments in favour of regulation, it is undeniable that the SMPA-style regulation of customer-supplier relationships equals a restriction of the freedom of contract. Moreover, it is an intervention into the self-regulatory capacity of the market, which has always been seen as fundamentally unacceptable for supporters of liberal concepts in economics and law. To make matters worse, the SMPA focuses on retailers buying agricultural and food products only. In other words, it completely ignores similar practices in other sectors of fast-moving consumer goods such as cosmetics or stationery or, for example, the construction sector. There, the same type of behaviour of non-dominant customers remains free of similar public regulation. This has, among other things, provoked a debate about the constitutionality of a differentiated treatment of arbitrarily selected business entities. However, an unconditional acceptance of these “conservative” arguments would rather mean to do nothing to solve the existing problems since hardly anyone believed that classic antitrust (namely the prohibitions deriving from Articles 101 and 102 TFEU) could offer an effective and easy solution.

Antitrust, that is public law protection of competition, exists to protect competition as a “public good” against distortions of structural nature that threaten to foreclose the market and damage consumer welfare. Therefore, antitrust fights cartels and abuses of dominance. Competition law fights also against such consequences of mergers and takeovers, which could lead to a significant impediment of competition. Such a focus clearly does not correspond to a task that should have been fulfilled by the SMPA. The top 10 retail chains in the Czech market hold together a 66% share in the total turnover of fast-moving consumer goods. The key top five retail chains represent 46% of this market (Incoma, 2014, p. 1) showing that the average market share of any single retail chain stands between 6% and 12%. Acting unilaterally *vis-à-vis* their suppliers none of them can structurally affect competition as such, and thus the law against abuse of dominance cannot be applied. Allowing for just a bit of a simplification, it could even be argued that

most of the bilateral relations of the retail chains with their suppliers would have enjoyed the benefit of the *de minimis* safe harbour. As such, antitrust would not notice them at all (Slanina and Škrabal, 2014, p. 116). On top of that, it has to be mentioned that the SMPA's impact on competition could also be negative if it helps to maintain inefficient suppliers on the market, or if it leads to an increase in retail prices for consumers without adequate improvements in the quality of the goods sold³.

Unfortunately, the SMPA has not solved the dilemma of its purpose, as its text did not mention any objective of the rules contained therein. The Explanatory Memorandum⁴ insisted that “the aim of the bill is to define, for the purpose of protection of competition, the merits of abuse of market power and to create tools to assess and prevent its abuses” (para. 2). Moreover, the terminology employed and the chosen institutional setting incorporated the SMPA into the antitrust field. It used terms such as: competitor, market structure, substantial distortion of competition and entrusted the Office with oversight over the compliance with the requirements of the SMPA.

However, as for its actual content, the SMPA tried to regulate the relationship between a retail chain and a supplier (in singular, in Section 3 of the Act). Its six Annexes contained quite detailed lists of rules applicable to invoicing, general contractual terms and conditions, individual contractual terms and conditions of sale, as well as prohibited certain habitual practices in customer-supplier relations. The question of how to prove and prevent “significant distortions of competition” through a close examination of the state of the invoicing and pricing policy of a retail chain with an about 10% market share, practiced *vis-à-vis* its smaller (usually, but not necessarily) supplier, apparently hardly crossed the mind of the SMPA proponents. The general clause contained in Section 4 of the SMPA, prohibiting the misuse of market power “towards all suppliers”, simply referred in all its paragraphs to the six Annexes, that is lists of unfair practices, attached to the Act. The SMPA thus summoned the Office to detect abusive payment terms, unequal sale conditions etc. in contracts “imposed” by retail chains upon each of their suppliers. Moreover, only if similar abusive clauses and practices were found in contracts with several suppliers, then the requirement set by the last sentence

³ Results of a study conducted by researchers from the University of Economics in Prague among suppliers of retail chains in the Czech Republic after 3 years of the application of the SMPA showed that their overwhelming majority (about 80%) did not notice any qualitative changes in their customer-supplier relationships and that their bargaining position *vis-à-vis* the retail chains remained without substantive changes (Filipová, Mokrejšová and Zeman, 2014).

⁴ *Důvodová zpráva* (Explanatory Memorandum) No. 395/2009 Dz. Retrieved from: <https://www.beck-online.cz/bo/chapterview-document.seam?documentId=onrf6mrqga4v6mzzguwta> (10.06.2016).

of the general clause of Section 4 – that the practice concerned must have as their object or effect the significant distortion of competition in the relevant market – was finally satisfied.

The meaning and the purpose of the SMPA was, therefore, *de facto* individually protectionist – the protection of small and medium enterprises acting as suppliers (Bejček, 2012, p. 16). Rather than to the rules of antitrust, the SMPA would thus be more similar to public protection of consumers (used to balance knowledge and information asymmetries) or even to the protection granted to employees (based on the “dependent” nature of the status of the weaker party). The daunting task of applying such an ambivalent legal Act fell to the NCA, even though the Office was established by law as a “central administrative body, its purpose is to maintain and protect competition against its prohibited restriction”⁵ and not as an inspectorate of bilateral customer-supplier relationships in the agro-food sector.

III. Practical application of the SMPA and its pitfalls

Less than three weeks after the SMPA entered into force, the Office opened a sector enquiry among retail chains in the agro-food sector to take stock of the situation in its newly attributed field of competence. A Department of SMP (Significant Market Power) was then set up at the end of 2010 to supervise compliance with the Act; it was staffed with five employees. In addition, in order to answer questions posed by nervous buyers of agricultural and food products, the Department endeavoured to apply the SMPA opening six administrative proceedings in the second year of the Act’s applicability. The results of the sector inquiry revealed the reality of long payment terms as well as of the unilateral enforcement by retail chains of discounts for early repayment of supplies. The Office solved some of these cases through competition advocacy and the acceptance by retail chains of commitments. The very first decision on the violation of the Act, which alone could clarify the problems of its interpretation, was taken against Kaufland Czech Republic in July 2011⁶. However, the retail chain brought an appeal against the original decision and the Chairman of the Office quashed it due to formal defects in

⁵ See Section 1 of Act No. 273/1996 Coll. Act on the Scope of Competence of the Office for the Protection of Competition.

⁶ Decision of the Office for the Protection of Competition of 19.07.2011, ref. number ÚOHS-S160/2/10-11017/2011/460.

May 2012⁷. A new first instance decision was subsequently issued in April 2013⁸ and confirmed by the Chairman in October 2013⁹. Kaufland proceeded to file an administrative action against this decision with the Regional Court in Brno which delivered its verdict in April 2016¹⁰. The “Kaufland story” proved to be the only case where the competent authorities repeatedly addressed the issue of the interpretation and application of the SMPA in its original form.

It has already been pointed out that the SMPA suffered from several contradictions and ambiguities (for example, it even failed to define what exactly it meant by agricultural and food products). However, the absolutely key issue for its practical application – a fact confirmed by the *Kaufland* judgment – was the interpretation of Section 3 in which “significant market power” was defined as follows:

- (1) Significant market power shall be deemed to be a relation between a buyer and a supplier in which, as a result of the situation in the market, the supplier becomes dependent on the buyer with regard to a possibility to supply own goods to consumers, and in which the buyer may impose unilaterally beneficial trade conditions on the supplier.
- (2) Significant market power shall be assessed particularly with regard to market structure, barriers to entry, market share of the supplier and the buyer, their financial power, size of the customer’s business network, and size and location of their individual stores.
- (3) Unless proven otherwise it shall be deemed that a buyer has significant market power if his net turnover exceeds CZK 5 billion¹¹.

Paragraph 1 of this Section pushed for the interpretation of SMP as a relative concept, which would mean that the specific parameters of the relationship between a retail chain and a supplier in a dependent position must be investigated to detect the existence of such power. In order to establish that a retail chain holds SMP, it would thus be necessary to first analyse its relationship with each individual supplier and only then, to identify those suppliers that are really threatened due to an unequal bargaining power. This would, therefore, mean that an abuse of SMP could happen only *inter partes*.

However, paragraphs 2 and 3 of the same Section suggested that SMP is an absolute concept which depends on the state of the market and on the position

⁷ Decision of the Chairman of the Office for the Protection of Competition of 29.05.2012, ref. number ÚOHS-R169/2011/TS-2901/2012/320/RJa.

⁸ Decision of the Office for the Protection of Competition of 24.04.2013, ref. number ÚOHS-S160/2010-7578/2013/460/Apo.

⁹ Decision of the Chairman of the Office for the Protection of Competition of 21.10.2013, ref. number ÚOHS-R146/2013/TS-20430/320/RJa.

¹⁰ Judgment of the Regional Court in Brno of 21.04.2016, ref. number 30 Af 125/2013–191.

¹¹ Approx. EUR 180,000,000.

held by the retail chain on it. Paragraph 3 even introduced a legal presumption of the existence of SMP for all retail chains trading in agro-food products with a turnover of at least CZK 5 billion (without specifying their product, geographical and temporal boundaries!). It could therefore be concluded that these two paragraphs understood SMP as if it were a kind of sub-dominance held, and potentially abused, by a retail chain *erga omnes*.

The duty to apply this contradictory definition of SMP put the Office between the rock and the hard place. On the one hand, it was clear from a practical viewpoint that the choice to interpret the SMP as a relative concept would turn the effective application of the SMPA into “mission impossible”. The Office would have to examine the extent to which each individual supplier really depends on the scrutinised retail chain, reviewing one by one each commodity. Only then would the NCA be able to tell whether SMP existed, and could be abused against a given supplier in a given commodity. Finally, in all individual SMP cases, the existence of unfair contractual terms would have to be inspected and summed together in order to demonstrate the magnitude of the retail chain’s practices that amounted to a “significant distortion of competition”. Such an approach would confirm the individually protective purpose of the SMPA, which would nevertheless contradict the Explanatory Memorandum to the Act, as well as the mission of the Office.

However, on the other hand, the SMPA did not give explicit and sufficient support for the interpreting SMP as an absolute concept. It may be rightfully claimed that both a “relative” and an “absolute” interpretation were equally possible, and that none was anti-constitutional. In such a situation, a state administration body should – in accordance with numerous decisions of the Supreme Administrative Court and the Constitutional Court – apply the rule *in dubio pro mitius* and adhere to the interpretation more favourable to the investigated and potentially sanctioned private entity (Slanina and Škrabal, 2014, p. 114). The Office would then be driven, in conflict with the effectiveness of the SMPA’s enforcement, towards the interpretation of SMP as a relative concept. This way, it would very likely come to a conclusion that the number of really dependent, and thus potentially damaged, suppliers of a retail chain was limited and the resulting offence less serious.

In the *Kaufland* decision, the Office chose to interpret the SMP as an absolute concept, which gave it the chance to effectively penalize the retail chain. The Chairman of the Office confirmed in his second appeal decision that Kaufland should be fined CZK 22,130,000 for a systematic negotiation of longer than 30-day payment terms of received invoices as well as for several provisions of its general contractual terms and conditions that had been unilaterally disadvantageous for its suppliers. The Office justified the choice of the absolute concept of SMP by both grammatical and teleological

interpretation of the Act. The Office pointed out in its decision, among others, that should the retail chain have had been able to differentiate against whom it had SMP; it would probably have led it to end its relationship with these dependent suppliers. Therefore the interpretation of SMP as a relative concept would have completely denied the motives that stood behind the adoption of the Act. The Office even compared quite explicitly its preferred interpretation of SMP to the definition of a dominant position, which is also determined on a certain relevant market *erga omnes* rather than towards individual business partners or consumers¹². Thus the Office brought the concept of SMP even closer to classical antitrust standards.

However, a panel of three judges of the Regional Court in Brno was quite ruthless toward the SMPA ruling on the administrative action brought by Kaufland against the decision of the Office. According to the judgment, the original SMPA suffered from major weaknesses and shortcomings as it failed to expressly declare its meaning and purpose – hence it was actually questionable what exactly it was meant to do. The dual purpose and the resulting double interpretation of the SMPA were recognized in the Court’s ruling: “If the real purpose of the Act is to protect competition, i.e. its institutional (existential) protection, then SMP should be understood as an absolute concept and vice versa if the purpose of the Act is to protect the weaker party – small or medium-sized suppliers, i.e. to provide an individual protection, then it suggests that the SMP is a relative concept”¹³. Both interpretative variants were thus equivalent according to the Court and so the rule *in dubio pro mitius* had to be applied. The Court endorsed the interpretation favourable to the retail chain – the relative concept of SMP. Regarding the problem of the Office’s difficulty in analysing each individual customer-supplier relationship, the Court emphasized that this was not a reason for refusing an interpretation more favourable to the entity under investigation. On that ground, the Regional Court annulled the Office’s decision against Kaufland.

The judgment was delivered at the time when the new wording of the SMPA was already known and effective. The judges even quoted it as one of the supporting arguments stressing that the newly amended Act clearly opted for the absolute concept of SMP as the legislature sought to remove the persisting doubts arising from an equally legitimate dual interpretation of the SMP concept¹⁴. As a result, even if the *Kaufland* appeal case ultimately ends up before the Supreme Administrative Court with a different outcome, it will prove of limited practical importance due to the legislative changes undertaken in the meantime. Since a major amendment of the SMPA has

¹² Decision of the Office, 2011, paras 53–64.

¹³ Judgment, 2016, p. 14.

¹⁴ Judgment, 2016, p. 12.

now come into force, primary attention should be attributed to whether this new legislation is free from the shortcomings that burdened its predecessor.

IV. 2016 amendment of the SMPA

After controversial discussions, the long-awaited amendment of the SMPA was finally adopted and became effective as of 6 March 2016 (Act No. 56/2016 Coll.). The new amendment focuses mainly on the extension of the scope of the applicability of the Act, a new definition of SMP, modifying the list of forms of SMP abuse, providing more precise mandatory requirements of supply contracts, as well as specifying new procedural rules emphasizing the preventive function of the Act together with more effective tools in relation to holding structures and entrepreneur alliances.

The aforementioned original version of the SMPA made the legislation rather longwinded and lacking in transparency. It only contained 11 sections and left a substantial part of its content to numerous annexes listing a large amount of different exemplary forms of prohibited conduct. The new wording of the SMPA is more systematic and compact – it incorporates the earlier annexes into the main body of the Act as well as substantially simplifies their content. Moreover, the vague and unclear definitions contained in the original text were abused by procedural parties, which frequently submitted numerous objections in order to delay administrative proceedings. This practice negatively affected the efficiency of state control over the SMPA and resulted in extremely long proceedings and an uncertain basis for decision-making. To counteract this practice, the new wording utilizes the long experience of the NCA especially in the field of abuse and cartels and the SMPA agenda since 2009.

However, despite the modifications, the main purpose and aim of the Act remains unchanged, including the fact that it only applies to the rather narrow category of the agro-food market. The new extensions of the applicability of the SMPA did not enlarge the defined sectorial scope of the regulation, leaving most of the argumentation unanswered concerning the potential need of adequate regulation in industries such as the construction, sanitary or stationary business. Similarly, the amendment failed to address the aforementioned objections concerning the arbitrary and non-systematic nature of this type of legislation.

V. New scope of the regulation

Extending the scope of the Act was among the priorities of the 2016 amendment. The scope of its application was enlarged by the adoption of new rules whereby not only the abuse of buyer's power in the purchase of food is subject to the SMPA regulation, but also that of services rendered relating to such purchases¹⁵. Typical services of this kind include: marketing support as well as transport or logistics. On the other hand, services such as energy supplies or rent are not considered to fall into this category. An important extension of the applicability of the Act lies also in a new rule regulating prohibited activities falling into the category of SMP abuse committed outside the territory of the Czech Republic that actually or potentially result in consequences manifesting themselves on a Czech local market. The new provisions specifically target holding structures of food retail chains with mother companies located outside the Czech Republic and directly or indirectly affecting the Czech food market. Such effect can take place by way of reverse bonuses, listing fees and similar contractual clauses, reached typically between local suppliers and foreign mother companies of holding structures as well as specific contracts concluded among foreign mother companies¹⁶.

A further extension of the scope of the SMPA is based on the fact that the 2016 amendment included alliances of purchasers into the definition of a "purchaser". The sole term "alliance" is in the practice of the Office interpreted extensively, covering various forms of groupings, not limited to legal entities, and regardless of the contractual or other nature of its origin. The legal definition of an alliance provided by the SMPA uses the general criteria of cooperation among purchasers in the process of the acquisition of food products for the purpose of its future sale. Alliances of purchasers in the aforementioned sense are thus, according to the new legislation, also subject to financial sanctions for a breach of the SMPA and jointly responsible for the payment of fines imposed by the Office.

A further extension of the applicability of the SMPA is provided by the enlargement of the scope of the regulated contracts. It used to be common to use agents of food chains in the negotiation and execution process of contracts in order to avoid public control and potential sanctions. To counteract this practice, the 2016 modification of the SMPA introduced an explicit rule whereby all agreements executed by agents acting on behalf of purchasers or suppliers are now subject to the SMPA.

¹⁵ See Section 1a) of 2016 SMPA.

¹⁶ See Section 1 para. 1b) of 2016 SMPA.

The new legislation removed some of the past uncertainties by adopting new terminology that avoids the danger of direct analogies with antitrust provisions. The 2016 amendment no longer uses the notion of competitor, replacing it by the concept of supplier and purchaser. The reasons for the new terminology were spelled out in the Informační List 2/2016 to the new legislation issued by the Office, hereinafter, Infolist (Brom, 2016, p. 6). The originally used term “competitor” was borrowed from the Act No. 143/2001 Coll. on protection of economic competition (hereinafter, APEC), the primary task of which is not the protection of any particular competitor but of economic competition *per se*. Regarding the fact that the concept of the SMPA is based on the protection of the weaker party in customer-supplier relationships in the area of agriculture and food supplies, it was necessary to implement new terminology to avoid potential misleading connotations. The described difference is even more significant in light of the fact that both legislative acts are implemented and enforced by the same public body – the NCA. An improvement was also achieved thanks to the adoption of more precise legal terminology referring to EU normative definitions such as the key term “food” (which replaced the original vague term of “agriculture and food products”) referring to the definition provided by relevant EU legislation¹⁷. On this basis, pet food, cosmetic products, medical or tobacco products can now not be considered to fall within the scope of the Act¹⁸.

VI. Amended definition of significant market power

The 2016 amendment of the SMPA has introduced a new definition according to which SMP shall be deemed to be a “(...) position of purchaser which could potentially without justifiable reason result to an advantage against suppliers in relation to the purchase of food; accepting or rendering services connected to the purchase of food”¹⁹. The new definition, replacing the old concept of SMP being “a relation between a buyer and a supplier”, is clearly based on objective criteria. It takes the status or position of the purchaser

¹⁷ I.a. Food Regulation No. 178/2002/EC of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

¹⁸ I.a. Cosmetics Directive No. 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products, and Tobacco Directive No. 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products.

¹⁹ Section 2d) of 2016 SMPA.

into account, instead of the mutual relations among particular entities. Under the new definition, market position is assessed in regard to market structure, market access barriers and the financial strengths of the purchaser.

This definition completely removed the previously used legal criteria of purchaser's market share, size of the network, number of business premises and its location. The new objective criteria-based definition confirmed the earlier interpretation and application practice of the Office – that is, the absolute concept of SMP (albeit beforehand it was based on the rather confusing definition of the 2009 version of the SMPA).

The new legislation provides better formulated principles for the assessment of the purchaser's CZK 5 billion (approx. EUR 180,000,000) turnover threshold, as the criterion for the presumption of significant market power. According to the new rules, the threshold should be calculated with regard to the last completed fiscal year and is aggregated with regard to holding structures and informal alliances, if applicable²⁰.

VII. Restricted forms of behaviour

The new concept and wording of the amended SMPA retains the legislative technique of an exemplary list of restricted forms of market behaviour. At the same time, the Office in its explanatory Infolist emphasised the exemplary nature of this list (Brom, 2016, p. 7). It stated that the relevant circumstances must be taken into account in the application process on a case-by-case basis considering potential abuse of SMP in each given case regardless of the particular form of the practice. The scope of the list is interpreted in an expansive manner by the Explanatory Memorandum (Úřad 2016a, p. 3). The Memorandum is using the absence of information on the total amount of goods and the absence of information on the time frame of discount actions as exemplary practices which must also be considered to be restricted forms of market behaviour even if not explicitly mentioned by SMPA. Based on this example, the NCA has set out more general explanatory criteria concerning the balance of business risks. Accordingly, one-sided attempts to shift the burden of business risk for unsold goods to suppliers, or the uncertainty surrounding sales actions, must also be seen as falling into the category of prohibited behaviours that infringe the rules of the SMPA.

²⁰ Section 3 para. 3c) of 2016 SMPA.

The exemplary list of forms of conduct explicitly defined as SMP abuse by the 2016 amendment was simplified. In its present form, it includes the negotiation or application of contractual terms and conditions resulting in a significant imbalance of rights and duties of contractual parties; any kind of payment or other fulfilment without an adequate performance by the other contractual party; making payments or discounts not part of the written contracts executed prior to the supply of food; invoicing practices not including the final purchase price calculating all agreed discounts; application of any kind of payments related to the acceptance of the goods by the purchaser (listing fee); use of the “return back of unsold goods to the supplier” mechanism; invoicing practices using longer than 30-days payment terms; discriminatory application of different contractual terms to suppliers of goods or services of similar nature and quality.

A significant change has also taken place because of the elimination of two essential pre-conditions which existed in the 2009 version of the SMPA. The previously required condition of “repeated and consistent” abuse no longer applies in the assessment process of potential SMP abuses. According to the 2016 amendment, a single case of SMP abuse constitutes now required and sufficient proof. The second condition completely removed by the amended SMPA is the general requirement that spoke of acts “which have as their object or effect the distortion of competition in the relevant market”. Critics of this change pointed out that the elimination of this requirement could potentially lead to an extreme extension of the scope of the applicability of the SMPA. Although it is necessary to assess this change in the light of the balancing modification of the new procedural rules, the exact interpretation and the future application practice is currently difficult to anticipate.

VIII. New procedural rules

The Office has been granted more discretion by giving it the option not to initiate proceedings if the actual act of abuse is not found to be of a serious nature. This discretionary power creates an important filter against “bullying” cases that frequently misuse proceedings before the NCA as an instrument of private fights among competitors. The new legislation puts also more emphasis on the preventive function of such proceedings by granting the Office the power to stop them if guarantees are provided, in the form of commitments offered by the offender, which would eliminate the detrimental market impact of the SMP abuse. In order to make the proceedings effective, the offender

has a short deadline of 15 days to submit such proposal. Its acceptance lies in the discretion of the NCA and if the proposed commitments are not found to be sufficient, the Office will not accept them and the normal procedure will apply. If the commitments are accepted however, the NCA will control compliance and in case of a breach, normal proceedings will continue. The latter would resume also if the decision of the Office will prove to have been based on incomplete or untrue information provided by the offender, or if the circumstances of the case significantly change. Similarly to the previous option, this procedure is not applicable for cases of serious nature (commitments are not possible for serious cases).

The new legislation provides only for general guidelines on the assessment of the seriousness of the nature of a case, it emphasizes the criteria of the nature of the behaviour, particular form of the abuse and the number of potentially jeopardized subjects. However, the final decision on the applicability of such procedures remains fully in the decision-making discretion of the Office. The removal of the requirement of the “repeated and consistent” occurrence of the abusive behaviour changed the position of the Office to a great extent in its investigating activities, especially in relation to the retail food chains. The body of evidence in procedures held at the Office has significantly decreased, and its proceedings are potentially quicker and more efficient now.

IX. Mandatory requirements of purchase contracts

One of the most problematic parts both of the original as well as the amended SMPA²¹ is its provision on mandatory requirements of purchase contracts in the food products and related services sector. Requirements concerning the form, payment terms, total amount of discounts or the formula used for the calculation of discounts were the main reasons that led, in practice, to great uncertainty and consequently resulted in the overburdening of the Office with an unmanageable number of requests for explanatory guidelines from the business community.

The new legislation, followed by the Infolist of the Office (Hanslianova, 2016, p. 9) removed most of the doubts thanks to a more precise formulation of the rules on the extent of the obligations with respect to: the duty to enter various types of payments into purchase contracts; the use of the proportional percentage form or the mandatory calculation of bonuses and reductions of the final purchase price, or the criteria for the calculation of the limit for

²¹ Section 3 para. 3a) of 2016 SMPA.

the mandatory requirement of complete disclosure of all payments made by the supplier of the amount which may not exceed 3% of the annual turnover threshold. The mandatory requirements of supply contracts, according to the new amendment of the SMPA, are not subject to review by the NCA from the perspective of the validity of the contract *per se*. The Office is limited in its decision-making power to findings concerning the fulfilment of the mandatory requirements of a particular contract without explicit reference to its validity, leaving this question to regular judicial review. This system defines a clear line between private and public law controls over supply contracts, leaving specific instruments and procedures in the above sense fully in the hands of the parties.

The Infolist of the Office (Hanslianova, 2016, p. 9) confirmed the extensive interpretation of the SMPA's mandatory requirements of supply contracts whereby the questionable 3% annual turnover (being the limit for the total amount of annual suppliers' payments) has to include all payments for services rendered, or certain benefits related to the purchase of food, the value of which can be individually evaluated and invoiced. Typically included in the above sense are payments made in connection with advertising services, secondary product placement or cash discounts. The 3% limit is not a bonus limit but a maximum threshold of payments made by the supplier for verifiable services provided by the purchaser. By contrast, price reductions resulting from annual price negotiations, seasonal price cuts or quantity price bonuses are all explicitly excluded from the calculation of the 3% threshold. The reasoning for this differentiation comes from the aforementioned definition of individual payments made by the supplier, which must meet the clear criteria of predictability of the payments pre-conditions. According to this definition, payments not directly related to the purchase of food are excluded from the mandatory 3% threshold. A distinctive criterion in this respect is the availability of such services on the market at a given time. Transport services provided by the purchaser are thus a typical example of this exemption, as long as they are rendered under normal market conditions. Each of the payments must be individually entered into the text of the purchase contracts in the form of a lump sum or percentage. Mixing prices of goods with prices of services rendered (such as marketing support, price of printed leaflets, etc.) in the invoicing practice was declared illegal. Transparency of invoicing, including the complete and accurate description of the character of services rendered, is in fact considered to be one of the fundamental principles of the new legislation. Any failure in this respect would result in a breach of the amended SMPA according to a strict interpretation of the new wording of the Act.

X. Sanctions

The threat of sanctions for a breach of the SMPA was significantly increased despite the fact that the basic formula for their calculation remains unchanged at the threshold level of CZK 10 million (approx. EUR 370,000), or 10% of the last fiscal year turnover of the entrepreneur. Regarding the fact that the 2016 amendment introduced new rules applicable to holding structures and different forms of entrepreneurial alliances, the 10% annual turnover threshold can now be calculated from the total aggregate turnover of the controlling and controlled entities or from the whole alliance, if applicable. In the case of fines imposed on particular members of the alliance, all members of the alliance would become jointly responsible for the payment of the fine according to the new provisions of the SMPA.

Responsibility for the breach of the SMPA passes without limitation to the legal successor of the infringing entity. The new legislation removed the earlier limitation of such transfer which took place through a rather vague requirement concerning the knowledge of the existence of a breach of the SMPA by the legal successor. In the case of multiple legal successors, responsibility shall now pass to them all. Having said that, the actual amount of the financial sanction will depend on the amount of assets of a given successor as well as the profits and other benefits gained in connection with the breach of the SMPA. The argument of continuation of the original enterprising activity by the legal successor must also be taken into account.

XI. Expected effects of the 2016 amendment of the SMPA

According to the interim provisions of the 2016 amendment of the SMPA, all contracts executed prior to 6 March 2016 must meet its mandatory requirements by 6 June 2016 at the latest. The three month implementation period provided by the Act has been subject to extensive criticism. Most of it relates to the fact that specific groups of especially mid- and small-sized suppliers may be jeopardized in the re-negotiation process of the many supply contracts affected by this amendment in the rather short time provided by it. According to the representatives of the Czech Business and Travel Association, which takes an active role in this process (Svaz obchodu a cestovního ruchu CR, 2016), the three month requirement will inevitably result in priority re-negotiations with dominant suppliers, leaving the rest in an uncertain position at the very least. This phenomenon can even potentially lead to a temporary elimination of large

groups of suppliers from the Czech food retail market, and in many cases to the economic liquidation of certain entrepreneurs. This situation was accelerated by an official announcement made by the NCA in May 2016 that a sector enquiry was launched into food chains focusing on the compliance of existing supply contracts with the mandatory requirements of the SMPA (Úřad, 2016b).

It will not be possible to assess most of the effects of the SMPA amendment until a longer decision-making and interpretational practice of the Office has been accumulated. Yet despite the fact that the legislation has entered into force only very recently, it is clear already that its improved text when it comes to legal definitions (including the objective approach to the concept of SMP), together with its overall more systematic and compact form, have a real potential to improve the regulation. By contrast, new doubts were created by the key change of the scope of the applicability of the SMPA that occurred by the removal of previous requirements of a “substantial detriment to economic competition” and of a “continues or repetitive nature” of the abusive attacks, which used to act as pre-conditions for the original Act. Leaving the principal aim and method of the legislation unchanged, the 2016 amendment would certainly not have satisfied liberal critics. Some fears of the business community concerning mainly the replacement of local products by imports and the increase of the price level in this regulated sector will remain (Svaz obchodu a cestovního ruchu CR, 2016). The reason for this can be found in the fact that the recent outcome of the legislative activity did not challenge the method and the sole *raison d'être* of this type of regulation. However, the aims and ambitions of the new legislation did not include such objectives, as they were formed and limited by the existing political paradigm.

