

YEARBOOK
of ANTITRUST
and REGULATORY
STUDIES

Vol. 2013, 6(8)



EDITORIAL BOARD

- Prof. **Tadeusz Skoczny** – Editor-in-Chief, CARS Director
Dr. **Agata Jurkowska-Gomulka** – Section Editor (Antitrust), CARS Scientific Secretary
Ewelina D. Sage, Ph.D. (OXON) – Section Editor (Audiovisual Services),
CARS International Coordinator
Prof. **Andrzej Szablewski** – Section Editor (Energy & Telecommunications),
Technical University in Łódź
Dr. **Tomasz Zalega** – Editor (Economics of Antitrust & Regulation),
University of Warsaw, Faculty of Management

SCIENTIFIC BOARD

- Prof. **Anna Fornalczyk**, Chairwoman – Technical University of Łódź;
former President of the Antimonopoly Office
Prof. **Stanisław Piątek**, Vice-Chairman – University of Warsaw, Faculty of Management
Prof. **Eleanor Fox** – New York University, School of Law
Prof. **Katatrina Kolesná** – Comenius University in Bratislava, Faculty of Law
Prof. **Janusz Lewandowski** – Warsaw University of Technology,
Institute of Heat Engineering
Prof. **Johannes Masing** – University of Freiburg; judge at the Federal Constitutional
Court in Karlsruhe
Prof. **Alojzy Z. Nowak** – Dean of the Faculty of Management of the University of Warsaw
Prof. **Gheorghe Oprescu** – Polytechnic University of Bucharest, Romania
Prof. **Jasminka Pecotić Kaufman** – University of Zagreb,
Faculty of Economics and Business, Department of Law
Prof. **Franz Jürgen Säcker** – Free University of Berlin, Institute for German
and European Business, Competition and Regulation Law
Prof. **Stanisław Sołtysiński** – Sołtysiński Kawecki & Szlęzak LPP
Prof. **Andrzej Sopoćko** – University of Warsaw, Faculty of Management;
former President of the Competition and Consumer Protection Office
Prof. **Rimantas Stanikunas** – Vilnius University, Faculty of Economics;
former Chairman of the Competition Council of the Republic of Lithuania
Prof. **Luboš Tichý** – Charles University, Prague, Faculty of Law
Prof. **Tihamér Tóth** – Pázmány Catholic University in Budapest
Prof. **Richard Whish** – University of London, Kings College
Prof. **Marek Wierzbowski** – University of Warsaw, Faculty of Law and Administration;
attorney-in-law
Prof. **Irena Wiszniewska-Białecka** – judge of the General Court of the European Union
Prof. **Anna Zielińska-Głębocka** – University of Gdańsk, Faculty of Economics;
member of the Monetary Policy Council

EDITORIAL OFFICE

Centre for Antitrust and Regulatory Studies (CARS)
University of Warsaw, Faculty of Management
PL – 02-678 Warszawa, 1/3 Szturmowa St.
Tel. + 48 22 55 34 126; Fax. + 48 22 55 34 001
[e-mail: cars@wz.uw.edu.pl](mailto:cars@wz.uw.edu.pl)
www.cars.wz.uw.edu.pl; www.yars.wz.uw.edu.pl

YEARBOOK *of* ANTITRUST *and* REGULATORY STUDIES

Volume Editor:

AGATA JURKOWSKA-GOMUŁKA

Vol. 2013, 6(8)



CENTRE FOR ANTITRUST AND REGULATORY STUDIES University of Warsaw



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

Forty first Publication of the Publishing Programme

Copyright by Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu
Warszawskiego, Warszawa 2013

Language editor: Ewelina D. Sage (English);
Kinga Szczawińska (French)

Statistic editor: Prof. Dr. 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. 2013, 6(8)**

Contents

| | |
|---------------------------------|---|
| Editorial foreword | 7 |
| List of acronyms | 9 |

ARTICLES

| | |
|---|-----|
| ALEXANDR SVETLICINI, Expanding the Definitions of ‘Undertaking’ and ‘Economic Activity’: Application of Competition Rules to the Actions of State Institutions in Bosnia and Herzegovina..... | 11 |
| DUSAN POPOVIC, Competition Law Enforcement in Times of Crisis: the Case of Serbia | 35 |
| 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 | 53 |
| MAJA BRKAN, TANJA BRATINA, Private Enforcement of Competition Law in Slovenia: A New Field to Be Developed by Slovenian Courts | 75 |
| AGATA JURKOWSKA-GOMULKA, Private Enforcement of Competition Law in Polish Courts: The Story of an (Almost) Lost Hope for Development..... | 107 |
| KARIN SEIN, Private Enforcement of Competition Law – the Case of Estonia | 129 |

NATIONAL LEGISLATION & CASE LAW REVIEWS

| | |
|--|-----|
| ANNA PISZCZ, Key Legislative and Jurisprudential Developments of Polish Antitrust Law in 2012..... | 141 |
|--|-----|

| | |
|--|-----|
| ROBERT NERUDA, LENKA GACHOVÁ, ROMAN SVĚTNICKÝ, 9th Amendment to the Czech Competition Act | 159 |
| PÁL SZILÁGYI, TIHAMÉR TÓTH, Recent Competition Policy Developments in Hungary – Unfair Commercial Practices, Cartels and Abuse of Dominance..... | 173 |
| ARANKA NAGY, Recent Competition Policy Developments in Hungary – Merger Control | 191 |
| ADNAN JASHARI, NORA ZIBA, Competition Law in Macedonia in 2011–2012: New Perspectives and New Challenges..... | 201 |
| ZUZANA ŠABOVÁ, KATARÍNA FODOROVÁ, DANIELA LUKÁČOVÁ, Recent Developments in Slovak Competition Law – Legislation and Case Law Review..... | 223 |

CASE COMMENTS

| | |
|--|-----|
| 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, <i>Autostrada Malopolska</i> (Ref. No. III SK 44/11). Commented by ELŻBIETA KRAJEWSKA..... | 245 |
| Regional Court in Brno on Cartels in 2012. Case comments to judgments in <i>CRT</i> cartel and <i>GIS</i> cartel. Commented by PETRA JOANNA PIPKOVÁ..... | 251 |
| Recent judgements of the General Court and the Supreme Court of the Slovak Republic in inspection matters – Landmark Decisions or Wasted Opportunities to Solve Problem? Commented by ONDREJ BLAŽO..... | 261 |

BOOKS REVIEWS

| | |
|---|-----|
| Dawid Miąsik, <i>Stosunek prawa ochrony konkurencji do prawa własności intelektualnej</i> [<i>The relationship between competition law and intellectual property law</i>], LEX a Wolters Kluwer business, Warszawa 2012. Reviewed by RAFAŁ SIKORSKI..... | 281 |
| Dusan Popovic, <i>Isključiva prava intelektualne svojine i slobodna konkurencija</i> [<i>Exclusive Intellectual Property Rights and Free Competition</i>], Faculty of Law of the University of Belgrade, 2012. Reviewed by ANA KNEZEVIC BOJOVIC | 287 |

CONFERENCE REPORTS

- Entrepreneur's rights in antitrust cases, Warsaw.
Reported by AGATA JURKOWSKA-GOMUŁKA..... 291
- 2nd International Competition Law Forum, Warsaw.
Reported by ELŻBIETA KRAJEWSKA..... 295

ACTIVITIES OF CARS

- CARS Activity Report 2012.
Reported by AGATA JURKOWSKA-GOMUŁKA..... 301

- BIBLIOGRAPHY 2012** (Poland and selected CEE countries: Croatia,
Czech Republic, Estonia, Hungary, Macedonia, Slovakia)..... 307

- Reviewers of YARS in 2012 and 2013..... 331

- Articles in YARS 2008–2012 – from vol. 1(1) to vol. 5(7)..... 333

Editorial foreword

The Editorial Board is pleased to present the 8th volume of the Yearbook of Antitrust and Regulatory Studies (YARS 2013, 6(8)). This volume continues and develops YARS's new mission – presenting developments in antitrust and sector-specific regulation not only, as originally envisaged, in Central and Eastern Europe, but also in the Balkans.

The first article in YARS 2013, 6(8) is written by Alexandr Svetlicinii and concerns the concepts of an ‘undertaking’ and ‘economic activities’ in the competition law of Bosnia & Herzegovina. The analysis focuses on the application of these two notions with respect to the functioning of state (public) entities. The author assessed the impact of EU law and jurisprudence on the national enforcement practice and presents the peculiarities of the domestic system in this regard.

Dusan Popovic identifies in his article three key problems of the enforcement of competition law in Serbia, a country with a rather weak economy. Among them is the arguably privileged treatment of state-owned companies. This is reflected in a reluctant antitrust enforcement in ‘sensitive’ industry sectors, which are still dominated by state-owned companies.

Csongor Istvan Nagy writes about the decisions of the Hungarian competition authority with respect to the abuse of dominance, comparing them with EU jurisprudence and the case law of the European Commission. The author claims that domestic and EU standards for the application of the abuse of dominance prohibition diverge. These differences are identified in the article as well as their results both for the competition law enforcement system as such, and for the market situation of individual undertakings.

The three following papers present the state of the development of private enforcement of competition law in Slovenia (Maja Brkan and Tanja Bratina), Poland (Agata Jurkowska-Gomułka) and Estonia (Karin Sein). The authors analyze relevant national jurisprudence, if there is any, or assess the reasons for its absence. All three articles, despite referring to different jurisdictions, illustrate the under-development of private enforcement of competition law in their domestic systems of competition protection.

The current volume of YARS contains also a number of legislative and jurisprudential reviews. It opens with a paper by Anna Piszcz on the 2012 developments in Polish antitrust law and jurisprudence. Roman Svetnický, Robert Neruda and Lenka Gachova resent next the recent amendments to the Czech Competition Act. The following two papers, written by Pál Szilágyi and Tihamér Tóth and by Aranka Nagy, concern competition law developments in Hungary in 2012. Nora Ziba Memeti and Adnan Jashari sum up the competition law enforcement practice in Macedonia in 2011-2012. Finally, Zuzana Šabová, Katarína Fodorová and Daniela Lukáčová discuss 2012 developments in the competition law of Slovakia.

The next part of YARS 2013, 6(8) is devoted to case comments. It includes an assessment of a judgment of the Polish Supreme Court delivered in an abuse of a dominant position case (prepared by Elżbieta Krajewska), a discussion of cartel judgments rendered by the court in Brno (written by Petra Pipkova) and finally, an analysis of judgments adopted by the Slovak Supreme Court regarding dawn raids (written by Ondrej Blažo).

In its book review section, the current volume of YARS presents the reviews of two books on competition law and IPRs both published in 2012, one in Poland and one in Serbia.

Finally, YARS 2013, 6(8) contains also two conference reports and the CARS Activity Report for 2012. The volume closes with antitrust and regulatory bibliography for 2012 in Poland, Croatia, the Czech Republic, Estonia, Hungary, Macedonia and Slovakia.

Two separate YARS volumes will be published in 2014. Aside from the regular volume, a special volume will be dedicated to the impact of EU law on domestic competition law and sector-specific regulation over the ten years of the CEE countries' membership in the EU. A Call for papers for each of the volumes will be announced shortly on the YARS website. The YARS special volume is expected to become the first product prepared within the framework of CRANE – a newly established network of academics from CEE countries specialising in antitrust and regulation.

Warsaw, December 2013

Dr. Agata Jurkowska-Gomulka
YARS Volume Editor

List of acronyms

COMPETITION AUTHORITIES:

| | |
|--------------|---|
| AMO | – Antimonopoly Office of the Slovak Republic |
| CPC | – Commission for the Protection of Competition in the Republic of Macedonia |
| GVH | – Hungarian Competition Authority |
| HCO | – Hungarian Competition Office |
| KV | – Competition Authority in Bosnia and Herzegovina |
| NCA | – National Competition Authority |
| OPC | – Czech Office for the Protection of Competition |
| SOKiK | – Polish Court of Competition and Consumer Protection |
| UOKiK | – Polish Office for Competition and Consumer Protection |

OTHER INSTITUTIONS:

| | |
|--------------|--|
| CFI | – Court of First Instance |
| CJEU | – Court of Justice of the European Union |
| ECJ | – European Court of Justice |
| ECN | – European Competition Network |
| ECtHR | – European Court of Human Rights |
| GC | – General Court |

LEGAL ACTS:

| | |
|------------------------|---|
| CCP | – Estonian Civil Procedure Code |
| Competition Act | – Polish Competition and Consumers Protection Act of 2007 |
| CzAPC | – Czech Act on Protection of Competition |
| CPC | – Estonian Criminal Procedure Code |
| CUCA | – Polish Combating Unfair Competition Act |
| ECHR | – European Convention for the Protection of Human Rights and Fundamental Freedoms |
| HCA | – Hungarian Competition Act |

| | |
|--------------|---|
| GPCCA | – General Part of Estonian Civil Code Act |
| LOA | – Estonian Law of Obligations Act |
| LPC | – Macedonian Law of the Protection of Competition |
| LSAC | – Macedonian Law on State Aid Control |
| TFEU | – Treaty on the Functioning of the European Union |
| UPC | – Unfair Commercial Practices Directives |

OTHER ACRONYMS:

| | |
|----------------|---|
| ATC | – average total costs |
| AVC | – average variable costs |
| B&H | – Bosnia and Herzegovina |
| CEE | – Central and Eastern Europe(an) |
| LPP | – legal professional privilege |
| LRAIC | – long-run average incremental costs test |
| OJEU | – Official Journal of the European Union |
| R.M. | – Republic of Macedonia |
| RPM | – resale price maintenance |
| SIEC | – Significant Impediment of Effective Competition |
| UCP | – Unfair Commercial Practices |

**Expanding the Definitions of ‘Undertaking’
and ‘Economic Activity’: Application of Competition Rules
to the Actions of State Institutions in Bosnia and Herzegovina**

by

Alexandr Svetlicinii*

CONTENTS

- I. Introduction
- II. State institutions as undertakings in EU competition law
- III. State institutions as undertakings within the meaning of the B&H Competition Act
- IV. Competition infringements committed by State institutions in the enforcement practice of the B&H Competition Council
 - 1. Anti-competitive agreements in the national healthcare system
 - 2. State institutions as undertakings in the public transport markets
 - 3. Reasons for exempting State institutions from competition law enforcement
- V. Concluding remarks

Abstract

State-initiated competition restraints remain a recurrent problem for competition law enforcement in transition economies characterized by a history of price controls and extensive State regulation of economic activities. The application of the concepts of ‘undertaking’ and ‘economic activity’ to the actions of State institutions, as developed in EU competition law, allows national competition authorities to enforce competition rules against public bodies. EU candidate countries, as well as States aspiring to a candidate status, have been continuously reforming their competition laws, aligning them with *acquis communautaire* and applying EU competition law concepts and standards in their domestic enforcement

* Senior Research Fellow at the Jean Monnet Chair of European Law, Tallinn University of Technology, Tallinn Law School; alexandr.svetlicinii@ttu.ee

practices. This paper deals with the particularities of the application of competition rules to the actions of State institutions in Bosnia and Herzegovina. A detailed study of emerging domestic case law demonstrates significant deviations in the interpretation and application of these well known competition law concepts. The legislative and enforcement peculiarities observed in the target jurisdiction are compared with those found in EU competition law and in the legal systems of neighbouring courtiers.

Résumé

Les restrictions de la concurrence initiées par l'Etat restent un problème répétitif pour l'application du droit de la concurrence dans les pays en transition ayant l'histoire du contrôle des prix et une réglementation vaste relative aux activités économiques imposée par l'Etat. L'application des concepts d' « entreprise » et d' « activité économique » à l'action des institutions de l'Etat, mises en oeuvre par le droit communautaire de la concurrence, permet aux autorités nationales d'imposer des règles de la concurrence contre des organes public. Les pays candidats à l'UE et les Etats qui aspirent au statut de pays candidat ont constamment réformé leurs lois sur la concurrence afin de les aligner à l'acquis communautaire et d'appliquer les concepts du droit de la concurrence et des normes européens dans leurs pratiques nationales. Le document traite sur des particularités de l'application des règles de la concurrence aux actions des institutions de Bosnie-Herzégovine. L'étude détaillée de la jurisprudence actuelle montre des écarts importants dans l'interprétation et l'application de ces concepts du droit de la concurrence bien connus. Les particularités législatives et d'exécution observées dans la juridiction sont comparées avec celles trouvées dans le droit de la concurrence de l'UE et des pays voisins.

Classifications and key words: anti-competitive agreement; antitrust enforcement; Bosnia and Herzegovina; economic activity; sanctions and penalties; State institutions; undertaking.

I. Introduction

In the context of the EU enlargement process, accession candidates (Macedonia, Montenegro, Serbia), and countries aspiring to a candidate status (Albania, Bosnia and Herzegovina and Kosovo¹)², have been required

¹ This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

² For their current status in relation to the EU see http://ec.europa.eu/enlargement/countries/check-current-status/index_en.htm.

to introduce competition and State aid rules into their national legislation. They have also been obliged to transpose a number of EU liberalization directives covering particular economic sectors³. The 'copy-pasting' of EU competition rules into small, often highly concentrated, emerging markets has provoked some criticisms concerning the functionality of this approach⁴. Moreover, for various reasons, the transplantation of EU rules and standards did not always result in their effective enforcement. Nevertheless, both Bosnia and Herzegovina (hereafter, B&H) and its neighbours have been continuously reforming their competition laws and related secondary legislation, harmonizing them with EU standards and practices. References to EU legislation and EU jurisprudence are being increasingly used by national competition authorities (hereafter, NCAs) and domestic courts in their investigations and decision-making processes⁵. In recent years, some of these countries have substantially revamped their competition law frameworks, enhancing the enforcement powers of the NCAs⁶.

³ For example, all of the above mentioned countries are parties to the Energy Community, they are committed to gradually implement *acquis communautaire* in the energy sector, to establish adequate regulatory frameworks and to liberalise their energy markets. For progress see implementation reports published by the Energy Community Secretariat at http://www.energy-community.org/portal/page/portal/ENC_HOME/DOCUMENTS?library.category=758.

⁴ In relation to the introduction of competition law in CEE countries see: M. Oiaja, *The Competition Law of Central and Eastern Europe*, Sweet & Maxwell, 1999; D. Gerardin and D. Henry, 'Competition Law in the New Member States -Where Do We Come From? Where Do We Go?', [in:] D. Gerardin, D. Henry (eds), *Modernisation and Enlargement: Two Major Challenges for EC Competition Law*, Intersentia, 2005; M. Botta, 'Does the EU Competition Model Satisfy the Needs of Emerging Economies? Lessons from the Countries without a Carrot', [in:] K. Podstawa, L. Puccio (eds), 'Framework for Economic Development in EU External Relations' (2012) 1 EUI Working Paper (Law) 51–74.

⁵ See Z. Mekšić, 'Jurisdikcija Suda EU u praksi Suda BiH' (2012) 8 *Sveske za javno pravo* 70–76. The author comments on the Judgment of the Court of B&H No. S1 3 U 005412 10 Uvl dated 15 March 2012 which refers to the jurisprudence of the CJEU when reviewing an infringement decision of the B&H KV in an abuse of dominance case concerning refusal to deal in the automobile market.

⁶ For competition law developments in particular jurisdictions see: on B&H – S. Kavaz Hukić, 'Stanje i perspektive prava konkurencije u Bosni i Hercegovini' (2013) 3-4 *Pravna misao (Sarajevo)* 7–33; on Croatia – J. Pecotić Kaufman, *Enforcement of Competition Rules in Croatia – Challenges and the Way Forward* (November 17, 2009), available at <http://ssrn.com/abstract=1844302>; on Macedonia – R. Karova, M. Botta, 'Five Years Enforcement of Competition Law in the Republic of Macedonia – Time for an Assessment' (2010) 2 *Mediterranean Competition Bulletin* 56–72, available at http://ec.europa.eu/competition/publications/mediterranean/mcb_2.pdf; on Montenegro – I. Dajković, 'Whither Competition Law in Montenegro: Current status and future challenges' (2007) 28(2) *ECLR* 92–100; on Serbia – V. Pavić, 'Revolution, Evolution and Devolution: Overview of the Past Twenty Years of Competition Legislation in Serbia', [in:] V. Beširević (ed.), *Public Law in Serbia: Twenty*

All of the above countries have a history of State dominated, regulated economies and their liberalisation process is still ongoing with different degrees of success in various economic sectors. For that reason, State regulation of economic activity continues to exert a decisive influence on the competitive conditions of particular markets⁷. Following the EU model, accession candidates and potential candidates have linked the application of their domestic competition laws to the concepts of 'undertaking' and 'economic activity'. These concepts are based on the nature of the activity carried out by a natural or legal person (public or private) and thus allow NCAs to apply competition rules directly to the actions of State institutions. When granted with enhanced investigative and direct sanctioning powers, NCAs can apply them in order to prevent, mitigate and punish anti-competitive actions of State institutions committed in their capacity as undertakings engaged in economic activities.

The purpose of this paper is to analyze the emerging competition case law in B&H. Its NCA – the Competition Council or KV⁸ – is increasingly active in treating State institutions as undertakings engaged in economic activities in order to subject them to the application of competition rules. This recent practice of the B&H NCA presents an interesting example of the transposition of EU competition law concepts into national legislation and enforcement practice. It raises a number of questions concerning the interpretation and application of EU competition rules as well as the effectiveness of such approach for the purpose of combating State-initiated competition restraints. The expanded interpretation of the notion of an 'undertaking' in B&H competition enforcement, which extends the application of competition rules to the actions of State institutions, has been noted by legal practitioners⁹. It however remains largely overlooked by academic literature¹⁰.

The article is structured as follows. Section II summarizes the application of the concepts of 'undertaking' and 'economic activity' to the actions of State

Years After, Esperia, 2012, p. 243–257; A. Svetlicinii, 'Competition law enforcement in Serbia: problems and prospects' (2012) 33(6) *ECLR* 273–279.

⁷ The effects of State regulation on competition have been discussed at the 7th ASCOLA Conference 'State-Initiated Restraints of Competition', 12–14 April 2012, Sao Paulo, Brazil, the programme is available at http://www.ascola.org/Tagungsprogramme/Sao_Paulo_Conference.pdf.

⁸ In Bosnian and Croatian – *Konkurencijsko vijeće*, in Serbian – *Konkurencijski savjet*, <http://bihkonk.gov.ba/>.

⁹ See T. Kojić and D. Gajin, *Propisi kao povreda prava konkurencije* [*Legislation as infringement of competition law*] available at <http://www.bdklegal.com/blog.288.html?bid=115&cid=0> (last access 27 February 2013).

¹⁰ For a discussion on various definitions of 'undertaking' in EU Member States see M. Szydło, 'Leeway of Member States in Shaping the Notion of an 'Undertaking' in Competition Law' (2010) 33 *World Competition* 549–568.

institutions in the practice of the European Commission and the Court of Justice of the European Union (CJEU). In Section III, the same concepts are observed in the competition law of B&H and its neighbours. Section IV discusses the emerging practice of the Competition Council applying B&H's substantive competition rules (national equivalent of Article 101 TFEU) to the actions of State institutions in particular economic sectors (healthcare, public transport). Summarised therein is also the NCA's approach to these concepts. The concluding Section V provides general comments on the observed enforcement practices and their likely impact on the development of competition law in B&H in the light of its European accession.

II. State institutions as undertakings in EU competition law

The concept of an 'undertaking' in EU competition law is separated from the legal status of the given person or entity; it focuses instead on the nature of the activities that this person or entity is performing. As summarized by the CJEU in its early *Höfner* precedent, 'the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed'¹¹. In the landmark *Commission v Italy* ruling, the CJEU made the supply of goods or services on the market a constituent element of an economic activity¹². If a person or entity, regardless of their legal status, does not engage in an economic activity, then it is exempt from the application of competition rules. Under such 'functional approach', the same entity might be categorised as an undertaking in relation to some of its activities, but not in relation to others¹³. Advocate General Jacobs has expressed the nature of determining the status of an undertaking as follows: 'the notion of undertaking is a relative concept

¹¹ Case C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR 1979, para. 21. In that judgment, the Court held that a public employment agency which is entrusted, under the legislation of a Member State, with the operation of services of general economic interest is subject to competition rules pursuant to Article 90(2) EC unless, and to the extent, to which the application of that provision is incompatible with the discharge of the particular duties entrusted to it. *Ibidem*, para. 24.

¹² Case 118/85 *Commission v Italy* [1987] ECR 2599, para. 7.

¹³ See generally R. Whish, *Competition Law*, 7thed, Oxford University Press, 2012, p. 84–91; A. Jones, B. Sufrin, *EC Competition Law*, 4thed, Oxford University Press, 2011, p. 124–141; V. Rose, D. Bailey, *Bellamy & Child European Union law of Competition*, 7thed, Oxford University Press, 2013, p. 83–94; Van Bael & Bellis, *Competition law of the European Community*, 5thed, Wolters Kluwer, 2010, p. 17–21.

in the sense that a given entity might be regarded as an undertaking for one part of its activities while the rest fall outside the competition rules¹⁴.

When it comes to State institutions, the CJEU confirmed the above interpretation in the *Wouters* case. It was held therein that competition rules ‘do not apply to activity, which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity... or which is connected with the exercise of the powers of a public authority’¹⁵. Therefore, public entities would not be viewed as undertakings in relation to activities where they exercise their public powers. For example, in the early *Poucet* case, local social security offices were not viewed as undertakings in administering sickness and maternity insurance¹⁶. The CJEU explained: ‘sickness funds, and the organizations involved in the management of the public social security system, fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of contributions’¹⁷. This approach was reaffirmed in the later *AOK Bundesverband* case where the CJEU held that sickness funds in a statutory health insurance scheme ‘are involved in the management of the social security system. In this regard they fulfil an exclusively social function, which is founded on the principle of national solidarity and is entirely non-profit-making’¹⁸. In the more recent *Kattner* judgment, the factors of solidarity (no link between the contribution and the benefits) and supervision by the State (operation under a statutory scheme supervised by the government), led the CJEU to conclude that an employers’ liability insurance association was not an undertaking within the meaning of Articles 101 and 102 TFEU¹⁹.

By contrast, a pension fund that makes investments, the success of which influences the amount of benefits that the fund can pay to its members, was categorised as an undertaking because its activity was not based on the

¹⁴ Opinion of Advocate General Jacobs of 17 May 2001, Case C-475/99 *Ambulanz Glockner v Landkreis Südwestpfalz*, para. 72. See also V. Louri, ‘Undertaking’ as a Jurisdictional Element for the Application of EC Competition Rules’ (2002) 29 *Legal Issues of Economic Integration* 143.

¹⁵ Case C-390/99 *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten* [2002] ECR I-1577, para 57.

¹⁶ Cases C-159/91 and 160/91 *Poucet v Assurances Generales de France* [1993] ECR I-637.

¹⁷ *Ibidem*, para. 18.

¹⁸ Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, para 51. For a discussion on the status of State owned healthcare providers in competition law see O. Odudu, ‘Are State owned healthcare providers that are funded by general taxation undertakings subject to competition law?’ (2011) 32(5) *ECLR* 231–241.

¹⁹ Case C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- and Metall-Berufsgenossenschaft* [2009] ECR I-1513.

principle of solidarity. As such, it represented an economic activity²⁰. In the same way, an ambulance service organization that provided some of its services for remuneration was qualified as an undertaking performing an essentially economic activity²¹. The mere presence of remuneration is not, however, sufficient to qualify a public entity's activity as economic in nature. That is so when the collection of such remuneration is indispensable from the exercise of public powers²². The above precedents show that the concept of an economic activity would encompass at least the following elements: (1) offering of goods or services on the market and, (2) that the same activity could also be carried out by a private entity for profit²³.

The activity of a State institution is evaluated in the same way when the institution is acting as a purchaser of goods or services on the market. However, where such purchase is undertaken for the purpose of non-commercial or social activities or for services of general economic interest (such as the administration of a national health system), the purchasing activity of a State institution is not considered economic in nature, not even in the case of monopsony²⁴. The CJEU upheld this approach and stressed that it is the purpose of a purchase which defines the economic activity, rather than the purchase itself: 'there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity, and that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity'²⁵. This more teleological approach, based on a complex evaluation of public powers and public objectives of a given State institution (instead of a technical separation of the various activities carried out by a public body), was upheld by the CJEU in its *SELEX* judgment²⁶.

²⁰ Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, para. 71–87.

²¹ Case C-475/99 *AmbulanzGlöckner v Landkreis Südwestpfalz* [2001] ECR I-8089, para. 19–22.

²² Case C-138/11 *Compass-Datenbank GmbH v Republik Österreich* of 12 July 2012 (not yet reported), para. 49.

²³ *Ibidem*, para. 19–22, Case C-205/03P *FENIN v Commission* [2006] ECR I-6295, para. 25.

²⁴ Case C-205/03P *FENIN v Commission* [2006] ECR I-6295, para. 37. See commentary in V. Louri, 'The FENIN Judgment: The Notion of Undertaking and Purchasing Activity: Case T-319/99, Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental v. Commission [2003] ECR II-00357' (2005) 32 *Legal Issues of Economic Integration* 87–97.

²⁵ Case C-205/03P *FENIN v Commission* [2006] ECR I-6295, para.26.

²⁶ Case C-113/07P *SELEX Sistemi Integrati SpA v Commission*, [2009] ECR I-2207. See also J. Nowag, 'SELEX Sistemi Integrati SpA v Commission of the European Communities (C-113/07 P) [2009] E.C.R. I-2207: redefining the boundaries between undertaking and the exercise of public authority' (2010) 31(12) *ECLR* 483–486; A. Svetlicinii, 'Back to the Basics:

The application of the purpose-based functional approach to the concept of an undertaking, which revolves around the exercise of an economic activity as opposed to the public powers carried out by State institutions and other entities, provides for a balanced application of competition rules designed for undertakings (market players and competitors). State institutions become subject to competition law only in relation to their economic activities, even though the exercise of public powers might be equally harmful to market competition. This functional approach to the determination of the addressees of competition rules and subjects of competition law enforcement has been transplanted into national competition law systems modelled on EU substantive rules and standards. The following section addresses the regulation of the concept of an undertaking in Bosnia and Herzegovina and its neighbouring countries positioned at various stages of their EU accession process.

III. State institutions as undertakings within the meaning of the B&H Competition Act

The harmonization of Bosnia and Herzegovina's legislation with *acquis communautaire* and, more specifically, the influence of EU competition law on domestic competition law enforcement, is determined by the Stabilization and Association Agreement (SAA)²⁷ and the Interim Agreement on trade and trade-related issues (the Interim Agreement)²⁸. The latter explicitly required B&H's authorities to assess anti-competitive practices (anti-competitive agreements, abuse of dominance, anti-competitive State aid) 'on the basis of criteria arising from the application of the competition rules applicable in the Community... and interpretative instruments adopted by the Community institutions' insofar as such practices 'may affect trade between the Community and Bosnia and Herzegovina'²⁹.

Pursuant to these international treaties, Bosnia and Herzegovina's duty to apply EU competition rules is conditioned upon a given practice's effect on trade between the EU and B&H (similar to the obligation of EU Member

Concepts of Undertaking and Economic Activity in the SELEX Judgment' (2009) *European Law Reporter* 422–427.

²⁷ Stabilisation and Association Agreement (SAA) between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, signed on 16 June 2008, has not yet entered into force.

²⁸ Interim Agreement on trade and trade-related matters between the European Community, of the one part, and Bosnia and Herzegovina, of the other part, signed on 16 June 2008, entered into force on 1 July 2008, OJ [2008] L 169/13.

²⁹ Interim Agreement, Article 36(2); SAA, Article 71(2).

States to apply EU competition rules under Regulation 1/2003)³⁰. The drafters of the B&H Competition Act went further, however, and provided that the 'Council of Competition, for the purpose of the assessment of a given case, can use the case law of the European Court of Justice and the decisions of the European Commission'³¹. This provision effectively authorized the KV to apply EU competition law to purely domestic cases – even those not covered by B&H's obligations under the Interim Agreement or the SAA.

The current B&H Competition Act is in force since 2005 with some minor later amendments³². It defines the application of competition rules as follows: 'This Act applies to all natural and legal persons who are directly or indirectly engaged in the production, sale of goods and services, involved in trade of goods and services and who with their actions can prevent, restrict or distort competition in the entire territory of Bosnia and Herzegovina or significant part of its market (hereafter, economic entities)'³³. More specifically, the B&H Competition Act regards as undertakings 'bodies of State administration and local self-government, when they directly or indirectly participate in or influence the market'³⁴. The literal reading of the above provisions highlights the two alternative criteria that natural or legal persons have to satisfy in order to be seen as „economic entities“ or undertakings for the purposes of competition law enforcement. The first criterion relates to the active participation in the market, which can involve the production, sale or trade in goods and services. The second criterion, applied specifically to State authorities, provides that in order to be categorised as an undertaking, State authorities should „participate in“ *or* „influence“ the market. While 'participation' in the market refers to the active engagement in economic activities as defined above, the understanding of 'influence' can be inferred. While State authorities might not engage in economic activities themselves, the exercise of their regulatory and other public powers can clearly have an 'influence' on the market.

In order to assess the originality of the approach followed by the B&H legislator in placing State authorities within the scope of the application of

³⁰ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, OJ [2003] L 1/1, Article 3. The concept of 'effect on trade' is further explained in the Commission Notice Guidelines on the effect on trade concept, contained in Articles 81 and 82 of the Treaty, OJ [2004] C 101.

³¹ B&H Competition Act (*Zakon o konkurenciji*), *Službeni glasnik BiH* No. 48/05, 76/07 and 80/09, Article 43(7).

³² According to the EU Commission's 2011 Bosnia and Herzegovina Progress Report, 'the Competition Law is mostly in line with the EU *acquis*, but needs further alignment'. See SEC(2011) 1206 final, Brussels, 12.10.2011, p. 37, available at http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/ba_rapport_2011_en.pdf.

³³ B&H Competition Act, Article 2(1).

³⁴ *Ibidem*, Article 2(1)(b).

domestic competition rules, a cross-country comparison seems helpful. The most meaningful comparison of B&H's competition law would be with relation to its neighbours, former Yugoslavian republics of Croatia, Macedonia, Montenegro and Serbia. All of these jurisdictions share a common legal history and all have harmonized their competition laws with EU standards during the course of their EU integration process.

The Serbian Competition Act employs the traditional 'functional' approach to the definition of undertakings – these are the entities that 'directly or indirectly, permanently, occasionally or ad hoc, perform economic activities in trade of goods and services'³⁵. Serbian competition law can thus be applied to 'State institutions, bodies of territorial autonomy and local self-governments'³⁶ only under the condition that they 'perform economic activities'. The Serbian NCA emphasised in 2011 in a public statement that its competition rules can be applied to State authorities only in situations where the latter directly or indirectly participate in the exchange of goods or services on the market³⁷. As such, the authority refused to initiate infringement proceedings in cases where applicants complained about the actions of State institutions carried out within the scope of the exercise of their public powers. Similarly, the Croatian Competition Act provides that competition law is applied to 'State authorities and local and regional self-government units where they directly or indirectly participate in the market'³⁸. This provision also requires some sort of market participation or market activities. Pursuant to the Macedonian Competition Act, a State authority³⁹ can be considered an undertaking if it performs economic activities⁴⁰ which are further defined as 'trade of goods and/or services on the market regardless whether the purpose of such trade is making a profit or not'⁴¹. The Macedonian NCA can thus enforce competition rules against State authorities only when they are engaged in economic activities on the relevant market. In the same way, the competition law of Montenegro applies to State authorities only 'when they engage in an economic activity directly or indirectly and participate in the trade in goods

³⁵ RS Competition Act (*Zakon o zaštiti konkurencije*), *Službeni glasnik RS* 51/2009, Article 3.

³⁶ *Ibidem*, Article 3(2).

³⁷ <http://www.kzk.org.rs/kzk/wp-content/uploads/2011/07/prema-drzavnim-organima.pdf>.

³⁸ HR Competition Act (*Zakon o zaštiti tržišnog natjecanja*), *Narodne novine* 79/09, Article 3(1).

³⁹ The definition of State authority covers the Government of the Republic of Macedonia, ministries, bodies of the ministries, independent bodies of State administration, administrative organizations, bodies of local self-government and the City of Skopje. MK Competition Act (*Zakon za zaštita na konkurencijata*), *Služben vesnikna PM* 145/10 Article 5.

⁴⁰ *Ibidem*, Article 5.

⁴¹ *Ibidem*, Article 5.

and/or services'⁴², that is, when they are considered to be undertakings under the Competition Act.

The result of this cross-country comparison highlights the originality of the policy choice made by Bosnia and Herzegovina's legislator. It appears, at least from a literary reading of the competition laws of its neighbours, that they all chose to use the 'functional approach' that regards State authorities as undertaking only when they participate in the market by engaging in economic activities. By contrast, the B&H Competition Act provides an alternative criterion that can place State institutions in the category of 'undertakings' when they directly or indirectly influence the market by their actions or decisions. Although the B&H Competition Act does not further clarify this term, it can be implied that influencing the market can be achieved without engaging in activities of an economic nature.

This interpretation raises the difficulty of applying traditional competition rules (aimed at undertakings engaged in economic activities) to State authorities which are also classified as undertakings even when they merely influence the market, without actually participating in it. Moreover, the B&H Competition Act provides for two basic competition law violations: anti-competitive agreements and the abuse of a dominant position (modelled after Articles 101 and 102 TFEU). The difficulty of applying the national equivalent of Article 102 TFEU⁴³ to public authorities that do not engage in economic activities is obvious – it would often be problematic to establish such entity's dominant position on a given relevant market seeing as it does not 'engage' in it in the first place⁴⁴. As a preliminary observation, it should thus be expected that public authorities that influence the markets without engaging in economic activities cannot be charged with an abuse of dominance

⁴² ME Competition Act (*Zakon o zaštiti konkurencije*), *Službeni list CG* 44/12, Article 3(3).

⁴³ B&H Competition Act, Article 10.

⁴⁴ *Ibid.*, Article 9: "Economic entity has a dominant position in the relevant market of goods or services, when owing to its market power it can behave in the relevant market considerably independently of its actual or potential competitors, buyers, consumers or suppliers, taking into account the market share of that economic entity in the relevant market, market shares of its competitors in that market, as well as the legal and other barriers to the entry of other economic entities in the market". The definition of dominance is further specified in the Regulation on definition of a dominant position adopted by KV Decision No. 01-01-26-102-I/06 dated 21 February 2006, available at <http://bihkonk.gov.ba/en/regulation-on-definition-of-a-dominant-position.html>. Article 2(2) of the Regulation provides that 'An undertaking is in dominant position in the relevant market of products and services where it faces no competition or insignificant existing competition'. These definitions clearly require the undertaking to be active on the relevant market so that its market share and market power can be assessed in the view of determining its dominance on that market. See also M. Gogić, 'Određivanje relevantnog tržišta u pravu konkurencije Bosne i Hercegovine i Evropske unije' (2012) 3–4 *Pravna misao (Sarajevo)* 84–101.

infringement. The only remaining alternative is the substantive provision prohibiting anti-competitive agreements. In its definition of agreements, the latter contains traditional agreements, contracts, concerted practices ‘as well as decisions and other acts of economic entities’ that have as their object or effect the prevention, restriction or distortion of market competition⁴⁵. Given that public authorities can be considered undertakings or economic entities, their decisions and ‘other acts’ could thus fall into the somewhat broad definition of prohibited agreements provided by the B&H Competition Act. However, while Article 101 TFEU was designed to apply to agreements and concerted practices of undertakings or to the decisions of associations of undertakings, its domestic equivalent appears to cover situations where a unilateral decision or action of any entity (including State authorities) can fall into the category of agreements.

If the above interpretations are correct, then State authorities can be found in violation of the national equivalent of Article 101 TFEU – a fact that can trigger antitrust sanctions. The B&H Competition Act authorizes the Competition Council to impose on undertakings that entered into prohibited agreements a financial penalty of up to 10% of their total annual turnover⁴⁶. Domestic competition law also provides for sanctions to be imposed on responsible individuals within the economic entities engaged in the infringement. These fines range from BAM 15.000 to BAM 50.000 (approx. € 7.500 to € 25.000)⁴⁷. An apparent specific feature of this manner of setting fines for competition law infringements is that they were primarily designed for undertakings engaged in economic activities. In case of State institutions that do not engage in economic or income generating activities, the closest equivalent of annual turnover would be their annual budget. Fines of up to 10% of such budget could, however, seriously undermine the ability of a public authority to carry on with its public functions.

The above interpretations and concerns have been made on the basis of the literal interpretation of the various concepts and rules contained in the B&H Competition Act as well as in related secondary legislation adopted by the KV. The ensuing section of this paper is aimed at verifying the above interpretations and assumptions through the analysis of the Competition Council’s enforcement practice in cases where State authorities have been the subject of infringement proceedings.

⁴⁵ B&H Competition Act, Article 4(1).

⁴⁶ Ibidem, Article 48(1)(a).

⁴⁷ Ibidem, Article 48(2).

IV. Competition infringements committed by State institutions in the enforcement practice of the Competition Council

1. Anti-competitive agreements in the national healthcare system

A recent line of cases investigated by the KV has targeted the healthcare sector – an industry heavily regulated by the State, especially with respect to the national health insurance system. Bosnia and Herzegovina's federal structure is reflected in its health sector. Its cantonal governments establish lists of approved medicines that can be sold to insured individuals and subsequently reimbursed from funds administered by cantonal health insurance offices. The recommended prices at which the approved medicines can be sold to the insured are also set by cantonal administrations.

The first relevant case in this field was investigated by the Competition Council in 2008 and concerned a complaint lodged by the association of foreign pharmaceutical producers in B&H (the Association) against the Sarajevo Cantonal Government⁴⁸. The latter ordered its Committee for Medicines to replace foreign drugs with domestically produced equivalents, where available. The Association argued before the NCA that the cantonal government's decision strengthened the dominance of domestic producers, facilitated the abuse of such position and effectively excluded foreign competitors from the relevant market. The representatives of Sarajevo's administration argued instead that the investigation should be suspended on the basis that the provisions of the B&H Competition Act, which prohibit anti-competitive agreements and practices, cannot be applied to the acts of State authorities⁴⁹.

The KV made reference in its decision to Article 2(1)(b) of the B&H Competition Act, which provides for the application of its provisions to the actions of central and local governments if they can directly or indirectly affect competition on the relevant market. The NCA found the Sarajevo Cantonal Government liable for anti-competitive practices because its decisions regarding the replacement of foreign drugs with their domestic equivalents were not based on qualitative criteria (or other objective factors), but merely on the origin of the manufacturers⁵⁰. According to the Competition Council,

⁴⁸ *Vlada kantona Sarajevo*, <http://www.ks.gov.ba/>.

⁴⁹ B&H Competition Act, Article 5.

⁵⁰ KV Decision 01-01-26-048-36-II/07 dated 22 October 2008. See A. Svetlicinii, 'The Bosnian & Herzegovinan Competition Authority prosecutes regional Government for intervening with competitive process on the market for pharmaceuticals reimbursed under the national health insurance scheme (Association of Foreign Pharmaceutical Producers in Bosnia & Herzegovina/Cantonal Government Sarajevo)' (2008) *e-Competitions* No. 26125.

Sarajevo's government excluded foreign pharmaceutical companies from the relevant market where they were placed at a competitive disadvantage in relation to their domestic rivals. It should be noted here that the KV did not impose any sanctions on the Sarajevo Government despite it being found in violation of national competition rules.

Also in 2008, this time following a complaint submitted by a pharmaceutical multinational Novo Nordisk, the KV established that the Sarajevo Cantonal Health Insurance Office⁵¹ excluded from the approved medicines list certain insulin products supplied by the complainant as well as a range of pharmaceutical products of other suppliers⁵². The NCA qualified the actions of the scrutinised Office as an anti-competitive agreement because they resulted in a reduction of competition on the relevant market. The exclusion of the specified products from the list of medicines approved under the State reimbursement scheme effectively placed the undertakings concerned at a competitive disadvantage with respect to their rivals. The Competition Council rejected at the same time the complainant's request to qualify the Office's actions as an abuse of dominance because the Office itself was not active on the relevant market and the influence on market competition alone can only be prosecuted as an anti-competitive agreement. As a sanction for the established infringement, the KV imposed on the Sarajevo Cantonal Health Insurance Office a fine in the amount of BAM 50,000 (approx. € 25,000). A fine of BAM 15,000 (approx. € 7,500) was also imposed on the responsible individual – the Director of the Office. According to the NCA, its primary objective in formulating the above sanctions was not to punish the infringement, but to correct its consequences. As a result, the imposed fines were minimal⁵³.

Actions of State authorities in the healthcare sector have re-emerged in the KV's enforcement practice in 2012 when the Competition Council investigated the activities of the Zenica-Doboj Cantonal Health Insurance Office (Ze-Do Office)⁵⁴. In order to be reimbursed for medicines provided to customers covered by the national health insurance scheme, all pharmacies were required to conclude reimbursement agreements with cantonal health insurance offices. The procedure for the execution of these agreements was regulated on the

⁵¹ *Zavod zdravstvenog osiguranja kantona Sarajevo*, <http://www.kzzosa.ba/>.

⁵² KV Decision 01-02-26-023-22-II/08 dated 20 November 2008. See A. Svetlicinii, 'The Competition Authority of Bosnia & Herzegovina prosecutes anticompetitive agreements from the regional health insurance office (Novo Nordisk v. Health Insurance Office of the Sarajevo Canton)' (2008) *e-Competitions* No. 25923.

⁵³ The B&H Competition Act provides for a minimal BAM 15,000 fine for responsible individuals, while the calculation of the fines imposed on undertakings is based on their annual turnover (Article 48). In this case the KV has not specified which percentage was taken as a basis for the determination of the fine.

⁵⁴ *Zavod zdravstvenog osiguranja Zeničko-dobojskog kantona*, <http://www.zzozedo.ba/>.

cantonal level – it was prescribed by cantonal governments. In order to qualify for the conclusion of a reimbursement agreements with the Ze-Do Office, the Ze-Do Cantonal Government⁵⁵ required all privately owned pharmacies to pay their employees salaries no lower than the average salary paid by State-owned pharmacies. The complainant argued before the KV that the above minimum salary requirement constituted an anti-competitive agreement, which was discriminatory towards private pharmacies and undermined their competitiveness vis-à-vis State-owned pharmacies.

The KV qualified the actions of the Ze-Do Government and Ze-Do Office as an anti-competitive agreement in the form of making the conclusion of contracts subject to the acceptance by the other party of supplementary obligations which, by their nature or according to commercial usage, had no connection with the subject of those contracts.⁵⁶ Although the B&H Competition Act sanctions anti-competitive agreements with fines of up to 10% of the undertaking's relevant turnover, the KV noted that in this case its objective was not to penalise, but to draw the attention of cantonal authorities to the need to comply with competition rules. As a result, the fine imposed on the Ze-Do Government totalled BAM 20.000 (approx. € 10.000). The Ze-Do Office was punished with a fine of BAM 10.000 (approx. € 5.000).

2. State institutions as undertakings in the public transport markets

Another sector targeted by the Competition Council with respect to the anti-competitive actions of State authorities was public transportation. According to a 2004 Decision of the Sarajevo Cantonal Assembly⁵⁷, taxi operators who satisfied certain mandatory technical conditions laid down in cantonal legislation, should be issued special markings for their cabs and should adhere to the standard agreement for the use of taxi terminals arranged by the cantonal transport ministry⁵⁸. The same Decision also provided that special taxi markings are issued to eligible taxi operators only after they conclude a taxi terminal agreement with the cantonal ministry. The ministry was concluding these agreements on the basis of its annual plans but the

⁵⁵ *Vlada Zeničko-dobojskog kantona*, <http://www.zdk.ba/>.

⁵⁶ KV Decision 02-26-2-06-56-II/11 dated 28 February 2012. See A. Svetlicinii, 'The Competition Authority of Bosnia & Herzegovina addresses anti-competitive regulations in the regional market for medicines reimbursed under national health insurance system (Cantonal Government of Zenica-Doboj and the Cantonal Health Insurance Office of Zenica-Doboj)' (2012) *e-Competitions* No. 47337.

⁵⁷ *Skupština kantona Sarajevo*, <http://skupstina.ks.gov.ba/>.

⁵⁸ *Ministarstvo saobraćaja kantona Sarajevo*, <http://ms.ks.gov.ba/>.

2009 plan, for instance, provided that the ministry would not conclude any new taxi terminal agreements that year. At the same time, taxi operators who concluded their terminal agreements in 2005 or earlier were allowed to automatically extend them for the year 2009. As a result, new taxi operators were unable to receive a taxi marking and could not commence operations even if they satisfied all mandatory technical conditions.

The Public Prosecutor representing the Sarajevo Cantonal Assembly argued that the assembly is a legislative body and therefore should not be subject to competition rules. In its decision, the NCA noted however that when adopting the above Decision, the Assembly acted as an administrative body issuing by-laws implementing federal legislation in the domain of public transport⁵⁹. The KV found that the Assembly's Decision and the Ministry's 2009 plan have effectively restricted competition on the relevant market by preventing new market entry and favouring existing competitors that have concluded their taxi terminal agreements in 2005 or earlier. Applying its sanctioning powers under the B&H Competition Act, the Competition Council imposed on the Ministry a fine in the amount of BAM 50.000 (approx. € 25.000), which represented 0,1% of its budget for 2008. The NCA noted also that the purpose of the fine was not to punish, but to draw the Ministry's attention to the need to comply with competition rules. Interestingly enough, both the Assembly and the Ministry challenged the KV decision before the Court of B&H⁶⁰. Both appeals were dismissed and the KV's decision was upheld by the court⁶¹.

Public transport in Sarajevo became once again the focus of an inquiry in 2012. The Competition Council found that the Sarajevo Cantonal Ministry of Transport entered into an anti-competitive agreement prohibited under the national equivalent of Article 101 TFEU.⁶² The Ministry committed an infringement by granting to the public undertaking KJKP Gradski Saobraćaj d.o.o. (GRAS) the exclusive right to supply subsidized transport services for local schools. In its reply to KV's information request, the Ministry stated that the organization of subsidized transportation for local schools falls under the scope of the exercise of its public power. According to the Ministry,

⁵⁹ KV Decision 01-02-26-041-36-II/09 dated 14 June 2011. See A. Svetlicinii, 'The Competition Authority of Bosnia & Herzegovina addresses anti-competitive regulations on the taxi market of one of the cantons (Ministry of Transport of the Sarajevo Canton and Assembly of the Sarajevo Canton)' (2011) *e-Competitions* No. 39258.

⁶⁰ *SudBosne i Hercegovine*, <http://www.sudbih.gov.ba/>.

⁶¹ Judgment No S13u00138010U dated 21 December 2012 and Judgment No S13u00127610U dated 24 December 2012.

⁶² KV Decision 06-26-3-026-67-II/11 dated 18 April 2012. See A. Svetlicinii, 'The Competition Authority of Bosnia & Herzegovina prosecutes the regional government for public procurement infringements that resulted in restriction of competition in the transports market (Centrotrans-Eurolines)' (2012) *e-Competitions* No. 45896.

agreements concluded with local administrations did not prevent the latter from procuring transport services from other providers. The Ministry took the principled position that the scrutinised contracts did not have as their object the limitation of competition because they were concluded on the basis of laws regulating the organization of the public education system. Seeing as relevant provisions stated that local administrations had to choose their transport providers through an open public procurement process, the NCA held that the Ministry has infringed these regulations by selecting GRAS as an exclusive service provider. The Competition Council concluded that the Ministry, by acting contrary to relevant regulations and public procurement rules, has restricted competition on the relevant market (limit or control production, markets, technical development) and has thus committed an infringement of the national equivalent of Article 101 TFEU. The KV stated once again that it did not intend to penalise the State authority but merely to draw its attention to the need to comply with competition rules. As a result, the fine imposed on the Ministry totalled BAM 26.000 (approx. € 13.000), which was equal to 0,0113% of its budget for 2010.

3. Reasons for an exemption of State institutions from competition law enforcement

The above cases illustrate the instances when State authorities were treated as undertakings under the B&H Competition Act and were found in violation of the national equivalent of Article 101 TFEU. The following case law examples demonstrate various reasons for the exemption of State authorities from competition law prosecution.

In 2009, the Competition Council investigated a case where two cantonal governments have allegedly given privileged treatment to a State-owned company (engaged in raw wood processing activities) through State subsidies and long term procurement contracts.⁶³ On the basis of market data obtained from the national statistics office, the KV established that the two cantons accounted for 8,9% and 10,1% of raw wood production in B&H respectively. The NCA established ultimately that only one of the cantons had actually entered into binding contracts with the State-owned company, but that the agreements in question affected an insignificant part only of the total wood supplies available on the market. As such, they did not have substantial anticompetitive effects.

⁶³ KV Decision 01-05-26-050-53-II/08 dated 21 July 2009. See A. Svetlicinii, 'The Competition Authority of Bosnia & Herzegovina holds that State subsidies to the wood-processing industry does not represent an anti-competitive agreement (The Union of Independent Entrepreneurs Olovo)' (2009) *e-Competitions* No. 28747.

The case against the cantonal governments was ultimately closed on the basis of the provisions on agreements of minor importance⁶⁴.

In 2010, following a complaint by a pharmaceuticals trader Pharma-Maac, the Competition Council initiated an investigation into the alleged anti-competitive agreement between the Sarajevo Cantonal Health Insurance Office (the Office) and Pharma-Maac's rival, Medimpex. The Office announced in 2008 a public tender for the supply of seasonal flu vaccines for the seasons of 2009/2010, 2010/2011 and 2011/2012. The conditions of the tender required bidders to provide evidence that their vaccines had been certified by the Office for Drug Control of the Federation of B&H for the season of 2008/2009. Since Pharma-Maac failed to present such evidence, its bid was considered ineligible and the supply contract was awarded to Medimpex. Pharma-Maac submitted that the certification requirement for the 2008/2009 season was unjustified and that it was introduced in order to favour its competitor. In Pharma-Maac's view, the Office concluded an anti-competitive agreement with Medimpex for the purpose of dividing the market and limiting output, thus significantly reducing competition. On the basis of the available evidence, the Competition Council found, however, no anti-competitive agreements. The NCA stressed that the requirement to provide evidence of vaccine certification could not be viewed as a discriminatory condition favouring one of the bidders above the other because it had to be satisfied by all tender participants. At the same time, the KV refused to decide whether the scrutinised Office had correctly applied sector-specific rules when setting the tender requirements; this decision was left to the sector regulator⁶⁵.

The most recent case relevant in this context concerns the influence exercised by State authorities on the electricity market through subsidies accorded to renewable energy power plants⁶⁶. The Government of the Federation of B&H⁶⁷ adopted in ... a federal Regulation on the exploitation of renewable energy sources and co-generation⁶⁸. The Regulation provided a series of measures meant to stimulate renewable energy generation including

⁶⁴ B&H Competition Act, Article 8.

⁶⁵ KV Decision 01-02-26-036-19-II/09 dated 23 March 2010. See A. Svetlicinii, 'The Competition Authority of Bosnia & Herzegovina investigates tender procedures for the supply of the vaccines organized by the State health insurance office (Pharma-Maac)' (2010) *e-Competitions* No. 31409.

⁶⁶ KV Decision 03-26-3-010-40-II/11 dated 4 October 2012. See A. Svetlicinii, 'The Competition Authority of Bosnia and Herzegovina rejects the complaint alleging the anti-competitive character of the government subsidies for energy generation from renewable sources (APEOR)' (2012) *e-Competitions* No. 50855.

⁶⁷ *Vlada Federacije BiH*, <http://www.fbihvlada.gov.ba/>.

⁶⁸ *Uredba o korištenju obnovljivih izvora energije i kogeneracije* published in *Službene novine FBiH* 36/10, 11/11 and 88/11.

State subsidies for the construction of new power generation plants. It also gave producers of renewable energy the right to conclude electricity purchase agreements with public electricity companies at guaranteed prices. Such agreements could be concluded for a period of up to twelve years starting from the year when the eligible power plant has commenced its operations. As a result, newly built power plants were able to benefit from guaranteed prices for a period of twelve years. By contrast, those that started operation prior to the adoption of this Regulation would be able to supply energy at guaranteed prices for a reduced period of time only, that is, twelve minus the number of years they have already been in operation. The Association of renewable energy producers (APEOR)⁶⁹ argued that the Government has distorted competition among renewable energy producers by favouring newly built power plants. Hence, claiming the existence of dissimilar conditions applied to similar transactions, as well as the imposition of unfair trading conditions, APEOR suggested that the Government's measure should be viewed as an anti-competitive agreement under the B&H Competition Act.

The KV accepted the Government's submission that the Regulation did not have as its objective the discrimination of existing renewable energy producers. Instead, it was meant to promote the use of energy from renewable sources and incentivize the construction of new power generation plants. Without addressing the actual effect of the above measures, the Competition Council concluded that there was no discrimination between renewable energy producers because the Regulation provided for purchase obligations at guaranteed prices that set equal conditions for all renewable energy producers for the period of twelve years. Interestingly, the allegedly anti-competitive character of this specific State action was assessed almost exclusively based on the objective of this measure. The KV justified its rejection of the discrimination claim by the fact that the Government attempted to incentivize the construction of new power plants. In this regard, all renewable energy producers could benefit from the maximum of twelve years guaranteed purchase prices.

V. Concluding remarks

The Competition Council's enforcement practice in cases where State institutions were charged with competition law infringements after being classified as undertakings highlighted the original choice made by Bosnia and Herzegovina's legislator when adopting the current Competition Act. Based

⁶⁹ *Asocijacija proizvođača električne energije iz obnovljivih resursa u BiH*, <http://www.apeor.com/>.

on the well known concepts of 'undertaking' and 'economic activity' developed in EU competition law, the provisions of the B&H Competition Act allow for an extremely wide interpretation of the motion of an undertaking. As a result, State institutions are classified as undertakings even when they influence market competition merely by exercising their public powers to legislate or to enforce existing laws, without actually engaging in any economic activity. Since the regulation of economic activities is one of the public functions of the State, it is inevitable that regulatory or enforcement actions of State authorities will have an effect on market competition. It appears that under the B&H Competition Act, such link between State actions and negative effects on competition will suffice for the Competition Council to treat State institutions as undertakings for the purpose of the application of competition rules.

This legal qualification allows the KV to order the annulment and/or amendment of State acts qualified as anti-competitive agreements under the national equivalent of Article 101 TFEU. State institutions will then be faced with the challenge of contesting the NCA's decision before the judiciary. As a result, theoretically any act of an executive authority that causes anti-competitive effects can be overruled by the NCA as being contrary to the B&H Competition Act. As demonstrated in the above discussion on the KV's emerging enforcement practice, the Competition Council has used its powers to order the annulment and/or amendment of acts issued by both federal and cantonal administrations. Moreover, this interpretation and application of the B&H Competition Act has been upheld by the judiciary seeing as the Court of B&H dismissed appeals lodged against KV's infringement decision in the aforementioned Sarajevo tax case. Judicial statistics demonstrate that the Competition Council has a strong record in defending its decisions before the court: no successful appeals were made in 2012⁷⁰ or 2010⁷¹ and only one in 2009 (not related to actions of State authorities)⁷².

As demonstrated in the discussion on the enforcement practice of B&H's NCA, the application of competition rules to the actions of State authorities has expanded the coverage of another substantive competition law concept also – that of an 'anti-competitive agreement'. When State authorities do not participate in the relevant market directly, it is not possible to determine their dominance and thus in turn apply the national equivalent of Article 102 TFEU. As a result, the NCA regards the actions of State authorities influencing competition on the relevant market as anti-competitive agreements

⁷⁰ See KV 2012 Annual Report, available at <http://bihkonk.gov.ba/datoteka/IZVJESTAJ-ZA-2012-GODINU.pdf>.

⁷¹ See KV 2010 Annual Report, available at <http://bihkonk.gov.ba/datoteka/IZVJESAJ-o-radu-2011bos.pdf>.

⁷² See KV 2009 Annual Report, available at http://bihkonk.gov.ba/datoteka/izvjestaj_2009.pdf.

sanctioned under the national equivalent of Article 101 TFEU. Following the Competition Council's practice, it appears that such category of 'agreements' does not require the existence and/or consent by another party – it is sufficient to show that a State authority has issued a binding regulation that undertakings are obliged to comply with.

Another inconsistency caused by the extended interpretation and application of the two discussed concepts emerges at the stage where a State authority is in fact found in violation of the national equivalent of Article 101 TFEU. Since State authorities can be treated as undertakings under the B&H Competition Act, there should be no reason for distinguishing between State entities and private companies when determining the amount of fines to be imposed. According to applicable rules, anti-competitive agreements can be sanctioned by a financial penalty of up to 10% of the undertaking's annual turnover⁷³. When determining the amount of the fine, the KV should take into account the aim and the duration of the violation⁷⁴. However, the NCA's enforcement of the B&H Competition Act in relation to State authorities demonstrated a significant leniency in sanctioning public bodies for competition infringements – fines did not exceed € 25,000 and never reached even as much as 1% of the infringing State institutions' turnover (budget).

Bosnia and Herzegovina remains a transition economy with continuous State regulations and little or no experience in enforcing competition rules. One could thus attempt to justify its legislator's choice to give extensive powers to the NCA in order to facilitate efficient enforcement of competition law against State-initiated competition restraints. Indeed, the emerging enforcement practice of the Competition Council should contribute to growing awareness of public officials concerning competition rules. It should also improve B&H's competition culture at the national, regional and local levels. At the same time, the way in which the KV applies substantive rules and concepts to deal with anti-competitive effects stemming from the actions of State authorities remains questionable. The concepts of 'undertaking', 'economic activity' and 'anti-competitive agreement', as well as fines for antitrust infringements calculated as a percentage of annual turnovers, were all transposed into national legislation from EU competition law. As the above cases demonstrate, these concepts have lost their original scope and meaning when applied to State institutions under the B&H Competition Act. Even though B&H's obligation under the Interim Agreement and SAA to apply EU competition rules is limited to cases where B&H-EU trade is affected, the current application of these concepts appears to contradict the legislator's intention to use EU

⁷³ B&H Competition Act, Article 48(1).

⁷⁴ *Ibidem*, Article 52.

competition law (CJEU's judgments and EU Commission's decisions)⁷⁵ for the assessment of domestic competition cases.

Interestingly enough, the European Commission's 2012 Progress Report for Bosnia and Herzegovina stated that the national Competition Act is still to be fully aligned with *acquis communautaire* and B&H is still to fulfil its commitment to apply EU competition principles to public undertakings and undertakings with special and exclusive rights.⁷⁶ It remains to be seen whether this comment will result in legislative amendments harmonizing the concepts of 'undertaking' and 'economic activity' applied to State authorities under the current B&H Competition Act.

Literature

- Beširević V. (ed.), *Public Law in Serbia: Twenty Years After*, Esperia, 2012.
- Dajković I, 'Whither Competition Law in Montenegro: Current status and future challenges' (2007) 28(2) ECLR.
- Gerardin D., Henry D. (eds), *Modernisation and Enlargement: Two Major Challenges for EC Competition Law*, Intersentia, 2005.
- Gogić M., 'Određivanje relevantnog tržišta u pravu konkurencije Bosne i Hercegovine i Evropske unije' ['Determination of relevant market in the competition law of Bosnia and Herzegovina and the European Union'] (2012) 3–4 *Pravna misao (Sarajevo)*.
- Jones A., Sufrin B., *EC Competition Law*, 4thed, Oxford University Press, 2011.
- Karova R., Botta M., 'Five Years Enforcement of Competition Law in the Republic of Macedonia – Time for an Assessment' (2010) 2 *Mediterranean Competition Bulletin*.
- Kavaz Hukić S, 'Stanje i perspektive pravakonkurencije u Bosni i Hercegovini' ['Current situation and perspectives for competition law in Bosnia and Herzegovina'] (2013) 3–4 *Pravnamisao (Sarajevo)*.
- Louri V., 'The FENIN Judgment: The Notion of Undertaking and Purchasing Activity: Case T-319/99, Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental v. Commission [2003] ECR II-00357' (2005) 32 *Legal Issues of Economic Integration*.
- Louri V., 'Undertaking' as a Jurisdictional Element for the Application of EC Competition Rules' (2002) 29 *Legal Issues of Economic Integration*.
- Mekšić Z., 'Jurisdikcija Suda EU u praksi Suda BiH' ['Jurisprudence of the CJEU in the practice of the Court of B&H'] (2012) 8 *Sveske za javno pravo*.
- Nowag J., 'SELEX Sistemi Integrati SpA v Commission of the European Communities (C-113/07 P) [2009] E.C.R. I-2207: redefining the boundaries between undertaking and the exercise of public authority' (2010) 31(12) *ECLR*.

⁷⁵ *Ibidem*, Article 43(7).

⁷⁶ Bosnia and Herzegovina 2012 Progress Report, SWD (2012) 335 final, Brussels, 10.10.2012, p. 36, available at http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/ba_rapport_2012_en.pdf.

- Odudu O., 'Are State owned healthcare providers that are funded by general taxation undertakings subject to competition law?' (2011) 32(5) *ECLR*.
- Pecotić Kaufman J., *Enforcement of Competition Rules in Croatia – Challenges and the Way Forward* (November 17, 2009), available at <http://ssrn.com/abstract=1844302>
- Podstawa K., Puccio L. (eds), 'Framework for Economic Development in EU External Relations' (2012) 1 *EUI Working Paper (Law)* 51–74.
- Rose V., Bailey D., *Bellamy & Child European Union law of Competition*, 7thed, Oxford University Press, 2013.
- Svetlicinii A., 'Back to the Basics: Concepts of Undertaking and Economic Activity in the SELEX Judgment' (2009) *European Law Reporter*.
- Svetlicinii A., 'Competition law enforcement in Serbia: problems and prospects' (2012) 33(6) *ECLR*.
- Svetlicinii A., 'The Competition Authority of Bosnia & Herzegovina prosecutes anticompetitive agreements from the regional health insurance office (Novo Nordisk v. Health Insurance Office of the Sarajevo Canton)' (2008) *e-Competitions* No. 25923.
- Svetlicinii A., 'The Bosnian & Herzegovinan Competition Authority prosecutes regional Government for intervening with competitive process on the market for pharmaceuticals reimbursed under the national health insurance scheme (Association of Foreign Pharmaceutical Producers in Bosnia & Herzegovina / Cantonal Government Sarajevo)' (2008) *e-Competitions* No. 26125.
- Svetlicinii A., 'The Competition Authority of Bosnia & Herzegovina holds that State subsidies to the wood-processing industry does not represent an anti-competitive agreement (The Union of Independent Entrepreneurs Olovo)' (2009) *e-Competitions* No. 28747.
- Svetlicinii A., 'The Competition Authority of Bosnia & Herzegovina investigates tender procedures for the supply of the vaccines organized by the State health insurance office (Pharma-Maac)' (2010) *e-Competitions* No. 31409.
- Svetlicinii A., 'The Competition Authority of Bosnia & Herzegovina addresses anti-competitive regulations on the taxi market of one of the cantons (Ministry of Transport of the Sarajevo Canton and Assembly of the Sarajevo Canton)' (2011) *e-Competitions* No. 39258.
- Svetlicinii A., 'The Competition Authority of Bosnia & Herzegovina prosecutes the regional government for public procurement infringements that resulted in restriction of competition in the transports market (Centrotrans-Eurolines)' (2012) *e-Competitions* No. 45896.
- Svetlicinii A., 'The Competition Authority of Bosnia & Herzegovina addresses anti-competitive regulations in the regional market for medicines reimbursed under national health insurance system (Cantonal Government of Zenica-Doboj and the Cantonal Health Insurance Office of Zenica-Doboj)' (2012) *e-Competitions* No. 47337.
- Van Bael & Bellis, *Competition law of the European Community*, 5thed, Wolters Kluwer, 2010.
- Whish R., *Competition Law*, 7thed, Oxford University Press, 2012.

Competition Law Enforcement in Times of Crisis: the Case of Serbia

by

Dusan Popovic*

CONTENTS

- I. General assessment of the Serbian competition law regime
- II. Specific problems of competition law enforcement
 - 1. Doubts as to the privileged treatment of state-owned undertakings
 - 2. Competition advocacy as a substitute for competition law enforcement
 - 3. 'Simulation' of state aid control
- III. Concluding remarks

Abstract

The development of Serbian competition law started in 2005 with the adoption of its first modern Competition Act. National competition rules are generally harmonized with European Union law, especially following the adoption of the current Competition Act of 2009. However, several problems in competition law enforcement can be identified still, the importance of which increases as the effects of the current economic crisis spread. The paper focuses mainly on three problems specific to competition law enforcement in Serbia, a country with a weak economy. The first problem identified is that of a possibly privileged treatment of state-owned companies. The Competition Authority commenced so far only two proceedings against undertakings with state-owned capital. Furthermore, the Authority seems to accord insufficient attention to some industry sectors that are of special public interest, such as the production and trade of gas or oil, dominated by undertakings with state-owned capital. Sector-specific analyses undertaken by the Competition Authority did not result in any proceedings being initiated *ex officio*. The second problem identified in this paper is the reluctance of the Serbian Competition

* Dr. Dusan Popovic, Associate Professor, University of Belgrade, Faculty of Law; dusan.popovic@ius.bg.ac.rs.

Authority to enforce competition rules in certain ‘sensitive’ situations. Instead of taking a pro-active approach, it sometimes seems that the Authority chooses to act as an ‘advisor’ of undertakings rather than an enforcer of competition law. Finally, the paper analyzes the activities of the Commission for State Aid Control, notorious for its perpetually positive approach towards institutions granting state aid.

Résumé

Le développement du droit serbe de la concurrence a commencé en 2005, avec l’adoption de la première loi moderne relative à la protection de la concurrence. Les règles nationales de la concurrence sont généralement harmonisées avec le droit de l’Union européenne, en particulier suite à l’adoption de la loi relative à la protection de la concurrence en 2009. Pourtant, l’auteur identifie plusieurs problèmes relatifs à la mise en œuvre des règles de concurrence, dont l’importance a augmenté pendant la crise économique actuelle. L’article se concentre en particulier sur trois problèmes relatifs à la mise en œuvre des règles de concurrence en Serbie, un pays à difficultés économiques. Le premier problème identifié par l’auteur est relatif à un possible traitement préférentiel des entreprises publiques. Jusqu’à présent, l’Autorité de la concurrence n’a initié que deux procédures contre les entreprises publiques. De plus, il paraît que l’Autorité de la concurrence n’accorde pas suffisamment d’attention aux secteurs d’intérêt général, comme celui de la production et distribution de gaz, qui sont dominés par d’entreprises publiques. Les enquêtes sectorielles entreprises par l’Autorité de la concurrence dans ces secteurs n’ont abouti à aucune procédure initiée *ex officio*. Le deuxième problème identifié par l’auteur est celui de la réticence de l’Autorité de la concurrence d’initier des procédures dans certaines situations « sensibles ». Au lieu d’approche proactive, l’Autorité a choisi de jouer le rôle de « conseiller » d’entreprises dans certains cas. Finalement, l’auteur analyse les activités de la Commission pour le contrôle d’aides d’Etat, fameux pour la totalité de décisions déclarant l’aide compatible avec la loi.

Classifications and keywords: competition advocacy; competition law enforcement; control of state aid; economic crisis; Serbia.

I. General assessment of the Serbian competition law regime

Similarly to other South-East European countries, Serbia embraced competition rules quite late, under the direct influence of European Union law and following significant political changes. While it was still part of the Socialist Federative Republic of Yugoslavia, Serbia had a centrally planned economy where the majority of market participants were state-owned. The idea of free competition was, thus, inconsistent with the values of a socialist society. In the last decade of the twentieth century, Serbian economy started

to slowly shift to a more liberal model. This process was, however, largely halted by the destruction of the socialist Yugoslavia, the UN embargo and the surrounding Balkans conflict. Still, the Federal Republic of Yugoslavia, which was at that time formed by Serbia and Montenegro, adopted in 1996 its first competition act, entitled the Act Against Monopolies¹. The legislation was highly controversial since it laid down rules which were practically impossible to enforce. Under the 1996 Act, competition rules were to be enforced by the Anti-monopoly Commission, whose members were appointed from among 'distinguished academics, experts and businessmen'². Paradoxically, certain members of the Commission were CEOs of the very undertakings whose behavior was to be analyzed under the 1996 Act! Although Serbia's first competition act was in force for almost ten years, it was never enforced.

The development of Serbian competition law can be traced more accurately to 2005 and the adoption of the first modern Competition Act (hereafter, 'the 2005 Competition Act')³. Compared to its neighbouring countries, Serbian legislation was introduced somewhat late. For instance, Hungary adopted its Competition Act in 1996, Slovenia in 1999 and Croatia in 2003. Although the substantive rules laid down by the Serbian 2005 Act were generally in line with EU law standards⁴, its procedural rules were not drafted in a satisfactory manner. Under the 2005 Act, the Competition Authority (Commission for the Protection of Competition) was not empowered to impose fines for an infringement of competition law. The Authority could only initiate proceedings before the misdemeanour tribunal which remained the only competent authority to impose fines. This was a rather peculiar solution, different to the competences of national competition authorities in most European countries and those of the European Commission. It is clear that the judges of the misdemeanour tribunals did not have sufficient knowledge on legal and economic issues surrounding the protection of free and undistorted competition, since they were generally dealing with cases of petty crime. This enforcement model was particularly dangerous since misdemeanour tribunals were often influenced by the executive power, which was a source of corruption concerns.

¹ Official Journal of the Federal Republic of Yugoslavia No. 29/1996.

² Regulation establishing the Anti-monopoly Commission, Official Journal of the Federal Republic of Yugoslavia No. 44/97.

³ Official Journal of the Republic of Serbia No. 79/2005.

⁴ However, certain substantive provisions were incomplete, especially those regulating anti-competitive agreements e.g. the 2005 Competition Act did not define *de minimis* agreements. Furthermore, by-laws allowing for block exemptions of certain anti-competitive agreements have never been adopted. For an in-depth analysis of the 2005 Competition Act see: D. Popovic, 'The upcoming reform of Serbian competition law: A necessary step towards closer approximation with the EU law' (2008) 4 *Concurrences* No. 22067.

In the first years following its establishment, the attention of the Competition Authority was placed firmly on merger control. This was a direct consequence of the fact that the 2005 Competition Act set rather low thresholds for the obligatory notification of concentrations⁵. Low thresholds led to large numbers of notifications, which were usually approved within summary proceedings only because it was clear that the notified operations did not restrict competition on the Serbian market⁶. Since the Authority had rather limited human resources, low notification thresholds resulted in other areas of competition law enforcement – prohibition of anti-competitive agreements and abuses of dominance – being *de facto* neglected.

A new Competition Act was adopted in 2009 (hereinafter, ‘the 2009 Competition Act’)⁷ significantly improving the Serbian competition law regime. Substantive rules have been further harmonized with EU law, while rules of procedure have undergone a much needed reform. The Competition Authority has finally become empowered to impose fines, which should be seen as an important pre-requisite for efficient competition law enforcement. Necessary by-laws were also adopted, thus completing the Serbian legislative framework. They include, most importantly, three block exemption regulations that were never adopted under the previous Act⁸. Importantly also, the 2009 Competition Act laid down different thresholds for notifications of concentrations, in order

⁵ In setting the thresholds for the control of concentrations, the 2005 Competition Act differentiated between concentrations whose participants are already present on the Serbian market and those in which at least one participant is a Serbian undertaking. This way, the 2005 Act created a system whereby foreign undertakings accede to the Serbian market. Authorization was necessary if one of the two conditions was met: (a) combined total annual turnover of all participants achieved on the Serbian market exceeding EUR 10 million in the previous financial year, or (b) combined total annual turnover of participants realized on the international market in the previous financial year exceeding EUR 50 million, whereby at least one of the participants had to be registered on the territory of the Republic of Serbia. During the privatisation process in Serbia, the second criterion was frequently met, since foreign investors generally realized total annual turnover of EUR 50 million on the international market. This automatically led them to notify the operation, regardless of the size of the undertaking acquired in Serbia.

⁶ In its 2008 Progress Report for Serbia, the European Commission noted the need for a more adequate notification thresholds for concentrations, which would ensure that the notification duty applies only to those operations that could affect competition in Serbia. See: Serbia 2008 Progress Report, SEC (2008) 2698 final.

⁷ Official Journal of the Republic of Serbia n^o 51/2009. For the analysis of the 2009 Competition Act see: I. Dajkovic, ‘Comments on the new Serbian Competition Law’ (2010) 31(2) *ECLR* 52.

⁸ The Government adopted 3 block exemption regulations (on specialization agreements, on R7D agreements, and on vertical agreements), a leniency regulation, a regulation on the criteria for setting fines, and a regulation on relevant market definition. They are available at the Competition Authority website: www.kzk.gov.rs.

to allow the Authority to better focus on anti-competitive agreements and the abuse of a dominant position⁹.

Neither the 2005 nor the 2009 Competition Act laid down rules on the control of state aid. These rules have been introduced into the Serbian legal system by a separate Act on the Control of State Aid (hereafter, 'State Aid Act'), which was adopted and entered into force in July 2009 although its application did not start until 1 January 2010¹⁰. The Government established a separate body in charge of its enforcement – the Commission for the Control of State Aid (hereafter, 'State Aid Commission'), within the auspices of the Ministry of Finance¹¹. In a country with rather fragile democratic institutions, it would have been more appropriate for the legislator to opt to empower the existing Competition Authority to enforce the State Aid Act, rather than establishing a separate institution with limited guaranties of its independence. The activities of the State Aid Commission will be analyzed in detail in the latter part of this paper.

The extent of the harmonization of Serbian competition rules with that of the European Union must be considered as rather high. The harmonization process started, on a voluntary basis, way before Serbia signed the Stabilization and Association Agreement, and the Interim (Trade) Agreement with the European Union, in April 2008¹². Under the Stabilization and Association Agreement, Serbian authorities are not required to apply EU law. They are only required to interpret national competition rules in line with the criteria arising from the application of EU competition rules and interpretative instruments adopted by EU institutions, in cases where the behaviour in question may

⁹ Under the 2009 Act, a notification duty arises if one of the following thresholds is met: (a) combined aggregate annual turnover of all undertakings concerned on the global market in the preceding year exceeds 100 million EUR, and at least one participant generates more than 10 million EUR turnover on the Serbian market; or (b) aggregate annual turnover of at least two participants generated on the Serbian market exceeds 20 million EUR, and each of at least two participants has generated turnover exceeding 1 million EUR on the Serbian market. Concentrations realized through public bids in accordance with the Act on Takeover need to be notified even if the thresholds are not met. The Competition Authority may also initiate *ex officio* proceedings in case the aggregate market share of the participants in the territory of the Republic of Serbia is at least 40%, in case the Authority presumes that the concentration does not meet the criteria for the approval prescribed by the Competition Act, or in case of any other operation not approved in accordance with the Competition Act.

¹⁰ Official Journal of the Republic of Serbia No. 51/2009. The first constitutive session of the State Aid Commission was held on 30 March 2010.

¹¹ Website of the State Aid Commission, part of the website of the Serbian Ministry of Finance: www.mfin.gov.rs.

¹² The European Commission publishes its Progress Reports annually, thus evaluating the reforms undertaken by Serbia. In December 2009, Serbia officially applied for membership in the European Union.

affect trade between Serbia and the EU¹³. This duty concerns only national provisions on anti-competitive agreements, abuse of dominance and state aid control. The Competition Authority has so far not referred directly to the criteria arising from the application of EU competition rules in its decisions, although it *de facto* observes them¹⁴.

II. Specific problems of competition law enforcement

In 2009, Serbia was strongly hit by the current global economic crisis, which originated in the United States in 2007. At that time, the Competition Authority was still largely inexperienced in the enforcement of the prohibition of anti-competitive agreements and the abuse of a dominant position. As explained, the 2005 Competition Act contained a ‘built-in error’, that is, low notification thresholds for concentrations, which largely pre-determined Serbia’s enforcement focus for a number of years. For example, in 2006 the Competition Authority did not establish the existence of a single anti-competitive agreement nor did it prove a single abuse case; it did, however, approve 40 concentrations. In 2007, the Authority established the existence of a single anti-competitive agreement, determined that an undertaking abused its dominant position twice and approved 102 concentrations. In 2008, two anti-competitive agreements were found as well as two abuses and 133 concentrations approved¹⁵.

The entry into force of the 2009 Competition Act coincided with the development of the economic crisis in Serbia. The new Act, which laid down

¹³ Art. 73(2) of Stabilization and Association Agreement between the European Communities and their Member States on the one part, and the Republic of Serbia of the other part: ‘Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the EC Treaty and interpretative instruments adopted by the Community institutions’. See also: Interim agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Serbia, of the other part, Art. 38(2). For the interpretation of similar provisions in agreements concluded between the Republic of Croatia and the EU, see: Constitutional Court of Croatia, case no. U-III-1410/2007, 13 February 2008, § 6.

¹⁴ It should be noted, however, that it is not possible to have a complete insight into the activities of the Serbian Competition Authority. The Authority is obliged to publish only the wording of its decisions in the Official Journal of the Republic of Serbia, which makes the website of the Authority the main source of information on competition enforcement. Unfortunately, only rare decisions of the Competition Authority are published online in their entirety.

¹⁵ See Annual Reports of the Serbian Competition Authority, available at <http://www.kzk.gov.rs>.

different notification thresholds, made it possible for the Authority to focus on competition infringements *stricto sensu*. It seems, however, that there was no general consensus among the members of the Authority whether to actually intensify their activities, given the difficult social and economic environment of the time. Still, certain improvements can be noted. In 2009, the Competition Authority found four anti-competitive agreements, established the abuse of a dominant position in two cases, and approved 103 concentrations. In 2010, it conducted four proceedings concerning alleged anti-competitive agreements, three for suspected abuse and cleared 73 concentrations. In 2011, the Authority conducted seven cases on anti-competitive agreements, one related to abuse and oversaw 94 concentrations¹⁶.

As the effects of the economic crisis grew, the challenges for the Competition Authority increased. On the one hand, it needed to prove it was capable to independently and efficiently enforce national competition rules. The Serbian public opinion, similarly to the European Union, expected the Authority to ‘show results’. On the other hand, there were very few undertakings not experiencing serious financial problems due to the crisis, and possible competition fines could seriously damage their already fragile situation. Furthermore, some of the undertakings still coping with the crisis were state-owned, a fact that certainly generated a psychological effect on the members of the Authority, still not comfortable to enforce competition rules against the state, broadly understood.

Three main features can be identified concerning the activities of the Serbian Competition Authority and the State Aid Commission during the current economic crisis. First, there are doubts as to the privileged treatment given to state-owned undertakings. Second, the Competition Authority seems to have opted in certain situations in favour of competition advocacy instead of competition law enforcement. Third, the activities of the State Aid Commission can be described as a ‘simulation’ of state aid control rather than its actual performance. These three issues are analyzed in more detail in the following sections.

1. Doubts as to the privileged treatment of state-owned undertakings

Pursuant to Article 3 of the 2009 Competition Act, competition rules apply to all legal and natural persons that directly or indirectly, permanently, occasionally or on an *ad hoc* basis, perform economic activities in the trade of goods or services, regardless of their legal status, ownership affiliation or state

¹⁶ *Ibidem*. Report for 2012 has not been published yet.

of origin, including: (a) domestic and foreign companies and entrepreneurs; (b) state institutions, bodies of territorial autonomy and local self-governments; (c) other natural and legal entities and associations (business associations, unions, sports organizations, institutions, co-operative associations, intellectual property holders and other); and (d) public undertakings, entrepreneurs and other undertakings performing activities of public interest, or those that have been given a fiscal monopoly by the state authority in charge, except if the application of the Competition Act would prevent them, either *de iure* or *de facto*, from performing the activities or tasks assigned to them by the public authority in question. The 2005 Competition Act could apply to state institutions, bodies of territorial autonomy and local self-governments only when they were directly or indirectly engaged in the trade of goods or services. There is no reference to direct or indirect participation in the trade of goods or services in the current Act suggesting that the scope of the application of Serbian competition rules has been enlarged.

It is clear from the previously cited provisions of the 2009 Competition Act that there is no *de iure* privileged treatment of undertakings with state-owned capital, even those in which the State holds a majority stake. However, according to publicly available information, the Competition Authority initiated so far only two proceedings against an undertaking with state-owned capital (the *Public Cemeteries of Kragujevac* case and *Telekom Srbija* case), one of which was later terminated. Such disappointing statistics generate doubts as to the privileged treatment of public undertakings in Serbia, given that their activities simply do not seem to raise the interest of the Competition Authority.

In the *Public Cemeteries of Kragujevac* case (see below), the Serbian Competition Authority found that the scrutinized public undertaking abused its dominant position on the market for the administration of cemeteries in the city of Kragujevac by leveraging its market power into a neighbouring market and tying unrelated services¹⁷. The Authority initiated also formal

¹⁷ Competition Authority, decision no. 5/0-03-92/2011-1, available at <http://www.kzk.gov.rs>. The *Public Cemeteries of Kragujevac* is a public undertaking entrusted by the municipal government to provide services of general economic interest – to manage municipal cemeteries. The undertaking decided to mark off certain parcels on the Bozman cemetery and place them under a special regime that provided that all individuals acquiring burial sites within that area had to purchase tombstone designs, construction and erection services exclusively from the *Public Cemeteries of Kragujevac*. The Competition Authority found that the public undertaking leveraged its market power into the connected market of tombstone design, construction, erection, maintenance and related funeral services. It concluded that the undertaking engaged in a competition restricting practice of tying unrelated services, thus abusing its dominance. The company was ordered to modify its standard agreements and subjected to a fine which amounted to 2,3 % of its total annual turnover: RSD 2.682.000,00 (approximately EUR 26.000,00).

proceedings against Telekom Srbija, incumbent electronic communications operator in Serbia, for alleged abuse. It does not seem, however, that a final decision had ultimately been adopted in this case¹⁸. Telekom Srbija, a state-owned company, is the leading fix and mobile telephony operator in the country. It is the owner of Serbia's communications infrastructure and thus the key player on wholesale markets. The proceedings were initiated *ex officio*, following an initiative¹⁹ submitted by Orion Telekom and the Association of Internet Service Providers of Serbia. The investigation focused on two types of behaviour. The Competition Authority examined first whether Telekom Srbija engaged in vertical price squeeze²⁰. The incumbent, a vertically integrated operator, conducted a promotional action in June and July 2011 offering to its potential retail customers Internet access at prices equal to or lower than those charged on the wholesale market. The investigation focused also on accusations of unfair trading practices implemented by Telekom Srbija on the wholesale market for Internet access²¹.

Aside from the fact that the Competition Authority initiates proceedings against state-owned undertakings only in extremely rare cases, it seems also that it pays insufficient attention to some of the sectors that are of special public interest, such as the production and trade of gas or oil, dominated by undertakings with state-owned capital. The impression briefly emerged in 2009 that the Serbian Competition Authority finally decided to investigate some 'politically sensitive' industries. It published in February 2010 the results of a sector inquiry evaluating the competitive conditions in existence on the market for the wholesale and retail distribution of liquefied petroleum gas. The inquiry was initiated by the Ministry of Trade and Services which was concerned that prices of liquefied petroleum gas in Serbia did not follow the fluctuations observed world-wide. This trend could have been caused by the lack of competition on the national market or by price-fixing

¹⁸ Order of the President of the Council of the Competition Authority of 6 October 2011.

¹⁹ Proceedings are initiated *ex officio*, but any legal or natural person may submit an initiative to the Competition Authority. Upon examination of the initiative, the Competition Authority may decide to initiate proceedings.

²⁰ A firm which is vertically integrated and controls essential input to retail services implements a price squeeze if the price demanded on the wholesale level makes it impossible for an equally-efficient retail-stage competitor to operate profitably (or even survive) given the level of retail prices, and if the firm does not charge its own downstream operation the same high price.

²¹ The activities of Telekom Srbija were under the scrutiny of the Bosnian Competition Authority as well. Telekom Srbija Bosnian branch – Telekom Srpske was under investigation for alleged abuse of a dominant position in proceedings initiated by one of its competitors, Crumb Group doo. However, the Bosnian Competition Authority failed to close the proceedings within the prescribed time limits. Competition Council of Bosnia and Herzegovina, case no. 05-26-2-028-78-II/10, 12 October 2011.

arrangements among competitors. Market participants stated during the inquiry that wholesale prices for the distribution of liquefied petroleum gas were established in Serbia taking into account world oil prices as well as the prices charged by competitors. All market participants interviewed by the Competition Authority submitted that they correlate their retail prices with those set by the Oil Industry of Serbia (NIS)²². The Authority concluded that it was not possible to establish that a price-fixing agreement was underway – retail price parallelism was explained by the fact that all competitors used the same reference price (retail prices of NIS). It was thus concluded that establishing a price-fixing agreement on the wholesale distribution market would require constant monitoring of prices and their comparison with the fluctuations of world oil prices, a requirement which could not have been fulfilled during the course of this market inquiry. Consequently, the Authority concluded that it was unable to prohibit the observed practices because they did not represent competition law infringements. Instead, the Competition Authority issued several recommendations²³. It is regrettable that the sector inquiry did not contain any information on the criteria used for non-price competition among retail distributors of liquefied petroleum gas, which induce consumers to choose between competing traders offering the product at the same price. Focusing the inquiry solely on price parallelism omitted other elements influencing the conditions of competition on the relevant market.

In April 2011, the Competition Authority announced that it is conducting a sector inquiry to evaluate the competitive conditions in existence on the markets for the import, processing, wholesale and retail distribution as well as the trade of oil and oil derivatives. The results of this inquiry were eventually published in February 2013, almost two years after its initiation. In a rather descriptive document, the Competition Authority concluded, *inter alia*, that retail prices of oil and oil derivatives were still equable. Further to this, the Authority addressed a recommendation to the Government to formulate additional statistical tools for monitoring the production and trade of oil and oil derivatives, which would allow the Authority to perform a new more detailed analysis in the subsequent 3-years period²⁴.

In the meantime, the Competition Authority issued a public warning to Srbijagas, a public undertaking engaged in the transport, distribution, storage and trade of natural gas. As indicated in a press release published on 8 April

²² A state-owned undertaking, prior to its privatization in 2009.

²³ The Competition Authority recommended NIS to refrain from informing its purchasers about the retail prices applied on its own retail locations. It noted that distribution agreements must not contain direct references to prices practiced by NIS. The Analysis is available at <http://www.kzk.gov.rs>.

²⁴ The Analysis is available at <http://www.kzk.gov.rs>.

2011, the public warning was a reacted to information published by the media which stated that Srbijagas reached an agreement with three potential buyers – Azotara Pancevo (fertilizer company), MSK (methanol and acetic acid complex) and Petrohemija (producer of petrochemicals) – on the sale of approximately 1 billion cubic meters of gas at prices below those used for other buyers. The Competition Authority acted ‘in an attempt to prevent any possible restrictions of competition and negative effects on the market’²⁵. The Authority noted also that if the agreement was to be implemented, it would have to initiate *ex officio* abuse proceedings against Srbijagas.

The fact that the Serbian Competition Authority issued a public warning is interesting for at least two reasons. First, it is not clear what was the legal basis for such action. Broadly interpreted, only Article 21(12) of the 2009 Competition Act could possibly be seen as such because it allows the Authority to perform activities meant to raise public awareness on the importance of competition protection. Second, and more importantly, it does not seem²⁶ that the Authority had ever before issued such warning to a privately-owned company. This creates doubt as to whether the Competition Authority would have reacted in the same ‘lenient’ way to alleged abuse had Srbijagas not have been a public undertaking.

2. Competition advocacy as a substitute for competition law enforcement

It is undisputed that the Competition Authority must do more than simply enforce Serbian competition law. These ‘additional’ activities are often referred to as competition advocacy. The notion of competition advocacy encompasses the Authority’s proactive activities, and especially its role in the formulation of Serbian economic policies which may adversely affect competitive market structures, business conduct and economic performance²⁷. An important focus for competition advocacy is the development of a competition culture. The tools that can be employed in this context include the publication of: decisions issued by the Competition Authority, information booklets for the general public, annual reports and market studies. They also cover regular communication with the media as well as the organization of seminars and conferences etc. Success in building a competition culture has clear benefits for enforcement: companies will be more likely to voluntarily comply with

²⁵ The press release is available at <http://www.kzk.gov.rs>.

²⁶ As already indicated, the Competition Authority does not publish all the acts it adopts on its website, which further complicates the analysis of its activities.

²⁷ OECD Study ‘Competition advocacy: Challenges for developing countries’, 1. The study is available at <http://www.oecd.org>.

competition rules, businesses and the public alike will more willingly cooperate with enforcement actions (e.g. by providing evidence), policy makers will support the mission of a competition body²⁸. Still, competition advocacy should only supplement the core activity of competition law agencies, which is the enforcement of competition rules, and not replace it even in part. It seems, however, that competition advocacy substituted competition enforcement on several occasions in Serbia.

For example, the Competition Authority issued in October 2011 a public warning to banks participating in the Serbian market, reminding them that it is prohibited to enter into gentlemen's agreements or any other forms of anti-competitive behaviour. More precisely, the Competition Authority warned banks not to agree on what interest rates to offer to their clients²⁹. It is regrettable that the Authority chose to act as an 'advisor' to the banks, instead of investigating allegations made public by associations of banking services users that such anti-competitive agreements had already been entered into. This is particularly true since the proceedings before the Serbian Competition Authority are, as a rule, initiated *ex officio*³⁰. Under Article 33 of the 2009 Competition Act, natural and legal persons that submit initiatives for investigating competition law infringements, those providing information and data, experts and organizations whose analyses are used in the proceedings, as well as other state bodies and organizations cooperating with the Competition Authority in the course of its proceedings, are not considered 'parties' to the procedure. Therefore, third parties cannot 'force' the Competition Authority to conduct an investigation of an alleged anti-competitive behaviour. The Competition Authority reacted in a similar, 'advisory' manner in April 2011 to the media coverage of the aforementioned agreement reached between the oil and gas distribution undertaking Srbijagas and three of its buyers.

In contrast to these cases, the Serbian Competition Authority demonstrated in December 2011 that it is in fact capable of combining competition advocacy with competition law enforcement. It found in the aforementioned Public Cemeteries of Kragujevac case, that the public undertaking, which was entrusted by the municipal government with the provision of services of general economic interest, abused its dominant position. Aside from initiating proceedings against this particular undertaking, the Authority organized also a meeting meant to raise awareness of competition law with the representatives of other public undertakings entrusted with the provision of the same public

²⁸ Ibidem, 9.

²⁹ The press release is available at <http://www.kzk.gov.rs>.

³⁰ The only two exceptions to this rule are: (a) notification of concentration; (b) request for an individual exemption from the prohibition of anti-competitive agreements.

service (managing municipal cemeteries)³¹. The Serbian Competition Authority should by all means continue to recourse to competition advocacy but only as a supplementary tool to competition law enforcement.

3. 'Simulation' of state aid control

The Stabilization and Association Agreement requires Serbia to introduce national legislation on state aid control that is in line with EU law standards. The State Aid Act was adopted and entered into force in July 2009 and its application commenced on 1 January 2010. The Act differentiates between three categories of state aid: (a) prohibited state aid; (b) state aid which is compatible with the State Aid Act; and (c) state aid which may be considered to be compatible with that Act. Under its Article 3, any state aid, regardless of the form in which it was granted, that distorts or may distort competition in the relevant market, or which is contrary to ratified international treaties, is prohibited. Under Article 4 of the Act, state aid is compatible if: (a) it has a social character and is granted to individual consumers, provided that it is granted without discrimination relating to the origin of the products concerned; or (b) it is granted to alleviate damage caused by natural disasters or other exceptional occurrences. Under Article 5, state aid may be considered compatible if it is granted: (a) to promote the economic development of areas of the Republic of Serbia where the standard of living is abnormally low or those with serious unemployment; (b) to remedy a serious disturbance in the Serbian economy or to promote the execution of an important project of the Republic of Serbia; (c) to facilitate the development of certain economic activities or of certain economic areas in the Republic of Serbia, where such aid does not adversely affect or threaten to affect competition in the relevant market; (d) to promote the protection and preservation of cultural heritage.

The categories of state aid laid down by Serbian legislation correspond to those laid down by Article 107 TFUE. However, the economic and social contexts in which these rules are applied differs significantly. In the European Union, undertakings benefit, directly or indirectly, from support via the Structural Funds, the Cohesion Fund, instruments related to the Common Agriculture Policy and other numerous EU financial instruments. By contrast, Serbian undertakings can benefit from the Instrument of Pre-Accession (IPA) but only to a certain extent. Therefore, they may generally receive aid only from their own, less generous national authorities, provided such aid is in line with the State Aid Act. Following the entry into force of the Interim

³¹ The press release is available at <http://www.kzk.gov.rs>.

Agreement with the EU, the Serbian market opened to certain categories of goods from the European Union, which exposed local producers to additional EU competition. Coupled with the effects of the ongoing economic crisis, this fact has significantly threatened the functioning of a large number of Serbian undertakings. National authorities found themselves faced with a dilemma: whether to financially support certain undertakings (in principle, state-owned ones), or to properly enforce state aid rules, which would surely result in the closure of a number of local companies and thus increase the unemployment rate³². In an economy where many undertakings depend on some form of state aid, the decision of the public authorities was not surprising. 'Financial injections' from the Government continued mostly to large socialist-type holdings in the electricity and steel production sectors as well as in car manufacturing.

However, the decision to continue granting significant amounts of state aid could not have been realized if Serbia had an independent body charged with the control of state aid. Instead of empowering the existing Competition Authority with the enforcement of the State Aid Act, the Government decided to establish a separate entity for that purpose – the State Aid Commission, under the auspices of the Ministry of Finance. The Commission does not, unfortunately, seem to be sufficiently independent from the executive power to efficiently fulfill its role. Members are appointed by the Government from among those who possess 'expert knowledge in the field of state aid, competition, and/or EU legislation'³³. Experts are chosen according to proposals submitted by the ministries of finance, economy, infrastructure and environmental protection, as well as the Competition Authority. The Commission is chaired by the person appointed according to the proposal of the Ministry of Finance, while the representative of the Competition Authority sits as deputy chairperson. Since the majority of state aid schemes, as well as the majority of individual state aid grants, originate from the Ministry of Finance, it seems highly unlikely that the Commission, led by the representative of that same Ministry, would declare such aid incompatible. In a country with a fragile democracy, it would have been wiser to empower the existing Competition Authority to enforce state aid rules. Unlike the members of the State Aid Commission, members of the Council of the Competition Authority are elected by the National Assembly, on proposal from the Parliamentary Trade Commission, a solution which guaranties at least a certain level of independence from the Government. The case law of the State Aid Commission proves the correctness of this

³² According to the survey conducted in 2012 by the National Statistics Authority of Serbia, the unemployment rate was 25.5%.

³³ Art. 6(4) of Act on Control of State Aid.

suggestion. According to its yearly reports published online, all notified aids have been declared compatible so far³⁴.

However, the Serbian situation does not greatly differ from that of the European Union during the current economic crisis. For example, EU Member States' governments did not show any reluctance when deciding to fund struggling banks. Such aid was approved by the European Commission, almost overnight³⁵. Current economic crisis aside, the impression remains strong that the enforcement of EU-type rules on state aid control in a candidate country should be postponed to the time immediately preceding its accession. Candidate countries should be equipped with more flexible tools, which would allow them to respond to specific problems of their national economies. However, this need is not recognized by the provisions of the Stabilization and Association Agreement signed by the EU with Serbia and other Western Balkan countries. Throughout the region, the same artificial 'performance' is thus being facilitated: a national body in charge of state aid control is indeed established but, in almost all cases, it declares that all aids granted are compatible with the law.

The need to introduce a special regime of state aid control for countries in a transitional period was not generally recognized by the European Union even during the previous phase of the enlargement process. This does not necessarily mean, however, that all state aid provisions of past association agreements were drafted in an identical manner. For instance, the Association (Europe) Agreement signed in 1993 between the European Communities and the Czech Republic provided that, until implementing rules were adopted by the Association Council, state aid control should be exercised by the contracting parties on their respective territories, according to their respective legislations³⁶. By contrast, the Europe Agreement with Poland provided that, until implementing rules were adopted, the provisions of the Agreement on

³⁴ Reports are available on the website of the Serbian Ministry of Finance: <http://www.mfp.gov.rs/pages/issue.php?id=7271>. The dependence of the State Aid Commission from the Ministry of Finance is evident even from the fact that it does not have a separate website, but only a page within the website of the Ministry.

³⁵ For an in-depth analysis see: T. Eger, 'Solidarity and competition in the European Union during the financial and debt crisis' (2011) *Institute of Law and Economics Working Paper Series*, available at <http://www.ssrn.com>. J. M. DeVito, 'The role of competition policy and competition enforcers in the EU response to the financial crisis' (2011) 11-01 *American Antitrust Institute Working Paper*, available at <http://www.antitrustinstitute.org>.

³⁶ Article 64(3) of Europe Agreement between the EC and the Czech Republic: 'The Association Council shall, within three years of the entry into force of this Agreement, adopt the necessary rules for the implementation of paragraphs 1 and 2. Until the implementing rules are adopted, practices incompatible with paragraph 1 shall be dealt with by the Contracting Parties on their respective territories according to their respective legislations'.

interpretation and application of Articles VI, XVI and XXIII GATT were to be used as implementation rules for the provisions of the Europe Agreement regarding state aid control³⁷. Implementing rules were to be adopted by the relevant Association Council within three years of the entry into force of each Europe Agreement. Those that entered the European Union in 2004 argued in their accession negotiations that account should be taken of problems associated with the ‘transition’ period. Poland, for instance, requested a protocol providing that state aid to environmental, regional and restructuring projects would be judged in the light of transition problems. The European Commission prepared even a draft of a special state aid regime for countries in a transitional period, but the draft was later withdrawn³⁸.

There is another particular problem with the *acquis* relevant to the Balkan countries. There has been no coherent application of the principle of subsidiarity in this field. The EU hesitates between considering state aid control as an important tool to prevent Member States from inflicting damage upon each other, and treating it as a kind of medicine that should be taken for the countries’ own good. It is true that while governments sometimes choose to use state aid in a foolish way, this tends to cause little damage outside their own borders. Undoubtedly, this is a matter of concern, but there are national political mechanisms for the expression of such concern³⁹.

III. Conclusive remarks

The current economic crisis, the effects of which are particularly severe in Western Balkan countries, has only emphasized competition law enforcement problems existing throughout the region. In the case of Serbia, these problems include, on the one hand, a rather lenient approach of the Competition Authority towards the activities of state-owned undertakings. So far, the Authority opened only two formal proceedings against public undertakings, one of which was terminated without a decision. Such statistics generate doubts as to the privileged treatment of state-owned undertakings in Serbia, given that their activities simply do not seem to raise the interest of the Competition Authority. Nevertheless, unlike private employers, state-owned undertakings managed to avoid massive job losses during the current crisis which makes them the backbone of the Government’s policy to maintain the unemployment rate under control. A closer inspection by the Competition Authority of the

³⁷ Article 63(3) of Europe Agreement between the EC and Poland.

³⁸ A. Evans, ‘Enlargement and state aid in CEECs’ (2004) 4 *CLASF Working Paper* 14.

³⁹ *Ibidem* 3.

potentially anti-competitive activities of incumbent operators could disturb their current market position, and consequently undermine the Government's policy efforts.

Regardless of ownership, it seems that in certain 'sensitive' situations, the Serbian Competition Authority uses competition advocacy as a substitute for law enforcement. Hopefully, such cases will become less frequent as the guaranties of independence for the Authority's members strengthen. Finally, a 'simulation' of state aid control is being facilitated both in Serbia and in other Western Balkan countries. Following the conclusion of a Stabilization and Association Agreement, a national body in charge of state aid control is indeed established, but it indiscriminately clears all notified state aid cases. Candidate courtiers before EU accession should be equipped with more flexible tools for state aid control, allowing them to take into consideration the specific problems of their own economies. However, this need is not reflected in the provisions of the Stabilization and Association Agreement signed by the European Union with Serbia, nor in the Agreements signed by the EU with other Western Balkan countries. Ignoring the specific needs of countries in the transitory phase creates an artificially positive result in the area of state aid control, which does not benefit either the candidate country or the European Union.

Literature

- Dajkovic I., 'Comments on the new Serbian Competition Law' (2010) 31(2) *European Competition Law Review*.
- DeVito J. M., 'The role of competition policy and competition enforcers in the EU response to the financial crisis' (2011) 11-01 *American Antitrust Institute Working Paper*.
- Evans A., 'Enlargement and state aid in CEECs' (2004) 4 *CLASF Working Paper*.
- Eger T., 'Solidarity and competition in the European Union during the financial and debt crisis' (2011) *Institute of Law and Economics Working Paper Series*.
- Popovic D., 'The upcoming reform of Serbian competition law: A necessary step towards closer approximation with the EU law' (2008) 4 *Concurrences* no. 22067.

A Chicago-School Island in the Ordo-liberal Sea? The Hungarian Competition Office's Relaxed Treatment of Abuse of Dominance Cases

by

Csongor István Nagy*

CONTENTS

- I. Introduction
- II. Predatory pricing
- III. Refusal to deal
- IV. Price squeeze
- V. Evaluation

Abstract

The paper presents and evaluates the impact of the 'more economic' approach of the Hungarian Competition Office's decisional practice as to predatory pricing, margin squeeze and refusal to deal under Hungarian competition law. It compares the Hungarian practice with the more formalistic approach of the CJEU's jurisprudence. The paper evaluates the Hungarian decisional practice in abuse cases and provides a brief assessment on the consequences of applying diverging standards in EU and national abuse of dominance law.

Résumé

Cet article présente et apprécie l'impact de l'approche plus économique («more economic approach») de l'Autorité hongroise de la concurrence en matière de prix d'éviction, compression des marges et refus de vente en droit hongrois. Il compare

* Csongor István Nagy, associate professor and head of the Private International Law Department at the University of Szeged (Hungary); csongor.nagy@gmail.com. The research was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences and the author gratefully acknowledges the support of the Academy.

la pratique hongroise avec l'approche plus formaliste de la jurisprudence de la CJUE. L'article apprécie la pratique hongroise en matière d'abus de position dominante et rend la récapitulation des conséquences de l'application des règles divergentes en droit européen et national en matière d'abus.

Classifications and key words: Article 102 TFEU; dominant position; Hungarian competition law; margin squeeze; predatory pricing; price squeeze; refusal to deal.

I. Introduction

Although the European Commission has endeavoured to infuse the law on the abuse of a dominant position with a 'more economic' approach¹, the CJEU's judicial practice still seems to be dominated by a rather ordoliberal attitude. The enforcement practice of Hungarian competition law clearly differs from this judicial trend. The Hungarian Competition Office (hereafter, HCO) takes a rather relaxed position towards alleged abuse of dominance and has, in fact, imposed no fines between 2007–2010 under Sections 21–22 of the Hungarian Competition Act² (hereafter, HCA), the domestic equivalent of Article 102 TFEU. Combating abuses appears to not have been a priority in Hungarian competition law enforcement. The HCO terminated its proceeding with a commitment order in numerous cases, in other words, the closure occurred in exchange for commitments from the dominant enterprise³.

As a fundamental principle, the HCO has repeatedly stated that although exclusionary practices directly victimise rivals of the dominant undertaking, Hungarian competition law is not meant to shield competitors but to protect competition. This declaration can be found, among other places, in a policy document entitled 'Fundamental principles followed by the HCO concerning the freedom of competition'⁴, which summarizes its enforcement policy. This document clarifies that the purpose of competition law is to protect competition, rather than market operators and competitors, and especially

¹ See e.g. the Guidance on its enforcement priorities in applying Article 102 to abusive exclusionary conduct by dominant undertakings (hereafter, Guidance on Article 102), OJ [2009] C 45.

² Act LVII of 1996 on unfair market practices and restraints of competition.

³ See C.I. Nagy, 'Commitments as surrogates of civil redress in competition law: the Hungarian perspective' (2012) 33(11) *ECLR*.

⁴ A verseny szabadságával kapcsolatos, a GVH által követett alapelvek (2007), available at http://www.gvh.hu/domain2/files/modules/module25/pdf/elemzesek_gvhtanulmanyok_antitrosztpolicy_2007_05.pdf

not specific competitors⁵. It also stresses that exclusionary abuse is not an abuse against actual or potential competitors and direct contracting partners, even if one of them suffers as a result. A given conduct is considered to be abusive from the perspective of final consumers and the general interest criteria⁶.

This paper demonstrates the use by the HCO of a 'more economic' approach in its treatment of predatory pricing, margin squeeze and refusal to deal as well as compares it with the more formalistic approach of the CJEU's jurisprudence. The paper closes with the evaluation of Hungarian decisional practice in abuse cases and a brief assessment on the consequences of applying diverging standards in EU and national abuse of dominance law.

II. Predatory pricing

Predatory pricing has proven one of the most controversial issues in dominant position and monopolisation cases on both sides of the Atlantic⁷. Albeit there are several remarkable divergences between US antitrust and EU competition law, the fact that fundamental differences remain always suggests that the issues at stake are controversial. The treatment of predatory pricing is one of these divergences. Interestingly, Hungarian competition law⁸ is closer to US antitrust in this regard than to the EU legal system. In essence, the prohibition of predatory pricing centres primarily on prices below average variable costs; a legal breach cannot be established if there is no possibility for recoupment. The wording used in the HCO's decisional practice is that no predatory pricing can be established if the market is contestable.

The legal test of predatory pricing centres around five questions⁹:

- relationship between costs and price,
- calculation of costs in case of multi-product firms (how to share the common costs of different products),
- 'recoupment',

⁵ Para. 3.199.

⁶ Para. 3.129.

⁷ For a comparative overview see C.I. Nagy, 'Predatory pricing in Hungary and in Community law' [in:] L. Ficzere, A.E. Kellermann, A. Nikodém (eds), *The perspectives of the legal approximation process in Central and Eastern Europe*, Budapest 2001, p. 147–162.

⁸ On the Hungarian practice on predatory pricing see C.I. Nagy, 'A felfaló ár megítélése a magyar versenyjogban' (2002) 6(3) *Collega*; C.I. Nagy, 'Felfaló árazás Magyarországon és az Európai Unióban' (2000) 10(8) *Versenyfelügyeleti Értesítő* 394.

⁹ On the EU competition law practice on price squeeze see R. Whish, *Competition Law*, Oxford University Press 2009, p. 732–741.

- requirement of anti-competitive foreclosure, and
- objective justification.

A. The relationship between costs and price

Under both EU and Hungarian competition law, two cost concepts have emerged as regards price predation: average total costs (hereafter, ATC) and average variable costs (hereafter, AVC). ATC is the cost element which contains fixed costs (such as: rental fees of premises, management and labour costs, fixed service charges etc.) and variable costs. Average variable costs vary depending on the quantities produced – they are costs incurred by producing one incremental unit (additional costs of raw material, energy etc.).

In the famous *AKZO* judgment¹⁰, the CJEU held that:

‘prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced’¹¹.

The CJEU regarded prices below AVC as automatically predatory, since the undertaking suffers loss with each sale. This approach was later confirmed in *Tetra Pak II*, where the CJEU unequivocally established that:

‘prices below average variable costs must always be considered abusive. In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking’¹².

In *AKZO*, the CJEU also addressed prices between AVC and ATC, holding that

‘prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive, if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them’¹³.

¹⁰ C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359.

¹¹ C-62/86 *AKZO Chemie BV v Commission*, para. 71.

¹² C-333/94 P *Tetra Pak International SA v Commission* [1996] ECR I-5951, para. 41.

¹³ C-62/86 *AKZO Chemie BV v Commission*, para. 72.

Accordingly, prices between AVC and ATC are not automatically predatory and, hence, are not outright prohibited. It is therefore to be proved that a scrutinised pricing policy was part of a plan that was meant to drive competitors out of the market. Prices above ATC are, as a general rule, not abusive. Still, even prices over ATC can be considered to be predatory in exceptional circumstances¹⁴.

The decisional practice of the HCO primarily uses the concept of direct costs; but the aforementioned classification of expenditures (AVC and ATC) also appears in its decisional practice.

In case Vj-168/2004 *Auchan & Tesco*, the authority held that it is the direct costs that are to be taken into consideration in the predatory pricing test. Direct costs cover all expenditures that are directly related to the sale of the product or provision of the service in question. In this sense, it certainly encompasses variable costs and may cover some, but not all, fixed costs.

The HCO held in this case that it is primarily the direct costs that are to be taken into consideration, while indirect costs are normally to be disregarded. Interestingly, once it was established that the prices were higher than the average direct costs, the HCO 'excluded the presumption of predatory pricing without further inquiry'¹⁵.

The HCO translated the above analysis into AVC and ATC terms also. It used, however, a slightly less interventionist approach than EU jurisprudence. It stated that it is 'very probable' that prices under AVC, if applied permanent in a non-transitory manner, are predatory in nature. Such a conclusion was seen as 'certainly excluded' if the prices were to be higher than ATC. For prices in the region between AVC and ATC, 'additional factors are to be taken into account'¹⁶.

B. Cost tests in respect of multi-product firms

The calculation of relevant costs may be uncertain in the case of a multi-product activity (where certain common fixed costs are shared among different products or services). The Commission applies here the long-run average incremental costs test (hereafter, LRAIC).

¹⁴ See joined cases C-395/96 P and C-396/96 P. *Compagnie maritime belge transports SA (C-395/96 P), Compagnie maritime belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v Commission of the European Communities* [2000] ECR I-01365. On selective price-cutting see R. Whish, *Competition Law*, p. 738-741.

¹⁵ Vj-168/2004 *Auchan & Tesco*, para. 21.

¹⁶ Vj-168/2004 *Auchan & Tesco*, para. 9.

In *Deutsche Post AG*¹⁷, the Commission dealt with an undertaking that held a legal monopoly in one of its markets, while facing competition in another. The authority considered that ‘when establishing whether the incremental costs incurred in providing mail-order parcel services [i.e. the competitive services] are covered, the additional costs of producing that service, incurred solely as a result of providing the service, must be distinguished from the common fixed costs, which are not incurred solely as a result of this service’¹⁸. In order to avoid condemnation, *Deutsche Post AG* was ‘required only to cover the costs attributable to the provision of [the competitive service, meaning that] these operations [were] not burdened with the common fixed cost of providing network capacity that [*Deutsche Post AG*] incur[red] as a result of its statutory universal service obligation’¹⁹. Accordingly, the Commission regarded LRAIC as ‘the additional costs incurred in providing [the new service]’ and took the position that a competition law breach occurs if the incremental revenue, normally the price of the new service, does not cover incremental costs.

In *Wanadoo*²⁰, in margin squeeze case, the Commission confirmed the use of the LRAIC method for the calculation of costs²¹ and gave a definition in this regard:

‘The long run incremental cost of an individual product refers to the product-specific costs associated with the total volume of output of the relevant product. It is the difference between the total costs incurred by the firm when producing all products, including the individual product under analysis, and the total costs of the firm when the output of the individual product is set equal to zero, holding the output of all other products fixed. Such costs include not only all volume sensitive and fixed costs directly attributable to the production of the total volume of output of the product in question but also the increase in the common costs that is attributable to this activity.

Since the long run incremental cost of the individual product also includes the increase in the common costs resulting from the provision of the product in question, the mere fact that one cost is common to different operations does not necessarily imply that the long run incremental cost due to the activity in question is zero for any individual product. One must assess whether such common cost would have been incurred, partially or totally, if the company would have decided not to provide the product in question²².

¹⁷ OJ [2001] L 125/27.

¹⁸ *Deutsche Post* decision, para. 7.

¹⁹ *Deutsche Post* decision, para. 10.

²⁰ Commission decision of 4 July 2007 Case Comp/38.784 – *Wanadoo España vs. Telefónica*.

²¹ *Wanadoo* decision, para. 318.

²² *Wanadoo* decision, paras 319–320.

The above approach is summarized in the European Commission Guidance on Article 102 as follows:

‘A multi-product rebate may be anti-competitive on the tied or the tying market if it is so large that equally efficient competitors offering only some of the components cannot compete against the discounted bundle.

In theory, it would be ideal if the effect of the rebate could be assessed by examining whether the incremental revenue covers the incremental costs for each product in the dominant undertaking’s bundle. (...) [I]n its enforcement practice the Commission will in most situations use the incremental price as a good proxy. If the incremental price that customers pay for each of the dominant undertaking’s products in the bundle remains above the LRAIC of the dominant undertaking from including that product in the bundle, the Commission will normally not intervene since an equally efficient competitor with only one product should in principle be able to compete profitably against the bundle. Enforcement action may, however, be warranted if the incremental price is below the LRAIC²³.

In Hungarian competition law, the HCO seems give more leeway to dominant enterprises by giving them more freedom as to dividing common costs between the various products they associated with. In case Vj-168/2004 *Auchan & Tesco*, the HCO explained that if an undertaking is engaged in different operations, indirect costs cannot be partitioned between these different operations and ‘the undertaking in question can define the principle of division freely’²⁴. In case of multi-product undertakings, prices lower than total costs, provided they are higher than average direct costs, do not amount to predatory pricing²⁵.

C. The requirement of recoupment

There is a remarkable difference between EU and Hungarian competition law as to the requirement of recoupment. While recoupment clearly seems not to be a pre-condition under Art. 102 TFEU, predatory pricing can be established under the HCA only if the possibility of recoupment is proved. The HCO has stated in a number of its decisions that predatory pricing cannot be established if the market is contestable²⁶.

²³ *Wanadoo* decision paras 59–60. See Guidance on Article 102, para. 26. The Guidance on Article 102 also gives an explanation on the concept of LRAIC in para. 26. fn 2.

²⁴ Vj-168/2004 *Auchan & Tesco*, para. 15.

²⁵ Vj-168/2004 *Auchan & Tesco*, para. 18.

²⁶ The issue of recoupment has been fiercely debated in EU competition law. See C. Ritter, ‘Does the Law of Predatory Pricing and Cross-subsidisation Need a Radical Rethink?’ (2004) 27(4) *World Competition* 613; M. S. Gal, ‘Below-Cost Price Alignment: Meeting or Beating Competition? The France Télécom Case’ (2007) 28(6) *ECLR* 382, 383; M. Moura e Silva,

In *Tetra Pak II*²⁷, the CJEU held that in order to establish predatory pricing it is not necessary to prove that the dominant undertaking has a real possibility to offset its losses²⁸. Accordingly, recoupment is not a necessary pre-requisite of predatory pricing in EU competition law.

In *Wanadoo*²⁹, the CJEU stressed (while endorsing the *Tetra Pak II* ruling) that the reason behind this approach is that prices below AVC prove predatory intent in themselves. It is thus unnecessary to also prove the possibility of recoupment³⁰. As a result, for prices between AVC and ATC, the issue of recoupment might be a factor in the analysis whether the contested prices are used in the framework of a general strategy to eliminate rivals. This is, however, not yet decided

Contrary to the aforementioned EU jurisprudence and in line with US antitrust law³¹, the requirement of recoupment is part of the Hungarian test on predatory pricing. The HCO repeatedly held that predatory pricing can be established here only if there is a reasonable chance to recoup losses.

In case Vj-159/2003 *MOL and others*, the authority stated that the establishment of predatory pricing presupposes a non-contestable market. If the market is contestable, predatory pricing is excluded by definition.

In cases Vj-94/2000 *Greiner* and Vj-76/1999 *Microsoft Magyarország*, the HCO referred to entry barriers and the perspective of recoupment which were treated as necessary elements of the assessment.

Finally in case Vj-138/2003 *ISOPLUS*, the HCO expressly pointed out that predatory pricing can be established only if there are high entry barriers that thwart re-entry and, thus, recoupment is possible.

'Predatory Pricing Under Article 82 and the Recoupment Test: do not go Gentle into that Good Night' (2009) 30(2) *ECLR* 61; J. Glöckner, Lisa V. Bruttel, 'Predatory Pricing and Recoupment Under EU Competition Law: Per Se Rules, Underlying Assumptions and the Reality: Results of an Experimental Study' (2010) 31(11) *ECLR* 423.