Literature

- Bejček, J. (2012). Úprava tzv. významné tržní síly: přirozený krok k ochraně spotřebitele a slabšího nebo “papírový tygr”? [Regulation of the so-called SMP: natural step to protect consumers and the weaker or “paper tiger”?]. *Bulletin Advokacie*, 7-8, 15-24. Retrieved from: http://www.cak.cz/assets/ba_7_8_2012_web.pdf (10.06.2016).
- Bejček, J. (2015). On abuse of (plain) market power and of so-called significant market power. Paper for ASCOLA Tokyo Conference. Retrieved from: http://ascola-tokyo-conference-2015.meiji.jp/pdf/ConferencePapers/General%20Session%203/Bejcek_Draft%20Tokyo%20%20ASCOLA%202015.pdf (10.06.2016).
- Brom, H. (2016). Významná tržní síla, *Informační List UOHS* 2, 4-7. Retrieved from: <https://www.uohs.cz/cs/vyznamna-trzni-sila/aktuality-z-vyznamne-trzni-sily/2173-informacni-list-k-novele-zakona-o-vyznamne-trzni-sile.html> (25.08.2016).
- Filipová, A., Mokrejšová, V. and Zeman, J. (2014). Significant Market Power Act Efficiency. *Acta Academia Karviniensia*, 4, 18-25. Retrieved from: <http://www.slu.cz/opf/>

- cz/informace/acta-academica-karviniensia/casopisy-aak/aak-rocnik-2014/docs-4-2014/Filipova_Mokrejsova_Zeman.pdf (10.06.2016).
- Hanslianová, B. (2016) Nejčastěji diskutovaná ustanovení novely zákona o významné tržní síle, *Informační List UOHS* 2, 8-11. Retrieved from: <https://www.uohs.cz/cs/vyznamna-trzni-sila/aktuality-z-vyznamne-trzni-sily/2173-informacni-list-k-novele-zakona-o-vyznamne-trzni-sile.html> (25.08.2016).
- Incoma Gfk (2014). Incoma Market Trends. 21 May 2014. Retrieved from: <http://incoma.cz/koncenrace-ceskeho-maloobchodu-stagnuje/> (10.06.2016).
- Slanina, J. and Škrabal, M. (2014). Nedostaky v aplikační praxi zákona o významné tržní síle [Weaknesses in Application Practice in Act on Significant Market Power]. *Antitrust – Revue of Competition Law*, 3, 111-117.
- Svaz obchodu a cestovního ruchu CR (Czech Business and Travel Association, SOCR) (2016). Stanovisko SOCR k novele zákona o významné tržní síle [SOCR statement to SAMP amendment]. 28 January 2016. Retrieved from: <http://www.socr.cz/clanek/stanovisko-socr-cr-k-novele-zakona-o-vyznamne-trzni-sile-d/> (10.06.2016).
- Úřad pro ochranu hospodářské soutěže (2010). Výsledky šetření odboru kontroly tržní síly [Results of the Department of SMP inquiry]. Retrieved from: <https://www.uohs.cz/cs/hospodarska-soutez/vyznamna-trzni-sila.html> (10.06.2016).
- Úřad pro ochranu hospodářské soutěže (2016a). Výkladové stanovisko UOHS k novele zákona o významné tržní síle [Memorandum to the amendment of Act on Significant Market Power]. 3 March 2016. Retrieved from: http://www.uohs.cz/download/VTS/vykladove_stanovisko_novelaVTS.pdf
- Úřad pro ochranu hospodářské soutěže (2016b). UOHS zahajuje sektorové řízení, aby prověřil účinky novely zákona o významné tržní síle [UOHS launching sector investigation in order to test effects of SMPA amendment]. 18 May 2016. Retrieved from: <https://www.uohs.cz/cs/hospodarska-soutez/aktuality-z-hospodarske-souteze/2135-uohs-zahajuje-sektorove-setreni-aby-proveril-ucinky-novely-zakona-o-vyznamne-trzni-sile.html> (10.06.2016).

Review of the New Polish Model of Abstract Control of Standard Forms of Agreements Concluded with Consumers

by

Paulina Korycińska-Rządca*

CONTENTS

- I. Introduction
- II. New model of abstract control of standard forms of agreements concluded with consumers
 - 1. Proceedings in cases for the classification of contractual provisions found in standard forms of agreements as abusive clauses
 - 2. Decisions in cases for the classification of contractual provisions found in standard forms of agreements as abusive clauses
 - 3. Limitation period
 - 4. Fines
 - 5. Role of the register of contractual provisions found in standard forms of agreements classified as abusive clauses
- III. Conclusions

Abstract

The Polish Act of 5 August 2015 amending the Act on Competition and Consumer Protection and certain other acts introduced several changes intended to strengthen consumer protection. Its substantial part concerns the abstract control of standard forms of agreements concluded with consumers. The Amendment Act of 2015 has completely changed the previous model of abstract control of standard forms of

* PhD candidate at the Department of Public Economic Law at the University of Białystok, legal counsel in Kancelaria Radców Prawnych Bieluk i Partnerzy; p.korycinska@gmail.com. Article received: 7 November 2016; accepted: 20 November 2016.



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.

agreements concluded with consumers by replacing the court proceedings model with the administrative proceedings model. This article presents an analysis of Polish legal rules on the abstract control of standard forms of agreements concluded with consumers as amended by the Amendment Act of 2015. Its purpose is to verify whether the new Polish model may be deemed as an appropriate and effective means of preventing the continued use of unfair terms, within the meaning of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. The paper analyses the legal rules on the new model of abstract control of standard forms of agreements concluded with consumers (the administrative proceedings model) and compares the new model with its predecessor (the court proceedings model). The paper does not cover the remaining changes introduced into the Polish Competition Act of 2007 by the Amendment Act of 2015, which are not connected to abstract control of standard forms of agreements concluded with consumers.

Résumé

La loi polonaise du 5 août 2015 modifiant la loi sur la concurrence et la protection des consommateurs et certains d'autres actes a introduit plusieurs modifications qui ont eu pour leur objectif de renforcer la protection des consommateurs. Sa partie substantielle concerne le contrôle abstrait des formulaires types des contrats conclus avec des consommateurs. La loi de 2015 a complètement modifié le modèle antérieur de contrôle abstrait des formulaires types des contrats conclus avec des consommateurs en remplaçant le modèle judiciaire par le modèle administratif. Cet article présente une analyse des règles juridiques polonaises relatives au contrôle abstrait des formulaires types des contrats conclus avec des consommateurs introduits par la loi de 2015. Son objectif est de vérifier si le nouveau modèle polonais peut être considéré comme un moyen approprié et efficace pour empêcher l'application des clauses abusives dans les contrats, au sens de la directive du Conseil n° 93/13/CEE du 5 avril 1993 relative aux clauses abusives dans les contrats conclus avec les consommateurs.

L'article analyse des règles juridiques du nouveau modèle de contrôle abstrait des formulaires types des contrats conclus avec des consommateurs (le modèle de la procédure administrative) et compare le nouveau modèle avec son prédécesseur (le modèle de la procédure judiciaire). L'article ne se réfère pas aux autres modifications introduites par l'amendement de 2015 dans la loi polonaise sur la concurrence de 2007, n'étant pas liées au contrôle abstrait des formulaires types des contrats conclus avec des consommateurs.

Key words: consumer protection; abusive clauses; register of abusive clauses; standard forms of agreements; proceedings in the cases for classification of contractual provisions found in standard forms of agreement provisions as abusive clauses.

JEL: K12; K20; K23

I. Introduction

The Polish Act on Competition and Consumer Protection was adopted in 2007¹ and came into force on 21 April 2007. It regulates both competition and consumer protection issues. In 2014, the Polish legislature decided to adopt the Amendment Act of 2014² designed to strengthen competition protection³. The changes covered by this Amendment Act relate to, in particular, the enforcement of the prohibition of anti-competitive practices and merger control proceedings (see the critical analysis of the changes introduced by the Amendment Act of 2014: Skoczny, 2015, p. 165-183; Piszcz, 2016).

Shortly after the Amendment Act of 2014 came into force on 31 March 2015, a pre-consultation meeting was organized, the purpose of which was to discuss the scope of the planned changes in the Competition Act in the field of consumer protection. The draft of the Amendment Act was sent for inter-ministerial consultations and public consultation on 15 April 2015. As it was indicated in the explanatory notes accompanying the draft Amendment Act of 2015, competition and consumer protection issues are strongly linked. After competition protection was strengthened by the adoption of the Amendment Act of 2014, it was, therefore, also necessary to adopt changes in the field of consumer protection⁴.

Hence, the Act of 5 August 2015 amending the Act on Competition and Consumer Protection and certain other acts⁵ introduced several changes mainly connected to the consumer protection area. A substantial part of this Act concerns abstract control of standard forms of agreements concluded with consumers. It replaces the earlier “court proceedings model” with an “administrative proceedings model”. Those are not, however, the only changes introduced by the Amendment Act of 2015. The remaining changes concern,

¹ The Act of 16.02.2007 on the Competition and Consumers Protection (consolidated text: Journal of Laws 2015, item 184 as amended); available in English at http://www.UOKiK.gov.pl/competition_protection.php (23.07.2016). Hereinafter, Competition Act.

² The Act of 10.06.2014 amending the Act on Competition and Consumers Protection and the Code of Civil Procedure (Journal of Laws 2014, item 945); unavailable in English. Hereinafter, the Amendment Act of 2014.

³ Explanatory notes accompanying the draft of Act amending the Act on Competition and Consumers Protection and the Code of Civil Procedure, p. 1; available at <http://www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?nr=1703> (23.07.2016); unavailable in English.

⁴ Explanatory notes accompanying the draft of Act amending the Act on Competition and Consumer Protection and certain other acts, p. 1; available at <http://www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?nr=3662> (23.07.2016); unavailable in English.

⁵ Journal of Laws 2015, item 1634; unavailable in English. Hereinafter, the Amendment Act of 2015.

amongst others, the protection of consumers on the financial services market⁶, the powers of investigation of the President of the Office of Competition and Consumer Protection (in Polish: *Prezes Urzędu Ochrony Konkurencji i Konsumentów*, hereinafter, UOKiK President)⁷, the communication of decisions in all cases within the jurisdiction of the UOKiK President, as well as information connected to the protection of consumer interests. The explanatory notes accompanying the draft of this Amendment Act reveal that the main purpose of its adoption was not only to strengthen the powers of the UOKiK President meant to prevent the violations of consumer interests, but also to answer the needs expressed by undertakings concerning, among others, an increase in legal certainty⁸.

Due to the extent of the issues covered by the Amendment Act of 2015, this review will focus only on those amendments that are strictly connected to changes introduced to abstract control of standard forms of agreements concluded with consumers. As a result, the paper will not cover other amendments as, in the author's opinion, they require a comprehensive analysis in a separate paper.

Before commencing the analysis of the Amendment Act of 2015 regarding changes in the area of abstract control of standard forms of agreements concluded with consumers, it should be noted that the introduction into domestic legal systems of rules that enable control of terms used in contracts concluded with consumers by sellers or suppliers is required by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts⁹. According to Article 7 paragraph 2 and 3 of this Directive, each member state shall include provisions which authorize any persons or organizations, having a legitimate interest under national law in protecting consumers, to take action for a decision as to whether contractual terms drawn up for general use are unfair. Such control may be made before the courts or before competent

⁶ The explanatory notes indicate also the problem which is particularly present on the financial services market – selling of a product that does not match the purchaser's needs (Explanatory notes accompanying the draft of Act amending the Act on Competition and Consumer Protection and certain other acts, p. 2–5). In order to strengthen the position of consumers on the financial services market, a new consumer interests' restricting practice has been introduced, i.e. proposing to consumers financial services which do not match the needs of those consumers or proposing the purchase of services in a manner unsuitable to the nature of those services.

⁷ The Amendment Act of 2015 grants to the UOKiK President two new investigative powers: the power to request information without prior initiation of proceedings and the power to take steps to purchase a product for the purpose of collecting information that may constitute evidence concerning practices infringing collective consumer interests (a mystery shopper).

⁸ Explanatory notes accompanying the draft of Act amending the Act on Competition and Consumer Protection and certain other acts, p. 1.

⁹ OJ L 95, 21.04.1993, p. 29–34 (hereinafter, the Directive).

administrative bodies. The decision as to whether control of such contractual provisions should be made in proceedings held before a court or before competent administrative bodies has been left to member states.

Taking into consideration the fact that Polish legal rules on abstract control of standard forms of agreements concluded with consumers constitute the measure required by aforementioned EU law, the question arises as to whether the new Polish model may be deemed as an appropriate and effective means of preventing the continued use of unfair terms within the meaning of the Directive. In order to find an answer to the above question, the paper analyses the new model of abstract control of standard forms of agreements concluded with consumers and compares it with the previous legal rules.

II. New model of abstract control of standard forms of agreements concluded with consumers

1. Proceedings in cases for the classification of contractual provisions found in standard forms of agreements as abusive clauses

The Polish model of control of standard forms of agreements concluded with consumers provides for two different types of proceedings: “individual control” and “abstract control”. The former is undertaken via court proceedings where the court controls the terms of a standard form of an agreement concluded between a consumer and an undertaking, both being party to given proceedings. In other words, in this type of proceedings, the court controls the terms of a standard form of agreement on the basis of an individual contract that had already been concluded by the procedural parties. By contrast, abstract control is undertaken in specific proceedings where the terms of a standard form of an agreement are controlled regardless of the legal relationship between the parties and the agreement concluded by them. While the Amendment Act of 2015 has completely changed the model of abstract control proceedings, individual control proceedings have not been modified. Abstract control was introduced into the Polish legal system by the Act of 2 March 2000 on the protection of certain consumer rights and liability for damage caused by a hazardous product¹⁰, which came into force on 1 July 2000.

Before the Amendment Act of 2015 came into force, abstract control of standard forms of agreements concluded with consumers was undertaken

¹⁰ Journal of Laws 2000, Number 22, item 271; unavailable in English.

through court proceedings. They were initiated, in the first instance, before the Regional Court of Warsaw – the Court of Competition and Consumer Protection (in Polish: *Sąd Ochrony Konkurencji i Konsumentów*, hereinafter, SOKiK)¹¹. The standing to bring an action before the court in order to initiate abstract control of standard forms of agreements was granted to a wide circle of entities: anyone who according to the defendant's offer could conclude a contract containing a provision which was being controlled, non-governmental consumer organizations (national, as well as, since 15 December 2002, also foreign¹²), district (municipal) consumer ombudsman, and the UOKiK President.

The Amendment Act of 2015 changes abstract control proceedings completely switching it from the court proceedings model into the administrative proceeding model conducted by the UOKiK President. As a result, a new type of proceedings were created to be conducted before the UOKiK President – proceedings in cases for the classification of contractual provisions found in standard forms of agreements as abusive clauses¹³. Hence, since 17 April 2016, Article 47(1) of the Competition Act contains four separate types of proceedings conducted by the UOKiK President on the basis of the Competition Act: preliminary proceedings, antitrust proceedings, proceedings in cases for the classification of contractual provisions found in standard forms of agreements as abusive clauses, and proceedings in the case of practices infringing collective consumer interests. The change of the model of abstract control of standard forms of contractual provisions does not mean that the role of SOKiK in this type of control has been eliminated – SOKiK is competent to hear appeals against decisions issued by the UOKiK President in this regard.

¹¹ Hereinafter, SOKiK. Appeals from the SOKiK's judgments are heard by the Court of Appeals in Warsaw (in Polish: *Sąd Apelacyjny w Warszawie*), whereas cassation appeals filed against rulings of the Court of Appeals in Warsaw are heard by the Supreme Court (in Polish: *Sąd Najwyższy*).

¹² This applied only to a foreign consumer organization, which was entered on the list of organizations authorized in the European Union to initiate proceedings for the classification of clauses in standard forms of agreement as illegal, published in the Official Journal of the European Communities, provided that the purpose of its activity justified the requested control regarding the standard forms of agreements used in Poland, which threatened the interests of consumers in the country where this organization was registered. Such foreign consumer organizations received the right to initiate proceedings by the Act of 05.07.2002 amending the Act on Competition and Consumers Protection and the Code of Civil Procedure and Act on Unfair Competition (Journal of Laws 2002, Number 129, item 1102); unavailable in English.

¹³ The Directive uses the term 'unfair term' whereas the Polish law uses the term 'abusive clause'. Due to the fact that this article concerns Polish legal rules on the new model of abstract control of standard forms of agreements concluded with consumers the author will use the term 'abusive clause'.

Proceedings in cases for the classification of contractual provisions found in standard forms of agreements as abusive clauses are being initiated by the UOKiK President acting *ex officio*. The fact that the Amendment Act of 2015 does not give the right to initiate abstract control proceedings to any other entity constitutes a major change in comparison to the previous court proceedings model, where a lawsuit brought by an authorized entity initiated the proceedings. It should be noted that under the previous legal rules on abstract control proceedings, massive lawsuits in this kind of cases¹⁴ were brought mostly by consumer organisations¹⁵. As it was stated in the explanatory notes accompanying the draft of the Amendment Act of 2015, the proposed changes were meant to reduce actions of some quasi-consumer organisations that were pursuing cases in order to receive financial profits¹⁶. The current solution should inevitably decrease the number of proceedings in the cases for the classification of contractual provisions found in standard forms of agreements as abusive clauses. This is supported by the information that until 22 June 2016, the UOKiK President has not initiated any proceedings in cases for the classification of contractual provisions found in standard forms of agreements as abusive clauses¹⁷.

The resolution that institutes proceedings may be preceded by a written notification submitted to the UOKiK President of a suspected infringement of the prohibition of using abusive clauses in standard forms of agreements referred to in Article 23a of the Competition Act. According to Article 99a(1) of the Competition Act, the following entities are entitled to submit such written notifications: a consumer, consumer ombudsman, the Insurance Ombudsman (in Polish: *Rzecznik Konsumentów*), a consumer organisation or a foreign organisation. The latter must be registered on the list of organisations which have the power in EU Member States to file a request for proceedings to be instituted concerning the classification of clauses in standard agreements as abusive, published in the Official Journal of the European Communities, where the object of the activity of such organisation warrants the submission by such organisation of a notification concerning standard agreements used in

¹⁴ The number of cases regarding abstract control pending before SOKiK: in 2011 – 5976, in 2012 – 13954, in 2013 – 41016, in 2014 – 3109, in 2015 – 1968.

¹⁵ On 31.12.2015, there were 6227 abusive clauses entered into the register of provisions of standard forms of agreements classified as abusive clauses. In 3424 of those cases consumers organisations acted as plaintiffs – this means that almost 55% of those cases were initiated by consumer organisations. However, this statistics involves only those proceedings, which have ended with a judgment recognizing a controlled contractual provision as an abusive clause.

¹⁶ Explanatory notes accompanying the draft of Act amending the Act on Competition and Consumer Protection and certain other acts, p. 8.

¹⁷ Data on the basis of a response to a request for public information (motion no. BP/0143-569/16).

the Republic of Poland which jeopardise collective consumer interests in the Member State where the organisation has its seat. The written notification of a suspected infringement of the prohibition referred to in Article 23a of the Competition Act is not binding on the UOKiK President. This means that in any case the UOKiK President remains independent to decide whether to initiate abstract control proceedings or not. Nevertheless, due to the non-binding character of the written notification of a suspected infringement, even if the UOKiK President receives such notification from an entity not listed in the above legal rules, this will not deprive the UOKiK President of the right to initiate proceedings.

Another change introduced by the Amendment Act of 2015 is the limitation of the scope of entities who are party to the proceedings regarding abstract control of standard forms of agreements concluded with consumers. Under the previous legal rules (court proceedings model), the following entities were party to such proceedings: the plaintiff (the entity that brought the action before SOKiK in order to initiate abstract control proceedings) and the defendant (the undertaking that used a standard form of an agreement that included a contractual provision which was subject to the abstract control in the specific proceedings). Those entities had a wide scope of powers that could have been used in order to influence the judgement (for instance, the right to present evidences, the right to present their views, the right to appeal the decision etc.). In the proceedings for the classification of contractual provisions found in standard forms of agreements as abusive clauses initiated on the basis of Poland's new legal rules (that is, those initiated as of 17 April 2016), the status of a procedural party is granted only to the investigated entity, that is, the undertaking against which the proceedings have been initiated¹⁸. Due to the fact that such proceedings are initiated against the entity that included a contractual provision which is subject to abstract control in proceedings conducted by the UOKiK President, the new abstract control model has only one party to the proceeding – the undertaking that uses or used to use the term subject to the control.

Importantly, the entity that submits to the UOKiK President a written notification of a suspected infringement of the prohibition of using abusive clauses in standard forms of agreements referred to in Article 23a of Competition Act, does not have the status of a procedural party. The entity authorised under the Article 99a(1) of the Competition Act to submit such a notification may only apply to the UOKiK President to become an interested party, who is not, however, a procedural party and whose rights in such proceeding are limited to two powers only: the power to file documentation

¹⁸ Article 99b(1) of the Competition Act.

and explanations as to the facts of the case, and the power to review the case files¹⁹. An interested party does not have the right to appeal the decision²⁰, which means that the UOKiK President's decision can be appealed only by the investigated entity. It should be emphasised that when proceedings are initiated as a result of information and evidences indicated in a notification of a suspected infringement of the prohibition referred to in Article 23a of Competition Act from an entity not listed in Article 99a(1) of the Competition Act, such entity cannot become an interested party (see Jurkowska-Gomułka, 2016, p. 113). The design of Poland's new legal rules regarding the scope of the entities that act in proceedings regarding abstract control of standard forms of agreements concluded with consumers, as well as rights given to such entities, leads to a serious limitation of the role of consumer organisations in abstract control proceeding (on the status and the role of consumer organisations in abstract control proceedings see more: Korycińska-Rządca, 2016b, p. 18–28).

Proceedings in cases for the classification of contractual provisions found in standard forms of agreements as abusive clauses shall last no longer than four months and, in particularly complex cases, five months from the date when it was initiated²¹. However, the indicated length of the proceedings is of an instructive nature only (Namysłowska, 2016b, p. 127). Under the previous legal rules, there was no deadline for the court proceeding before SOKiK to be closed.

2. Decisions in cases for the classification of contractual provisions found in standard forms of agreements as abusive clauses

Proceedings in cases for the classification of contractual provisions found in standard forms of agreements as abusive clauses can end with the following decisions:

- 1) decision classifying a clause found in a standard form of an agreement as abusive and prohibiting the use of that clause²² or by a commitment decision²³;
- 2) decision on the discontinuation of the proceedings²⁴.

¹⁹ Article 99c(5)-(6) of the Competition Act.

²⁰ Article 99c(7) of the Competition Act.

²¹ Article 99e of the Competition Act.

²² Article 23b(1) of the Competition Act.

²³ Article 23c(1) of the Competition Act.

²⁴ Article 83 of the Competition Act in connection to Article 105 of the Act of 14.06.1960 – Code of Administrative Procedure (consolidated text: Journal of Laws 2016, item 23 as amended).

A decision classifying a clause found in a standard form of an agreement as abusive as well as prohibiting the use of that clause is issued if the UOKiK President finds the prohibition specified in Article 23a of the Competition Act to have been infringed. According to rules on the limitation period, referred to in Article 99f of the Competition Act, the fact that the contested contractual provision has ceased to be applied does not exclude the issuance of this type of decision, provided the proceedings were initiated before the period stipulated in this legal rule has passed²⁵. In a decision classifying a clause found in a standard form of an agreement as abusive, the UOKiK President may also specify measures for remedying the ongoing effects of the infringement of the prohibition referred to in Article 23a²⁶. Such measures may be imposed only if they are proportionate to the severity and nature of the infringement as well as necessary to remedy its consequences²⁷. Article 23b(2) of the Competition Act indicates what exemplary, informative measures may be imposed in this context: to inform consumers who are party to individual contracts based on the applicable standard form of an agreement that clauses contained therein have been recognized as abusive, or to make a single, or recurring statement of the wording and in the form specified in the decision. The UOKiK President can also impose different measures not listed in this legal rule. In such decision, the UOKiK President may order that the decision shall be published in whole or in part, indicating clearly whether the decision is legally binding, in the form specified therein, at the undertaking's expense²⁸. The publication of a decision classifying a clause found in a standard form of an agreement as abusive, may contribute to enhancing the effectiveness of the abstract control of standard forms of an agreement as it helps communicate more easily the abusive nature of a given contractual provision to consumers, and encourage them to undertake steps in order to defend their rights. The Amendment Act of 2015 authorises the UOKiK President to rule that the decision is immediately enforceable in whole or in part where an important consumer interest so requires²⁹.

The possibility of the issuance of a commitment decision has been indicated in Article 23c(1) of the Competition Act. However, the wording of this legal rule leads to the conclusion that a commitment decision does not constitute a separate type of decision but rather is a part of a decision classifying a clause in a standard form of an agreement as abusive, issued under the Article 23b(1) of the Competition Act (Namysłowska, 2016a, p. 33). This

²⁵ About the limitation period see the remarks in II.3. of this article.

²⁶ Article 23b(2) of the Competition Act.

²⁷ Article 23b(4) of the Competition Act.

²⁸ Article 23b(3) of the Competition Act.

²⁹ Article 99d of the Competition Act.

differentiates a commitment decision issued in abstract control proceedings from commitments decisions that may be issued in other proceedings conducted by the UOKiK President, that is, in antitrust proceedings (Article 12 of the Competition Act) and in proceedings concerning practices infringing collective consumer interests (Article 28 of the Competition Act). The introduction of the possibility to issue a commitment decision has been seen by the authors of the draft of Amendment Act of 2015 as beneficial from both consumers' (it should eliminate the abusive clauses quicker) and undertakings' (a fine will not be imposed on the undertaking and the undertaking will have an impact on the imposed commitments) point of view³⁰. In order to issue a commitment decision the following premises have to be fulfilled: 1) a decision classifying a clause in a standard form of an agreement as abusive shall be issued; 2) the undertaking shall make a commitment to take or cease certain actions in order to stop the infringement of the prohibition referred to in Article 23a of the Competition Act; 3) the commitment shall be made prior to the issuance of the decision referred to in Article 23b(1) of the Competition Act. The fulfilment of all of those premises is a condition *sine qua non* of the issuance of the commitment decision. However, even if all of those premises are fulfilled, the UOKiK President is not obliged to issue such a decision as the issuance of a commitment decision depends on the UOKiK President's discretion. The UOKiK President may specify the time limit for the fulfilment of the commitment and may impose on the undertaking an obligation to provide, within a specified time frame, information regarding the extent of the fulfilment of the commitments³¹. A commitment decision may be revoked in that part which concerns the commitments if: 1) the decision was issued on the basis of false, incomplete or misleading information or documents; 2) the undertaking has not complied with the commitments or obligations. If the UOKiK President revokes the commitment decision on the abovementioned legal basis, he may impose a fine on the undertaking. A commitment decision may also be revoked, this time upon the undertaking's consent, with regard to that part of the decision which concerns the commitments, if circumstances, having a significant impact on the issuance of the decision, have changed³². However, in this situation, the UOKiK President is not entitled to impose a fine on the undertaking (Namysłowska, 2016a, p. 40–41).

The last type of decision that the UOKiK President can issue in abstract control proceedings is a decision on the discontinuation of the proceedings. This type of decision is issued when the proceedings do not provide evidences

³⁰ Explanatory notes accompanying the draft of Act amending the Act on Competition and Consumers Protection and the Code of Civil Procedure, p. 20.

³¹ Article 23c(2)–(3) of the Competition Act.

³² Article 23c(7) of the Competition Act.

that the prohibition referred to in Article 23a of the Competition Act has been infringed or when the UOKiK President initiated proceedings despite the fact that the limitation period stipulated in Article 99f of the Competition Act had already passed³³.

By way of the Amendment Act of 2015, the Polish legislature has also eliminated doubts which had existed with relation to the earlier control model concerning the binding force of final judgements declaring a specific contractual provision to be an abusive clause. According to Article 479⁴³ of the Code of Civil Procedure, a final judgement has an effect from the moment when the contractual provision classified as abusive has been entered into the register of provisions of standard forms of agreements recognized as abusive clauses. Two interpretations were possible on the basis of this legal rule: 1) the ban imposed on using the abusive clause applied only to the undertaking that was the party to the abstract control proceedings³⁴ or 2) the contractual provision classified as an abusive clause in abstract control proceedings and entered into the register cannot be used by any undertaking, that is, this prohibition applies also to undertakings that were not party to the given proceedings³⁵. In recent jurisprudence, the first interpretation prevails³⁶. However, doubts as to the scope of the binding force have not been dispelled (on the binding force of SOKiK judgements recognizing contractual provisions as abusive see more: Korycińska-Rzałdca, 2016a, p. 175–190). The Amendment Act of 2015 introduced Article 23d into the Competition Act whereby a legally binding decision recognizing a clause in a standard form of agreements as abusive is effective with respect to the undertaking determined to be using the abusive clause and with respect to all consumers who have concluded an agreement with that undertaking on the basis of the standard form of an agreement specified in that decision. This legal rule applies to a decision issued on the basis of Article 23b(1) of the Competition Act as well as on the basis of Article 23c(1) of the Competition Act (commitment decision).

The new legal rules on the scope of the binding force of a decision classifying a clause in a standard form of agreements as abusive shall be assessed positively for the following reasons: 1) it clearly indicates the scope of the binding force, dispelling any doubts existing on the basis of the former legal rules, 2) it protects

³³ About the limitation period see in II.4. of this paper.

³⁴ See e.g.: Polish Supreme Court judgements of 12.04.2011, III SK 44/10, of 30.05.2014, III CSK 204/13; Court of Appeals in Kraków of 09.06.2015, I ACa 404/15, Court of Appeals in Warsaw of 04.11.2014, VI ACa 74/14.

³⁵ Polish Supreme Court resolution of 13.07.2006, III SZP 3/06.

³⁶ See: Polish Supreme Court resolution of 20.11.2015, III CZP 17/15; available in Polish at <http://www.sn.pl/> (30.07.2016) as well as Polish Supreme Court judgements of 12.04.2011, III SK 44/10, of 30.05.2014, III CSK 204/13. Differently: Polish Supreme Court decision of 14.02.2012, III SK 32/11, Court of Appeals in Warsaw of 29.11.2012, VI ACa 821/12.

the right to defence of undertakings that were not a party to the proceedings regarding abstract control of provisions found in the standard form of an agreement that were ultimately classified as abusive, and 3) it protects all consumers that are (or could be) parties to a contract using an abusive clause. Moreover, the new rules are in compliance with recent judgements regarding the interpretation of Article 479⁴³ of the Code of Civil Procedure³⁷.

3. Limitation period

Under Article 479³⁹ of the Code of Civil Procedure³⁸, which has been repealed by the Amendment Act of 2015, an action to recognize the provisions of standard forms of agreements as abusive clause could not be brought if the defendant discontinued the use of this provision not later than six months earlier. This relatively short limitation period has been extended by the Amendment Act of 2015. As a result, from 17 April 2016, proceedings for the classification of contractual provisions found in standard forms of agreements as abusive clauses shall not be initiated if three years have passed since the end of the year when the provision had ceased to be applied³⁹. It was indicated in the explanatory notes accompanying the draft of the Amendment Act of 2015 that the 3-years period was an optimal period of time allowing for the effective prosecution of undertakings using abusive clauses, including those provisions that ceased to be applied. Simultaneously however, it did not overextend the period of the threat of a fine⁴⁰.

Article 99f of the Competition Act excludes only the possibility to initiate abstract control proceedings after the limitation period has passed. It does not, however, limit the UOKiK President's power to issue a final decision in this kind of proceedings, provided they had been initiated before the 3-years period referred to in this legal rule had passed (see: Namysłowska, 2016c, p. 128). Hence, if proceedings for the classification of contractual provisions found in standard forms of agreements as abusive clauses are initiated despite the fact that the limitation period indicated in Article 99f of the Competition Act had passed, the UOKiK President is obliged (acting *ex officio*) to discontinue the proceedings due to the fact that the proceedings are groundless (Miąsik, 2014, p. 1208).

³⁷ See the judgements indicated above.

³⁸ Act of 17.11.1964 – the Code of Civil Procedure (consolidated text: Journal of Laws 2014, item 101 as amended).

³⁹ Article 99f of the Competition Act.

⁴⁰ Explanatory notes accompanying the draft of Act amending the Act on Competition and Consumers Protection and the Code of Civil Procedure, p. 21.

4. Fines

The Amendment Act of 2015 extends the list of infringements for which the UOKiK President may impose a maximum fine of 10% of the turnover generated in the financial year preceding the year in which the fine is imposed. Since 17 April 2016, alongside the infringement of the prohibition of competition-restricting practices, performing a concentration without obtaining consent from the UOKiK President, and an infringement of the prohibition of practices infringing collective consumer interests, the aforementioned fine may be imposed for an infringement of the prohibition provided for in Article 23a of the Competition Act. This change is connected to the change of the model of abstract control proceedings of standard forms of agreements that are controlled in the new proceedings conducted by the UOKiK President. As indicated in the explanatory notes accompanying the draft of the Amendment Act of 2015, the introduction of fines for the infringement of the prohibition imposed on the use of abusive clauses in consumer contracts was necessary to ensure the effectiveness of this prohibition⁴¹.

The introduction of a fine for the infringement of the prohibition indicated in Article 23a of the Competition Act shall be assessed positively. However, the manner of calculating the fine may raise objections. The authors of the draft of the Amendment Act of 2015 have not explained the reasons for their decision to introduce financial penalties that might result in very high fines. Still, Article 106(1) of the Competition Act only stipulates the maximum amount of the fine – it does not prevent the UOKiK President from imposing a fine of a lower level. That is so especially since the determination of the amount of the fine for an infringement of Article 23a of the Competition Act shall be made in accordance with the rules indicated in Article 111 of the Competition Act.

5. Role of the register of contractual provisions found in standard forms of agreements classified as abusive clauses

While implementing the Directive, the Polish legislature decided that in order to eliminate abusive clauses from contracts concluded with consumers, a register of contractual provisions found in standard forms of agreements classified as abusive clauses shall be created⁴². According to Article 479⁴⁵ § 1 and § 2 of

⁴¹ Explanatory notes accompanying the draft of Act amending the Act on Competition and Consumers Protection and the Code of Civil Procedure, p. 23.

⁴² Explanatory notes accompanying the government draft of Act on the contracts concluded of contracts concluded outside the business premises or at a distance and amending the Acts: the Civil Code, the Code of Civil Procedure and the Code of Petty Offenses, that was submitted

the Code of Civil Procedure, a copy of a final court judgement upholding the claim, that is, a ruling classifying a given contractual provision as abusive, is sent to the UOKiK President in order for it to be entered into the register of the provisions of standard forms of agreements classified as abusive clauses⁴³. The idea to introduce a register into the Polish legal order was taken from France⁴⁴.

The register of provisions found in standard forms of agreements classified as abusive clauses was subject to criticism, especially due to the fact that the register was overextended⁴⁵ and the abusive clauses were entered chronologically. Moreover, the data published in the register did not make the verification possible of the reasons for a judgment classifying a given contractual provision as an abusive clause (see: Marecki and Witkowski, 2013, p. 18D–19D; Wyżykowski, 2013, p. 36). Voices emerged in literature that the reasons for judgments should be published⁴⁶, but there was no legal basis for that. The verification of the register by entrepreneurs was thus complicated.

The Amendment Act of 2015 introduced a new manner of communication of provisions found in standard forms of agreements classified as abusive clauses by the UOKiK President. Since 17 April 2016, each decision issued by the UOKiK President shall be published on the website of the Office of Competition and Consumer Protection (in Polish: *Urząd Ochrony Konkurencji i Konsumentów*)⁴⁷, albeit without business secrets or other information protected under separate legal rules⁴⁸. The publication of the entire decision enables interested parties to check why the given provision was classified as abusive. The Polish legislature has decided that there was no justification to uphold the register of the provisions found in standard forms of agreements classified as abusive clauses. At the same time, however, the legislature decided that the register, in the same form, will exist for the next 10 years from the date when the Amendment Act of 2015 comes into force (in other words, until 17 April

to the Sejm on 26.02.1999, p. 15; available at <http://orka.sejm.gov.pl/> (23.07.2016); unavailable in English.

⁴³ The register of provisions of standard forms of agreements recognized as abusive clauses is available at: https://uokik.gov.pl/rejestr_klauzul_niedozwolonych2.php.

⁴⁴ Explanatory notes accompanying the government draft of the Act on the contracts concluded outside business premises or at a distance and amending the Acts: the Civil Code, the Code of Civil Procedure and the Code of Petty Offenses, that was submitted to the Sejm on 26.02.1999, p. 15; available at <http://orka.sejm.gov.pl/> (23.07.2016); unavailable in English.

⁴⁵ On 22.07.2016 there were 6513 abusive clauses entered into the register of provisions of standard forms of agreements recognized as abusive clauses.

⁴⁶ P. Marecki and S. Witkowski suggested that the reasons for the judgements should be published in an electronic data base available on the website of the Office of Competition and Consumer Protection (see: Marecki and Witkowski, 2013, p. 21D). Also: Korycińska-Rządca, 2016a, p. 175–190.

⁴⁷ Hereinafter, the UOKiK Office.

⁴⁸ Article 31b of the Competition Act.

2026). However, the provisions the legality of which will be questioned by the UOKiK President from now on shall not be entered therein. This basically means that from 17 April 2016 onwards, two manners of communication of the wording of abusive clauses coexist in Poland depending on the legal rules on the basis of which the legality of the given provision is questioned. First, those provisions which are recognized as abusive clauses in court proceedings conducted on the basis of the previous rules are entered into the register. Second, those provisions that will be recognized as abusive clauses by the UOKiK President in proceedings in cases for the classification of contractual provisions found in standard forms of agreements as abusive clauses will be published together with the entire decision on the website of the UOKiK Office (about the role of the register of provisions of standard forms of agreements recognized as abusive clauses after 17 April 2016 see more in: Korycińska-Rządca, 2016a, p. 175–190).

The aforementioned changes regarding the manner of communication of decisions issued in cases of abstract control of consumer contract terms should enable entrepreneurs to uncover the reasons for the decision to classify a given term as abusive. However, the change of the manner of communication of contractual provisions classified as abusive clauses introduced by the Amendment Act of 2015 means that as of 17 April 2016, Polish law no longer provides for a document that includes all of the contractual provisions classified as abusive clauses. The register will exist for the next 10 years, but it will not be expanded to include contractual provisions classified as abusive from now on by the UOKiK President. Therefore, the register will slowly become a historical document. Unfortunately, Polish legislature did not introduce another register that could replace the current one.

III. Conclusions

In the author's opinion, the new changes introduced into the Polish legal rules on abusive clauses in standard forms of consumer contracts are, as a rule, in compliance with the pattern of such control established by the Directive. Most of the adopted amendments have the potential to strengthen consumer protection. First of all, they should decrease the number of proceedings regarding abstract control of contractual terms in consumer contracts due to the fact that decisions whether abstract control of contractual terms in consumer contracts should be initiated or not will belong solely to the UOKiK President. Therefore, the phenomenon of massive abstract controls of terms of contracts concluded with consumers should end. This creates hope that the

institution of abstract control of terms in contracts concluded with consumers will be used for the purpose for which it was initially created. Second, changes regarding the manner of communication of decisions in cases of abstract control of consumer contract terms should enable undertakings to uncover the reasons for the classification of a given contractual provision as abusive. However, the decision to dissolve the register of contractual provisions of standard forms of agreements classified as abusive clauses raises the question whether its elimination was necessary. It is likely that an extension of the current register, in order to include at least a short explanation of the reasons for a given decision, would be sufficient to counteract the criticism directed towards the initial model of the register.

Regarding the new Polish model of the abstract control of standard forms of agreements concluded with consumers under the Competition Act, most concerns are linked to the serious limitations of the role of consumer organizations. In the author's opinion, such a significant limitation of their role was not justified. The fact that consumer organizations exploited the previously applicable legal rules in order to gain financial profits was not an adequate reason to introduce such limitations. That is so especially, since the first step aimed at reducing the numbers of cases initiated by consumer organizations was taken thanks to a reduction in attorneys' fees in those proceedings, which took place in 2013⁴⁹. This change has significantly decreased case numbers proving that this method might have been appropriate to regain the initial purpose of this proceeding. Moreover, in the author's opinion, a serious limitation of rights previously granted to consumer organizations leads to the conclusion that consumer organizations are not likely to engage in abstract control proceedings conducted by the UOKiK President.

Literature

- Jurkowska-Gomułka, A. (2016). Art. 99a. In M. Namysłowska, A. Piszcz (eds), *Ustawa o zmianie ustawy o ochronie konkurencji i konsumentów z 5.8.2015 r. Komentarz*. Warszawa: Wydawnictwo C.H. Beck, 109–118.
- Korycińska-Rządca, P. (2016a). Elektroniczny rejestr postanowień wzorców umowy uznanych za niedozwolone po 17.04.2016 r. In J. Bieluk, A. Marciniak (eds), *Postępowanie i prawo cywilne w dobie informatyzacji*. Sopot: Currenda.

⁴⁹ The Ordinance of the Minister of Justice of 23.01.2013 amending the ordinance on legal advisors' fees and the covering by the State Treasury of the costs of legal assistance provided by court-appointed counsel (Journal of Laws 2002, No. 163, item 1348) has reduced the fees of legal advisors in proceedings in cases for the classification of contractual provisions found in standard agreements as abusive clauses from 360 PLN to 60 PLN.

- Korycińska-Rządca, P. (2016b). Status prawny i rola organizacji konsumenckich w postępowaniu w sprawach o uznanie postanowień wzorca umowy za niedozwolone. *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 3(5), 18-28. DOI: 10.7172/2299-5749.IKAR.3.5.2.
- Marecki, P. and Witkowski, S. (2013). Rejestr postanowień wzorców umowy uznanych za niedozwolone – identyfikacja aktualnych problemów i propozycje zwiększenia efektywności rejestru. *Radca Prawny* 138, 16D–21D.
- Miąsik, D. (2014). Art. 105. In T. Skoczny (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*. Warszawa: Wydawnictwo C.H. Beck, 1205–1208.
- Namysłowska, M. (2016a). Art. 23c. In M. Namysłowska, A. Piszcz (eds), *Ustawa o zmianie ustawy o ochronie konkurencji i konsumentów z 5.8.2015 r. Komentarz*. Warszawa: Wydawnictwo C.H. Beck, 30–41.
- Namysłowska, M. (2016b). Art. 99e. In M. Namysłowska, A. Piszcz (eds), *Ustawa o zmianie ustawy o ochronie konkurencji i konsumentów z 5.8.2015 r. Komentarz*. Warszawa: Wydawnictwo C.H. Beck, 126–128.
- Namysłowska, M. (2016c). Art. 99f. In M. Namysłowska, A. Piszcz (eds), *Ustawa o zmianie ustawy o ochronie konkurencji i konsumentów z 5.8.2015 r. Komentarz*. Warszawa: Wydawnictwo C.H. Beck, 128–130.
- Piszcz, A. (2016). A Note on 2015 Developments in Polish Competition Law: Is It Really a Drive Towards the European Model? *YARS* 9(14).
- Skoczny, T. (2015). 2014 Amendment of the Polish Competition and Consumers Protection Act 2007. *YARS* 8(11), 165–183.
- Wyżykowski, B. (2013). Abstrakcyjna kontrola postanowień wzorców umów. *Przegląd Prawa Handlowego* 10, 30–40.

C A S E C O M M E N T S

What Role for EU Competition Law in Regulated Industries? Reflections on the Judgment of the General Court of 17 December 2015

Orange Polska v European Commission (Case T-486/11)

by

Sandra Marco Colino*

CONTENTS

- I. Introduction
- II. Background: the behaviour of Orange Polska and the decision of the Commission
- III. The Judgement of the General Court
 1. Duty to motivate findings of past infringements
 2. Adequacy of the fine: where is the effects-based approach?
 3. Mitigating factors and the prior intervention of NRAs
- IV. The significance of the GC's Orange Polska ruling: an assessment
- V. Conclusion

Key words: antitrust; competition law; sector-specific regulation; network industries; refusal to supply; essential facilities.

JEL: K20; K21; K22; K23

* Assistant Professor, Faculty of Law, Chinese University of Hong Kong. Director, Centre for Financial Regulation and Economic Development (CFRED). Deputy Director, European Union Academic Programme in Hong Kong (EUAP). Non-Governmental Advisor to the International Competition Network. E-mail: s.marcocolino@cuhk.edu.hk

The work described in this paper was substantially supported by a grant from the Research Grants Council of the Hong Kong Special Administrative Region, China (Project No. CUHK 401612).

Article received: 2 September 2016; accepted: 9 October 2016.



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.

I. Introduction

On 17th December 2015, the General Court of the European Union (GC) confirmed a fine of over EUR 127 million imposed by the European Commission (hereinafter the Commission) on the Polish telecommunications company Orange Polska (hereinafter OP), formerly known as Telekomunikacja Polska¹. According to the fining decision, issued in 2011 (hereinafter the Commission decision), OP abused its dominant position by refusing access to its wholesale broadband services to new entrants, acting in contravention of Article 102 of the Treaty on the Functioning of the European Union (TFEU)².

Abuse of dominance is a particularly convoluted area of competition law. The long-awaited judgments of the GC in *Intel*³ and of the Court of Justice in *Post Danmark II*⁴, handed down shortly before the *Orange Polska* ruling, have absorbed the attention of antitrust experts, and the ongoing Google investigation is the *cause célèbre* of the moment. In such an unsettled context, the case against the Polish incumbent has gone somewhat by the wayside. Yet the GC's endorsement of the Commission decision is not without significant implications for the treatment of constructive refusals to supply in network industries. By confirming the imposition of one of the most substantial financial penalties ever levied on a broadband Internet service provider, the European courts have once again given their blessing to the Commission's activism in the liberalization of telecommunications markets (de Streel, 2014). Interestingly, by the time OP was punished, the infringement had allegedly come to an end following the intervention of the national regulatory authority (hereinafter NRA). The decision thus fanned the flames of the debate, particularly fervent among Polish scholars, as to whether competition law should intervene where there is sector-specific regulation.

The argument that the action of the relevant NRAs should be prioritised over the application of competition law by the national competition authorities (NCAs) and the Commission in regulated industries (Stawicki, 2011) finds support in the prevailing view in the United States (US) that treats regulation and antitrust as antonyms (Maggiolino, 2015; Díez, 2015)⁵. Such a position has been somewhat fuelled by the relatively inconsistent case law of the Polish Supreme Court, which has appeared to suggest that incumbent operators

¹ Case T-486/11 *Orange Polska S.A. v European Commission* 17 December 2015 (nyr), hereinafter GC ruling.

² Commission decision of 22 June 2011, COMP/39.325 – *Telekomunikacja Polska*.

³ Case T-286/09 *Intel v Commission*, EU:T:2014:472.

⁴ Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651.

⁵ Case *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko* 540 U.S. 398 (2004).

should be immune to competition law when they act on the instructions of the regulator⁶. However, the predominant view is that competition law and regulation can, and should, coexist. EU competition law can step in when NRAs fall short in their attempts to ensure effective liberalization, as the landmark *Deutsche Telekom* case confirmed⁷.

The investigation of OP's behaviour is as interesting as it is complex. Since 2005, there have been decisions of the NRA, the NCA, the Court of Justice (which had to decide on the adequacy of the action taken by the Polish NCA), the Commission, and most recently the GC. This paper discusses the implications of the GC's judgment for the application of EU competition law to regulated network industries, and the power of the Commission to take action in such cases. It first explores the background against which the ruling was made, including the Commission decision (part II), to subsequently delve into the GC judgement (part III) and conduct an assessment of the significance of the case (part IV). Finally, conclusions are drawn.

II. Background: the behaviour of Orange Polska and the decision of the Commission

Between 2005 and 2009, OP provided wholesale broadband internet access services by means of unbundled access to the local loop in Poland (although the decision of the Commission is addressed to Telekomunikacja Polska, the company's former name, throughout this paper the company will be referred to as OP, for the sake of consistency). Unbundled access to the local loop allows new entrants, or Alternative Operators (AOs), to use the infrastructure of the incumbent to offer services in competition with the former monopolist. In this period, two wholesale broadband access products existed in the Polish market: unbundled access to the local loop itself (Local Loop Unbundling, LLU) and broadband access (Bitstream Access, BSA). OP was the only provider of such wholesale broadband products in the entire country, which also held a dominant position in the downstream retail market of broadband access services offered by operators to end users. To operate in the latter, OP's competitors required access to the incumbent's wholesale products. Both EU and national sectoral regulation impose an obligation on operators

⁶ Judgment of Supreme Court of 17 March 2010, case *III SK 40/09*.

⁷ Commission decision COMP/C-1/37.451, 37.578, 37.579 – *Deutsche Telekom* (2003) and case T-271/03 *Deutsche Telekom AG v Commission*, ECLI:EU:T:2008:101.

with “significant market power” to grant AOs access to LLU, and to publish a Reference Offer⁸.

The Commission initiated proceedings against OP on 17th April 2009, following an inspection of the company’s premises in 2008. The Commission alleged that the incumbent had not ensured appropriate access to its network through, *inter alia*, the following practices: unreasonable conditions for accessing its wholesale broadband products; a tendency to fail to meet the regulatory deadline of 90 days for concluding negotiations; network access restrictions through unreasonable rejections and difficult technical conditions for connecting; the limitation of subscriber lines, and unreasonable rejection of new entrants’ orders to activate them; and the failure to provide reliable general information indispensable for AOs⁹. These practices not only contravened sector-specific regulation, but also violated Article 102 TFEU insofar as they amounted to a refusal to supply which precluded AOs from competing in downstream markets.

OP questioned the Commission’s competence to act on multiple grounds. One of the principal arguments put forward in this respect related to the fact that both the NRA and the Polish competition authority had already taken action. Indeed, since 2005, the Polish NRA, *Urząd Komunikacji Elektronicznej* (hereinafter UKE) had attempted to force OP to comply with its regulatory obligations, with limited success. In a string of decisions, it fined the company for not fulfilling its obligations to grant access to the network, and imposed commitments (Kowalik-Bańczyk, 2015, p. 194). It was only under the threat of functional separation that the NRA managed to twist OP’s arm into signing a voluntary agreement in October 2009, in which the incumbent vowed to take measures to ensure genuine market access for AOs. Since the agreement failed to solve all the problems, the UKE issued further decisions in December 2010 and April 2011 to respectively encourage LLU and BSA access¹⁰. OP thus alleged that “ex post intervention by the Commission on the issues for which UKE has already exercised and continues to exercise effective control does not seem appropriate”¹¹. The Commission rejected this claim, reminding OP that the case law of the European courts had consistently defended that “competition rules may apply where sector specific

⁸ Regulation (EC) No. 2887/2000 of the European Parliament and of the Council of 18 December 2000 on Unbundled Access to the Local Loop (OJ L 336, 30.12.2000, p. 4), repealed and carried over in Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on Access to, and Interconnection of, Electronic Communications Networks and Services (OJ L108, 24.04.2002, p. 7), amended by Directive 2009/140.

⁹ Commission decision, paras 81–118.

¹⁰ Commission decision, paras 78–79.

¹¹ TP’s presentation at the Oral Hearing, p. 4.

legislation exists”¹². In this case, UKE had not assessed the compatibility of OP’s behaviour with Article 102 TFEU, so the issue was fairly straightforward. However, the company was reminded that, as recognised in *Deutsche Telekom* and *Masterfoods*, even if it had done so “the Commission cannot be bound by a decision taken by a national body pursuant to Article 102 TFEU”¹³. In any case, the Commission found that the *ne bis in idem* principle was not breached by its intervention since there was no unity of the legal interest protected¹⁴. Sectoral and competition law serve different purposes.

With regard to the action of the Polish competition authority, *Urząd Ochrony Konkurencji i Konsumentów* (UOKiK), the Commission held that its investigation had not focused on the application of Article 9 of the Polish competition law, the national equivalent of Article 102 TFEU¹⁵. Importantly, the UOKiK’s non-infringement decision was challenged before the Court of Justice by Netia SA (known at the time as Tele2 Polska), a competitor of OP. In its controversial judgement, the Court stated that Article 5 of Regulation 1/2003 should be interpreted to mean that only the Commission is empowered to make negative decisions, that is, to formally declare that no breach of EU competition law had occurred¹⁶. According to the Court, such a view aims to ensure the uniform application of Articles 101 and 102 TFEU. Unsurprisingly, the ruling has been subject to harsh doctrinal criticism. Petit, for instance, has said that it is premised on, *inter alia*, a “flawed understanding of the concept of effectiveness of EU competition law, dubious literal reading of Article 5, inconsistency with *VEBIC*, long-term legal uncertainty effects” (Petit, 2011).

As a consequence of the above reasoning, the Commission found that OP’s practices at best delayed, and at worst altogether prevented, the surge of competition in broadband markets by using its monopoly over wholesale markets to protect its dominant position in the downstream retail markets. On the basis of the Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No. 1/2003¹⁷, the Commission imposed a fine amounting to ten percent of the average value of sales on the relevant markets, and multiplied it by the duration of the unlawful behaviour. It then deducted the quantities already paid by the incumbent by virtue of the fines imposed by UKE. The final amount reached was EUR 127 554 194¹⁸.

¹² Commission decision, para. 126.

¹³ Commission decision, para. 128.

¹⁴ Commission decision, para. 137.

¹⁵ Act of 16 February 2007 on the protection of competition and consumers (Ustawa o ochronie konkurencji i konsumentów), Dz.U. 2007, No 50, pos. 331.

¹⁶ Case C-375/09, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o.* ECLI:EU:C:2011:270, para. 29, and Commission decision, para. 129.

¹⁷ OJ C 210, 01.09.2006, p. 2.

¹⁸ Commission decision, paras 917–921.

III. The Judgement of the General Court

When the case was brought before the GC, OP did not put into question the existence of abusive practices. Instead, its appeal was founded on multiple technical aspects of the Commission decision, including: the failure to prove a legitimate interest in the pursuit of a past infringement; alleged breaches of procedural guarantees required by the European Convention of Human Rights (ECHR); and the method of calculating the fine. The sheer volume of issues raised is testimony to the kind of impressive lawyering one has grown accustomed to in abuse cases, since the powerful companies under investigation usually have the means to fight until they have exhausted every defence channel. Given the impossibility to deal with every petition in this brief paper, the issues raised by the most solid grounds for appeal have been cherry-picked for discussion.

1. Duty to motivate findings of past infringements

The single plea put forward for full annulment was the fact that the infringement had allegedly ended nearly two years before the adoption of the contested decision. According to Article 7(1) of Regulation 1/2003, to pursue a past infringement the Commission would need to demonstrate a legitimate interest. The Court took this opportunity to insist on the difference between declaratory findings of past infringements and sanctions. A declaratory finding is the mere establishment of a breach (Frese, 2014, p. 162–164). The Commission adopts declaratory findings, *inter alia*, when there is a risk that the anticompetitive practice will be resumed¹⁹ and for facilitating damage claims²⁰. While such findings may be accompanied by sanctions, they are not sanctions in themselves. The Commission is under an obligation to motivate declaratory findings relating to past contraventions, but its power to punish is not time-barred and does not need to be justified²¹. As a consequence, the GC confirmed that there is no duty to prove a legitimate interest when penalties accompany the declaration of an infringement (Salerno, 2016). Read in conjunction with previous jurisprudence, the ruling heightens the broad leeway granted to the Commission to tackle past infringements: sanctions can, in principle, always be imposed, and declaratory findings are only put

¹⁹ Case 7/82 *GVL*, ECLI:EU:C:1983:52, para. 27.

²⁰ Joined cases T-22/02 and T-23/02 *Sumitomo*, ECLI:EU:T:2005:349, paras 137–138.

²¹ GC ruling, paras 69–80.

into question when they are excessively delayed²². It is hoped that in future cases the European courts will provide further clarifications as to whether the Commission's fining powers are indeed limitless in time.

2. Adequacy of the fine: where is the effects-based approach?

OP raised multiple challenges with regard to the amount of the fine imposed, all of which were quashed by the GC. Importantly, the court had to confront its repeated reluctance to adopt an effects-based approach for the analysis of abusive practices, which appears to be at odds with the Commission's (non-binding) suggestion that it would focus on consumer harm when pursuing exclusionary abuses²³. Effects were relegated to virtual irrelevance with the GC's confirmation that the Commission did not need to consider the duration and intensity of each individual practice to adjust the fine²⁴. Moreover, the court confirmed its view that actual effects are not necessary to prove an infringement. In this case, it argued, the fine was imposed as a consequence of the nature of the infringement, its geographical scope, the company's market share and its implementation of the infringement²⁵. This position is hardly surprising following the outcome of previous cases such as *Intel*, which show that specific consumer harm is not analysed when finding the existence of an abuse (Nihoul, 2014). While controversial, the message sent to incumbents about the legal consequences they may face if they prevent market access is loud and clear.

The proportionality of the substantial fine was also put into question. The GC defended the fairness of the amount given the seriousness of the breach. Once again, the categorization of the violation as serious did not require an effects analysis. According to the court, the gravity resided in the fact that the company abused its power as former legal monopoly to engage in "multiple, flagrant, persistent and intentional breaches", being fully aware of the illegality of its conduct, which affected product markets "of considerable size and social importance"²⁶.

²² *Sumitomo*, supra note 21.

²³ Guidance on the Commission's Enforcement Priorities in Applying Article [102] of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (OJ C 45, 24.02.2009, p. 7), hereinafter Guidance Paper.

²⁴ GC ruling, paras 117–57.

²⁵ GC ruling, paras 158–175.

²⁶ GC ruling, paras 178–181.

3. Mitigating factors and the prior intervention of NRAs

The relationship between sectorial regulation and competition law came up in the examination of the mitigating factors that, according to OP, the Commission overlooked when deciding the final amount of the fine. OP alleged that it had made considerable investments since entering into the agreement with UKE in order to modernise the national fixed-line infrastructure for both AOs and end users, yet those investments had not been taken into consideration to adjust the penalty. The court avoided going into a thorough analysis of the interaction of regulation and competition (Tóth, 2016). It argued that only investments that amount to compensatory measures for third parties, such as the ones in the *Nintendo* case, can be taken into consideration²⁷. The investments made by OP may have reaped some benefits to those affected by the illegal conduct, but they were not compensatory measures strictly speaking. The sole intention behind OP's investments was to avoid the functional separation threatened by UKE²⁸. In any event, the Commission had benevolently chosen the date of the signature of the agreement as the date that marked the end of the infringement²⁹.

Other mitigating factors put forward by OP were its voluntary cessation of the illegal conduct and the commitments it made. With regard to the voluntary termination of the infringements, the GC highlighted that there had to be a causal link between the interventions of the Commission and the termination of the infringement concerned³⁰. In this case, there was gradual compliance, motivated by a desire to avoid the penalties of the NRA rather than by the Commission's intervention. The causal link could thus not be established³¹. As for the commitments, the court established that the undertaking had to cooperate beyond its legal obligation to do so³². The Court found that in this case the commitments adopted did not intend to facilitate the establishment of the infringement but merely to terminate it³³. Such behaviour did not amount to special cooperation.

²⁷ GC ruling, paras 197–201.

²⁸ GC ruling, para. 197.

²⁹ GC ruling, para. 207.

³⁰ GC ruling, paras 214–215.

³¹ GC ruling, para. 213.

³² GC ruling, para. 219.

³³ GC ruling, para. 223.