²⁷ C-333/94 P *Tetra Pak International SA v Commission* [1996] ECR I-05951.

²⁸ C-333/94 P *Tetra Pak II*, para. 44.

²⁹ C-202/07 P *France Télécom SA v Commission* [2009] ECR I-2369, paras 29-38.

³⁰ C-202/07 P *Wanadoo*, para. 110.

³¹ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) ('The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices. (...) Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers').

D. Anti-competitive foreclosure

The decisional practice of the HCO suggests that allegedly abusive conduct, including predatory pricing, is not subject to an automatic condemnation but the authority intervenes only if that conduct produces negative effects for market competition.

This standpoint is in line with views of the European Commission expressed in Guidance on Article 102 which provides that ‘the Commission will normally intervene under Article 102 where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure’³². The Guidance enumerates several factors that are to be taken into account when analysing the existence or non-existence of anti-competitive foreclosure. It refers, among others things, to the position of the dominant undertaking, entry and expansion conditions on the market, the position of the dominant undertaking’s competitors and the extent of the allegedly abusive conduct.

The Guidance seems to make it clear, in the context of predatory pricing, that the analysis of the cost-price relationship is insufficient, in itself, for establishing an abuse, anti-competitive foreclosure has to be investigated also³³. It mentions also, among others, that although recoupment is not a pre-requisite of predatory pricing, it is to be examined with respect as to anti-competitive foreclosure ‘if the undertaking is likely to be in a position to benefit from the sacrifice’ (i.e. losses suffered from the low prices) and ‘can reasonably expect its market power after the predatory conduct comes to an end to be greater than it would have been had the undertaking not engaged in that conduct in the first place’³⁴.

In line with the above, the HCO held in numerous decisions that predatory pricing can be established only if the low-price strategy is applied for a sufficiently long period of time³⁵. It held in case Vj-76/1999 *Microsoft Magyarország* that predatory pricing can be established only if there is a real chance of eliminating one or more competitors. The use of low prices restricted cannot be regarded as predatory if it is limited in terms of time or quantity. All these statements suggest that under Hungarian competition law a conduct, even if involving below-cost sales, can be condemned only if it is capable of eliminating competitors.

³² Guidance on Article 102, para. 20.

³³ Guidance on Article 102, paras 67–68.

³⁴ Guidance on Article 102, paras 70–71.

³⁵ See cases: Vj-168/2004 *Auchan & Tesco*; Vj-159/2003 *MOL and others*; Vj-76/1999 *Microsoft Magyarország*.

E. Objective justification

There is no specific Hungarian decisional practice on objective justification as to predatory pricing. However, it is probable that the HCO would follow the very restrictive approach of the Commission Guidance on Article 102 which provides that ‘in general it is considered unlikely that predatory conduct will create efficiencies. However, (...) the Commission will consider claims by a dominant undertaking that the low pricing enables it to achieve economies of scale or efficiencies related to expanding the market’³⁶.

III. Refusal to deal

According to Section 21(c) HCA, a situation where an abuse if a dominant enterprise refuses, without objective justification, to establish or maintain a business relationship conformable with the transaction’s characteristics amounts to abuse³⁷. This provision has been applied by the HCO in a number of cases³⁸. According to its decisional practice, the mere fact of a refusal is not sufficient in itself to establish abuse – the refusal must also have a negative impact on competition. In other words, no entity has a normative right to contract or to maintain contractual relations with a dominant undertaking. In other words: noone has a normative right to contract or to maintain contractual relations with a dominant undertaking.

Notwithstanding the ‘more economic’ approach advocated by the Commission in the Guidance on Article 102³⁹, the CJEU’s judicial practice has been rather *ordo-liberal* in refusal to deal and essential facility judgments. The jurisprudence of the CJEU as to refusal to deal will be analysed here in

³⁶ Guidance on Article 102, para. 74.

³⁷ On refusal to deal and essential facilities see C.I. Nagy, ‘Nélkülözhetetlen eszközök koncepciója az amerikai, a közösségi és a magyar versenyjogban’ [in:] M. Király (ed.), *Európai Jogi Tanulmányok*, Budapest 2006, p. 125-156; C.I. Nagy, ‘Refusal to deal and the doctrine of essential facilities in US and EC competitionlaw. A comparative perspective and a proposal for an analytical framework’ (2007) 32(5) *European Law Review* 664.

³⁸ See e.g. cases: VJ-61/1994 *Burial Services*; VJ-39/2002 *UPC Hungary*.

³⁹ Guidance on Article 102, para. 81 (‘The Commission will consider these practices as an enforcement priority if all the following circumstances are present:

- the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market,
- the refusal is likely to lead to the elimination of effective competition on the downstream market, and
- the refusal is likely to lead to consumer harm’).

general, with the exclusion of issues which are specific to access to intellectual property rights⁴⁰.

In *Commercial Solvents*, the dominant enterprise (Commercial Solvents Corporation; hereafter, CSC) was the single producer of certain primary commodities indispensable for the production of ethambutol, an anti-tuberculosis drug. Until 1970, CSC distributed these materials through its Italian company. The CSC group changed its business policy in 1970 and started producing ethambutol by itself. From then on, it refused to supply the producer of ethambutol in Italy (Zoja). The CJEU held that:

‘an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position’⁴¹.

The same leveraging logic was used in *Télémarketing* where the CJEU interpreted EU abuse provisions in the framework of a preliminary ruling. In 1984, the company running Luxembourgian television refused to transmit advertisements which did not display its agent’s telephone number, thus excluding from the market Centre Belge, who was engaged in the telemarketing business. The CJEU held that:

‘an abuse within the meaning of Article 86 [now 82] is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking’⁴².

In *United Brands*, the defendant (United Brands Corporation; hereafter, UBC) had a dominant position in the market of banana production. United Brands stopped supplying a Danish distributor who started favouring the commodities of one of the UBC’s competitors and participated to a lesser

⁴⁰ See e.g. Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR I-5039; Commission Decision 2007/53/EC *Microsoft*, OJ [2007] L 32/23; case T-201/04, *Microsoft v Commission* [2007] ECR II-3601.

⁴¹ Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* [1974] ECR 223, paras 24–25.

⁴² Case C-311/84, *Centre belge d’études de marché – Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* [1985] ECR 3261. Answer to the second question and para. 27. The same leveraging logic was used in Commission Decisions: 88/518/EEC *Napier Brown/British Sugar*, OJ [1988] L 284/41, para 64; 88/589/EEC *London European-Sabena*, OJ [1988] L 317/47, para. 34 and in case C-18/88 *Régie des télégraphes et des téléphones v GB-Inno-BM SA* [1991] ECR I-5941. paras 18–19.

extent in the ripening and distribution of UBC's bananas. The CJEU ruled that:

'an undertaking in a dominant position for the purpose of marketing a product – which cashes in on the reputation of a brand name known to and valued by customers – cannot stop supplying a long standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary'⁴³.

The evaluation of this ruling is debated. Some scholars argue that the Court established here that a dominant undertaking is encumbered with a positive duty to supply, save the refusal is reasonably justifiable⁴⁴. Others argue that the judgment suggests that although a dominant undertaking may have a duty to deal in some cases, there is, however, no general duty to supply. Moreover, it can be read between the lines that supplying a customer or a distributor is a less strict obligation than supplying a competitor⁴⁵. The reason behind this principle is that: refusal to deal with a customer (who is not a competitor) restricts competition and is, thus, abusive only if it results, directly or indirectly, in a situation where the customer is able to purchase only from the dominant undertaking⁴⁶. Without restrictive effects on competition, refusal to deal is not to be regarded as illegal.

However, the CJEU's construction of the case was as follows: first, it established that a dominant undertaking cannot stop supplying a long standing customer; thereafter, it posed the question whether the discontinuation of supplies was justified⁴⁷.

Although the Commission used the term 'essential facilities' for the first time in the two cases concerning the Holyhead harbour⁴⁸, perhaps, the first essential facility case faced by the CJEU was in fact *Magill*. Even though the case concerned intellectual property rights, it also contains rulings of a general nature.

Three Irish broadcasters published their schedules weekly, providing detailed information about their own radio and television programs for the

⁴³ Case 27/76 *United Brands Company and United Brands Continental BV v Commission (Chiquita Bananas)* [1978] ECR 207, paras 182 & 184.

⁴⁴ See e.g. I. Van Bael, J. F. Bellis, *Competition Law of EEC* (2nd ed.), Chicago 1990, p. 410.

⁴⁵ J.T. Lang, 'Defining legitimate competition: companies' duties to supply competitors and access to essential facilities' (1994) 18 *Fordham International Law Journal* 437, 447. See R. Subiotto, R. O'Donoghue, 'Defining the Scope of the Duty of Dominant Firms to Deal with Existing Customers under Article 82 EC' (2003) 24(12) *ECLR* 683, 685–686.

⁴⁶ J.T. Lang, 'Defining legitimate competition...', p. 437, 476.

⁴⁷ Case 27/76 *United Brands*, paras 182. & 184.

⁴⁸ Case IV/34.174 *B&I plc/Sealink Harbours* [1992] 29 CMLR 255; Commission Decision 94/19/EC *Sea Containers/Sealink*, OJ [1994] L 15/8, para. 66.

forthcoming week. These publications were the only sources of information containing scheduling data covering more than a few days in advance. Other publishers, such as daily newspapers, were granted free access to their scheduling information but only on a daily basis (one or two days in advance). An independent publisher planned to offer a comprehensive weekly television guide but the three broadcasters refused to disclose the necessary data, arguing that it was protected by Irish intellectual property law.

The Commission considered this conduct to be abusive. The decision was upheld by the CJEU, which based its decision on the following grounds. First, the three broadcasters were ‘the only sources of the basic information on program scheduling which is the indispensable raw material for compiling a weekly television guide’⁴⁹. Second, they refused to provide access to that information. Third, there was no justification for the refusal. Fourth, the companies ‘reserved to themselves the secondary market of weekly television guides by excluding all competition on that market (...) since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide’⁵⁰.

In *Bronner*, the CJEU re-interpreted *Magill* in a non-IP context. Mediaprint had a dominant position in the market for daily newspapers in Austria operating also a nationwide newspaper home-delivery scheme. No other such scheme existed. Mediaprint refused to grant access to that scheme to a competing current daily newspaper publisher, Oscar Bronner. The latter claimed that it could not create a competing home-delivery system, or find an alternative distribution method, because of the low number of its subscribers. According to the definition delivered by the CJEU in *Bronner*, abuse can be established in a refusal to deal case if three conditions are met: (1) the refusal is likely to exclude all competition in the relevant market, (2) access is essential and indispensable in order to continue the business activity in question, (3) access is refused without any reasonable justification and, thus, it can be designated as arbitrary, discriminative or predatory⁵¹.

There is a tendency in the EU jurisprudence to apply a general refusal to deal test to two-market cases while reserving the essential facility doctrine to one-market situations, albeit this differentiation is far from well-settled⁵². The

⁴⁹ Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* [1995] ECR I-743, paras 53–56.

⁵⁰ C-241/91 P and C-242/91 P, *Radio Telefis Eireann*, para. 56.

⁵¹ L. Ritter, W. David Braun, *European Competition Law. A practitioner's guide* (3rd ed.), the Hague 2005, p. 381.

⁵² C.I. Nagy, ‘Refusal to deal and the doctrine of essential facilities in US and EC competition law. A comparative perspective and a proposal for an analytical framework’ (2007) 32(5) *European Law Review* 664, 680–681.

gist of the refusal to deal concept is that a dominant undertaking is obliged to supply its customers unless there is an objective justification not to do so. Arguably, as a matter of practice, there appears to be a general duty to supply in two-market situations. Despite the CJEU's position that a refusal to supply is not abusive in itself but only if accompanied by additional, aggravating and coexisting circumstances⁵³, these additional elements are in fact usually established.

The legal test formulated by the HCO for refusal to deal cases can be boiled down to four conjunctive conditions. The authority held in Case Vj-10/2002/16 that refusal to deal infringes HCA if

- the undertaking has a dominant position in the relevant market,
- refuses or ceases to do business or binds it to abnormal conditions,
- the conduct has an appreciably negative impact on market competition and its efficiency, beyond breaching the interests of the undertakings concerned,
- the dominant undertaking cannot prove that the conduct has objective and economically reasonable justifications⁵⁴.

Due to the principle that competition law protects competition rather than competitors, refusal to deal is not considered to be abusive if it has no palpable repercussions on consumers. Accordingly, a dominant undertaking does not infringe Hungarian law if it refuses to enter or maintain a contract if such behaviour does not entail a considerable restriction of competition.

In Case Vj-186/2007 *Magyar Posta*, the HCO closed the procedure against the Hungarian Post (*Magyar Posta*), which was accused of preventing a competitor from entering the market. The HCO stated that the investigated entity held a dominant position and refused to deal with a potential new entrant, which was the pre-condition of entering the market of cash-transfer services. If successful in entering the market, the new entrant would have become an actual competitor of the Post. Nevertheless, several enterprises were already present in this market segment and thus the refusal did not restrict competition and, as a consequence, did not infringe the HCA.

The Hungarian Post had a legal monopoly in certain services as well as provided cash-transfer services (delivering cash to addressees named by the client). For initiating such a cash-transfer, a special blank (cash-transfer blank) was needed, the technical details of which were determined by the Post. The production of blanks was liberalized but producers had to obtain a licence from the Post. The corresponding regulation specified that the Post issued the licence once certain technical requirements were met. Licences could relate to two different activities: production of blanks or their personalization (printing

⁵³ P. Treacy, 'Essential facilities – Is the tide turning?' (1998) 19(8) *ECLR* 501, 502.

⁵⁴ Vj-10/2002/16, para. 36; this principle was endorsed in case Vj-98/2003/26, para. 20.

the name and identification of a particular person or undertaking on blanks so they would not have to be filled-out manually).

Between 2004 and 2007, the Post refused to issue a licence for the production of blanks to four undertakings (mainly because of its own business interests) despite the fact that they met the technical requirements. At the same time, the Post issued licences to a number of other undertakings. Several dozens of undertakings were issued personalization licences; some received licences to produce and distribute blanks. However, the Post's business code provided that it would issue production licences only if it did not have sufficient capacity to satisfy demand by itself. Before issuing a production licence, the Post examined therefore the utilization rate of its own production capacity.

The HCO found that although the Post, for business rather than technical reasons, failed to grant a licence in four cases, several enterprises were present in the market already generating intense competition for the Post⁵⁵. According to the HCO, the conduct at stake was not general and did not restrict competition in the market for the production of blanks or any of its other segments. The Post was not the largest operator in the market for personalized blanks.

The authority emphasized that although the behaviour of the incumbent might have impeded market entry of certain operators, it was not systematic and had no restrictive effects on competition and consumers⁵⁶. Those already present in the market had sufficient free capacity. The authority stressed that the HCA does not protect the existence or contracting possibilities of market operators but that of market competition⁵⁷. Since it was not proven that the conduct of the Post endangered competition in the market for the production of blanks or in any other market, it could not be assumed that consumers were harmed. The HCO thus concluded that the procedure was not justified by public interest. Nevertheless, it also stressed that if negative market effects were to be demonstrated, the conduct of the Post would have amounted to a competition law violation.

It is to be noted as a criticism of the *Magyar Posta* decision that while the HCO has based its argumentation on the principle that competition law protects competition rather than competitors, its reluctance to assist the latter seemed to disregard the interests of the former.

First, the decision sends a message that a dominant undertaking's non-strategic (non- arbitrary) raids on rivals and new entrants are automatically pardoned. There is no clear line between anti-competitive conduct with negligible effects and anti-competitive conduct with real market consequences.

⁵⁵ Vj-186/2007 *Magyar Posta*, paras 33–35.

⁵⁶ Vj-186/2007 *Magyar Posta*, para. 33.

⁵⁷ Vj-186/2007 *Magyar Posta*, para. 34.

Dominant undertakings may thus retain some leeway here and build up a reputation of complicating the life of, or even suppressing new entrants. Such behaviour may deter market entry. Second, the decision focused on the market for the personalization of blanks. It is true that the Post had major competitors in the production market, though not as many as in the personalization market. The argument does not seem convincing, however, that a restriction of output (impeding new entrants) makes no difference here because there is already sufficient competition in the production market. New entrants always have the potential of contributing to the intensity of market competition, even if only slightly.

Third, the decision seems to suggest that conduct that might have negative effects on competition, can nevertheless escape antitrust condemnation if such effects do not materialise, even if it has simply no way of producing pro-competitive results. According to the HCO's decisional practice, the requirements against refusal to deal by dominant undertakings are more relaxed if it is one of the distributors that is targeted⁵⁸.

The authority held in Case Vj-6/2005, that a producer has a wide discretion as to how it organizes its distribution system. For consumers, the relevant field of rivalry is inter-producer competition; whether the producer excludes a reseller from the distribution system is of minor importance. The question is whether the exclusion of a trader impairs inter-brand competition. If this is not the case, the restriction or lack of intra-brand competition is not a problem⁵⁹.

Accordingly, no distributor has a normative right to be on the market. The key question in the context of refusal to deal is whether it is detrimental to consumers. Hence, it is not the task of competition law to ensure that a particular distributor can enter or remain on the market, unless it is shown that this would entail benefits to consumers⁶⁰.

A dominant undertaking can prove that its refusal to deal is based on an objective justification. This requirement is met if the refusal is based on objective, economically reasonable grounds. No enterprise can be compelled to act to the prejudice of its own legal interests or to suffer extra-costs⁶¹.

In Case Vj-89/1998/17, a cable television company disconnected some of its customers. Among other things, the HCO examined the operator's motives and assumed that the switch-off had reasonable grounds seeing as a service provider is not interested in excluding customers as this would reduce its

⁵⁸ Vj-105/2001, para. 32; Vj-6/2005, para. 73; Vj7/2005, para. 68.

⁵⁹ Vj-6/2005, paras 71 & 74.

⁶⁰ Vj-105/2001, para. 32; Vj-7/2005, para. 68; Vj-6/2005, para. 73.

⁶¹ Vj-105/2001, para. 32; Vj-98/2003/26, para. 21; Vj-6/2005, para. 73; Vj-7/2005, para. 68; Vj-117/2005, para. 38. This approach was endorsed also in the judicial practice, see: Case FB. 2.K.32366/1993, Case FB. 2.K. 32527/1992.

subscription clientele. It is unlikely that it would exclude consumers that had no arrears. However, the HCO also noted that if this practice was widespread, it might qualify as an abuse..

Overall decisional practice of the HCO appears to give more leeway to dominant enterprises than the legal test applied by the CJEU in cases such as *Commercial Solvents* and *United Brands*.

IV. Price squeeze

There have been only a few price squeeze cases in Hungary so far – the test applied is similar to the approach of EU competition law⁶². Still price squeeze can be established under Hungarian competition law only if considerable entry barriers exist, that is, if the market is not contestable. This element parallels the requirement of recoupment in predatory pricing cases.

The Commission dealt with margin squeeze on a few occasions⁶³.

In *Napier Brown – British Sugar*⁶⁴, the latter had a dominant position in the wholesale market of sugar and was competing with the former in downstream retail. British Sugar (hereafter, BS) was condemned for increasing its wholesale prices and decreasing its retail prices in a way that forced Napier Brown (hereafter, NB) to operate at a loss. The legal test applied by the Commission was the following: assuming that NB matched BS's efficiency, the Commission examined the margin left to NB, or any other retail competitor using industrial sugar purchased from BS. The Commission found that low retail prices made it impossible for competing re-packagers, as efficient as BS, to earn a sufficient margin 'even without trying to make a profit'⁶⁵.

The Commission established that where an undertaking is dominant in the markets for both, the raw material and the derived products, an abuse occurs if the difference between the dominant enterprise's raw material prices and derived product prices is 'insufficient to reflect that dominant company's own costs of transformation'. The gap between the dominant enterprise's wholesale and retail prices has to be compared to its own repackaging costs. Accordingly,

⁶² See: G. Faella, R. Pardolesi, 'Squeezing Price Squeeze Under EC Antitrust Law' (2010) 6(1) *European Competition Journal* 255; L.Y. Hou, 'Some Aspects of Prize Squeeze Within the European Union: a Case Law Analysis' (2011) 32(5) *ECLR* 250; N. Dunne, 'Margin Squeeze: Theory, Practice, Policy-Part II' (2012) 33(2) *ECLR* 61; N. Dunne, 'Margin Squeeze: Theory, Practice, Policy: Part I' (2012) 33(1) *ECLR* 29.

⁶³ For an overview of the EU competition law practice on price squeeze see R. Whish, *Competition Law*, p.745–746.

⁶⁴ Commission Decision 88/518/EEC *Napier Brown – British Sugar*, OJ [1988] L 284/41.

⁶⁵ Commission Decision 88/518/EEC *Napier Brown – British Sugar*, para. 30.

retail costs to be taken into account are those of the dominant undertaking. This is meant to ensure that only those competitors are afforded protection that are at least as efficient as the dominant undertaking. The Commission noted that the above pricing policy, if maintained for a long period of time, was likely to drive competitors out of the retail market⁶⁶.

Nevertheless, entry barriers and the perspective of re-entry were not an issue here. It is to be noted that in this case the profit, calculated on the basis of the above formula, was negative.

In *Deutsche Telekom*⁶⁷, the Commission investigated once again a case where the dominant undertaking left a negative profit to its retail distributor. The Commission placed emphasis on the fact that Deutsche Telekom's (hereafter, DT) retail competitors 'even if they are at least as efficient as DT, can never make a profit, because on top of the wholesale charges they pay to DT they also have other costs such as marketing, billing, debt collection, etc.'⁶⁸. The Commission rephrased therefore the legal test established in *Napier Brown – British Sugar*⁶⁹.

In *Wanadoo España v Telefónica*⁷⁰, the Commission condemned again a price squeeze where the profit left to retail competitors was negative. The margin between wholesale and retail prices was insufficient to cover costs that an operator, at least as efficient as Telefónica would have to incur to provide retail broadband access. The Commission summarized the legal test of price squeeze as follows:

'In accordance with established case law the methodology applied for establishing the existence of a margin squeeze consists in assessing whether Telefónica's downstream arm would operate profitably on the basis of the upstream charges levied by Telefónica's upstream arm'⁷¹.

The HCO's decisional practice largely parallels the aforementioned EU examples.

In Case Vj-100/2002 *Magyar Távközlési Rt.*, prices of telecoms access and those for retail telecoms services set by the incumbent Hungarian telecoms operator (MATÁV, now Magyar Telekom) triggered a 'negative margin'. The HCO stressed that an abuse may be established even if the margin is 'positive', but overly small. It held also that it is to be analysed whether the dominant undertaking's prices on the downstream market cover both its wholesale prices and retail costs. It was emphasised that the dominant undertakings wholesale

⁶⁶ Commission Decision 88/518/EEC *Napier Brown – British Sugar*, para 66.

⁶⁷ Commission Decision 2003/707/EC *Deutsche Telekom AG*, OJ [2003] L 263/9.

⁶⁸ *Deutsche Telekom AG*, para. 102.

⁶⁹ *Deutsche Telekom AG*, paras 106–108.

⁷⁰ Commission Decision in Case COMP/38.784 *WanadooEspaña v Telefónica*.

⁷¹ Summary of Commission Decision in Case COMP/38.784 *WanadooEspaña v Telefónica*.

costs are expected to be equal to those of its competitors. Otherwise, it would be condemned for discrimination. A negative margin implies that competition law is violated. If the margin is positive but relatively small, a detailed cost analysis must be performed. Nevertheless, the HCO added that the above is but one of the prerequisites of price-squeeze – an infringement of the HCA can be established only if the practice lasts for a long period of time and there are considerable entry barriers.

In case Vj-101/2002 *Vivendi Telecom Hungary*, the defendant charged a high price in its (wholesale) ADSL contracts, while pushing down the prices in the retail market for access to ADSL-based Internet. The HCO considered that the retail margin created by this pricing policy was rather small and objectionable. However, it established also that the market was contestable. Partly due to competitive pressure from cable broadband Internet, the defendant could thus not have increased its prices without attracting new entrants⁷².

Essentially the same issues emerged in another telecoms case, Vj-73/2003 *Magyar Távközlési Rt.* The HCO stressed here that the dominant enterprise can include in the final price cost-savings that it managed to achieve through efficiency. The alleged 2002 price squeeze was the result of price regulation which covered both wholesale and retail prices. The margin left to the retail segment in 2003 was considered to be reasonable. Accordingly, no abuse was established.

To sum up, in accordance with EU competition law, the HCO's decisional practice suggests that price squeeze can be established even if the competitor is left with a small margin, provided that margin is not unreasonably low. A practice can be condemned only if it lasts for a long period of time and is capable of driving competitors out of the market. Even in this case (similarly to predatory pricing) competition's potential to self-help has to be taken into account: price squeeze can be established only if considerable entry barriers exist (if the market is not contestable).

V. Evaluation

The adoption of the “more economic” approach is obviously a matter of degree. The HCO appears to follow a rather categorical version of this credo. Notwithstanding its apparent merits (such as reducing false positives), exiling

⁷² The HCO conceptualized the applicable test as follows: whether P is equal or higher than $A + C$, where P is the retail price charged by the dominant undertaking, A is the wholesale input price of the commodity and C is the retail costs (the cost of converting the input into the final product).

all “legalistic” analysis from the law on the abuse of dominance in exchange for a case-by-case economic analysis raises a number of concerns.

First, while it is tempting to condemn only acts that actually have a negative impact on competition, such rather lenient treatment of abuse cases may encourage ‘hit and run’ tactics. Commitments are widely accepted in the HCO’s decisional practice. Putting an end to the contested practice, accompanied by a remedy, is sometimes the reason to close proceedings. Unfortunately, this may reduce the deterrent effect of competition fines in this area⁷³.

Second, using the ‘more economic’ approach reduces predictability and certainty in abuse cases. Competition matters usually involve complex economic issues, the examination of which normally cannot be saved. While an economic analysis is not expected to produce predictable results, legal compliance and legal enforcement do need judicable rules and standards that provide guidance to legal counsels. This was clearly one of the reasons behind introducing automatic condemnation in the field of restrictive agreements (*per se* illegality in US antitrust and agreements anti-competitive by object in EU competition law). In the field of dominant position abuse, it is quite difficult to identify practices that are always, or almost always, anti-competitive without having any redeeming virtues. Still, some clarity could be introduced without increasing the risk of false positive. For instance, in Case Vj-186/2007 *Magyar Posta*, the HCO found that the exclusion of some downstream competitors had no appreciable negative impact on competition because the retail market was competitive. Even accepting that this was factually true, the message here is that dominant undertakings can sometimes exclude downstream operators even without an objective justification. It is to be noted that even if a downstream competitor cannot notably contribute to the intensity of competition in the market, it would certainly not reduce it.

Although competition law has been traditionally resistant to clear-cut rules, its core values and principles do merit such treatment. The principle that competition law should protect competition and not competitors is not being questioned. However, it is submitted here that it is only one of the functions of a competition law investigation (though certainly the most important one) to resolve the case at hand. Its second function is to provide future guidance to the market.

Third, the use of the ‘more economic’ approach, if applied excessively, may distort a competition authority’s enforcement policy. Since an economic analysis is rather expensive, the authority will investigate fewer cases, and focus its resources on ‘cheaper’ matters. This can dilute the rigor of competition law enforcement in the field of dominant position abuse.

⁷³ This was one of the reasons why the Hungarian court quashed the HCO’ commitment order in case Vj-22/2008 *OTP*. See C.I. Nagy, ‘Commitments as Surrogates...’, p. 531, 534–535.

Finally, there is an intrinsic dilemma involved in the application of diverging standards in EU and national competition law.

On the one hand, the national legislator and the domestic competition authority have their own sovereign competences to adopt whatever competition policy they favour. In some areas, departure from EU practice is also justified by clear economic arguments. For instance, one of the core principles of EU competition law is the “single market imperative” (market integration), which results in the prohibition of practices that would be otherwise permitted. The single market imperative has, however, no value domestically. The most remarkable example for the operation of this principle is the treatment of territorial exclusivity in EU competition law. From a competition law point of view, there seems to be no point in following this strict approach in domestic matters.

On the other hand, diverging standards increase costs: the costs of legal analysis, the costs of competition law enforcement and decision-drafting. Moreover, due to the uncertainty as to whether a practice affects trade between EU member State or not, diverging standards may also have spill-over effects. In case of local matters (matters that have a local ‘centre’), it is often extremely difficult to give a clear answer to the question whether the contested conduct affects EU trade. While there are several truly local matters, and some that are sure to have a more *de minimis* impact on inter-state trade, the grey zone between these two categories is extremely large. This is mainly due to the principle that a practice may affect trade between EU member States even without a cross-border element⁷⁴, due to its indirect repercussions and spill-over effects. In this grey zone, the most prudent thing to do for a legal counsel is to test the conduct under both regimes and to try to comply with the more rigorous one, taking into account that both might ultimately be applicable.

Regulation 1/2003 addresses this issue providing that if a practice is not prohibited by EU abuse rules, but is condemned under more stringent national provisions, the latter prevail⁷⁵. However, this rule does not work in reverse: more lenient national rules are ‘absorbed’ in the application of EU law on dominant position abuse. Where a national legal system has a more lenient policy towards abuse, there is a risk, therefore, that huge companies will face stricter EU rules, even in the absence of a cross-border element, than companies that are truly local and thus bound by more relaxed national legislation.

⁷⁴ See Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ [2004] C 101/81. paras 77 & 93–99.

⁷⁵ Article 3(2).

Literature

- Dunne N., 'Margin Squeeze: Theory, Practice, Policy: Part I' (2012) 33(1) *ECLR*.
- Dunne N., 'Margin Squeeze: Theory, Practice, Policy-Part II' (2012) 33(2) *ECLR*.
- Faella G., Pardolesi R., 'Squeezing Price Squeeze Under EC Antitrust Law' (2010) 6(1) *European Competition Journal*.
- Gal M.S., 'Below-Cost Price Alignment: Meeting or Beating Competition? The France Télécom Case' (2007) 28(6) *ECLR*.
- Glöckner J., Bruttel L. V., 'Predatory Pricing and Recoupment Under EU Competition Law: Per Se Rules, Underlying Assumptions and the Reality: Results of an Experimental Study' (2010) 31(11) *ECLR*.
- Hou L.Y., 'Some Aspects of Prize Squeeze Within the European Union: a Case Law Analysis' (2011) 32(5) *ECLR*.
- Lang J.T., 'Defining legitimate competition: companies' duties to supply competitors and access to essential facilities' (1994) 18 *Fordham International Law Journal*.
- Moura e Silva M., 'Predatory Pricing Under Article 82 and the Recoupment Test: do not go Gentle into that Good Night' (2009) 30(2) *ECLR*.
- Nagy C.I., 'A felfaló ár megítélése a magyar versenyjogban' [The assessment of predatory pricing in Hungarian competition law'] (2002) 6(3) *Collega* 6.
- Nagy C.I., 'Commitments as surrogates of civil redress in competition law: the Hungarian perspective' (2012) 33(11) *ECLR*.
- Nagy C.I., 'Felfaló árazás Magyarországon és az Európai Unióban' [Predatory pricing in Hungary and the European Union'] (2000) 10(8) *Versenyfelügyeleti Értesítő*.
- Nagy C.I., 'Predatory pricing in Hungary and in Community law' [in:] L. Ficzere, A.E. Kellermann, A. Nikodém (eds), *The perspectives of the legal approximation process in Central and Eastern Europe*, Budapest 2001.
- Nagy C.I., 'Refusal to deal and the doctrine of essential facilities in US and EC competition law. A comparative perspective and a proposal for an analytical framework' (2007) 32(5) *ECLR*.
- Ritter C., 'Does the Law of Predatory Pricing and Cross-subsidisation Need a Radical Rethink?' (2004) 27(4) *World Competition*.
- Ritter L., Braun W. D., *European Competition Law. A practitioner's guide* (3rd ed.), the Hague 2005.
- Subiotto R., O'Donoghue R., 'Defining the Scope of the Duty of Dominant Firms to Deal with Existing Customers under Article 82 EC' (2003) 24(12) *ECLR*.
- Van Bael I., Bellis J. F., *Competition Law of EEC* (2nd ed.), Chicago 1990.
- Whish R., *Competition Law*, Oxford University Press 2009.

Private Enforcement of Competition Law in Slovenia: A New Field to Be Developed by Slovenian Courts*

by

Maja Brkan **, Tanja Bratina ***

CONTENTS

- I. Introduction
- II. National legal framework regarding private enforcement
 - 1. Legal basis and legislative changes
 - 2. Conditions for the award of damages
 - 2.1. Infringement of national or EU competition rules and fault
 - 2.2. Damages and casual link
 - 3. Jurisdiction
 - 3.1. Territorial jurisdiction: civil procedure
 - 3.2. Potential inconsistencies between civil and administrative procedures
 - 3.3. International jurisdiction
 - 4. Procedural standing
 - 4.1. Collective redress mechanisms
 - 4.2. Indirect purchasers
 - 5. Evidence and burden of proof
 - 5.1. Discovery and obtaining evidence from the opposing party
 - 5.2. Access to the administrative file

* This article is based on the national report for Slovenia, written in the framework of the project 'Comparative Private Enforcement and Consumer Redress in the EU', led by Professor Barry Rodger, Strathclyde University Law School and financed by Arts & Humanities Research Council (UK). The details of the project as well as the national report can be found at www.clcpecreu.co.uk.

** Doc. Dr. Maja Brkan, PhD (Faculty of Law, University of Ljubljana), LL.M. (New York University School of Law); assistant professor, Faculty of Law, Maastricht University; maja.brkan@maastrichtuniversity.nl.

*** Tanja Bratina, LL.M. candidate (Faculty of Law, University of Ljubljana), associate at the law firm Avbreht, Zajc & Partners, Ltd. The views expressed in this article are the personal views of the author and do not in any way express the position of the law firm of Avbreht, Zajc & Partners, Ltd.; tanjabratina@hotmail.com.

- 5.3. Burden of proof
- 6. Limitation periods
- 7. Legal costs and fees
 - 7.1. Court fees
 - 7.2. Attorney's fees
- 8. Possibilities of judicial settlement and ADR
- 9. Cooperation between the Competition Protection Agency, the European Commission and national courts
 - 9.1. Binding and non-binding effect of administrative decisions
 - 9.2. Other forms of cooperation
- 10. Remedies
- III. Jurisprudence of Slovenian courts
 - 1. Methodology
 - 2. Analysis of existing jurisprudence
 - 3. Pending cases
 - 4. Potential follow-up actions
- IV. Conclusion

Abstract

This contribution aims to demonstrate the legal framework that can shape and influence private enforcement in Slovenia. This includes, in particular, conditions for damage claims, collective redress mechanisms, legal costs and fees as well as discovery and burden of proof. It is shown which legislative changes may be needed in order to improve the effectiveness of private enforcement and the practical obstacles that will have to be overcome in the future. Furthermore, the article analyses the jurisprudence of Slovenian courts concerning private enforcement. Although there was practically no jurisprudence in this area only a few years ago, Slovenian courts have now ruled on a few such cases already. The number of private enforcement proceedings will most likely increase in the future. Therefore, it can be stated that private enforcement of competition law is an area that is slowly, but steadily, gaining importance in the Slovenian legal system.

Résumé

La présente contribution vise à démontrer le cadre juridique susceptible de former et d'influencer la mise en œuvre des règles de concurrence de l'UE à l'initiative de la sphère privée (« *private enforcement* ») en Slovénie. Les conditions pour des recours en dommages et intérêts, des mécanismes des recours collectifs, des règles sur des dépenses ainsi que la divulgation des preuves et la charge de la preuve y sont analysés. La contribution démontre quelles modifications législatives seraient nécessaires et quelles obstacles pratiques devront être surmontés à l'avenir afin d'améliorer l'effectivité de ce type de mise en œuvre du droit de la concurrence. La jurisprudence des juridictions slovènes dans ce domaine-là est également analysée.

Même si cette jurisprudence a été pratiquement inexistante il y a quelques années, les juridictions slovènes ont déjà rendu quelques arrêts dans ce domaine et il est à attendre que le nombre de ce type d'affaires accroîtra dans le futur. Ainsi, il est possible de constater que l'importance de ce type de mise en œuvre du droit de la concurrence augmentera lentement – sûrement dans l'ordre juridique slovène.

Classifications and key words: antitrust damage; collective redress; evidence; nullity; private enforcement of competition law; public enforcement of competition law; Slovenia.

I. Introduction

Private enforcement of competition law is a relatively new issue for Slovenian courts, most likely because the market economy, as well as the legislation concerning competition law, was introduced only after the country gained its independence in 1991. The development of private enforcement of competition law in Slovenia has been gradual and is still in the process of development. Seen from this viewpoint, it was necessary to not only develop markets but also mechanisms of monitoring the effectiveness of competition. The legal framework governing these monitoring mechanisms, both public and private is certainly an important factor in this regard. This article aims to show, on the one hand, the legal framework that can shape and influence private enforcement in Slovenia. This includes, in particular, conditions for damage claims, collective redress mechanisms, legal costs and fees as well as discovery and burden of proof. It is shown which legislative changes may be needed in order to improve the effectiveness of private enforcement and the practical obstacles that will have to be overcome in the future. On the other hand, the article analyses the jurisprudence of Slovenian courts concerning private enforcement.

II. National legal framework regarding private enforcement

1. Legal basis and legislative changes

Slovenia reformed its competition law in April 2008 by adopting a new competition act¹ – the Prevention of the Restriction of Competition Act

¹ The National Assembly adopted the Act on 01/04/08. The Act was published in the Official Journal of the Republic of Slovenia (hereafter, OJ RS) on 11/04/08 and, according to its Art. 84, entered into force on the fifteenth day after the publication in the OJ RS.

(in Slovenian: *Zakon o preprečevanju omejevanja konkurence*; hereafter, Competition Act)² which entered into force on 26 April 2008. The Competition Act introduced important changes to the field of private enforcement of Slovenian competition rules (Art. 6 and 9 of Competition Act), as well as of EU competition law (Articles 101 and 102 TFEU). According to Art. 62 of Competition Act:

Article 62

(Compensation)

- (1) Anyone violating, either deliberately or negligently, the provisions of Articles 6 or 9 of this Act or Articles 81 or 82 of the EC Treaty [Articles 101 and 102 TFEU] shall be liable for any damages arising from such an infringement.
- (2) If the damage was caused by an infringement of Articles 6 or 9 of this Act or Articles 81 or 82 of the EC Treaty [Articles 101 and 102 TFEU], the court is bound by the final decision finding an infringement rendered by the [Competition Protection] Agency and the European Commission. This obligation does not influence the rights and obligations stipulated in Article 234 of the EC Treaty [Article 267 TFEU].
- (3) The statute of limitations for damage claims referred to in the first paragraph of this Article shall be suspended from the date of initiating proceedings before the [Competition Protection] Agency or the European Commission to the date when such proceedings are given a final conclusion.
- (4) The court must immediately inform the [Competition Protection] Agency of any action brought before it, demanding compensation on the grounds of infringement of Articles 6 or 9 of this Act or Articles 81 or 82 of the EC Treaty [Articles 101 and 102 of the TFEU]³.

This provision was introduced in accordance with EU competition policy; it is in line with the recommendations of the Commission's White Paper⁴ and Commission Staff Working Paper on Damages Action for Breach of the EC antitrust rules⁵.

² OJ RS, No. 36/2008, 40/2009, 26/2011, 57/2012, 39/2013 Odl.US: U-I-40/12-31, 63/2013-ZS-K.

³ This unofficial translation of the Competition Act can be found at www.uvk.gov.si/fileadmin/uvk.gov.si/pageuploads/ZPOMk-1_-_ang.pdf. Note that this translation erroneously contains the indication 'Treaty on the European Union' instead of 'EC Treaty'. This has been changed for the purposes of this citation. Furthermore, the terminology from this translation has been partially changed for the purposes of this article to correspond with the terminology used in EU competition law.

⁴ White Paper on Damages Actions for Breach of the EC antitrust rules (COM(2008) 165, 2.4.2008).

⁵ Commission staff working paper accompanying the White paper on damages actions for breach of the EC antitrust rules (SEC(2008) 404, 2.4.2008).

2. Conditions for the award of damages

According to Slovenian law, damages are awarded if four conditions are fulfilled:

1. infringement of competition rules (Article 6 or 9 of Competition Act or Article 101 or 102 TFEU);
2. damage;
3. fault (intentional or negligent);
4. a causal link between the infringement and the damage claimed.

2.1. Infringement of national or EU competition rules and fault

Slovenian provisions on private enforcement allows claims for damages for both the infringement of EU competition rules, Article 101 and 102 TFEU, as well as for their national equivalents, Article 6⁶ and 9 of Competition Act⁷.

Article 62(1) of Competition Act states: 'Anyone violating, either deliberately or negligently, the provisions of Art. 6 or 9 of this Act or Art. 101 or 102 TFEU shall be liable for any damages arising from such an infringement'. According to general civil law rules, it is the *damage* that must be caused deliberately or negligently⁸, while Competition Act clearly states that the *infringement* (and not the damage) must be committed deliberately or negligently to permit a claim for damages. If the damage is caused by several persons jointly, or where there is no doubt that the damage was caused by one of two or more concerned persons, who are somehow linked to each other, but it is impossible to establish who among them actually caused the damage, these persons shall be jointly and severally liable⁹.

2.2. Damages and casual link

Slovenian law on damages, the function of which is reparatory and preventive rather than punitive, rests on the principle of full and single compensa-

⁶ Art. 6 Competition Act prohibits restrictive agreements, that is, '[a]greements between undertakings, decisions by associations of undertakings and concerted practices of undertakings [...] whose object or effect is the prevention, restriction or distortion of competition in the Republic of Slovenia'.

⁷ Art. 9 Competition Act prohibits the abuse of a dominant position. Accordingly, '[a]n undertaking or several undertakings shall be deemed to have a dominant position when they can act independently of competitors, clients or consumers to a significant degree'.

⁸ Fault exists, when the person causes the damage deliberately or with negligence. Art. 135 Code of Obligations (*Obligacijski zakonik (OZ)*), OJ RS, No. 97/2007 (official consolidated version).

⁹ Art. 186(1) and (4) Code of Obligations.

tion¹⁰. The general principle of full compensation for material damages is found in the Code of Obligations. The Code states that, by taking into account the circumstances arising after the damage, the court should award compensation in the amount that is necessary to restore the claimant's financial situation to what would have existed if the act causing the damage had not been committed¹¹. Defendants can rely on the passing-on defence seeing as the focus lies on the position of the person that suffered damage or, better said, with the damage itself, and the compensation should not exceed it¹².

The claimant has the right to compensation for three types of damages: ordinary damage (lessening of assets – *damnum emergens*), lost profit (prevention of the augmentation of assets – *lucrum cessans*) and non-material damage (harm to the reputation of a legal person)¹³.

It is difficult to prove lost profit in the context of damage actions for the breach of competition rules. The Code of Obligations contains a broad definition of lost profit. In its assessment, the profit that should be taken into consideration is that which could have been justifiably expected to occur taking into account an ordinary course of events or special circumstances, but which was not achieved because of the act of the person who caused the damage¹⁴. The notion of profit is a typical economic category and is close to the notion of net profit as revealed in an income statement. It reflects the difference between the revenues that the person suffering a damage would have acquired in the absence of the offence, and the expenses that he/she would have incurred in order to accumulate these revenues¹⁵. The degree of likelihood expected in this context must exceed 50 per cent. Furthermore, to calculate the profit, an ordinary course of events (business as it could have been foreseen in view of past operations) or special circumstances (e.g. opening-up of markets, recession) should be considered. It is thus very difficult to prove the amount of expected business (ordinary course of events) where the claimant intended to merely start his/her activities but the contested practice prevented the realisation of such plans. In such cases, an appropriately detailed analysis of the situation of the market will be needed¹⁶.

¹⁰ Compare Plavšak, [in:] Plavšak, Juhart, Vrenčur, *Obligacijsko pravo. Splošni del*, GV Založba, Ljubljana, 2009, p. 617.

¹¹ Art. 169 Code of Obligations.

¹² Jadek Pensa, [in:] Plavšak, Juhart, Jadek Pensa, Kranjc, Grilc, Polajnar Pavčnik, Dolenc, Pavčnik, *Obligacijski zakonik s komentarjem*, Vol. 1, GV Založba, Ljubljana 2003, p. 919.

¹³ Art. 132 Code of Obligations.

¹⁴ Art. 168(3) Code of Obligations.

¹⁵ For more on lost profit, see Plavšak, [in:] Plavšak, Juhart, Vrenčur, *Obligacijsko pravo...*, p. 622 et seq.

¹⁶ Plavšak, [in:] *Obligacijski zakonik s komentarjem*, p. 948–951.

The burden of proof with regard to damages lies with the claimant. However, when a claim is well-founded, and it is only the exact amount of the compensation that cannot be determined, or if the determination thereof would cause unreasonable difficulties, setting the amount shall be left to judicial discretion¹⁷. Judicial discretion is not based upon guess-work, however, but on the presented facts instead. Facts cannot be merely hypothetical; the claimant must present them very clearly so that a discretionary calculation of the amount of damage is possible¹⁸. Case-law indicates that courts do refer to judicial discretion when it is not possible to calculate with mathematical precision the actual amount of damage¹⁹.

Finally, the casual link between the infringement and the damage must be established. The Slovenian Code of Obligations does not contain any specific rules on the causal link. The determination of a causal link requires, according to Slovenian doctrine, the assessment of the (un)predictability of certain consequences, of the adequacy of the consequences in relation to the cause (the theory of adequate causation), of the protective purpose of the norm (the theory of *ratio legis* causation), an interruption of the causal link (*novus actus* or *nova causa interveniens*) and of direct and indirect causation²⁰.

3. Jurisdiction

3.1. Territorial jurisdiction: civil procedure

The Slovenian legal system does not have specialised courts to decide private enforcement cases. Consequently, they should be brought before ordinary civil courts. The jurisdiction to decide civil procedures (in the first instance) is vested in district (*okrajna*) and circuit (*okrožna*) courts²¹. The general delineation of their competences is based on the value of the dispute: those up to the value of 20.000 EUR are decided by district courts, all other disputes by circuit

¹⁷ Art. 216 Civil Procedure Act (*Zakon o pravdnem postopku (ZPP)*), OJ RS, No. 73/2007 (official consolidated version).

¹⁸ II Ips 769/2006 and II Ips 770/2006, judgment of the Supreme Court of 25/09/08, II Ips 82/2005 judgment of the Supreme Court of 25/01/07.

¹⁹ Wedam Lukić, [in:] Ude, Betetto, Galič, Rijavec, Wedam Lukić, Zobec, *Pravdni postopek, zakon s komentarjem*, Vol. 2, GV Založba, Ljubljana 2006, p. 398.

²⁰ Jadek Pensa, [in:] *Obligacijski zakonik s komentarjem*, p. 672. Compare, in the older theory, also Strohsack, *Odškodninsko pravo in druge neposlovne obveznosti*, ČZ Uradni list RS, 1990, p. 33 et seq.

²¹ Art. 99 and 101 Courts Act (*Zakon o sodiščih (ZS)*), OJ RS, No. 94/2007 (official consolidated version), 45/2008. According to Art. 114 and 115 of the Courts Act, there are 44 district and 11 circuit courts.

courts²². However, circuit courts have jurisdiction irrespective of the value of the subject-matter in disputes concerning the protection of competition²³. These jurisdictional rules are applicable in cases where competition law is applied *à titre principal*. Even if the circumstances upon which jurisdiction is based change during the course of the proceedings, the court that assumed jurisdiction upon the filing of the action shall retain it, even though the changes concerned would otherwise confer jurisdiction on another court of the same type²⁴. Furthermore, circuit court decide competition disputes always as a panel²⁵. A circuit court panel consists of one professional judge, who is the presiding judge, and two lay judges²⁶.

A judgment rendered in the first instance in a civil case can be appealed before a High Court²⁷ within fifteen days from the day of the delivery of a copy of the judgment²⁸. The High Court rules on the case in a panel consisting of three judges²⁹. It is also possible to fill for an extraordinary judicial review, provided that certain conditions are fulfilled (revision and petition for protection of legality which are decided by the Supreme Court, and the reopening of the proceeding).

3.2. Potential inconsistencies between civil and administrative procedures

Decisions of the Competition Protection Agency (previously known as Competition Protection Office³⁰), which can be used by the claimants as the basis for a follow-up action, can also be appealed. This is true for decision issued via the administrative procedure and those delivered via the minor offences procedure. Such an appeal model can lead to inconsistencies concerning substantive questions of competition law because jurisdiction for

²² Art. 30 and 32 Civil Procedure Act. The delineation line of 20.000 EUR began to be applied on 01/01/10; before that date the delineation line was 8.345,85 EUR.

²³ Art. 32(2) Civil Procedure Act.

²⁴ Art. 32(3) Civil Procedure Act.

²⁵ Art. 34 Civil Procedure Act.

²⁶ Art. 33(3) Civil Procedure Act.

²⁷ There are four high courts in Slovenia: High Court in Celje, High Court in Ljubljana, High Court in Koper and High Court in Maribor. See Art. 116 Courts Act.

²⁸ Art. 333(1) Civil Procedure Act.

²⁹ Art. 36 Civil Procedure Act.

³⁰ The Competition Protection Office was transformed into the Competition Protection Agency with the Ruling on the establishment of the Slovenian Competition Protection Agency (*Sklep o ustanovitvi Javne agencije Republike Slovenije za varstvo konkurence*, OJ RS Nos. 61/2011, 105/2011, 64/2012). The Agency started to operate on 01/01/13 and took over all the competences and cases of the Office. This article refers thus to the notion of 'Agency', except when expressly noting a decision of the Office issued before 01/01/13.

administrative procedures is conferred to the Administrative Court³¹, and oversight over the minor offences procedures is lodged with the District Court in Ljubljana³². The decision of the District Court in Ljubljana can be further appealed to the High Court in Ljubljana (division for minor offences).

It is difficult to avoid inconsistencies in a system in which three different courts are competent to review competition matters: the High Court in civil cases, the Administrative Court in administrative cases, and the District Court in Ljubljana/High Court in Ljubljana in minor offence cases. One potential mechanism to avoid these inconsistencies is for a party to request extraordinary judicial review if particular conditions are fulfilled. Another, and possibly more important, mechanism lies in the fact that the Competition Protection Agency is served with the court rulings in both the administrative and minor offences procedures while civil courts must immediately inform the Agency of any damage actions submitted for the breach of competition rules³³.

3.3. International jurisdiction

The provisions of the Brussels I Regulation³⁴ are applicable to damages suffered either in another Member State or by a company or a consumer resident in another Member State. According to its Article 2(1)³⁵, the general jurisdictional rule is *actor sequitur forum rei*. Seeing as this is clearly a general rule only, it is likely that claimants will try to establish jurisdiction in their Member State on the basis of specific provisions regarding jurisdiction for damage claims. The jurisdiction for damage claims is regulated by Article 5(3) of the Brussels I Regulation. Accordingly, a person domiciled in a Member State may, in another Member State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur³⁶. The most important factor in determining jurisdiction is the

³¹ Art. 56 Competition Act.

³² Art. 214(5) Minor Offences Act (*Zakon o prekrških (ZP-1)*), OJ RS, No. 3/2007 (official consolidated version), 17/2008.

³³ Art. 62(4) Competition Act.

³⁴ Council Regulation (EC) No 44/2001 of 22/12/00 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ [2001] L 12/1). As of 10/01/15, the new Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12/12/12 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ [2012] L 351/1.

³⁵ According to Art. 2(1) of this regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

³⁶ The jurisprudence of the ECJ on the interpretation of Art. 5(3) of the Brussels I Regulation is well developed. See, e.g., cases: C-509/09 *eDate Advertising e.a.*, not yet reported; C-523/10 *Wintersteiger*, not yet reported; C-133/11 *Folien Fischer and Fofitec*, not yet reported.

place where the action was committed or where the damage occurred³⁷. If either of the two takes place on Slovenian territory, Slovenian courts acquire jurisdiction. This means in practice that if a cartel was ‘committed’ in Slovenia, but the claimant suffered damages in another Member States, he/she can bring an action before a Slovenian court. In cases where the claim comes from consumers, the specific rules stemming from Articles 15 to 17 of the Brussels I Regulation apply³⁸.

4. Procedural standing

The general provisions of the Civil Procedure Act on procedural standing apply also in competition law cases. There are no special provisions concerning standing in the area of competition law or with regard to private enforcement issues, despite the fact that the Civil Procedure Act allows for a special provision to define parties to the procedure other than natural or legal persons. The same conditions apply also to domestic or foreign companies or consumers.

4.1. Collective redress mechanisms

With regard to collective redress mechanisms, neither class actions nor representative actions are allowed by the Slovenian legal system. Bodies representing public interests or consumer associations cannot intervene in private enforcement proceedings also because they cannot prove their legal interest³⁹. The existence of a party’s legal interest can be proven only if the judgment rendered in a dispute between other parties would also indirectly affect the party’s legal position⁴⁰. However, according to Article 76(3) of the Civil Procedure Act, the court may in exceptional cases and with legal effect limited to a specific case award procedural standing also to other forms of associations, when they meet the essential conditions to sue or to be sued, especially if they have assets that can be subject to enforcement.

³⁷ For a more in-depth analysis of the possibility of determining jurisdiction on the basis of Art. 5(3) of the Brussels I Regulation, see for example D.-P. Tzakas, ‘Effective collective redress in antitrust and consumer protection matters: A panacea or a chimera?’ (2011) 48(4) *Common Market Law Review* 1161 et seq.

³⁸ For jurisprudential interpretation of specific rules on jurisdiction in consumer cases, see e.g. cases: C-180/06 *Ilseger*, ECR [2009] I-03961; C-585/08 *Pammer in Hotel Alpenhof*, ECR [2010] I-2527; C-190/11 *Mühlheimer*, not yet reported; C-419/11 *Česká spořitelna*, not yet reported.

³⁹ According to Art. 199(1) of the Civil Procedure Act, only a person who has a legal interest with respect to the subject of the proceedings between the parties may join the litigation in favour of the party whose interest in victory he/she shares.

⁴⁰ Ude, [in:] *Pravdni postopek...*, p. 266.

Nevertheless, in case of multiple actions against the same defendant, there are two ways to group them. On one hand, courts may join cases with the same subject matter. In other words, if there are several cases in which the same entity is the defendant of several plaintiffs before the same court, the court may adopt a decision that those cases should be heard jointly to speed up the proceedings or to reduce costs⁴¹. On the other hand, the Slovenian legal system offers the claimants the system of 'co-litigation' (*litis consortium*), which is a form of aggregation of individual claims where several persons sue or are sued in the same action. According to the Civil Procedure Act, several claimants may sue in the same action if two conditions are fulfilled: the disputed claims are of the same type and are based upon substantially homogeneous factual and legal grounds, and if the same court has jurisdiction to hear all of the claims⁴². However, there are as many procedural relationships as there are claimants, since each of the co-litigants acts as an independent party to the litigation⁴³.

4.2. Indirect purchasers

According to general rules on damage liability in Slovenian law, an indirectly injured person does, in principle, enjoy legal protection⁴⁴. However, it is unclear how such an indirect purchaser would prove the existence of a causal link between the damage suffered and the supposedly illegal conduct of a competition law offender. Just as in any other case concerning damages, the burden of proof to evidence the existence of a causal link must be borne by the indirect purchaser him/herself. The court will then determine whether the given end effect necessarily results from a given cause⁴⁵.

5. Evidence and burden of proof

Producing evidence plays the most important role in damage actions, but unfortunately there are no provisions which would facilitate collecting evidence in cases involving breaches of competition rules. The decision on which facts are considered to be proven is taken by the court after carefully and thoroughly evaluating every individual piece of evidence, as well as the evidence as a whole, and after considering the outcome of the entire proceedings⁴⁶.

⁴¹ Art. 300(1) Civil Procedure Act.

⁴² Art. 191(1) Civil Procedure Act. In theory, see Betetto, [in:] *Pravdni postopek...*, p. 240.

⁴³ Art. 195 Civil Procedure Act. See also [in:] *Pravdni postopek...*, p. 238.

⁴⁴ II Ips 875/2006, judgment of the Supreme Court of 07/12/06.

⁴⁵ II Ips 875/2006, judgment of the Supreme Court of 07/12/06.

⁴⁶ Art. 8 Civil Procedure Act.

5.1. Discovery and obtaining evidence from the opposing party

The general rule on presenting facts and producing evidence is contained in Article 7 of the Civil Procedure Act, which states, in paragraph 1, that the parties shall state all facts giving rise to their cause of action and shall adduce evidence proving these facts.

With regard to obtaining evidence from the opposing party, the latter is obliged to produce evidence even if it is not in his/her favour⁴⁷. If a party identifies a document as evidence that supports its statements, asserting that such a document is in the possession of the opposing party, the court orders the latter to submit the document within a specified time⁴⁸. The opposing party can defend him/herself by asserting that such a document is not in his/her possession and may produce evidence to determine the truth of this assertion⁴⁹. Importantly also, it can refuse to produce such a document for the same reasons as a witness can refuse to testify⁵⁰. However, the opposing party has an absolute duty to supply evidence in three situations⁵¹: (1) if the opposing party relies on the same evidence in support of his/her allegations in the same litigation (even if the motion for the admission of evidence was withdrawn afterwards⁵²); (2) if the document has to be presented according to the law; and (3) if the content of the document relates to both parties to the litigation (i.e. when the document is produced for the benefit of both parties⁵³).

As the court cannot force the opposing party to produce a requested document, the aforementioned court order is not a very effective mechanism for obtaining evidence from the opposing party. However, the court shall assess, taking into account all of the circumstances of the case, the significance of the fact that a party holding a document failed to comply with such order, or if the party asserts, contrary to the belief of the court, that he/she is not in possession of such document⁵⁴. Failure to produce the document could be an indication that its content is unfavourable to the refusing party. Consequently, the court may conclude that the statements of the party referring to the content of that document are true⁵⁵.

⁴⁷ Zobec, [in:] *Pravdni postopek...*, p. 227.

⁴⁸ Art. 227(1) Civil Procedure Act.

⁴⁹ Art. 227(4) Civil Procedure Act.

⁵⁰ Art. 227(3) Civil Procedure Act.

⁵¹ Art. 227(2) Civil Procedure Act.

⁵² Zobec, [in:] *Pravdni postopek...*, p. 430.

⁵³ Zobec, [in:] *Pravdni postopek...*, p. 430.

⁵⁴ Art. 227(5) Civil Procedure Act.

⁵⁵ Zobec, [in:] *Pravdni postopek...*, p. 431.

Finally, entities other than parties to the proceedings may also be ordered to submit documents, but only if they are so obliged by law, or if the content of the requested document relates both to the person in possession thereof and to the party adducing it as evidence⁵⁶.

5.2. Access to administrative file

The access of third persons to the administrative file is governed by the Act on the Access to Information of Public Character⁵⁷, which ensures free access by anyone to public information held by, *inter alia*, state bodies and the reuse of such information⁵⁸.

However, Competition Act contains special provisions that contradict the Act on the Access to Information of Public Character and enable the Competition Protection Agency to reject an applicants' request for information to protect the secrecy of sources and business secrets⁵⁹.

5.3. Burden of proof

According to the Civil Procedure Act, the party that brings an action before a court shall state the facts and provide the evidence upon which his/her claims are based⁶⁰. However, with regard to actions for damages, Article 131 of the Code of Obligations establishes liability of fault with a reversed burden of proof⁶¹ – a person who causes damages to another has an obligation to remedy it unless he/she can prove that the damage occurred without his/her fault. Accordingly, the burden of proof for the three prerequisites of a damage claim (illegality, causation, and damage) lies with the claimant⁶², whereas the burden of proof for fault lies with the defendant.

6. Limitation periods

The statute of limitations is regulated in the Code of Obligations that distinguishes between the limitation periods for claiming damages resulting from

⁵⁶ Art. 228(1) Civil Procedure Act.

⁵⁷ *Zakon o dostopu do informacij javnega značaja (ZDIJZ)*, OJ RS, No. 51/2006 (official consolidated version).