IV. The significance of the GC's *Orange Polska* ruling: an assessment

The Commission's intervention against the Polish broadband incumbent once again demonstrates the institution's hands-on approach when it comes to the liberalization of regulated network industries. It does not hesitate to intercede where the actions of NRAs prove insufficient to erase the resilient vestiges of former legal monopolies. Of the tools it has at its disposal – the *ex ante* review of NRAs' decisions using Articles 7 and 7a of the Electronic Communications Framework Directive³⁴, going after Member States' for their failure to comply with EU law on the basis of Article 258 TFEU, and the use of EU competition law provisions – it relies principally on EU antitrust, the faster and less politicised means of intervention (de Streef, 2014, p. 205). The European courts, on their part, have ensured that the Commission has wide discretion to act not only where NRAs have previously acted but also, as this investigation and the related *Tele2 Polska* case prove, where NCAs seemingly do not apply Articles 101 and 102 TFEU in a way that ensures the effectiveness of EU competition law.

Is intervention through competition law necessary, or even acceptable, in heavily regulated sectors? The question is latent in OP's allegations during the investigation and appeal process. In this regard, de Streef has raised technical concerns about institutional (in)equilibrium when the Commission effectively behaves as a European telecoms regulator (de Streef, 2014, p. 206–207). At the same time, Postrel sees no need for antitrust in markets subject to constant transformation by innovation (Postrel, 1999). While the latter observation may ultimately hold true, it does not address the immediate risks inherent to the presence of incumbents in network industries, and their ability to exploit their positions to leverage their dominance³⁵. Ibáñez Colomo rightly points out that the concurrent use of competition and regulation is acceptable insofar as the two promote similar, but not identical, objectives. While regulation creates or stimulates competition in markets in which it would otherwise not spring spontaneously, antitrust protects the resulting (artificially cultivated) competition (Ibáñez Colomo, 2016, p. 3). Safeguarding competition in these markets is as paramount as in others, and sectoral regulation is not the panacea of all ills affecting network industries. Moreover, the principle of primacy of EU law would justify the precedence of Articles 101 and 102 TFEU in cases where national (sector-specific) regulation does not sufficiently or adequately protect

³⁴ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ L108, 24.04.2002 p. 33), hereinafter the Framework Directive.

³⁵ *US v Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

the interests of the Union. From this standpoint, the discretion afforded to the Commission by the European Courts to act in regulated industries would be justified where the action of NRAs is insufficient to correct the behaviour of incumbents (de Streel, 2014, p. 208).

While ruling out the application of competition law altogether is unadvisable, the – more complex – question raised by the *Orange Polska* case is *how* antitrust should apply to recently liberalised industries. There is little doubt that the Commission and the European courts adapt substantive standards to investigations affecting regulated sectors. Such adjustments are inherent to the versatile nature of competition law, and its inextricable link to the specific context in which it applies. In fact, the very *modus operandi* of Article 102 TFEU entails imposing different standards, and placing special responsibility, on companies in possession of market power. Liberalised network industries display a specific problem relating to the incumbents' continued control of an upstream market which AOs must access in order to compete in downstream markets, and which can be used as a bottleneck for effective competition in the latter. While monopoly power may be tackled with sectorial regulation, holding such control is not anticompetitive in itself. Competition law is only concerned with the use of that power with a view to eliminating competition in downstream markets. Constructive refusals to supply in network industries, such as the ones effected by OP, could well have that effect.

A consequence of this adaptability of EU competition law is that effectiveness is prioritised over consistency in its application. The GC repeatedly refers to the effectiveness of Article 102 TFEU when refuting OP's pleas. At the same time, the Commission has explicitly referred to different standards to assess refusals to supply in industries liberalized through regulation as part of its policy³⁶. The focus on the *effet utile* and the importance given to context is valuable in many respects. In dynamic markets, bright lines risk becoming mere slogans if one does not take into account the specific facts that led to the adoption of basic principles (Coates, 2016). However, the European courts need to ensure that *some* consistency is attained. Otherwise, as noted by de Streel, there is a significant risk of developing sector-specific competition law, leading to the contamination of bright lines with sectorial reasoning (de Streel, 2014). In this regard, the GC ruling against OP does not really help to reconcile effectiveness and consistency.

³⁶ Guidance Paper, para. 82.

V. Conclusion

The OP saga is not over yet, as the company has lodged an appeal against the judgement of the GC before the Court of Justice³⁷. Tóth has noted that the GC ruling reflects a firepower of EU competition law “much greater than [that of] national sector-specific regulation, which can be useful if the powers of regulatory authorities lack effectiveness” (Tóth, 2016). The case is a vivid illustration of the complexity of the concurrent intervention of NRAs applying national sectorial regulation, NCAs applying national and EU competition law, and the Commission applying EU competition law in liberalised markets. As a result of the multiplication of legal proceedings, there will necessarily be increased transaction costs and decreased legal certainty (de Streef, 2014). These issues are virtually inescapable in network industries, where the behaviour of the incumbent has repercussions for both regulation and competition law, and neither discipline alone can always fix all the harm caused by the actions of the former monopolist.

The application of competition law in situations where regulators have already intervened is not only conceivable, but may also be valuable: antitrust can help protect competition in contexts in which it has been artificially invigorated through regulation, and where the presence of incumbents with market power could hamper effective liberalisation. This view serves to justify the alleged activism of the Commission in regulated markets through Article 102 TFEU, and appears to be guiding the decision-making process of the European courts. Following the GC ruling, it is clear that the Commission has very broad powers to pursue and punish constructive refusals to supply, even if they took place in the past and the relevant NRA has already intervened to try to correct the behaviour of the incumbent. Moreover, where the NCA has also taken action, the Commission’s interference is also plausible, provided that the illegal conduct has not been adequately tackled by the national authority. In this regard, the ruling leaves two important questions unanswered. The first is whether there really is no time limit whatsoever for the issuance of fining decisions. They can seemingly be imposed retroactively and with no duty to motivate legitimate interest on the part of the Commission. The second is how to ensure the effective, decentralised application of EU competition law where, as the related *Tele2 Polska* case clarified, NCAs are precluded from making negative decisions on the application of Article 102 TFEU. While the judgement of the GC gives broad powers to act to ensure effectiveness, greater certainty might be desirable.

³⁷ Case C-123/16 P *Orange Polska v Commission*, n.yd.

Literature

- Bernatt, M. (2012). Convergence of Procedural Standards in the European Competition Proceedings. *Competition Law Review*, 8(3), 255–283.
- Coates, K. (2016). An Emerging Competition Law for a New Economy? Introductory Remarks for the Chillin Competition Panel. *21st Century Competition: Reflections on Modern Antitrust* January 21. Retrieved from: <http://www.twentyfirstcenturycompetition.com/2016/01/an-emerging-competition-law-for-a-new-economy-introductory-remarks-for-the-chillin-competition-panel/> (02.09.2016).
- Díez, F. (2015). Promoting Competition in Digital Markets: a Case Against the Google Case, and the Futile Search of ‘Neutrality’ in On-line Searches. *SSRN*. Retrieved from: <http://ssrn.com/abstract=2691058> (02.09.2016).
- Frese, M.J. (2014). *Sanctions in EU Competition Law: Principles and Practice*. Oxford: Hart Publishing.
- Ibáñez Colomo, P. (2016). EU Competition Law in the Regulated Network Industries. In: ed. J. Galloway (ed.). *Intersections of Antitrust: Policy and Regulation*. Oxford: Oxford University Press.
- Kowalik-Bañczyk, K. (2015). Regulatory Approach to Competition Law in the Practice of the Polish Competition Authority – A Critical Assessment. In: J. Drexel and F. di Porto (eds), *Competition Law as Regulation* (pp. 174-206). Cheltenham: Edward Elgar.
- Kuik, K. and Mościbroda, A. (2012). 2010 and 2011 EU Competition Law and Sector-Specific Regulatory Jurisprudence and Case Law Developments with a Nexus to Poland. *Yearbook of Antitrust and Regulatory Studies* 5(2), 157-190.
- Maggiolino, M. (2015). The Regulatory Breakthrough of Competition Law: Definitions and Worries. In: J. Drexel and F. di Porto (eds), *Competition Law as Regulation* (pp. 3–26). Cheltenham: Edward Elgar.
- Marco Colino, S. (2011). *Competition Law of the EU and UK*, 7th edn. Oxford: Oxford University Press.
- Moir, G. (2015). *Orange Polska v Commission* (Case T-486/11). *Shepherd & Wedderburn* December 17. Retrieved from: <http://www.shepwedd.co.uk/knowledge/orange-polska-v-commission-case-t-48611> (02.09.2016).
- Nuechterlein, J.E. and Weiser, P.J. (2013). *Digital Crossroads: Telecommunications Law and Policy in the Internet Age*, 2nd edn. Cambridge: MIT Press.
- Nihoul, P. (2014). The Ruling of the General Court in Intel: Towards the End of an Effect-based Approach in European Competition Law? *Journal of Competition Law and Economics* 5(8), 521–522.
- Petit, N. (2011). The Perverse Effects of the Court’s Ruling in *Tele2 Polska*. *Chillin’ Competition* June 17. Retrieved from: <https://chillingcompetition.com/2011/06/17/the-perverse-effects-of-the-courts-ruling-in-tele2-polska/> (02.09.2016).
- Postrel, V. (1999). What Really Scares Microsoft. *New York Times* Nov 8. <http://www.nytimes.com/1999/11/08/opinion/what-really-scars-microsoft.html?pagewanted=all> (02.09.2016).
- Salerno, F.M. (2016). *Orange Polska*: No Duty to Motivate the Commission’s Legitimate Interest in Finding a Past Infringement. *Journal of Competition Law & Practice* (forthcoming).

- Stawicki, A. (2011). The Autonomy of Sector-Specific Regulation – Is it Worth Protecting? Further Thoughts on the Parallel Application of Competition Law and Regulatory Instruments. *Yearbook of Antitrust and Regulatory Studies* 4(4), 115–133.
- de Streel, A. (2014). The Antitrust Activism of the European Commission in the Telecommunications Sector. In: P. Lowe and M. Marquis (eds), *European Competition Law Annual 2012: Competition, Regulation and Public Policies* (pp. 189–208). Oxford: Hart Publishing.
- Tóth, A. (2016). General Court Judgement on *Orange Polska* – Fine for Abusive Conduct. *European Networks Law and Regulation Quarterly* (forthcoming).

**Guidance on the Limits for the Use of Restrictive Clauses
in Commercial Lease Agreements – Once Again on Restrictions
“by Object”.**
**Case Comment to the Preliminary Ruling of the Court of Justice
of 26 November 2015**
SIA ‘Maxima Latvija’ v Konkurences padome (Case C-345/14)

by

Olga Stefanowicz*

CONTENTS

- I. Preliminary summary
- II. Legal context
- III. Key findings of the CJ
- IV. Analysis
 - 1. Vertical character of the right to veto
 - 2. Current state of “by object” matters
 - 3. Recent examples of the application of “by object”
 - 4. Logic and features of the “object box”
- V. Three-tier analysis
- VI. Decisive impact of market foreclosure
- VII. Code of conduct
- VIII. Conclusion

* LL.M. (FU), PhD candidate at University of Wrocław (EMS), Poland; olgastefanowicz@yahoo.pl. Article received: 11 July 2016; accepted: 18 October 2016.



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.

Key words: anti-competitive agreement; non-compete clause; vertical restriction; Article 101 TFEU; by object; by effect; market foreclosure; commercial lease agreement; shopping centres; analogous national legislation; Latvia.

JEL: K21; K42

I. Preliminary summary

The Court of Justice (hereinafter, CJ or Court) held in case C-345/14 *SIA 'Maxima Latvija' v Konkurences padome* that the inclusion of a clause that allows a tenant to indirectly select a neighbour of adjoining shopping centre spaces is not a restriction “by object”. On the example of Maxima Latvija (a supermarket chain active predominantly in the food sector), the CJ outlined under which conditions can competition law concerns arise from non-compete clauses in lease agreements concerning shop premises. The existence of a right to veto over potential tenants of adjoining shop premises may have the effect of restricting competition within the meaning of Article 101(1) TFEU, and should thus be assessed according to its market impact. Although the Court recognised that a unilateral decision on the lease of other commercial spaces is not by its nature anti-competitive, an effect-based assessment would require a multi-faceted analysis, which might still find a competition law infringement. Although the multi-criteria analysis proposed by the CJ is somewhat blurry, the judgment is a valuable contribution to the debate on the restrictive interpretation of “by object” restrictions.

What certainly emerged from the CJ’s standpoint in *Maxima Latvija* is a clarification of the “object” criterion, which has for some time now been in a state of flux. On the one hand, *Maxima Latvija* acts as a reminder to be well aware of contractual non-compete arrangements. On the other, the judgment provides comments on legal framework of vital character. However, while the remarks of the Court are meaningful, they remain vague. Nevertheless, as things stand, the CJ emphasised that the approach towards object restrictions cannot be too simplistic. The *Maxima Latvija* judgment offers a reliable approach whereby the judiciary should examine the context of each case before them, identify the type of arrangements in place, and check whether the behaviour is really “bad”. Although the content of the judgment does not provide much detail on why the potential harm contained in the scrutinised lease agreements (or more precisely, in the contested clause introduced into them) was ruled as not harmful enough, the fact has to be welcomed that the Court then looked at the clause’s effects. This is obviously also good news for undertakings active in shopping malls. However, the approach taken in the

Maxima Latvija case, apart from accurate practical and doctrinal remarks, simply does not provide them with sufficient indications how to avoid similar competition concerns in the future. There are therefore two ways out: if not to use an extended economic market analysis than to use the trial and error method, albeit the application of the latter could be costly in practice.

The article discusses the state of the law in the *Maxima Latvija* judgment, regulatory interest in the maintenance of a division into two types of competition restrictions, and some nuances noted by the Court in its judgment that are nevertheless of major significance, likely to influence future cases on contractual exclusivity in vertical relations.

II. Legal context

The retail food trade market is often recognised as problematic when it comes to the application of competition law provisions. Problems appear most frequently in the horizontal context, when competition authorities face complaints from small retailers and regarding practices conducted by large-format stores. Vertical restrictions are observed less often but they tend to cause more (or more complex) anti-competitive problems, a fact that was part of the reasoning in the *Maxima Latvija* case.

The request for a primary ruling from the Augstākā Tiesa (Supreme Court) concerned the interpretation of Article 101(1) TFEU as regards a fine imposed on Maxima Latvija (hereinafter, Company) for having concluded a series of commercial lease agreements with shopping centres. The investigated agreements contained a clause granting the Company (strategic tenant), the right to agree to the shopping centre (lessor) renting to third parties commercial premises not rented to the Company. According to the Latvian Competition Council (hereinafter, Council), the contested clause constituted a vertical restraint, the object of which was the prevention, restriction or distortion of competition. After analysing 119 of such contracts, the Council found that 12 of them contained the above anti-competitive clause. In light of this fact, the Council issued a decision imposing a fine of approximately 34,770 EUR on Maxima Latvija. The Company brought an action for annulment against that decision before the Regional Administrative Court and then appealed its judgment to the Supreme Court which referred the case to the Court of Justice. The Supreme Court saw a similarity between Latvian competition law and the wording of Article 101(1) TFEU, as well as a common public benefit of national courts applying its law in accordance with EU law. Despite the fact that the referring court found that the agreements were not of a kind that

could affect trade between Member States, it nevertheless referred a series of questions to the CJ for a preliminary ruling because of their similarities in essence.

III. Key findings of the CJ

The Court disposed of the admissibility objection first stating that it has jurisdiction to answer the questions referred to it by the Supreme Court in the interest of certainty and uniformity of EU law even if there is no effect on EU trade of the practice at hand. The line of reasoning followed by the CJ was based on the necessity to prevent future differences in the interpretation of EU competition law, irrespective of the circumstances in which they are to apply.

The CJ began its assessment by dealing with the fundamental issue of the “object or effect” of anti-competitive conduct. As for the question whether commercial lease agreements constitute a restriction “by object”, the CJ reiterated that the concept of the two types of restrictions must be interpreted restrictively¹. The prohibition laid down in Article 101(1) TFEU, according to established jurisprudence starting with the *L.T.M.* judgment² and a purely linguistic interpretation indicated by the conjunction “or”, presumes that “*an agreement must have as [its] object or effect the prevention, restriction or distortion of competition within the internal market*”. Such wording stresses not only a separable character of the two types of infringements, but also the need to consider the precise object of the agreement in the economic context in which it is to be applied.

Investigating the “object” should always take place by way of analysing the agreement in its context (John and Turner, 2015, p. 34). As a result, the essential criterion for ascertaining whether an agreement between undertakings restricts competition “by object” is to find that such coordination in itself “*reveals sufficient degree of harm*”³. Allocating a case to an “object box” would thus mean that a competition authority does not need to demonstrate an anti-competitive effect⁴. Although such approach seems to be common practice, and the CJ made it clear that this “decisional shortcut” could be taken only if

¹ *Maxima Latvija*, para. 18; see also judgment of the CJ of 11 September 2014, Case C-67/13 *P CB v Commission*, EU:C:2014:2204, para. 58.

² Judgment of the ECJ of 30 June 1966, Case 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)*, EU:C:1996:38, para. 249.

³ *CB v Commission*, para. 57.

⁴ See e.g. judgment of the GC of 14 March 2013, T-587/08 *Fresh Del Monte Produce v Commission*, EU:T:2013:129, paras 304–308.

an agreement will inevitably have a harmful effect within the internal market. In practice, the Commission has several times left the question of “by object” open and still tends to provide fertile ground for further discussion as well as charges brought by the parties to the alleged anti-competitive agreements⁵.

According to the Court, once an “object type” restriction has been ruled out, the effect of an agreement on competition must be assessed in the economic and legal context in which it occurs, and where it might combine with others to have a cumulative effect on competition. The assessment shall take into account all of the factors which determine access to the relevant market (local retail food trade). In this sense, it would always be necessary to check whether *Maxima Latvija*’s competitors could establish themselves in other commercial spaces and how accessible they are. Accordingly, competitive forces on the relevant market should play a major role in the assessment. Taking account of the economic context, it would be necessary to know the number and size of existing market operators as well as market concentration levels, consumer fidelity to existing brands and their habits. The position of the contracting parties and the duration of their agreements would constitute crucial factors also as only agreements that make an appreciable contribution to the closing-off of the market should be prohibited⁶.

IV. Analysis

1. Vertical character of the right to veto

The non-compete clause in question gave the Court an opportunity to once again look closely at the subtle distinction between restrictions “by object” and “by effect”. In *Maxima Latvija*, the CJ noted that the contested agreement, and the veto right incorporated therein, was of a vertical character. It was an agreement concluded by firms operating at different levels: a retailer and a property owner that did not compete with each other. Although vertical agreements are not normally considered as anti-competitive by their very nature, the Court looked deeper into the question how this type of agreement fits into the “by object” and “by effect” category of antitrust infringements.

⁵ Master Card MIF charges of 19 December 2007, COMP/34.579, paras 406-407. Charges brought in case T-111/08 *MasterCard* (judgment of the GC of 24 May 2012).

⁶ An extensive analysis of market foreclosure was conducted by the ECJ in judgment of 28 February 1991, Case C-234/89, paras 23–24. Here, beer supply agreements entered into by breweries the contribution of which to the cumulative effect was insignificant was deemed as not falling under the prohibition of Article 85(1) TEC.

It was a welcome move in demarcating a boundary between alternative categories of market restrictions. Since the analytical and legal framework applied in *Allianz Hungary*⁷, *Cartes Bancaires*⁸ and *Dole Food*⁹, the “by object and effect” dichotomy has relied upon a more or less unchanged legal understanding. A restriction “by object” is still commonly understood as a behaviour which, by its nature, is likely to have negative effects on the market. It is thus presumed that illegality of “by object” is not based on a presumption of anti-competitive effects, but rather on an intrinsic nature of that constraint (Chapman and Goyder, 2016, p. 318). An agreement between commercial entities is therefore considered restrictive “by object” if it harms competition, for instance, by having a negative impact on the price, quality or quantity of goods and services. Instead, a restriction “by effect”, being read disjunctively, exists when a coordination between undertakings cannot be regarded by its very nature as being harmful to the proper functioning of competition. Hence, if a legal test to identify an object restriction fails but there is still (even potential but appreciable) negative impact on competition, a detailed review of an agreement and its economic context should be conducted in order to allocate it to one of the boxes (Whish and Bailey, 2015, p. 127).

2. Current state of “by object” matters

The distinction between “by object and effect” has been confirmed by consistent jurisprudence over many years¹⁰. It was stressed by competition law practitioners and scholars¹¹ that the concept of restriction “by object” should not be given an unduly broad interpretation, nor should it be interpreted so narrowly as to deprive it of its practical effectiveness. Warnings against the mingling of an object and effect analysis have been heard loud and clear, but have never stopped the discussion on where to draw the line between the two categories of distortions. Ultimately, no exhaustive list of such practices exists even now. In fact, a detailed review of relevant jurisprudence makes it possible to even bring up the issue of the creation of a potential “third box”, hovering

⁷ Case C-32/11 *Allianz Hungária Biztosító Zrt. v Gazdasági Versenyhivatal*.

⁸ Case C-67/13 P *Groupement des cartes bancaires (CB) v Commission*.

⁹ C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission*.

¹⁰ E.g. in judgment of the ECJ of 4 June 2009, Case C-8/08 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:343, para. 28; judgment of the ECJ of 20 November 2008, Case C-209/07 *Beef Industry Development Society and Barry Brothers*, ECLI:EU:C:2008:643, para. 15.

¹¹ E.g. point 65 of the opinion of Advocate General Cruz Villalón in *Allianz Hungária Biztosító and Others* and point 44 of opinion of Advocate General Kokott in *T-Mobile Netherlands and Others*.

somewhere between the object and the effects “boxes”. Nevertheless, since there is no basis for such division in the TFEU, creating it could only add unnecessary obscurity to this already ambiguous sphere (Whish and Bailey, 2015, p. 127).

The debate on what constitutes a restriction “by object and effect” has been going on for almost fifty years. It should be stressed that an over-use by competition authorities of the “by object” category resulted in much academic commentary (Rose and Bailey, 2013, para. 2.117). The main point in the recent debate is the fact that it is not possible to precisely define the content of the “object box”. The question remains current as within the EU the Commission continues to apply the latter concept, most recently in its ongoing proceedings against corporate giants (Newman and Ruubel, 2016). The polemic is particularly relevant in practice, visible by how the “by object” concept is used in the probe concerning the agreements between Hollywood studios and pay-TV broadcasters such as Canal Plus and Sky UK¹². The Commission has come to the preliminary view that certain contractual obligations in Paramount’s agreement with Sky UK Limited and Sky Plc. (which prevented or limited Sky from responding to unsolicited requests from consumers located outside Sky’s licensed territory), had as their object the restriction of competition within the meaning of Article 101(1) TFEU. The pay-TV investigation shows the updated approach to the application of antitrust rules to new digital markets. Yet it is targeted specifically to the clarification of the modern understanding of the “by object” concept. Fifty years after the European Court of Justice first ruled on whether agreements can breach antitrust law by their very nature, the European judiciary is still looking at this complex issue.

3. Recent examples of the application of “by object”

The validity of the “by object” concept has not diminished and it has recently become a matter of a new precedence. For the first time, the Norwegian Supreme Court has asked the Court of Justice of the European Free Trade Association States (EFTA court) to give its opinion on an allegedly “by object” case (Newman and Eccles, 2016) with respect to a joint bid for a public contract by two taxi cooperatives that was labelled as having a “competition-restricting-object”¹³. A Norwegian appeals court held that a joint bid for a public

¹² Case AT.40023, Paramount Pictures commitments of 22 April 2016, available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/40023/40023_4638_3.pdf.

¹³ EFTA Court, Case E-3/16, *Ski Taxi SA, Follo Taxi SA og Ski Follo Taxidrift AS v staten v/Konkurransetilsynet*.

transport contract was anti-competitive “by object”, irrespective of whether it actually resulted in less intense competition on the relevant market. The case was appealed and has now taken an interesting turn. Despite the apparent mundane nature of the so-called “taxi case”, it contributed a valuable element to the debate. What the Norwegian and Latvian cases have in common is the important finding whereby: if there seems to be an insufficient legal basis for applying the “by object” approach, it is not impossible for the practice to be deemed illegal on the basis of an investigation into its likely effects. However, an intrinsic anti-competitive nature cannot be presumed and based solely on datasets such as those presented in the *Maxima Latvija* or *Oslo taxis* case seeing as it was not obvious that the non-compete clauses or joint bid, respectively would have had inherent anti-competitive effect. Unfortunately, despite much criticism on the expansive view on “by object” restrictions, the issue keeps reappearing.

4. Logic and features of the “object box”

Some agreements may be found to be restrictive “by object” in light of their particular characteristics or their context while others, which appear to contain object restrictions, might be found not to do so¹⁴. A clear line between the two types of restrictions would certainly help define them correctly. However, there is still no “test of time”, albeit some antitrust lawyers called as such the balancing approach criteria presented in the French *Cartes Bancaires* case. This ruling was seen as suggesting that the Commission should take a narrow view of what kind of agreements belong to the “object box”, not even because of theoretical categorisation motives, but in order to distinguish legality from illegality (Newman and Ruubel, 2016). As aptly diagnosed in the opinion to *Cartes Bancaires* by Advocate General Wahl¹⁵, a clear line between “object” and “effect” would bring three benefits to the competition doctrine. First, such delineation would bring legal certainty from being able to anticipate potential legal consequences of certain market actions. Second, identification of agreements, decisions and concerted practices which have the “object” of restricting competition would work as a deterrent and help prevent anti-competitive conduct. Lastly, a clear distinction between “by object” and “by effect” would further procedural economy, in so far as it would provide economic efficiency for competition authorities with respect to time-consuming and often complex examinations of potential or actual market effects.

¹⁴ Ibidem, p. 132. See also *Broadcast Music Inc v CBS* 441 US (1979), U.S. Supreme Court.

¹⁵ Opinion of Advocate General Wahl delivered on 27 March 2014, Case C-67/13 P *Groupement des cartes bancaires v Commission*, para. 35.

Examining the *CB* case indirectly, the CJ confirmed the postulates put forward by Advocate General Wahl. The Court emphasised that certain findings made by the General Court fall within the examination of “effects” on competition, not the “object” of the agreement¹⁶. Indeed, there is no need to search for the obvious, or move beyond criteria of the object analysis. The recognition of the criteria of an “object” and an “effects” analysis would allow antitrust officials to avoid a burdensome investigation of the effects of suspicious behaviour, provided the context of the case allows them to do so. It is thus to the best interest of the authorities to have a palpable guidance on their analysis, and have a clear line drawn in-between. Additionally, a narrowly defined “object box”, and a strict interpretation of the provision of Article 101(1) TFEU, pursues the goal of the rationalisation of the legal concept at hand, an issue encouraged for a number of decades now.

On the other hand, an open-ended nature of the “object category”, as well as an alternative relation between object and effect, argues that a restriction of competition “by object” cannot be reduced to only those agreements which “obviously restrict competition”. As clearly spelled out in *Beef Industry*¹⁷, it is not only the content of an agreement but also its legal and economic context which must be taken into account. A classification as a restriction of competition “by object” cannot depend on whether the object is clear at first sight, or becomes evident upon closer examination while taking account of the intentions of the parties (Ezrachi, 2014, p. 93). The criteria of “by object” and “by effect” analysis do not overlap and cannot be misused in that way. An agreement is either restrictive because of its object, or it is void because it has the potential to result in a prevention, restriction or distortion of competition within the internal market.

The distinction between “object” and “effect” has important practical implications. It is also inextricably interlinked with competition law concerns on the dismantling of the two categories of restrictions. The circumstances of the case at hand inclined the CJ to reiterate the wider implications of the judgment. Despite the recent proliferation of the tendency to expand the “by object” category, the *Maxima Latvija* case amounts to the justified conclusion that the two variations are alternatives and as each others’ alternatives – they need not be tested cumulatively. Nevertheless, the extent to which the market needs to be elaborated depends on the circumstances and, as a rule, requires a more sophisticated economic analysis with respect to the

¹⁶ Judgment of the CJ of 11 September 2014, Case C-67/13 P *Groupement des cartes bancaires (CB) v. Commission*, para. 81.

¹⁷ *Beef Industry*, paras 15–16. An agreement may, however, be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives.

qualification of effects (Wendt, 2013, p. 256). Limited contractual exclusivity, granted to *Maxima Latvija*, albeit not seen as anti-competitive as such, had the potential to significantly distort competition. Hence, the CJ went on to extensively explain that if the restriction had fallen into the “by object” category, then the character of a non-compete clause would not have required the support of any economic evidence. Supposing differently would mean that the requirement of certain quality and specific weight of harm contained in an agreement required in order to omit a broader effect analysis would lack a legal justification. Such supposition would mean that competition authorities would have “*carte blanche*” to decide whether to conduct a full economic analysis or not, regardless of the guidelines of the TFEU. This could clearly undermine legal certainty and allow the authorities to hand down findings without fair limits on the boundaries of the “object category”.

V. Three-tier analysis

Unfortunately, the Court was not very explicit in *Maxima Latvija* as to why it ruled the way it did. It went on, however, to explain the main criteria to be applied on the issue of substance.

In order to determine harm to the proper functioning of competition surrounding commercial lease agreements, a comprehensive analysis shall be three-tiered and include the following factors:

- 1) access to the relevant market – economic, administrative and legal barriers for a new entrant – the CJ went on to say that the veto could potentially distort competition if there were certain limitations placed on the occupation of commercial premises in other shopping centres located in next-door areas;
- 2) competitive forces on the relevant market – the number of operators present on the market, the size of the competitors, degree of concentration, customer fidelity to existing brands and their habits;
- 3) contribution of the agreement to market foreclosure (to be analysed if the 1st and 2nd factors are fulfilled) – by an investigation of the position of the contracting parties on the market in question and the duration of the agreement (non-compete clauses).

By a way of example, if there are certain barriers which limit accessibility to commercial land and if additional limitations come into play (e.g. administrative limitations on the acquisition of neighbouring land, lack of land for sale in the relevant area, unreasonably high prices for the acquisition of commercial land in comparison to the price paid by the incumbent), the extent of the

contribution of each agreement to that closing-off effect will in practice determine the final assessment. As a result, if, hypothetically, an agreement with a veto clause would be concluded for a period of 10 years and at least one of its parties had strong market power, such agreement is likely to be considered to have the “effect” of preventing/restricting/ distorting competition within the meaning of Article 101(1) TFEU.

VI. Decisive impact of market foreclosure

It is difficult to pin down exactly how the presumption of negative effect differs from agreements which are “*by nature likely to have negative effects*” (Chapman and Goyder, 2016, p. 319). Jurisprudence on market foreclosure was, however, in line with the *Cartes Bancaires* judgment and earlier rulings on the scope of object restrictions. Relying on analogy to *Delimitis*¹⁸, the CJ emphasised that the closing-off effect of non-compete clauses will be cumulative and so several factors (market position, duration of the agreements) need to be taken into consideration.

Where “object” was ambivalent, the CJ looked for actual or potential foreclosure of third parties via barriers to entry. In compliance with core recent standards, the analysis of the “effect” of the investigated conduct referred to the “theory of harm” as an economic narrative in order to explain why it was believed that the conduct in question would adversely affect competition in the retail market. European jurisprudence has tended to adopt a broad interpretation of foreclosure, an approach visible in the *Maxima Latvija* judgment as well. Foreclosure on the retail market would not only consist of eliminating existing competitors but also their weakening, as well as preventing existing competitors from expanding and deterring potential competitors from entering the market¹⁹. In truth, foreclosure is not an absolute term and is only one of the negative market effects that may result from an agreement which Article 101(1) TFEU aims to prevent (Rose and Bailey, 2013, p. 142). Nevertheless, in *Maxima Latvija*, the CJ seemed to be particularly concerned with the prevention of existing competitors from expanding on the market.

¹⁸ Judgment of the ECJ of 28 February 1991, Case C-234/89 *Stergios Delimitis v Henninger Bräu AG*, EU:C:1991:91, para. 25.

¹⁹ See e.g. *Morgan Stanley/Visa International and Visa Europe*, T-461/07 *Visa v Commission*, judgment of the GC of 14 April 2011, ECLI:EU:T:2011:181.

VII. Code of conduct

Should developers and tenants always seek advice while introducing a veto clause into their lease agreements? There cannot be any foregone conclusion drawn simply from the existence of such veto rights in lease agreements. Key in making an assessment here would be the economic context and the content of contractual arrangements between the relevant parties. Although the analysis of market effects takes into account potential competition, as protected by competition law, the fact that an agreement could be presumed to have an anti-competitive effect does not automatically mean that a restriction by object exists.

Under these commercial circumstances, the classification of lease agreements seems to be of particular importance. The relationship between landlords and tenants, unlike other vertical agreements, falls into a category of arrangements that because of their subject matter cannot benefit from a block exemption under the conditions set out in the Vertical Block Exemption Regulation²⁰. As a result, it is not possible to presume the legality of such agreements and so the criteria of Article 101(1) TFEU are fully applicable. As long as the contractual relationship at hand falls outside the scope of supply agreements, the block exemption provided for vertical agreements for goods or services delivered by a supplier to a buyer does not apply²¹. Being well aware of the risk, such hidden agenda should encourage retail food market players to reconsider the idea before they succumb to incentives to contractually exclude competing supermarkets.

VIII. Conclusion

After many years of a vibrant debate, the issue of what constitutes a competition restriction “by object” continues to be a popular topic of legal discussion. The case at hand suggests that what lies at the heart of the distinction into the two types of restrictions is the categorisation which agreements fall into the “object box” as defined by their effects on the market. In *Maxima Latvija*, the CJ seems to sustain the assumption that competition authorities

²⁰ Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practice, OJ L 102, 23.04.2010, p. 1.

²¹ European Commission Guidelines on Vertical Restraints, OJ C 130, 19.05.2010, p. 1, para. 26.

should take a narrow view of what kind of agreements can be considered antitrust violations “by object”. There could be no clear-cut “by object” infringement, as has been argued, for instance, in the pay-TV broadcaster example. As emphasised by J. Owen Forrester, “labelling” conduct as a “by object” infringement “*can free regulators and judges from making further inquiry into the reality of what is happening*”²².

It seems that the debate over “by object” and “by effect” will continue. Thus, it will be a tall order not even to formulate a brief clause, but to make sure that the test of *Maxima Latvija* case law would not appeal. This certainly leaves the door wide open for brave companies which are not afraid to take a risk of potential consequences of such contractual arrangements, or simply have the time and the resources to conduct the three-tier analysis beforehand.

Literature

- Chapman, A. and Goyder, J. (2016). SIA Maxima Latvija: More on “Object” Restrictions in Vertical Relations. *Journal of European Competition Law and Practice*, 7(5).
- Ezrachi, A. (2014). *EU Competition Law, An Analytical Guide to the Leading Cases*. Oxford and Portland, Oregon: Hart Publishing.
- John, L.E. and Turner, J. (2015). *Bellamy & Child, European Union Law of Competition, Second Cumulative Supplement to the Seventh Edition*. Oxford: Oxford University Press.
- Newman, M. and Eccles, M. (31 March 2016). By-object breaches to get European court guidance, *MLex market insight*. <http://mlexmarketinsight.com/>.
- Newman, M. and Ruubel, S. (22 March 2016). Cartes Bancaires ruling may offer “more reliable” approach to antitrust conduct, Forrester says, *MLex market insight*. <http://mlexmarketinsight.com/>.
- Rose, V. and Bailey, D. (eds). (2013). *Bellamy and Child, European Union Law of Competition*. Oxford: Oxford University Press.
- Wendt, I.E. (2013). *EU Competition Law and Liberal Professions: An Uneasy Relationship?* Leiden-Boston: Martinus Nijhoff Publishers.
- Whish, R. and Bailey, D. (2015). *Competition Law*. Oxford: Oxford University Press.

²² “Object or Effect? Judicious Thoughts on Classic Themes”, Competition Law Association, speech from 21 March 2016 after (Newman and Ruubel, 2016).

**Antitrust Liability in the Context of Online Platforms.
Case Comment to the Preliminary Ruling of the Court of Justice
of 21 January 2016
*'Eturas' UAB v Lietuvos Respublikos konkurencijos taryba (Case C-74/14)***

by

Bartosz Targański*

CONTENTS

- I. Introduction
- II. Legal background
- III. Online booking system
- IV. Tool for coordination
- V. Not liable for incoming emails?
- VI. Public distancing in the digital era
- VII. Compliance in e-commerce

Key words: antitrust; coordination; e-commerce; online platforms; compliance.

JEL: L410; L810

I. Introduction

In its judgment of 21 January 2016 in Case C-74/14 (hereinafter, judgment), the Court of Justice (hereinafter, CJ) responded to a preliminary question submitted by the Supreme Administrative Court of Lithuania. The latter

* Legal advisor; PhD in economics, assistant professor at the Warsaw School of Economics (SGH); btarga@sgh.waw.pl. Article received: 23 June 2016; accepted: 3 October 2016.



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.

asked whether the mere dispatch of an email relating to the maximum level of rebates may constitute sufficient evidence to establish that its addressees can be found liable for illegal concerted practices within the meaning of Article 101(1) TFEU. The CJ judgment raises novel issues specific to antitrust enforcement in e-commerce in two areas: (i) can users of a third party online booking platform be found liable for an anti-competitive practice purely on the basis of receiving unprompted email messages, even if they were not aware of their content, and (ii) what steps should they take in order to distance themselves from anti-competitive actions in an e-commerce environment.

II. Legal background

In a decision of 7 June 2012, the Lithuanian Competition Council (hereinafter, Council) found that 30 travel agencies as well as the administrator of the online booking system E-TURAS violated Article 101(1) TFEU and its national equivalent Article 5 of the Lithuanian Competition Act. The infringement took the form of the coordination of the level of discounts available on bookings made via the E-TURAS system between 27 August 2009 and the end of March 2010. The proceedings were instigated by a leniency application submitted by one of the travel agencies. On 8 April 2013, the Vilnius District Administrative Court upheld the decision in part but reduced the fines imposed. The case was subsequently appealed to the Supreme Administrative Court of Lithuania, which then asked the CJ for a preliminary ruling under Article 267 TFEU. Advocate General Szpunar delivered his Opinion on the case at hand on 16 July 2015. Following the CJ judgment, the Supreme Administrative Court of Lithuania ultimately upheld the decision of the Council on 3 May 2016.

III. Online booking system

E-TURAS is an online travel booking system that allows travel agencies to offer travel bookings for sale on their websites through a uniform presentation method determined by the administrator, who holds exclusive rights to the system. Each travel agency had a mailbox within the System in order to communicate with the administrator. On 25 August 2009, the administrator of the System sent an e-mail to several travel agencies through the internal messaging system, the email was named *Vote*. In that email, the administrator

asked each addressee to vote on the appropriateness of reducing the online discount rate from 4% to 1%-3%. Two days later, on 27 August 2009, the administrator sent another email to each travel agency with the header: *Message concerning the reduction of the discount for online travel bookings, between 0% and 3%*, with the following content:

Following an appraisal of the statements, proposals and wishes expressed by the travel agencies concerning the application of a discount rate for online travel bookings, we will enable online discounts in the range of 0% to 3%. This “capping” of the discount rate will help to preserve the amount of the commission and to normalise the conditions of competition. For travel agencies which offer discounts in excess of 3%, these will automatically be reduced to 3% as from 2:00 pm. If you have distributed information concerning the discount rates, we suggest that you alter that information accordingly.

Following the dispatch of that message, technical modifications were made to the System so that when a booking was made a window appeared indicating that the travel package chosen was subject to a discount of 3%. Although travel agencies were not prevented from granting discounts greater than 3%, they were required to take additional technical steps in order to do so.

IV. Tool for coordination

The Council concluded that the System served as a tool for coordinating the rebate cap by travel agencies and eliminated the need for actual meetings. The authority also stated that failure to oppose the discount cap amounted to tacitly assenting to the cap, without the need for direct contacts. According to the Council, travel agencies, which had expressed no objection to the message, could be held liable for an illegal horizontal practice since they could reasonably assume that all other users of that System would also limit their discounts to a maximum of 3%. The administrator of Eturas was held liable too for its facilitating role in the practice.

By contrast, the travel agencies argued that they could not be held liable for the unilateral action of the administrator as they were not aware of the message sent on 27 August 2009 and of the modifications made by the administrator. Moreover, they stated that the sales made via the System represented only a very small part of their turnover. In view of that, the Supreme Administrative Court of Lithuania raised doubts whether the mere presumption that the travel agencies had read, or should have read, the message of 27 August 2009 meets the standard of proof in establishing their participation in a concerted practice under Article 101(1) TFEU.

V. Not liable for incoming emails?

The fact that Article 101(1) TFEU applies to passive participation in meetings where anti-competitive topics are discussed has long since been an integral part of EU competition law – it is assumed that passive participants adjust their activity to what they heard in those meetings¹. In the case at hand, the CJ commented on whether the same assumption should be applicable to online correspondence also. In other words, should the investigated travel agencies that received the email sent by the administrator of the System on 27 August 2009 be presumed to have taken into account the content of this message, and thus be held liable for the concerted practice?

The CJ stated that unlike the participation in physical meetings, the mere dispatch of an electronic message is not sufficient evidence of the participation in a concerted practice. The approach of the CJ has to be welcomed since it takes into account the nature of electronic communication. Unlike the participation in physical meetings, the recipient of an email has no control over either the content of the incoming email or the number of the incoming messages. The risk of being involved in a concerted practice exists, provided there are other objective and consistent indicia showing that the undertaking was aware of the content of the message and did not publicly distance itself from the practice.

When it comes to electronic correspondence, one could imagine many situations where it may be difficult to determine, without any doubt, whether or not the recipient has read a given email. In a multitude of emails, marking them as read does not necessarily mean that one has actually familiarised oneself with their content. There may be doubts as to how the email system works (for instance, the possibility of marking an email as unread again, spam filters) and what people handling the email system do (for instance, deleting an email). The CJ judgment does not provide detailed guidelines on this matter and leaves the assessment of evidence and the standard of proof in a particular case to national procedures to decide.

VI. Public distancing in the digital era

The safest solution for an entrepreneur who has received an email suggesting illegal actions will undeniably be to distance oneself from that email. Yet another problem has emerged in this context and has been tackled by the CJ in this case – how to effectively distance oneself from the content of an email.

¹ See CJ judgment of 4 June 2009, Case C-8/08 *T-Mobile Netherlands and Others*, paras 51–53.

According to settled views of the CJ, in case of an actual meeting where anti-competitive discussions take place, participants may distance themselves from a concerted practice by leaving the meeting and communicating their opposition to other participants². Yet unlike physical meetings, the recipients of the contested emails did not know who else received the emails³. They were therefore not able to communicate their opposition to other “participants”. In its judgment, the CJ made it clear that in a situation such as this, a travel agency could distance itself from the practice by sending a clear and express objection to the practice to the administrator, by systematically applying discounts exceeding the cap in question, or by reporting the practice to administrative authorities.

VII. Compliance in e-commerce

The CJ judgment points out the antitrust risk related to participating in wider Internet communications. This pertains not only to electronic mail but also to social networks. As implied in the name itself, social networks are characterised by the fact that they make virtual participation in the society possible. This is manifested, among others, in that a profile user may follow posts featured by many people without having to actively engage in the conversation. In the context of the CJ judgment, it seems that even such a form of indirect contact may potentially be considered dangerous. So the question arises as to how to assess the awareness of illegal content (posts) among social network users, and how a network user should behave when s/he notices illegal content in posts of other users.

Furthermore, the CJ judgement stresses the need to raise awareness of antitrust risks typical for the Internet. It is the consequence of the freedom and mass character of Internet communications that participating entrepreneurs, even if they do so only passively, may be more exposed (than it would be the case for traditional meetings) to charges of partaking in illegal contacts. It is thus crucial for an entrepreneur to have a pro-active approach when it comes to distancing itself from an illegal practice. To do so, firms ought to commit employees within their compliance systems to notify their superiors about the appearance of dangerous electronic correspondence and establish a procedure of distancing themselves from it.

² See CJ judgment of 17 September 2015, C-634/13 P *Total Marketing Services, venant aux droits de Total Raffinage Marketing v European Commission*, paras 23–24.

³ The situation resembles that of receiving a group email in which the recipients are not disclosed, as their addresses are concealed in a blind carbon copy (bcc).

This case should also be taken into account by compliance policies of online intermediaries offering online commercial and communication services (such as online platforms, auction portals, price comparison websites, etc.). The administrator of Eturas was held liable for the anti-competitive practice, even though the company was in fact active on a different market than the travel agencies. The liability of Eturas was derived from its facilitating role in the emergence of the illegal contacts between the travel agencies. In this light, the CJ judgment confirms the position of the European Commission and the CJ with respect to facilitators of cartels first established in the *AC Treuhand* case⁴.

⁴ Judgment of CJ of 22 October 2015, Case C-194/14 P *AC-Treuhand AG v European Commission*.

**Evaluation of Pre-accession State Aid in the Energy Sector.
Case Comment to the Judgment of the Court of Justice
of 1 October 2015
Electrabel SA, Dunamenti Erőmű Zrt. v European Commission
(Case C-357/14 P)**

by

Tihamér Tóth*

CONTENTS

- I. Introduction
- II. The background of the case: the privatization of the Hungarian electricity sector
- III. The Commission decision on illegal State aid
- IV. The Judgment of the Court of Justice
 - 1. Non-admissibility: the limits of the concept of an “undertaking”
 - 2. Evaluating pre-accession State aid – the legal framework
 - 3. Evaluating pre-accession State aid – the reference date for applying the MEIP test
 - 4. Absence of an advantage during the privatization
 - 5. The subject of the recovery order
 - 6. Other related litigations: the ICSID dispute and actions for damages
 - 7. Evaluation of the case

* Assistant professor, Pázmány Péter Catholic University, of counsel Réciczka Dentons Europe LLP; Tihamer.Toth@dentons.com. Article received: 20 July 2016; accepted: 18 October 2016.



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.

Key words: power purchase agreements; pre-accession state aid; recovery of unlawful state aid; energy market; concept of an undertaking; MEIP test – lack of advantage; ICSID procedure; Energy Charter Treaty.

JEL: K23; K32; K41

I. Introduction

The European Commission decided in 2008 that Hungary provided State aid through a set of Power Purchase Agreements¹. Electrabel SA (hereinafter, Electrabel) and Dunamenti Erőmű Zrt. (hereinafter, Dunamenti Erőmű) brought an action for annulment against this decision that was dismissed by the General Court in 2014². One year later, the Court of Justice confirmed the first instance ruling, even though Advocate General Wathelet was of the opinion that the contested judgment should be set aside.

According to the Advocate General (hereinafter, AG), the case raised three difficult issues: (i) is the relevant date for the assessment of the existence of the aid the date on which the measure was implemented (well before Hungary's EU accession) or the date of the accession; (ii) should the date of accession be the relevant date, do facts prior to that date have to be included in the assessment of the existence of State aid, and (iii) which company should repay the aid granted³.

II. The background of the case: the privatization of the Hungarian electricity sector

Dunamenti Erőmű is a Hungarian electricity generator which operates a power plant in the proximity to Budapest. As a former public undertaking, the company was privatized in 1995. Electrabel SA (part of the GDF Suez group) became its majority owner; Magyar Villamos Művek Zrt. (hereinafter, MVM), now the key Hungarian public undertaking in the electricity sector, owned 25% of its shares.

¹ NN 49/2005, Brussels, 2008.VI.04 C (2008) 2223 final, available at: http://ec.europa.eu/competition/state_aid/cases/201965/201965_827719_388_1.pdf (20.07.2016).

² Case T-179/09 *Dunamenti Erőmű v Commission*, ECLI:EU:T:2014:236.

³ Case C-390/98 *H.J. Banks & Co. Ltd v The Coal Authority and Secretary of State for Trade and Industry*, ECLI:EU:C:2001:456, and C-277/00 *Germany v Commission*, ECLI:EU:C:2004:238.

The facts of the case date back to the mid 1990s. At that time, the most urgent policy objectives included: to achieve supply security, to modernize infrastructure, and to meet environmental protection standards. The socialist-liberal government that came into power in 1994 decided that these aims could only be attained with the involvement of foreign investors. The State thus sold the country's most important electricity producers and distributors, with the exception of the nuclear power plant and the high voltage transmission grid.

Hungary thus attracted huge foreign investments. However, all this came at a price. Foreign investors were reluctant to commit themselves without long-term power purchase agreements (hereinafter, PPAs), with MVM purchasing power generated at a price calculated according to a formula included in the privatization deal. Moreover, the PPAs enabled MVM to fulfil its obligation of ensuring supply security in the entire country. Twenty such agreements were concluded between 1995 and 2001, ten of which were subject to the decision⁴ of the European Commission (hereinafter, EC or Commission) subject to the appeal proceedings culminating in the reviewed judgment.

The PPAs reserved for MVM all, or a substantial part of the generation capacities of the power plants covered by the agreements. At the same time, MVM was required to purchase a specific minimum quantity of electricity from each power plant operated under a PPA at prices fixed in the PPAs according to the set formula. Starting from 1 January 2004, the rules provided for the introduction of, first, a capacity fee for the reserved capacities in order to pay for the making available of that capacity, that fee covered fixed costs and the cost of capital, including profit, being paid by MVM, and, second, an electricity fee to be paid for the guaranteed minimum off-take, which covered variable costs. Even if MVM did not purchase the fixed minimum quantity, it had to pay for the fuel costs incurred.

The PPA between Dunamenti Erőmű and MVM entered into force in 1996. It was to continue until 2010 with respect to the gas-fired "F block", and until 2015 with respect to the "G2 block", a combined cycle gas turbine unit. Just two months after the conclusion of the PPA, Electrabel acquired Dunamenti Erőmű from the Hungarian State following a competitive public tendering procedure. The agreement made the State-owned MVM acquire about 75% of Dunamenti's electricity production.

Until 2002, the Hungarian electricity market had not been liberalized, only privatized. The vertically integrated MVM acted as a single buyer. Electricity generators could supply energy directly only to MVM and the latter was the only company authorized to sell electricity to regional distribution companies. At the time when Hungary finally joined the EU, Hungary had a dual market

⁴ The European Commission (EC) did not challenge agreements that ceased to exist before Hungary's EU accession.

in electricity. The public utility sector accounted for approximately 70% of power generation, the competitive sector accounted for about 30%. In the public utility sector, MVM was still the only wholesaler. MVM was also selling surplus electricity purchased under the PPAs (that is, electricity not needed in the public utility sector) in the competitive sector. This interim regime was in place between January 2003 and January 2008.

The PPAs covered about 2/3 of the Hungarian electricity production. As a result, even if price regulation was abolished in 2003, wholesale prices were not influenced by market trends but rather, by the effects of the PPAs.

III. The Commission decision on illegal State aid

On 4 June 2008, the Commission adopted a decision finding that the PPAs conferred illegal State aid within the meaning of Article 87(1) EC (now 101(1) TFEU) on Hungarian electricity generators and that this State aid was incompatible with the common market. The State aid resulting from the PPAs consisted of the fact that MVM was obliged to purchase a certain capacity and a guaranteed minimum quantity of electricity at a price covering capital, fixed costs and variable costs over a significant part of the lifetime of the generating units, thereby guaranteeing a return on investment to the generators. The Commission believed that at the time of Hungary's EU accession, no rational market economy investor would have entered into such an agreement. Bearing all the risks of fluctuating fuel prices, disregarding market trends, and the extended length of time of the agreements, was not in line with competitive market circumstances⁵. Accordingly, the EC ordered that the aid should be terminated within six months and obliged Hungary to recover it from the beneficiaries within ten months starting from 1 May 2004.

Hungary did not challenge the decision but complied by adopting a new law terminating the PPAs effective starting from 31 December 2008. In the end, no aid was recovered from the beneficiaries because the government decided to put in place a stranded costs compensation scheme, as foreseen by a Commission communication acknowledging that certain losses caused by market liberalization can be levelled by the State⁶. Since *Dunamenti Erőmű's*

⁵ According to the EC, in 2006, prices under the PPAs were 15-135% higher than prices in the liberalized market albeit admittedly comparing historic PPA prices with those existing in other Member States is not an easy exercise.

⁶ Commission Communication relating to the methodology for analysing State aid linked to stranded costs, available at http://ec.europa.eu/competition/state_aid/legislation/stranded_costs_en.pdf (20.07.2016). Under the scheme, stranded costs correspond to the difference between

stranded costs were higher than the aid they were to pay back to the State, there was no recovery in real terms.

Dunamenti Erőmű challenged the findings of the Commission on the existence of the State aid, on its classification as “new aid”, as well as on the identification of the relevant date to assess the aid. The plaintiff disputed also the way in which the Commission applied the market economy investor principle (hereinafter, MEIP) test and alleged a breach of the principles of the protection of legitimate expectations and of legal certainty. The company argued furthermore that the aid contained in the PPA was not an operating aid, but rather an investment aid.

In the judgment under appeal, adopted on April 2014, the General Court (hereinafter, GC) rejected all pleas in law raised by the plaintiff. Interestingly, it took the first instance court five years to adjudicate all the arguments raised by the plaintiff. The procedure before the Court of Justice (hereinafter, CJ) was far shorter.

IV. The Judgment of the Court of Justice

1. Non-admissibility: the limits of the concept of an “undertaking”

The judgment covered an interesting procedural issue. According to the second paragraph of Article 56 of the Statute of the Court of Justice of the European Union (hereinafter, CJEU), an appeal against a judgment of the GC may be brought by “any party which has been unsuccessful, in whole or in part, in its submissions”. The Commission decision was formally challenged only by Dunamenti Erőmű, while the judgment of the GC was also appealed by Electrabel. This was because when the action against the contested decision was brought before the GC, Electrabel and Dunamenti Erőmű were both members of the same entity – the GDF group. However, in June 2014, Electrabel sold its shareholding in Dunamenti Erőmű.

AG Wathelet argued that Electrabel’s action should be dismissed on this basis, seeing as it was not a party to the proceedings before the General Court. The CJ agreed by pointing out that preventing Electrabel from bringing the appeal does not in any way infringe its right of access to justice or the principle of good administration⁷. The precise identification of persons capable of

the investment costs of each of the beneficiaries and their operating profits, both historic (from the date of entry into force of the PPAs to their early termination) and projected (between the date of early termination and the expiry dates of the PPAs as initially stipulated).

⁷ Judgment, para. 31.

bringing an appeal before the CJEU in a given case, as laid down in Article 56 of the Statute, is precisely to safeguard the proper administration of justice. As a result, the CJ dealt only with the pleas submitted by Dunamenti Erőmű.

2. Evaluating pre-accession State aid – the legal framework

State measures put into effect before EU accession but still applicable after that accession, and which can be regarded as State aid under Article 107(1) TFEU at the date of that accession, are subject to the specific rules set out in Annex IV to the Act of Accession. These measures are classified as new aid unless they fall within one of three categories: (i) aid measures put into effect before 10 December 1994, (ii) aid measures expressly listed in the Appendix to Annex IV, and (iii) aid measures which prior to the date of accession were assessed by the State aid monitoring authority of Hungary and found to be compatible with *aquis*, and to which the Commission did not raise an objection pursuant to a special procedure.

The GC agreed with the Commission that the PPA at hand did not fall within any of the three aforementioned categories. The PPA was not implemented before 10 December 1994, it was not listed in the appendix to Annex IV, and it was not assessed by the Hungarian State aid monitoring authority prior to the date of its EU accession and found to be compatible with *aquis*, with no objection being raised towards it by the Commission.

It should be noted that the Act of Accession changed previous law on this subject whereby aid introduced before the Treaty came into force, or before the accession of the Member State concerned to the European Union, had to be regarded as existing aid⁸.

3. Evaluating pre-accession State aid – the reference date for applying the MEIP test

The EC decision, as confirmed by the GC, took the date of Hungary's EU accession, 1 May 2004, as the relevant date for the assessment of whether the PPAs constituted State aid.

Dunamenti Erőmű argued that the GC erred in law by taking the date of Hungary's EU accession as the date of reference for the determination of whether the PPA constituted State aid. Dunamenti Erőmű added that it is illogical and incorrect in law to apply the concepts of "advantage" and

⁸ Judgment of the ECJ of 15.03.1994, Case C-387/92 *Banco Exterior de España*, ECLI:EU:C:1994:100, para. 19.

“private investor” to a date where no investment had been made⁹. The plaintiff submitted that the date on which the PPA had in fact been granted (that is to say, December 1995) should have been taken as the date of reference. Where, as in the present case, the measure in question remained applicable at the time of accession, the reference date serves to identify the moment at which it is necessary to assess whether the measure constituted State aid. However, taking the date of accession as the reference date does not in itself automatically mean that matters prior to that date cannot be taken into account¹⁰.

AG Wathelet emphasized that the position of a hypothetical market operator, like the Hungarian State, should be analysed on the date when the investment decision had been made, taking thus into account the circumstances prevailing in 1995. “If, in the context of applying the private investor test, it is necessary to ask the question whether, at the time of accession, a hypothetical market operator would have acted in the same way as the State had acted, then the relevant factual circumstances which dictated the grant of the aid measure at issue cannot be excluded solely because they precede accession, since that would place the State and the hypothetical market operator in situations that are not comparable, which could obviously lead them to take different decisions”¹¹.

AG Wathelet noted also that this approach is in line with the Commission’s own practice when it systematically takes into account, in its assessment of the existence of aid, factual circumstances prior to the date of the new Member State’s EU accession. In another Hungarian case, the Postabank Decision No. 2009/174, the Commission stated that “[w]hen assessing the action of the Hungarian authorities in the light of the market economy investor principle in 2003, it has to be noted that the Commission does not question the way Postabank was privatised and acknowledges that it was sold to the highest bidder under an open competitive tender procedure”¹².

The AG thus concluded that by rejecting Dunamenti Erómű’s arguments regarding the Commission’s refusal to take into account the intrinsic link between the PPA and its privatisation when reviewing the Commission’s application of the private investor test solely because that factor preceded Hungary’s EU

⁹ Judgments in *France v Commission* (Case C-482/99, ECLI:EU:C:2002:294, paras 71 and 76 to 83); *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* (Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57, para. 246), and *Netherlands v Commission* (Cases T-29/10 and T-33/10, ECLI:EU:T:2012:98, para. 78), noting that the private investor analysis should be based on the circumstances prevailing at the date of adoption of the measure concerned.

¹⁰ Opinion, 113–114.

¹¹ Opinion, 121.

¹² 2009/174/EC of 21 October 2008 on measure C 35/04 implemented by Hungary for Postabank and Takarékpénztár Rt./Erste Bank Hungary Nyrt. (OJ L 62, 6.03.2009, p. 14).

accession, the GC erred in law and, in that respect, its judgment should be set aside. AG Wathelet suggested also that the proper application of the MEIP test is not a matter for the judiciary, the Commission decision should thus be annulled in so far as it concerns *Dunamenti Erőmű*. The proper application of the MEIP test involves a complex economic assessment and the judiciary must not substitute (its) own economic assessment for that of the Commission¹³.

The CJ did not follow the advice of its Advocate General. The CJ's reasoning started by recalling that European State aid rules became mandatory in Hungary on 1 May 2004, the date of its EU accession. Furthermore, Hungary accepted that aid measures still applicable after that date had to be examined in the light of EU State aid rules, if those measures could not be classified as existing aid in accordance with the provisions of that act.

The CJ, after recalling the wording of implementing Regulation 659/1999¹⁴ and its own judgment in *Kremikovtzi*¹⁵, concluded that the date of Hungary's EU accession is the date on which an aid measure still applicable after that date must be assessed. The GC was thus correct to hold¹⁶ that if the approach advocated by *Dunamenti Erőmű* was to be accepted, the Commission could not review any measure adopted before the date of accession, which did not constitute State aid at that time but which, subsequently, became State aid and remained so after that date¹⁷.