⁵⁸ Art. 1(1) Act on the Access to Information of Public Character.

⁵⁹ Art. 13b(4) Competition Act.

⁶⁰ Art. 212 Civil Procedure Act.

⁶¹ I Cp 460/2008, judgment of the High court in Celje of 08/12/08.

⁶² II Ips 874/93, judgment of the Supreme Court of 16/03/95, II Ips 626/96, judgment of the Supreme Court of 29/10/97.

non-contractual obligations and those resulting from contractual obligations. In the first case, the right of compensation is statute-barred three years after the injured party became aware of the damage and the identity of the person responsible⁶³. In any event, this right becomes statute-barred five years after the occurrence of the damage⁶⁴. In the case of damage resulting from contractual obligations, the right to compensation is statute-barred after a period of time fixed for the prescription of such contractual obligation⁶⁵. Moreover, settled jurisprudence states that with respect to repeated practices, where multiple completed practices following each other within a short period of time, the limitation period shall commence from the day on which these practices entirely cease⁶⁶.

However, Competition Act contains a provision which states that the limitation period is suspended from the day of the commencement of administrative proceedings before the Competition Protection Agency or the European Commission until the day on which the procedure is given a final conclusion⁶⁷.

7. Legal costs and fees

With regard to procedural fees, it is important to analyse both court fees and attorney's fees.

7.1. Court fees

With regard to court fees, it is important to stress the difference between administrative and judicial procedures. No costs are associated with filing a complaint in administrative proceedings before the Competition Protection Agency. Court fees do apply in civil judicial procedures. The final amount of court fees will depend on two factors: the value and the type of the claim (quotient). For example, if a claim has a value of up to 300 EUR, the court fee will be 18 EUR. If the value of the subject matter of the dispute exceeds 500.000 EUR, the court fee increases to 110 EUR for each additional amount of 50.000 EUR⁶⁸. These

⁶³ Art. 352(1) Code of Obligations.

⁶⁴ Art. 352(2) Code of Obligations.

⁶⁵ Art. 352(3) Code of Obligations.

⁶⁶ Cp 991/99, judgment of the High court in Celje of 16/02/00.

⁶⁷ Art. 62(3) Competition Act.

⁶⁸ Art. 16 Court Fees Act. It is to be noted that the maximum court fee with the quotient 1.0 is 60.975 EUR. For the calculation of court fees with the quotient 1.0, see Appendix 1 of the Court Fees Act.

are the amounts for the calculation of court fees with the quotient 1.0. However, in filing an action for damages, the quotient is 3.0. Therefore, the court fee for filing an action for damages reflects a calculation of the amount of the court fee based on the value of the action multiplied by the quotient 3.0⁶⁹. For example, if the value of the subject matter of the dispute is up to 300 EUR, the court fee is 54 EUR (3 x 18 EUR); if the value is up to 600 EUR, the court fee is 78 EUR (3 x 26 EUR), etc. However, if the parties reach a settlement, the quotient is 1.0 instead of 3.0⁷⁰. This system is thus meant to promote settlement. The Court Fees Act also includes provisions that allow the financial situation of the parties to be taken into consideration⁷¹.

Table 1: Amount of court fees with the quotient 1.0

| Value of the subject matter of the dispute up to ... EUR | Court fee [EUR] | Value of the subject matter of the dispute up to ... EUR | Court fee [EUR] |
|--|-----------------|--|-----------------|
| 300 | 18 | 40.000 | 291 |
| 600 | 26 | 45.000 | 313 |
| 900 | 34 | 50.000 | 335 |
| 1.200 | 42 | 65.000 | 409 |
| 1.500 | 50 | 80.000 | 483 |
| 2.000 | 55 | 95.000 | 557 |
| 2.500 | 60 | 110.000 | 631 |
| 3.000 | 65 | 125.000 | 705 |
| 3.500 | 70 | 140.000 | 779 |
| 4.000 | 75 | 155.000 | 853 |
| 4.500 | 80 | 170.000 | 927 |
| 5.000 | 85 | 185.000 | 1.001 |
| 6.000 | 95 | 200.000 | 1.075 |
| 7.000 | 105 | 230.000 | 1.185 |
| 8.000 | 115 | 260.000 | 1.295 |
| 9.000 | 125 | 290.000 | 1.405 |
| 10.000 | 135 | 320.000 | 1.515 |
| 13.000 | 153 | 350.000 | 1.625 |
| 16.000 | 171 | 380.000 | 1.735 |
| 19.000 | 189 | 410.000 | 1.845 |
| 22.000 | 207 | 440.000 | 1.955 |
| 25.000 | 225 | 470.000 | 2.065 |
| 30.000 | 247 | 500.000 | 2.175 |
| 35.000 | 269 | | |

⁶⁹ Tariff heading no. 1111 of the Court Fees Act.

⁷⁰ Tariff heading no. 1112 of the Court Fees Act.

⁷¹ See Art. 11 Court Fees Act.

7.2. Attorney's fees

The claimant must bear his/her own attorney's fees should he/she be represented by one. Attorney's fees in civil proceedings are usually considerably higher than attorney's fees for representation given before the Competition Protection Agency. In a stand-alone action, the majority of the burden of proof will remain on the claimant, which results in an increased work load for an attorney. In administrative procedures by contrast, the Agency has the power to inspect, which enables it to investigate the infringement by itself.

Until 2009, attorney's fees were regulated by the Attorneys' price list⁷² that was repealed on 1 January 2009 by the Attorney's Fee Act⁷³. However, if the judicial procedure in the first instance was initiated before the Attorney's Fee Act entered into force, attorney's fees and other service costs in this, as well as further procedures with legal remedies were to be calculated in accordance with the Attorneys' price list⁷⁴. The Attorney's Fee Act was repealed approximately 4 months after it entered into force (on 9 May 2009) by the Act Amending the Attorneys Act⁷⁵. The power to adopt an act to regulate attorney's fees was once again conferred to the Bar Association of Slovenia. Attorney's fees presented in this article will thus be based on the Attorneys' price list.

The amount of the fee for bringing an action for damages is calculated in the same manner as the amount of the court fee: it depends on the value of the subject matter of the dispute. The only difference is that the value of the subject matter of the dispute is not expressed in euros but in points, whereby the value of 1 point is associated with 0,459 EUR. If the value of the subject matter of the dispute exceeds 120.000 points, the value of the service increases by 100 points for each further initial amount of 40.000 points, where the maximum value is 2.000 points (i.e. 918 EUR) or 3.000 points (i.e. 1377 EUR) in economic disputes⁷⁶.

Alternatively, the Slovenian legal system makes it possible to grant the attorney a part of the damages awarded to the client. Instead of charging an attorney's fee for the service performed, an attorney and his/her client can conclude a written agreement by which they agree on the given attorney's reward, which can amount to up to 15% of the sum awarded to the client⁷⁷.

⁷² *Odvetniška tarifa*, OJ RS, No. 67/03 and 70/03.

⁷³ *Zakon o odvetniški tarifi (ZOdvT)*, OJ RS, No. 67/2008, 35/2009.

⁷⁴ Art. 41(1) Attorneys Act (*Zakon o odvetništvu (ZOdv)*), OJ RS, No. 18/1993, 24/2001, 54/2008, 35/2009.

⁷⁵ Act Amending the Attorneys Act (*Zakon o spremembah in dopolnitvah Zakona o odvetništvu (ZOdv-C)*), OJ RS, No. 35/2009.

⁷⁶ Tariff heading no. 18, point 1 of the Attorney's Tariff.

⁷⁷ Art. 17(3) of the Attorneys Act.

This type of payment is made by the party that was condemned to pay damages. It thus reflects the principle that the loser pays the winning attorney's fees. It is important to stress, however, that this type of solution is used extremely rarely in practice.

Table 2: Amount of attorney's fees for bringing an action

| Value of the subject matter of the dispute | | Value of the service in points |
|--|--------------|--------------------------------|
| above points | up to points | |
| | 750 | 100 |
| 750 | 3.000 | 200 |
| 3.000 | 10.000 | 300 |
| 10.000 | 20.000 | 400 |
| 20.000 | 35.000 | 500 |
| 35.000 | 50.000 | 600 |
| 50.000 | 65.000 | 700 |
| 65.000 | 80.000 | 800 |
| 80.000 | 100.000 | 900 |
| 100.000 | 120.000 | 1.000 |

8. The possibilities of judicial settlement and ADR

In the Slovenian legal system, judicial settlement is regulated by the Civil Procedure Act⁷⁸, the provisions of which apply also to cases for damages due to competition law infringements. Accordingly, the court invites the parties to a so-called 'settlement hearing' that takes place before the oral hearing. The purpose of a settlement hearing, which is closed to the public⁷⁹, is to examine the possibility for a judicial settlement between the parties in an attempt to reach such a settlement⁸⁰. However, a judicial settlement can be reached not only during the settlement hearing but also at any other time during the proceedings⁸¹. It can concern all or any part of the whole claim, or any of the contentious issues between the parties⁸².

⁷⁸ See Art. 305a to 309a Civil Procedure Act.

⁷⁹ Art. 305a(3) Civil Procedure Act.

⁸⁰ Art. 305a(1) and (2) Civil Procedure Act. The court may decide not to carry out the settlement hearing, if an ADR has been unsuccessful or if the court estimates that there is no possibility of judicial settlement or that it is not appropriate in a particular case (Art. 305a(4) Civil Procedure Act).

⁸¹ Art. 306(1) Civil Procedure Act.

⁸² Art. 306(2) Civil Procedure Act.

During the settlement hearing, the parties may agree to try to solve the case by way of alternative dispute resolution (ADR) – arbitration or mediation. In that event, the court will suspend the proceedings for no longer than three months⁸³. It is to be noted that arbitration and mediation are regulated by separate acts in Slovenia⁸⁴. The Arbitration Act regulates the appointment of arbitrators, the arbitrage procedure, the legal value of the final decision⁸⁵ and other issues⁸⁶. Arbitrage can be conducted for all contractual and non-contractual claims between the parties⁸⁷. According to the Mediation in Civil and Commercial Matters Act, a mediator, which must be independent and impartial, is appointed by the parties by mutual consent, unless the parties agree on another appointment procedure⁸⁸. Parties may, or may not agree on the mediation procedure. If they do, they can do so by reference to the existing rules on mediation⁸⁹. If they do not agree on the meditation procedure, the mediator conducts the procedure as he/she deems appropriate, taking into account all of the circumstances of the case, the requests of the parties and the need for a rapid and durable solution to the case⁹⁰. The mediator can give suggestions how to solve the case but they do not have a binding effect on the parties⁹¹. Mediation is brought to an end if the parties reach an agreement. Mediation can be terminated if the parties do not appoint a mediator within 30 days from the beginning of the process; if the mediator, after consulting the parties, establishes that mediation would not be reasonable; if the parties submit to the mediator a written agreement that the mediation is terminated; or by an unilateral act of one of the parties by which the latter informs the other(s) and the mediator that the mediation is terminated⁹².

⁸³ Art. 305b(3) Civil Procedure Act.

⁸⁴ Mediation in Civil and Commercial Matters Act (*Zakon o mediaciji v civilnih in gospodarskih zadevah (ZMCGZ)*), OJ RS, No. 56/2008; Arbitration Act (*Zakon o arbitraži (ZArbit)*), OJ RS, No. 45/2008.

⁸⁵ According to Art. 38 of the Arbitration Act, the decision is deemed to have the same value as a final judgment.

⁸⁶ Such as the competence of the Arbitration Act (Art. 19) and its possibility to issue interim measures (Art. 20).

⁸⁷ See Art. 10(1) Arbitration Act.

⁸⁸ Art. 7(1) Mediation in Civil and Commercial Matters Act.

⁸⁹ Art. 8(1) Mediation in Civil and Commercial Matters Act.

⁹⁰ Art. 8(2) Mediation in Civil and Commercial Matters Act.

⁹¹ Art. 8(3) and (4) Mediation in Civil and Commercial Matters Act.

⁹² Art. 13 Mediation in Civil and Commercial Matters Act.

9. Cooperation between the Competition Protection Agency, the European Commission and national courts

9.1. Binding and non-binding effect of administrative decisions

To ensure consistency between judicial and administrative decisions, national courts are bound by final decisions of the Competition Protection Agency stating that a company violated national or EU rules of competition⁹³. However, although national courts are bound by such decisions, they may still address a preliminary reference to the CoJ on the interpretation of Article 101 or 102 TFEU. Therefore, the obligatory nature of a national antitrust decisions does not in any way influence the rights and obligations of the courts as stipulated in Article 267 TFEU⁹⁴.

If, however, the Competition Protection Agency in the course of its proceedings finds no infringement of Article 6 or 9 of Competition Act or of Article 101 or 102 TFEU, or if special circumstances indicate that it would not be reasonable to conduct proceedings, and thus terminates the proceedings by way of an order⁹⁵, a national court is not bound by such order⁹⁶. Termination of antitrust proceedings without finding a breach of competition rules does not necessarily mean that there was no infringement; it could also mean that there was, for example, not enough evidence to prove the violation. If proceedings were thus to be opened concerning claims for damages due to antitrust infringements, a national court can come to a different conclusion⁹⁷. In accordance with Regulation 1/2003, commitment decisions have the same non-binding effect for national courts⁹⁸. As to the notification duty, a national court must immediately inform the Competition Protection Agency of any action brought before it that demands compensation on the grounds of an infringement of Article 6 or 9 of Competition Act or Article 101 or 102 TFEU⁹⁹.

⁹³ According to the first sentence of Art. 62(2) of Competition Act, 'if the damage was caused through an infringement of Art. 6 or 9 of this Act or Art. 81 or 82 of the EC Treaty, the court is bound by the final decision finding an infringement rendered by the Agency [...]'.
⁹⁴ Second sentence of Art. 62(2) Competition Act.
⁹⁵ Art. 40(1) Competition Act.
⁹⁶ Vlahek, [in:] Grilc, Bratina, Galič, Kerševan, Kocmut, Podobnik, Vlahek, Zabel, *Zakon o preprečevanju omejevanja konkurence s komentarjem (ZPOmK-1)*, GV Založba, Ljubljana 2009, p. 509.
⁹⁷ Ibidem.
⁹⁸ Ibidem.
⁹⁹ Art. 62(4) Competition Act.

National courts are also bound by decisions of the European Commission¹⁰⁰. This, however, does not influence the rights and obligations stipulated in Article 267 TFEU¹⁰¹. Doctrine suggests that the provisions of the Competition Act are not, in this regard, entirely in line with Article 16(1) Regulation 1/2003 seeing as Slovakian legislation binds national courts to a *final* decision of the European Commission only, whereas Article 16(1) Regulation 1/2003 speaks only of ‘a decision’¹⁰², suggesting that not-final decisions are also binding.

9.2. Other forms of cooperation

The Competition Act contains other provisions concerning the cooperation between national courts and the Competition Protection Agency. National courts are obliged to inform the Agency of all court proceedings linked to the application of Article 101 and 102 TFEU¹⁰³. If the Agency files a written opinion regarding the application of these EU rules according to Article 15(3) Regulation 1/2003, the national court concerned has a duty to send, without delay, a copy of such written opinion to the parties¹⁰⁴. Such a non-binding written opinion may be filed at any time until a judgment is rendered¹⁰⁵. National court must send the Competition Protection Agency (as well as the European Commission) copies of all rulings involving the application of Article 101 and 102 TFEU¹⁰⁶.

The Competition Act does not, however, contain specific rules on whether national courts must stay proceedings, if the Competition Protection Agency has initiated proceedings on the same matter, until the Agency reaches its decision. Nor does it contain any rules on whether the Agency must stay its proceedings until a national court decides the matter.

The Competition Act also regulates cooperation between national courts and the European Commission. Whenever the Commission files a written opinion regarding the application of Article 101 and 102 TFEU in accordance with Article 15(3) Regulation 1/2003, the court must immediately forward it the Agency and the parties involved¹⁰⁷. The Commission may file a non-binding

¹⁰⁰ first sentence of Art. 62(2) of Competition Act states that, ‘if the damage was caused through an infringement of Art. 6 or 9 of this Act or Art. 81 or 82 of the EC Treaty, the court is bound by the final decision finding an infringement rendered by [...] the European Commission’.

¹⁰¹ Second sentence of Art. 62(2) Competition Act.

¹⁰² Vlahek, [in:] *Zakon o preprečevanju omejevanja konkurence...*, p. 506.

¹⁰³ Art. 63(1) Competition Act.

¹⁰⁴ Art. 63(3) Competition Act.

¹⁰⁵ Art. 63(4) Competition Act.

¹⁰⁶ Art. 63(6) Competition Act.

¹⁰⁷ Art. 63(2) Competition Act.

written opinion at any point in time until a judgment is rendered¹⁰⁸. Where a national court requests the Commission to issue a non-binding opinion in accordance with the first paragraph of Article 15 Regulation 1/2003, the court shall inform the parties of that fact. After receiving the opinion, it shall send a copy of that opinion to the Agency and the parties¹⁰⁹. National courts must supply the Commission with copies of all rulings involving the application of Article 101 and 102 TFEU¹¹⁰. Communication between courts and the European Commission may be conducted directly or through the Agency¹¹¹.

10. Remedies

Private actions for damages for the breach of competition rules do not have a special status in Slovakia and are not afforded special remedies under national law. In principle, there are several categories of decisions that the court may issue. First, if it is found that the conditions for awarding damages are fulfilled, a court can issue a judgment awarding damages. Second, if it is found that these conditions are not met, it can issue a judgment rejecting the claim. Third, the court may also issue interim orders according to the Enforcement and Securing of Civil Claims Act in every civil procedure¹¹². It issues an interim order to secure a monetary claim (such as a claim for damages) if the creditor proves that it is possible that the debt exists or that it will exist in the future¹¹³. The creditor must also prove the existence of the risk that, in the absence of an interim order, debt recovery will be impossible or difficult due to the debtor's acts, such as alienating or concealing property¹¹⁴. The creditor does not have to prove the existence of such risk if it is probable that the debtor would suffer only a minor prejudice due to the interim order¹¹⁵. It is presumed that the risk exists if the debt is to be recovered abroad, unless the recovery takes place in one of the EU Member States¹¹⁶.

Moreover, the court may, upon the request of the claimant, declare a contractual clause null and void if it infringes competition rules. The court

¹⁰⁸ Art. 63(4) Competition Act.

¹⁰⁹ Art. 63(5) Competition Act.

¹¹⁰ Art. 63(6) Competition Act.

¹¹¹ Art. 63(7) Competition Act.

¹¹² *Zakon o izvršbi in zavarovanju (ZIZ)*, Official consolidated version: OJ RS, no. 3/2007, with changes: 93/2007, 28/2009, 47 and 48/2009, 51/2010, 26/2011, 17/2013.

¹¹³ Art. 270(1) Enforcement and Securing of Civil Claims Act.

¹¹⁴ Art. 270(2) Enforcement and Securing of Civil Claims Act.

¹¹⁵ Art. 270(3) Enforcement and Securing of Civil Claims Act.

¹¹⁶ Art. 270(4) Enforcement and Securing of Civil Claims Act.

may also order other relief, such as, for example, that access to an essential facility is given to a competitor filing a claim in this regard¹¹⁷.

II. Jurisprudence of Slovenian courts

1. Methodology

Three types of research tools had to be relied upon in order to identify existing Slovenian jurisprudence relevant to this article. First, the paper is based on online research via the database 'sodisce.si'. This database, however, does not contain all rulings of all Slovenian courts, but only those that the database considers to be of most importance. Consequently, rulings of first instance courts in particular are not available through this web portal. Since the database is not exhaustive, it could not be used as the sole research method. The second methodological tool used was an analysis of the media followed by direct contact with the appropriate courts to obtain a copy of pre-identified rulings. Pending cases were found in the same way. The third method was a questionnaire sent to all circuit courts in Slovenia¹¹⁸. The questionnaire essentially tried to establish whether the courts have dealt with cases relating to private enforcement of competition law. Four out of the eleven circuit courts/particular judges sent back a negative response stating that they have not yet dealt with private enforcement¹¹⁹. No response was received from any of the other courts. It is thus difficult to determine whether other private enforcement cases exist aside from those identified for the purposes of this article.

2. Analysis of existing jurisprudence

Four rulings will be analysed here in detail, two of them were decided by the High Court (court of appeal) and two by the circuit court (court of first instance).

The first case concerns the judgment II Pg 485/2006 of 9 March 2010 rendered by the Circuit Court of Ljubljana. The claimant, an undertaking active

¹¹⁷ See, for example, Vlahek, [in:] *Zakon o preprečevanju omejevanja konkurence...*, p. 521.

¹¹⁸ Circuit courts in Celje, Koper, Nova Gorica, Kranj, Krško, Ljubljana, Novo mesto, Maribor, Murska Sobota, Ptuj and Slovenj Gradec.

¹¹⁹ Responses were received from the courts/judges in Celje, Krško, Gornja Radgona, Maribor and Slovenj Gradec.

in the field of telecommunications service (hereafter: telecommunications undertaking), was not seeking compensation based on a damage claim due to a competition law violation, but filed an action for the payment due on the basis of the contract of lease against his contractual party who was leasing data cables (hereafter: lessee of data cables) from the telecommunications undertaking.¹²⁰ In this case, the Court was asked to determine whether a specific contractual clause of the contract of lease, concluded by the two companies, was null and void because of an alleged breach of competition rules. The Court established that the contested provision infringes the statutory rule that prohibits the abuse of a dominant position. It was thus concluded that the clause was in fact null and void.

The Court found that the telecommunications undertaking was dominant in the market for data lines and that by imposing additional obligations (which were by their nature unrelated to the content of the contract), this undertaking abused its dominant position. The telecommunications undertaking had charged the lessee of data cables for the service performed – the lease of data lines. In the contractual price, the claimant had however also included the lease of modems, which were used in connection with the data lines, despite the fact that the modems were technically an incidental aspect of the data lines. The court found that this additional obligation (lease of modems), which was imposed by the telecommunications undertaking on the lessee, was in breach of competition rules and represented an abuse of the dominant position by the telecommunications undertaking. In light of this finding, the telecommunications undertaking could not demand the payment on the basis of such a contractual clause.

The telecommunications undertaking appealed, asserting that the lessee's contentions about its dominant position were without merit and that the Court could not assess whether there was a dominant position or its abuse based on such contentions. The telecommunications undertaking claimed that, in order to determine whether it has abused its dominant position, the Court would have had to determine first what the relevant product and geographic market was, establish its dominance in that market, and assess whether its dominant position was abused.

The appeal was upheld by the Court of appeal in its judgment I Cpg 845/2010 of 2 December 2010. The Court of appeal took the position that establishing dominance is not a fact, but a legal standard, which must be established by the court on the basis of legally-based relevant facts and circumstances. Therefore, for a legal conclusion to arise that an undertaking holds a dominant position, the relevant (product/service/geographical) market must be defined first, as

¹²⁰ The names of the parties are not disclosed in the judgment.

dominance can only be found on a given relevant market. The party that claims that abuse has taken place must put forward the facts and propose evidence, based upon which the relevant market can be defined and upon which it can be determined whether the scrutinised undertaking has indeed a dominant position in that market. Therefore, the Court of appeal concluded that, as the defendant did not state these facts, the Court of first instance could not determine the relevant market or the existence of dominance.

The second ruling to be considered is the judgment of the Circuit Court of Ljubljana in case No. VII Pg 473/2004 delivered on 14 September 2010. In this case, an undertaking selling home phone switchboards filed an action for damages in the amount of 354.440,41 EUR against a telecommunications undertaking, claiming that it suffered damages (lost profit) due to an abuse of dominant position by the telecommunications undertaking.¹²¹ The telecommunications undertaking, dominant in the market of verbal telephony, allegedly excluded the undertaking selling home phone switchboards from the market, due to its abuse of dominant position relating to the DDI (direct dial-in) services. In technical terms, the home phone switchboards are technically dependent on the DDI service, meaning that they cannot be used in the absence of this service. In the case at hand, the undertaking selling home phone switchboards claimed that the telecommunications undertaking increased the prices of the DDI service, withdrew the DDI from its offer and thus prevented the purchase of the DDI service by the end-consumers. In addition, the telecommunications undertaking allegedly charged a too low price for its own service that performed the same function as the DDI service, i.e. his own product that was in competition with the DDI service. The undertaking selling home phone switchboards alleged that the telecommunications undertaking lowered the prices of its own product below costs in order to increase its sales and to decrease the sales of the DDI service (to which the activity of the undertaking selling home phone switchboards was closely linked). The Court of first instance found that the telecommunications undertaking had indeed abused its dominant position but the court nevertheless rejected the damage claim because the claimant, the undertaking selling home phone switchboards, had not proved the existence of an actual damage. The undertaking selling home phone switchboards filed an appeal, which was declared unfounded by the Court of appeal.

The Court of appeal (High Court of Ljubljana, decision No. I Cpg 1473/2010 from 18th May 2011) upheld the position of the Court of first instance. It agreed that the claimant, the undertaking selling home phone switchboards, was indeed obliged to prove the damage sustained and that it failed to prove the

¹²¹ The names of the parties are not disclosed in the judgment.

actual amount of lost profit (profit which could have been justifiably expected taking into account an ordinary course of events or special circumstances, but which was not achieved because of the act of the person who caused the damage). Lost profit represents the difference between the economic situation of the person suffering damage after the damaging act and the economic situation in which that person would have been without the damaging act. The claimant did not provide the courts with sufficiently detailed information on the factual background of the case nor provide sufficient evidence to prove the worsening in its economic situation resulting from the abuse.

According to the Court of appeal, the simple mathematical calculation presented by the claimant was not enough to prove lost profit. Claims concerning the termination of contracts with its business partners and the non-conclusion of new contracts with potential clients were also insufficient and not specific enough to prove the damage, without proving the content of that business relationship and the difference between the revenues that the person suffering damage would have acquired in the absence of the damaging act and the expenses that would have occurred due to the accumulation of these revenues. The submitted claims were too abstract to even be challenged by the defendant.

The lacking factual basis could also not be replaced by an expert's opinion. The prerequisite for the appointment of an expert, who is a professional assistant of the court, is that the claimant presents and proves a factual basis from which the expert can make conclusions concerning the expected future. In the context of determining lost profit, an expert could be needed to help choose the most appropriate method and to assess the exact past business data, from which conclusions could be made about the business activities during the relevant period. However, the task of an expert is not to identify the factual basis of the claim from the claimant's business and accounting documentation. This would represent inadmissible evidence that would help the claimant replace the missing factual basis. An expert's opinion, which was provided by the claimant, included no data on the basis on which the expert made his calculations. The claim did, therefore, not provide a sufficient factual basis for such calculations to be made, not even in conjunction with publicly available data provided in annual reports. Only a more concrete factual basis for the calculation of lost profit would have provided a sufficient basis upon which the court, with the assistance of an expert, could assess the amount of lost profit. As the claimant did not provide such a factual basis, it did not prove the damages, and the High Court of Ljubljana rejected his appeal.

The third case to be analysed here concerns the *ABM v. Telekom Slovenije* (IV Pg 55/2002) proceedings where the main Slovenian telecoms company, Telekom Slovenije, was condemned to pay 2,3 million EUR in damages to

ABM due to the incumbent's abuse of its dominant position. In 2002, ABM filed a claim for 4 million EUR, which the court ultimately lowered to 2,3 million on the basis of an expert's opinion.

The Circuit Court in Ljubljana delivered its judgment on 14 November 2011 stating that Telekom Slovenije abused between 1999 and 2002¹²² the dominant position it held in the market of 'verbal telephony' (*govorna telefonija*). The effects of the abuse were evident in the closely related market of internet services¹²³. The incumbent abused its dominant position by including, in its packages for ISDN dial-up Internet connections, solely the CDs of its own daughter company, SIOL, and refusing to include the CDs of a competitor, ABM, despite the latter's repeated offers in this regard. By excluding ABM from its dial-up package offers, Telekom Slovenije created different conditions for competitors in the internet services market and placed ABM in a less favourable position than its subsidiary. In the relevant period, dial-up Internet access was not possible without the use of Telekom Slovenije's infrastructure, since it was, at that time, the sole owner and manager of the relevant infrastructure¹²⁴.

It is important to stress at the outset that the scrutinised damages claim was in fact a follow-up action. The Competition Protection Agency issued a decision stating that Telekom Slovenije abused its dominant position by refusing to include ABM's CDs into its ISDN dial-up packages¹²⁵. The decision was appealed by Telekom Slovenije, but it was subsequently confirmed by the first instance court¹²⁶ and once again by the Supreme Court which decided the case in the last instance¹²⁷. The civil court deciding the damages claim took into account the conclusions reached by the Supreme Court in the antitrust case considering the existence of abuse, the definition of the relevant market, and other particularities of the abuse¹²⁸.

The second important characteristic of this private enforcement judgment is that the civil court paid great attention to an opinion submitted by an expert with respect to the calculation of the actual damages¹²⁹. The claimant sued for

¹²² The abuse lasted only until 2002 since after that year, dial-up connections were only rarely used, as other types of Internet connection (such as broadband) entered the market. See the judgment in *ABM v. Telekom Slovenije* (IV Pg 55/2002), p. 17.

¹²³ The relevant geographic market was the entire territory of Slovenia. See the judgment in *ABM v. Telekom Slovenije* (IV Pg 55/2002), p. 5.

¹²⁴ See the judgment in *ABM v. Telekom Slovenije* (IV Pg 55/2002), pp. 2–5.

¹²⁵ See the Decision of the Competition Protection Office of the Republic of Slovenia no. 3073-9/02-4, available at: www.abm.si/uvk/UVK-2004-05-04.pdf.

¹²⁶ See case U 1155/2004-70.

¹²⁷ See case X Ips 749/2007-28.

¹²⁸ See the judgment in *ABM v. Telekom Slovenije* (IV Pg 55/2002), pp. 5–6.

¹²⁹ See, in this regard, the judgment in *ABM v. Telekom Slovenije* (IV Pg 55/2002), p. 14.

more than 4 million EUR, which the Court lowered to about 2,3 million on the basis of the opinion of an expert. The parties submitted their own expert opinions, but the Court followed the views of an economist that it appointed on its own initiative. According to the latter's calculations, ABM suffered damages in the amount of 2.306.285,75 EUR. The first estimation provided by the court's expert was in fact more than a million higher (3.816.164,74 EUR), but after the oral hearing and on the basis of the comments submitted by the parties to the first estimate, the expert lowered the sum later in the procedure to 2,3 million EUR. This amount incorporated two types of damages: regular damage (*damnum emergens*) and lost profit (*lucrum cessans*). The actual damage resulted from lost subscribers; lost profit consisted of the profit that the claimant would likely have realized had it retained those subscribers. In determining the amount of damage, the expert took as a basis a hypothetical situation, in which ABM and SIOL were the only two providers of ISDN packages in Slovenia, taking into account that dial-up ISDN Internet services were, at the time, a new offer. The Slovenian court entirely accepted its expert's opinion with regard to the amount of damages to be awarded.

The third aspect of the case that must be analysed concerns fees. Court fees and attorney's fees totalled 21.369,53 EUR. The former covered the fee for filing the claim (1.585,71), the fee for the judgment (1.642,00), and the fee for the expert (1.447,75). However, because the claimant succeeded in recovering only 75% of the claim (100% regarding the abuse of dominance, but only 50% as to the amount of damages), the defendant had to pay the claimant 75% of the total amount of court fees. Consequently, the amount of fees owed by the incumbent to ABM was 16.027,15 EUR¹³⁰.

Moreover, the procedure (only in the first instance) lasted nearly 9 years. The action was first filed in 2002, and the judgment was rendered in 2011. While it is well known that court cases in Slovenia may last several years, it is likely that the competent first instance court wanted to wait until the Supreme Court ultimately rules on the validity of the antitrust decision establishing Telekom Slovenije's abuse. By delivering its own judgment only after the final ruling of the antitrust case, the competent first instance court avoided potential inconsistencies in the case-law and contributed to its coherence.

Telekom appealed the first instance decision¹³¹ and the Court of appeal lowered the amount of damages awarded to ABM to 62.000 EUR, by calculating the damage only in relation to its actual customers, but not as regards all the potential customers that ABM would or could have acquired

¹³⁰ As to the exact calculations, see the judgment in *ABM v. Telekom Slovenije* (IV Pg 55/2002), p. 18.

¹³¹ See its announcement in media, available at: www.delo.si/gospodarstvo/podjetja/telekom-se-bo-pritozil-na-sodbo-v-zadevi-abm.html.

if the abuse of dominant position had not taken place. The Court of appeal decided that the defendant did indeed abuse its dominant position, but that the amount of damages awarded by the Court of first instance exceeded the amount of damages actually suffered.

The fourth case pertinent for the purposes of this article is *T-2 v. Telekom Slovenije*, also filed in 2007, where T-2 requested 129,56 million EUR in damages¹³² from Telekom Slovenije. T-2 claimed that the incumbent abused its dominant position. The Court of first instance rejected the claim of T-2 on 21 January 2013, stating that the claimant failed to submit proof with regard to the amount of damages¹³³.

3. Pending cases

A few pending cases have been identified for the purposes of this article although Slovenian courts are currently also dealing with other cases in the field of private enforcement. The majority of damage claims caused by competition law infringements concern the telecoms sector, mostly mobile telecommunications services.

In *Tušmobil v. Telekom Slovenije* commenced in 2007, the telecoms operator Tušmobil, first claimed that it was entitled to compensation of 21,5 million EUR, but later increased its claim to 28,2 million¹³⁴. The claimant stated that Telekom Slovenije favoured SIOL, a competing telecoms company controlled by the incumbent.

In 2008, a movie distributor, Blitz, filed an action against a cinema (*Blitz v. Kolosej Kinematografi*) claiming that the cinema abused its dominant position and requested damages of 943.449 EUR. This claim was a follow-up action to a decision issued in 2007 by the Competition Protection Office (now: Agency) where it stated that the cinema abused its dominant position in 2004 and 2005 by unduly refusing to show movies distributed by Blitz¹³⁵.

With regard to *Simobil v. Telekom Slovenije* and *Tušmobil v. Telekom Slovenije*, the claimants were the second and the third largest Slovenian operators of mobile telecommunications respectively. Both filed claims in 2011 against the

¹³² See, for example: <http://24ur.com/novice/gospodarstvo/t-2-terja-odskodnino-od-telekoma.html>.

¹³³ See, for example: www.delo.si/gospodarstvo/podjetja/sodisce-zavrnilo-130-milijonsko-tozbo-t-2-proti-telekomu.html.

¹³⁴ See, for example: www.delo.si/clanek/137898.

¹³⁵ Decision of the Competition Protection Office of the Republic of Slovenia no. 306-66/2006-52, 26 July 2007, available at: www.uvk.gov.si/fileadmin/uvk.gov.si/pageuploads/informacija_javnega_znacaja/ijz108.pdf.

incumbent due to the presumable abuse committed by its daughter company, Mobitel. Whereas Tušmobil sought damages amounting to 68 million EUR¹³⁶, Simobil estimated its damages to be 286,4 million EUR¹³⁷. They claimed that the abuse was due to the introduction by Mobitel of predatory pricing in the framework of a special subscriber package ('Itak Džabest'). The cases are a follow-up action to an antitrust decision, which declared that Telekom Slovenije has committed the said abuse¹³⁸.

4. Potential follow-up actions

It is not likely that consumers will sue for damages when a cartel or an abuse of a dominant position causes them financial harm because of the lack of collective claims in Slovenian law, the length of the proceedings and the small amount of the damages suffered individually. That amount might, for a single consumer, be much smaller than the court or the attorney's fees.

The well-publicised in Slovenia concerted increase in electricity prices is an example of potential follow-up litigations by consumers in the private enforcement of competition law field. The Competition Protection Office (now: Agency) issued a decision in 2008 stating that 5 electricity distributors engaged in a concerted practice and raised household prices electricity¹³⁹. This decision was later confirmed in part by the Slovenian Supreme Court¹⁴⁰. The profits that the 5 companies made because of the infringement totalled about 10 million EUR, but the damage caused to each individual client was very small, less than 20 EUR. Given the small amount of damages caused, consumers did not file damages actions against the perpetrators because procedural costs would exceed the damages. It is not without relevance also that court proceedings in Slovenia can take longer than a decade to resolve.

¹³⁶ Data on this claim was found in the media. See, e.g.: www.delo.si/gospodarstvo/makromonitor/telekom-slovenije-prejel-86-milijonsko-tozbo-tusmobila.html.

¹³⁷ See, e.g.: <http://24ur.com/novice/slovenija/simobil-od-telekoma-zahteva-286-4-milijona-evrov.html>.

¹³⁸ Decision of the Competition Protection Office of the Republic of Slovenia no. 228/2012, 12/03/12, available at: www.uvk.gov.si/si/zakonodaja_in_dokumenti/ostali_dokumenti/arhiv_odlocb/odloeba228.

¹³⁹ Decision of the Competition Protection Office of the Republic of Slovenia no. 306-168/2007-57, 06/08/08, available at: www.uvk.gov.si/fileadmin/uvk.gov.si/pageuploads/ijz069.pdf.

¹⁴⁰ The Supreme Court confirmed that part of the decision concerning the infringement of Slovenian law, but annulled the part that concerned EU rules. The Court decided that there was no infringement of EU law, but that Slovenian legislation had been violated. See, e.g., orders of the Supreme Court Sklep III Ips 111/2009, III Ips 117/2009, III Ips 118/2009, III Ips 116/2009, III Ips 115/2009. In theory, see T. Ivanc, 'Sklep Vrhovnega sodišča RS v zadevi Elektrodistributerji' (2010) 2(1) *Lexonomica* 129.

The Slovenian Consumer Association has issued a public notice in different media outlets calling upon the companies to repay what they owed. The Association noted also the related problem of legal costs, the absence of collective actions, and the absence of adequate ADR mechanisms¹⁴¹. A public information campaign does contribute to citizens' awareness of their rights to claim compensation in the field of competition law. The fact remains, however, that consumers are not likely to file damages claims if the amount of damage suffered by each claimant is small. The offending companies bowed down to public pressure and decided to issue a refund without forcing consumers to go to court¹⁴². It was not possible to determine, however, for the purpose of this article whether all of the dues were returned to all consumers. In other words, it remains unclear whether the voluntary reimbursement caused by public pressure was as effective as a court case would have been.

Another example of consumer damages lies in the concerted practice of several Slovenian banks whereby they charged their clients to withdraw money from other banks' ATMs. On 2 February 2006, four Slovenian banks, Nova Ljubljanska banka (NLB), Abanka, Nova Kreditna banka, and Maribor (NKBM) in Banka Celje, introduced a fee that their own clients had to pay to withdraw money from the ATMs of other banks. For example, a client of NLB had to pay a set fee when withdrawing money from an ATM belonging to Abanka. The banks all charged the same amount – 0,33 cents (or 80 SIT before the introduction of the EUR). The fact that all of the banks introduced the fee on the very same day is a strong indicator that this was the result of a concerted practice. The Slovenian Competition Protection Office (now: Agency) issued a decision in February 2007 establishing that the contested action represented a concerted practice and was thus banned by competition rules¹⁴³. Although the banks appealed the antitrust decision, both the first instance court¹⁴⁴ and the Supreme Court agreed with the Office¹⁴⁵.

This situation was similar to the damages caused by the concerted price increase implemented by the aforementioned electricity companies. Since consumers were once again reluctant to sue for damages, banks repaid the

¹⁴¹ Poziv ZPS nadzornim odborom elektrodistributerjem, www.zps.si/trg-in-cene/potrosnik-in-konkurenca/poziv-zps-nadzornim-odborom-elektrodistributerjem.html?Itemid=308.

¹⁴² See, for example, in media: www.energijadoma.si/znanje/zanimivosti/elektrodistributerji-z-razlicnimi-pogledi-na-preplacano-elek.

¹⁴³ Decision of the Competition Protection Office of the Republic of Slovenia no. 63/2007, 26/02/07, available at: www.uvk.gov.si/si/zakonodaja_in_dokumenti/ostali_dokumenti/arhiv_odlocb/odloca63.

¹⁴⁴ See judgment of the Administrative Court U 581/2007.

¹⁴⁵ See judgment of the Supreme Court X Ips 70/2010.

amounts due because of media and public pressured alone¹⁴⁶. Still, while they announced that they would repay the money, it is impossible to tell if they have actually repaid the entire amount due to all consumers.

IV. Conclusion

Private enforcement of competition law is an area that is slowly, but steadily, gaining importance in the Slovenian legal system. Although there was practically no jurisprudence in this area only a few years ago, Slovenian courts have now ruled on a few such cases already. The number of private enforcement proceedings will most likely increase in the future. Slovenia is thus beginning to follow European trends in enhancing and stimulating the possibilities of private enforcement of competition law. The new Prevention of the Restriction of Competition Act of 2008 in particular, which regulates the area of damages claims in a comprehensive and more detailed manner, should cause positive results in this area. So far, the majority of private enforcement claims have been filed in the telecoms sector.

Notwithstanding this trend, however, certain features of the Slovenian legal system still hinder full effectiveness of private enforcement, particularly important among them is the absence of collective claims¹⁴⁷. This lacunae is very clearly reflected by current jurisprudence which shows that so far, only companies, not consumers, have filed damages claims. Lack of collective or representative claims hinders consumers, who are unwilling or unable to sue for small amounts of damages. The most striking example in this regard is the case of consumer damages caused by the concerted price increase by electricity distributors. Due to the very small amounts of damage suffered by individual consumers, not a single damages claim was filed. It is unfortunate that there is no national equivalent of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure¹⁴⁸ (the latter is applicable to cross-border claims only). Sadly, it is easier for a claimant from another Member State to get compensation from a Slovenian company on the basis of EU law than it is for a claimant from Slovenia on the basis of its own. Private enforcement in Slovenia is relatively ineffective also because courts lack specialization

¹⁴⁶ See, e.g.: www.zps.si/za-medije/izjave-za-javnost-2010/zps-poziva-banke-k-vracilu-nezakonito-zaracunanih-provizij.html?Itemid=456 or www.dzp.si/domov/novice-projekti-aktualno/articleid/19/cbmoduleid/435.aspx.

¹⁴⁷ See Vlahek, [in:] *Zakon o preprečevanju omejevanja konkurence...*, p. 493.

¹⁴⁸ OJ [2007] L 199/1.

deciding in competition matters, and because juridical proceedings take a very long time to resolve¹⁴⁹.

Notwithstanding certain obstacles for private enforcement of competition law in Slovenia, current legislation already provides some incentives for its more effective development. The new Competition Act, that entered into force in April 2008, is already yielding positive results. While there is still much room for improvement, especially with regard to collective claims and ADR, the most important steps have already been taken to start private enforcement. It is also to be seen how the future Directive governing actions for damages under national law for infringements of competition law¹⁵⁰ – if it is adopted – will influence the effectiveness of private enforcement of competition law in Slovenia. With regard to future changes in this field, the Latin phrase *festina lente* is appropriate: it is important to adopt the necessary legislative changes as soon as possible, but always after due reflection and weighing the interests of all involved parties.

Literature

- Grilc, Bratina, Galič, Kerševan, Kocmut, Podobnik, Vlahek, Zabel, *Zakon o preprečevanju omejevanja konkurence s komentarjem (ZPOmK-1)* [The Prevention of the Restriction of Competition Act with Commentary], Ljubljana 2009.
- Ivanc T., The Order of the Supreme Court of the Republic of Slovenia in the case Electro distributors [‘Sklep Vrhovnega sodišča RS v zadevi Elektro distributerji’] (2010) 2(1) *Lexonomica*.
- Plavšak, Juhart, Jadek Pensa, Kranjc, Grilc, Polajnar Pavčnik, Dolenc, Pavčnik, *Obligacijski zakonik s komentarjem (Code of Obligations with Commentary)*, Vol. 1, Ljubljana 2003.
- Plavšak, Juhart, Vrenčur, *Obligacijsko pravo. Splošni del [Law of obligations. General part]*, GV Založba, Ljubljana 2009.
- Strohsack, *Odškodninsko pravo in druge neposlovne obveznosti [Law of Damages and other Non-contractual Obligations]*, ČZ Uradni list RS, 1990.
- Tzakas D.-P., ‘Effective collective redress in antitrust and consumer protection matters: A panacea or a chimera?’ (2011) 48(4) *Common Market Law Review*.
- Ude, Betetto, Galič, Rijavec, Wedam Lukić, Zobec, *Pravdni postopek, zakon s komentarjem [Civil Procedure, Act with Commentary]*, Vol. 2, Ljubljana 2006.

¹⁴⁹ Vlahek, [in:] *Zakon o preprečevanju omejevanja konkurence...*, p. 493.

¹⁵⁰ Proposal 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 of the European Union (COM(2013) 404, 11.6.2013).

Private Enforcement of Competition Law in Polish Courts: The Story of an (Almost) Lost Hope for Development*

by

Agata Jurkowska-Gomułka**

CONTENTS

- I. Introduction
- II. Polish jurisprudence on private enforcement of competition law
 - 1. General overview
 - 2. Back to the 1990s: two opposing positions of the Supreme Court (1993, 1995)
 - 3. *PKP Cargo/Wilan* (2004)
 - 4. *Warsaw Apartments* saga (2006, 2007)
 - 5. *MPEC* (2008)
 - 6. *TPPD* (2008)
 - 7. *Zinc* (2009)
- III. Legal, structural and institutional background of private enforcement of competition law in Poland
- IV. Conclusions

Abstract

The article reviews judgments of Polish courts on private enforcement of competition law between 1993 and 2012. A quantitative analysis of this jurisprudence shows that very few cases of that type exist at all. Their qualitative characteristics illustrate that: none of them referred to consumers; none of the claims was a 'pure' damage

* This article is based on the national report for Poland, written in the framework of the project 'Comparative Private Enforcement and Consumer Redress in the EU', led by Professor Barry Rodger, Strathclyde University Law School and financed by the Arts & Humanities Research Council (UK). The details of the project can be found at <http://www.clcpecreu.co.uk>.

** Dr. Agata Jurkowska-Gomułka, Centre of Antitrust and Regulatory Studies, Faculty of Management, University of Warsaw; Of-Counsel Modzelewska&Paśnik; agathajur@o2.pl.

claim; all of these cases focused on partial or general nullity of contracts concluded as a result of an anticompetitive practice; almost all of them concerned an abuse of a dominant position; only one referred to competition-restricting agreements. The relevant jurisprudence largely focused on the binding force of a prior decision of the Polish competition body upon civil courts. Even if the fact that some cases of this type were at all record might suggest that there is a potential for developing private enforcement of antitrust in Poland, nothing like this actually happened. Unfortunately, the Act on Collective Redress (in force since July 2010) has not contributed to a growth in the number of consumers (or any other entities) engaging in court disputes with undertakings restricting competition.

Résumé

L'article passe en revue les jugements des tribunaux polonais sur l'application privée du droit de la concurrence entre 1993 et 2012. Une analyse quantitative de cette jurisprudence montre que très peu de cas de ce type existent. Leurs caractéristiques qualitatives montrent que: aucun d'entre eux ne concernait les consommateurs; aucune des revendications ne constituait une demande d'indemnisation dans le sens exacte; tous ces cas axaient sur la nullité partielle ou générale des contrats conclus à la suite d'une pratique anticoncurrentielle; la quasi-totalité d'entre eux concernaient un abus de position dominante; une seule visait aux accords restreignant la concurrence. La jurisprudence se concentrait surtout sur la force contraignante d'une décision préalable de l'organe polonais de la concurrence prise par des tribunaux civils. Même si le fait que certains cas de ce type-là étaient notés, il pourrait suggérer qu'il existe un potentiel de développement de l'application privée de la concurrence en Pologne – rien que cela ne s'est réellement passé. Malheureusement, la Loi sur les recours collectif (en vigueur depuis juillet 2010) n'a pas contribué à une augmentation du nombre de consommateurs (ou d'autres entités) s'engageant dans des litiges judiciaires avec les entreprises qui restreignent la concurrence.

Classifications and key words: antitrust damage; collective redress; evidence; nullity; private enforcement of competition law; Poland; public enforcement of competition law.

I. Introduction

Public enforcement of competition law started in Poland in 1990 as an element of the widespread economic and political changes that took place at the turn of the 1980s and 1990s¹. At its outset, the nature of public enforcement

¹ The first antimonopoly act was adopted in 1987 but it was not a competition act in a modern sense so it should not be seen as the beginning of competition protection in Poland's market economy.

was strictly antitrust (antimonopoly), rather than competition law – Poland's first legislation was issued in 1990 and entitled the Act on Counteracting Monopolistic Practices². In later periods, the original act was replaced by the Act of 15 December 2000 on Competition and Consumer Protection³. The Act on Competition and Consumer Protection currently in force was adopted on 16 February 2007⁴. None of these legislative measures contained any specific provisions dedicated to private enforcement of competition law. However, each contained a rule stating that legal activities constituting anticompetitive (monopolistic) practices are null and void. Notwithstanding the above, private enforcement of competition law has always been recognised in domestic jurisprudence (even if the number of cases was minimal). The problematic judicial attitude towards the binding force upon civil courts of a final decision issued by the National Competition Authority (hereafter, NCA) was gradually reviewed and modified.

Even if there are no special provisions for private enforcement of competition law, the Polish lawmaker appreciated its significance in the overall system of competition law enforcement. Introducing the Competition Act 2007, the government justified the elimination of a specific legal provision permitting the initiation of antitrust proceedings upon a motion (request) of a private party by stating that private claims can be ruled upon by common (civil) courts instead. Although this solution was expected to increase the number of privately litigated competition cases, it has not yet been fulfilled.

In theory, private enforcement of competition law was admissible in Poland but there is very little empirical data to actually consider. A realistic view of private litigation in competition cases cannot be easily presented as gathering reliable data is difficult primarily because for many years there was no central database of the jurisprudence of Polish common courts⁵. Only cases dealt with by the Supreme Court were relatively easy to identify. Even the Ministry of Justice was not able to provide trustworthy data on rulings involving private enforcement of competition law seeing as these cases had no special indicators (they are listed as standard civil law cases). Under those circumstances, only legal databases created by private companies (such as LexPolonica Maxima by LexisNexis Poland or Lex by Wolters Kluwer Poland) or information provided

² Act of 24 February 1990 on Counteracting Monopolistic Practices and Consumer Protection (consolidated text: Journal of Laws 1997, No 49, item 318, as amended); hereafter, the Antimonopoly Act 1990.

³ Act of 15 December 2000 on Competition and Consumer Protection (consolidated text: Journal of Laws 2005 No 244, item 2080, as amended), hereafter, the Competition Act 2000.

⁴ Act of 16 July 2007 on Competition and Consumer Protection (Journal of Laws 2007 No 50, item 331, as amended); hereafter, the Competition Act 2007.

⁵ This situation changed in 2012 when such a database started operating under auspices of the Ministry of Justice (databases available at <http://orzeczenia.ms.gov.pl>).

directly by law firms could be considered as a source of research material. Through these sources, it was possible to collect information on the absolute majority (if not all) of cases involving private enforcement of competition law in Poland between 1990 and 2012. In order to confirm the limited outcomes of this research, a questionnaire on this subject was sent in May and June 2012 to antitrust lawyers in leading law firms operating in Poland⁶. One law firm responded that they are currently dealing with two such cases at a pre-trial stage (it is likely however that these disputes will never reach a court); another answered that one case is pending in a court in Krakow. The content of this article was prepared with the best knowledge of the Author as of 29 July 2012.

There have never been any legal obstacles in Poland for consumer redress within private enforcement of competition law (consumers have always had the possibility of raising an action) and yet none of the identified cases involved consumers – they were all cases between entrepreneurs (undertakings). It is worth noting that the possibility of lodging a collective claim was introduced in Poland for both consumers and entrepreneurs on 19 July 2010 (the date of the entry into force of the Act of 17 December 2009 on collective redress⁷). Although expectations in relation to this new legal instrument were very high⁸, Poland has not yet seen a case that uses collective claims as a tool in private enforcement of competition law by consumers or any other groups.

II. Polish jurisprudence on private enforcement of competition law

1. General overview

As mentioned, the number of privately litigated competition cases in Poland is very low; it thus seems justified to present them all together. Even a small number of cases makes it possible to assess the general characteristics of private enforcement of competition law in Poland. The qualitative characteristics of the existing jurisprudence show the following features:

- a) None of the cases referred to consumers; the claimants were always entrepreneurs (undertakings);

⁶ Research on private enforcement of competition law conducted by other Polish academics confirms the very low number of existing cases – see for instance D. Hansberry-Biegunska, *Poland*, [in:] I. K. Gotts (ed.), *The Private Competition Enforcement Review*, London 2011, p. 251–259.

⁷ Journal of Laws 2009 No. 7, item 44.

⁸ Some Polish authors seem to consider this opportunity as an important factor for developing private litigation in antitrust case, see M. Sieradzka, *Pozew grupowy jako instrument prywatnoprawnej ochrony interes konsumentów z tytułu naruszenia reguł konkurencji*, Warszawa 2012.

- b) None of the claims was a 'pure' damage claim (one case was based on an unjustified enrichment claim);
- c) All of the cases focused on partial or general nullity of contracts concluded as a result of an anticompetitive practice – in this sense, private enforcement of competition law in Poland has so far played the role of a 'shield' rather than a 'sword';
- d) Not only is the number of cases very low, but, from a research perspective, their content is also very poor. Actually, the key issue in relation to private enforcement of competition law concerns the binding force of a prior decision of a competition body upon civil courts. Jurisprudence evolved in this context considerably. In the 1990s, one Supreme Court judgment (ref. no. I CRN 238/93) recognized the full independence of, respectively, the rulings of civil courts and those of the competition authority in relation to the existence of an anticompetitive practice. By contrast, a second judgment delivered in that time period also by the Supreme Court (ref. no. III CZP 135/95) made a decision by the competition authority a necessary pre-condition for a subsequent ruling by a civil court. Recent jurisprudence on this issue seems to have settled: if an antitrust decision exists in a certain case, it is binding upon a court unless it is a commitment decision. If a competition authority has not yet acted, a civil court is totally free in making its own decision upon the existence or non-existence of an anticompetitive practice.
- e) Almost all the identified cases concerned an abuse of a dominant position; only one referred to competition-restricting agreements. This realisation might be related to the characteristics of Polish antitrust law and the transformation of the national economy. Reflecting the highly monopolized structure of Poland's pre-1989 market, the NCA has since its creation consistently dealt with a greater number of abuse than cartel (agreement) cases. It was not until recently that the proportion of abuse versus cartel cases has somewhat changed. The Polish NCA, the President of the Competition and Consumer Protection Office (hereafter, the UOKiK President), issued 28 decisions on competition restricting agreements and 72 decisions on abuse in 2011 as opposed to the 20 decisions on agreements and 82 on abuse issued in 2002. It is difficult to compare detailed data from earlier periods since the Antimonopoly Act 1990 prohibited monopolistic practices in general, without making a sharp distinction between competition restricting agreements and the abuse of dominance. Still, it is estimated that in 1992, for instance, 75% of the proceedings concerned practices which would be classified in today's terminology as an abuse of a dominant position.

- f) The majority of the identified cases concerned antitrust practices on relevant markets connected to infrastructure (energy supply, water supply, sewage collection). The majority of the contested practices resulted from unclear legislation regarding private and public ownership of infrastructure related to political and economic changes and the liberalization processes that took place mostly in the 1990s. The same practices could not occur nowadays as those legal problems were subsequently resolved. Only one case (ref. no. III CK 521/02) referred to rail transport services, one case (ref. no. III CZP 52/08) referred to an abuse of a dominant position in the sale of wood and the most recent case (ref. no. VI ACa 422/09) to an anticompetitive agreement on a market of zinc-processing.

Not once in these cases has a court applied EU law, but the Supreme Court suggested the possibility of its application in a 2008 resolution (ref. no. III CZP 52/08). The Supreme Court claimed therein that because the contested contract was concluded after Poland's accession to the EU in 2004, and the resulting antitrust decision was thus also issued after that time, Article 102 TFEU should have been applied. As a consequence, the Supreme Court referred in its resolution to arguments flowing from EU law (Article 3(2) Regulation 1/2003 and EU case-law).

2. Back to the 1990s: two opposing positions of the Supreme Court (1993, 1995)

The very first judgment identified in the framework of this research project as involving private enforcement of competition law in Poland concerned a case between *Przedsiębiorstwo Wodociągów i Kanalizacji in K.* (a local water-supply and sewage-collecting company; hereafter, PWK) and *Zakłady Pivowarskie in K.* (a local brewery; hereafter, Brewery). The case was ruled upon by the Supreme Court on 22 February 1993 (ref. no. I CRN 238/93⁹). Both companies entered into a contract involving sewage-collection. One of its clauses imposed a duty on the Brewery to pay penalty payments for letting pollution into the sewage system which did not meet the conditions prescribed in the contract. The PWK submitted a claim to a civil court demanding from the Brewery a certain amount of money as a penalty payment for the collected sewage. The payment was calculated on the basis of a regulation of the Council of Ministers being in force at the time when the contract was signed, but not at the time of the requested payment (as a consequence, the

⁹ OSNC 1994 No. 10, item 198.

payment was considered by the Brewery to be too high). Courts at first and second instance agreed with the claimant (PWK). Neither referred in their judgments to the Brewery's claim that PWK's behaviour should have been considered as a monopolistic practice prohibited by the applicable Article 4(1)(1) of the Antimonopoly Act 1990. It was the Minister of Justice, who requested a revision of the case by the Supreme Court according to applicable procedural provisions¹⁰, that drew the Supreme Court's attention to this very problem. The Court subsequently stated that 'an existence of a monopolistic practice – and consequently – nullity of a whole agreement or its part (...) may also be stated in a civil case between parties to a contract as a prerequisite for ruling on claims resulting from it'. The fact that the claim concerning the potentially 'monopolistic' character of the practice was not analysed by the lower instance courts resulted in the annulment of their rulings.

In an order of 27 October 1995, ref. no. III CZP 135/95¹¹, the Supreme Court refused to answer a preliminary question referred to it by the Court of Appeals in Lodz. The case concerned a dispute between a company managing districts of blocks of flats (Spółdzielnia Mieszkaniowa in S.; hereafter, SM) and an electricity company (Zakłady Energetyczne SA in Ł; hereafter, ZE). SM demanded from ZE the return of the former's expenditure on constructing electricity lines in its districts. The contract for building the lines was concluded in 1989; the lines were transferred to ZE in 1993. The contested lines became part of the electricity system managed by ZE. Although ZE became the owner of the contested lines, it refused to refund their construction costs to SM. According to SE, the refusal to share construction costs was a monopolistic practice by ZE. The preliminary question from the Court of Appeals did not raise any antitrust issues. However, the Supreme Court decided not to answer the preliminary question because of the effect on the original court proceedings of a decision issued already by the competition body (Antimonopoly Office). Unlike the panel of judges that delivered the aforementioned ruling (ref. no. I CRN 238/93), this time the judges took the view that the Antimonopoly Office, a central body of administration, was the sole institution competent to issue a decision on the existence or non-existence of monopolistic practices. The Supreme Court stressed that it is a specific feature of antitrust nullity that a violation of antitrust law required a prior decision of the NCA stating that the contested practice was, in fact, a prohibited monopolistic practice. In the Supreme Court's view, a civil court could declare that a given contract is null and void only when a respective decision of a competition body had already been adopted. This approach proved

¹⁰ This procedure is no longer in force, nowadays the party would stand up on its own with a cassation that replaced 'special revision of a lower instance judgment.

¹¹ OSP 1996 No. 9, item 112.

a real hurdle for the development of private enforcement of competition law in Poland. This realisation is illustrated by the fact that the 1995 judgment was followed by a number of years with no private enforcement cases at all – the next identified case did not reach the Supreme Court until 2004, a noticeable gap even for the underdevelopment Polish private enforcement of competition law field. The question whether antitrust decisions are binding upon civil courts is certainly an important factor in this context, especially since this problem is not resolved by statutory (no *Masterfoods*-like rule in legal provisions) but merely by jurisprudential means in Poland (as presented below).