Interestingly, the CJ refused to consider arguments relating to the practice of the Commission. It emphasized that the practice followed by the EC in its decisions or its guidelines cannot bind the CJ in its interpretation of EU rules relating to State aid¹⁸.

¹³ Order in *DSG v Commission* (Case C-323/00 P, ECLI:EU:C:2002:260, para. 43). See also *Spain v Lenzing* (Case C-525/04 P, ECLI:EU:C:2007:698, para. 57).

¹⁴ Council Regulation (EC) No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.03.1999, p. 1). According to Article 1(b)(v), aid is deemed to be an existing aid because it can be established that at the time when it was put into effect it did not constitute an aid, and subsequently it became an aid due to the evolution of the common market and without having been altered by the Member State. Para. 54 provides that only as from the time of accession that, in Bulgaria, the criteria laid down in Article 87(1) EC may be directly applied as such, and then only in respect of situations that arise on or after that date.

¹⁵ Case C-262/11, ECLI:EU:C:2012:760, paras 2 and 3, according to which measures implemented before the accession of the Republic of Bulgaria to the European Union, but which, first, are still applicable post-accession and, second, satisfy the cumulative requirements of Article 87(1) EC on the date of accession, are subject to the specific rules laid down in Annex V to the 2005 Act of Accession.

¹⁶ Judgment of the GC, para. 65.

¹⁷ This was the case here since previous state measures started to have effects on the internal market only after the market was liberalized.

¹⁸ Para. 68.

4. Absence of an advantage during the privatization

According to Dunamenti Erőmű, when analysing whether the PPA had given an advantage to foreign investors, the privatisation and its context should have been taken into account, since the PPA was a pre-privatisation measure. MVM acted as a private investor when it entered into that agreement. Also, the State acted as a private investor seeking to maximise the financial outcome of the sale of Dunamenti Erőmű. Even if the PPA had entailed an advantage, the acquisition of Dunamenti Erőmű by Electrabel in the course of a tendering procedure eliminated any alleged advantages.

On the other hand, the Commission argued that the absence of an advantage to the purchaser does not exclude the presence of an advantage to the purchased business, irrespective of the fact that the shares or the assets of the undertaking were purchased¹⁹. Even if the purchaser, in this case Electrabel, pays a market price for it, and thus does not itself benefit from aid, this fact is not relevant to the assessment of whether the purchased entity received aid. The EC did not take into account events that occurred a decade before Hungary's EU accession, the link between the privatization and the PPA was disregarded by the Commission.

The GC refused to consider Dunamenti Erőmű's arguments that the aid had been repaid by Electrabel on the ground that the change in share ownership had taken place before Hungary's EU accession²⁰.

The CJ agreed with the GC's finding that the plaintiffs' arguments cannot demonstrate that that PPA, as applied from 1 May 2004 onwards, did not confer an advantage on Dunamenti Erőmű. The question as to whether that agreement contained State aid compatible with the common market on the date of its conclusion or on any other date prior to Hungary's EU accession is of no relevance for the determination whether that agreement contained State aid on the accession date. The arguments relating to the sale of Dunamenti Erőmű to Electrabel cannot be accepted either, since the State aid is not a consequence of the sale itself but stems from the PPA, as applied from 1 May 2004 onwards²¹.

The CJ recalled that when applying the private investor test, the Commission has a duty to carry out a global assessment of the aid measure at hand, according to the information available and developments foreseeable at the time when the decision to grant that aid was taken. Information on events

¹⁹ Judgments in *Elliniki Nafpigokataskevastiki and Others v Commission* (Case T-384/08, ECLI:EU:T:2011:650, paras 66 to 68), and *Commission v Scott* (Case C-290/07 P, ECLI:EU:C:2010:480, paras 5 to 11, 25 and 26).

²⁰ GC, paras 68 and 69.

²¹ Paras 94-95.

which occurred prior to the date of adopting a State measure may shed light on the question if that measure constitutes an advantage for the purposes of Article 107(1) TFEU. In this case, the EC was right to take into account information relating to events prior to the date of Hungary's EU accession.

The GC thus erred in law, refusing to consider Dunamenti Erőmű's arguments on the sole ground that the privatization took place before the date of Hungary's EU accession²². However, this did not lead to the annulment of the GC's judgment since its operative part was well founded even with this error²³.

5. The subject of the recovery order

The case raised a delicate issue where the CJ had to reconcile two of its diverging jurisprudential lines. The Commission's position, based on *Germany v Commission*²⁴, was that the unlawful aid should be recovered from the undertaking sold; Dunamenti Erőmű relied on *Banks*²⁵ to argue that the seller provided that the undertaking which benefited from the aid was sold on market terms.

Dunamenti Erőmű argued that even if an advantage had been granted to it before its privatisation, its purchaser reimbursed the Hungarian State for that advantage since the PPA was included in the price paid by the purchaser to the State. The CJ held in *Banks* that, "in principle, where a company which has benefited from aid has been sold at a market price, the purchase price reflects the consequences of the previous aid, and it is the seller of that company that keeps the benefit of the aid. In that case, the previous situation is to be restored primarily through repayment of the aid by the seller".

On the other hand, the Commission relied on *Germany v Commission* where the CJ had held that normally it is not the buyer but the undertaking retaining the competitive advantage connected with that aid that shall repay it. That is so provided the undertaking to which unlawful State aid was granted retains its legal personality and continues to carry out the activities subsidised by the State aid²⁶.

²² Para. 107.

²³ Judgments in *Lestelle v Commission*, Case C-30/91 P, ECLI:EU:C:1992:252, para. 28, and *FLAMM and Others v Council and Commission*, Cases C-120/06 P and C-121/06 P, ECLI:EU:C:2008:476, para. 187 and the case-law cited.

²⁴ Case C-277/00, ECLI:EU:C:2004:238.

²⁵ Case C-390/98, ECLI:EU:C:2001:456.

²⁶ It should be noted that most sale contracts stipulate that the seller guarantees the liabilities of the company sold. In such case, the company sold will be liable to repay any unlawful aid and the clause guaranteeing its liabilities will give the purchaser recourse against

AG Wathelet pointed out that these judgments apparently propound contradictory views²⁷. The only point on which they concur is that the purchaser cannot be held liable to repay the aid²⁸. In trying to reconcile the two rulings, the AG recalled that although the judgment in *Germany v Commission* was adopted later than *Banks*, it was handed down by a chamber of five judges while the judgment in *Banks* was handed down by a bench of 11 judges (the Grand Chamber at the time) and has subsequently been cited on a number of occasions. Even after its *Germany v Commission* ruling, the CJ left the possibility open of recovering the aid either from the seller or from the undertaking sold, without proposing a criterion for deciding which of the two options might be appropriate²⁹.

AG Wathelet took the position that recovery of the aid must follow the advantage, in the sense that the entity which has benefited, or continues to benefit from the advantage must repay it whether there was a sale of assets or a sale of shares³⁰. The aid must thus be recovered from Dunamenti Erőmű rather than from the seller, in this case MVM or the Hungarian State.

The CJ emphasized that the main purpose of the repayment of unlawful State aid is to eliminate the distortion of competition caused by the unlawful aid³¹. The CJ has consistently held that where an undertaking (which had benefited from unlawful State aid) is bought at a market price, the aid element was assessed at a market price and included in the purchase price. It was held in *Germany v Commission* that the buyer cannot be regarded as having benefited from an advantage in relation to other market operators³². If the beneficiary of the unlawful State aid retains its legal personality and continues to carry out the activities subsidized by the State aid, it is normally this undertaking that must repay an amount equal to that advantage³³. Even if that company was sold by the State to Electrabel at a market price, and that price fully reflected the value of the advantage resulting from the PPA,

the seller. The matter will then be decided in accordance with the applicable contractual rules, rather than in the context of a recovery procedure.

²⁷ AG Sharpston attempted to explain the discrepancy between these judgments by reference to the fact that *Banks* concerned the sale of shares while *Germany v Commission* set out the precedence to be applied for the sale of assets. AG Wathelet did not follow this line of argument.

²⁸ Opinion, 144.

²⁹ Opinion, 147, quoting *Commission v France* (Case C-37/14, ECLI:EU:C:2015:90), and *Falck and Acciaierie di Bolzano v Commission*, Cases C-74/00 P and C-75/00 P, ECLI:EU:C:2002:524, para. 180.

³⁰ Opinion, 156.

³¹ Para. 111, referring to *Germany v Commission* (Case C-277/00, ECLI:EU:C:2004:238, para. 76).

³² Case C-277/00, ECLI:EU:C:2004:238, para. 80 and the case-law cited.

³³ Para. 113.

Dunamenti Erőmű still retained the advantage of the PPA as it applied starting from 1 May 2004. According to the CJ, the GC did not err in law when it sided with the Commission.

6. Other related litigations: the ICSID dispute and actions for damages

In 2007, Electrabel initiated arbitration proceedings against Hungary before the International Centre for Settlement of Investment Disputes (hereinafter, ICSID)³⁴. Electrabel claimed, among other things, that by terminating the PPAs without providing full compensation for stranded costs, Hungary had breached the obligations of fair and equitable treatment of investments. The latter are covered by Article 10 of the Energy Charter Treaty of 17 December 1994 (hereinafter, ECT), to which the Kingdom of Belgium, Hungary and the EU are contracting parties to, and which entered into force in April 1998. The ECT contains provisions protecting foreign investments in the energy sector providing protection against expropriation and fair and equitable treatment of foreign investors, etc.

The Commission intervened as a non-disputing party in these proceedings. Its general concern was that compensations awarded as a result of a tribunal decision should not neutralize the effects of its State aid decisions that impose the duty to recover unlawful State aid³⁵. The concern lies in the fact that an EC decision ordering the reimbursement of a State aid would be made ineffective if the Member State was obliged to pay the same or similar amount back in the form of compensation to foreign investors. Tamás Kende argues that as a rule, an investment award itself, and subsequently, the enforcement of an investment award, does not generally constitute illegal State aid under Article 107 TFEU because the payment of compensation is involuntary (Kende, 2015, p. 43)³⁶.

The Arbitral Tribunal held that the ECT could not protect a European investor from a Member State's enforcement of a binding EC decision. If the provisions of EU law and that of the ECT contradict each other, the Arbitral Tribunal considered that, pursuant to Article 307 CE, (i) the ECT would apply

³⁴ *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19.

³⁵ See, e.g. cases SA.38517(2014/C) (ex 2014/NN) – Romania Implementation of Arbitral award *Micula v Romania*, 11 December 2013; http://ec.europa.eu/competition/state_aid/cases/254586/254586_1595781_31_11.pdf (20.07.2016).

³⁶ Citing (Tietje and Wackernagel, 2014, p. 3), referring also to *Asteris*, joint Cases 106 to 120/87, ECLI:EU:C:1988:457 (explaining that damages which the national authorities may be ordered to pay to individuals in compensation for damage they have caused to those individuals do not constitute aid).

when it comes to relations between EU Members and non-EU Members but that (ii) EU law would prevail over the ECT in relations between EU Members themselves. The Arbitral Tribunal dismissed Electrabel's expropriation claim. The Tribunal considered that an "expropriation" implied a radical deprivation of rights or a destruction of an investment, its value or use. In the Tribunal's opinion, Electrabel's investment in Dunamenti remained intact. Hungary could not be held liable for acts committed by the European Commission. Although the termination of the PPA was considered lawful under the ECT, the Arbitral Tribunal found that there was a significant lack of symmetry in the stranded costs compensation scheme amounting to an infringement of the fair and equitable treatment standard³⁷. However, given that the final amount of Dunamenti Erőmű's and Electrabel's net stranded costs cannot be calculated until after 31 December 2015, the Arbitral Tribunal decided to reserve its decision to the quantum phase of the proceedings as to whether the scheme for the compensation of stranded costs implemented by Hungary infringed Article 10 ECT. Nevertheless, the Arbitral Tribunal indicated that the non-payment of HUF 22,171,991,000 or a lesser sum at the end of Hungary's legislative scheme did not strike the Tribunal as necessarily amounting to a breach of the fair and equitable treatment standard. However, non-payment (in cash or otherwise) of a significantly higher sum for Net Stranded Costs most probably could³⁸.

Dunamenti Erőmű and Electrabel brought also an action for damages before the GC relying on the second paragraph of Article 340 TFEU, requesting compensation for the loss allegedly suffered as a result of the adoption of the contested EC decision. In November 2014, the GC dismissed that action as inadmissible on the ground that it was time-barred³⁹.

³⁷ See Stibbe Newsletter of 04.01.2013, "EU Member State not liable towards EU Investor under the Energy Charter Treaty?", available at: <http://www.stibbe.com/en/news/2013/january/bru-energy-energy-ebulletin-jan-2013-eu-member-state-not-liable-towards-eu-investor> (20.07.2016).

³⁸ That does not appear to have been the approach of the Arbitral Tribunal in the similar *Électricité de France (EDF)* case. EDF was a shareholder in Budapesti Erőmű. In connection with the termination of its PPA, Hungary was ordered to pay EDF EUR 107 million. See Thomson, D., EDF wins claim against Hungary, published on 11 December 2014, available at: <http://globalarbitrationreview.com/news/article/33251/edf-wins-claim-against-hungary/> (20.07.2016).

³⁹ Order of the GC of 13.11.2014, Case T-40/14, ECLI:EU:T:2014:1004. Later, the plaintiffs withdrew their appeal in case C-32/15 P; order of the Court of 25.02.2016, ECLI:EU:C:2016:197.

7. Evaluation of the case

Long term PPAs pose various competition policy problems. Since they are often concluded between market players with significant market power, they may result in market foreclosure and thus the postponing of the beneficial effects of market liberalization. In addition to Articles 101 and 102 TFEU, State aid rules also have a role to play if the buyer is a publicly owned undertaking. The Commission decided in 2008 that the Hungarian PPAs, concluded at the dawn of the nationwide privatization of the Hungarian energy sector, benefited electricity producers. The fact was of key importance here that the publicly owned MVM was obliged to pay a price calculated on the basis of a formula that a market economy investor would not have agreed to.

The decision of the Commission ordering the return of the aid was not unexpected. Policy papers issued by the Hungarian Competition Authority had warned as early as 1999 and 2002 that long-term purchasing agreements concluded between powerful undertakings may well infringe European competition rules. Similar long-term agreements (extending until 2027) covering 40% of the Polish energy market, were found to be unlawful State aid as well⁴⁰. A year earlier, in its Energy Sector Inquiry, the Commission assessed the effects of PPAs on the internal market⁴¹ and concluded that “(l)ong-term power purchase agreements (PPAs) are another factor which may affect the volumes that are traded on a regular basis on wholesale markets”⁴². With regard to the PPAs in Poland, the EC argued that “they may well constitute a significant barrier to the development of the Polish wholesale market”. It went on to say that “(a) similar situation exists in Hungary, where Magyar Villamos Muevek (“MVM”) is the public utility wholesaler and acquires electricity by means of long-term PPAs that is subsequently sold to the local retailers. The Hungarian PPAs cover the vast majority of the Member State’s electricity needs, which may have effects on wholesale trading similar to, or even going further than, those described above in the context of the Polish wholesale market”.

Despite all these related events, this was a major decision that made it clear that Hungary belonged now to the European Union where strict rules on competition prevail. In the end however, the EC decision that went against the State aid did not result in huge cash transfers from the electricity generators back to the Hungarian State. Following complex and time consuming

⁴⁰ NN/99/2005, Brussels, 25.IX.2007 C (2007) 4319 final, available at: http://ec.europa.eu/competition/state_aid/cases/202115/202115_763547_94_1.pdf (20.07.2016).

⁴¹ Published on 10.01.2007; available at: http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiries/energy/ (20.07.2016).

⁴² Recitals 467 to 473.

calculations, the conclusion was reached that the same companies that were now meant to return the State aid would have at the same time been entitled to compensation for their stranded costs resulting from unforeseen sectorial liberalization. These compensations were then “traded in” for the State’s recovery obligations resulting from the EC decision. Ultimately, the Hungarian State arrived at a zero amount – hence, no recovery. Still, some companies litigated the case both before EU courts and international tribunals.

This decision is one of those rare cases when the EC intervened to change the effects of State measures that had been taken before Hungary joined the EU. As a rule, State aid carried on into the Union by a new Member State becomes existing aid. Importantly, in contrast with new aid, incompatible existing aid should be terminated for the future, and so a decision going against State aid would not include a burdensome recovery order. However, Central and Eastern European countries had to face more stringent conditions if they wanted to become members of the “Club”. Existing Member States wanted to protect the internal market against State measures introduced in the candidate countries before their EU accession. These measures were made subject to, starting from 1 May 2004, EU rules relating to new aid, if those measures did not come within the exceptions specifically listed in the aforementioned annex. It has to be said that this unusual legal framework was not warranted. It is certainly true that the Europe Agreements’ State aid-related provisions, mirroring European competition law provisions, did not have direct effect. Also, they did not establish the same level playing field as if the candidate countries were Member States. Yet, even if the general rules of the Regulation implementing Articles 107-108 TFEU had been followed, existing aid could have been terminated by the Commission. In other words, old Member States could have achieved the phasing out of those aid measures which distorted competition to the detriment of their companies.

Cases focusing on measures adopted in the distant past often raise issues relating to which law is to be applied and the events of which time period should be taken into account. In this case, the time factor was further complicated by EU accession, part of the PPAs’ life time being before, part of it after 1 May 2004.

AG Wathelet was persuaded by the plaintiff’s arguments that the Commission and the GC should have travelled back in time to the date when the PPAs had first been agreed upon. The CJ did not follow this path but ruled instead that the reference period for evaluating the State aid cannot be earlier than the date of Hungary’s EU accession. According to the CJ, the Commission was right to believe that this is the right approach, also in cases where a measure became State aid only years after its actual adoption (here as a result of Hungary becoming a part of the liberalized EU energy market).

It should be noted that the EC also ordered the recovery of aid still existing after the accession date. The investigation did not cover those measures which ceased to exist before 1 May 2004.

Emanuela Matei argues that it is unfortunate for the CJ not to draw the logical consequences of its well established economic unit doctrine⁴³. Dunamenti Erőmű, the acquired entity, was regarded as the actual beneficiary of the State aid while Electrabel was presented as a separate entity, even though it held a 75% controlling stake in the electricity producer. From the perspective of a private investor such as Electrabel, the benefit of the PPA covering a time horizon of 15-20 years was sure to have played a role in its decision to acquire the Hungarian operator. It is hard to believe that the price paid by Electrabel in 1995 did not cover the value of the PPAs. Hence the Commission should have assessed the matter whether the price paid by Electrabel took into account the PPAs as part of the MEIP test. The CJ did not follow the opinion of its AG on this point.

It is certain that without the long term PPAs foreign companies would have been less interested in purchasing Hungarian electricity producers only a couple of years after the collapse of its socialist regime. The conclusion of the PPAs by the publicly owned MVM might have been compatible with the long-term strategy of a private investor. Furthermore, even if aid had been granted to the producers, their subsequent privatization price should have reflected the following – without the PPAs, the price paid by foreign investors should have been lower. In other words, the price of the aid was paid by the new owners. Yet to prove this theory to the requisite high standard after so many years is extremely demanding, if not impossible.

There is a further factor strengthening the Commission's strict interpretation. The PPAs original timeframe was extended before Hungary's EU accession for an additional couple of years. The plaintiff may have argued that the value of the 15-year long PPA was considered in the purchase price. This is not true, however, for the extra years. This advantage could not have been properly remunerated when the company was privatized.

Another noteworthy point of the case was that, as pointed out by AG Wathelet, the jurisprudence of the CJ was somewhat inconsistent as to which company must repay the aid if the undertaking was meanwhile sold. The CJ did not hesitate to confirm its *Germany v Commission* ruling providing that if the beneficiary of the unlawful State aid retains its legal personality and continues to carry out the activities subsidized by the State, as Dunamenti Erőmű did, it is normally this undertaking that must repay the advantage.

⁴³ E. Matei, A new misnomer in State aid law: single economic unit with separate legal personality (C 357/14 P, *Dunamenti Erőmű/Commission*), 22.10.2015, available at: <http://stateaidhub.eu/blogs/stateaid/post/3945> (20.07.2016).

From a procedural point of view, it was also interesting to realize the limits of the wide concept of an undertaking. A company that was not a party in the first instance judicial procedure was not allowed to appeal the GC's judgment even if, at the time when the case was registered, it formed an economic unit with the undertaking to which the Commission's decision was addressed.

Literature

- Kende, T. (2015). Arbitral Awards Classified as State Aid under European Union Law. *ELTE Law Journal*, 1.
- Tietje, C. and Wackernagel, C. (2014). Outlawing Compliance? – The Enforcement of intra-EU Investment Awards and EU State Aid Law. *Policy Papers on Transnational Economic Law*, 41.

Piotr Semeniuk,
Konceptcja jednego organizmu gospodarczego w prawie ochrony konkurencji
[*The Concept of a Single Economic Unit in Competition Law*],
University of Warsaw Faculty of Management Press,
Warsaw 2015, 325 p.

The book under review here provides a very broad analysis of the concept of a single economic unit. The analysis refers either to many aspects of substantive rules of competition law (among them, the application of the prohibition of competition restricting agreements to agency contracts or bid-riggings, merger control, setting up of joint ventures) or to the complex problem of attributing liability for antitrust breaches and imposing sanctions for them. [why is it either or?] The Author tries to compare the application of the concept of a single economic unit in competition law and its application in other legal areas such as energy law or regulations on public procurements. The economic context is not omitted either, which must be presented due to the nature (economic as such) of the analyzed concept, economic issues are thus covered in subchapter II.3. As a result, the reviewed book presents the concept of a single economic unit in a complex legal and economic context.

The very wide scope of this publication is fully reflected in its structure – the book contains 9 chapters. Chapter I introduces the key problems covered by the Author. Chapter II presents the concept of a single economic unit from the perspective of jurisprudence and economics. Chapter III focuses on the concept of a single economic unit in merger control. Chapter IV explores the single economic unit in the context of joint ventures. In chapter V, the Author presents the relative dimension of the concept of a single economic unit with a nexus to the status of an agent and an employee. Chapter VI covers the formal aspect of the concept of a single economic unit, which is attributing antitrust liability to a particular entrepreneur being a part of an economic unit or to a unit as a whole. Chapter VII introduces problems associated with the substantive aspect of the concept of a single economic unit and clearly focuses on applying this concept to bid-riggings. In chapter VIII, the Author provides a comparison of the concept of a single economic unit and neighbouring institutions



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.

of competition law and other legal areas. Chapter IX presents conclusions based on the analysis contained in all of the preceding chapters.

The Author's aim seems to be to convince readers that the concept of a single economic unit can have different meanings, and that the concept is subject to an analysis with a different scope and a different nature depending on the character of the legal norms the application of which demands reference to the doctrine of a single economic unit. In my opinion, this thesis as such is not particularly original – the fact that a given concept/doctrine is applied in a different manner with respect to legal norms of a different substantive scope and different goals seems to be completely clear. Instead, the original character of the reviewed book lies in the manner of the presentation of this (non-controversial by its nature) thesis.

The Author decided that a key point of the analysis leading to the conclusion on a heterogeneous character of the single economic unit doctrine was his own concept of the inclusive and exclusive context of this doctrine, its relative and absolute dimension and, finally, its substantive and formal aspects. The specific dimension of the doctrine identified by the Author that he connected with *ex post* and *ex ante* application of competition rules cannot, in my opinion, be seen as fully original. By so shaping the context and boundaries of his research, the Author shows however his abilities to properly identify a scientific and practical problem, not limiting himself to a mere description of a problem but additionally creating new (original) concepts used to better characterise the single economic unit doctrine.

What can draw the attention of the readers is the fact that on the level of particular chapters or even subchapters, the Author identifies and resolves research problems of a narrower scope than the problem identified as the core issue for the whole publication. Constructing the book in this manner results in a very broad scope of the publication. On the one hand however, this proves the Author's personal research abilities yet on the other, it turns the book into a sort of "patchwork" and makes its internal structure rather heterogeneous. This results in a slightly chaotic path of argumentation in some parts of the book's contents. In my opinion, the transparency of the structure of the book as well as the coherence of its arguments are additionally disturbed by its subchapters dedicated exclusively to the analysis of case law and decisional practice. These include, for example, subchapter II.4.2.3. Other examples of application of the concept of a single economic unit in EU competition law; VI.3.4.2. Analysis of cases concerning joint ventures; VII.3.5. Polish case law on "Polish bid-riggings" (the term "Polish bid-riggings" was introduced by the Author in a famous article published in 2013 the "internetowy Kwartalnik Antymonopolowy i Regulacyjny"). Analyses of this kind are naturally needed and determine the high quality of publications. They should, however, only serve as tools for the presentation of the merits, not a fundamental part of certain parts of the content. Moreover, many subchapters dedicated solely to EU law or EU case law (or solely to Polish regulations and case law) contribute to an unnecessary division of argumentation into the Polish and EU level.

However, a great advantage of this book lies in “breaking the borders” of competition law, resulting in the definition and resolution of problems in a very broad context. Proposals for the identification of the concept of a single economic unit (or its elements) in other legal areas can constitute an important point of reference for the analysis of this concept on the grounds of competition law. However, I consider the Author’s approach inappropriate where he combines within one chapter his findings on the concept of a single economic unit in the context of “neighbouring institutions of competition law” and “other legal areas” if the title of the book refers to competition law as such, not to its selected institutions or other legal areas where the single economic unit doctrine was confirmed in case law.

The Author presents a very creative approach to solving previously identified problems concerning the analysed concept – the attempt to transfer the basic assumptions of the single economic unit doctrine to relationships between a mother company and its subsidiaries can serve as a very good example here. Another can be found in the rebus puzzles created by the Author in order to confirm the opportunities to apply the concept of a single economic unit to agency agreements (chapter V “Relative dimension of the concept of a single economic unit – the status of an agent and an employee”).

The book delivers a presentation of the results of a review of opinions and positions of the most important representatives of Polish and European doctrine dealing with the issue of a single economic unit in their works. It seems that the Author managed to identify all Polish judgments and antitrust decisions concerning the application of this concept; the analysis of EU practice and references to American case law seem to be just sufficient. References to economic doctrines and concepts seem to be one of the strongest points of the reviewed book.

What is of fundamental importance, the opinions expressed by the Author can be the sources of controversies. There is, therefore, a great chance that they will cause debates and discussions not only in legal writing but also in judgments of Polish courts and decisions of the Polish competition authority. The Author is truly brave in formulating his own opinions, using appropriate, perfectly combined arguments. Piotr Semeniuk does not hesitate to go into a discussion with the opinions of others, often commonly recognized and appreciated representatives of jurisprudence. What I find especially valuable is the Author’s critical (although justified) approach to Polish case law and the decisional practice of the competition authority. The Author’s attitude is somehow uncompromising which – especially in the case of young researchers – should be considered an advantage. Additionally, this uncompromising approach can efficiently increase the level of the intensity of legal debate.

To the best of my knowledge the topic of a single economic unit had not yet been analysed in Polish legal literature in such a broad manner (even in the form of an article, if not a book). Undoubtedly, the book written by Piotr Semeniuk fills this gap and complements the development of Polish antitrust doctrine. However, not only is the sole fact of its publication worthy of the attention of the readers,

the quality of the book is also worth appreciating. Concepts of the inclusive and exclusive dimension of the single economic unit doctrines should somehow be incorporated by Polish jurisprudence contributing to the development of antitrust law in Poland¹.

Prof. WSiIZ dr hab. Agata Jurkowska-Gomułka

University of Information Technology and Management
agathajur@o2.pl

¹ A reference to Poland is done solely because of the fact that book – published in Polish – is accessible mainly for Polish researchers.

R E P O R T S

The Pursuit Before Polish Courts of Actions for Damages Based on Competition Law Infringements.

Warsaw, 20 April 2016

The Conference entitled “The pursuit before Polish courts of actions for damages based on competition law infringements” (*“Dochodzenie przed sądem polskim roszczeń odszkodowawczych z tytułu naruszenia reguł konkurencji”*) took place in Warsaw on 20th April 2016. It was organized by the Centre for Antitrust and Regulatory Studies (CARS, University of Warsaw). The Conference was dedicated to issues connected to the implementation into the Polish legal order 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 (hereinafter, Damages Directive).

Professor Stanisław Piątek (Faculty of Management, University of Warsaw) opened the conference on behalf of Professor Tadeusz Skoczny (CARS Director), welcomed the participants and briefly described outline of the conference. He then informed the audience that the conference would be preceded by the Great Owl Award Ceremony – the Great Owl is an Honorary Award granted by CARS for overall achievements in the field of law and economics of competition. In 2016, the jury decided to award the Great Owl to Professor Stanisław Sołtysiński (of counsel at Sołtysiński Kawecki & Szlęzak – Kancelaria Radców Prawnych i Adwokatów Spółka komandytowa, Poland). As a member of the Great Owl jury, Professor Marek Szydło (Faculty of Law, Administration and Economics of the University of Wrocław, Poland) spoke next of the many reasons for awarding the Great Owl to Professor Sołtysiński, emphasizing his great scientific achievements in the competition law field. Professor Anna Fornalczyk (the first President of the Polish Anti-Monopoly Office) stressed next that Professor Sołtysiński exercised a major impact on the competition law application practice in Poland and proceeded to present Professor Sołtysiński with the Great Owl Award. Professor Sołtysiński thanked for the award and briefly described his role in the negotiations of the Polish EU accession treaty and his beginnings with competition law.

As Professor Piątek stated during the opening speech, the conference was convened to discuss issues referred to in the monograph “The pursuit before Polish courts of actions for damages based on competition law infringements” edited by Professor



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.

Anna Piszcz (Faculty of Law of the University of Białystok, Poland) and Dr Dominik Wolski (in-house lawyer in Jeronimo Martins, Katowice Scholl of Economics, Poland) published by CARS.