3. *PKP Cargo/Wilan* (2004)

After a long gap of almost seven years, the Supreme Court delivered its next identified ruling on 28 April 2004, ref. no. III CK 521/02. A company, Wilan, applied for a cassation of a judgment rendered by the Court of Appeals in Krakow whereby it was forced to pay a certain amount of money to Polskie Koleje Państwowe Cargo (Polish Railways Cargo; hereafter, PKP Cargo). The Court of Appeals rejected Wilan's request to suspend its proceedings in order to await the outcome of related proceedings before the Antimonopoly Court¹². The antitrust dispute concerned an alleged abuse of a dominant position by PKP Cargo by way of the imposition of excessive prices and the application of burdensome contract terms, bringing unjustified profits to the dominant undertaking. The Court of Appeals dismissed the application to suspend its civil proceedings until a ruling of the Antimonopoly Court because the only document presented in this context by Wilan was a copy of the latter's motion to initiate antitrust proceedings before the NCA. In truth, this could have merely confirmed the opening of administrative proceedings, not juridical ones.

The Court of Appeals stated that there was no need to suspend its own proceedings because civil courts are exclusively competent to assess the validity of contracts. According to the Court, assessing the validity of the contested contract was, however, not possible here because Wilan did not show which of its clauses were – in its view – infringing the prohibition of an abuse of dominance contained in Article 8 of the Competition Act 2000. The Court of Appeals noticed also an internal discrepancy in Wilan's position. On the one hand, Wilan agreed with PKP Cargo's claims and yet, on the other

¹² The Antimonopoly Court (currently: Court of Competition and Consumer Protection) rules on appeals against decisions rendered by the competition authority. It is a civil, first-instance court which operates within the framework of public enforcement of competition law.

hand, it questioned the validity of a contract being the source of its confirmed obligations towards PKP Cargo.

The cassation request concerning the judgment of the Court of Appeals was based on two grounds. First, a procedural irregularity was alleged in the Court of Appeal's refusal to suspend its proceedings until the end of the proceedings before the UOKiK President. Second, a violation of substantive law was asserted (Article 8(3) in relation to Article 9 of the Competition Act 2000) whereby the Court of Appeals was of the incorrect opinion that civil courts are the only ones permitted to assess the validity of contracts concluded through the abuse. The cassation request stated instead that a civil court may affirm the nullity of such contract only if the UOKiK President has already adopted a decision confirming an anticompetitive practice. Concerning the first claim, the Supreme Court stipulated that 'the prejudicial character of rulings based on special regulations and adopted by specialized bodies (as in this case: the UOKiK President and Antimonopoly Court) may often lead to a justified application for suspension of a proceeding. It does not need to suspend a proceeding every time a party to a court proceeding initiates by its own motion an administrative proceeding'. In the Supreme Court's opinion, suspension of proceedings is not applicable mainly when a court sees no prerequisites for the nullity of the contested contract. Since the Supreme Court saw also no grounds for applying Article 8(3) of the Competition Act 2000, the cassation was ultimately dismissed.

4. *Warsaw Apartments* saga (2006, 2007)

The history of antitrust enforcement in Poland has its own 'saga' – a number of cases known as 'Warsaw Apartments' that were reviewed by the Supreme Court twice. A company active in the construction industry, Warsaw Apartments, invested in the provision of water and sanitary pipes to a district of its apartments. In 2000, Warsaw Apartments concluded three contracts with the municipal water supply company (Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji; hereafter, MPWiK). Accordingly, Warsaw Apartments built water and sanitary pipes with its own resources but the right of ownership to these pipes was then transferred to MPWiK. Warsaw Apartments raised a claim based on Article 405 of the Polish Civil Code (provisions on unjustified enrichment).

The Regional Court dealing with the case in the first instance noted that the relevant contracts had been concluded before the entry into force of the Act of 7 June 2001 on Collective Water Supply and Sewage Collection¹³.

¹³ Journal of Laws 2001 No. 72, item 747.

This legislation could thus not form the basis for the assessment of the case. The Court admitted that the only reason for concluding the contracts in question was that MPWiK was the sole water supply company in Warsaw. It held on it a dominant, if not even a monopolistic position. In the Court's view, the contracts between Warsaw Apartments and MPWiK contained some conditions which could be assessed from the perspective of the Competition Act 2000 as burdensome terms, bringing unjustified benefits to the dominant company (Article 8(2)(6) of the Competition Act 2000). If so, these contracts were null and void and Warsaw Apartments could demand the return of any unjustified enrichment from MPWiK up to an amount equivalent to the value of the water and sewage pipes it transferred.

The Court of Appeals in Warsaw disagreed with the Regional Court in its judgment delivered on 3 March 2005 (ref. no. I ACa 963/04). According to the Court of Appeals, the gratuitous transfer of the pipes' ownership by Warsaw Apartments to MPWiK was a necessary condition for integrating a new apartment complex with the existing water supply and sewage collection system. As a result, no anticompetitive behaviour was found and no basis for declaring that the contracts were null. Keeping in mind the aforementioned disparity in the two 1990s Supreme Court judgments that dealt with the binding power of antitrust decisions, the Court of Appeals referred to the later judgment of 27 October 1995 (ref. no. III CZP 139/95). It stated on its basis that declaring a contract null and void required a prior decision of the NCA on the anticompetitive nature of the dominant company's behaviour. When the case reached the Supreme Court, however, which delivered its ruling on 2 March 2006 (ref. no. I CSK 83/05¹⁴ (*Warsaw Apartments I*)) the views of the Court of Appeals were rejected. The panel of judges of the Supreme Court who assessed the Warsaw Apartments case based its decision on the Supreme Court ruling of 22 February 1994 (ref. no. I CRN 238/93) instead.

The Supreme Court confirmed first that legal activities resulting from prohibited anticompetitive practices are null and void *ipso iure*. In its view, such conclusion derives directly from Article 8(3) of the Competition Act 2000. Second, 'if the protection against competition restricting practices is based on a model of legal prohibition, a decision of the UOKiK President is of a declaratory nature only and does not constitute a new legal situation in the civil law sphere. Therefore, there are no obstacles for a court to make independent arrangements on contracts connected to competition restricting practices'. Third, in its administrative proceedings the UOKiK President protects the public interest; it is the personal (subjective) rights of parties that are protected in civil proceedings. As such, not every single practice

¹⁴ Case unreported.

restricting competition must be confirmed by a decision based on Article 9 of the Competition Act 2000.

The Supreme Court concluded that if proceedings before the UOKiK President had not been initiated yet, or existing proceedings have not yet been concluded with a decision based on Article 9 or 10 of the Competition Act 2000 (decisions declaring that the practice was anticompetitive), a court is competent to decide on its own on the anticompetitive nature of a practice constituting part of a contract, as a prerequisite for declaring the scrutinised contract null and void. Contrary to the views of the Court of Appeals, the Supreme Court also stated that the Act of 7 June 2001 on Collective Water Supply and Sewage Collection should have been applied in this case. This was so especially with respect to its Article 31 which imposed a duty on the interested parties to conclude a contract on the transfer of water and sewage pipes in relations such as those described in this case (between a construction company and a water supply and sewage collecting company). As a result, the judgment of the Court of Appeals in Warsaw was annulled and the case was returned for renewed assessment.

The Court of Appeals delivered its second ruling on 12 June 2006 (ref. no. I ACa 357/06) once again changing the judgment of the Regional Court by stating that the claims submitted by Warsaw Apartments were unfounded. The Court of Appeals noted that the Competition Act 2000, referred to by the Supreme Court, could not be applied in this case because all the contracts between the parties to the dispute had been concluded before it entered into force. There was thus a need to examine if the contracts in question were potentially contrary to Article 5(1)(6) of the Antimonopoly Act 1990. Actually, from the substantive point of view, there was hardly any difference between the two acts as both provisions had the same content – they stated that a prohibited abuse may take the form of the imposition of burdensome terms of contracts bringing unjustified benefits to a dominant company. The Court of Appeals did not find the behaviour of MPWiK abusive and, as a result, did not find any basis for declaring that the contested contracts were null. It was said, moreover, that even if the contracts had been null there would have been no legal basis for accepting a claim for unjustified enrichment because declaring contracts null had an *ex tunc* effect. Instead, Warsaw Apartments should have demanded the fulfilment of the contract and, if not fulfilled, it should have based its claims on *ex contractu* liability (Article 471 of the Polish Civil Code).

The Supreme Court delivered its second ruling on 14 March 2007 (ref. no. I CSK 454/06¹⁵ (*Warsaw Apartments II*)). It assumed therein that the Court of Appeals had ignored its binding statements from the earlier ruling of 2 March

¹⁵ Case unreported.

2006 whereby if contracts had turned out to be null, the claimant could not have demanded the performance of the contract but would have to raise a damages claim. In the subsequent part of the judgment, the Supreme Court focused on issues concerning the core of potential abuse in the light of the Act on Collective Water Supply and Sewage Collection. The cassation was upheld and the second judgment of the Court of Appeals was once again annulled. It can be assumed, even without the possibility to access the third judgment of the Court of Appeals, that it did not have great significance for the development of private enforcement of competition law in Poland since the key legal issues of this dispute seem to have been resolved by the earlier verdicts of the Supreme Court. Still, 'Warsaw Apartments' was not a purely antitrust case, it also related to the regulation of water supply and sewage collection.

5. *MPEC (2008)*

The judgment of the Supreme Court of 4 March 2008 (ref. no. IV CSK 441/07¹⁶) concerned a dispute between a local company supplying thermal energy (Miejskie Przedsiębiorstwo Energetyki Ciepłej; hereafter, MPEC) and a local company managing blocks of flats (Spółdzielnia Mieszkaniowa 'P'; hereafter, SM). The case originated before the Regional Court in Białystok when MPEC demanded from SM a payment (plus interest) for thermal energy delivered in May 2002. In accordance with applicable provisions, the President of the Energy Regulatory Office stated on 4 October 2001 that a sales contract on thermal energy was concluded between MPEC and SM. Fulfilling this contract, MPEC delivered thermal energy to SM in May 2002 with an invoice of over 692,000 PLN. In a decision of 19 September 2002, the UOKiK President recognized as anticompetitive the imposition of burdensome contract terms by charging a tariff that was partly invalid as a consequence of the Act of 26 May 2000 amending the Energy Law Act. The prohibited practice was implemented by MPEC between 1 July 2000 and 30 September 2000. Because of the partly invalid tariff, SM overpaid more than 210,000 PLN in this period. As a result, the court reduced the sum to be paid by SM to MPEC by this amount. Both the Regional Court and the Court of Appeals accepted the possibility of recouping the overpaid amount. The Supreme Court, deciding on the cassation in this case, shared the view of the Court of Appeals that a decision of the UOKiK President was binding upon a civil court.

¹⁶ LEX no. 376385.

6. TPPD (2008)

The Supreme Court dealt with private enforcement of competition law most recently in a resolution delivered on 23 July 2008 (ref. no. III CZP 52/08) as a response to a preliminary question posed to the Civil Chamber of the Supreme Court by the Regional Court in Torun. The case concerned a dispute between a state forestry enterprise (Skarb Państwa – Nadleśnictwo Dobrzejewice; hereafter, SP) and a company active in the timber industry (Toruńskie Przedsiębiorstwo Przemysłu Drzewnego SA; hereafter, TPPD). Both entities concluded a contract on the write off of bad debts. SP claimed that the contract should be considered invalid as it was concluded as a result of the abuse of a dominant position by TPPD who made its conclusion a condition for the sale of wood. The Local Court (court of first instance) dismissed SP's demand, which in turn appealed the first instance judgment to the Court of Appeals in Torun. The latter sought a preliminary ruling from the Supreme Court, asking if a decision issued by the NCA declaring that a certain practice infringed the abuse prohibition is binding in a civil case in which one of the prerequisites is the nullity of a contract. Supposing that the answer to the first question was yes, the Court of Appeals asked whether a commitment decision issued by the UOKiK President was also binding.

The Supreme Court stated that if it is necessary to find nullity of a legal activity, a court may independently decide on an infringement of the abuse of dominance prohibition, unless the UOKiK President has already issued a final decision on such violation. Referring to the second question, the Supreme Court pointed out that a commitment decision could not be treated as final because it is only based on the probability of an anticompetitive practice rather than on its certainty. In the Court's view, the finding that a legal activity constitutes an abuse of a dominant position is equivalent to stating that a company restricted competition. However, in court proceedings this assessment is only a condition (prerequisite) for the finding of nullity of a legal activity. The Supreme Court stressed that private interests are protected in court proceedings by declaring a legal activity ineffective where it was undertaken through the abuse of a dominant position¹⁷.

¹⁷ This case was broadly discussed in Polish doctrine: see e.g. A. Jurkowska, 'W stronę umocnienia prywatnoprawnego wdrażania zakazów praktyk ograniczających konkurencję – glosa do uchwały SN z 23.07.2008 r. (III CZP 52/08)' (2010) 5 *Europejski Przegląd Sądowy*; R. Poźdźnik, 'Glosa do uchwały SN z 23 lipca 2008 r., sygn. III CZP 52/08' (2009) 7-8 *Orzecznictwo Sądów Polskich*; R. Trzaskowski, 'Kompetencja sądu do ustalania nieważności czynności prawnych będących przejawem nadużywania pozycji dominującej oraz nieważności porozumień ograniczających konkurencję' (2009) 9–10 *Palestra*.

7. Zinc (2009)

Two companies active in the market for zinc-processing concluded a contract whereby one of them obliged itself not to contract with a certain number of co-operators (an exclusivity clause). Breach of this condition was subjected to a penalty payment of 100,000 EUR. The said party ultimately breached its obligation but did not want to pay the penalty because it claimed that the non-competition clause was contrary to Article 6 of the Competition Act and thus invalid. The court of first instance decided that a contract cannot be considered invalid, resulting from an infringement of the Competition Act, if there were no antitrust proceedings confirming the infringement of the relevant prohibition. The Court of Appeals in Warsaw did not share the views of the first instance court and annulled the judgment in a ruling of 25 November 2009 (ref. no. VI ACa 422/09¹⁸). The Court of Appeals noted that settled jurisprudence does not require any preconditions (such as completing antitrust proceedings) for a civil court to rule on the invalidity of a contract which is contrary to the Competition Act.

III. Legal, structural and institutional background of private enforcement of competition law in Poland

The key feature of the legal, structural and institutional background of private enforcement of competition law in Poland is that there is no single special procedural provision for this purpose. Competition cases are treated as 'normal' civil law cases. Claims can be based either on the Civil Code or on the Combating Unfair Competition Act of 16 April 1993¹⁹ (hereafter, CUCA). Article 3(1) of the latter provides a broad concept of 'unfair competition practice' which also covers anticompetitive practices²⁰. However, CUCA can form the basis for claims for entrepreneurs only, not for consumers. An issue under discussion at the moment is whether consumer claims can be based on the Combating Unfair Market Practices Act of 23 August 2007²¹. This act should, on the one hand, be seen as complementary (from the consumers'

¹⁸ LEX No. 1120262.

¹⁹ Consolidated text: Journal of Laws 2003 No. 153, item 1503, as amended; hereafter, Unfair Competition Act.

²⁰ See T. Skoczny, M. Bernatt, [in:] J. Szwaja (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2012, p. 566; J. Sroczyński, M. Mioduszewski, [in:] M. Zdyb, M. Sieradzka (eds), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, Warszawa 2011, p. 477.

²¹ Journal of Laws 2007 No. 71, item 1206; hereafter, Unfair Market Practices Act.

point of view) to the Combating Unfair Competition Act – while the latter allows claims by entrepreneurs, the former should create the legal basis for consumer claims. On the other hand, however, it is uncertain if the legal definition of ‘an unfair market practice’ contained in Combating Unfair Market Practices Act can easily be applied to practices restricting competition within the meaning of the Competition Act. Naturally, competition restricting practices can influence the situation of an individual consumer. Nevertheless, it cannot be said that an anticompetitive practice in the meaning of Articles 6 or 9 of the Competition Act 2007 ‘significantly distorts or may distort the market behaviour of an average consumer (...)’, as required by Article 4(1) of the Combating Unfair Market Practices Act²².

There are no special courts or tribunals dealing with competition cases in private litigations. Even if these are unfair-competition-type cases, they are judged by ‘normal’ civil courts (disputes between entrepreneurs are resolved by a subcategory of civil courts called ‘commercial courts’). Within the public enforcement system, there is a special competition court – the Court of Competition and Consumer Protection Court that delivers judgments on appeals against decisions of the UOKiK President. Its jurisprudence, as well as that of other courts engaged in public enforcement of competition law (the Court of Appeals in Warsaw and the Supreme Court – Chamber of Labour, Social Insurance and Public Matters), can be seen as an important source of intellectual inspiration for civil courts in assessing competition cases.

Till 3 May 2012, the Civil Procedure Code used to contain separate procedural rules for proceedings before commercial courts (proceedings between entrepreneurs). This legal solution was changed by amendments to the Civil Procedure Code which abolished the contested rule of ‘evidence limitation’ whereby a plaintiff used to be obliged to contain in his action (initiating a proceeding) all of his statements and all of the supporting evidence²³ (if any evidence was missing at this point, only the court could exceptionally agree to presenting new evidence later in the proceedings). The rule of ‘evidence limitation’ was seen as inhibiting court proceedings in commercial cases (including competition cases). Its elimination from

²² Views supporting the possibility of using the Unfair Market Practices Act as basis for private litigation in competition matters are expressed by: P. Podrecki, ‘Civil Law Actions in the Context of Competition Restricting Practices Under Polish Law’ (2009) 2(2) *YARS*; A. Piszcz, ‘Still-unpopular Sanctions: Developments in Private Antitrust Enforcement in Poland After the 2008 White Paper’ (2012) 5(7) *YARS* 67; A. Stawicki, ‘Poland’, [in:] G. Blanke, R. Nazzini (eds), *International Competition Litigation: A Multi-jurisdictional Handbook*, Kluwer Law International BV 2012, p. 572.

²³ *Ex Art. 479* ^{12 i 14} of the Civil Procedure Code.

Polish civil procedure rules can be seen as facilitating private enforcement of competition law.

A standard set of claims that can be submitted in the case of a violation of competition law includes: 1) a claim to repair the damage which can be shaped as tort (Article 415 of the Civil Code) or contractual civil liability (Article 471 of the Civil Code); Article 18(1)(4) CUCA; 2) a claim to cease an unlawful action (Article 439 of the Civil Code; Article 18(1)(1) CUCA); 3) a claim to remove the results of unlawful actions or to restore a situation existing before a breach (Article 363(1) of the Civil Code; Article 18(1)(2) CUCA); 4) a claim to hand over unjustified benefits (Article 405 and following of the Civil Code; Article 18(1)(5) CUCA); 5) a claim to confirm the existence of a legal relationship (that is, a claim to decide on potential nullity of a legal activity; Article 189 of the Civil Procedure Code). An entrepreneur whose interests may have been threatened or violated can additionally demand a single or repeated statement of a given content and in a prescribed form (Article 18(1)(3) CUCA) and/or an adjudication of an adequate amount of money to a determined social goal connected with the support of Polish culture or related to the protection of national heritage (provided the act of unfair competition was deliberate; Article 18(1)(6) CUCA).

Regarding civil liability for damages, the Polish Civil Code requires proof of the damage, proof of the action that caused the damage and of a factual relationship between them. It is also necessary to prove fault (on the part of the entity violating antitrust law). In tort liability, the concept of fault primarily covers deliberate activities so it might sometimes be difficult to prove damage resulting from certain abuses of a dominant position. In contractual liability, the concept of fault covers either an intention not to fulfil an obligation or involuntary negligence in performing an obligation. Standard compensation covers real damage, lost profits and – if a case so requires – interest; the current annual rate established by the Council of Ministers is 13%. Article 415 of the Civil Code (deals with civil liability for tort) is also seen as the basis for the compensation of non-material damages that are excluded from contractual liability. Due to general civil liability rules, exemplary or punitive damages cannot be claimed. Still, the Polish Copyright Law Act recognizes multiple damages²⁴, modelled on US treble damage, in its Article 79(1)(3)(b)²⁵.

As liability in competition cases is based on general rules of civil law, it can also be based on joint liability. If damage is paid by a given member of

²⁴ A critical approach to this type of damage in Polish law see: P. Podrecki, *Środki ochrony praw własności intelektualnej*, Warszawa 2010, p. 300.

²⁵ Act of 4 February 1994 on Copyright Law and Neighbouring Rights (consolidated text: Journal of Laws 2006 No 90, item 631, as amended).

a cartel, the latter will have a claim for a contribution against other members of that cartel.

There are no obstacles to raising either stand-alone or follow-on actions. According to the analysed jurisprudence, a decision of the NCA is not a necessary condition for submitting a claim to a civil court. However, jurisprudence confirms also that for follow-on actions a prior final antitrust decision, which declares that a practice restricts competition, is binding upon a civil court; this rule does not apply to commitment decisions. Where court proceedings and administrative proceedings before the NCA are concurrent, courts are not obliged to suspend their own proceedings awaiting an antitrust decision. However, stalling civil proceedings is allowed according to Article 177(3) of the Civil Procedure Code; suspending them was also recommended by jurisprudence. Neither legislation nor jurisprudence provide any rules on the potential influence of prior civil court judgments on antitrust decisions. However, the separation of powers principle would appear to exclude such possibility²⁶.

As mentioned, there are no special rules for private litigations in competition cases. As a result, the general provision on the burden of proof applies – Article 6 of the Civil Code presumes that the burden of proof rests fully on a claimant.

Regarding standing in competition cases, both entrepreneurs (competitors, contractors) as well as consumers may submit a claim. It must be stressed once again that consumer claims cannot be based on the Combating Unfair Competition Act. Because of the requirement to prove a direct factual relationship between the alleged damage and the illegal activity, it is unlikely that an indirect purchaser could be successful in claiming damages or that a defendant could benefit from a passing-on defence.

No special rules on discovery (disclosure) of evidence are available in civil cases including those based on competition law; the exchange of information between parties may also only be of an informal nature. Disclosure-like procedures are seen in Polish legal literature as a breach of the burden of proof rule and a limitation of the privilege against self-incrimination. Parties may, however, ask the court to place an obligation upon another party to provide particular evidence, but a court is not bound by such requests. A court may decide on its own to issue an order forcing a party to provide particular evidence or documentation²⁷.

²⁶ A. Jurkowska-Gomułka, *Publiczne i prywatne egzekwowanie zakazów praktyk ograniczających konkurencję: w poszukiwaniu zrównoważonego modelu współistnienia*, Warszawa 2013, p. 317–319.

²⁷ *Ibidem*, p. 273–282.

Applicants submitting follow-on claims have little chance to gain access to the case file of the respective proceedings before the UOKiK President. In fact, the Competition Act 2007 guarantees access to the case file only to the parties of the actual antitrust proceedings (only entrepreneurs against whom the proceedings have been initiated); potential victims of a cartel or an abuse of dominance do not have access to the case file. The only way to view evidence collected in antitrust proceedings is in accordance with the Access to Public Information Act of 6 September 2001²⁸. A recent judgment of the Supreme Administrative Court of 17 June 2011 (ref. no. I OSK 490/11) confirms that some data collected by the NCA in its antitrust proceedings should be treated as public information with free public access. The Supreme Administrative Court stated also that even documents formulated by an entrepreneur as a form of implementing an antitrust decision (such as a new form of contracts for instance) can be seen as public information under the Act. The position of the judiciary gives hope for a rather favourable interpretation of the Access to Public Information Act for applicants in private litigations cases based on competition law.

Providing access to information collected by the UOKiK President in the context of civil proceedings faces also difficulties caused by the unclear content of Article 73 of the Competition Act 2007. Article 73(1) prescribes that ‘information received in the course of the proceeding may not be used in any other proceedings based on separate provisions (...)’. A literal interpretation of this provision could exclude data gathered in antitrust proceedings from the duty to provide access to the case file. However, Article 73(2)(5) states that the aforementioned provision shall not apply to ‘providing competent authorities with information which may indicate that other separate provisions have been infringed’. It is unclear whether Article 73(2)(5) of the Competition Act 2007 extends the term ‘competent authorities’ to civil courts in competition cases²⁹.

It should be noted that civil courts can assist parties in discovering evidence. Pursuant to Article 248(1) of the Civil Procedure Code, everyone is obliged to present – upon a demand of the court – a document that can prove a fact crucial for resolving a case (unless it contains secret information). There is no reason to exclude the NCA from the duty to present parts of its case files upon a demand from a civil court.

Private litigation in competition cases cannot be supported by the UOKiK President as *amicus curiae* because there is no legal provision for such role for entities other than non-governmental organizations. In my view, there are also

²⁸ Journal of Laws 2001 No 112, item 1198, as amended.

²⁹ See e.g. M. Bernatt, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 1303; B. Turno, *Leniency – program łagodzenia kar pieniężnych w polskim prawie ochrony konkurencji*, Warszawa 2013, p. 551.

no provisions granting such standing to the European Commission pursuant to Article 15 of Regulation 1/2003.

The Competition Act 2007 provides for a special limitation period to institute antitrust proceedings before the UOKiK President – the time limit extends to a year since the end of the year when the alleged infringement of competition law was terminated. The expiry of this limitation period does not influence the possibility to submit a claim based on the Civil Code or the Combating Unfair Competition Act. General limitation periods established in the Civil Code apply to competition cases also – the time limit for bringing an action for damages resulting from a tort generally passes after three years from the moment when the injured party discovered the damage and found out the identity of the person obliged to redress it. The absolute limitation period is ten years from the moment the action resulting in the alleged damage took place (Article 442 of the Civil Code). The limitation period in commercial cases (cases with entrepreneurs as parties) is three years regardless of whether they are based on the Civil Code or the Combating Unfair Competition Act.

Pursuant to the Act of 28 July 2005 on Court Costs and Fees in Civil Matters³⁰, the fee for lodging a claim regarding material rights (pecuniary claims) amounts to 5% of the value of the object of the dispute, not less than 30 PLN (about 7.5 EUR) and not more than 100,000 PLN (about 25,000 EUR). In a claim for immaterial rights (non-pecuniary claims), there is a fixed fee, regardless of the value of the dispute, which is not less than 30 PLN and not more than 5,000 PLN (not exceeding 1,250 EUR). If the value of the dispute cannot be determined, the president of the court settles an interim fee (between 30 PLN and 1,000 PLN). However, what Poland really struggles with is not necessarily the amount of the fee, but the fact that civil court proceedings last an average of 540 days. During this period, the plaintiff's fees are 'frozen' – such long term monetary investment in court proceedings is seen as another factor discouraging claims in competition cases. Another factor deterring civil claims in competition cases is that the maximum amount of attorney's fees that may be awarded to the winning party is 10,000 EUR. This is a rather low figure considering the complex nature of antitrust disputes.

Finally, the opportunity for collective redress was introduced in Poland quite recently, in July 2010, on the basis on the Collective Redress Act of 17 December 2009. Practical experience with collective redress remains limited and thus many questions are still open regarding the operation of this mechanism. The Polish solution is designed as an opt-in model. The collective redress regime can be applied in consumer cases, defective product liability

³⁰ Journal of Laws 2005 No 167, item 1398 as amended.

cases and tort liability cases. Although Article 1(2) of the Collective Redress Act does not mention competition disputes directly, they can be treated as tort liability cases and as such, they are subject to the Collective Redress Act. Only entities which hold claims of ‘one kind based on the same facts’ (Article 1(1) of the Collective Redress Act) are entitled to participate in collective redress. There are no other limitations with respect to who is entitled to use it. The applicability of the Act is not limited to consumers or natural persons – it also covers legal persons and even organizational entities without legal personality. This broad scope of potential claimants for collective redress was subject to strong criticism during the public consultation process of the draft act. Nonetheless, this is a positive solution for private enforcement of competition law seeing as it potentially enhances the effectiveness of private litigation in competition cases.

Either pecuniary or non-pecuniary claims can be submitted as collective actions – although this realisation is not expressed directly in the Act, it can be interpreted *a contrario* from its Article 2(1). All members of the group are entitled to a unified amount of damage provided the ‘circumstances of the case are the same’. Despite the fact that it is not actually possible to assess the Collective Redress Act in practice, views on it are generally quite negative. There is considerable scepticism on whether the current regime can be effective. It is certain also that collective redress in Poland is not particularly consumer-oriented.

The Polish legal system has not created any incentives for private litigations in competition cases. Recent years saw a number of opportunities to change this situation being wasted. In 2011, the Civil Procedure Code was fundamentally amended and yet no reference to private litigation in competition cases was made. Similarly, the UOKiK President announced in May 2012 a draft amendment to the Competition Act 2007 with no effect upon its private enforcement either³¹. Neither were there any relevant proposals made during the public consultations process on the draft amendment. Still, it is of little wonder that private litigation issues were not covered by Poland’s recent legislative proposals. The Commission White Paper has generated hardly any debate on private enforcement of competition law, and private litigations in competition cases have clearly not been a hot topic for Polish legal doctrine³².

³¹ The draft proposes a few new institutions for Polish competition legislation such as settlements, fines for antitrust breaches imposed on individuals or ‘leniency plus’. The amendment act was submitted to the lower chamber of the Polish Parliament in August 2013; the legislative works are still in progress as of October 2013.

³² See A. Piszcz, ‘Pakiet Komisji Europejskiej dotyczący powództw o odszkodowania z tytułu naruszenia unijnych reguł konkurencji oraz zbiorowego dochodzenia roszczeń’ (2013) 5(2) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.

Absence of special legal provisions does not mean that private enforcement is not possible – competition cases can be litigated in Poland pursuant to general rules on civil liability. However, adapting general civil procedure rules for antitrust cases can be quite challenging for courts.

IV. Conclusions

Since the Ashurst Report in 2004, private enforcement of competition law in Poland has not undergone any substantial changes. It is still underdeveloped, especially regarding consumer redress – the few cases that can be identified in the history of Polish private litigations in competition matters involved entrepreneurs only. This is somewhat surprising seeing as private litigations remain the sole manner in which consumers can intervene directly against anticompetitive practices. Antitrust proceedings can only be instituted *ex officio* in Poland by the UOKiK President. Consumers, as well as any other entities, are allowed to submit to the NCA non-binding information on a suspected infringement, but they cannot force the UOKiK President to act upon it. A stronger incentive is surely needed to intensify private enforcement of competition law in Poland. In the opinion of the Author, there is no chance for a legislative initiative in this area at the national level without any EU law ‘inspiration’. Moreover, court proceedings are seen as time and money consuming, with a low likelihood of success. As a result, a sort of disbelief in the national judicial system forms another obstacle for the development of private enforcement of competition law in Poland. The best scenario for developing private litigation in domestic competition cases would probably be a consumer success story, preferably in a cartel case, against well-known companies, on a relevant market for commonly used products (a Polish ‘*Manfredi*’ case). Such a precedent would surely be an important factor in encouraging potential private litigants.

Literature

- Blanke G., Nazzini R., *International Competition Litigation: A Multi-jurisdictional Handbook*, Kluwer Law International BV 2012.
- Gotts I. K. (ed.), *The Private Competition Enforcement Review*, London 2011.
- Jurkowska A., ‘W stronę umocnienia prywatnoprawnego wdrażania zakazów praktyk ograniczających konkurencję – glosa do uchwały SN z 23.07.2008 r. (III CZP 52/08)’ [‘Towards strengthening private enforcement of prohibition of competition-restraining

- practices – commentary on the Supreme Court resolution of 23 July 2008 (III CZP 52/08)’] (2010) 5 *Europejski Przegląd Sądowy*.
- Jurkowska-Gomułka A., *Publiczne i prywatne egzekwowanie zakazów praktyk ograniczających konkurencję: w poszukiwaniu zrównoważonego modelu współistnienia* [Public and private enforcement of prohibitions of anticompetitive agreements: searching for sustainable model of co-existence], Warszawa 2013.
- Piszcz A., ‘Pakiet Komisji Europejskiej dotyczący powództw o odszkodowania z tytułu naruszenia unijnych reguł konkurencji oraz zbiorowego dochodzenia roszczeń’ [‘Commission “package” on actions for damages based on EU competition law infringements and collective redress’] (2013) 5(2) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Piszcz A., ‘Still-unpopular Sanctions: Developments in Private Antitrust Enforcement in Poland After the 2008 White Paper’ (2012) 5(7) *YARS*.
- Podrecki P., ‘Civil Law Actions in the Context of Competition Restricting Practices Under Polish Law’ (2009) 2(2) *YARS*.
- Poźdźik R., ‘Głosa do uchwały SN z 23 lipca 2008 r., sygn. III CZP 52/08’ [Case comment to the Supreme Court resolution of 23 July 2008, ref. no. III CZP 52/08] (2009) 7–8 *Orzecznictwo Sądów Polskich*.
- Sieradzka M., *Pozew grupowy jako instrument prywatnoprawnej ochrony interes konsumentów z tytułu naruszenia reguł konkurencji* [Collective redress as a tool for private protection for consumers’ interest in antitrust cases], Warszawa 2012.
- Skoczny T., Jurkowska A., Miąsik D. (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, [Competition and consumer protection act. Commentary], Warszawa 2009.
- Szwaja J. (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz* [Combating Unfair Competition Act. Commentary], Warszawa 2012.
- Turno B., *Leniency – program łagodzenia kar pieniężnych w polskim prawie ochrony konkurencji* [Leniency in Polish competition law], Warszawa 2013.
- Trzaskowski R., ‘Kompetencja sądu do ustalania nieważności czynności prawnych będących przejawem nadużywania pozycji dominującej oraz nieważności porozumień ograniczających konkurencję’ [‘Judicial right to identify illegality of legal activities reflecting an abuse of a dominant position’] (2009) 9–10 *Palestra*.
- Zdyb M., Sieradzka M. (eds), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz* [Combating Unfair Competition Act. Commentary], Warszawa 2011.

Private Enforcement of Competition Law – the Case of Estonia*

by

Karin Sein**

CONTENTS

- I. Introduction
- II. Legal, structural and institutional background
 - 1. Types of remedies available
 - 2. Limitation periods and the possibility of the passing-on defence
 - 3. Legal fees and costs in competition proceedings
- III. Estonian jurisprudence on private enforcement of competition law
 - 1. Reasons for the scarcity of jurisprudence
 - 2. First Supreme Court ruling on private enforcement of competition law
- IV. Conclusions

Abstract

Jurisprudence on private enforcement of competition law has so far been almost non-existent in Estonia. Most cases where competition law issues are raised within the context of damage claims are solved by out-of-court settlements. One of the main reasons for this scarcity is the fact that this is a fairly unfamiliar field for Estonian lawyers, attorneys and judges. The first reason for the low number of private enforcement of competition law cases in Estonia is therefore lacking awareness and legal uncertainty. The other key barrier lies in burden of proof issues associated with damage claims. It has proven very difficult in practice for an injured person to prove that he/she sustained damages as a result of a competition

* This article is based on the national report for Estonia, written in the framework of the project 'Comparative Private Enforcement and Consumer Redress in the EU', led by Professor Barry Rodger, Strathclyde University Law School and financed by the Arts & Humanities Research Council (UK). The details of the project can be found at <http://www.clpecreu.co.uk>.

** Karin Sein, dr. iur, Associate Professor of Civil Law, Faculty of Law, University of Tartu, Estonia; karin.sein@ut.ee.

law infringement; even more so to prove the actual extent of such damages. There is no juridical practice yet on how to calculate business losses and judges face considerable difficulties when confronted with this task. Another problem lies in the availability of evidence. As discovery is not possible in Estonia, its civil procedure rules make it difficult for claimants to obtain evidence necessary to prove the facts underlying their claims.

Estonian law does not provide for a special procedure for antitrust damage claims – there are no collective claims, no class actions, nor actions by representative bodies or other forms of public interest litigation (no collective redress). It is thus only possible to file damage claims arising from competition law infringements either in normal civil proceedings or as a civil claim within the framework of criminal proceedings on a competition law crime. The need for collective redress has not yet been subject to a legal debate at the national level, and there has not been a single private enforcement case opened by a consumer in Estonia so far. The only Supreme Court case in existence in this field, which was decided in 2011, has cleared the basis and availability of damage claims for competition law infringement. It has shown, at the same time, the many problems connected to calculating damages in this context.

Résumé

La jurisprudence relative à l'application privée du droit de la concurrence a été jusqu'à présent presque absente en Estonie. La plupart des cas où les questions de droit de la concurrence sont soulevées dans le cadre de demandes d'indemnisation, sont résolus par des règlements à l'amiable. L'une des raisons principales de cette pénurie est le fait que c'est un domaine assez inconnu pour les avocats, les procureurs et les juges estoniens. La première raison pour le faible nombre de cas de l'application privée du droit de la concurrence en Estonie est donc la manque de conscience et l'incertitude juridique. L'autre obstacle majeur réside dans des questions relatives à la charge de preuve liées à des demandes d'indemnisation. Il s'est avéré très difficile en pratique pour une personne blessée à prouver qu'il/elle a subi des dommages à la suite d'une infraction au droit de la concurrence; plus encore à prouver l'étendue exacte de tels dommages. Il n'existe pas encore de pratique juridique sur la façon de calculer les pertes commerciales. Alors les juges font face à des difficultés considérables lorsqu'ils sont confrontés à cette tâche. Un autre problème réside dans la disponibilité de la preuve. A cause du fait que la découverte n'est pas possible en Estonie, ses règles de procédure civile rendent l'obtention des preuves nécessaires pour soutenir les faits qui prouvent des revendications soumis par des demandeurs difficile.

La législation estonienne ne prévoit pas de procédure spéciale pour les demandes de dommages antitrust – il n'y a pas de revendications collectives, aucune action de classe, ni des mesures prises par les organes représentatifs ou d'autres formes de litiges d'intérêt public (pas de recours collectif). Il n'est donc possible que de déposer des demandes d'indemnisation en cas d'infraction au droit de la

concurrence soit dans les procédures civiles normales, soit comme une action civile dans le cadre d'une procédure pénale sur un crime de droit de la concurrence. La nécessité de recours collectif n'a pas encore fait l'objet d'un débat juridique au niveau national, et il n'a pas eu en Estonie un seul cas de l'application privée ouverte par un consommateur jusqu'à présent. Le seul cas qui a été présenté à la Cour suprême en ce domaine (le jugement a été prononcé en 2011), a autorisé la base et la disponibilité des demandes d'indemnisation pour violation du droit de la concurrence. Il a présenté en même temps les problèmes nombreux reliés à la calculation des dommages dans ce contexte-là.

Classifications and keywords: antitrust damage claim; collective redress; Estonia; evidence; private enforcement of competition law; public enforcement of competition law.

I. Introduction

This paper covers the legal background and practice of private enforcement of competition law in Estonia. Described first is its legal, structural and institutional background, including factors such as the available types of legal remedies for private enforcement, compensation of legal fees and procedural costs as well as the possibility of the passing-on defence. Relevant Estonian jurisprudence is analysed thereafter, focussing on the reasons for its scarcity and the results and reasoning of the very first Estonian Supreme Court ruling in this field.

II. Legal, structural and institutional background

1. Types of remedies available

There is no specific judicial or other procedure for competition law proceedings in Estonia; nor does the law provide for collective redress, including consumer collective redress. There is no possibility of collective claims, class actions, actions by representative bodies or other forms of public interest litigation¹. For that reason, it is only possible to file a damage claim arising from competition law infringements either in normal civil proceedings

¹ E. Tamm, L. Naaber-Kivisoo, [in:] *Competition Litigation 2010*, Global Legal Group, London, p. 52.

regulated by the Estonian Civil Procedure Code (hereafter, CCP)² or as a civil claim in the framework of criminal proceedings on competition crimes according to sections 37–40 of the Estonian Criminal Procedure Code (hereafter, CPC)³.

It is possible to file both stand-alone and follow-on actions in Estonia but there is no specific mechanism for the latter. The decisions of the Estonian Competition Board and/or the European Commission are neither binding on courts in follow-on civil cases nor do they constitute a rebuttable presumption of an infringement. They are merely an element that the judge can take into consideration during civil proceedings⁴. However, the importance of the competition authority should not be underestimated as it is likely to have a persuasive influence on courts.

The use of discovery procedure is unavailable in Estonia. National legislation follows the procedural principles of a civil law country⁵ and thus gathering of documentary evidence occurs during the trial and under the supervision of the court. The requesting party must identify the documents required and show their relevance to the case. This situation is further complicated by the fact that the Civil Procedure Code and the Criminal Procedure Code both entitle the defendant to refuse to produce a document if the latter can incriminate him/her with respect to criminal or misdemeanour offences⁶. Since violations of competition law constitute either a criminal or a misdemeanour offence under Estonian law, the defendant (or any other party who is requested to produce a document) may refuse to produce a requested document if its contents include proof of an antitrust violation⁷.

The basis and calculation principles of a delictual damage claim are regulated in the Estonian Law of Obligations Act⁸ (hereafter, LOA). Damages awards serve primarily a compensatory purposes⁹; it is therefore not possible to award punitive or treble damages in competition law cases. Damages are meant to restore the aggrieved person's condition to a situation as close as possible to what it would have been if the circumstances which are the basis for the compensation had not occurred (subsection 127(1) LOA). Estonian

² RT I, 21 December 2012, 18.

³ RT I, 21 December 2012, 10.

⁴ This is a general principle of the Estonian civil procedure law, see, for example, P. Varul, I. Kull, V. Kõve, M. Käerdi, *Võlaõigusseadus I. Üldosa, Kommenteeritud väljaanne*, Juura, Tallinn 2006, p. 436; the Decision of the Estonian Supreme Court no. 3-2-1-41-05.

⁵ I. Soots, 'Kohtu selgitamiskohustus hagemenetluses' (2011) 5 *Juridica* 323.

⁶ Subsections 257 (1) of CCP and 71 (2) of CPC, respectively.

⁷ E. Tamm, L. Naaber-Kivisoo, [in:] *Competition Litigation 2010*, p. 54.

⁸ RT I, 8 July 2011, 21.

⁹ Varul et al, *Kommenteeritud...*, p. 438; the decision of the Estonian Supreme Court no. 3-2-1-137-05.

law follows in this sense the principles of compensatory damages and full compensation¹⁰. The available types of damages are: direct damage and loss of profit (subsection 128(1) LOA). However, compensation is possible only if the prevention of such very damage was the actual purpose of the provision that has been violated, that is, the purpose of the Estonian Competition Act in competition law cases (subsection 127(2) LOA). However, there is no well-established court practice yet on calculating damages and applying general damages rules to antitrust cases.

A leniency programme was introduced in Estonia in February 2010. The competition authority can offer immunity from fines to a ‘whistle-blower’ if he/she fully co-operates with the Competition Board facilitating the conviction of other cartel members. Participating in the leniency program does not, however, grant immunity from civil claims¹¹.

A national debate has not yet arisen concerning the review of Estonia’s legal position on collective redress in general, and/or in relation to competition law in particular. Fighting cartels remains one of the main priorities of the Estonian Competition Board since the beginning of 2008, a fact that causes a more active public enforcement of competition law. However, private enforcement of competition law has not yet gained the attention it should – neither in the decisional practice nor on the academic level.

2. Limitation periods and the possibility of the passing-on defence

Estonian limitation periods (periods of time during which compensation claims must be filed) are regulated in the General Part of its Civil Code Act (hereafter, GPCCA)¹². For tort claims, Estonian law combines minimum and maximum limitation periods. According to Subsection 150(1) GPCCA, the limitation period for a claim arising from unlawfully caused damages is three years from the moment when the entitled person became or should have become aware of the damage and of the identity of the person obliged to compensate it. Under subsection 150(3) GPCCA, the maximum limitation period extends to ten years after the performance of the act or occurrence of the event which caused the damage. Subsection 160(1) states, moreover, that the limitation period is to be suspended when the entitled person files a damage claim. Court practice has not yet tested whether these limitation periods are adequate to provide effective protection to damaged parties.

¹⁰ Varul et al, *Kommenteeritud...*, p. 438.

¹¹ E. Tamm, L. Naaber-Kivisoo, [in:] *Global Competition 2010*, p. 56.

¹² RT I, 6 December 2010, 12.

Neither has it been decided yet when is the claimant supposed to ‘become aware of the damage and of the person obliged to compensate for the damage’.

The passing-on defence – whether the direct purchaser is entitled to receive compensation for the part of the overcharge that he/she has passed on to indirect purchasers – has not yet been used in Estonian court practice¹³. Surrounding questions will probably be solved on the basis of subsection 127(5) LOA which stipulates that:

‘Any gain received by the injured party as a result of the damage caused, particularly the costs avoided by the injured party, shall be deducted from the compensation for the damage unless deduction is contrary to the purpose of the compensation.’

It could be argued that passing on of inflated prices to others could constitute ‘gain’ within the meaning of this provision. It could be said, therefore, that an entity that should have sustained damages from a competition law infringement in such circumstances, has not in fact suffered any loss that had to be compensated. The decisive question is here whether such deduction would be ‘contrary to the purpose of the compensation’. This issue has not yet been resolved either by jurisprudence or legal literature.

3. Legal fees and costs in competition proceedings

Another factor that might affect the effectiveness of private enforcement of competition law in Estonia is the legal basis and the mechanisms according to which legal fees and costs associated with competition law proceedings are financed and compensated. In Estonia, attorney fees can be agreed upon either on an hourly basis, as a lump sum or as a contingency fee: those possibilities are expressly allowed in Subsection 61(1) of the Estonian Bar Association Act¹⁴. The level of legal fees can vary, depending on the law firm as well as on the region; the highest fees are collected in Tallinn, the capital of Estonia. In competition cases an average hourly fee stands at 100-150 EUR. Fees are usually agreed upon on an hourly basis but lump sum payments are also used. Contingency and conditional fees are permitted, but they occur, at least in competition law cases, fairly seldom in practice. Legal aid is guaranteed for low-income citizens through a state financed scheme¹⁵.

¹³ The same has been stated by E. Tamm, L. Naaber-Kivisoo, [in:] *Global Competition 2010*, p. 55.

¹⁴ RT I, 21 December 2012, 4.

¹⁵ This principle is established by Subsection 162 (1) CCP.

As for cost recovery, Estonia has adopted the ‘loser pays’ principle whereby the party that loses has to compensate the legal costs of the winner¹⁶. The maximum amount of legal costs that can be recovered from the losing party is in a Government regulation¹⁷ (the amount depends on the value of the claim). In exceptional cases, the court has the discretion to rule that both parties bear their own costs. It can also limit the loser’s liability in cases where the enforcement of the usual ‘loser pays’ principle would lead to extremely unfair results.

There are no specific funding mechanisms for competition litigations in Estonia, neither with, nor without contingency fees. General principles of civil litigation are applicable instead: the claimant has to pay the legal fees and costs first, the judge will decide on the issue of costs, usually based on the ‘loser pays’ principle, upon making the judgment.

Estonia’s extremely high court fees have been reduced since 1 July 2012 in light of repeated rulings of the Supreme Court which declared some of them as unconstitutional¹⁸. This fact might act as an incentive for antitrust damages claims.

III. Estonian jurisprudence on private enforcement of competition law

1. Reasons for jurisprudential scarcity

It was revealed by searching national legal databases¹⁹ and consulting competition law practitioners that jurisprudence on private enforcement of competition law has thus far been almost non-existent in Estonia. Most cases where competition issues are raised within the context of damage claims are solved by out-of-court settlements. One of the main reasons for that scarcity is that this area is fairly unfamiliar to Estonian lawyers, attorneys and judges. Most attorneys are not ready to advise their clients to file a damage claim and even if they are, clients might be reluctant to start court proceedings because

¹⁶ The provision of legal aid to low-income persons is regulated by Sections 180-193 CCP and the State Legal Aid Act, RT I, 28 December 2011, 16.

¹⁷ Regulation no. 137 of the Estonian Government. RT I, 3 December 2010, 8.

¹⁸ Decisions of the Estonian Supreme Court no. 3-4-1-7-12 and 3-2-1-67-11.

¹⁹ All Estonian Supreme Court rulings are published in an online database accessible via the website of the Estonian Supreme Court (*Riigikohus*) at www.nc.ee. Judgements of lower instance courts are available in an online-database only since the end of 2006. Earlier judgments of lower instance courts were available to a very limited extent only. Since the end of 2006, all judgments of lower courts ought to be published in an online-database at http://www.riigiteataja.ee/kohtuteave/maa_ringkonna_kohtulahendid/main.html.

their outcome is largely unforeseeable. The first reason for the scarcity of private enforcement of competition law cases in Estonia is, therefore, lack of awareness and legal uncertainty.

Burden of proof in damage claims constitutes another main obstacle. For a successful damage action, the claimant must prove that (i) a competition law infringement occurred, (ii) that he/she has suffered damages, and (iii) that a causal link exists between the violation and the damage²⁰. Injured parties have found it very difficult in practice to prove that they have suffered damages as a result of a competition law infringement, as well as the exact extent of the damage. There is no court practice yet how to calculate such losses and judges face considerable difficulties when being confronted with the task.

Another problem lies in the availability of evidence. As discovery is not available in Estonia, its civil procedure rules make it difficult for claimants to obtain evidence necessary to prove the facts underlying their damage claims²¹. It is particularly difficult to prove a breach of competition law – this is basically only possible if the Estonian Competition Board or a criminal court had earlier issued a ruling to that effect²². Filing damage actions arising from competition law breaches is not encouraged by the relatively modest number of competition crimes cases. Still, abuse of dominance can be prosecuted in Estonia not only as a criminal offence but also as a misdemeanour. However, the latter expire after only two years from the commissioning thereof²³, and the Competition Board is often not able to reach a conviction within such a short time period. The short expiry periods of misdemeanours can thus pose a problem for private enforcement of competition law in Estonia.

As a result, there had been no judgments at all on damage claims in civil or criminal proceedings for competition infringements until 2009²⁴ in Estonia; not a single case of consumer private enforcement of competition law has been reported even until now. However, 2011 saw the first private enforcement of competition law case to reach the Estonian Supreme Court.

²⁰ The fault of the defendant is presumed under Estonian tort law: thus the tortfeasor must prove the absence of fault to escape liability. See further on the prerequisites of delictual liability in Estonia in P. Varul, I. Kull, V. Kõve, M. Käerdi, *Võlaõigusseadus III. Kommenteeritud väljaanne*, Juura, Tallinn 2009, p. 630-632.

²¹ The same concern has been expressed in K. H. Eichhorn, C. Ginter, *Euroopa Liidu ja Eesti konkurentsioigus*, Juura, Tallinn 2007, p. 178.

²² Neither a judgement of a criminal court nor a decision of the Competition Board is binding for a civil court, nor does it constitute a rebuttable presumption of a competition law infringement. It is merely an element that the judge can take into consideration during civil proceedings, see above.

²³ Subsection 81(3) of the Penal Code, RT I, 20 December 2012, 12.

²⁴ That was also the conclusion of E. Tamm, K. Paas, [in:] *Enforcement of Competition Law 2009*, Global Legal Group, London, p. 59.

2. The First Supreme Court case on private enforcement of competition law

The first Estonian Supreme Court case on private enforcement of competition law was decided in 2011. It concerned damages suffered due to an abuse committed by an undertaking holding a dominant position on the electricity market²⁵. The parties of the dispute had no contractual relationship. Instead, the defendant (Estonia's main electricity producer) had concluded two contracts for the fixed supply of electricity²⁶ with two network operators. The same network operators had, in turn, concluded two open supply contracts²⁷ with the claimant. According to the open contracts, the claimant acted as a balance provider for the network operators – it had a contractual obligation to maintain their electricity balance.

In 2008, the defendant unilaterally changed the standard terms of its fixed supply contracts. Seeing as the network operators refused to accept the change that placed upon them the obligation to conclude new open supply agreements with the parent company of the defendant, the latter stopped its electricity supplies. In order to maintain the network operators' electricity balance, the claimant had to buy electricity from other suppliers for considerably higher prices and to re-sell it to the network operators at a loss. The defendant ultimately restored electricity supplies to the two network operators, but only four months later and only after an injunction to that effect issued by the Estonian Competition Board. The claimant demanded from the defendant the reimbursement of the damages it sustained from the price difference during those four months.

The claimant was successful in the court of the first instance. However, that ruling was repealed in the second instance. The Supreme Court analysed the legal arguments of the parties but, in the end, it sent the case back for re-consideration to the second instance court. The Supreme Court first determined the legal basis and nature of the damage claim. Accordingly, such claim can be based on section 1043 LOA which provides that:

‘A person (tortfeasor) who unlawfully causes damage to another person (victim) shall compensate for the damage if the tortfeasor is culpable of causing the damage or is liable for causing the damage pursuant to law’.

²⁵ Ruling of the Estonian Supreme Court no. 3-2-1-19-11.

²⁶ I.e. the sale to a market participant of a fixed amount of electricity agreed upon in advance for a trading period and of which the balance provider is informed in advance.

²⁷ I.e. the sale to a market participant of the total amount of electricity needed by the market participant or, in order to ensure the balance of a market participant, the sale to the market participant of an amount of electricity that the participant lacks in a trading period or the purchase from the market participant of the surplus amount of electricity during a trading period.

Thus one of the central requirements for delictual liability under Estonian law is the ‘unlawfulness’ of the defendant’s behaviour. Pursuant to subsection 1045(1) no. 7) of LOA, causing the damage is unlawful, *inter alia*, if the damage is inflicted by a behaviour which breaches an obligation arising from the law. However, causing the damage by infringing an obligation arising from the law is not unlawful, if the purpose of the violated provision is other than to protect the victim from such damage (subsection 1043(3) LOA)²⁸. It is thus necessary to determine whether the purpose of section 16 of the Estonian Competition Act²⁹ is to protect the claimant from such damage.

Section 16 no. 4 and 6 of the Competition Act prohibits any direct or indirect abuse by an undertaking, or several undertakings, of a dominant position. That includes making the conclusion of contracts subject to the acceptance by the other party of supplementary obligations which have no connection with the subject of such contract, or unjustified refusal to sell or buy goods. Seeing as the Estonian Competition Board has found the defendant guilty of the abuse, and that the parties had not contested that fact during the juridical proceedings in the second instance, the Supreme Court ruled that the breach of section 16 no. 4 and 6 of the Competition Act (the abuse of the dominant position of the defendant) was proven. It was more difficult to decide, however, on the issues of causality and damages.

The Supreme Court said that it was indeed possible that the purpose of section 16 of the Competition Act was to protect the defendant from the damage (the price difference) which the company had suffered due to the fact that the defendant had arbitrarily stopped electricity supplies to the two network operators. The Court explained that the purpose of the Competition Act is, *inter alia*, to guarantee the existence of effective competition and to protect the market as a whole (and not only the contract partners). According to the Supreme Court, competition rules are meant to protect the economic interests of market participants. It was thus of the opinion that the type of damage suffered by the claimant lies within the protection range of section 16 of the Competition Act. It also stated that a causal link between the abuse of the dominant position of the defendant and the damage suffered by the claimant could have indeed existed.

Ultimately however, the Supreme Court did not decide on the outcome of the dispute. In order to determine the existence of causality as well as the actual amount of damages, the Supreme Court referred the case back to the second instance court³⁰. No final judgment has yet been delivered in

²⁸ See further on this question in Varul et al (note 20), pp. 650-651.

²⁹ RT I, 27 June 2012, 11. Section 16 of the Estonian Competition Act is a domestic equivalent of Article 102 TFEU.

³⁰ Decision of the Estonian Supreme Court no. 3-2-1-19-11, p. 18.

this case; it is highly possible that the parties have reached an out-of-court settlement.

IV. Conclusion

The system of private enforcement of competition law in Estonian is fairly undeveloped. Estonian law has no special procedure for antitrust damages claims: there is no possibility of collective claims, class actions, actions by representative bodies or other forms of public interest litigation. This issue has not yet been subject to a legal debate at the national level either. Since there is no collective redress for antitrust damages in Estonian law, it is only possible to file damage claims arising from competition law infringements either in normal civil proceedings or as a civil claim in the framework of criminal proceedings on competition law crimes.

Estonian jurisprudence on antitrust damages, including consumer initiated private enforcement, is virtually non-existent. Only one case has so far reached the Supreme Court. The main reasons for this scarcity are lack of awareness and legal uncertainty as well as problems surrounding the burden of proof and availability of evidence. The sole existing Supreme Court ruling on this issue has cleared the basis and availability of damage claims for competition infringement. It has shown, at the same time however, that calculating damages can be problematic in this context.

Literature

Competition Litigation 2010, Global Legal Group, London 2010.

Eichhorn K. H., Ginter C., *Euroopa Liidu ja Eesti konkurentsioigus* [European and Estonian Competition Law], Juura, Tallinn 2007.

Enforcement of Competition Law 2009, Global Legal Group, London 2009.

Soots I., 'Kohtu selgitamiskohustus hagemenetluses' [translation in English] (2011) 5 *Juridica*.

Varul P., Kull I., Kõve V., Käerdi M., *Võlaõigusseadus I. Üldosa. Kommenteeritud väljaanne* [Commentary of the Estonian Law of Obligations Act I, General Part], Juura, Tallinn 2006.

Varul P., Kull I., Kõve V., Käerdi M., *Võlaõigusseadus III. Kommenteeritud väljaanne* [Commentary on the Estonian Law of Obligations Act, Part III], Tallinn, Juura 2009.

NATIONAL LEGISLATION AND CASE LAW REVIEWS

Key Legislative and Jurisprudential Developments of Polish Antitrust Law in 2012

by

Anna Piszcz*

CONTENTS

- I. Antitrust legislation
 - 1. General remarks
 - 2. Amendments to legal provisions regarding judicial antitrust proceedings
 - 3. New ‘soft law’ of the UOKiK President
- II. Antitrust case law
 - 1. General remarks
 - 2. Competition restricting agreements
 - 2.1. Types of anticompetitive agreements
 - 2.2. Other selected issues related to anticompetitive agreements
 - 3. Abuse of a dominant position
 - 3.1. Imposition of unfair prices or other trading conditions
 - 3.2. Counteracting the formation of the conditions necessary for the emergence or development of competition
 - 3.3. Other practices and issues related to an abuse of a dominant position
 - 4. Control of concentrations
 - 5. Relationships between the Competition Act and other legislation
 - 6. Enforcement issues

Abstract

This article has two objectives. First, it presents the most important developments of Polish antitrust legislation of 2012. These include recent amendments to legal

* Dr. hab. Anna Piszcz, Department of Public Economic Law, Faculty of Law, University of Białystok; legal advisor; piszcz@uwb.edu.pl.

provisions on judicial antitrust proceedings contained in the Code of Civil Procedure, and some novel issues in the area of non-binding guidelines of the Polish NCA, the UOKiK President. Second, the article introduces key developments in Polish competition law jurisprudence of 2012. It characterises selected rulings delivered by the Polish Supreme Court, the Court of Appeals in Warsaw and the Court of Competition and Consumer Protection. Judgments are divided according to their subject matter.

Résumé

Cet article a deux objectifs. Premièrement, il présente les développements les plus importants de la législation antitrust polonaise de 2012. Il s'agit notamment de récentes modifications apportées à des dispositions juridiques en matière de procédure antitrust judiciaires qui se trouve dans le Code de procédure civile, et quelques nouvelles questions dans le domaine des lignes directrices non-contraignantes de l'Autorité nationale du contrôle polonaise, le président de l'Organe pour la protection de la concurrence et des consommateurs (UOKiK). Deuxièmement, l'article présente les développements principaux en matière de jurisprudence de 2012 relative à la loi polonaise de la concurrence. Il caractérise des jugements sélectionnés prononcés par la Cour suprême polonaise, la Cour d'appel de Varsovie et la Cour de la concurrence et de la protection des consommateurs. Les jugements sont présentés selon les sujets qu'ils concernent.

Classifications and key words: antitrust legislation; judicial antitrust proceedings; guidelines; antitrust jurisprudence; anticompetitive agreements; abuse of a dominant position; concentrations; fines.

I. Antitrust legislation

1. General remarks

The currently applicable Act of 2007 on Competition and Consumer Protection (hereafter, the Competition Act)¹ underwent its last amendment in 2011, making 2012 a relatively quiet year for Polish antitrust legislation. At the same time, no new relevant regulations were issued by the Council of Ministers, nor existing ones amended. In light of the above, this review focuses on changes introduced in 2012 to Poland's legislation on judicial antitrust

¹ Journal of Laws 2007 No. 50, item 331, as amended.

proceedings contained in the Code of Civil Procedure². Also covered will be some novel issues in the area of legally non-binding guidelines of the UOKiK President.