The first session of the conference was moderated by Professor Sołtysiński; it was devoted to substantive law aspects of private competition law enforcement.

Dr Dominik Wolski (in-house lawyer in Jeronimo Martins, Katowice Scholl of Economics, Poland) delivered the first paper dedicated to key issues connected to the implementation of the Damages Directive into the Polish legal order. Speaking about principles of liability for damages arising from competition law infringements, he emphasized that there is a need to ensure consistency between the principles of private and public competition law enforcement. He stated that the introduction of “special” liability for claims arising from competition law breaches would not be justified. In particular, it would not be recommended to introduce objective illegality. He also indicated that pursuing claims by persons indirectly injured was controversial. However, if there was a rule of law that would expressly enable persons indirectly injured to claim damages, any doubts in this matter should be waived. Dr Wolski stated also that there are objections as to the moment from which the injured person may claim interests. According to the Damages Directive, interests should be due from the moment when the harm occurred until the time when compensation is paid. He indicated that the Damages Directive is clear in this context but such solution may be contrary to the principle of justice. In case of damages claimed on a legal basis other than competition law infringements, interests are, as a rule, due after the summons for payment. The speaker mentioned that the definition of overcharges would probably not solve the problems with the quantification of harm. As to the role of a competition authority in the process of the quantification of harm, he stated that the authority should not be the one that quantifies it – its role should be limited to helping in this process as the courts may not have enough knowledge to quantify the harm properly.

Professor Paweł Podrecki (Faculty of Law and Administration of the Jagiellonian University in Kraków, Poland) and Katarzyna Wiese (The Truple Konarski Podrecki & Wspólnicy Law Firm, Poland) presented jointly a paper on joint liability of competition law infringers and focused on its limitations. Professor Podrecki briefly explained the elements of joint and several liability and stated that the basic function of compensation was to compensate the damage. The full compensation rule means that the injured person cannot claim compensation exceeding the amount of the damage. However, there is a problem here with legal rules on interests due from the moment when the harm occurred. The speaker stated also that the limitations of joint liability of SMEs as well as that of recipients of immunity from competition law fines (leniency) might cause practical problems in claiming damages. Those limitations lead to a modification of the general liability principle, because if one of the severally liable entities is either a SME or benefits from leniency, other severally liable entities will not be able to recover an appropriate contribution from them. Katarzyna Wiese discussed subsequently issues connected to the limitations of joint liability of SMEs and immunity recipients focusing in particular on the conditions that SMEs have to fulfil in order to limit their liability.

Aleksander Stawicki (Senior Partner at WKB Wierciński, Kwieciński, Baehr law firm, Poland) delivered a paper – prepared jointly with Dr Bartosz Turno (WKB Wierciński, Kwieciński, Baehr law firm, Poland) – on the limitation periods in competition law enforcement. Mr Stawicki briefly mentioned basic provisions on limitation periods. He stated that in Dr Turno’s and his own opinion, one may be sure that there was an infringement once a decision issued by the President of the Office of Competition and Consumer Protection (UOKiK – the Polish National Competition Authority, NCA) becomes final. The speaker indicated that the proceeding initiated by the UOKiK President or before the Court of Competition and Consumer Protection would not interrupt the running of the limitation period. He also emphasized that the limitation period will not start until the infringement ceased. In this scope, there may be a practical problem with establishing when the infringement has ceased. In his opinion, the introduction of the five-year minimal limitation period provided by the Damages Directive was sufficient, albeit the Polish legislator should also introduce a second limitation period, the course of which would not depend on the damaged entity’s knowledge of the infringement. He proposed that the second limitation period could last ten years from the date of the act which caused the harm, or from the date when the infringement ceased. In his opinion, the introduction of such second limitation period – despite the fact that it has not been covered by the Damages Directive – will not be contrary to the Damages Directive.

The first conference session closed after a discussion focusing in particular on the issue of the quantification of harm, including the cooperation between the UOKiK President and national judiciary with respect to this matter.

The second session was chaired by Katarzyna Lis-Zarrias (judge, Ministry of Justice, Poland); it was dedicated to procedural issues of competition law enforcement.

Professor Agata Jurkowska-Gomułka (Higher School of Information Technology and Management in Rzeszów) presented the first paper in this session speaking about public and private enforcement of competition law in the EU and in Poland. She first indicated that the European model of competition law enforcement is seen as a public model rather than a private one and that the Damages Directive reflects what had already been mentioned in the jurisprudence. She also emphasized that the model of private enforcement, introduced in the Damages Directive and in the act that will implement this Directive into the Polish legal order, is not likely to have an impact on the development of private competition law enforcement. Professor Jurkowska-Gomułka noted that the reason for this does not arise from the Damages Directive stating that the European model of competition law enforcement is built mainly as public competition law enforcement. She also indicated that the number of cartels is not that great in Poland.

Maciej Gac (Jagiellonian University in Kraków, Poland) covered in his speech the issue of disclosure of evidence of competition law infringements. He emphasized that in Poland the mechanism of gaining evidences from the opposing party rests currently in Article 248 of the Civil Procedure Code. However, the existing legal provision could prove insufficient in private competition law enforcement. The procedure of disclosure of evidence is not yet known in Poland and so it is necessary to introduce the procedure

of the disclosure of evidence as described in Article 5 of the Damages Directive. In his opinion, the limitations on the disclosure of evidence included in the files of a competition authority is one of the key issues regarding the disclosure of evidence.

Professor Anna Piszcz delivered the next paper on the effects of a domestic infringement decision. She indicated that the Damages Directive has introduced two types of effects of a domestic infringement decision: a cross-border effect (Article 9(1) of the Damages Directive) and a non-cross-border effect (Article 9(2) of the Damages Directive). She emphasized that Article 9(1) of the Damages Directive should be implemented by the introduction into the Polish legal order of an irrefutable legal assumption. This would mean that for the purpose of a damages claim on the basis of Articles 101 or 102 TFEU and equivalent national provisions, it would be assumed that a competition law infringement had taken place if it was so declared in a prior final decision of the NCA or the reviewing court of that EU Member State. It is crucial to expressly indicate that evidence to the contrary is not permitted. As to the implementation of Article 9(2) of the Damages Directive, she proposed that the Polish legislator should introduce a refutable legal assumption. This would mean that for the purpose of a damages claim on the basis of Articles 101 or 102 TFEU and equivalent national provisions, it would be assumed that a competition law infringement had taken place if it was so declared in a prior final decision of a NCA or reviewing court from another EU Member State. However, it should be possible to attempt to disprove this legal assumption.

Małgorzata Modzelewska de Raad (Modzelewska & Paśnik law firm) presented a paper on consensual resolution of disputes resulting from competition law violations. In her opinion, it is commendable that the Damages Directive also covers the issue of the effects of consensual settlements on subsequent actions for damages. She emphasized that public administration bodies are not involved in consensual resolution of disputes. The manner of solving those disputes depends on general legal culture, since alternative dispute resolution requires the consent of the parties of the dispute. The speaker indicated that a given arbitration court should apply public competition law and stated that a decision issued by a competition authority becomes a part of the legal order. Therefore, the arbitration court should not make its own assessment as to the infringement if there was a prior final decision of a competition authority declaring that a competition law violation had indeed taken place. She indicated that arbitration courts are more predestined to quantify the harm than common courts.

The second session closed after a discussion focusing in particular on the effects of consensual settlements on subsequent actions for damages and the limitations of liability for immunity recipients.

The conference was briefly summarised by Professor Piszcz and Dr Wolski. Subsequently, Professor Piątek thanked the participants and closed the conference on behalf of Professor Tadeusz Skoczny and CARS.

Paulina Korycińska-Rządca

PhD candidate at the Department of Public Economic Law at the University of Białystok, legal counsel in Kancelaria Radców Prawnych Bieluk i Partnerzy
p.korycinska@gmail.com

Third National Conference: Consumer in the Rail Passenger Market. Łódź, 10 May 2016

The Third National Conference entitled “Consumer in the rail passenger market” was held on 25th May 2016 at the Faculty of Law and Administration of the University of Łódź. The event was organised for the third time by the Polish Foundation of Competition Law and Sector Regulation *Ius Publicum* and the Student Society of Energy Law and Infrastructural Sectors of the University of Łódź. The organising committee was joined for the first time by the Department of European Economic Law of the University of Łódź, the Department of Public Economic Law of the University of Łódź, and the Office of the Łódź Voivodeship. The Conference was held under the patronage of the President of the Office of Rail Transport (in Polish: *Urząd Transportu Kolejowego*, hereinafter, UTK), the Centre of Antitrust and Regulatory Studies (CARS, University of Warsaw) and the Railway Business Forum. PKP S.A acted as the Golden Partner of the conference, the Institute for Economic Law Sp. z o.o. as its Silver Partner, and Łódź Agglomeration Railway Sp. z o.o. as its Bronze Partner. A number of other bodies gave their support to the conference including: the Centre for Public Procurement and Public-Private Partnership of the University of Łódź, Pawełczyk & Szura Law Office, Wierzbicki Adwokaci i Radcowie Prawni Law Office, the Student Council of the Faculty of Law and Administration of the University of Łódź, the Scientific Association of Law Students of the Maria Skłodowska-Curie University of Lublin, the Scientific Group of Administrative Law at the Silesia University, and the Student Society of Energy Law and Sector Regulation of the Adam Mickiewicz University of Poznań.

The event was the continuation of the first and second edition of the “Consumer in the rail passenger market” conferences held on 10th May 2014 (in Katowice)¹ and 18th March 2015 (in Łódź)² respectively.

¹ Kraśniewski, M. (2014). Sprawozdanie z ogólnopolskiej konferencji naukowej pn. „Konsument na rynku kolejowych przewozów pasażerskich”, Katowice, 10 marca 2014 r. *iKAR*, 7(3), 133–135.

² Kraśniewski, M. and Ziarkowski, M. (2015). Sprawozdanie z II Ogólnopolskiej Konferencji Naukowej pn. Konsument na rynku kolejowych przewozów pasażerskich Łódź, 18 marca 2015 r. *iKAR*, 4(4), 159–163.



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.

Professor Maria Królikowska-Olczak (head of the Department of European Economic Law, curator of the Department of Public Economic Law, University of Łódź) acted as the head of the conference. The position of the president of the Conference Programme Council was held by Professor Mirosław Pawełczyk (Chairman of the Board of the Polish Foundation of Competition Law and Sector Regulation *Ius Publicum*, Associate Professor, Department of Public Economic Law, Silesian University). The organisational works concerning the conference were led by Marcin Kraśniewski (Chairman of the Board of the Student Society of Energy Law and Other Infrastructural Sectors of the University of Łódź).

The aim of the conference was to get to know and understand the processes taking place on the rail passenger market as well as to exchange views and experiences between scientists, civil servants and businessmen in this area. The conference provided also an occasion for undergraduate and graduate students to get acquainted with the regulation of the railway sector.

Professor Królikowska-Olczak greeted the moderators, speakers, discussion participants, guests and other participants of the conference. Thereafter, Professor Agnieszka Liszewska (Dean of the Faculty of Law and Administration, University of Łódź) opened the conference. She drew the attention of the audience to the key role played by railway transport and expressed her satisfaction that this already third edition of the event had been organised at the University of Łódź. In the opening part of the conference, Alina Giedryś (advisor to the Marshal of the Łódź Voivodeship responsible for railway infrastructure) read a letter from the Marshal of the Łódź Voivodeship, Witold Stępień. Subsequently, Dr Jan Michajłowski (Principal in the Department of Infrastructure of the Office of Łódź Voivodeship) read a letter from the Voivode of Łódź, Professor Zbigniew Rau. Both letters were directed to the participants of the conference. On behalf of Professor Tadeusz Skoczny (Director of CARS, University of Warsaw), a speech was also given by Dr Jan Walulik (Associate Professor, CARS).

The opening speeches were followed by the first panel entitled “The role of the State and the EU in influencing the functioning of the rail passenger market”; the panel was moderated by Dr Jan Walulik.

Dr Stefan Jarecki (Associate Professor, Faculty of IT Management, Warsaw School of Information Technology) delivered the first paper entitled “Incentives other than competitive efficiency”. The speaker discussed the aims of the EU legislator concerning railway transport, such as increasing the share of railway use in transport overall and better quality of transport services, EU regulatory solutions, and competition models in the rail passenger market. He noted that there are two models of appointing an operator on the railway market – a competitive model and direct handover. Dr Jarecki indicated that in view of those two models, the EU legislator decided to introduce other mechanisms than competitive pressure, which could impose an improvement of efficiency (both economical and related to quality of service). He described those mechanisms as “motivational incentives” that should be practised by public transport organisers. He then proposed an example of motivational incentives, presented preparations of the Fourth Railway Package and potential effects of the new EU rules.

Dr Michał Będkowski-Koziół (acting head of the Department of Public Economic Law, Faculty of Law, Kardynał Wyszyński University, partner at Kochański Zięba i Partnerzy Sp.j.), presented the next paper focusing on the European Railway Agency in light of the Fourth Railway Package. He first outlined the main aim of the new package (removing technical and administrative barriers for the development of the EU railway area) and then presented its technical and market pillars. He stressed the place of the Agency in the EU's institutional system and the controversies surrounding the delegation of competences of the EU to the Agency. The speaker referred to the Maroni doctrine and to the CJEU's *Romano* and *Short selling* judgments. He stated that the CJEU has not yet decided whether the possibilities of delegating competences are properly limited. The speaker also indicated that the Agency should be treated as an answer to the so called "liberalisation paradox", which resulted in creating new regulators in infrastructural sectors. Dr Będkowski-Koziół described later the tasks of the Agency conferred upon it by the Fourth Railway Package, the stages of creating that package, and changes in the organisational structure of the Agency. In conclusion, he indicated that organisational changes are the result of the implementation the Commission's plan referring to unifying structures of EU agencies.

Dr Bartosz Mazur (member of Prokolej Programme Board, advisor for integrated transport of the President of Rybnik) delivered the next paper entitled "Claims and complaints from railway operators towards public railway transport authorities". The aim of the paper was to present key jurisprudential theses developed by administrative and general courts concerning the organisation of public transport. The speaker started by presenting the reasons for choosing this topic and the basic legal acts regulating the relation between organisers of public transport and transport entities. He then spoke of those that are "organisers" or "operators of public transport" and the opportunities surrounding the organisation of public transport. He also stressed the rules of direct entrustment of the provision of transport services and focused on presenting a number of jurisprudential theses developed by the administrative and general judiciary. Finally, Dr Mazur set out what conclusions arise from his jurisprudential analysis and spelled out existing legal imperfections concerning the organisation of public transport and the fact that courts failed to explicitly solve many of the contentious issues.

Dr Jan Walulik subsequently invited the participants of the conference to raise questions. In the discussion that followed, the floor was taken by Professor Królikowska-Olczak who noted the centralisation tendency occurring in EU law and referred to experiences in road transport and changes in intellectual property law. She also mentioned the effects of centralisation, that is, the increasing costs for entrepreneurs. After a short presentation, she asked about the costs of proceedings before the European Railway Agency. Adrian Furgalski (president of the Board of Directors of the Railway Business Forum, vice-president of the Board of Directors of Zespół Doradców Gospodarczych TOR sp. z o.o.) was the next person to ask about centralisation. He indicated that the idea of strengthening the Agency is in general correct, since it makes it possible to reduce the number of proceedings with which transporters are currently struggling. The following questions remain unanswered at the moment however: How much will proceedings cost? How much will Polish

transporters pay for them? How long will proceedings last? What requirements will transporters need to fulfil? Elaborating on the issue of requirements, he pointed out that potential demand of “top-end” requirements, like for instance in Germany or France, will negatively influence the Polish entities dealing with examining supply trains. Dr Będkowski-Koziół agreed stating that strengthening the Agency will surely create winners and losers. Changes will certainly improve the situation of transporters, who are or will focus on developing their activity in the wider area of the EU. At the moment, there are no details on the costs of proceedings and increasing the administration of the Agency. However, it is known that the cost will not be higher than the European average, and this means that Polish transporters will have to spend more on proceedings. The speaker also indicated that the process of unification and centralisation is unavoidable, because the paradigm of the market can lead to the teardown of the internal market. Relocating some competences to the EU level is necessary – otherwise the market would not function properly. At the end, Professor Królikowska-Olczak stressed the fact that none of the agencies have their seat in Poland and asked if Poland applied to have the Agency situated on its territory. Dr Będkowski-Koziół answered that the seat of the Agency would be situated in Lille, France.

Professor Królikowska-Olczak moderated the second panel of the conference entitled “Integration of railway transport with other means of transport” and it was discursive in nature. The panel had the following participants: Dr Michał Beim (Member of the Board of Directors of PKP S.A., Associate Professor, Faculty of Land Reclamation and Environmental Engineering, Poznań University of Life Sciences), Adrian Furgalski, Ryszard Rebilas (President of the Board of Directors of Koleje Małopolskie Sp. z o.o.), Alina Giedryś and Włodzimierz Wilkanowicz (President of the Board of Directors, Koleje Wielkopolskie Sp. z o.o.).

Professor Królikowska-Olczak indicated first that European policy includes every type of transport (inland, railway, air, road, maritime transport) but if looked at through the lens of EU law, it is fair to say that Article 100 TFEU prioritises railways, inland and road transport. As a result, railway transport is regulated both by primary and secondary EU law (while air and maritime transport are subject to secondary EU law only). She then pointed out that economic integration consists of mainly obeying the principle of non-discrimination which covers not only transporters, but also contractors and passengers. She spoke of the challenges of railway transport which include, for instance, increasing competitiveness by liberalising freight and passenger transport. Some limitations of that process result from the network nature of transport and from the need of providing public services. The speaker asked the participants of the panel about State policy on the shape of public transport.

Dr Michał Beim was the first to respond stating that integration happens on many levels. The first concerns technical matters, which is likely to be the easiest and most standard to deal with. As a justification of this thesis, he indicated that building rail hubs constitutes an important position of the 2020 budget. However, he also noted that, according to technical integration, it is important to outwork “best practice” when it comes to the way and range of providing passenger information. Dr Beim spoke

next of the problem of functional integration, which consists of the harmonisation of timetables and improving the way in which train delays are handled. Moreover, he claimed that Poland was a sectorial country because every sector prepared its own set of assistance for specific categories of passengers, which greatly hinder the integration process and disorient passengers. In this respect, it is necessary to start the discussion about simplifying the assistance system in Poland. At the end, he noted the problem of the “real” powers of transport organisers. Polish metropolises are currently in the process of undertaking intensive activities meant to integrate their transport systems but meanwhile financial issues arise and so systemic measures should be undertaken as well. Dr Beim concluded that, without integration, railways will not be able to attract passengers, especially the younger generations.

The floor was taken by Mr A. Furgalski who started by talking about simplifying ticketing systems. In his opinion, ticketing systems should not be used which can soon lose their modern and passenger-friendly advantages (referring to London’s experiences of introducing a ticketing system which is currently not used). In his assessment, railway transport should be integrated firstly in the area of its own market – a railway operator defines his competitor incorrectly as another railway operator, rather than as an individual road transport. An example of this kind of thinking is the campaign of PKP S.A.: “Not every train is PKP”. Mr Furgalski claimed that what should be done instead is for railway companies to find a common ground and stop treating each other as competitors. He then mentioned the issue of common tickets asserting that the pathology should be eliminated whereby a passenger of one railway-company cannot buy a ticket at another’s cashier. He also spoke of the issue of joint connections – common consideration of railway timetables that should provide a mental integration of the railway environment, seeing as legislation will not solve all of the problems. He noted the already existing integration, inhibited by the creation of the new metropolitan act. Mr Furgalski mentioned also the integration of air transport and railway transport and stated that it should be based on loyalty programmes. The speaker referred here to German experiences where Lufthansa tickets include connecting railway tickets.

Włodzimierz Wilkanowicz elaborated subsequently on the topic of railway and air transport integration. First he said that it is hard to speak of changing attitudes where there is financial competition. He indicated also that infrastructure integration is very tough partly because it has many owners, and partly because it is not always possible for the owners to provide the same standards. This problem is related to the State’s role since it should provide proper order in this regard. Moreover, the speaker also claimed that access to railway infrastructure should include not only access to railways itself but to the exchange infrastructure as well.

Ad vocem Dr Beim said that the existence of several operators in the area of railway infrastructure is not a negative situation. He claimed that for the proper course of integration, there is no need for only one administrator to exist and to repeat the same solutions; here he referred to German experiences. In general, in Dr Beim’s opinion, it is difficult to introduce identical infrastructural standards and having many administrators might be beneficial as it can influence efficiency.

There is no doubt that identical information standards should be strived for.

W. Wilkanowicz asked Dr Beim how railway buildings, which have lost their railway-function and are currently used as schools or libraries for instance, should be administrated and who should provide railway passengers with relevant information therein. Dr Beim responded that those problems should be solved through cooperation between local governments and railway administration.

The floor was taken by Ryszard Rebilas who first outlined the beginnings of Poland's youngest railway transporter – Koleje Mazowieckie. He noted, among other things, how important it is for a railway transporter to properly prepare and settle its timetable, which is not easy since administrators introduce many revisions during the year and often change their prices. Those actions result in higher costs (in comparison to those set out in the contract) for the transporter. He also pointed out that investments into improvements of railway infrastructure are not perfect yet, and that Koleje Małopolskie are estimated to gain a stronger position in the railway market. Professor Królikowska-Olczak asked Mr Rebilas about the state of Koleje Małopolskie's preparations in relation to the World Youth Day, which place a duty on the transporter to ensure safety of the participants. Mr Rebilas replied that a special committee was created last year which coordinates those preparations – the transporter will also provide for that purpose its newest carriages, train its workers and cooperate with airports.

In the next part of the discussion, the moderator asked the participants about transport integration plans. Alina Giedryś was the first to take the floor here stressing first that integration is necessary. She started with a short historical summary of railway transport in the city of Łódź. The speaker indicated that transport integration is the basis of planning and explained that the level of integration depends on the level of preparation and execution of local sustainable development plans. She then mentioned that the infrastructural aspect of transport integration is not fulfilled properly. Infrastructural integration encounters a lot of obstacles of administrative nature, which do not make it possible to prepare common EU projects by local governments or other entities. Finally, she introduced the transport plans for the Łódź Voivodeship. Professor Królikowska-Olczak commented that all of the mentioned issues paint an optimistic picture.

The next part of the panel discussion included questions from the audience. It was indicated therein that there are important issues in relation to the hypothetical acquisition of PLL LOT by PKP, especially the duties of the participants and the contracts between transporters and passengers. The fact was also stated that integration is hindered because of certain issues arising from the state of railway infrastructure. With respect to common tickets, it was observed that these are not necessary since they are already integrated. The realisation was also stressed that there are flaws in the metropolitan act because it does not provide the possibility of concluding agreements between a metropolitan organiser and a transporter. Finally, it was indicated that transport plans are announced with a big delay.

Professor Agata Jurkowska-Gomułka (Chair of Administrative Law, University of Information Technology and Management in Rzeszów) chaired the next traditional

session that concerned the significance of railway infrastructure for the functioning of passenger rail transport.

Professor Aleksander Werner (Warsaw School of Economics) presented a paper entitled “Forms and allocation of state aid in the rail transport sector”. At first he indicated that the rail transport sector, in addition to the steel sector, the coal mining sector, the shipbuilding industry, as well as the agriculture and fisheries sector is known as a “hard sector”. Referring to the work of Professor Karol Sobczak (Warsaw School of Economics), he pointed out that rail transport is subject to many pressures which impede competition. He also pointed out that the significance of those sectors exceeds the scope of a given company and that these sectors are prone to maintain natural monopolies. The speaker also stressed that all of these aspects had been noticed by the creators of EU primary and secondary legislation, reporting that this is manifested by the creation of its state aid rules in the rail transport sector. He then outlined the content of Article 93 TFEU, which acts as *lex specialis* for Article 106(2) TFEU. He also elaborated on the content of Regulation 1370/2007 of the European Parliament and of the Council, pertaining road and rail passenger transport and repealing Council Regulation No. 1191/69 and No. 1107/701, as well as the Commission Communication which contains the Community guidelines on aid for railway undertakings³. Professor Werner noted in conclusion the assumptions of the Fourth Rail Package that will introduce market rules for state aid.

Przemysław Ciszak (solicitor, PKP S.A.) focused in his presentation on the legal status of the distribution system operator of traction energy in view of the Act on Rail Transport. He indicated that his statement should be linked with the sale in 2015 by PKP S.A. of shares of PKP Energetyka to a private investor. The sale, regardless of its business and political assessment, caused numerous discussions connected to the legal status of the assets of PKP Energetyka – especially those assets that constitute elements of the power catenary – as well as referring to the legal status of the company itself, in view of the Act on Rail Transport. Mr Ciszak also noted that one of the arguments raised in the discussion concerned recognising that PKP Energetyka’s legal status excludes the possibility of qualifying its assets as railway infrastructure. As a result, it also makes it impossible for the provider of traction energy services to railway companies to be categorised as a railway infrastructure supervisor. Subsequently, the speaker analysed the legal conflict between the Act on Rail Transport and the Act: Energy Law, having regard to EU rules.

During this part of the conference, Alina Gierdyś focused on the impact of modernization projects concerning railway infrastructure on the standard of rail transport in the Łódź Voivodeship. She first stated that the standard of rail carrier offer addressed to passengers depends on many factors such as the standard of rolling stock and that of railway infrastructure. She then presented the stages of railway activation by the Łódź Agglomeration Railway, its rolling stock standard, actions taken in order to create its brand as well as presented changes in the number of its passengers between 2014-2016. The speaker also detailed the common agglomeration

³ OJ C 184, 22.07.2008, p. 13.

ticket that offers favourable prices for rail and local transport and promoted the passenger satisfaction survey of the Łódź Agglomeration Railway (based on time of travel and on service frequency). In conclusion, Ms Gierdyś presented railway infrastructure improvement plans for 2014-2020, emphasizing the significance of the new Łódź-Fabryczna Railway Station.

In conclusion, conference participants were invited by Professor Jurkowska-Gomulka to ask questions and share their own insights with the participants of the panel. Highlighted here was the Polish system of railway infrastructure financing, which doesn't deviate from the standards adopted in other EU Member States. The consequences of taking the statutory release of buildings and equipment belonging to PKP Energetyka from property tax was also mentioned. The confusion surrounding Article 5 of the Act on Rail Transport was noted, which defines duties of the railway infrastructure supervisor, as well as the consequences of the amendment of the Act on Rail Transport implementing Directive 2012/34/EU of the European Parliament and of the Council.

Parallel panels took place after lunch. Associate Professor Monika Namysłowska (Department of European Economic Law WPiA UŁ) chaired the consumer panel entitled "Protection of consumer rights in the rail transport sector". Marcin Kraśniewski chaired the access panel entitled "Access to railway infrastructure as a pro-competitive instrument in the rail transport sector".

During the consumer panel, Dr Sebastian Gajewski (researcher, Faculty of Law and Administration, University of Warsaw) presented a paper entitled "Rights of disabled persons and persons with reduced mobility and their protection in rail traffic". He stressed that an important part of Regulation 1371/2007 lies in standards relating to the rights of disabled persons and persons with reduced mobility in rail traffic. He then pointed to four main powers vested in this category of passengers: the right to transport, the right to information, the right to assistance and the right of access. The speaker outlined the detailed content of these individual rights – along with the scope and conditions of their permissible restrictions – and legal measures meant to guarantee their realization. In conclusion, he stressed the major role of the President of UTK when it comes to due protection of the rights of persons with disabilities.

Karol Kłosowski (Head of Unit –UTK, Passenger Rights Department, Administration Procedure and Supervision Unit; PhD Student in Nicolaus Copernicus University in Toruń, Faculty of Law and Administration, Department of Civil and Family Law) presented the next paper entitled "Unlawful practices infringing collective interests of rail passengers – remarks *de lege lata* and *de lege ferenda*". Mr Kłosowski spoke first of the powers of the President of UTK to conduct administrative proceedings concerning illegal practices infringing collective interests of rail passengers. He presented the origins and legal structure of this institution. He then analysed the current practice of the President of UTK in the area of administrative proceedings conducted in such cases and covered the imposition of fines in cases of violations of the prohibition of the use of illegal practices infringing collective interests of rail passengers. The speaker compared the competences of the President of UTK to those of the President of the

Office of Competition and Consumer Protection (UOKiK), the National Competition Authority, and formulated *de lege ferenda* proposals.

Grzegorz Pilecki (Senior Law Consultant in Legal Department of Administrative Proceedings and Supervision of UTK) delivered a speech entitled “Railway Passenger Ombudsman – alternative systems of extra-judicial dispute resolution as a new element of protecting the rights of rail passengers”. The starting point of his speech was to direct the attention of the audience to the concept and rationale of alternative systems of extra-judicial dispute resolution (ADR). The speaker clarified the powers and operational mode of the Rail Passenger Ombudsman, which was entered into the public system model of extra-judicial settlement of consumer disputes, based on general applicable provisions. Mr Pilecki outlined applicable provisions and the establishment of the Act of 18 May 2016 on extrajudicial resolution of consumer disputes. He then consecutively presented: the rules for the election and dismissal of the Ombudsman, the mode and manner of proceedings before the Ombudsman, the request for initiation of proceedings and possible outcomes of a case before the Ombudsman. In conclusion, he also pointed to that UTK is working on the regulation of the institution of the Ombudsman.

Dr Przemysław Kowalik (Assistant Professor, Department of Quantitative Methods in Management, Faculty of Management, Technical University of Lublin) introduced the principles for the construction of tariff offers in rail passenger transport as the cause of damage to the interests of consumers. At the outset, he stated that Regulation 1371/2007 obliges railway carriers or ticket vendors to provide information before traveling on, among others, the conditions for the lowest fares. Citing studies, he argued that rail operators do not fulfil that obligation. The speaker continued on to presented the guidelines for the proper construction of transportation tariffs, the compliance of passenger tariffs of Polish railways to the assumptions of correct tariff structures, and examples of failure to inform about the cheapest fare. He concluded by speaking about proposals for changes in the construction of passenger tariffs and their potential effects.