Without any actual changes to the Competition Act, the UOKiK President presented in May 2012 draft assumptions for the Government's draft Competition and Consumer Protection Amendment Act (hereafter, Draft Amendment Act) which was submitted for public consultation. After several months of public discussion regarding the need for an antitrust reform and its scope, the UOKiK President ultimately published in November 2012 a Draft Amendment Act³. It is worth noting that the original draft assumptions were the basis for the Draft Explanatory Notes accompanying the Draft Amendment Act. The most important legislative changes proposed by the UOKiK President relate to the introduction into the Polish legal system of the following concepts:

- (1) the leniency plus programme, a kind of supplement or addition to the ordinary leniency programme;
- (2) behavioural and structural remedies optionally applied by the UOKiK President when cease-and-desist orders are issued⁴;
- (3) two-stage proceedings in concentration control;
- (4) settlements in cases relating to practices restricting competition and
- (5) personal administrative (financial) liability of managers for some anticompetitive agreements.

The last proposal in particular (that is, to extend antitrust sanctions to managers), attracted strong opposition from organisations of undertakings. According to the NCA, the proposed changes, if incorporated into the Competition Act of 2007, would eliminate a number of problems inherent in the current system. If the Draft Amendment Act is enacted by the Polish Parliament – which may happen in 2014 – the resulting Amendment Act will certainly be the main antitrust development in Poland of 2014.

² Act of 17 November 1964 (Journal of Laws 1964 No.43, item 296, as amended); hereafter, Code.

³ The Draft Act was adopted by the Council of Ministers in July 2013 and sent to the Parliament in August 2013. The lower house of the Polish Parliament (in Polish: *Sejm*) commenced work on the Draft Act in September 2013 and forwarded it to the Parliamentary Committee of Economy. In October 2013, the Committee appointed an extraordinary subcommittee which holds its meetings regularly once in two weeks starting from 23 October 2013. The Draft Act is currently being processed by the subcommittee which has been given a mandate to carry out a full review of the Draft Act.

⁴ The proposal is modelled on Article 9 of 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 [2003] L 1/1; hereafter, Regulation 1/2003.

2. Amendments to legal provisions regarding judicial antitrust proceedings

Judicial antitrust proceedings regarding appeals from the decisions and resolutions issued by the UOKiK President are governed by Polish rules on civil procedure. A number of significant changes were introduced, as of 3 May 2012, into those rules by the Code of Civil Procedure Amendment Act dated 16 September 2011 (hereafter, CCP Amendment Act)⁵. This legal development also influenced judicial antitrust proceedings.

Until 3 May 2012, Section IVa introduced in 1989 into Part I ('Case examination') Book I ('Contentious proceedings') Title VII ('Specific types of proceedings') of the CCP – contained rules on judicial proceedings to review economic cases (commercial proceedings). The second chapter in this Section (Articles 479²⁸–479³⁵) dealt with judicial antitrust proceedings. Issues regarding judicial antitrust proceedings not regulated by the second chapter were subject to the first chapter of this Section (Articles 479¹–479²⁷), that is, general provisions on commercial proceedings. Article 1(46) of the CCP Amendment Act repealed the first chapter in Section IVa. At the same time, according to Article 1(45) of the CCP Amendment Act, Section IVa was re-titled into 'Proceedings to review cases relating to competition protection'. All specific elements of commercial proceedings as compared to ordinary civil cases, resulting from general provisions on commercial proceedings, were therefore abolished. They shall thus no longer be applied to cases relating to competition protection and other cases decided by the Court of Competition and Consumer Protection (in Polish: *Sąd Ochrony Konkurencji i Konsumentów*; hereafter, SOKiK). However, under transitional rules (Article 9(7) of the CCP Amendment Act), earlier provisions shall still be applicable to cases concerning decisions issued by the UOKiK President before 3 May 2012.

Since 3 May 2012, a number of specific legal solutions no longer apply with respect to judicial antitrust proceedings. First, the CCP Amendment Act repealed the so-called 'non-admission of evidence' principle⁶ – specific rules on the burden of proof applicable to undertakings incorporated in Articles 479¹² § 1 and 479¹⁴ § 1–2 CCP. Amended Articles 207 and 217 CCP are now applicable instead with respect to evidence. They do not differentiate between commercial cases and 'ordinary' civil cases, as well as between submissions by undertakings and other procedural parties. As a rule, the presiding judge may in all cases require parties to file submissions, giving them directions on the order of submissions and their deadlines, as well as stress which

⁵ Act Amending the Civil Procedure Code and Some Other Acts (Journal of Laws 2011 No. 233, item 1381).

⁶ In Polish: *prekluzja dowodowa*.

points must be explained and clarified. Parties are not allowed to file any submissions other than a statement of claim, response to the statement of claim and those required by the court, unless such submissions solely contain additional evidentiary motions. Under the new approach, it is now possible for the presiding judge to disallow parties to file any submissions other than a statement of claim and the defendant's response thereto. It thus seems that statutory non-admission of evidence has now been replaced by judicial non-admission of evidence. As the non-admission of evidence principle remains part of the CCP, albeit it has taken on a different form, not much has in truth been changed for undertakings as parties to judicial antitrust proceedings⁷.

Second, Article 479⁹ § 1 CCP was repealed which used to contain an exception to the rule that in the course of proceedings documents are served by the court. A party represented by a solicitor, legal advisor, patent attorney or the General Attorney of the Treasury (professional representatives) used to be obliged to serve most documents directly to the other party irrespective of whether the latter was represented by a professional representative or not. Currently, the general rule of Article 132 § 1 CCP states that a party not represented by a professional representative receives documents from the other party served by the court.

Third, the CCP Amendment Act repealed the non-binding three-month deadline for rendering judgments (Article 479¹⁶ CCP).

Fourth, the contents of Article 479^{6a} were transferred to Article 479^{29a} CCP. However, by doing so, the scope of *amici curiae* participation in judicial proceedings has been limited because while Article 479^{6a} CCP used to relate to all economic cases including those between undertakings, Article 479^{29a} CCP concerns only those relating to competition protection reviewed by SOKiK. The intervention of the UOKiK President as *amicus curiae* in private antitrust actions is not permitted.

It is worth noting in the closing lines of this section that Article 479²⁹ § 2 CCP has not been repealed despite the fact that it has no purpose. It regards the right of 3rd parties allowed to take part in administrative proceedings before the UOKiK President (as so-called interested parties) to later become participants of proceedings before SOKiK. However, the current Competition Act of 2007, unlike its predecessor⁸, does not provide for the institution of interested parties to be participants of antitrust proceedings. Therefore, Article 479²⁹ § 2 CCP should be repealed.

⁷ See A. Piszcz, 'Still-unpopular Sanctions: The Private Antitrust Enforcement Developments in Poland after the 2008 White Paper' (2012) 5(7) *YARS* 71–72.

⁸ Act of 15 December 2000 on competition and consumer protection (consolidated text: Journal of Laws 2005 No. 244, item 2080, as amended); hereafter: Competition Act 2000.

3. New 'soft law' of the UOKiK President

According to Article 32(4) of the Competition Act, the Official Journal of UOKiK is used for the publication of documents such as guidelines (in Polish: *wyjaśnienia*) that are of significant importance for the application of legal provisions encompassed by the scope of the activities of the NCA. In 2012, the UOKiK President published two sets of such guidelines (UOKiK Official Journal No. 1 of 1 August 2012):

- 1) Guidelines on the assessment of notified concentrations;
- 2) Guidelines for the issuance of commitment decisions in cases of competition-restricting practices and practices infringing collective consumer interests.

The Guidelines on the assessment of notified concentrations are a lengthy (42 pages) document that supplements the 2011 Guidelines on the criteria and procedure of notifying the intention to concentrate to the UOKiK President (UOKiK Official Journal No. 1). The new soft law act is divided into two sections – the first part focuses on the relevant market, while the second part deals with a concentration's influence on competition. Covered in the first part are thus topics such as product market, demand-side substitution, supply-side substitution, asymmetric substitution and geographic market. The second part examines vertical, horizontal (both non-coordinated and coordinated) and conglomerate effects of concentrations as well as contractual competition restrictions related to concentrations.

By contrast, the UOKiK President's Guidelines for the issuance of commitment decisions in cases of competition-restricting practices and practices infringing collective consumer interests are much more concise (5½ pages). They relate to decisions of the NCA covered by Articles 12 and 28 of the Polish Competition Act. They provide information on:

- (1) conditions for the adoption of commitment decisions such as rendering anticompetitive practices plausible, an undertaking's obligation to "take or discontinue certain actions aimed at preventing an infringement";
- (2) issuance of commitment decisions with reference to competition-restricting agreements;
- (3) content of commitments offered by undertakings;
- (4) elements of commitment decisions, and
- (5) failure to comply with a commitment decision.

The status of Guidelines within the Polish legal system is clear – they are not legally binding on undertakings – this fact is explicitly confirmed in the two soft-law acts themselves. Still, they provide an important source of information and advice for undertakings which reduces legal uncertainty.

II. Antitrust jurisprudence

1. General remarks

According to statistics published by the UOKiK President in the 2012 Activities Report⁹, Polish courts delivered 91 judgments in the framework of public enforcement of competition law in 2012. SOKiK, Poland's 1st instance court competent in competition matters, rendered 60 judgments in total. This number included 3 rulings annulling decisions issued by the UOKiK President and 10 judgments modifying earlier decisions of the NCA. The 2nd instance court assessing competition law cases, the Court of Appeals in Warsaw (in Polish: *Sąd Apelacyjny w Warszawie*), rendered 29 judgments in 2012. At the same time, Poland's Supreme Court ruled on two competition cases only, both concerned the abuse of dominance.

Most of the judgments related to anticompetitive agreements (50 rulings overall including 37 judgments with regard to vertical agreements); concentrations cases were least numerous (5 judgments). If the above statistics are compared with data for 2011, SOKiK was the only court to be more active in 2012, but even here the increase was only slight¹⁰.

Despite the fact that some of the judgments outlined below relate to the Competition Act of 2000, the interpretation of its legal provisions remains in most cases also relevant to the legal provisions of the Competition Act of 2007.

2. Competition restricting agreements

2.1. Types of anticompetitive agreements

The Supreme Court has not rendered even a single judgment on anticompetitive agreements in 2012. The overwhelming majority of the cases outlined below reviewed by SOKiK and the Court of Appeals regarded price fixing. Under Article 6(1)(1) of the Competition Act, agreements 'consisting of fixing, directly or indirectly, prices and other trading conditions' shall be prohibited if they have as their object or effect the elimination, restriction or any other infringement of competition in the relevant market.

In the judgment of 1 March 2012 (VI ACa 1179/11, ZAiKS and SFP), the Court of Appeals dismissed an appeal concerning a ruling delivered by SOKiK

⁹ See www.uokik.gov.pl/download.php?plik=13213 (last accessed 31 October 2013), p. 17.

¹⁰ See www.uokik.gov.pl/download.php?plik=11986 (last accessed 31 October 2013), p. 17.

on an agreement between the collective rights management organisation ZAiKS and the Polish Filmmakers Association (SFP). According to the original antitrust decision, the agreement in question was anticompetitive because its parties fixed uniform rates for the use of audiovisual works and refused to negotiate those rates individually. Part of the justification of the Court of Appeals' judgment is dedicated to the issue of the circumstances which corroborate the presence of a price-fixing agreement: 'What proves that an agreement is meant to restrict competition are the agreement's provisions fixing a uniform rate of remuneration, uniform minimum prices, uniform allocation of remuneration among authorised authors, and an introduction of allocation of responsibilities among its participants'. This case is interesting primarily because it concerns the *raison d'être* of collective rights management organisations and their core activities.

In the judgment of 27 November 2012 (XVII AmA 184/10, *Kamsoft, Faktor IBS and others*)¹¹, SOKiK considered the definition of price-fixing agreements. It stated therein that this definition comprised both direct price-fixing as well as any agreements on the build-up of prices. Any restrictions on the freedom to pursue an independent pricing policy are thus inadmissible. Moreover, the prohibition also covers agreements on those aspects of a business activity which have an impact on prices (e.g. guaranteeing terms and conditions). On the other hand, in order to establish whether an undertaking took part in a price-fixing agreement, its turnover volume is irrelevant because price-fixing agreements are prohibited regardless of the volume of the turnover (size) of its parties.

In the judgment of 25 May 2012 (XVII AmA 215/10, *Investing and others*), SOKiK stated that the practice prohibited by Article 6(1)(1) of the Competition Act might take the form of the elimination of the right to discretionary reductions of commission (up to the resignation from its collection altogether). Such an agreement threatens competition and makes transaction prices higher than those that contractors could obtain under conditions of an absolute freedom of competition between undertakings.

Article 6(1)(3) of the Competition Act speaks of market-sharing agreements in sale or purchase markets. In the judgment of 11 June 2012 (XVII AmA 197/10, *Papier-Hurt and Office Pulse*), SOKiK considered that an agreement, the subject matter of which placed on one of the parties a time-restricted

¹¹ See also A. Jurkowska-Gomułka, 'Próba uzasadnienia klauzuli cenowej przepisem art. 15 ust. 1 pkt 1 ustawy o zwalczaniu nieuczciwej konkurencji. Wyrok Sądu Ochrony Konkurencji i Konsumentów z dnia 27 listopada 2012 r., XVII AmA 184/10' ['The attempt to justify a price clause with Article 15(1)(1) of the Combating Unfair Competition Act. Judgment of the Court of Competition and Consumer Protection of 27 November 2012, XVII AmA 184/10'] (2013) 1(2) *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 177–179.

ban concerning the targeting of offers for the sale of goods distributed by the party to some clients (on pain of burdening the other party with contractual penalties), was a market-sharing agreement.

2012 saw few SOKiK judgments in the area of tender collusions (bid-rigging). In judgments of 19 October 2012 (XVII Ama 22/11, XVII Ama 33/11, *Poczta Polska and others*), SOKiK stated that the practice prohibited by Article 6(1)(7) of the Competition Act might take the form of a conduct, during pending tenders, that involves the resignation from the conclusion of the won contract – resignation, which in turn leads to the conclusion of such a contract with an undertaking which had originally submitted a more expensive offer. It should be added that in this case the competing participants of the tender were a married couple.

2.2. Other selected issues related to anticompetitive agreements

Object and effect of an anticompetitive agreement

In a judgment of 19 December 2012 (VI ACa 752/12, *Hajduki and others*), the Court of Appeals took the view that the prohibition formulated in Article 6(1) of the Competition Act covers not only cases where the intended anticompetitive objective has indeed been achieved, but also the mere participation in a restrictive agreement. It is thus not necessary to prove that the object of the given agreement was achieved, that is, that the intended anticompetitive effect in a relevant market had been realised. In order to be caught by the prohibition, the occurrence of anticompetitive effects is no longer important once the anticompetitive object of an agreement is established. It is sufficient to prove that the object of the practice was an infringement of the principles of market competition.

Passive participation in an anticompetitive agreement

The Court of Appeals stressed in the judgment of 20 April 2012 (VI ACa 1384/11, *TIC and others*) that passive participation in an anticompetitive agreement does not exempt the inactive party from liability. Passivity also does not mean that such an undertaking had ceased to take part in the illegal agreement. Decisive here is the very fact of price-fixing rather than whether uniform prices were actually applied by undertakings operating in the market. A participant is exempt fully and completely from antitrust liability only by way of its active conduct of openly distancing itself from participation in the agreement. Such active conduct must imply, beyond any doubt, the lack of any intention to get engaged in the prohibited practice. Importantly, the

aforementioned Court of Appeals judgment does not diverge from the SOKiK ruling of 25 May 2012 (XVII AmA 215/10, *Investing and others*), which has been noted earlier. SOKiK took the view therein that neither the fact implying that an agreement has not always been implemented, nor the lack of explicit sanctions for the failure to observe it, can constitute prerequisites supporting the view that the cartel has not been implemented.

Decisions by associations of undertakings

SOKiK noted also in the same judgment (XVII AmA 215/10, *Investing and others*) that internal acts issued by corporations, including those establishing professional standards, are not equivalent to the provisions of national law and must therefore be consistent with binding legislation. Antitrust provisions that stipulate the prohibition of price-fixing agreements are binding in their nature. If the provisions of professional standards appear contradictory to antitrust prohibitions, they would be null and void by virtue of the law.

3. Abuse of a dominant position

3.1. Imposition of unfair prices or other trading conditions

Abuse of a dominant position by way of the imposition of unfair prices or other trading conditions is prohibited in Poland by Article 9(1) in conjunction with Article 9(2)(1) of the Competition Act. Courts referred to this form of abuse in a number of rulings in 2012 including the Supreme Court judgment of 13 July 2012, III SK 44/11, *Stalexport Autostrada Małopolska*. The same form of abuse was also considered in two rulings of the Court of Appeals: the judgment of 17 May 2012, VI ACa 31/12, *PKS w Elblągu*, and the judgment of 13 December 2012, VI ACa 967/12, *MPK – Łódź*.

In the *Stalexport Autostrada Małopolska* case, the Supreme Court dismissed a cassation request regarding the judgment of the Court of Appeals of 31 May 2011 (VI ACa 1028/10)¹². The original decision of the UOKiK President declared that the scrutinised undertaking (*Stalexport Autostrada Małopolska*) had abused its dominant position by way of the imposition of unfair toll prices for driving on the A4 motorway. The UOKiK President concluded that the undertaking had no right to charge full toll prices for driving on the contested road when the motorway failed to meet standards usual for this type of road due to repair works being carried out on certain of its sections.

¹² More on this judgment A. Jurkowska-Gomułka, 'Key Legislative and Jurisprudential Developments of Polish Antitrust Law in 2012' (2012) 5(7) *YARS* 205.

These maintenance works resulted in longer travel times and significant traffic obstructions including, in particular, two-way traffic on a single lane. The Supreme Court shared the standpoint of the NCA. It emphasized that an objective assessment of the equivalency of considerations of both parties is to verify whether an undertaking (which does not experience pressure from competitors or clients) achieves economic benefits from its market position which cannot be justified in a model of social market economy. When setting the level of the toll, the undertaking should have taken into account the quality of its services. Depending on the maintenance work's organization and intensity, the refurbishment of a payable motorway may make it impossible for the operator to provide users with a service that allows them to benefit from the use of a paid motorway as it is under 'normal' circumstances (the so-called reference transaction¹³). As a result, collecting a full toll price may be considered objectively unfair. In the opinion of the Supreme Court, the toll is a price in the meaning of Article 4(8) of the Competition Act.

The problem of the imposition of unfair prices and the scope of the definition of a 'price' also surfaced in the judgment of the Court of Appeals of 13 December 2012, VI ACa 967/12, *MPK – Łódź*. The Court took note therein of the fact that the fee for the participation in the maintenance costs of bus stops (which was, *de facto*, imposed on carriers for their use of these bus stops) was inconsistent with road transport provisions. *Ipsa facto*, it was an unfair price within the meaning of Article 9(2)(1) of the Competition Act. The Court pointed out that what decides whether trading conditions were imposed or not is the analysis of the agreement's content as well as the circumstances of its conclusion. It is necessary here to establish that a specific provision played a dishonest role, for instance, that it was an essential element of the agreement without which the latter would not have been concluded.

3.2. Counteracting the formation of the conditions necessary for the emergence or development of competition

In 2012, the abusive practice of counteracting the formation of conditions necessary for the emergence or development of competition was the object of frequent judicial reviews. In the judgment of 23 May 2012 (VI ACa 1142/11, *NFZ*), the Court of Appeals dismissed an appeal against a SOKiK judgment that upheld a UOKiK decision. The NCA established that the National Health

¹³ For more see: E. Krajewska, '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)' (2013) 6(8) *YARS*; K. Kohutek, 'Głosa do wyroku SN z dnia 13 lipca 2012 r., III SK 44/11' [Commentary to the judgment of the Supreme Court of 13 July 2012, III SK 44/11], *LEX/el.*, 2012.

Fund treated its previous contractors in a privileged way when determining bid evaluation criteria in healthcare services tenders, seeing as they scored extra points based on this criterion. Such practice hindered the winning of tenders by undertakings which had not cooperated with NFZ before. In the Courts' view, the scrutinised practice constituted an abuse of a dominant position held by NFZ in the market for the organisation of state-funded healthcare services. The Court of Appeals also confirmed that NFZ was seen as an undertaking under the Competition Act.

In the *City of Poznań* judgment of 15 May 2012 r. (VI ACa 1270/11), the Court of Appeals stated that the unreasonable denial of access to housing infrastructure, in order to install telecoms equipment and lay cables in the property, was a competition restricting practice. The Court stressed that even 'one-off' conduct of an undertaking holding a dominant position in a relevant market may be seen as a practice leading to the disturbance of conditions necessary for the emergence or development of competition in the meaning of Article 9(2)(5) of the Competition Act.

In the *Wodociągi* judgment of 22 February 2012 (AmA 171/11), SOKiK confirmed that water supply and sewage infrastructure management companies abuse their dominant position if they extort certain conduct in an interdependent market. In this case, they favoured undertakings using fixture/fitting types specified by the managers when connecting to the dominant company's infrastructure, thus they also indirectly favoured undertakings producing such fittings/fixtures¹⁴. The abuse took place in the interdependent contractor market for water supply and sewage network connections. When a dominant undertaking delineates the group of fixture/fittings producers that an applicant for a connection build is obliged to use, it makes applicants unable to choose freely which part manufacturers to use from among all those operating in the market. At the same time, fixture/fittings producers not selected by the dominant undertaking are made unable to compete. SOKiK continued on to define exclusionary practice as comprising conduct of a dominant undertaking which may result in the foreclosure, or full or partial obstruction, of the ability to grow of undertakings already operating in a relevant market. It may also amount to the creation of market entry barriers for new undertakings. Such practice is particularly harmful to consumers. An exclusionary practice has an anticompetitive effect since it either precludes

¹⁴ See also K. Kohutek, 'Narzucanie uciążliwych warunków umownych przez dominanta. Wyrok Sądu Ochrony Konkurencji i Konsumentów z dnia 22 lutego 2012 r., XVII Ama 66/10' ['Imposition of onerous agreement terms by a dominant undertaking. Judgment of the Court of Competition and Consumer Protection of 22 February 2012, XVII Ama 66/10'] (2012) 3(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 116–117.

or hampers development of already existing or potential competition in a relevant market.

3.3. Other practices and issues related to an abuse of a dominant position

SOKiK's *MPWiK* judgment of 30 May 2012 (XVII AmA 66/10) focused on an abuse claim by way of the imposition of onerous contractual terms prohibited by Article 9(1) in conjunction with Article 9(2)(6) of the Competition Act. The Court was of the opinion here that the water supply service provider, MPWiK, had imposed onerous terms on its contractors because it used a contract template when concluding water supply agreements. The template was prepared independently by MPWiK and was not subject to individual negotiations. The agreement was thus concluded by accepting terms and conditions established unilaterally by the water supply service provider. SOKiK explained that agreement terms are onerous if they burden one party more than commonly accepted in relevant relations. What needs to be considered when assessing if given terms are onerous, is whether the dominant undertaking would be able to negotiate such terms and conditions in a hypothetical situation of a competitive relevant market. Moreover, the assessment as to whether the terms are onerous must be carried out from the point of view of a contractor these terms are imposed upon.

Attention should be paid to the *Porty Lotnicze* judgment delivered by SOKiK on 30 March 2012 (XVII AmA 180/10). In this dispute, the dominant undertaking eliminated charter services from Terminal E of Warsaw Chopin Airport, while they were still permitted from Terminal A, because admitting such traffic would under current conditions cause serious inconvenience in passenger handling. The scrutinised practice concerned all carriers without an exception. SOKiK did not find that an abuse took place but came to the conclusion instead that the dominant undertaking's decision was rational and objectively justified by the circumstances of the case. SOKiK did not recognise Terminal E as an essential facility in the dominant undertaking's infrastructure without which it would be impossible for its clients to provide their own services at the scrutinised airport. SOKiK rejected at the same time the argument that the complainant was discriminated against. The Court confirmed that discrimination occurs when a comparison of undertakings in the same situation suggests that at least one of them is treated worse than the others or, alternatively, at least one of the companies is treated in a more privileged way than the others. Such a phenomenon did not occur in this case. SOKiK pointed out that a mere restriction of another undertaking's freedom to act by a dominant undertaking is not sufficient to claim that such practice amounts to an abuse of market power.

4. Control of concentrations

Statistics suggest that Polish courts rarely deal with concentrations of undertakings cases. This is primarily so because the UOKiK President clears the absolute majority of notified operations.

SOKiK did, however, deal with a concentration in a judgment of 14 May 2012 (XVII AmA 41/11, *PGE*) based on an appeal submitted by PGE who was originally prohibited by the UOKiK President from taking over its competitor, Energa. SOKiK upheld the take-over ban, but had at the same time the opportunity to express its opinion on two important problems. SOKiK stated first of all that undertakings were allowed to apply for a conditional clearance of a concentration pursuant to Article 19(1) of the Competition Act also before that very Court. According to SOKiK, this is so because court proceedings in the matter of an appeal against a decision of the UOKiK President are first-instance in nature. Second, SOKiK also specified that the burden of proof with respect to the efficiencies indicated in Article 20 of the Competition Act (contribute to economic development or technical progress, positive impact on the national economy) rest upon the undertaking concerned. In SOKiK's view, in order to prove these circumstances, it is not sufficient to invoke the consistency of an intended concentration with a government document defining state policy.

5. Relationships between the Competition Act and other legislation

In the judgment of 18 December 2012 (III SK 9/12, *Krajowa Stacja Chemiczno-Rolnicza*), the Supreme Court considered the relationship between the Competition Act and the Fertilizers and Fertilisation Act¹⁵. The Supreme Court annulled a judgment of the Court of Appeals (judgment of 29 March 2011, VI ACa 1087/10) sustaining SOKiK's judgement (judgment of 23 April 2010, XVII AmA 84/09) which questioned the decision delivered by the UOKiK President. The NCA originally established an abuse of a dominant position in making the issue of an opinion on a fertilisation schedule dependent upon the performance of a soil analysis in a district chemical-agricultural station or in an accredited laboratory. The Supreme Court found the Court of Appeals' interpretative assumptions wrong, which implied that Article 27(1) and (4) of the Fertilizers and Fertilisation Act exclude the application of the Competition Act. Article 27 of the Fertilizers and Fertilisation Act lists the tasks of the

¹⁵ Act of 10 July 2007 on fertilizers and fertilisation (Journal of Laws 2007 No. 147, item 1033, as amended).

plaintiff (*Krajowa Stacja Chemiczno-Rolnicza*) as encompassing, among others: the determination of a way of doing agrochemical research including a choice of research methods; and undertaking activities in the scope of participation of laboratories of district chemical-agricultural stations in the examination of accuracy of performing chemical analyses. According to the Supreme Court, the provisions of the Fertilizers and Fertilisation Act do not suggest that the legislator obliged the plaintiff to determine the principles of performing soil analyses (in order to issue opinions on fertilisation schedules) in a way which results in a limitation of the circle of subjects entitled to carry them out. These provisions do therefore not impose on the plaintiff the duty to engage in a practice which the UOKiK President qualified as a competition-restricting practice.

In the aforementioned SOKiK's judgment of 11 June 2012 (XVII AmA 197/10, *Papier-Hurt and Office Pulse*), the Court also considered the issue of the relationship between the Competition Act¹⁶ and the Combating Unfair Competition Act¹⁷. SOKiK decided therein that there is no discrepancy between the legal provisions contained in these two Acts. The relationship between the norms that can be interpreted from them should be treated as mutually reinforcing – while the Combating Unfair Competition Act protects primarily the interest of private undertakings, the Competition Act mainly protects the public interest. It means that while claiming that an act of unfair competition occurred, an undertaking cannot simultaneously bring about the removal of its effects by way of a violation of the prohibitions specified in the Competition Act (such as the prohibition of market-sharing). Hence, the intention to remove the effects of a business secrets violation does not legalise the anticompetitive character of an agreement which restricts the free choice in contractors by the clients of the parties to that agreement. The Combating Unfair Competition Act does not directly exclude the validity of the prohibitions of specified practices classified in the Competition Act.

6. Enforcement issues

Some judgments delivered in 2012 gave rise to particularly interesting issues concerning the imposition of fines. In the judgment of 17 May 2012 (VI ACa 31/12, *PKS w Elblągu*), the Court of Appeals stated that fines stipulated in the Competition Act are optional and discretionary in nature. The Court may

¹⁶ This issue was also considered in the aforementioned SOKiK's judgment of 27 November 2012 (XVII AmA 184/10, *Kamsoft, Faktor IBS and others*).

¹⁷ Act of 16 April 1993 on combating unfair competition (consolidated text: Journal of Laws 2003 No. 153, item 1503, as amended).

therefore interfere with their amount only when their size grossly deviates from what would be a fair and equitable amount for the infringement established.

In the judgment of 20 March 2012 (VI ACa 1038/11, *PKP Cargo*)¹⁸, the Court of Appeals referred to fines as an instrument strengthening the severity of the principal sanction, that is, the injunction to cease the competition restricting practices. The Court came to the conclusion that the imposition of a fine on an undertaking for the infringement of competition law is subject to an assessment in the context of all of the accumulated evidence, including the purposefulness of strengthening the principal sanction.

A few merger-related judgments were rendered in 2012 that also focused on the imposition of fines. In the judgment of 17 May 2012 (VI ACa 1428/11, *Carrefour B.V.*), the Court of Appeals dealt with the non-fulfilment of obligations (duty to dispose of rights to some assets) imposed in a conditional clearance on *Carrefour B.V.* as the acquiring company. The Court decided that liability for the infringement of obligations resulting from the Competition Act is objective in its nature. As such, the establishment of a culpable character of the violation is not a necessary prerequisite to plead a violation of its provisions. The Court found therefore that considerations on fault are irrelevant in light of the possibility to apply substantive law provisions. By contrast, the subjective element of an intentional or negligent nature of the infringement, referred to as fault, is a circumstance taken into account when determining the amount of fine.

In the judgment of 1 June 2012 (XVII AmA 82/11, *Jeronimo Martins Dystrybucja*), SOKiK annulled a decision of the UOKiK President which imposed a fine on an undertaking for the provision of incorrect data when submitting (at the NCA's request) additional information related to that undertaking's application for the clearance of a concentration. SOKiK stated that the UOKiK President's request for additional information was formulated incorrectly because the NCA failed to instruct the undertaking that submitting false information could result in a fine stipulated in Article 106(2)(1) of the Competition Act. In SOKiK's view, the aforementioned legal provision is criminal in nature and cannot be 'treated extensively'.

In the judgment of 6 December 2012 (XVII AmA 43/11, *AGD MARKET*), SOKiK modified a decision of the UOKiK President that imposed a fine for the implementation of a concentration without the NCA's prior consent. SOKiK lowered the amount of the original fine by almost 93%. It stressed that when assessing what fine would be adequate to the deed committed, one should also take into account a hypothetical decision that would most probably be made when the plaintiff notified the UOKiK President about the

¹⁸ It was annulled by the judgment of the Supreme Court of 3 October 2013 (III SK 67/12).

intention of a concentration. The conduct of an undertaking whose intention to concentrate would not be approved should be assessed differently from that of an undertaking which would certainly obtain consent. If a concentration was to be implemented without notification, the market consequences of these two different scenarios would be disproportionately distinct. SOKiK decided that failure to notify a concentration constituted an insignificant threat to the public interest if the scrutinised undertaking did not obtain any financial benefit from the violation of its duty under the Competition Act. SOKiK took into account the fact that the undertaking notified the concentration voluntarily, immediately after learning about its failure to comply with the notification duty. In SOKiK's opinion, voluntary, even if late, notifications should be rewarded in an analogous way to the workings of other existing legal institutions such as leniency or, in fact, active repentance in criminal and criminal tax law where a perpetrator may completely avoid a penalty. SOKiK decided that the conduct of an undertaking that notified a concentration after it was implemented (admitted to its failure to notify) should be rewarded by a considerable lowering of the fine.

The last issue that should be mentioned here is the application of Article 5 of Regulation 1/2003 by the UOKiK President as an NCA. In the judgment of 22 February 2012 (VI ACa 1304/11, *TP S.A.*), the Court of Appeals took the view that the UOKiK President could not decide to discontinue antitrust proceedings if it did not find an infringement of Article 101 or 102 TFEU. The aforementioned judgment was delivered after the Supreme Court decided to annul an earlier ruling of the Court of Appeals (10 July 2008, VI ACa 8/08) and referred the case back for renewed assessment¹⁹. The Supreme Court annulled the judgment of the Court of Appeals after it had received a preliminary judgment from the Court of Justice of the European Union of 3 May 2011 (C-375/09). The CJEU ruled therein that according to the second paragraph of Article 5 of Regulation No. 1/2003, where, on the basis of the information in the possession of an NCA, the conditions for prohibition are not met, the NCA may adopt a decision stating that there are no grounds for action on its part, but not a decision stating that there has been no breach of that article. The newest judgment of the Court of Appeals took this position into account.

¹⁹ See the judgment of the Supreme Court of 8 June 2011 (III SK 2/09). For the description of this judicial saga see K. Kowalik-Bańczyk, 'Ochrona konkurencji – obowiązek wydania decyzji stwierdzającej brak podstaw do działania po stronie Prezesa UOKiK w sytuacji niestwierdzenia przez Prezesa UOKiK naruszenia art. 102 TFUE. Wyrok Sądu Apelacyjnego z 22.02.2012 r. VI ACa 1304/11' [*'Competition protection – an obligation to issue a decision stating that there are no grounds for action on the part of the UOKiK President in a case where no infringement of Article 102 TFEU is found. Judgment of the Court of Appeals of 22 February 2012, VI ACa 1304/11'*] (2012) 4(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 108–109.

The Court stated that the UOKiK President should have adopted a decision stating that there were no grounds for action which constituted a specific type of decision on the merits of the case.

Literature

- Jurkowska-Gomułka A., 'Key Legislative and Jurisprudential Developments of Polish Antitrust Law in 2012' (2012) 5(7) *YARS*.
- Jurkowska-Gomułka A., 'Próba uzasadnienia klauzuli cenowej przepisem art. 15 ust. 1 pkt 1 ustawy o zwalczaniu nieuczciwej konkurencji. Wyrok Sądu Ochrony Konkurencji i Konsumentów z dnia 27 listopada 2012 r., XVII AmA 184/10' [The attempt to justify a price clause with Article 15(1)(1) of the Combating Unfair Competition Act. Judgment of the Court of Competition and Consumer Protection of 27 November 2012, XVII AmA 184/10'] (2013) 1(2) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Kohutek K., "Glosa do wyroku SN z dnia 13 lipca 2012 r., III SK 44/11" ['Commentary to the judgment of the Supreme Court of 13 July 2012, III SK 44/11'], LEX/el., 2012.
- Kohutek K., 'Narzucanie uciążliwych warunków umownych przez dominanta. Wyrok Sądu Ochrony Konkurencji i Konsumentów z dnia 22 lutego 2012 r., XVII AmA 66/10' [Imposition of onerous agreement terms by a dominant. Judgment of the Court of Competition and Consumer Protection of 22 February 2012, XVII AmA 66/10'] (2012) 3(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Kowalik-Bańczyk K., 'Ochrona konkurencji – obowiązek wydania decyzji stwierdzającej brak podstaw do działania po stronie Prezesa UOKiK w sytuacji niestwierdzenia przez Prezesa UOKiK naruszenia art. 102 TFUE. Wyrok Sądu Apelacyjnego z 22.02.2012 r. VI ACa 1304/11' [Competition protection – an obligation to issue a decision stating that there are no grounds for action on the part of the UOKiK President in the case where no infringement of Article 102 TFEU is found. Judgment of the Court of Appeals of 22 February 2012, VI ACa 1304/11'] (2012) 4(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Piszcz A., 'Still-unpopular Sanctions: The Private Antitrust Enforcement Developments in Poland after the 2008 White Paper' (2012) 5(7) *YARS*, p. 71–72.

9th Amendment to the Czech Competition Act

by

Robert Neruda^{*}, Lenka Gachová^{**}, Roman Světnický^{***}

CONTENTS

- I. Introductory Summary
- II. Leniency Programme
 - 1. New Rules
 - 2. Commentary
- III. Settlement
 - 1. New Rules
 - 2. Commentary
- IV. Prioritisation
 - 1. New Rules
 - 2. Commentary
- V. Supervision over Public Bodies
 - 1. New Rules
 - 2. Commentary
- VI. Other Changes Relating to the Competition Act
 - 1. Statement of Objections
 - 2. Providing Information to the Competition Office
 - 3. New Type of Sanction
 - 4. Legal Succession

^{*} Robert Neruda, partner in Czech-Slovak law firm Havel, Holásek & Partners; Faculty of Law, Masaryk University; robert.neruda@havelholasek.cz.

^{**} Lenka Gachová, legal expert in Havel, Holásek & Partners, specialising in competition law; lenka.gachova@havelholasek.cz.

^{***} Roman Světnický, junior associate in Havel, Holásek & Partners, specialising in competition law; roman.svetnický@havelholasek.cz.

I. Introductory Summary

On 9 October 2012, the President of the Czech Republic signed Act No. 360/2012 Coll., amending Act No. 143/2011 Coll., on the Protection of Competition, as amended (the ‘Competition Act’), and Act No. 40/2009 Coll., the Criminal Code, as amended (the ‘Criminal Code’). The Amendment became effective on 1 December 2012.

The main objective of the Amendment Act is to improve the effectiveness of detecting cartel arrangements by the Czech Office for the Protection of Competition (the ‘Office’). Many of the legal tools covered by the Amendment were already in use before its promulgation – either on the basis of existing soft laws of the Office or in fact, without any legal backing. Their introduction directly into the Competition Act is expected to increase legal certainty and thus make their use more effective. They include, most of all, the leniency programme and the settlement procedure. Seen as novel is the introduction of certain material consequences of both instruments particularly with respect to the range of potential penalties and criminal law consequences associated with them.

The Amendment also expressly regulates the Office’s right to refrain from taking action against anti-competitive practices because of their minor harmful effects. The purpose of such ‘prioritisation’, which is a manifestation of the opportunity principle, is to free up the Office’s sparse resources in order to enable it to investigate more serious violations. Although this should be seen as a legitimate goal, it also entails risks which are addressed in this paper.

Last but not least, the Amendment introduces a new power into the Competition Act which allows the Office to supervise public administration bodies in order to determine whether their activities restrict competition. This is quite a controversial step which could ultimately create the impression that the principles of competition protection take priority in the Czech legal order over all other national interests. This impression is strengthened by the general wording of the relevant provision.

Each of these major amendments is described and thoroughly commented on in a separate section of this paper. The final part presents other changes introduced by the aforementioned Amendment Act relating mainly to jurisdictional and technical issues that might also be of interest.

FIVE KEY CHANGES

- Leniency application as protection against criminal liability
- Settlement – only a 20% fine reduction
- The Office is entitled to decide which cases to pursue
- Public administration bodies may not distort competition
- New penalty – ban on public contracts and concession agreements

II. Leniency Programme

1. New Rules

All over the world, the leniency programme seems to represent the most effective tool for detecting secret agreements between competitors – most cartels detected by competition authorities in developed countries are reported by a leniency applicant.

The leniency programme consists of immunity from fines or a fine reduction granted to a leniency applicant if it ceases the illegal conduct, confesses to the competition authority, and provides the latter with information and evidence enabling other participants to be caught and punished. All this is subject to the assumption that the competition authority has not yet been informed about the existence of the illegal agreement or that the new information supplied by the leniency applicant brings significant added value to existing findings. Only the first undertaking to submit a leniency application can gain total immunity from fines. The Czech competition authority has been using leniency for years based on soft laws formulated and published by the Office on its website¹. Intense discussions are underway surrounding the issue whether, and if so what protection a ‘whistle-blower’ has from criminal prosecution and private damages claims from affected customers or competitors.

The Amendment introduces new basic rules for the leniency programme directly into the Competition Act increasing legal certainty for market participants. Defined therein is type I leniency (total immunity) and type II leniency (fine reduction), while upholding the existing granting conditions. Detailed provisions on the leniency programme will continue to be governed by relevant soft laws, the updated version of which will be made available on the Office’s website.

The fact that the newly introduced competition law penalty, consisting of a ban on public contracts or concession agreements (see below), will not affect a successful leniency applicant (for both types), constitutes the first of the major changes introduced by the Amendment to the existing leniency framework.

The Amendment changes also the procedural provisions relating to access to case files that contain leniency applications. The Office is apparently

¹ Leniency programme on imposition of fines in accordance with the Article 22 of the Act No. 143/2001 Coll. on the Protection of Competition and on amendment to certain Acts (Act on the Protection of Competition) as amended, on prohibited agreements distorting the competition, on condition that certain additional requirements are fulfilled the parties to the cartel can be granted immunity from a fine or a reduction of a fine (the Leniency programme). Available at: <http://www.uohs.cz/en/competition/antitrust/new-leniency-programme.html>.

convinced that the failure to protect such documents or, more precisely, failure to protect the applicants, could jeopardise the utilisation of the leniency programme and hence the investigative capability of the Office.

Thus, information about the fact that a leniency application was submitted at all and the identity of the applicant can be held by the Office outside the administrative file. That is so up to the time of the issue of the statement of objections. Afterwards, the parties to the proceedings will be able to access leniency applications but they will not be entitled to make any copies of, or extracts from these documents.

The Amendment has introduced an ambiguous solution to the problem of availability of leniency applications to civil courts conducting damages proceedings. Upon request, the Office will refer the protected documents to the given court. However, it is up to the court to specify under what conditions will access to the documents contained in leniency applications be provided or denied to third parties (the plaintiff in particular)².

Answered by the Amendment were also the calls of the practitioners to give leniency applicants not merely immunity from administrative fines but also immunity from criminal prosecution. For that purpose, the Amendment has changed the Criminal Code to incorporate a new, special provision governing ‘active repentance’ with respect to the criminal offence of a breach of competition rules. In substantive criminal law, active repentance must relate to an individual – perpetrator of a criminal offence – whose own activity will contribute to the successful result in the application of the leniency programme. In other words, an employee or representative of a cartel member should avoid criminal sanctions if he/she later actively cooperates with the Office within the leniency program.

2. Commentary

Although the Office was bound by its own rules on leniency even when they were only a soft law, their incorporation into the Competition Act certainly contributes to guaranteeing the rights of leniency applicants.

The Amendment has in this respect one clear primary goal: to motivate undertakings as much as possible to take part in the leniency programme. As a result, the intention to deliver maximum protection possible for leniency applicants takes precedence over the interests of other parties, be it other parties to the administrative proceedings (those denied access to leniency applications) or third parties (those that cannot be sure if they will be able to rely on leniency applications in civil disputes).

² Cf. C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161.

A parallel could be drawn between the Czech provisions and the rules applicable to proceedings before the European Commission. It is disputable, however, to what an extent are the latter consistent with the principles of Czech administrative proceedings or, more precisely, its administrative sanctioning. Experience shows extensive difficulties faced by a party to cartel proceedings when denied, for a significant proportion of the procedure, the opportunity to familiarize itself with allegedly key evidence against it, or to verify its authenticity and credibility. Even after the leniency application is incorporated into the file, such party must rely on its memory being precluded from making copies of, or excerpts from, the documents. Such provisions considerably limit the possibility of building an effective procedural defence.

Moreover, the Office declares that its objective is to put into practice, for the time being, a rather technical threat of criminal sanctions. It should be noted in this context that individuals involved in cartel arrangements face a prison sentence of up to eight years under the Czech Criminal Code. The introduction of criminal immunity for a leniency applicant's employees and representatives, alongside the expected growth in activity by the Police and prosecution services, is likely to increasingly motivate cartel members to consider the use of leniency. This will be true all the more in cases related to public procurement and tenders, which offer a leniency applicant the additional benefit of being exempt from the danger of facing a new sanction – a ban on public contracts and concession agreements.

NEW RULES REGARDING THE LENIENCY PROGRAMME

- Higher legal certainty for leniency applicants
- Limited access to leniency applications by other parties to the proceedings and third parties
- Successful leniency applicant will protect its employees from criminal sanctions and itself from facing a ban on public contracts and concession agreements

III. Settlement

1. New Rules

Another important change brought about by the Amendment Act is the introduction of the concept of settlement directly into the Competition Act. Settlement allows the Office to reduce penalties for those who acknowledge responsibility for committing an infringement, as defined and legally qualified

by the Office in a statement of objections. The new provisions explicitly require the offender to confess to committing the conduct at hand.

The fine reduction is considered to act as compensation for simplifying the procedural situation of the Office. It is legally set at a fixed rate of a 20% discount on the amount of the fine indicated in the statement of objections. Hence, the Office is not able to reduce the penalty by any more than the statutory 20%.

The Amendment also regulates the period during which the parties to the proceedings can submit an application for settlement. In principle, they can do so within 15 days from the day of the delivery of the statement of objections. A settlement application that has already been filed can be withdrawn no later than 15 days after the lapse of the period available for the original submission (i.e. within 30 days since the delivery of the statement of objections). The withdrawn application and the documents and information attached thereto shall not be taken into account during the on-going administrative proceedings. Thus, if the party to the proceedings confesses to the conduct in its settlement submission but subsequently withdraws it, the Office should not take into account the information provided by that party in its application for the forthcoming decision.

If the Office reduces the fine for a settlement applicant, the new type of sanction associated now to competition law infringements – a ban on public contracts or concession agreements – cannot be imposed on that undertaking in the same case.

2. Commentary

The main advantage of settlement procedures is that parties may actively influence the length of the administrative proceedings and the content of the resulting decision. Experience shows that the latter are usually short and do not contain details relating to the anti-competitive behaviour. This fact alone limits their use in future disputes concerning compensation of damage caused by anti-competitive behaviour.

However convinced one might be that settlement might be a practical solution for both the parties and the Office, it has not been clear for some time now whether the offer of a 20% fine reduction in exchange for acknowledging responsibility for a competition law violation is a sufficient motivator for such step in the Czech Republic. Undertakings will always consider the advantages and risks associated with a confession as part of settlement, on the one hand, and the judicial review, including the likelihood of the Office's decision being annulled, on the other.

While the European Commission applies settlement to cartels only, the Czech Competition Act permits its use with respect to all types of infringements,

including vertical agreements and the abuse of dominance. It is understood that one of the reasons for limiting the amount of the discount to 20% is to avoid obstructing the effectiveness of leniency (if the fine reduction was comparable, it would be more rational to use settlement). However, these arguments do not apply to non-cartel cases, abuse and vertical agreements in particular, which cannot benefit from leniency. It can be argued that the discount could and should in such cases be even higher – 50% – as it used to be the case in the past.

In accordance to the Amendment, the Office is able to apply settlement in cases where it considers reduced punishment to be adequate to the nature and severity of the infringement. The Office would clearly like to reserve a certain level of discretion in deciding when to apply the settlement procedure. However, the criterion of severity is not relevant in this context. In particular, settlement should not be limited to lesser cases only (in other words, it should not exclude agreements among competitors). Indeed, the Office has applied settlement to such a case in the past³. The option of concluding a settlement agreement even in cartel cases should thus be kept open.

As already mentioned, the Office has been using settlement even before the Amendment. Future will show whether, and to what an extent, the Office is actually willing to deviate from its established decisional practice. The announced soft law could eliminate existing doubts. It is regrettable that these guidelines were not issued prior to the entry into force of the Amendment so that undertakings could more thoroughly acquaint themselves with the new settlement framework.

SETTLEMENT IN THE CZECH REPUBLIC

- Only a 20% discount on the fine
- Settlement available for cartels, abuse of dominance and vertical agreements
- Protection against bans on public contracts and concession agreements but not against criminal liability

IV. Prioritisation

1. New Rules

The Amendment gives the Office a new statutory power whereby it can decide, after a preliminary investigation, that no administrative proceedings will be opened in a given case. Such decision can be taken due to lack of public

³ Cf. decision of the Office No. ÚOHS-S169/2008/KD-368/2011/850/KNe of 10 February 2011 in the case Cartel of detergent manufacturers.

interest in conducting a further investigation because of the minor scale of the anti-competitive effects of the preliminarily scrutinised practice. This situation reflects the so-called ‘prioritisation’ of the competition authority’s activity and/or the enforcement of the principle of opportunity.

Enacting the prioritisation principle should allow the Office to avoid having to extensively deal with infringements which affect the functioning of competition only to a very limited extent. The Office alleges that it will use the freed resources for cases where the violation has more serious consequences for the entire economy.

The Office will determine the types of behaviour which pose a limited threat to competition upon the consideration of several criteria:

- nature of the behaviour: the Office will check whether competition was completely excluded as a consequence of the given anti-competitive behaviour, in particular if exclusion was intentional;
- form of the anti-competitive behaviour: the Office should primarily examine whether the anti-competitive effects result from enforcement by an individual undertaking or from an agreement or whether the investigated undertakings applied controls and sanctions aimed at securing the execution of the prohibited agreement;
- importance of the market: the Office will favour the initiation of proceedings in cases where the breach has a nation-wide impact as opposed to those having local effects only while taking into consideration the importance of the given market for downstream economy sectors and for consumers;
- number of affected consumers: in accordance with the legislator’s intention, public interest in conducting full competition law proceedings will exist, as a rule, if the behaviour affected thousands of consumers.

The Office is obligated to make a written and reasoned record of its decision to not commence proceedings in its file.

Alongside the introduction of the principle of prioritisation into the Competition Act, the Office issued a working version of a Notice on the definition of proceedings without public interest and on an alternative solution to competition-related problems⁴. It elaborates therein on the criteria considered in this context and gives examples of behaviour considered of marginal impact on effective competition. For the sake of enhanced transparency and predictability, the Office shall publish an annual list of cases which ended in a decision to not proceed with the investigation and where the identified competition problem was remedied without the commencement of full proceedings. Moreover, if a court that conducts civil proceedings (e.g. for

⁴ Available at: www.uohs.cz/cs/hospodarska-soutez/aktuality-z-hospodarske-souteze/1490-verejna-diskuse-o-vymezeni-rizeni-na-jejichz-vedeni-neni-verejny.html.

compensation of damage caused by anti-competitive conduct) submits an inquiry concerning such case, the Office may answer that competition law has indeed been breached despite the fact that it chose not to investigate it fully.

2. Commentary

Contrary to many opinions, the use of prioritisation is to be supported, in principle – the Office should be able to concentrate its resources on the investigation of most serious violations. However, the manner in which the Office will proceed and the lack of effective review of its decision remains a concern.

The Amendment requires that a mere note is to be made in the administrative file on the Office's decision not to proceed with a given case. However, in accordance with the Code of Administrative Procedure, an appeal cannot be filed against this type of decision. Czech courts are very restrictive as far as allowing third parties (typically complainants) to challenge any outputs of the Office. It can thus be assumed that an undertaking or a consumer affected by anti-competitive behaviour that was not pursued has nowhere else to go to have the Office's conclusion concerning the minor importance of a case re-evaluated.

In accordance with established decisional practice, neither the investigated nor the complainant can have access to the file before the actual opening of formal proceedings. The complainant will thus have no chance to review the reasons why the Office considered the challenged practice as behaviour that poses a low degree of threat for the economy.

The impossibility to duly review the Office's decision cannot be seen as a favourable legal solution as it can facilitate an arbitrary approach including even the dismissal of difficult cases, for whatever reason. There is no need to stress that a decision not to proceed with complex or sensitive cases would sharply contradict the purpose of prioritisation or the role of the competition authority as the guardian of fair competition.

Point 15 of the draft Notice indicates that it is possible to decide not to proceed with a full investigation if it is not necessary to provide extensive evidence to conclude that the law has indeed been breached. It is unclear why the Office would wish to forfeit the possibility to punish anti-competitive behaviour that has been proven or which can be proven with minimal effort. Thus, the situation of injured parties is generally complicated. Although the Office confirms the possibility of answering a court inquiry as to whether a given practice amounts to a breach of competition rules, it is not clear whether it will be possible to force the Office to make such a statement.

Moreover, the potential impact of such an expert opinion remains questionable since it is not preceded by fully evidenced formal proceedings.

Finally, incorporating the prioritisation principle may lead to a situation where the Office does not deal with ‘minor’ cases. Such an approach could put smaller entities under the impression that they will not face any negative consequences for breaching competition law.

Having previously decided not to proceed with ‘less serious violations’ in order to investigate more severe offences, and having subsequently dealt with the latter, one has to wonder if the Office will subsequently tackle cases that were previously not proceeded with for lack of resources. Such an approach would certainly contradict the principle of legal certainty and equal treatment.

PRIORITISATION

- The Office shall be authorised to decide not to proceed with a case of flagrant breach of competition law if low public interest exists therein
- Unclear or disputable criteria defining public interest
- Complainants cannot defend themselves against an unfounded decision not to proceed with their case

V. Supervision over Public Bodies

1. New Rules

The Amendment extends the supervisory powers of the Office to also cover public administration authorities, both on the national and local level. All public bodies are now subject to a ban on distorting competition whether by providing preferential support to a particular undertaking or otherwise. Pursuant to the new Section 22aa(2) of the Competition Act, the Office may impose a fine of up to CZK 10,000,000 (up to EUR 390,000) for a competition law violation committed by a public body.

If a local government body distorts competition, the Office shall send a final and binding decision to that public entity’s supervisory agency under the Act on Municipalities, Regions and the City of Prague. It shall subsequently transfer the entire administrative file to that agency at its request.

Interestingly, the Senate of the Czech Republic introduced here a change into the draft Amendment. According to the general substance of Section 19a (1), public administration authorities are prohibited from distorting competition by providing preferential support to a particular undertaking or

otherwise. The wording set by the Senate is more stringent than the original proposal, which prohibited public administration authorities from distorting competition by ‘evident’ support or aid. This change clearly indicates the legislators’ efforts to make the language of the Act more rigorous. Based on the final wording of the Amendment, public administration bodies may not distort competition by way of any support or aid (not just its evident form) that would give an advantage to a particular undertaking.

2. Commentary

Public administration authorities and local government bodies have broad competencies that enable them to interfere with business sectors making them potentially also able to inappropriately interfere with, and distort, the market. Deliberate interference with the primary aim of giving an advantage to a specific undertaking (or group of undertakings) is undesirable. Experience shows that competition advocacy as applied by the Office, embedding competition principles into the policies of other public administration bodies through comments and public proclamations, is not always efficient.

The wording of the Amendment under which the Office is able to proceed against any measure that distorts competition evokes the notion of superiority of competition policy (protection of competition) over other policies and interests of a democratic state (such as health care and welfare policies). The Office, if it were to use this new power wisely, would have to always apply the proportionality test and consider each time whether a measure that distorts competition is in fact necessary to achieve the aim of another state policy (and whether a less restrictive measure exists that would enable the achievement of the same goal). Otherwise, the Office would probably have to assess the declaration of Prohibition based on the protection of public health⁵, from the competition law perspective; as such prohibition would undoubtedly result in competition restrictions.

It follows from the experiences of the Slovak Antimonopoly Office, which has a similar supervisory power, that its application makes sense in certain cases. For example, the Slovak Antimonopoly Office imposed a fine on the Bratislava Nové Mesto Borough Authority for having issued a binding opinion precluding the opening of a new pharmacy in a building of an outpatient clinic. The given explanation was that ‘a functional pharmacy already exists in

⁵ Please note that the Czech government declared a Prohibition (a prohibition to sell alcohol) in 2012 as a response to several cases of alcohol-poisoning. It is an example of the competition restriction due to the conduct of public body. On the other hand, the Prohibition was declared in order to protect citizens’ health until the investigation is finished.

the building of this outpatient clinic, which, together with other pharmacies in the vicinity of the outpatient clinic sufficiently guarantees medical care to the people who live in the area in question⁶. Thus, anti-competitive support was provided in this particular case to the operator of the already functioning pharmacy in the form of a negative decision that prevented new entrants from entering the market and engaging in effective competition.

It appears that the new legal provisions amount to the prohibition of any financial subsidies and advantages given by the state and local governments to particular undertakings if such subsidies and advantages could distort competition. Importantly, this rule applies even if such preferential treatment does not amount to state aid within the meaning of Article 107 TFEU, that is, even if it is not capable of affecting trade between Member States. It is worth considering whether the legislator was actually aware of the wide extent of the prohibition it created and its consequences.

It is likely that the Office believes that the Amendment will provide it with a new, more effective tool in its combat against ‘tailor-made’ public contracts and corruption. The question remains, however, whether a threat of a fine of up to CZK 10 million is a sufficient deterrent considering that public contracts are often worth billions of crowns. It is also questionable whether imposing a fine will make any sense as its recoverability will, as a rule, be problematic. Transfers of money from one state administration authority to another do not appear to be meaningful either.

Thus, although the new provisions should principally be welcomed, it is likely that its success will largely depend on how the Office will handle them, that is, whether it will promote the competition principles actively, but proportionately, and whether its decisions will actually be accepted by other public administration authorities.

SUPERVISION OVER PUBLIC ADMINISTRATION AUTHORITIES

- A very broad ban on any competition distortions by the state, counties and municipalities
- State aid is prohibited, even if not capable of distorting trade between Member States
- Fine up to CZK 10 million
- Will it be applied by the Office at all? Will it be applied in a proportionate manner?

⁶ Decision of the Slovak Antimonopoly Office no. 2007/39/1/1/083 of 9 October 2007 in the case of *Městská část Bratislava Nové Mesto* (District Bratislava – New City).

VI. Other Changes Relating to the Competition Act

In addition to the above-covered new provisions incorporated into the Competition Act, the Amendment brings about a number of partial changes and additions also. Their purpose is to eliminate logical inaccuracies in the text of current legislation and/or to clearly define the rights and duties of the Office and other entities.

1. Statement of Objections

A statement of objections is a written declaration of the Office (not a decision) by which the parties to the proceedings are informed that a particular behaviour of theirs is regarded by the Office as unlawful, about its legal qualification, and evidence on the basis of which the Office arrived at this conclusion. Further procedural steps of the Office and the parties shall be developed upon delivery of a statement of objections.

As a consequence of the Amendment, the Office is now obligated to inform the parties to the proceedings in the statement of objections of the amount of the fine to be imposed upon them. This change helps strengthen the rights of the parties to the proceedings and to enhance the transparency and predictability of the subsequent steps taken by the Office. At the same time, knowing what amount of fine to expect makes it possible for undertakings to better assess the advantage of using fine reduction mechanisms embedded in the settlement and leniency procedures.

2. Providing Information to the Office

The Amendment introduces a general duty to provide the Office with complete, accurate and truthful materials and information. This obligation applies irrespective of whether they are submitted on the basis of a prior written request from the Office or whether they are provided on a voluntary basis. A breach of this duty may be sanctioned by the Office with a procedural fine. Thus, under the new provisions, a fine may also be imposed on those who provide the Office with incomplete, incorrect or false information on their own initiative such as undertakings notifying a concentration, applicants for an exemption from the ban on concentrations between undertakings or third parties (e.g. complainants).

3. New Type of Sanction

The Amendment reflects also the Czech government's strategy to combat corruption by giving the Office a new power – the right to impose a ban on public contracts and concession agreements. The ban lasts a period of three years and can be imposed if the scrutinised infringement was committed in connection with a contract-award procedure or a tender for a concession. The 'period of three years', to which the rule refers, indicates that the sanctions will not be imposed in a flexible manner at the administrative discretion of the Office. Instead, it will always cover the exact statutory period of three years. This provision will have an impact mainly on cases involving bid-rigging.

The Amendment introduced therefore into the Competition Act a ban similar to that contained in the Public Procurement Act and in the Concessions Act. This new and stringent power could spark a significant inflow of leniency applications by parties to bid-rigging and cartel agreements. Indeed, the introduction of this new sanction may prove to have a greater impact on undertakings than the usual fines as it can lead to a major loss of profits (especially for those whose activities depend on their participation in public contracts), customers, and ultimately even market share.

4. Legal Succession

The Amendment also changes the conditions for the transfer of liability for an administrative infringement from a legal entity to its legal successor. Before the Amendment, liability was passed on to a legal successor only if the latter knew or could have known that the other legal entity had committed an act that possessed an elements of an anti-competitive infringement.

Under the Amendment, liability for anti-competitive conduct of a legal entity that ceased to exist passes to its legal successor automatically. Thus, the Amendment objectifies the criterion for the transfer of liability for an administrative violation as the cessation of the existence of a legal entity causes the transfer of that liability automatically without the need to prove knowledge or awareness of the violation by the legal successor.

Recent Competition Policy Developments in Hungary – Unfair Commercial Practices, Cartels and Abuse of Dominance*

by

Pál Szilágyi**, Tihamér Tóth***

CONTENTS

- I. Introduction
- II. Unfair commercial practices
 - 1. Introduction
 - 2. Hungarians choose Hungarian food products
 - 3. Bait advertising
 - 4. Kids ads
 - 5. Who has the best mobile network?
 - 6. Lottery-like consumer credit services
 - 7. Commitments accepted in UCP cases
 - 8. Sanctions
- III. Anticompetitive agreements
- IV. Abuse of a dominant position
- V. Conclusions

I. Introduction

This article introduces the most important Hungarian competition cases decided between the beginning of 2012 and May 2013. The paper presents

* The article was published under the project TÁMOP-4.2.1.B-11/2/KMR-2011-0002 – Development of Scientific Research at PPCU.

** Dr. Pál Szilágyi, Director of Competition Law Research Centre (Pázmány Péter Catholic University, Faculty of Law and Political Sciences); pal.szilagyi@versenyjog.com.

*** Dr. Tihamér Tóth, President of the Scientific Board of the Competition Law Research Centre, professor at Pázmány Péter Catholic University, Faculty of Law and Political Sciences and of-counsel at Réczicza White and Case LLP.

legal novelties and issues which might prove interesting for an international readership in light of recent developments and focus of competition policy. Shown are both developments concerning unfair commercial practices and the UCP Directive¹ as well as anticompetitive agreements and abuse of dominance.

Hungary has an enforcement system where the national competition authority, the Gazdasági Versenyhivatal (hereafter, GVH) is responsible for the enforcement of competition rules. Within the GVH the Competition Council is responsible for taking substantive decisions on infringements. The GVH is headed by a president and there are two vice-presidents supervising the operation of case handlers, while the other acts as the chairman of the Competition Council. The Competition Council consists of lawyers and economists who enjoy a quasi-judicial status. Decisions are made in proceeding councils composed of three or five members selected by the chairman of the Competition Council.

II. Unfair commercial practices

1. Introduction

The investigation of unfair commercial practices (hereafter, UCP) dominates the GVH's enforcement agenda. This is certainly true with respect to both the number of its cases and its press appearances. Looking at the size of antitrust fines, cartel cases are usually considered to be more important. However, the year 2012 was an exception to this rule due to low numbers of cartel decisions. A quick look at the GVH's official website illustrates that UCP dominate its policy and its competition culture agenda as well. It is notable that the Hungarian competition authority issued in 2012 new guidelines on commitments but they only cover UCP, excluding antitrust issues from its scope. It seems therefore that the GVH is campaigning much more against certain UCP than towards a further strengthening of the antitrust culture.

Cases decided in the reference period with respect to UCP related to markets that are at the top of the enforcement agenda for several years already: retail chains, time share, mobile phones, banking and other financial services. The unique areas that the GVH has recently tackled include:

¹ Directive 2005/29/EC of the European Parliament and of the Council of 11/05/2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ [2005] L 149/22.

'Hungaricum', referring to products with a special Hungarian character, kids ads and comparative advertising. The average size of fines fluctuated in the range of a few million forints – with the exception of two penalties that reached 100 million HUF. These numbers do not seem excessively high given the large size of the undertakings involved. It is notable that the GVH did not hesitate to impose fines reaching the statutory maximum in cases relating to credit-like financial services where some providers continuously disregarded the clear and well-articulated expectations of the competition authority.

2. Hungarians choose Hungarian food products

Slogans like 'Hungarian product', 'Hungarian quality' or the use of the Hungarian tricolours are frequently used by supermarkets to promote the sale of food stuffs. Based on experiences gained in the course of its investigations, the GVH issued a press release explaining its approach to these phenomena. The authority established that even price sensitive Hungarian consumers tend to choose products of domestic origin provided the price difference is not major. Purchasing national products helps save jobs and guarantee that profits remain in the country. It is not surprising that this issue topped the political agenda also with the Parliament adopting a new law regulating the use of expressions referring to Hungarian origin².

The Hungarian competition authority follows a standard text in the reasoning of its decisions. It recalls the provision of the UCP Act³ that a misleading communication relating to the origin of a product may amount to an unfair market practice. The GVH believes that references to a domestic nature of a product are perceived by the average consumer as meaning that it was made of Hungarian components, by a Hungarian company, employing Hungarian workers and within the territory of Hungary. It seems that the GVH considers that these conditions would apply cumulatively.

In August 2012, Auchan was found to have infringed the prohibition of the Hungarian UCP Act. The hypermarket chain had to pay 10 million HUF in fines because it used Hungarian folk motives and the red-white-green tricolour during a one-week advertising campaign held in August 2010. According to the GVH, it was misleading to claim that products covered by this campaign were 'Auchan Hungaricum'.

Auchan argued that the average consumer would interpret 'hungaricum' as a product that has a strong relation to Hungary and its national identity, that is, a typical brand consumed by Hungarians for many years. Brands like

² Act XXX of 2012 on Hungarian values and Hungaricum.

³ Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices against Consumers.

Sport chocolate, Sió juice or Soproni beer are ‘hungaricums’ because they are not traded and thus not known abroad. Auchan denied that it should prove the domestic origin of these products explaining, among others, that Omnia coffee should be regarded as a ‘hungaricum’ even though it is a well known fact that coffee does not grow in Hungary.

The GVH explained in response that it is not required to carry out a statistical survey to prove how the average consumer interprets the message of an advertisement. The Competition Council held that the overall message derived from the term ‘hungaricum’, tulip motives and red-white-green colours is that the product is truly Hungarian. However, about 60% of the products covered by the investigated campaign were not actually produced in Hungary – promoting them as ‘hungaricums’ was therefore considered misleading to consumers. The competition authority imposed a fine on Auchan, in line with its guidelines.⁴ The fine was based on the costs relating to the illegal communication campaign. The uncertainties surrounding the exact definition of ‘hungaricum’ and the short duration of the infringement were taken into account as attenuating circumstances. Incidentally, the decision states that the GVH intends to impose fines in order to deter future infringements. It is doubtful, however, whether HUF 10 million would have such an effect considering that the decision notes, as an aggravating circumstance, the fact that the company was already fined two times for similar misconduct (30 million each time).

In a most recent decision, the Competition Council of the GVH imposed a fine of HUF 5 million on Penny Market for claiming that several of its products were Hungarian. Penny Market claimed in its defence that it took into account the ‘administrative origin’ of the products. The GVH was not convinced by this technical explanation. Once again, the fine seems rather small given that the investigated campaign run in this case for almost one and a half years and that the company has committed several other similar infringements in the past.

3. Bait advertising

The GVH is well known for challenging promotions where the advertised products are not available in sufficient quantity. Point 5 of the UCP Directive’s black list prohibits ‘an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure

⁴ 1/2007 Communication of the president of the GVH and the chairman of the Competition Council on the calculation of fines in unfair commercial practices cases. Available in Hungarian at http://www.gyh.hu/domain2/files/modules/module25/pdf/joghatter_magyarpiac_kozlemenyek_2007_1_fogybirsag_m.pdf.

another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered'. This unfair commercial practice is known as bait advertising. The length and structure of the above sentence shows that this is not a prohibition easy to understand or implement. The GVH has established in the past that supermarket chains are responsible for their failure to provide the advertised products during a two-day promotion campaign and where a 'luring' effect can be assumed. Although point 5 of the black list seems to make it easier for traders to explain why their action should not be regarded as unfair, the GVH imposed fines in several such cases last year.

ALDI was fined for its failure to provide a single product – a Tevion external hard drive – promoted for one week between the end of December 2011 and the beginning of January 2012. A fine of HUF 25 million was imposed with reference to aggravating circumstances such as recidivism and the fact that the campaign reached many potential consumers. The authority took also into account that ALDI offered a 1 000 Ft voucher to complaining customers as a kind of compensation. Nevertheless, the decision makes no reference to the GVH fining guidelines. The cost of the campaign might have served as a basis for the calculation of the fine; GVH took into account the size of the Tevion drive advertisement compared to the total size of the promotional leaflet.

ALDI argued unsuccessfully that it relied upon the quantity sold during the previous promotion held in October. If demand proved higher, it hoped that its suppliers would be able to procure more of the product. It was due to natural disasters that Thailand's hard drive production fell in autumn of 2011, a fact that dramatically changed global markets. ALDI claimed also that it was unable to acquire more hard disks from its Austrian outlets.

The Competition Council emphasized that point 5 of the black list cannot be seen as creating a duty for retailers to provide the product for the entire period of the promotion and to each and every consumer. The key point here is that traders should organize their campaigns diligently. It was established that ALDI must have known that supplies will be scarce due to the drop in production, that the Tevion hard drives sold well in November even at normal prices and that a 28% reduction would surely stimulate further demand. Unfortunately, the number of products stored during the October and December campaigns cannot be compared since they are business secrets. It is telling, however, that the Competition Council made note of the fact that several ALDI stores failed to have even one Tevion hard drive for sale in December.

One of the first decisions of 2012 was to levy fines of HUF 30 million on the Hungarian franchise company CBA. The network consists of independent

small and medium size shops covering the entire national territory. These stores operate a joint procurement system and run joint promotion campaigns. For one week in May 2010, some of the CBA shops (located in one of the regions of Western Hungary) did not sell all of the goods covered by its nationwide promotion leaflet or sold them at higher prices. The investigation covered the time period starting from January 2009. It was concluded that CBA failed to establish a system where stock and prices were guaranteed in its franchisees all over the country.

The decision heralds a rather wide interpretation of the UCP Directive and its domestic equivalent as regards bait advertising and stocking issues. The Competition Council held that liability can be established even if the conditions of point 5 of the black list were not met. According to its approach, the black list includes certain practices prohibited *per se*, but similar actions may infringe the prohibition of unfair commercial practices if either the general ban on misleading or the even broader general unfairness provision is infringed. It is true that this interpretation is in line with the structure of the UCP Directive and its implementing act. However, it also diminishes the importance of the black list's definition of bait advertising. Even if a trader can show that the conditions⁵ of point 5 of the list are not met, it may still be held liable on other (less clear) grounds if the GVH does not like the given promotion policy. GVH's policy in post-UCP era cases has so far been to only sanction companies on account of products unavailable during promotions if the strict conditions of point 5 of the black list were met. The detailed provisions of the black list were construed as a kind of *lex specialis* explaining when a stocking problem can lead to retailer liability. The departure from this business-friendly approach made it possible for GVH to condemn CBA's general marketing policy for not providing sufficient safeguards to ensure that products promoted nationwide were actually sold under the same conditions all over the country. The GVH admits that it may be more difficult, but still not impossible, to guarantee the same conditions in a franchise network comprising independent shops.

Interestingly, the decision's reasoning is very short when it comes to the actual insufficiency of products and the explanation why this might have caused a material distortion of transactional decision of average consumers. Only five products were not actually on sale everywhere during the promotion

⁵ According to point 5 of the UCP Directive 'black list' the 'making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising) is prohibited'.

in the two years investigated by the authority. Moreover, the decision makes no effort to look into the reasons behind product shortage as required by point 5 of the black list.

The Competition Council did not set clear rules when a retailer's promotion system or policy was to infringe general UCP prohibitions. The decision repeats previous statements that undertakings should take into account quantities sold during previous promotions, under similar circumstances as regards the season and the size of the discount. The test becomes far vaguer when it also refers to practices of competitors and the 'mood of consumers' willing, or not willing to buy that product. It would be a fair question for retailers to asked how should factors like these be integrated into their promotion systems to make them fire proof under the UCP Act.

The Competition Council gave a brief explanation only using broad terms about how the fine was calculated. Similarly to the ALDI case, it did not refer to its own fining guidelines. The penalty was based on the expenditure relating to the unlawful communication (presumably the cost of CBA's promotional leaflets). The Council found no attenuating circumstances. The length of the infringement (two years), the significant size of the franchise and the number of consumers affected were all listed as aggravating circumstances.

Tesco, Hungary's largest retailer, was fined in February 2013. Its Hungarian subsidiary had to pay HUF 20 million because it failed to stock sufficient quantities of 23 garden machines that were offered for sale at prices 50% and 70% lower than normal during two week sales in autumn 2011. A quarter of Tesco shops did not have a single of these items in stock during the campaign. Taking into account the size of ALDI and Tesco, the number of products promoted without sufficient stocks, the length of the campaign and the number of previous breaches of the ban on misleading advertising, Tesco's fine seems rather small in comparison to that of ALDI.

Interestingly, GVH did not condemn Tesco for infringing point 5 of the black list when some of the advertised garden machines were not available in certain shops. Instead, the decision relies on the general ban on misleading provided by the UCP Act. Moreover, it is not entirely clear why the ads were found illegal at all, given that the Competition Council admits that in contrast to normal promotions, the company is not required to have opening stocks in each and every of its shops when it launches a seasonal final sale. Tesco's promotion materials simply advertised huge discounts of up to 70% for certain products. Its ads did not specify which exact products were covered. Instead, it invited consumers to visit its stores and look for what was available. However, the GVH found an infringement already in the 50% & 70% discount claims, since the company failed to prove that such savings could actually be achieved in comparison to previous prices. It must be concluded that the decision and

its reasoning is quite confusing as to the requisite legal standard to be observed in final sales cases.

4. Kids ads

Point No. 28 of the black list prohibits, as an aggressive practice, advertisements that directly exhort children to buy the advertised products or persuade their parents or other adults to buy these products for them. The GVH conducted two such procedures in 2012 – one against a toy manufacturer and one against the publisher of a children magazine – modest fines were imposed in both cases. The company M-Ágnes selling ‘Nappy’ dogs and ‘Filly’ royal family members had to pay HUF 1 million. The GVH argued here that the main message of the ads to ‘Collect them all!’ pushed children to buy multiple toys in order to get the entire collection. Since the advertised products were packed in non-transparently bags, children had to buy doubles in order to get every toy in the set. The Egmont-Hungary publishing company was also fined HUF 1 million this time for urging children to collect Egmont stickers all year long to participate in a competition.

It will be interesting to see whether this enforcement campaign continues. There are many advertisements on TV, especially on children channels, which are all meant to push children or their parents to buy certain toys or food product for them.

5. Who has the best mobile network?

Mobile service providers are penalised by the GVH almost every year. The highest fines of the year were imposed in two twin-procedures against Vodafone and Magyar Telekom (part of the Deutsche Telekom group). It was Vodafone that started the war by advertising itself between December 2010 and June 2011 as having the ‘fastest’ and ‘best mobile data network’ in Hungary. Magyar Telekom launched its campaign in response in February 2011 lasting till the end of March 2011.

The GVH found that Vodafone’s message was unfounded. The company had solid data sustaining its claims only for the largest Hungarian cities including Budapest, but not for the entire territory of the country. The Competition Council added that in a market subject to rapid and constant technological improvements, it is almost impossible to verify the truthfulness of such claims with respect to the entire length of a marketing campaign. In response to Vodafone’s campaign, Magyar Telekom began to claim that it

had the fastest broadband mobile data network In Hungary. The GVH found these advertisements to be misleading also, since they were relying on up and download speeds only disregarding web-browsing.

The legal basis of the two decisions was not only the Hungarian UCP Directive Act but also the Act on Advertisements implementing EU Directive on comparative advertising⁶. The relationship between these two types of unlawful advertising activities (and their respective Directives) is that in order to qualify as a lawful comparative advertisement, the ad should not be misleading under the UCP Directive. The Competition Council explained that in markets with just a few well known players, a 'number one' claim can be regarded as a comparative ad despite the fact that specific competitors are not expressly mentioned.

As a result, Vodafone had to pay HUF 50 million and Magyar Telekom 100 million in fines – the difference related to the varying marketing budget of these two companies, according to the GVH. The competition authority should have given more weight to the facts that Magyar Telekom actions were merely a response to Vodafone's earlier unlawful behaviour as well as to the fact that Vodafone falsely advertised itself for a duration four times longer than the market leader, Magyar Telekom.

Vodafone, the third largest operator, was again fined HUF 30 million a few month later (March 2013) for claiming in its Rally campaign of February and March 2012 that its network was accessible 'countrywide' and 'everywhere' compared with, and in contrast to the other two mobile service networks. As regards the fine, the Competition Council recalled the seriousness of the effects of the campaign due to its length and the repeated nature of the violation. Despite the Competition Council's intentions, given the previous infringements of the company and bearing in mind the usually high costs of a TV ad campaign, a 30 HUF million fine cannot be considered serious.

6. Lottery-like consumer credit services

Companies organizing so called 'consumer groups' quite often provide their services as if they were offering financial credit products. Cases like these have been reoccurring in the GVH's recent enforcement practice. The competition authority does not hesitate to impose fines reaching the maximum statutory level if the ads confuse an average vulnerable consumer as to the true nature of the service. Members of these consumer groups pay instalments for long periods of time that form the basis of a loan which they will acquire in the

⁶ Directive 2006/114/EC of the European Parliament és of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ [2006] L 376.

future. Unlike with banks, however, consumers will not automatically get such a loan after the contract is concluded. Instead, these services include a gambling element: only lucky participants will get access to financial resources in a fast and convenient manner. The rest of the consumer group will have to wait for an uncertain period of time to benefit from their membership. The provision of services like these is not illegal *per se*. However, the related communication should not confuse these services with credit products offered by banks.

Relying on its established practice, the GVH decided to publish a press release⁷ explaining its approach to this issue and warning consumers of the risks involved. Individuals targeted by companies organizing consumer groups are considered by the GVH to be vulnerable as they would usually not get a loan from commercial banks.

Among the examples of such cases is Vj-57/2011 where Orion Lux Kft. was fined HUF 3.4 million and Euromobilien Kft.-t close to 1 million HUF. Their ads were found to be misleading because they did not state that there was an entry fee consumers had to pay to join the club of consumers. These fines do not seem large at first sight. In relative terms, however, compared to the size of the infringers, they are burdensome. Euromobilien Kft. had to pay the maximum possible amount of 10% of its previous financial year's turnover because it was regarded as a recidivist.

In February 2012, six related companies had to pay fines of HUF 60 million for repeatedly giving incomplete information about the true nature of the consumer group which they operated. The Competition Council relied here on the juridical reasoning of Hungarian courts which have in the mean time reviewed its earlier decisions. Accordingly, companies operating in this market should provide clear information on the gambling element of the service such as the fact that it may even take 25 years for participants to get the desired loan.

7. Commitments accepted in UCP cases

The GVH issued in 2013 a set of guidelines on the approach it takes towards commitments in UCP cases. This legal instrument (commitments) was first introduced by the legislator in order to be used in antitrust cases so that the agency could solve complex problems that did not cause significant damage to the functioning of competitive markets. However, the new guidelines cover UCP cases only. The GVH reasoned the UCP focus by recalling that most of its procedures relate to misleading advertising, rather than antitrust. Hence,

⁷ Press release of 26 March 2010 on the risks of consumer groups, available in Hungarian at http://www.gvh.hu/gvh/alpha?m5_doc=6428&pg=58.

it felt in a better position to publish guidelines solely in relation to these types of investigations.

The Hungarian Post Office has benefited recently from this type of closure in case Vj-67/2011. The GVH decided that the postal operator offered sufficient commitments to remedy the competition concerns initially identified by the authority. The investigation started because consumers were not properly informed at the postal counters about costs of paying with a debit/credit card, instead of using cash. The GVH was unhappy that post office clerks were required to mention that using cards amounts to a cash withdrawal rather than a normal card payment, which is usually free in Hungary (at least to the customer). The GVH urged the company to provide consumers with more precise information. Magyar Posta ultimately undertook to use verbal as well as written communication that paying by card in a post office is regarded as a cash withdrawal subject to charges set by the issuer of the card.

The September 2012 decision shows how difficult it may be to accept commitments in UCP cases. Promising to discontinue the allegedly illegal action is not sufficient. The GVH is eager to get something more in exchange for not declaring the scrutinised practice to be illegal. It is hard to see, however, what this ‘added value’ for consumers was in this case – providing them with full information would be a natural consequence of an infringement decision. Perhaps the provision of written materials, beyond verbal warnings, was considered sufficiently ‘added value’ to make the Competition Council decide not to sanction the company.

8. Sanctions

The usual and sometimes automatic sanction used in UCP cases is to impose fines on the undertaking involved in the infringement. It is rare for companies to survive an investigation without monetary sanctions. Termination decisions are also quite common in this category of cases. Chances of successfully arguing a case before the Competition Council are rather small unless the company is able to offer appropriate commitments. The Competition Act’s rules on fining are the same regardless whether the GVH is taking a decision in a cartel, abuse or misleading advertising case. The upper limit is 10% of the turnover realized in the previous business year.

Fining guidelines in misleading advertising cases were published a couple of years ago. They were signed by the President of the GVH as well as the chairman of its Competition Council. The starting point of their calculation follows the same logic as antitrust fining guidelines – a basic amount is set which is later adjusted by other relevant factors. In UCP cases, it is the costs

of publishing the misleading or otherwise unfair communication that tends to act as the starting point for the calculation of the fine. The wider and more intensive the campaign, the higher the fine will be. Unfortunately, decisions are not very detailed on this issue seeing as the actual size of the marketing budget employed in a given case amounts to a business secret. Most of the cases decided by the Competition Council in 2012 refer to these guidelines as a basis for calculating the fine. It is hard to track, however, how the GVH actually arrived at the final amounts – the reasoning of UPC decisions lists the various factors taken into account when setting the fine without assigning to them any particular weights or percentages.

It is not easy to rank cases according to the amount of fines imposed. It is tempting to take the nominal amount as the basis. The relative size of the fine, compared with the size of the company, is however far more telling for policy purposes. Fines of several thousand millions of HUF do no hurt giants like Tesco or telecoms companies, the latter ranking first as far as the size of their fines is concerned. Markgold was another company that ranked high here with its HUF 40 million fine for unfair market practices in promoting its time share services. More modest fines imposed on small companies may have greater impact. As mentioned, the respectively highest fines were imposed on small companies actively misleading vulnerable consumers in organizing gambling-related credit services.

III. Anticompetitive agreements

In terms of numbers of GVH decisions, not much has recently taken place in the field of anticompetitive agreements – one case was decided in early 2012 and two cases terminated in 2012-2013.

After a surprising legislative development influencing Hungarian competition law⁸, the future of its competition policy is somewhat ambiguous. At the same time, GVH decisions show unwelcome developments also. The Agricultural Act⁹ basically precludes the application of domestic competition rules in cases where agricultural products are concerned. It also makes it impossible for the GVH to impose fines in agricultural cases if Article 101 TFEU is appli-

⁸ P. Szilágyi, 'Hungarian Competition Law & Policy: The Watermelon Omen' (2012) 2 *Competition Policy International – Antitrust Chronicle*.

⁹ 2012. évi CXXVIII. törvény a szakmaközi szervezetekről és az agrárpiaci szabályozás egyes kérdéseiről. [Act Nr. CXXVIII. on certain aspects of the interbranch organizations and agricultural market regulation.] (hereinafter, the Agricultural Act).

cable¹⁰. As a result, the GVH terminated its ‘Watermelon case’¹¹ procedure in light of the new act. In the reasoning of its decision, the competition authority first stated that trade between EU Member States was in fact affected by the scrutinised agreement and that Article 101 TFEU was applicable to the alleged price fixing by the investigated retailers. However, the decision went on to say that the new Hungarian law precludes the imposition of a fine in this case since the illegal behaviour (price fixing) was terminated already.

The GVH elaborated further on the possibility of the application of Article 101 TFEU. Accordingly, Member States, in this case the GVH, must ensure the effective enforcement of Article 101 TFEU while the European Court of Justice is the only body competent to rule on the conformity of the new Hungarian legislation with EU law. However, the GVH cannot request a preliminary ruling that could condemn the contested Act – that prerogative is limited to the judiciary. The authority can therefore do nothing other than to close its proceedings, seeing as its scarce resources are better focused on cases without legal doubts concerning the applicability of competition rules. The approach applied here by the GVH is somewhat surprising. All Member States, and thus all their NCAs, must apply Article 101 TFEU – the GVH could have disregarded national legislation which it knew breaches EU law. It could have based its decision solely on Article 101 TFEU and the *effect utile* doctrine, seeing as domestic laws were clearly preventing the effective application of EU competition rules.

A similar problem emerged in the investigation of one of the largest alleged cartels of recent years. The authority suspected in Sugar Cartel II¹² the existence of anticompetitive agreements between sugar producers. The GVH stated that although trade between Member States might have been affected, it ultimately did not establish whether that was the case seeing as it terminated the proceedings. Insufficient evidence of the anticompetitive agreement was listed among the reasons for terminating the procedure. The competition authority did not see it reasonable to conduct a further investigation into the cartel also because the new Hungarian Competition Act makes the possibility of competition law enforcement uncertain, basically because of the new provisions of the Agricultural Act. Therefore, GVH resources shouldn’t be wasted on this case.

¹⁰ In principle fining the undertakings for the violation of Article 101 TFEU is possible, since the act requires the GVH to first give a formal notice and require the undertakings to end the behaviour and if they do not comply, only then is it possible for the authority to impose a fine.

¹¹ Vj-62/2012 – *ALDI MagyarországÉlelmiszer Bt. and Others* – GVH (10 April 2013).

¹² Vj-50/2009. – *AGRANA MAGYARORSZÁGÉRTÉKESÍTÉSI Korlátolt Felelősségű Társaság and Others* – GVH (19 December 2012).

This reasoning is not satisfactory from an academic point of view¹³. According to EU law, the applicability of Article 101 TFEU is possible even if national legislation tries to prevent it. Competition law is one of the most important policies of the European legal order. Competition authorities should therefore not bow down to dubious national legislations.

The final case¹⁴ decided in the time covered by this article is a decision concerning railway companies. Accordingly, three rail operators temporarily fixed prices and two engaged in market sharing. As a result, they were fined 1.25 billion HUF. In its decision, the GVH expressly took into consideration the special rules of Council regulation 1017/68/EEC. The investigated undertakings tried to rely on its Article 2 that provides for certain exemptions. The GVH decided however that Article 2 was not applicable in this case for various reasons, including that its provisions must be interpreted narrowly and are only applicable if the agreement relates exclusively to technical development. One of the interesting issues here was whether the three scrutinised companies were, at the time of the anticompetitive behaviour, in fact a single undertaking, or whether they were independent from each other. The GVH ultimately concluded that since GYSEV was owned by the Hungarian State and the Austrian State jointly, its agreements with the two other parties, owned solely by Hungary, were in fact agreements between independent undertakings.

By contrast to the small number of recent antitrust decisions, the Hungarian judiciary has managed to review many past GVH cases in 2012 and the first half of 2013. Among them is a ruling delivered by the Curia, the highest Hungarian court, in a case¹⁵ that dated back to 2004 and concerned one of a number of famous construction cartels.¹⁶ The court considered here a number of claims made by the parties that their rights under the European Convention of Human Rights (hereafter, ECHR) were violated. The parties argued more specifically that their right to fair trial (Article 6 ECHR) was breached because a relevant piece of evidences was not properly filed and its origin was questionable as well as because the case was based on circumstantial evidence only. The Curia stated in this context that the rights of the Convention cannot just be invoked in a general manner – parties have to prove that there is a causal connection between the alleged ECHR infringement and the outcome of the case. The Curia rejected also the claim that Article 6 ECHR was violated because

¹³ Meanwhile the European Commission initiated an infringement procedure against Hungary because of the Agricultural Act.

¹⁴ Vj-3/2008 – *Győr-Sopron-Ebenfurti Vasút Zártkörűen Működő Részvénytársaság, MÁV Magyar Államvasutak Zártkörűen Működő Részvénytársaság and Rail Cargo Hungaria Zártkörűen Működő Részvénytársaság* – GVH (27 April 2012).

¹⁵ Kfv.VI.37.232/2011/13.

¹⁶ Vj-25/2004. – *Betonút and Others* – GVH (16 September 2005).

the parties did not have a right to appeal the decision of the court ordering a dawn raids. This is a questionable approach seeing as the European Court of Human Rights has ruled, in a very similar situation, that the lack of timely review of a court decision which allows a dawn raid is an infringement of the Convention¹⁷.

The parties argued also that the Competition Council (in the GVH) is a tribunal within the meaning of Article 6 ECHR and that this interpretation is supported by a ministerial opinion attached to the Hungarian Competition Act. As it is well-known, tribunals within the meaning of Article 6 ECHR have to respect and protect the fundamental rights enshrined in the Convention. The parties argued, the Council's decision-making process is contrary to Article 6, since the authority is both investigating and deciding on the infringements. The Curia rejected this argument, but not because it denied that the Competition Council is a tribunal (it remained silent on this issue) but because the Competition Council closely follows every case, is the body which issues statement of objections as well as adopts final decisions. As such, it is not impartial. The Hungarian Competition Act entrusts this right to the Competition Council; the impartiality argument can therefore not be accepted. Curia's approach is very questionable, since the European Court of Human Rights (ECtHR) has well developed jurisprudence on the notion of tribunals within the meaning of Article 6. It is easy to argue on its basis that the Competition Council does not satisfy the requirements of Article 6 ECHR.

The Metropolitan Appellate Court delivered its judgement¹⁸ in the famous 'baker cartel' case¹⁹. An interesting part of this ruling concerned the burden of proof and the standard of proof for participating in a cartel meeting. The GVH in its decision came to the conclusion that one of the parties (Kürdi Family Pék) was present at an anticompetitive meeting despite the fact that the undertaking concerned denied it. The court of first instance agreed with the authority, mainly based on a statement by another participant. There was, however, no other evidence of the presence of the undertaking at the actual meeting. The Appellate Court ruled that evidence was insufficient to condemn that undertaking and that the GVH decision could not be upheld with respect to that company. In light of recent developments in human rights case law, it is interesting to note that the Appellate Court expressly stated that a court cannot substitute its own judgement to that of the authority. All a court can do is an administrative legality review of the authority's decision.

¹⁷ ECHR judgments of 21 December 2010, *Primagaz v France*, Application No 29613/08, and *Société Canal Plus v France*, Application No 29408/08.

¹⁸ 2.Kf.27.260/2011/13.

¹⁹ Vj-57/2007 – *Association of Bakers and Others* – GVH (4 June 2009).

The Metropolitan Appellate Court delivered another judgement²⁰ in the ‘University IT-cartel’ case²¹. Among the key issues considered was whether individual public procurements should be treated as separate relevant markets, or whether the relevant market should be defined more broadly. The Appellate Court was in favour of the former interpretation. The court also expressly recognized that there is no need for any direct evidence of a cartel – a cartel can be proven based on indirect, circumstantial evidence only. The court also stated that if an undertaking receives the minutes of a meeting where information on an anticompetitive agreement or concerted practice was exchanged, then it must expressly distance itself from it. Otherwise it will be liable as if it was also present at the actual meeting.

The Metropolitan Appellate Court delivered a judgement²² reviewing yet another case concerning associations of undertakings²³ whereby the companies and their association were fixing minimum prices for certain hunting activities. This was a clear-cut cartel case and the court agreed in that regard both with the authority’s evaluation of the facts and the ruling of the court of first instance. However, the Appellate Court stated also that a court cannot substitute its own views to that of the authority regarding the level of fines. In that regard, the authority has a margin of discretion and a court cannot review the decision in that regard (it can only carry out an administrative legality review).

A number of other judgments²⁴ regarding anticompetitive agreements were delivered in the time period covered by this article. None of them involved new points of law which were either noteworthy or not yet covered by this article.

IV. Abuse of a dominant position

Only two abuse cases were dealt with by the GVH in the time period under consideration – the E.ON case²⁵ and the OFFI case²⁶.

The GVH initiated the E.ON investigation in 2010 suspecting that a change introduced by the power company to its general contractual clauses (preventing some customers from switching during the year) constituted an abuse of a

²⁰ 2.Kf.27.195/2012/6.

²¹ Vj-162/2004 – *International System House Kft. and Others* – GVH (15 June 2006).

²² 2.Kf.27.556/2011/7.

²³ Vj-89/2003. – *Budapest Agrárkamara and Others* – GVH (9 December 2004).

²⁴ 2.Kf.27.519/2011/10. by the Metropolitan Court of Appeal in the newspaper delivery cartel, Kfv.III.37.011/2012/6. by the Curia in the Hungarian GIS cartel and Kfv. II.37.370/2012/14. by the Curia in the hunting societies cartel case.

²⁵ Vj-124/2010. – *E.ON Energiaszolgáltató Kft.* – GVH (20 September 2012).

²⁶ Vj-111/2010 - *Országos Fordítóés Fordításhitelesítő Iroda Zrt.* – GVH (21 May 2013).

dominant position. The suspected breach was an atypical competition law violation that fell under the general abuse clause. The GVH stated that such behaviours can escape the prohibition if they can be objectively justified and if there is harm to competition and not only to individual undertakings. E.ON successfully argued that limiting the periods and dates for the termination of contracts is objectively justified by the dynamics of the electricity market and its supply, and that these limitations are necessary to ensure efficient operation and lower prices.

On another occasion, the GVH suspected that OFFI applied excessive prices regarding some of its services (authorisation and official review) concerning translated documents. The scrutinised undertaking was providing these services based on state authorisation. The first question for the GVH to consider was whether there was an economic activity at all. The above services were provided in Hungary exclusively by OFFI and the undertaking argued that it was carrying out a public function. The authority considered for a while whether the undertaking was in fact carrying out a service, a public service or if it was exercising public power. Ultimately however it left this question open arguing that an abuse could not be proven. The authority tried to define the costs associated with the scrutinised services, it used benchmarking and tried to get relevant information from the undertaking itself. However, it was not able to estimate the costs of the service. The approach of the GVH is interesting because it argued that since it had failed to define the costs associated with the scrutinised activity, it therefore could not establish an infringement. A question poses itself here whether the inability of an authority to define the costs of a certain activity should lead to the statement that no legal violation occurred.

The Metropolitan Court decided in another judgement²⁷ that the GVH was correct in condemning as an abuse the activities of a dominant undertaking which was trying to slow down or hinder market entry by a new entity. The abuse took the form of not providing the new entrant with necessary information regarding contractual term or the provision of such information in a flawed or overly slow manner.

In the *Invitel* judgement²⁸, the Metropolitan Court had to deal again with an abuse of a dominant position primarily by hindering market entry. The GVH fined *Invitel* 150 million HUF for that infringement²⁹. The case is interesting from a legal review point of view since the court confirmed once again that it cannot substitute its judgment to that of the authority.

²⁷ 2.Kf.649.926/2013/2.

²⁸ 2.Kf.649.905/2013/3.

²⁹ VJ-69/2005 – *Invitel Távközlési Zrt.* – GVH (5 December 2006).

V. Conclusions

It seems quite clear that the fight against unfair commercial practices remains among the key areas of the GVH's activities. By contrast, the enforcement of antitrust rules is almost nonexistent in the last one and a half years. Although several antitrust cases were reviewed by Hungarian courts in this time frame, almost no substantive decisions were delivered by the competition authority. There is no information in the public domain that competition law enforcement has increased since then albeit several sources suggest that the GVH has indeed been initiating cartel investigations recently. The adoption of the Agricultural Act on the exemption of agricultural products from the applicability of competition law has been a big setback for the GVH since two of its key recent cartel investigations had to be terminated as a consequence.

Recent Competition Policy Developments in Hungary – Merger Control*

by

Aranka NAGY**

CONTENTS

- I. Introduction
- II. Procedural and structural reforms
 - 1. New notification form, new unit
 - 2. Simplified decisions
- III. Cases conducted in 2012
 - 1. Retail markets
 - 1.1. Definition of 'parts' of undertakings
 - 1.2. Establishing relevant markets
 - 1.3. Interdependent transactions
 - 2. Concentrations with the participation of the Hungarian State
 - 3. Repeated procedures
- IV. Conclusions

I. Introduction

One of the most significant enforcement tasks of the Hungarian Competition Authority (hereafter, GVH) is the control of concentrations. Undertakings are

* The article was published under the project TÁMOP-4.2.1.B-11/2/KMR-2011-0002 – Development of Scientific Research at PPCU.

** Aranka Nagy, PhD Candidate (Pázmány Péter Catholic University, Faculty of Law and Political Sciences) and a case handler at the Hungarian Competition Authority; aranka.dora.nagy@gmail.com.

The content of this article does not necessarily reflect the official position of the Hungarian Competition Authority. Responsibility for the information and views expressed in this article lies entirely with the author.

legally obliged to receive clearance for their transactions from the competition authority if the notified operation meets the turnover thresholds¹ set out in the Hungarian Competition Act.

This article gives a short overview of the most significant procedural and case-law improvements that took place in the GVH's practice in 2012.

II. Procedural and structural reforms

In 2012, the Hungarian Competition Authority undertook to reform its concentration control system. The aim of the reform was to speed up the review procedures, but at the same time, to preserve (and possibly improve) the quality of work conducted by the GVH in this area.

1. New notification form, new unit

As of February 2012, a new notification form is in use that aims to reduce unnecessary administrative burdens placed on the parties, to shorten the review process and to strengthen transparency. The new form contains two main sections although its second part (Chapters VI–VII.) needs to be completed only if the concentration results in significant overlaps or relations (e.g. vertical or portfolio relations). However, the GVH is allowed to place a duty on the parties to complete Chapters VI-VII of the notification form even in other cases, if that seems to be necessary in order to conduct an in-depth analysis of the concentration.

The GVH facilitated also the formal introduction of pre-notification contacts between the parties and itself (such contacts were informally available already before the reform). Their aim is to increase the efficiency and productivity of the review procedures by providing the parties with the opportunity to consult the authority on various questions relating to the notification form before its actual submission. These types of meetings are completely informal and

¹ In line with Article 24 (1) 'For a concentration of undertakings, the authorisation of the Hungarian Competition Authority shall be sought in cases where the aggregate net turnover of all the groups of undertakings concerned (Article 26(5)) and the undertakings jointly controlled by undertakings that are members of the groups of undertakings concerned and by other undertakings exceeded HUF fifteen billion in the preceding business year, and the net turnover of each of at least two of the groups of undertakings concerned in the preceding business year combined with the net turnover of the undertakings jointly controlled by undertakings members of the respective group of undertakings and other undertakings was more than HUF five hundred million'.

the GVH encourages parties to initiate them. They increase the chances of avoiding requests for additional information being issued at the beginning of the formal procedure, which can lengthen the overall review process.

In addition to the aforementioned measures, a new department was created in March 2012 within the structure of the Hungarian Competition Authority – the Merger Section – in order to deal with merger control cases as well as to facilitate the procedural reforms.

2. Simplified decisions

As the last step of the reform, the GVH introduced the use of simplified decisions that do not contain a reasoning or information on legal remedies. Simplified decisions are generally only one page long and contain a very limited amount of information: the names of the parties and the fact that the Competition Council authorised the operation. This particular reform was a consequence of the amendment of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services. According to a notice issued by the Hungarian Competition Authority on the simplified procedures, these types of decisions can only be issued if the authority fully accepts the notification and the case cannot be contested by any other party.

Previously, the GVH specified in Vj/24/2012 which facts can be regarded as circumstances that preclude the use of a simplified decision – the so called “negative list”. The negative list contains several restrictions in this context such as: a decision cannot be issued in a simplified way if the transaction has to be evaluated in Phase II; if it is questionable whether the transaction qualifies as a concentration; or where, due to other reasons, the publication of a reasoned decision serves a legitimate public interest (for instance, if the transaction concerns the Hungarian State). However, simplified decisions (in the sense of applying the amendments of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services) are not necessarily equivalent to Phase I decisions. Unlike the former, the latter must be properly reasoned if the transaction falls into the categories specified in the “negative list”. Simplified decisions can thus be regarded as a sub-category of Phase I decisions that can be only issued under certain, specified (and limited) circumstances.²

Currently, there are no publicly available statistics on the average length of Hungarian merger review procedures closed by simplified decisions.

² 13 simplified decisions are available on the GVH’s website from 2012 cases: Vj/48/2012, Vj/61/2012, Vj/71/2012, Vj/76/2012, Vj/80/2012, Vj/81/2012, Vj/83/2012, Vj/85/2012, Vj/87/2012, Vj/96/2012, Vj/103/2012, Vj/107/2012, Vj/110/2012.

However, for notifications lodged after 1 December 2012, the fact and date of the notification, the participating undertakings and a short summary of the case made by the applicant(s) is published by the GVH on its website. This information is primarily meant to provide other market participants with the opportunity to comment on the transaction. Indicating the exact date of the notification (coupled with the fact that final decisions are also published on the official website) makes it possible to roughly calculate the length of the overall review procedures.³ Experience for cases notified after 1 December 2012 show that the overall length of simplified-decision procedures is less than 30 days⁴. This is a significantly shorter time than the 45 calendar days specified by the Hungarian Competition Act as the deadline for Phase I cases.

III. Cases conducted in the year 2012

35 merger decisions are available on the GVH's website dating from 2012, which is approximately one third of all the procedures closed by the GVH in 2012.⁵

1. Retail markets

A large part of these cases concerned retail markets. According to GVH's press release, the authority received 13 notifications relating to retail markets between June 2012 and February 2013⁶. The high number of retail operations in particular resulted from the fact that the Delhaize group (operating the chains Match, Profi and Cora) left the Hungarian market. As a result, 57 Match and Profi stores were acquired by different groups of undertakings⁷.

³ Taking into consideration also the fact that the publication of the notification does not necessarily mean the completeness of the notification and therefore, time limits cannot be easily calculated from the date of notification (for instance issuing request for additional information stops the clock).

⁴ See e.g. Vj/110/2012, which was notified on 21/12/2012, and closed with a simplified decision on 18/01/13 and Vj/11/2013, notified on 31/01/2013, and closed with a simplified decision on 22/02/13.

⁵ At the closing date of this article (March 2013).

⁶ These are the followings: Vj-13/2013; Vj-11/2013; Vj-8/2013; Vj-110/2012; Vj-106/2012; Vj-103/2012; Vj-100/2012; Vj-95/2012; Vj-92/2012; Vj-76/2012; Vj-59/2012; Vj-53/2012; Vj-10/2013.

⁷ Delhaize group's market exit also concerned hypermarkets – Auchan acquired sole control over Magyar Hipermarket (which was operating 7 hypermarkets under the brand 'Cora' in

These transactions were motivated by Delhaize's market exit as well as by new Hungarian legal provision that restricts the establishment and extension of retail properties over 300m². This amendment induced market participants to acquire already operating stores rather than building new ones.

1.1. Definition of 'parts' of undertakings

By conducting the aforementioned cases, the GVH has formulated a more sophisticated approach towards the definition of 'parts' of an undertaking. According to Article 23 (5) of the Hungarian Competition Act, 'the term "part of an undertaking" is to be understood as assets or rights, including the clientele of an undertaking, the acquisition of which, solely or together with assets and rights which are at the disposal of the acquiring undertaking, is sufficient for enabling market activities to be pursued.'

In some of the 2012 cases, such as Vj/92/2012 and Vj/95/2012, the fact was not questioned at all whether the tangible/intangible assets transferred constituted 'parts' of an undertaking. In both of these two cases, the buyer acquired sole control over the ownership rights to the vendor's real-estate (and other assets), combined with the transfer of the vendor's personnel. The Competition Council went even further in Vj/100/2012 by establishing that even the leasing of real-estate (combined with the acquisition of the vendor's assets and personnel) and the transfer of the ownership rights to a closed store (and related assets) constitutes 'parts' of an undertaking within the meaning of the Hungarian Competition Act.

This approach was generally confirmed in Vj/10/2013 where the GVH authorised the acquisition of control over three closed Bricostore stores by OBI. Importantly, the basis of this transaction was a lease contract and not a sale and purchase agreement. The Competition Council stressed here that the fact that Bricostore conducted DIY activities inside the investigated stores, which activity is pursued by OBI on a national level, meant that these stores carry goodwill, according to which OBI would be able to pursue the same activity previously conducted in those premises by Bricostore with the assistance of OBI's employees, know-how and its own clientele. The Competition Council also noted that the duration of the contract ensures that the acquisition of control will be upheld on a lasting basis. Having regard to all of these facts, the authority established that the leasing of the closed Bricostore stores complies with the definition of 'parts' of an undertaking within the meaning of Article 23(1)(a) and 23(5) of the Hungarian Competition Act. As the transaction did

Hungary). The transaction was cleared by the European Commission (COMP/M. 6506 – GroupeAuchan/Magyar Hipermarket).

not raise competition concerns, the Competition Council ultimately cleared the operation.

1.2. Establishing relevant markets

The aforementioned retail cases have brought about some novel insights into relevant market definition. Case Vj/53/2012 deserves closer scrutiny in this context where the Pékó group acquired control over Integrál-M and Mába Invest (both operating on the wholesale market). The case took the form of a Phase II procedure due to the competition problems identified – the party's activities overlapped in five Hungarian settlements (Zalaegerszeg, Keszthely, Lenti, Nagyatád, Fonyód and in two subregions of Nagykanizsa and Letenye). Many questions have arisen in this case such as the possibility of substitution between different retail outlets (traditional shops, super- and hypermarkets) in the field of daily consumer goods⁸. The latter issue relates to the determination of the relevant geographic market. The Competition Council applied here a complex analytical method whereby the distance between the stores and the settlements concerned were taken into consideration while evaluating the notified operations' effect on competition. As a consequence, the authority focused on the location of the stores, the distance between them and the existence of nearby competitors.

1.3. Interdependent transactions

With respect to the aforementioned retail cases, that the Competition Council emphasised also that it is irrelevant how many transactions were actually concluded in order to implement a given concentration. If the same buyer acquires control over the target by way of multiple interdependent transactions that are not far apart in time (this means generally maximum 30 days)⁹, then these operations can be regarded as a single concentration. As a result, they do not have to be evaluated in several different procedures but can be unified into one assessment. This approach was confirmed and further developed in Vj/88/2012 where the applicants have concluded several

⁸ Relating to hypermarkets, the Competition Council established that they generally operate with lower prices and with a greater range of products on the one hand, but, on the other hand, they are situated in the outskirts and thus they cannot be regarded as a viable alternative for daily shopping for a significant part of consumers.

⁹ See Vj/106/2012 at: <http://www.gvh.hu/domain2/files/modules/module25/230007E04CFE64D84.pdf>. The Competition Council noted here that the period between the first and the last step of the transaction cannot exceed 30 days; therefore, the 30 day-period complies with the requirement of “not far apart in time”.

contracts with different vendors in order to reach their real economic goal. The Competition Council stressed here that the use of a unified procedure is not precluded if a concentration is realised through many transactions with different vendors. The authority established overall that if the different transactions depend on each other (meaning that one transaction will not take place without the other), they could be unified into one review procedure, as one concentration.

2. Concentrations with the participation of the Hungarian State

A significant part (approximately one fifth) of the notifications submitted to the GVH in 2012 related to the concentrations that concerned the Hungarian State¹⁰.

The notion of independent undertakings and decision-making centres

The Vj/17/2012 case deserves utmost attention here whereby Magyar Posta (the Hungarian Post), Magyar Villamos Művek (Hungarian Electricity Ltd; hereafter, MVM) and MFB Invest (subsidiary of the Hungarian Development Bank; hereafter, MFB) notified their intention to create MPVI Mobil company. The motivation of the parties to create MPVI Mobil company was that they filed a joint auction package (as a consortium) to the frequency application issued by the National Media and Infocommunications Authority (hereafter, NMHH)¹¹.

Article 23(1) (c) of the Hungarian Competition Act stresses that undertakings, which are jointly creating another undertaking, have to be independent from each other. The Competition Council closely evaluated in this case whether the notifying parties could in fact be regarded as independent from each other (if not, than their transaction does not constitute a concentration subject to pre-emptive merger control).

To do so, the Competition Council took into consideration that in line with Article 15(3) ‘undertakings under majority state or municipality ownership have to be regarded as independent undertakings if they are empowered with autonomous decision-making power in determining their market conduct’. If an undertaking requires the approval of the state/municipality in order to adopt its business plan, then it has to be regarded as not independent from the

¹⁰ See Vj/3/2012, Vj/17/2012, Vj/23/2012, Vj/51/2012, Vj/70/2012, Vj/109/2012 at the website of the GVH.

¹¹ See the website of the NMHH at: http://english.nmhh.hu/cikk/150052/Decision_on_the_registration_of_applicants_for_the_auction_of_the_900_MHz_band.

State. The Competition Council has also stressed that the State may endow the practicing of its ownership rights to decision-making centres. Undertakings controlled by different decision-making centres do not belong to the same group of undertaking in the sense of Article 15(2) of the Competition Act and thus they shall be regarded as independent.

Having regard to all the above-mentioned facts, the Competition Council established in this case that the controlling rights of the State (the Minister) are restricted because it does not control the formulation of MFB's business plan. As such MFB constitutes a different decision-making centre from Magyar Posta and MVM. As a consequence, the Competition Council concluded that the transaction qualifies as a concentration within the meaning of the Competition Act. The operation was ultimately cleared because it did not raise competition problems¹².

This approach was later upheld by the Competition Council in Vj/23/2012 and Vj/51/2012. In the former case, the aforementioned companies MVM and MFB (party to Vj/17/2012) aimed to acquire joint control over Magyar Gáz Tranzit. The situation described in Vj/17/2012 has not changed as far as the decision-making centres is concerned (in the sense of Article 15(2) of the Competition Act). As a result, the Competition Council established that MVM and MFB are independent from each other and that their transaction is subject to approval. By contrast, the Competition Council pointed out in the Vj/51/2012 case that the buyer (Hungarian National Asset Management Inc – 'MNV', Tiszavíz Vízierőmű Energetikai Kft.) cannot be regarded as independent from the vendors (MALÉV)¹³ and thus the transaction was not subject to pre-emptive control. There were also other transactions which were conducted with the participation of the State. These operations generally concerned public utilities such as sewage disposal and treatment (Vj/3/2012).

3. Repeated procedures

Merger decisions of the GVH are generally not challenged by the parties because their majority approves the notified transactions without imposing

¹² The newly created (MPVI Mobil) company could have become the fourth significant market player on the market of mobile telecommunications services (next to Magyar Telekom, Telenor and Vodafone). However, it is interesting to note that the decision closing the frequency auction issued by the NMHH was repealed by the court, which means that despite the authorisation of the Transaction, currently there is no fourth market player on the market concerned.

¹³ Since both vendors were 100% controlled by MALÉV (MALÉV Hungarian Airlines), the Competition Council evaluated whether MALÉV can be regarded as independent from MNV or not.

any remedies. It is very likely, however, for the parties to appeal a merger prohibition. Such was the case in Vj/158/2008 where the GVH rejected the application of Telekom (telecoms incumbent; hereafter: 'MT') to acquire control over ViDaNeT (local electronic communication service provider; hereafter, 'Vidanet').

The authority assessed the case in Phase II proceedings because of MT's and Vidanet's high market shares on the local markets for Internet access, cable television and voice services. Relevant here was also the nature of the concentration (the operation would have resulted in a 3-to-2 situation). After closing the investigation, the authority delivered its preliminary position to MT stating that the concentration would likely result in competition problems on the investigated markets (residential broadband cable Internet services, voice services, broadcasting) where the operation was likely to create a dominant position. Of most concern was the fact that together, the two parties would end up operating the only broadband network infrastructure available on the territory of the horizontally affected region in western Hungary. Commitments offered by the parties did not seem adequate to outweigh the identified competition concerns.

Generally, if parties presume that their concentration will be prohibited by the authority, in most of the cases they withdraw their application. This practice also appeared in the preceding case of the merger concerned, as it was not the first time when Telekom intended to acquire control over Vidanet (see Vj/110/2003), however in that case the parties decided to withdraw their application. In contrast to that, in Vj/158/2008 the latter scenario was not repeated as parties did not withdraw their application.

Having regard to all the above-mentioned competition concerns, the GVH prohibited the transaction. The ban was challenged by the parties resulting in a long judicial procedure. The Court of Appeal of Budapest ruled in April 2012 that the decision of the GVH was not sufficiently grounded and thus upheld the ruling of the Court of First Instance which repealed the merger prohibition and ordered the GVH to initiate new proceedings relating to the notified transaction.

Many questions could arise relating to this procedure including the length of the review process. Merger procedures are originally pre-emptive procedures, but this case was initiated in 2008 and reopened in 2012 making it very difficult to define the period of time under investigation, especially taking into consideration the developments that took place on the relevant markets in the meantime. It will thus be very interesting to see how the GVH will deal with these procedural/theoretical questions in its renewed assessment.

IV. Conclusions

The year 2012 brought with it many welcomed procedural shifts in Hungary from the perspective of competition law practitioners. These changes were triggered by the introduction of a new notification form, which is being dealt with by a specified unit within the GVH (Merger Section). Noteworthy are also some other procedural modifications, such as the formal introduction of pre-notification contacts that are meant to shorten the merger review process and increase its efficiency.

An evaluation of Hungarian merger decisions clearly shows that the Competition Council faced a lot of new challenges in 2012. As a result, it managed to refine its definition of ‘parts’ of an undertakings, the notion of interdependent transactions and the concept of decision-making centres. These latter improvements are of great importance to future cases. It will be interesting to see how this case-law will develop in 2013.

Competition Law in Macedonia in 2011–2012: New Perspectives and New Challenges

by

Adnan Jashari*, Nora Ziba Memeti**

CONTENTS

- I. Introduction
 - 1. Some features of competition law in the R.M. during the time period 2011–2013
 - 2. An institutional perspective: the Commission for the Protection of Competition
- II. Legal framework on competition law in the R.M.
 - 1. The Law on the Protection of Competition
 - 1.1. By-laws
 - 1.2. New draft regulations
 - 1.3. Adoption of three new Guidelines
 - 2. Administrative and misdemeanor proceedings conducted before the Commission for the Protection of Competition
- III. Assessment of agreements between undertakings
- IV. Abuse of a dominant position
 - 1. Introduction
 - 2. Legal framework on the abuse of a dominant position
 - 3. Case law regarding the abuse of a dominant position
- V. Concentrations
 - 1. Introduction
 - 2. Legal framework on concentrations
 - 3. Case law regarding concentrations

* Ph.D., Associate Professor, Adnan Jashari, Faculty of Law, SEEU, Tetovo, Republic of Macedonia; a.jashari@seeu.edu.mk.

** Ph.D., Teaching Assistant, Nora Ziba Memeti, Faculty of Law, FON University, Skopje, Republic of Macedonia; nora.memeti@fon.edu.mk.

- VI. State aid
 - 1. Legal framework
 - 2. By-laws
 - 3. Case law in the area of State aid
- VII. Other issues related to Macedonia's competition law (sector analysis)
 - 1. Analysis of the market for advertising in electronic media (TV)
 - 2. Analysis of the banking sector
- VIII. Conclusions

I. Introduction

Keeping in mind that competition policy is of key importance for the European Union, the Republic of Macedonia (hereafter, R.M.) has taken it upon itself to introduce and adopt a domestic competition law regime in the framework of its EU accession process.

Macedonian Constitution guarantees the freedom of trade and business as well as security and equal protection of the legal position of different entities in the market¹. From a historical perspective, it should be noted that the R.M. was the first country in the Western Balkan region to sign the Stabilization and Association Agreement with the European Union in April 2001², which entered into force in 2004. In 2005, the European Council granted Macedonia the status of an EU 'candidate country'. This status provides for a competition regime to be applied in the trade relations between the European Union and the R.M. Significant changes were made to Macedonian antitrust legislation, which was in force since January 2005, by way of the new Law on the Protection of Competition of 2010 (hereafter, LPC)³. These recent legislative reforms introduced relevant changes to the institutional structure of Macedonia's competition protection system at the same time. The purpose of the LPC is to ensure free competition in the domestic market in order to stimulate economic efficiency and consumer's welfare⁴.

¹ Constitution of the Republic of Macedonia, Article 37.

² Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, Brussels, 26 March 2001.

³ Law for the Protection of Competition, Official Gazette of the R.M., No. 145/2010.

⁴ LPC, Article 2, Official Gazette, No. 145/2010.

1. Some features of competition law in the R.M. during the time period 2011–2012⁵

Competition Law in the R.M. prohibits anti-competitive agreements, cartels as well the abusive conduct of undertakings that hold a dominant position. What characterizes the area of Macedonia's competition law in this period is the decisive role played in this context by the Commission for the Protection of Competition (hereafter, CPC). Three features of the CPC's work in 2011 and 2012 are noted in this article:

- conduct of administrative and misdemeanor procedures to determine the existence of offenses set out in the Law for the Protection of Competition;
- analysis of specific markets and;
- adopted recommendations and opinions.

In particular, the year 2011 is characterized by good progress, in particular with respect to mergers⁶. The number of decisions adopted by the CPC as well as the number of judgments rendered by the Administrative Court has increased with regard to concentrations. By contrast, the numbers are still very low in the area of cartels.

2. An institutional perspective: the Commission for the Protection of Competition

The role of the Commission for the Protection of Competition is highly emphasized in Macedonia. The CPC was founded in 2005 based on the Law for the Protection of Competition of 2005⁷. Considering the experiences of EU Member States, the CPC is organized as an independent state authority that answers exclusively to the Parliament of the R.M. It controls the application of the Law for the Protection of Competition, the Law on State Aid Control and related by-laws. It also determines the rules and measures for the protection of competition and measures for the establishment of effective competition. The CPC is a collegial body composed of a President and four members elected by the Assembly for a period of 5 years. Pursuant to the Law on

⁵ Yearly report from the work of the CPC during 2011, adopted in March 2012.

⁶ In this Article, the concept 'merger' is replaced by the broader concept known as 'concentrations' used by Law for Protection of Competition (Official Gazette No. 145/2010).

⁷ LPC 2005, Official Gazette No. 4/05, Official Gazette No.70/60 and Official Gazette No.22/07. The very first Macedonian provisions for on competition, in particular those against monopolistic behavior are found in trade law of 1995: Law for Trade, Official Gazzette of the R.M., No. 23/95, 30/95, 43/95, 23/99 43/99.

State Aid of 2003⁸, the CPC gained in June 2006 the competence to supervise every form of State aid granted in the R.M. in order to ensure that market competition remains free from state intervention. In exercising its powers, the CPC must keep administrative and misdemeanor proceedings in lieu with applicable legal provisions for imposing fines as sanctions under the provisions of the law.

As mentioned, Macedonia's Parliament adopted in 2010 a set of new legislative acts concerning the work of the CPC including a new Law on the Protection of Competition (145/10) and a new Law on State Aid Control (145/10), both of which replaced previous legislation in this area. These laws are known as harmonization laws with the *acquis* of EU competition law. Unfortunately, harmonization⁹ by way of fragmented interventions affecting specific parts of existing legislation, or dealing with chosen issues only, can sometimes make legal non-coherence deeper and separation thicker. Significant criticism followed the aforementioned harmonization laws because they were seen as a copy of past EU legislation bringing with them a lot of confusion and inconsistency to the national legal system¹⁰.

Macedonia has a small, concentrated and open economy. Geographically, the country has a territory of 25.713 km² with approximately 2 million inhabitants. In the last two decades, its economy has been characterized by a stable macroeconomic climate¹¹. The GDP per capita remains low, amounting to only 26% of the EU-25 GDP average¹². These macro-economic indicators have important consequences in relation to the structure of the domestic market. It must be stressed therefore that the land-lock position of the country, the small size of its territory and its population, as well as its low GDP per capita, which reduces per capita consumption, all lead to the conclusion that the R.M. can, from a competition law point of view, be considered a 'small concentrated economy'.

⁸ Law on State aid, Official Gazette of the R.M., No.24/03, 70/06 and 55/07.

⁹ M. Boodman, 'The Myth of Harmonization of Laws' (1990) *International Congress of Comparative Law Montreal* 126–130; H.P Glenn, 'Harmonization of law, foreign and private international law' (1993) 1 *ERPL*, 47–57.