After the presentations, Professor Namysłowska opened the floor for a discussion which highlighted the consequences flowing from the principles of the structure of passenger tariffs, the issue of decisions finding a violation by a rail carrier of its information duty concerning lowest prices, and the vagueness of the term “conditions for lowest fares”. In addition, it is indicated on the practice of the President of UTK for the protection of passengers’ rights of persons with disabilities and limited mobility, which makes the relevant supervisory and control activities in this area.

During the parallel concerning access, Łukasz Romański (Department of Safety, UTK, PhD student, Faculty of Law and Administration, Warsaw University) presented a paper entitled “Liberalization policy in the railway sector in the EU in relation to the position and role of regulatory authorities in EU Member States”. Ochirsuren Badral (student, Faculty of Law and Administration, University of Łódź) spoke next of a fee for access to railway infrastructure. Aleksandra Bogusz (PhD student, Faculty of Law and Administration, University of Łódź) considered the environmental aspect of access to railway infrastructure. Michał Bałdowski (student, Faculty of Law and

Administration, University of Warsaw) presented the jurisprudence of the CJEU on access to railway infrastructure. Katarzyna Surmiak (student, Faculty of Law and Administration, University of Silesia in Katowice) spoke of activities and expertises of the President of UTK in the area of railway infrastructure. The session ended with a speech by Tomasz Mizioch (student, Faculty of Law and Administration, University of Silesia in Katowice) entitled “An administrative law analysis of a decision of the President of UTK replacing a contract for access to railway infrastructure”.

The conference ended with speeches given by Professor Królikowska-Olczak and Professor Pawełczyk. During the closing ceremony they announced the organization of the next edition of the conference, which will take place in March 2017 in Łódź. They also announced the publication of a book containing a selection of papers concerning the regulation and protection of consumer rights in the railway sector. The planned publication will be the continuation of the speeches presented during the Third National Law Conference “The consumer in the passenger rail transport market”.

Katarzyna Chojecka

Faculty of Law and Administration of the University of Warsaw;
k.chojecka00@gmail.com

Marcin Kraśniewski

Faculty of Law and Administration of the University of Łódź,
Polish Foundation of Competition Law and Sector Regulation “Ius Publicum”;
krasniewski@iuspublicum.pl

Tomasz Mizioch

Faculty of Law and Administration of the Silesia University; tomasz.mizioch@gmail.com

Agnieszka Sobierajska

Faculty of Law and Administration of the University of Łódź; agnieszka92.92@o2.pl

4th Polish-Portuguese PhD Students' Conference on Competition Law. Białystok, 10 June 2016

The 4th Polish-Portuguese PhD Students' Conference took place on 10 July 2016 in Białystok, Poland. The conference focused primarily on competition law issues in Portugal and Poland. It was organized by the Department of Public Economic Law at the Law Faculty of the University of Białystok. The conference was the result of on-going fruitful cooperation between the latter and the Católica Porto Law School, Catholic University of Portugal. The international character of the conference provided an excellent opportunity for Portuguese and Polish PhD students to exchange opinions on issues related to competition law in particular.

Professor Anna Piszcz (University of Białystok) opened the conference and welcomed a number of guests including: Professor Manuel Fontaine Campos (Católica Porto Law School), Professor Dusan V. Popovic (Faculty of Law, University of Belgrade), Professor Aleksander Werner (Warsaw School of Economics) and Professor Daniel D. Barnhizer (College of Law, Michigan State University). Professor Piszcz presented subsequently the assumptions and scope of the conference.

The first session was chaired by Professor Piszcz. Professor Manuel Fontaine Campos took the floor first with a presentation entitled "The regulation of state aid according to the Portuguese Competition Act". His speech centred on finding an answer to the question: what could/should be the role of National Competition Authorities (hereinafter, NCA) regarding state aid control? The speaker analysed the international trade and the economic rationale of state aid. The speaker also explained the rationale of supranational state aid and presented the scope of the control exercised by the European Commission in this regard. The last part of his presentation devoted to the role and powers of the Portuguese Competition Authority.

Professor Dusan V. Popovic spoke next presenting a paper entitled "Control of state aid from the perspective of an EU candidate country". He started his speech by comparing legislative frameworks referring to state aid control entrusted to a NCA in Western Balkans. Professor Popovic also made a comparison between provisions and legal frameworks that existed in the pre-accession period in Central and Eastern European Countries. In the last part of the presentation, the speaker indicated a vague



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.

perspective of EU accession as the main problem with the harmonization of national state aid acts with the Treaty on the Functioning of the European Union.

Professor Aleksander Werner gave the third paper entitled “Control of state aid in Polish regulations”. The speaker devoted a large part of his presentation to institutions of state aid control in Poland. Professor Werner also focused on procedures applied in the evaluation of the compatibility of public aid with EU law and covered the relationships between EU and Polish state aid law. Furthermore, he analysed Polish regulations concerning the control of the granting of state aid.

Professor Daniel D. Barnhizer presented the last paper of the first session entitled “Contract automation – evaluating the normativity of codability”. Its author stressed two areas of automation in contract law: contract formation/standardization and the automation in legal jobs in contract. Professor Barnhizer presented examples of common law provisions preventing effective automation. In the last part of his presentation, the speaker explained what makes “codability” normatively desirable.

The first session ended with a panel discussion where the participants of the conference discussed legislative proposals and compared their national state aid control systems.

The second part of the conference included presentations prepared by PhD students from both Poland and Portugal that centred around state aid control issues, consumer protection and competition law. Professor Manuel Fontaine Campos moderated the second session of the conference.

Katarzyna Kimla (Warsaw School of Economics) spoke first discussing various forms of fiscal state aid in a presentation entitled “State aid granted by means of tax measures”. She highlighted the main sources of regulation both at EU and national level. She presented a number of different forms of tax reliefs, such as deferring tax payment, distribution of tax liability into instalments as well as full or partial redemption of tax arrears. They were followed by an analysis of examples taken from the Polish state aid system.

Paulina Korycińska-Rządca (University of Białystok) gave the second presentation entitled “New Polish model of abstract control of standard forms of agreements concluded with consumers under the Act on Competition and Consumer Protection”. The presentation focused on abstract control of contractual terms found in consumer contracts in Poland pursuant to the amendment of the Act on competition and consumer protection adopted in 2015, which came into force as of 17 April 2016. The speaker outlined a number of major changes introduced by the amendment and the key advantages and disadvantages resulting from providing a new model of abstract control of adhesion contracts. She spoke also of new challenges facing the UOKiK President, the National Competition Authority, and the outlook for the future.

Nuno Castro Marques (Católica Porto Law School, Catholic University of Portugal) presented the next paper entitled “Cartels in Portuguese procedures, investigative powers and new legal dimensions of the fight against anticompetitive agreements”. He described antitrust proceedings on anti-competitive conduct in Portuguese law and presented key competences granted to the National Competition Authority to prevent and fight cartels. Discussed in the presentation were also the main phases

of the proceedings, referring to procedural issues, the setting of fines as well as judicial review of the NCA's decisions. The speaker emphasized the importance of the authority's role in enforcing the Portuguese Competition Act.

Magdalena Knapp (University of Białystok) discussed subsequently the concept of abuse of superior bargaining power in a presentation entitled "Protection against the abuse of superior bargaining position". She addressed therein the problem of exploitative behaviour of one party which imposes unjust terms and conditions on a weaker contractual party. She analysed different legislative measures implemented by states in order to address issues relating to abusive conduct of stronger contracting parties. The speaker presented a number of shortcomings present in existing regulations and incentives to introduce specific provisions on abuse of superior bargaining position.

The next part of the conference consisted of conclusions and a summary of the session devoted to the presentations made by PhD students. The conference allowed for the exchange and analysis of international experiences on competition law issues. The next meeting, to be held on 14 October 2016 in Białystok, is now eagerly awaited. It will focus on private enforcement of competition law and combating unfair competition.

Magdalena Knapp

PhD student at the Department of Public Economic Law at the University of Białystok;
e-mail: knapp.magdalena@gmail.com

Radostaw Niwiński

PhD student at the Department of Public Economic Law at the University of Białystok;
e-mail: rniwinski@op.pl

Special Report on the Centre for Business Law and Practice, University of Leeds

The Centre for Business Law and Practice is a leading research centre based at the University of Leeds in the United Kingdom. Bringing together over twenty experienced academics (almost half of which are full professors), this well-established centre has research expertise in a number of areas, including corporate and financial law, commercial and consumer law and, importantly, competition/antitrust law. The Centre, led by Professor Gerry McCormack, conducts doctrinal, theoretical and empirical research within its research areas. It disseminates its research outputs as widely as possible by publishing monographs, articles, and reports. It also hosts regular seminars and high profile conferences which engage with both the academic community, the legal profession, policy-makers and regulators. It has a large and diverse community of PhD students, who are supported by an annual PhD student conference and a ‘brown bag’ lunch seminar series at which they can present their own research.

Recently the Centre has taken active steps to develop its competition law expertise. In particular, in October 2013 both **Professor Pinar Akman** and **Associate Professor Peter Whelan** took up positions at the School of Law, with Professor Akman becoming the Deputy Director of the Centre (until September 2015).

Professor Akman has published her research in both renowned specialist competition law journals and generalist law journals and is the author of the research monograph *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart Publishing, 2012). She has been involved in many externally funded research projects and was one of the eight investigators who applied for the second five-year funding of the ESRC Centre for Competition Policy in 2009 which obtained over £4 million. Some of the other work she has undertaken has been commissioned by, for example, the UK Department of Business, Enterprise and Regulatory Reform, energywatch and the Irish Competition Authority. In 2015/16, Professor Akman provided consultancy to Google, Inc on the European Commission’s competition law investigation into Google’s practices in Europe. She is a Non-Governmental Advisor (NGA) to the International Competition Network’s (ICN) Unilateral Conduct Working Group for the UK and the Cartels Working Group for Turkey. Professor Akman is qualified to practice in Turkey.



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.

Dr Whelan has a PhD in Law from the University of Cambridge and is a qualified Attorney-at-Law and member of the New York State Bar. He sits on the Editorial Boards of five journals and has published widely in specialist competition law journals (in the US and in Europe), as well as in generalist law journals (including Cambridge Law Journal, Oxford Journal of Legal Studies and Modern Law Review). Dr Whelan recently published a monograph with Oxford University Press on the criminalization of European cartel enforcement: *The Criminalization of European Cartel Enforcement*. He has presented oral evidence to the Commerce Committee of the New Zealand Parliament on their competition law, has advised the Finnish authorities on cartel criminalisation, and has provided training in competition law to a variety of judges from different levels of the Romanian judicial system. He is also a Non-Governmental Advisor to the International Competition Network. He is the Managing Editor of Oxford Competition Law, which is operated by Oxford Competition Law.

In 2015 two additional academics joined the Centre and boosted its competition law expertise. **Dr Konstantinos Stylianou** is a Lecturer in Competition Law and Regulation with a focus on high technology markets. Before joining Leeds, he was a Fellow at the Center for Technology and Society at FGV Direito Rio (Brazil) and worked and/or interned at the Council of Europe, the US Federal Communications Commission, the Berkman Center at Harvard, and the European Platform for Regulatory Authorities. Dr Stylianou has advised numerous Internet startup companies. His work and research have been supported among others by the Fulbright Foundation, the Onassis Foundation, the Koch Foundation and the National Scholarship Foundation. He sits on the Editorial Board of *World Competition*.

Dr Mihail Danov is an Associate Professor in Law. His research interests are in private international law and competition law. His monograph *Jurisdiction and Judgments in Relation to EU Competition Law Claims* was published in December 2010. In 2010-2012, he coordinated the successful completion of a funded research project (JLS/2009/JCIV/AG/0034- 30-CE-0350182/00-68) which resulted in a project book on Cross-Border EU Competition Law Actions (June 2013). At present, he is part of a research consortium working on a project (JUST/2013/JCIV/AG/4635) on Cross-Border Litigation in Europe. The latter project, which is coordinated by the University of Aberdeen, attracted over €730,000 in support from the European Commission Civil Justice programme.

In addition, there are currently three full-time PhD students at the Centre who conduct research in competition law. Another couple of students who will conduct doctoral research in competition law are set to arrive shortly. The competition law team also teaches an undergraduate module in competition law and postgraduate modules in international competition law and in the economic regulation of business.

The Centre's research interests in competition law are diverse. They include: the interface between legal and economic concepts underlying competition law and in particular Article 102 TFEU; the historical origins of EU competition law; the interplay between competition law and other areas, such as technology, consumer law, contract law and behavioural economics; competition and telecommunications; competition

and regulation; the Digital Single Market; private international law and competition law; the employment of imprisonment as a method of enforcing competition/antitrust law; all aspects of competition law enforcement; and international cooperation in competition law. The competition law team at Leeds is interested in developing research projects with international partners in those particular areas of competition law scholarship.

Examples of the recent competition law outputs of the Centre include: Akman, 'A Competition Law Assessment of Platform Most-Favoured-Customer Clauses' (2016) *Journal of Competition Law and Economics*, forthcoming; Danov, 'Global Competition Law Framework: A Private International Law Solution Needed' (2016) 12(1) *Journal of Private International Law* 77; Stylianou, 'Systemic Efficiencies in Competition Law: Evidence from the ICT Industry' (2016) 12(3) *Journal of Competition Law and Economics* 557; and Whelan, 'Beyond the Theoretical: Articulating Enforcement Strategies for Successful European Antitrust Criminalization' (2016) 81 *Antitrust Law Journal*, forthcoming.

The competition law team at the Centre organise an annual conference (in Leeds) on competition law. The first conference was held on 15 May 2015 and was entitled 'Contemporary Challenges in Competition Law'. It considered some of the cutting-edge, most difficult topics of competition law and its enforcement. These are issues that competition law and economics, as they stand, struggle to resolve. The keynote speech was delivered by Lord David Currie, Chairman of the Competition and Markets Authority. The second, and most recent, conference was entitled 'Competition and Regulation in Digital Markets' and was held on 9 September 2016. It brought together in a series of panels academics, industry representatives and government officials from multiple jurisdictions and provided an informative and thought-provoking insight into the most significant challenges for competition and regulation in online and digital markets. The keynote speech was delivered by Dr Andrea Coscelli, Acting Chief Executive, Competition and Markets Authority. The next conference is currently in the process of being organised and will take place in the autumn of 2017.

Dr Peter Whelan

Associate Professor in Law, University of Leeds; p.whelan@leeds.ac.uk

ARTICLES IN YARS 2008–2016

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES VOL. 2016, 9(13)

- KATALIN J. CSERES, **The Regulatory Consumer in EU and National Law? Case Study of the Normative Concept of the Consumer in Hungary and Poland**
- MAREK RZOTKIEWICZ, **National Identity as a General Principle of EU Law and its Impact on the Obligation to Recover State Aid**
- ERMAL NAZIFI, PETRINA BROKA, **Grounds for Private Enforcement of Albanian Competition Law**
- DARIUSZ AZIEWICZ, **Resale Price Maintenance in Poland – Further Steps to Its Liberalization or Stuck in a *Status Quo*?**
- ILONA SZWEDZIAK-BORK, **Energy Security as a Priority for CEE countries. Is the King Naked?**
- JOANNA PIECHUCKA, **Design of Regulatory Contracts – Example of the Urban Transport Industry**



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
VOL. 2015, 8(12)

- KATALIN J. CSERES, Harmonising Private Enforcement of Competition Law in Central and Eastern Europe: The Effectiveness of Legal Transplants Through Consumer Collective Actions**
- AGATA JURKOWSKA-GOMUŁKA, How to Throw the Baby out with the Bath Water. A Few Remarks on the Currently Accepted Scope of Civil Liability for Antitrust Damages**
- ANNA PISZCZ, Piecemeal Harmonisation Through the Damages Directive? Remarks on What Received Too Little Attention in Relation to Private Enforcement of EU Competition Law**
- ALEŠ GALIĆ, Disclosure of Documents in Private Antitrust Enforcement Litigation**
- VLATKA BUTORAC MALNAR, Access to Documents in Antitrust Litigation – EU and Croatian Perspective**
- ANNA GULIŃSKA, Collecting Evidence Through Access to Competition Authorities' Files – Interplay or Potential Conflicts Between Private and Public Enforcement Proceedings?**
- RAIMUNDAS MOISEJEVAS, The Damages Directive and Consensual Approach to Antitrust Enforcement**
- ANZHELIKA GERASYMENKO, NATALIA MAZARAKI, Antitrust Damages Actions in Ukraine: Current Situation and Perspectives**
- ZURAB GVELESIANI, Georgia's First Steps in Competition Law Enforcement: The Role and Perspectives of the Private Enforcement Mechanism**
- RIMANTAS ANTANAS STANIKUNAS, ARUNAS BURINSKAS, The Interaction of Public and Private Enforcement of Competition Law in Lithuania**
- ONDREJ BLAŽO, Directive on Antitrust Damages Actions and Current Changes of Slovak Competition and Civil Law**

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
VOL. 2015, 8(11)

- ZURAB GVELESIANI, Need for Competition Law – Universal or the First World Problem? Discussing the case of Georgia**
- RAJMUNDAS MOJSEJEVAS, Developments of Private Enforcement of Competition Law in Lithuania**
- MACIEJ GAC, Individuals and the Enforcement of Competition Law – Recent Development of Private Enforcement Doctrine in Polish and European Antitrust Law**
- MARCIN KULESZA, Leniency – the Polish Programme and the Semi-formal Harmonisation in the EU by the European Competition Network**
- ORHAN ÇEKU, Competition Law in Kosovo: Problems and Challenges**
- ERMAL NAZIFI, PETRINA BROKA, 10 Years of Albanian Competition Law in Review**
- EWA M. KWIATKOWSKA, Economic Determinants of Regulatory Decisions in the Telecommunications sector in Poland**

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
VOL. 2014, 7(10)

- ELSBETH BEUMER, **The Interaction between EU Competition Law Procedures and Fundamental Rights Protection: the Case of the Right to Be Heard**
- PIERLUIGI CONGEDO, **The “Regulatory Authority Dixit” Defence in European Competition Law Enforcement**
- ANTON DINEV, **The Effects of Antitrust Enforcement Decisions in the EU**
- SHUYA HAYASHI, **A Study on the 2013 Amendment to the Antimonopoly Act of Japan – Procedural Fairness under the Japanese Antimonopoly Act**
- MARIATERESA MAGGIOLINO, **Plausibility, Facts and Economics in Antitrust Law**
- MARTA MICHĄŁEK, **Fishing Expeditions and Subsequent Electronic Searches in the Light of the Principle of Proportionality of Inspections in Competition Law Cases in Europe**
- KASTURI MOODALIYAR, **Access to Leniency Documents: Should Cartel Leniency Applicants Pay the Price for Damages?**
- LORENZO PACE, **The Parent-subsidiary Relationship in EU Antitrust Law and the AEG Telefunken Presumption: Between the Effectiveness of Competition Law and the Protection of Fundamental Rights**
- SOFIA OLIVEIRA PAIS, ANNA PISZCZ, **Package on Actions for Damages Based on Breaches of EU Competition Rules: Can One Size Fit All?**
- EWELINA D. SAGE, **Increasing Use of “Negotiated” Instruments of European Competition Law Enforcement towards Foreign Companies**
- KSENIYA SMYRNOVA, **Enforcement of Competition Rules in the Association Agreement between the EU & Ukraine**
- SIH YULIANA WAHYUNINGTYAS, **Challenges in Combating Cartels, 14 Years after the Enactment of Indonesian Competition Law**

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
VOL. 2013, 7(9)

- JOSEF BEJČEK, European Courts as Value-Harmonizing “Motors of Integration”**
KATI CSERES, Accession to the EU’s Competition Law Regime: A Law and Governance Approach
ALEXANDR SVETLICINII, Enforcement of EU Competition Rules in Estonia: Substantive Convergence and Procedural Divergence
RIMANTAS ANTANAS STANIKUNAS, ARUNAS BURINSKAS, The Impact of EU Competition Rules on Lithuanian Competition Law
ONDREJ BLAŽO, Twenty Years of Harmonisation and Still Divergent: Development of Slovak Competition Law
BARBORA KRÁLIČKOVÁ, Ten Years in the European Union – Selected Remarks Related to the Harmonisation of Slovak Competition Law with EU Competition Law
KRYSTYNA KOWALIK-BAŃCZYK, Ways of Harmonising Polish Competition Law with the Competition Law of the EU
ANNA LASZCZYK, Forgotten Issues When Talking about the More Economic Approach to Competition Law in Poland
PIOTR SITAREK, The Impact of EU Law on a National Competition Authority’s Leniency Programme – the Case of Poland

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
VOL. 2013, 6(8)

- ALEXANDR SVETLICINII, Expanding the Definitions of ‘Undertaking’ and ‘Economic Activity’: Application of Competition Rules to the Actions of State Institutions in Bosnia and Herzegovina**
DUSAN POPOVIC, Competition Law Enforcement in Times of Crisis: the Case of Serbia
CSONGOR ISTVÁN NAGY, A Chicago-School Island in the Ordo-liberal Sea? The Hungarian Competition Office’s Relaxed Treatment of Abuse of Dominant Position Cases
MAJA BRKAN, TANJA BRATINA, Private Enforcement of Competition Law in Slovenia: A New Field to Be Developed by Slovenian Courts
AGATA JURKOWSKA-GOMUŁKA, Private Enforcement of Competition Law in Polish Courts: The Story of an (Almost) Lost Hope for Development
KARIN SEIN, Private Enforcement of Competition Law – the Case of Estonia

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
VOL. 2012, 5(7)

- JASMINKA PECOTIĆ KAUFMAN, **How to Facilitate Damage Claims? Private Enforcement of Competition Rules in Croatia – Domestic and EU Law Perspective**
- ANNA PISZCZ, **Still-unpopular Sanctions: Developments in Private Antitrust Enforcement in Poland After the 2008 White Paper**
- ONDREJ BLAZO, **What Do Limitation Periods for Sanctions in Antitrust Matters Really Limit?**
- SILVIA ŠRAMELOVÁ, ANDREA ŠUPÁKOVÁ, **Development of the Judicial Review of the Decisions of the Antimonopoly Office of the Slovak Republic**
- DILYARA BAKHTIEVA, KAMIL KILJAŃSKI, **Universal Service Obligation and Loyalty Effects: An Agent-Based Modelling Approach**
- MAGDALENA OLENDER-SKOREK, **To Regulate Or Not to Regulate? – Economic Approach to Indefeasible Right of Use (IRU)**

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
VOL. 2012, 5(6)

- MAŁOZATA KRÓL-BOGOMILSKA, **Standards of Entrepreneur Rights in Competition Proceedings a Matter of Administrative or Criminal Law?**
- ANNA BŁACHNIO-PARZYCH, **The Nature of Responsibility of an Undertaking in Antitrust Proceedings and the Concept of ‘Criminal Charge’ in the Jurisprudence of the European Court of Human Rights**
- ALEKSANDER STAWICKI, **Competence of Common Courts in Poland in Competition Matters**
- RAFAL STANKIEWICZ, **The Scope of Application of the Provisions of the Administrative Procedure Code in Competition Enforcement Proceedings**
- MACIEJ BERNATT, **Can the Right To Be Heard Be Respected without Access to Information about the Proceedings? Deficiencies of National Competition Procedure**
- PRZEMYSŁAW ROSIAK, **The *ne bis in idem* Principle in Proceedings Related to Anti-Competitive Agreements in EU Competition Law**
- MATEUSZ BŁACHUCKI, SONIA JÓZWIAK, **Exchange of Information and Evidence between Competition Authorities and Entrepreneurs’ Rights**
- INGA KAWKA, **Rights of an Undertaking in Proceedings Regarding Commitment Decisions under Article 9 of Regulation No. 1/2003**
- BARTOSZ TURNO, AGATA ZAWŁOCKA-TURNO, **Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?**
- KRYSTYNA KOWALIK-BANČZYK, **Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings**
- MARIUSZ BARAN, ADAM DONIEC, **EU Courts’ Jurisdiction over and Review of Decisions Imposing Fines in EU Competition Law**
- JAN SZCZODROWSKI, **Standard of Judicial Review of Merger Decisions Concerning Oligopolistic Markets**

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
VOL. 2011, 4(5)

- ANNA FORNALCZYK, **Competition Protection and Philip Kotler's Strategic Recommendations**
ANTONI BOLECKI, **Polish Antitrust Experience with Hub-and-Spoke Conspiracies**
MACIEJ BERNATT, **The Powers of Inspection of Polish Competition Authority. The Question of Proportionality**
KONRAD STOLARSKI, **Fines for Failure to Cooperate within Antitrust Proceedings – the Ultimate Weapon for Antitrust Authorities?**
ŁUKASZ GRZEJZDZIAK, **Mr Hoefner, Mr Elser, Please Welcome to Poland. Some Comments on the Polish Healthcare System Reform from the Perspective of State Aid Law**
MARLENA WACH, **Polish Telecom Regulator's Decisions Regarding Mobile Termination Rates and the Standpoint of the European Commission**
MICHAŁ WOLAŃSKI, **Estimation of Losses Due to the Existence of Monopolies in Urban Bus Transport in Poland**

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
VOL. 2011, 4(4)

- BARTŁOMIEJ NOWAK, **Paweł Grzejszczak, Poland's Energy Security in the Context of the EU's Common Energy Policy. The Case of the Gas Sector**
ALEKSANDER STAWICKI, **The Autonomy of Sector-Specific Regulation – Is It Still Worth Protecting? Further Thoughts on the Parallel Application of Competition Law and Regulatory Instruments**
FILIP M. ELŻANOWSKI, **The Duties of the President of the Polish Energy Regulatory Office in the Context of the Implementing the Third Energy Package**
MARZENA CZARNECKA, TOMASZ OGŁÓDEK, **The Energy Tariff System and Development of Competition in the Scope of Polish Energy Law**
MARIA MORDWA, **The Obligation of Strategic Gas Storage Introduced in Poland as an Example of a Public Service Obligation Relating to Supply Security: A Question of Compliance with European Law**
MARCIN STOCZKIEWICZ, **The Emission Trading Scheme in Polish law. Selected Problems Related to the Scope of Derogation from the Auctioning General Rule in Poland**
JANUSZ LEWANDOWSKI, **Cutting Emissions in the Energy Sector: a Technological and Regulatory Perspective**
ANDRZEJ T. SZABLEWSKI, **The Need for Revaluation of the Model Structure for Electricity Liberalization**
TADEUSZ SKOCZNY, **Consolidation of the Polish Electricity Sector. Perspective of Preventive Control of Concentrations**

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
VOL. 2010, 3(3)

- DAWID MIĄSIK, *Solvents to the Rescue – a Historical Outline of the Impact of EU Law on the Application of Polish Competition Law by Polish Courts*
- MARCIN KOLASIŃSKI, *Influence of General Principles of Community Law on the Polish Antitrust Procedure*
- MACIEJ BERNATT, *Right to Be Heard or Protection of Confidential Information? Competing Guarantees of Procedural Fairness in Proceedings Before the Polish Competition Authority*
- TOMASZ KOZIEŁ, *Commitments decisions under the Polish Competition Act – Enforcement Practice and Future Perspectives*
- KONRAD KOHUTEK, *Impact of the New Approach to Article 102 TFEU on the Enforcement of the Polish Prohibition of Dominant Position Abuse*
- JAROSŁAW SROCZYŃSKI, *Permissibility of Exclusive Transactions: Few Remarks in the Context of Media Rights Exploitation*
- EWELINA D. SAGE, *Who Controls Polish Transmission Masts? At the Intersection of Antitrust and Regulation*
- MARCIN KRÓL, *Liberalization without a Regulator. The Rail Freight Transport Market in Poland in the Years 1996-2009*

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
VOL. 2009 2(2)

- OLEŚ ANDRIYCHUK, *Does Competition Matter? An Attempt of Analytical ‘Unbundling’ of Competition from Consumer Welfare*
- ANNA FORNALCZYK, *Economic Approach to Counteracting Cartels*
- RAJMUND MOLSKI, *Polish Antitrust Law in its Fight Against Cartels – Awaiting a Breakthrough*
- PAWEŁ PODRECKI, *Civil Law Actions in the Context of Competition Restricting Practices under Polish Law*
- EWELINA RUMAK, PIOTR SITAREK, *Polish Leniency Programme and its Intersection with Private Enforcement of Competition Law*
- KATARZYNA TOSZA, *Payment Card Systems as an Example of Two-sided Markets – a Challenge for Antitrust Authorities*
- BARTŁOMIEJ NOWAK, *Challenges of Liberalisation. The Case of Polish Electricity and Gas Sectors*
- MARCIN KRÓL, *Benefits and Costs of Vertical Separation in Network Industries. The Case of Railway Transport in the European Environment*

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
VOL. 2008, 1(1)

IAN S. FORRESTER, QC, ANTHONY DAWES, **Parallel Trade in Prescription Medicines in the European Union: The Age of Reasons?**

DAWID MIAŚIK, **Controlled Chaos with Consumer Welfare as a Winner – a Study of the Goals of Polish Antitrust Law**

AGATA JURKOWSKA, **Antitrust Private Enforcement – Case of Poland**

SŁAWOMIR DUDZIK, **Enforceability of Regulatory Decisions and Protection of Rights of Telecommunications Undertakings**

STANISŁAW PIĄTEK, **Investment and Regulation in Telecommunications**

KRYSTYNA BOBIŃSKA, **The Defense of Monopoly as a Determinant of the Process of Transformation of State-owned Infrastructure Sectors in Poland**

ADRIANNA ZABŁOCKA, **Antitrust and Copyright Collectives – an Economic Analysis**