¹⁰ R. Karova, M. Botta, 'Five Years Enforcement of the Competition Law in the Republic of Macedonia – Time for an Assessment' (2010) 2 *Mediterranean Competition bulletin* 59–60.

¹¹ Macedonian State Statistical Office (2013), data available at <http://www.stat.gov.mk>., See also: 20 години Независна Македонија, Република Македонија, Државен завод за статистика, 20 years of independent Macedonia, Republic of Macedonia, State Statistical Office, 2011, p. 28–29.

¹² http://ec.europa.eu/enlargement/candidatecountries/the_former_yugoslav_republic_of_macedonia/economic_profile_en.htm (23.9.2010).

II. Legal framework on competition law in the R.M.

1. The Law on the Protection of Competition

The Law on the Protection of Competition of 2005 was in force until 13 January 2010.¹³ The new LPC (No. 145/10) was adopted in 2010 and is fully compliant with European competition provisions, in particular with Articles 101, 102, 106 and 107 TFEU. The LPC was subsequently amended in 2011¹⁴ with respect to its provisions relating to the principle that ‘silence is consent’.¹⁵ These changes should contribute to a faster and more efficient fulfillment of the rights of both citizens (consumers) and business.

1.1. By-laws to the Law for the Protection of Competitor

A number of by-laws related to the Law for the Protection of Competition were adopted in 2005 on the basis of the LPC of 2005. They are in force still, even after the adoption of the new LPC of 2010, and the adoption of several new regulations based on the latter. It needs to be noted that the 2005 by-laws were introduced in order to link them with current regulations of 2011 and 2012. They include:

1. Regulation on the block exemption granted to vertical agreements on exclusive distribution right, selective distribution right, exclusive purchase right and franchise
2. Regulation on the block exemption granted to horizontal R&D agreements
3. Regulation on the block exemption granted to horizontal specialization agreements
4. Regulation on the block exemption granted to technology transfer, license or know-how agreements
5. Regulation on the block exemption granted to agreements on distribution and servicing of motor vehicles
6. Regulation on the block exemption granted to agreements in the insurance sector
7. Regulation on agreements of minor importance

¹³ LPC, Official Gazette of the R.M., No. 04/05, 70/60 and 22/07.

¹⁴ LPC, Official Gazette of the R.M., No. 136/11 which further harmonized the LPC 2010 with the Law on General Administrative Procedure, Official Gazette of the R.M., 38/05, 110/08 and 51/1.

¹⁵ 2011 report from the work of the CPC, published March 2012.

8. Regulation on the form and content of the notification and criteria on the evaluation of concentrations¹⁶.

1.2. New draft Regulations

In 2011, the Commission for the Protection of Competition prepared nine draft regulations arising from the LPC to be adopted by the government of Macedonia. A wide-spread consultation process was conducted covering all interested stakeholders, such as State Ministries, the Institute of Industrial Property, the National Bureau of Insurance Supervision, and the Union of Chambers of Commerce of Macedonia. The aim of these Regulations was said to be the achievement of a higher degree of harmonization with European *acquis*. They include:

1. Regulation for similar terms on the block exemption granted to technology transfer agreements, license or know-how transposing EU Regulation 772/2004;¹⁷
2. Regulation for similar terms on the block exemption granted to R&D agreements transposing EU Regulation 1217/2010;¹⁸
3. Regulation for similar terms on the block exemption granted to horizontal specialization agreements transposing EU Regulation 1218/2010;¹⁹
4. Regulation on the block exemption granted to insurance agreements transposing EU Regulation 267/2010;²⁰
5. Regulation on the block exemption granted to agreements on distribution and servicing of motor vehicles transposing EU Regulation 461/2010;²¹

¹⁶ All these Regulations are published in the Official Gazette of the R.M. no. 91/05.

¹⁷ Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.

¹⁸ Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements.

¹⁹ Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements.

²⁰ Commission Regulation (EU) No 267/2010 of 24 March 2010 on the application of Article 101(3) TFEU to certain categories of agreements, decisions and concerted practices in the insurance sector.

²¹ Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices in the motor vehicle sector.

6. Regulation on the block exemption granted to vertical agreements transposing EU Regulation 330/2010;²²
7. Regulation on the form and the content of the notification and the necessary documents and criteria on the evaluation of concentrations transposing EU Regulation 802/2004;²³
8. Regulation for similar terms on agreements of minor importance transposing EU measure;²⁴
9. Regulation for similar terms and procedure under which the Commission on misdemeanor decides to release or reduce the fine, transposing EU measure.²⁵

The Macedonian government adopted all the above measures in 2012²⁶ stressing that they contribute towards a higher degree of harmonization of Macedonia's legislation with European *acquis*.

1.3. Adoption of three new Guidelines

In 2011, the Commission for the Protection of Competition carried out a broad consultation process with relevant stakeholders that resulted in the formulation and adoption of three new Guidelines regarding the application of the LPC. They include:

1. Guidelines on the manner of the preparation of a non-final version of a decisions of the CPC (February 2011), consistent with the guidelines of DG Comp on market share;
2. Guidelines on defining the relevant market for the purposes of the LPC²⁷ harmonized with Commission Notice on the definition of relevant market²⁸;

²² Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices.

²³ Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

²⁴ 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*).

²⁵ Commission Notice on Immunity from fines and reduction of fines in cartel cases.

²⁶ More exactly, on 23 March 2013, but having effect from 2012.

²⁷ Official Gazette of the R.M. no.145/10, the Guidelines on defining the relevant market are fully harmonized with Commission notice on the definition of the Relevant Market for the purposes of Community competition law, Official Journal C 372, 09.12.1997, p. 5.

²⁸ Commission Notice on the definition of relevant market for the purposes of Community competition law.

3. Guidelines on restrictions, related directly and seen as necessary to the implementation of a concentration²⁹, harmonized with EU measures on restrictions directly related and necessary to concentrations³⁰.

In 2012, the CPC adopted three additional guidelines concerning the application of the LPC:

1. Guidelines for the application of Article 7(3) LPC (March 2012); these guidelines are consistent with the European Commission guidelines on the application of Article 81(3) of the Treaty;³¹
2. Guidelines on the term 'concentration' (March 2012); these guidelines are consistent with Guidelines on the control of concentrations between undertakings;³²
3. Guidelines for the determination of cases where the CPC delivers a decision in an abbreviated form (June 2012); these guidelines are consistent with the European Commission Notice on simplified procedure for treatment of certain concentrations.³³

2. Administrative and misdemeanor proceedings conducted before the Commission for the Protection of Competition

In accordance with the Law for the Protection of Competition, procedures on anticompetitive agreements, abuses of a dominant position or control of concentrations were, until November 2010, primarily conducted as administrative proceedings before the Commission for the Protection of Competition. If the latter determined, during its administrative proceedings, that a prohibited agreement or abuse had taken place, it would then after the completion of the administrative proceedings conduct misdemeanor proceedings for the same case. With the adoption of the new Law on the Protection of Competition of 2010 (No. 145/10 with amendments No. 136/11), assessing agreements between undertakings and the prevention and elimination of abuse are both assessed in misdemeanor procedures only.

²⁹ Formulated by the CPC, in accordance with Art. 28(3) LPC in connection to Art. 25 LPC 145/10 I 136/11, during a meeting held on 26 November 2011; they comply with the Official Journal 56, 5.3.2005 pages 24-31, Celex52005XC0305(02).

³⁰ Commission Notice on restrictions directly related and necessary to concentrations.

³¹ Communication from the Commission, Notice — Guidelines on the application of Article 81(3) of the Treaty.

³² Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings.

³³ Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004Text with EEA relevance.

III. Assessment of agreements concluded between undertakings

In accordance with the Law on the Protection of Competition, all agreements concluded between undertakings, decisions taken by their associations and concerted practices which have as their object or effect the distortion of competition, are prohibited by law. Article 7 LPC enumerates prohibited practices as those that:

1. directly or indirectly fix purchase or selling prices or any other trading conditions;
2. limit or control production, markets, technical development or investments;
3. share markets or sources of supply;
4. apply dissimilar conditions to equivalent or similar transactions with other trading parties, thereby placing them at a competitive disadvantage;
5. make the established agreements subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements.

The aforementioned prohibition shall not apply to agreements, decisions of associations of undertakings and concerted practices which contribute to the promotion of the production or distribution of goods and services or to the promotion of technical or economic progress. This is so provided that consumers receive a proportionate share of the resulting benefits and that the practices do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives. The given practice can also not afford such undertakings the possibility to eliminate competition with respect to a substantial part of the products or services in question.

As an exception, and when necessary to protect the public interest related to the application of Article 7 LPC, Commission for the Protection of Competition may, acting on its own initiative, established by means of a decision that this article is not applicable to an agreement, a decision of an association of undertakings or a concerted practice because the conditions of Article 7(1) LPC are not fulfilled or because the conditions of Article 7(3) LPC are satisfied.

The CPC initiated in 2011 one *ex officio* procedure and conducted two misdemeanor proceedings for the existence of a prohibited agreement. The latter include:

1. Decision no. 08-5 of 04 July 2011 on the existence of a prohibited agreement in an *ex officio* procedure against Macedonia's National Federation of Agencies for Temporal Employment, as well as other

temporal employment agencies such as *Partner*, *Next Level*, *Lizing*, *ESL*, *Trenkvalder*, *DEKRA employment*, *CLR Ltd* and *Aksios Vardar*. The decision determined that the above mentioned undertakings have signed a prohibited agreement and/or engaged in a concerted practice the purpose of which was the prevention, restriction or distortion of competition in the market for the provision of employment mediation services in the territory of the R.M.. During a meeting of the Federation, the parties jointly agreed upon a recommended minimum fee to be charges by the Federation's members to employers. By doing so, they indirectly fixed the prices of employment mediation services provided by these agencies. Therefore, they committed a violation of Article 7(1(1)) LPC. The decision of the CPC was appealed initiating an administrative dispute before the Administrative Court³⁴.

2. Decision no. 8-158/5 of 12 September 2011 on the existence of a prohibited agreement in *ex officio* proceedings against *Avto Moto Sojuz* (Macedonia's Drivers Union) and the Auto-school center *Boro Petrusevski* Skopje. It was determined therein that the aforementioned entities concluded a prohibited agreement and/or engaged in a concerted practice whereby their adopted decisions/price lists (establishing prices for technical inspections of motor vehicles and trailers), had been earlier mutually agreed upon. The parties had thus directly fixed the selling price for the service known as 'technical inspection of motor vehicles and trailers in the territory of the R.M.' with the aim of preventing, restricting or distorting competition in the relevant service market, which have violated Article 7(1(1)) LPC.

In 2012, the CPC adopted two decisions in administrative proceedings that determined the existence of a prohibited agreement:

1. Decision no. 08-1 of 09 January 2012 on the existence of a prohibited agreement in proceedings initiated *ex officio* against *Digi Plus Multimedia Ltd* Skopje and *Discovery Communications Europe Ltd* UK. It was determined therein that the parties concluded on 9 November 2009 a contract incorporating discriminatory provisions (parties apply dissimilar conditions to equivalent or similar legal transactions with other trading parties) which put other trading partners at a competitive disadvantage. The practice concerned the market of documentary/ educational channels with a Macedonian translation broadcast in the R.M.. They have thus been found to have committed a violation of Article 7(1(4)) LPC.
2. Decision no. 08-1 of 24 February 2012 on the existence of a prohibited agreement in *ex officio* proceedings against *Digi Plus Multimedia Ltd*

³⁴ For more details see http://www.kzk.gov.mk/eng/zapis_decision.asp?id=20.

Skopje and *Fox International CHANNELS EOOD* Bulgaria. The decision determined that the parties concluded on 28 October 2009 a contract on the terms of channel distribution, the purpose or effect of which was to distort competition. The agreement contained two provisions whereby the contracting parties were to apply discriminatory terms for the same or similar legal matters with other trading parties. The practice had therefore put the latter at a competitive disadvantage on the market for movie channels with a Macedonian translation broadcast in the R.M.. By so doing, the aforementioned entities have violated Article 7(1(4)) LPC (Official Gazette of the R.M. No. 04/05, 70/06 and 22/07).

The CPC's Commission deciding on Offences³⁵, initiated *ex officio* 6 misdemeanor procedures in 2012 for determining the existence of a prohibited agreement but, ultimately, adopted only 3 decisions in misdemeanor proceedings that determine the existence of a prohibited agreement:

- Decision No. 09-7/4 of 29 February 2012 on the existence of a prohibited agreement in proceedings initiated *ex officio* against five driving schools which participated (1 March 2006 to 31 December 2010) in a price fixing agreement for candidate training services taking the B Category driving exam in the Municipality of Strumica.
- Decision No. 09-12/41 of 10 May 2012 on the existence of a prohibited agreement in proceedings initiated *ex officio* against *Alkaloid Cons import-export Ltd* and “*Dr. Panovski*” joint stock companies. The decision determined that the above wholesalers engaged in tender rigging as companies that engage in the trading of medicine in the R.M.. The agreement concerned tenders undertaken by the PHI University Clinic for Radiotherapy and Oncology, Skopje and the PHI Clinical Hospital ‘DR Trifun Panovski’ Bitola in 2008, 2010 and 2011. The participants were found to have deliberately replaced free market competition by their practical cooperation meant to restrict competition by direct or indirect price fixing.
- Decision No. 09-17/21 of 04 October 2012 on the existence of a prohibited agreement in proceedings initiated *ex officio* against, once again, *Alkaloid Cons import-export Ltd* and ‘*Dr. Panovski*’. It was found that the aforementioned wholesalers engaged in a concerted practice and coordinated their drug distribution activities in the R.M. in tenders undertaken in 2011 by the PHI University Clinic for Radiotherapy and Oncology, Skopje; the PHI Pediatric Clinic Skopje; the PHI University Clinic of Hematology, Skopje; and the PHI Clinical Hospital ‘DR.Trifun Panovski’ Bitola. As such, they substituted effective competition in the relevant market by way of their concertation. They intended to distort competition through the

³⁵ The Commission deciding on Offences functions within the CPC.

direct or indirect fixing of selling prices etc. They thus violated Article 59(1(1)) in connection with Article 7(1) LPC and Article 27(1) LPC (Official Gazette No. 62/06 51/11).

IV. Abuse of a Dominant Position

1. Introduction

The Law for the Protection of Competition prohibits any abuse of a dominant position by one or more undertakings on the relevant market or its essential part. Provisions on dominant market position and distortion of competition are contained in Chapter Two of this act including, most importantly, Articles 10 and 11 which deal with abuse of dominant position. The applicable relevant geographical market is delineated as the territory of the R.M. or a substantial part thereof, depending on the nature of the product involved. It should be noted that holding a dominant position is not prohibited per se in Macedonian law – the ban only concerns cases where the abuse is evidenced in accordance with the prescribed law.

2. Legal framework on the abuse of a dominant position

The LPC envisages six situations amounting to an abuse of a dominant position when two or more undertakings:

- are directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- are limiting production, markets or technical development to the prejudice of consumers;
- are applying different conditions to equivalent (or similar) legal transactions with other trading partners, thereby placing the latter at a competitive disadvantage;
- are making the conclusion of agreements subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements;
- unjustifiably refuse to deal or encourage and request other undertakings or their associations not to purchase or sell goods and/or services to/from a certain undertaking, with the intention to harm that undertaking in a dishonest manner;

- unjustifiably refuse to allow others access to the dominant undertaking's network or other infrastructure facilities (despite adequate remuneration) provided that without such access the requesting entity becomes unable to operate as a competitor on the relevant market as a result of existing legal or factual reasons³⁶.

3. Case law regarding the abuse of a dominant position

The Commission for the Protection of Competitions initiated three misdemeanor procedures in 2011 and rendered five misdemeanor decisions imposing fines for the abuse of a dominant position. The latter include:

1. Decision no. 09-13/3 of 4 March 2011 in proceedings initiated *ex officio* against *ONE* under Article 47(1)(2) LPC. The case concerned the abuse of a dominant position held by the telecoms operator ONE, Skopje on the market for call termination on ONE's public mobile communication network. ONE directly imposed in the territory of the R.M. unfair selling prices to those of its subscribers who have activated 'voice mail' (starting from the moment of establishing the call, i.e. from the moment of the activation of the IVR for leaving messages, where the voice message was part of the service and was subject to the interval that has been charged). The CPC fined the offender 249,000 EUR.
2. Decision no. 09-15/8 of 16 March 2011 in proceedings initiated *ex officio* against *EVN* for the violation of Article 47(1)(2) LPC as an undertaking with a dominant position in the market for the supply of electricity to consumers in the territory of the R.M.. The company was found to have abused its position during the period of time between 27 May 2006 and 28 February 2008 by imposing unfair trading conditions (monthly bills for electricity included an administrative fee in the fixed amount of 0,097560 cents). The CPC fined EVN 498,000 EUR.
3. Decision no. 09-5/5 of 21 April 2011 in proceeding initiated *ex officio* against *Makedonski Telekom JSC*, Skopje for an offence under Article 47(1)(2) LPC in relation with Article 14(2) LPC of 2005³⁷. The CPC found that *Makedonski Telekom JSC*, an enterprise which held a dominant position in the market of fixed public telephone networks and services in the territory of the R.M., has abused its position between 1 July 2006 and 28 February 2007 by directly imposing unfair trading conditions on the territory of the R.M. Detailed monthly bills provided to its subscribers contained a special fee to cover the costs of preparing the bill in a fixed

³⁶ Article 11 LPC.

³⁷ Law for protection of Competition, Official Gazette of RM, No. 4/05, Article 14.

amount of 0,097560 cents for minimum package subscribers; 0,406504 cents for residential customers; and 0,813008 cents for business users. The CPC fined the offender 998,000 EUR.

4. Decision no. 09-1/13 of 24 June 2011 in a procedure initiated upon the request of a Public Utilities Entity (hereafter, PUE) *Komunalec Pehcevo* against the PUE '*Usluga*' *Berovo* for the latter's offense under Article 59(1)(2) LPC. This case dealt with the abuse of dominance with respect to the supply of drinking water to two villages (Umlena and Robovo) in the period of time between 1 October 2006 and 2 September 2009. The offender delivered to the PUE *Komunalec Pehcevo* m³ of drinking water charging the latter retail rather than wholesale prices. This was seen as a direct imposition of unfair selling prices which is prohibited by Article 11(2)(1) PC. The CPC imposed a fine of 975,6097561 EUR.
5. Decision no. 09-3/11 of 26 September 2011 against PUE *Ohridskikomunalec* for the violation of Article 59(1(4)) LPC related to Article 11(2)(1) LPC. The offender, which held a dominant position in the market for the management of a cemetery in the Municipality of Ohrid, abused its position between 25 May 2010 and 4 January 2011 by directly imposing unfair trading terms. The dominant company unjustifiably imposed, an additional charge of 615,000 EUR per month for maintaining public hygiene of the overall infrastructure, which the funeral services operator uses when performing a funeral. CPC fined the offender 1 951,2195 EUR.

The difference between a dominant position of one company and concentrations lies with the number of undertakings. While, in the above case the abuse was exercised by a single entity, presented below are cases where the infringement of competition rules derived from multiple companies.

In 2012, the CPC adopted only 1 decision in administrative proceedings establishing the existence of an abuse of a dominant position:

1. Decision no. 08-358/2 of 05 December 2012 based upon a request for the initiation of Procedure No.17 -35 /1 of 12 March 2003, submitted to the Macedonian Office of Monopoly by *Fokusnet LLC*, Stip against *Macedonian Telekom AD*, Skopje. The request concerned abuses of dominance under Article 25(8(1)) of the Act against limiting Competition (Official Gazette No. 80/99, 29/02 and 37/04). The decision acknowledged and determined that the offender held a dominant market position as the incumbent operator in the R.M. Between 01 September 2001 and 18 December 2002, the incumbents was found to have jeopardized the competitive opportunities of Fokusnet LLC in a certain geographic area (including city of Veles etc), hampering the latter's provision of public telecommunications services. The decision was appealed to the Administrative Court of Macedonia; proceedings are ongoing.

In 2012, the CPC's Commission for Offences led 4 misdemeanor procedures for the existence of an abuse of a dominant position and brought forth one criminal procedure that found an abuse of dominance:

1. Decision No. PP. 09-3 of 14 August 2012 in proceedings initiated upon request of *ECO CLUB LTD Bitola* (an enterprise engaged in the collection and transport of hazardous waste), against the Public Enterprise *Komunalec Bitola*. It was determined therein that the latter held a dominant position in the market for the disposal of municipal non-hazardous waste in the territory of the city of Bitola and surrounding areas, which according to the principle of proximity set in the Law on Waste Management (Official Gazette of the R.M. No. 68/04, 107/07 and 143/08) gravitate towards Bitola. Regarding the disposal of municipal hazardous waste, the offender was the sole company managing the landfill Meglenci, the only site in the specified geographical market. It abused its position between 12 November 2011 and 12 December 2011 by unjustifiably refusing access to this site to ECO CLUB LTD Bitola. The offender committed a violation of Article 59(1(2)) of the Law on Competition – Abuse of a dominant position within the meaning of Article 11(2(6)) of this Act. The offender was sentenced to a fine of 1951, 219 EUR to be paid within a specified period of time.

V. Concentrations

1. Introduction

The third chapter of the Law on the Protection of Competition is dedicated to concentrations³⁸. Under Article 12 LPC, a concentration shall be deemed to arise where a change of control on a lasting basis results from:

- the merger of two or more previously independent undertakings or parts of undertakings, or
- acquisition of direct or indirect control of the whole or parts of one or more other undertakings by
 - one or more persons already controlling at least one undertaking, or
 - one or more undertakings,

whether by purchase of securities or assets, by means of an agreement or in other manner stipulated by law.

Concentrations, be it via mergers or acquisitions, are meant to improve the effectiveness of the participants' business. By joining, they might, however,

³⁸ Articles 12-25 LPC.

establish a dominant position in a particular market – its abuse may in turn violate competition. From a legal point of view, the participants of a merger or acquisition may, or may not, lose their legal independence. However, the loss of legal independence is not as important as the fact whether their economic power will change as a result of the concentration. Participants are thus obliged to notify the relevant competition body of the planned operation for the latter to verify whether the notified concentration can restrict or eliminate market competition or whether it is within the permitted parameters.

2. Legal framework on concentrations

In accordance with the LPC, those intending to participate in a concentration are obliged to send a notification to Macedonia's Commission for the Protection of Competitions if a change of control is to occur. A notification must take place if the following conditions are met:

1. the aggregate turnover of all participants, generated by the sale of goods and/or services in the world market, amounts to at least 10 million ERU (equivalent in MKD according to the exchange rate of the day when the annual account was compiled), realized in the business year preceding the concentration; provided that at least one participant is registered in the R.M., and/or
2. the aggregate turnover of all participants, generated by the sale of goods and/or services in the R.M., amounts to at least 2.5 million ERU (equivalent in MKD according to the exchange rate of the day when the annual account was compiled), realized in the business year preceding the concentration, and/or
3. The market share of one of the participants amounts to more than 40%, or the total market share of all participants amounts to more than 60% in the year preceding the concentration.

The CPC received 22 notifications in 2011 and adopted 18 decisions concerning concentrations, all of which determined that the operations were in compliance with the LPC. They will thus only be introduced briefly in this paper.

3. Case law regarding concentrations

Decision no. 08-74 of 13 October 2011, the concentration between *Acibadem Saglik Hizmetleri Tidzaret* on the one hand, and *Clinical Hospital SISTINA*, Skopje and *Association of Commerce and services for medical equipment Acibadem Sistina Medical Company Ltd.*, Skopje on the other hand. Although

it was said to fall under the provisions of the LPC, the operation was deemed to not result in a significant prevention, restriction or distortion of effective competition in the market or its significant part, particularly as a result of the creation or strengthening of a dominant position of the participants. It was in accordance with the Article 19(1(2)) LPC;

Decision no. 08-68 of 28 September 2011 pursuant to Articles 28 and 19 LPC and following the notification of a concentration between China's *Wolong Holding Group Co. Ltd.* on one hand, and *ATB Austria Antriebstechnik Aktiengesellschaft* on the other side. Notification lodged by Wolong Holding Group Co. Ltd.;

Case no. 08-41 of 26 January 2011 regarding the concentration between *Silgan Holdings Inc.* (USA) and *Drisht for Manufacture of tin containers and Trade Vogel and Noot Beijing Ltd.* based in Bitola, Macedonia. The participants were active in the market of metal cans and cans made of white sheet. The CPC found that although the concentration did fall under the provisions of the LPC, it would not notably prevent, restrict or distort effective competition in the market or its substantial part;

Case no. 08-42 of 26 January 2011 on the concentration between *GOFI-group of finance and investment SA* (Switzerland), *Euronetkom LLC* (Kosovo) and *Euronetkom* (Albania);

Case no. 09-76 of 6 December 2011 on the concentration between *Coca Cola Beverages holdings II BV* (Netherlands) and *Brau Union AG* (Austria) on the one side, and the Skopje brewery *Joint Share Company* (Macedonia), on the other side;

Case no. 08-78 of 12 September 2011 on the concentration between *EVN Macedonia Elektrostpanstvo*, a Macedonian stock company for the distribution of electricity on the one hand and *sovtverskiAlbnor Company Ltd.*, a Macedonian producer of electricity and computer services, on the other side. The participants were active in the electricity market.

The CPC adopted 22 concentration decisions in 2012. Not unlike in 2011, all cases were found to fall under the provisions of the LPC but would not result in a significant prevention, restriction or distortion of effective competition in the market or its substantial part, especially as a result of the creation or strengthening of a dominant position of the participants. They include:

Decision no. 08-82 of 10 January 2012 on the concentration between *Metinvest BV* (Netherlands) on the one hand and, on the other hand: *Brandfeld Fajmens Ltd.* (Cyprus), *Vernan Servisis Ltd.* (Cyprus); *Lasartiko Holdings Ltd.* (Cyprus); *Stransten Holdings Ltd.* (Cyprus); *Investments Ltd Rojver.* (Cyprus); *Sitler Management Ltd.* (Cyprus); and *Barlenko Ltd.* (Cyprus);

Case no. 08-81 of 23 January 2012 on the concentration between Macedonian companies *NEAR LLC* and *Third Macedonian Brigade* on the one side, and

ANI CABLE CAT Ltd. on the other side. Merging parties were active in the market providing transmission services of audio – visual content to end users;

Case no. 08-89 of 23 January 2012 on the concentration between Open Joint Stock Company *Silovi Machines – ZTL, LMZ, Elektrosila, Energomashekспорт* (Russia) on the one side, and Open Joint Stock Company *Energomashinostroitelnij Allianz* (Russia) on the other. Merging parties were active in the market for the production and wholesale of boilers for power generation in power plants.

Case no. 08-87 of 7 February 2012 on the concentration between the physical person *BLAGOY Mehandziski* (R.M.) on the one hand, and *Zegin LLC* (R.M.) on the other side. Participants were active in the wholesale market of pharmaceutical products.

VI. State aid

1. Legal framework

The legislation on State aid currently in force³⁹ is the Law on State Aid Control (hereafter, LSAC) which entered into force in 2010⁴⁰. The act regulates: forms of State aid, general conditions and rules for notifying State aid as well as its assessment and monitoring. The objective of the LSAC is to establish a legislative framework for notification, approval, granting and monitoring of State aid in order to implement the principles of market economy, providing free competition and fulfilling the obligations undertaken by the R.M. through ratified international treaties containing provisions on State aid⁴¹.

According to Article 2 LSAC, the legislation is applicable to any form of subsidy granted by State aid providers, irrelevant of whether it is granted under an aid scheme or as an individual measure. The LSAC is applicable provided the aid may affect the trade inside the R.M.; trade between the R.M. and the European Union; or trade between the R.M. and other countries which together with the R.M. are parties to ratified international agreements containing provisions on State aid⁴². Article 2 LSAC states also that the provision will not be applicable to State aid granted in the agriculture and

³⁹ Law on State Aid, Official Gazette of the R.M., 24/03, 70/06 and 55/07 are no longer in force.

⁴⁰ Law on State Aid Control, Official Gazette of the R.M.145/10 which replaces the Law on State Aid, Official Gazette of RM, 24/03, 70/06 and 55/07.

⁴¹ Article 2 LSAC.

⁴² Article 3 LSAC.

fisheries sectors⁴³. Importantly, the last paragraph of Article 2 states that during the assessment of the forms of State aid that may affect the trading relations between the R.M. and the EU, in accordance with Article 69 of the Stabilization and Association Agreement, the criteria arising from the proper application of EU State aid rules shall be applied accordingly. Based on a governmental report, the participation of State aid in Macedonia's 2011 GDP was 0,19%; the total amount awarded in 2011 was 13, 002888992 euro.

The LSAC is characterized by the fact that it simplifies relevant administrative procedure. The year 2011 can be noted for the increase in the number of State aid decisions issued in Macedonia due to the need to improve the qualification of the given aid.

1. By-laws

On 15 December 2003, the Macedonian Government adopted as set of by-laws to the Law on State Aid of 2003 including: Regulation on establishing conditions and procedures for granting regional aid⁴⁴ (under Article 6(4) of the Law on State Aid of 2003); Regulation on the forms and procedure of notification to the state aid commission and for assessment of state aid⁴⁵ (under Article 11(2) of the State Aid Law of 2003); and Regulation on establishing conditions and procedure for granting aid for rescue and restructuring of firms in difficulty⁴⁶ (under Article 8 of the State Aid Law of 2003).

Pursuant to Article 5(2) and in accordance with Article 5(1(b)) of the Law on State Aid of 2003⁴⁷, the Government adopted also on 27 December 2007 a Regulation on establishing conditions and procedure for granting horizontal Aid⁴⁸.

A number of additional regulations were issued in 2008 and 2009. They formed one of the bases for the Macedonian Parliament to adopt the new Law on State Aid Control of 2010.

⁴³ Article 3(2) LSAC.

⁴⁴ Regulation on establishing conditions and procedures for granting regional aid, Official Gazette of the R.M. No. 15/12/2003.

⁴⁵ Regulation on the forms and procedure of notification to the state aid commission and for assessment of state aid, Official Gazette of the R.M. No. 15/12/2003.

⁴⁶ Regulation on establishing conditions and procedure for granting aid for rescue and restructuring of firms in difficulty, Official Gazette of the R.M. No. 15/12/2003.

⁴⁷ Law on State Aid, Official Gazette of the R.M., 24/03; 70/06; and 55/07.

⁴⁸ Regulation on establishing conditions and procedure for granting horizontal Aid, Official Gazette of the R.M. No. 157 (27th December 2007).

2. Case law in the area of State Aid

The Commission for the Protection of Competition adopted two decisions in 2011 that determined that the notified measures did not constitute State aid within the meaning of the Law on State Aid Control:

- Decision no. 10-43 of February 2011 on the use of budgetary funds by the Macedonian Bank for Support and Development for credit servicing due to interest costs arising from a governmental decision (Official Gazette No. 103/10), and
- Decision no. 10-64 of June 2011 on the award of state guarantees to *JSC MEPSO* in order for it to gain a loan from international financial institutions. It was determined therein that the state guarantee did not constitute state aid under Article 5(1) LSAC because it did not distort market competition.

Mentioned must also be a case where the CPC decided that the notification duty should only apply to existing, and continuing aid granted prior to the entry into force of the Law on State Aid of 2003.

With the Decision no. 10-209/12 of 27 August 2008, the CPC initiated a formal investigation of an individual aid granted by the Ministry of Transport and Communication to *Ramstore Makedonija DOO*, Skopje. The aid took the form of a contract signed on 12 December 2003 (No. 16-11096) for the transfer of State owned land with the surface of 19866m². The CPC concluded that the Ministry was a State aid provider and *Ramstore Makedonija DOO* was a recipient of the aid. Assessing the aid itself, the CPC concluded that the day of the conclusion of the contract (12 December 2003) was simultaneously the date of the provision and termination of the provision of the aid. According to Article 2 of the Regulation on the Forms and Procedure of the Notification to the State Aid Commission and for Assessment of State aid⁴⁹, only existing and continuing aid granted prior to the entry into force of the Law on State Aid of 2003, but not prior to the entry into force of the Stabilization and Association Agreement and the Interim Agreement on Trade and Trade related Matters, should be notified to the CPC. This is the case for individual aid not bound by the obligation to submit a notification for existing aid, foreseen in Article 2 of the Regulation on the Forms and Procedure of the Notification to the State Aid Commission and for Assessment of State aid. The CPC concluded that the Law of 2003 cannot apply to this aid because while the latter was granted before the legislation came into force on 01 January 2004, the aid was discontinued after that date. Incidentally, the CPC decision can be appealed to the administrative court within 30 days from the day of receiving this decision.

⁴⁹ Official Gazette of Republic of Macedonia, No. 81/03.

Research on State aid granted in the R.M. in 2012 shows that it is largely awarded to support projects that have direct impact on the national economy via the promotion of economic development in geographic areas where the standard of living is extremely low, or areas characterized by high unemployment. On the one hand, it is State assistance for regional development which supports foreign investment in the R.M. On the other, through different development programs, especially those undertaken by the Ministry of Economy, the government uses the mechanism of State support and assistance to participate in the development of cluster association, the implementation of industrial policy or the support and development of SMEs. The government uses State aid also to assist the country's various areas in the framework of its Operational Plan and active employment measures for 2012–2013 implemented by the Ministry of Labor and Social Policy.

VII. Other issues related to competition law in the R.M. (sector analysis)

1. Analysis of the market for advertising in electronic media (TV)

In 2011, the Commission for the Protection of Competition has launched for the first time a market enquiry directed at television advertising (covering in particular the period of time when political parties are advertising their programs). It is worth mentioning that the CPC has a duty to cooperate with other (non-governmental and governmental) bodies on matters relating to the protection of competition. In 2012, it introduced the results of its successful cooperation with the European Commission, the Agency for Electronic Communications, Bureau of Public Procurement etc.

2. Analysis of the banking sector

The CPC has a yearly duty to monitor and analyze the conditions of competition in the banking sector. The CPC has initiated procedures on agreements, decision of associations of undertakings or concerted practice as well as on the abuse of dominance in this sector. It also received a number of notifications of concentrations in accordance with the provisions of the LPC. With respect to the latter, the CPC found in 2012 that the notified concentrations were consistent with Macedonian competition law – although falling under the provisions of the LPC, they did not notably prevent, restrict

or distort effective competition in the market or its significant part, especially as a result of the creation or strengthening of a dominant position of the participants. Incidentally, two out of the three concentrations concluded through direct acquisition of control by a foreign bank of another foreign bank, were achieved through a merger or acquisition of two domestic banks.

VIII. Conclusion

Competition protection is a legal issue that has been subject to constant amendments at the EU level. Hence, the monitoring and adjusting of respective national legislation is a continuous process and the main task of Macedonia's Commission for the Protection of Competition. The responsibility for an effective implementation of harmonized competition law is currently shared between the CPC and the Administrative Court. Both institutions continue to carry out tasks meant to enable Macedonia to become a full member of the EU, keeping in mind that competition protection is of vital importance in this context.

Recent Developments in Slovak Competition Law – Legislation and Case Law Review¹

by

Zuzana Šabová*, Katarína Fodorová**, Daniela Lukáčová***

CONTENTS

- I. Introduction
- II. Legislative changes
 - 1. Latest amendment of the Act on the Protection of Competition (2012)
 - 2. New draft amendment to the Act on the Protection of Competition (2013)
- III. Selected decisions and other activities of the Slovak Antimonopoly Office
 - 1. Control of concentrations
 - 2. Antitrust cases
 - 3. Competition advocacy
 - 3.1. Inter-ministry comment procedures
 - 3.2. Market studies
- IV. Significant judgments of Slovak courts in competition matters
- V. Conclusions

¹ All views expressed by authors in this paper are strictly personal and do not represent the opinion of the Antimonopoly Office of Slovak Republic; zuzana.sabova@antimon.gov.sk.

* Zuzana Šabová, Antimonopoly Office of Slovak Republic, PhD. Student at Comenius University, Bratislava. All views expressed in this paper are strictly personal and do not represent the opinion of the Antimonopoly Office of Slovak Republic; zuzana.sabova@antimon.gov.sk.

** Katarína Fodorová, Antimonopoly Office of Slovak Republic; katarina.fodorova@antimon.gov.sk.

*** Daniela Lukáčová, Antimonopoly Office of the Slovak Republic; daniela.lukacova@antimon.gov.sk.

I. Introduction

Slovak competition law is set by the Act No. 136/2001 Coll. on the Protection of Competition, as amended (hereafter, Competition Act). Covered therein is the prohibition of competition restricting agreements and the prohibition of the abuse of dominance as well as concentration control. The wording of the prohibitions is identical to Articles 101 and 102 TFEU. Control of concentrations is largely modelled after the EU system also including the substantive test, Significant Impediment of Effective Competition, which is used in Slovakia since 2012 with some procedural divergences. Enforcement is administrative in nature and only undertakings are subject to investigations and fines. The relevant enforcement body is the Antimonopoly Office of the Slovak Republic².

The EU enforcement model remains the main source of inspiration for national legislation, for the decision-making practice and competition policy of the national competition authority – the Antimonopoly Office (which tends to rely on the concepts and doctrines established at EU level) as well as for the soft laws adopted by the Office on its own initiative (Leniency programme, Guidelines on Commitments, Guidelines on Settlement etc.).

In recent years, the main issue has been the interplay between the Office's decision-making practice and judicial review carried out by the Regional Court in Bratislava, acting as the first-instance court, and the Supreme Court of Slovakia, as the appellate body. The Office lost several big cases in 2009–2011 before the first-instance court that related to issues such as: bid-rigging in the construction sector; restrictive agreement in the banking sector and; several abuse cases in telecoms³. Some of these cases are still pending before the Supreme Court based on appeals lodged by the authority. The differences in opinion between the Courts and the Office related mainly to the evidential threshold and other procedural aspects. Unlike the authority, the courts tend to rely more on criminal investigations or general administrative principles than on EU case-law and doctrines as their reference point.

The need for coherent application of EU competition law has led to two *amicus curiae* interventions by the European Commission pursuant Article 15(3) Regulation 1/2003⁴. The first took place in 2011 and concerned the notion of

² Decisions of the Office and the relevant national judgements are published on the Office's web site www.antimon.gov.sk.

³ The Office's stance on the judgments can be found in the document „Problems arising from the decision-making practice of the courts in competition law in Slovakia“. The Office published the document on its webpage; an English version is available at <http://www.antimon.gov.sk/849/c-2011.axd>.

⁴ 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 [2003] L 1/1.

‘undertaking’, in particular the transfer of liability for a breach of competition law from the offender onto a new entity (economic successor) after the perpetrator ceased to exist (economic continuity test). The more recent 2012 case related to the imposition of a fine for an offence consisting of a violation of the so called ‘general clause’ – general ban on the abuse of dominance⁵. Mentioned should also be the fact that a Slovak court submitted recently for the first time a reference for a preliminary ruling under Article 267 TFEU. The issue at stake was the notion of a cartel and liability for participating in such conduct.

This experience has shown that it is worth building an open and continuous dialogue with the national judiciary and the Office has indeed been paying a lot of attention to competition advocacy. Recently, a number of conferences and workshops were organised and discussions launched about particular features of competition law and its current problems including the margin squeeze doctrine, inspection powers or fining mechanisms⁶. Thanks to initiatives on both sides, progress can be expected.

The policy of the Slovak Antimonopoly Office shows a clear shift from a traditionally formal to a more economic approach. This is visible in cases concerning vertical agreements (such as a case concerning alleged RPM in distribution of luxury cosmetics in 2011) as well as recent abuse cases (exclusionary behaviour in the waste management sector, excessive fees for certain activities in the electricity sector). A positive attitude towards this trend, which corresponds to EU practice, can also be observed on the part of Slovak courts as illustrated by the latest judgment of the Regional Court in Bratislava concerning margin squeeze in telecoms. In order to ensure a coherent and expert approach in this field, a chief economist unit was formally established in 2012.

At the beginning of 2013, the Office publicly presented also its strategy for the next term⁷. This document suggests that the Office’s general objective is

⁵ The Supreme Court ruled in 2011 for the first time that the Office cannot impose a fine when the offence consists of a violation of a ‘general clause’ (opinion given in a ruling related to a case concerning funeral services assessed under national law only). This view was later followed by other panels of judges in different cases (telecoms, fuel) some of which concerning also the application of Article 102 TFEU. However, this judicial view is not uniform as shown by the latest telecoms judgment, where the Regional Court in Bratislava left this question open. For detailed comments see K. Kalesná, ‘Zneužívanie dominantné hopostavenia v teórii a aplikačnej praxi’ [Abuse of dominant position in theory and case law] (2012) 4 *PrávnyObzor*; Z. Šabová, ‘Zásada nullum crimen sine lege a ukládanie sankcií v súťažnompráve’ [The principle of nullum crimen sine lege and imposition of fines in competition law] (2013) 2 *PrávnyObzor*; O. Blažo, ‘Nullum crimen, nulla poena sine lege a generálne klauzuly v prípadoch zneužívania dominantné hposavenia’ [Nullum crimen, nulla poena sine lege and general clauses in cases of the abuse of dominant position] (2013) 4 *Justičná revue*.

⁶ 2012 Annual Report of the Antimonopoly Office, available also in English on its website.

⁷ The document ‘Antimonopoly Office of the Slovak Republic, its mission and policy orientation for the next period’ is available at <http://www.antimon.gov.sk/files/31/2012/Ciele%20PMÚ%20SR.pdf>.

to build a modern competition authority with a policy focused on consumer benefits. To achieve this, the authority has been gradually introducing a variety of special measures and changes to Slovak legislation and policy-making as well as to the Office's own organizational structure. Prioritization seems to be the main challenge of its enforcement activities; an effort that corresponds to the EU model as well as to the overwhelming trend throughout the EU.

Although prioritizing is not a notion completely new to the Office's practice (such references can be found in cases dating from 2009⁸), it is the first time for it to be publicly announced as a matter of policy. The principles of prioritization were published⁹ in March 2013 in the form of a soft law, there is no direct legislative provision supporting them in the Competition Act yet. Nevertheless, since infringement procedures can only be opened in Slovakia on an *ex officio* basis, it is fair to say that prioritization is legitimate also under the current wording of the Competition Act. Since these principles have been used in practice for a very short period of time only, it is not yet possible to draw substantial conclusions in this regard.

As regards the prioritization principles, it is obvious that the Office will focus its resources on the most serious types of infringements such as cartels (namely bid-rigging), exclusionary abuses and the implementation of prohibited mergers. These types of conduct are generally considered as the most harmful to competition. It is thus not surprising that also the Slovak competition authority aims to concentrate its resources on prosecuting them. More importantly, the document sets and explains detailed rules on how the authority intends to apply the prioritization policy in its everyday work. Aside from this, it is declared that administrative proceeding are but one of the many means to alleviate competition concerns and problems stressing also the usefulness of advocacy activities and sector inquiries.

Concerning sectorial orientation, the Office will focus its activities in the next term on the financial sector, food industry and the heat sector. While the first two largely mirror EU efforts, the final selection reflects the repeated complaints submitted in this field in Slovakia in recent years as well as the fact that the heat sector is perceived as a sensitive area from the end-user perspective and marked by systemic deficiencies resulting from structural problems and insufficient regulation.

The shaping of the prioritization policy and the wording of its particular principles will certainly be subject to expert discussion and possible refinements may arise from practical experiences. Nonetheless, the essential need for

⁸ e.g. the Office did not investigate a given period of abuse due to regulatory intervention. The Office concluded that since the identified problem was solved by the regulator, parallel proceedings would no longer be of priority.

⁹ Available at <http://www.antimon.gov.sk/409/4939/prioritisation-policy-of-amo-sr.axd>.

prioritization remains indisputable. The Office makes visible efforts to become a modern and flexible enforcement agency and a full-fledged member of the ECN. However, with its limited budget of about 2,1 million EURO for 2013 and a small number of staff (34 non-administrative staff working on competition matters in 2012), which represents a decrease in resources compared to 2012¹⁰; prioritization of its activities in all areas of competencies appears to be inevitable.

II. Legislative changes

1. Most recent amendment of the Act on the Protection of Competition (2012)

Slovak competition law has undergone several amendments since its introduction in 1991 – most recently in January 2012 by the provisions of Act No. 387/2011 Coll. Introduced thereby were primarily changes to its merger control rules creating new assessment criteria whether a concentration shall be subject to pre-emptive control by the Office. The amendment eliminated obligatory notifications in cases where the target company meets certain worldwide turnover criteria but does not notably participate in the competitive exchange within Slovakia itself. For the national notification obligation to arise, the target company must now attain a given turnover inside the Slovak Republic. The main goal of this shift is to enable the Office to focus its capacity on concentrations most important to the national economy.

At the same time, a two-phase assessment process was introduced. The Antimonopoly Office currently has twenty-five working days from the date of the notification to analyze concentrations or ninety working days for more complicated cases.

The amendment adjusted also the circumstances and the lapsing of the time limit: for the Office to find that a notification had been incomplete in its section referring to affected markets; when it asks a party to the proceedings to submit further information and documents, which may substantially affect the decision on the concentration; or if the decision is annulled by the court or by the Office itself; and when the original notification becomes non-complete due to a change of market conditions or provided data which has occurred in the mean time.

The amendment introduced also the Significant Impediment of Effective Competition test (SIEC test) as the assessment criteria for concentrations and eliminated the use of the earlier Dominance test. This change harmonises Slovak legislation with EU competition law and is consistent with the more economic approach to competition law proceedings.

¹⁰ In 2012, the Office's budget was of EUR app. 2,4 million.

The amendment shortened also the period in which the Office can issue a decision on the exemption from the suspension of a concentration. The Office is to issue a decision on the granting or non-granting of such an exemption within twenty-five working days following the delivery of the request (as opposed of the previous thirty days).

Following these legislative changes, the Office's Decree on the particulars of the notification procedure was also amended in the part that relates to affected markets. It is now more precise in stipulating which markets are considered as 'affected' by a concentration.

Beside the merger-focused part of the reform, the 2012 amendment brought about a number of minor changes concerning procedural aspects of competition enforcement such as the fact that a warrant submitted by a party to the proceedings no longer requires a certified signature.

In addition, changes were introduced in the area of sanctioning. Undertakings are now no longer obliged to pay a penalty for failing to pay the imposed fine on time. The reason for this change was that the Office had found that such penalty payment did not satisfy a precautionary purpose but represented only a secondary sanction which could be excessively high compared to the sanction imposed.

The amendment affected also the enforcement of Slovak competition law decisions. The Office used to be obliged to finish execution within five years. The period within which its decisions can be ordered to be executed is now set to five years from the expiration of the time limit set for the fulfilment of the imposed obligation. This amendment puts Slovak competition law in line with its general legislation on administrative proceedings.

2. The new draft amendment to the Act on the Protection of Competition (2013)

The Antimonopoly Office prepared in 2012 a new draft amendment to the Competition Act, which was submitted for public consultation and is currently being prepared for legislative submission. The main aims of the draft are to further approximate Slovak legislation with EU law and to further improve its national merger control system.

In the antitrust field, the draft omits the regulation of the essential facility as it did not correspond to EU case-law and has proven problematic in practice.

Regarding merger control, the Office intends to further speed up its assessment process. The counting of the time limit for issuing a decision is drafted to begin on the day following the day of the delivery of the notification rather than the day of the delivery of a complete notification as is currently the case. Following the EU model, the amendment is to introduce the role

of a trustee and provides further details in this regard. A trustee would assist the Office in supervising the fulfilment of merger remedies or would directly fulfil the remedies on their behalf.

The draft clarifies the competences of the Office with respect to procedural rules. Following practical experiences and judicial review, it also provides for a refinement and clarifications of the obligations of undertakings during inspections.

In light of the increasing importance of ‘due process’, the draft tackles the need to regulate access to the file as an important part of the right of defence. This is an especially sensitive issue that requires precise rules particularly so when the file contains confidential information or business secrets. Again, the adopted approach draws inspiration from the European Commission’s practice and EU jurisprudence. In addition, the amendment provides precise rules on access to the file in leniency cases. After the amendment enters into force, leniency applications will not be part of the file until the Call before Issuing a Decision (national equivalent of the Statement of Objections) is sent to the scrutinised undertakings. Only after would a party to the proceedings be allowed to make a transcript of the relevant documents but even then, it will not be allowed to copy them.

With the aim to encourage leniency applicants and boost the use of the Leniency programme, another important draft change relates to claims for private damages. Similarly to Hungarian legislation, a leniency applicant will in the future not be further liable in private lawsuits, provided the sustained damage can be reimbursed by other cartel members.

However, the leniency programme can only be efficient if the Office is able to uncover cartels *ex officio* also. In order to achieve this, the draft introduces a completely new tool – the so-called ‘informant’ – as already used in some EU countries such as the United Kingdom and Hungary. Accordingly, the first person to provide significant evidence about a horizontal restrictive agreement may in the future be entitled to a reward of 1% of the imposed sanction (not exceeding EUR 100,000) under conditions specified by law. Given the quite low number of leniency cases completed so far in Slovakia, this new tool could lead to an increase in the number of cartel cases in general as well as induce leniency applicants to approach the Office in particular.

From a practical point of view, the draft proposes a change relating to communication between the parties to the proceedings and the Office. Delivery of some documents by the Office will be possible by electronic means, if the undertaking so requests.

Furthermore, the draft introduces a shift in the internal organisation of the Antimonopoly Office. The Deputy Chairperson will no longer be a member of the Council of the Office but will be responsible for first-instance proceedings

instead. The amendment stipulates the conditions of the performance of the Deputy Chairperson's office, in particular appointment and dismissal conditions.

A number of related soft laws will be changed once the amendment of the Competition Act is introduced. The Office has prepared a new draft Decree on the *De minimis* rule as well as on Settlement and on the Leniency programme. According to current legislation, the *De minimis* rule is governed directly by the Competition Act. Based on the amendment, only its basic framework will be stipulated in the Act, its details will be covered by a Decree. The same will happen with respect to Leniency and the Settlement procedure. The *De minimis* rule will be further approximated with EU law. In terms of Settlement, there was so far no legal basis in Slovakia for the operation of such procedure. Fine reductions were awarded in practice on the basis of a general rule allowing the lowering of fines for cooperation during the investigation and proceedings¹¹. The basic principles of the new Slovak Settlement procedures are identical to those used by the Commission. Unlike in the EU however, the Slovak procedure will be applicable to all competition law infringements including restrictive agreements, abuse, infringements relating to merger control and other forms of unlawful restrictions of competition¹².

In addition, the existing Decree on the particulars of the notification procedure will be annulled and a new one prepared. The Decree on the calculation of turnover will also be annulled – some of its provisions will be incorporated into the Competition Act, other aspects will be regulated in a new soft law act.

III. Selected decisions and other activities of the Antimonopoly Office of the Slovak Republic

1. Control of concentration

Holcim and VSH (construction industry)

In this concentration, the undertaking HOLCIM Auslandbeteiligungs GmbH, Federal Republic of Germany (hereafter, Holcim) gained direct exclusive control over the undertaking Východo – slovenskéstavebnéhmoty,

¹¹ For further details see O. Blažo, 'Úsviturovnania na Slovensku' ['Dawn of settlement in Slovakia'] (2011) 2 Antitrust – Revue of Competition law.

¹² State administration authorities during the performance of state administration, local self-administration authorities during the performance of self-administration and transferred performance of state administration, and special interest bodies during the transferred performance of state administration must not provide evident support giving advantage to certain undertakings or otherwise restrict competition.

a. s., TurňanadBodvou (hereafter, VSH). It was the first concentration approved with remedies after the Office published in 2006 its Directive on Conditions and Obligations (national equivalent to EU merger remedies)¹³. The concept of trustee and a ban to implement a concentration before the fulfilment of remedies were used here for the first time during the remedies imposition procedure.

Holcim was a member of a group of companies controlled by Holcim Ltd. and operated in the Slovak Republic through its subsidiary Holcim (Slovensko) a. s., Rohožník. It was active in the production and sale of bulk and packed cement, truck-mixed concrete, aggregates and transport services.

VSH was a Slovak company that engaged, most importantly, in the production and sale of bulk and packed grey cement. It was also active in the production and sale of truck-mixed concrete, aggregates and transport services.

The Office analysed the impact of the concentration on several relevant markets and found that the operation would negatively influence effective competition on the relevant market for the production and sale of grey cement in Slovakia. Barriers to effective competition were also identified on the relevant market for the production and sale of truck-mixed concrete within the respective territories in the Slovak Republic.

Upon the request of the Office, Holcim proposed conditions and related obligations leading to the sale of the Vlkanová Terminal, a sales force of Holcim, within a scope necessary to achieve viability and competitiveness of the sold business. The Antimonopoly Office tested whether the proposed conditions were sufficient and effective enough to prevent Holcim from acquiring or strengthening a dominant position as a result of the concentration, which would create major barriers to effective competition on the respective relevant markets.

On the basis of market enquiries and other information received in the administrative proceedings, the Office found that competition problems would not arise if the Vlkanová Terminal was sold to an independent transferee (not related to the parties to the operation and their economic groups). However, such entity would have to have experience, incentive and opportunity to maintain and develop the respective business and be able to exert effective competitive pressure on Holcim after the implementation of the concentration on the relevant market for the production and sale of grey cement. The sale of the Vlkanová Terminal to a suitable transferee was subject to approval by the competition authority.

¹³ Available at <http://www.antimon.gov.sk/574/directives-and-guidelines.axd>.

In view of the limited number of suitable transferees, the Office applied in its decision a particular provision of the Competition Act whereby the parties to a concentration must not exercise the rights and obligations resulting from the concentration until the fulfilment of the imposed conditions. The decision¹⁴ with conditions and obligations entered into force on May 15, 2011.

AGROFERT HOLDING, a. s. and EURO BAKERIES HOLDING a. s. (bakery sector)

The Office assessed here a concentration consisting of the acquisition of direct sole control by the undertaking AGROFERT HOLDING, a. s., Praha, Czech Republic (hereafter, 'AGROFERT'), over the business of the undertaking EURO BAKERIES HOLDING a. s. Praha, Czech Republic. The Office conducted its assessment according to the former substantive test – the Dominance test – and focused on the potential creation or strengthening of a dominant position with a significant negative impact on competition.

In its horizontal assessment, the Office focused on the analysis of the relevant market for the production and distribution of fresh bread in Slovakia, relevant market for the production and distribution of fresh common bakery products in Slovakia and the relevant market for the production and distribution of other sweet and savoury bakery products in Slovakia.

According to the Office's findings in the first-instance proceedings, this concentration would have created a dominant position for the undertaking AGROFERT resulting in significant barriers to effective competition in all mentioned markets.

In its vertical assessment, the Office examined the impact of the transaction on the market for flour distribution but did not identify any competition concerns. In the light of the conclusions regarding horizontal aspects of the operation, the Office prohibited the concentration in first-instance proceedings. AGROFERT appealed the decision at first but ultimately withdrew its notification in the course of second-instance proceedings. The Council of the Office changed therefore the original decision and terminated the proceeding¹⁵.

Caterpillar/MWM (use of referral system)

In 2010, the Slovak Antimonopoly Office received a notification of a concentration between Caterpillar Inc., United States of America (hereafter, 'Caterpillar') and MWM Holding GmbH, Germany (hereafter, MWM). The European Commission soon informed Member States that the German

¹⁴ Available at http://www.antimon.gov.sk/files/29/2011/018_bez%20OT.rtf.

¹⁵ Decision available at <http://www.antimon.gov.sk/files/38/2013/RozhAgrofertWeb.rtf>.

competition authority, the Bundeskartellamt, submitted a request for referral under Article 22 of Regulation No. 139/2004 and that other EU countries could join the request of the German competition authority.

The proposed concentration led to horizontal overlaps, especially in the area of gas power plants driven by piston engine (hereafter, 'REGS') for decentralized energy supply. The geographical relevant market was determined to be the area of the EEC.

The Slovak competition authority joined the request of the Bundeskartellamt and asked for the European Commission to assess the case. The Commission informed the Office that such referral was admissible because it fulfilled the requirements set forth in Article 22(2) and Article 22(3) of the Regulation: the request had been delivered within the prescribed time period, the concentration influenced trade between Member States; and was likely to significantly influence competition in the territory of the Member State or Member States requesting referral. The Commission thus decided to examine the concentration. Subsequently, the Slovak competition authority stopped its own proceedings¹⁶. This was the first time for the Office to successfully apply Article 22 Regulation 139/2004. It was also the first time for waivers to be used.

2. Antitrust cases

Procter & Gamble and HENKEL (Agreement restricting competition, leniency programme, settlement procedure)

Based on a leniency application lodged by Procter & Gamble, International Operations and Procter & Gamble, spol.s r. o., the Antimonopoly Office opened an investigation of a cartel agreement among detergent producers. Given the time frame of the infringement, national laws were applied regarding the pre-accession period, both national and EU competition rules were used in parallel for the period after the Slovak Republic's entry into the EU.

According to the Office's findings¹⁷, between mid-1999 and the end of 2004, particular undertakings belonging to the Procter & Gamble and Henkel groups negotiated an agreement on the limitation of the scope and frequency of promotional activities for the sale of high-efficiency detergents in the Central European region. They also agreed, in terms of standardization of packaging of high-efficiency detergents, for prices to remain at the level of former packaging even after the introduction of a new standard packaging.

¹⁶ Available at <http://www.antimon.gov.sk/files/29/2011/005.rtf>.

¹⁷ For further details see Annual Report of the Antimonopoly Office of the Slovak Republic, 2011.

Participants exchanged also commercially sensitive information. The Office decided that the parties concluded and implemented an agreement on indirect fixing of prices for goods on the relevant market for household detergents in Slovakia.

Both leniency applicants from the Procter & Gamble group fulfilled the immunity conditions. The Office imposed a fine of EUR 291 060 on Henkel Central Eastern Europe and a fine of EUR 194 040 on HENKEL SLOVENSKO, spol. sr.o.. Regarding these two undertakings, the fact that they admitted their participation in the cartel, cooperated in the investigation and provided the Office with supplementary evidence was taken into account as a mitigating circumstance. As a result, the basic amount of their fines was decreased by 30%. The decision was not appealed.

This case represents the first successful use of the Leniency Programme in the Slovak competition authority's decision-making practice. Two others proceedings initiated upon a request for the non-imposition of fines were also opened but while one of them is currently pending before the Slovakian Supreme Court, the other was closed for procedural reasons.

The Slovak Leniency Programme is modelled after the EU. Its basic conditions are stipulated in the Competition Act and expanded upon in soft law. Leniency has been part of Slovak legislation since 2001 but it was not used in practice until the first case opened in 2007. The 3 aforementioned cases are thus Slovakia's only experiences with leniency. Still, the stance that courts will take in the future regarding pending cartels will surely influence the motivation of undertakings to approach the Office with leniency submissions. Meanwhile, the authority strives to promote the programme and to eliminate possible concerns for potential applicants. For that purpose, it induced a change into Slovak criminal and public procurement law whereby a successful leniency applicant receives immunity from sanctions not just from national competition law but the other two legal systems also¹⁸. Moreover, the currently underway draft amendment of the Competition Act (presented above) is to introduce a further refinement of the Leniency programme (reward for informants) which will benefit applicants and, simultaneously, may also boost the number of leniency submissions.

Despite the fact that there is currently no legal basis for settlement in the Competition Act, the Office applied it successfully in this case to the Henkel group on the basis of soft law only. In order to increase legal certainty for

¹⁸ Z. Šabová, 'Aktuálne otázky aplikácie Leniency programov v súťažnompráve' ['Current trends in leniency programmes in competition law'] (2011) 8-9 *Justičná revue*; K. Fodorová, 'Zánik trestnosti trestné hočiny v nadväznostinavy užítie leniency programu v Slovenskej republike [Interplay between the decriminalisation of cartels and the leniency programme] (2010) 2 *Antitrust – Revue of Competition Law*.

undertakings and transparency of public activities, the above draft amendment introduces essential rules on settlement into the Competition Act to be complemented by an additional Decree of the Office stipulating its further details.

3. Competition advocacy

Beside its decision-making activities, the Antimonopoly Office promotes and develops the Slovak competitive environment also through competition advocacy initiatives. It is generally recognized that such activities have a preventive effect on law compliance and contribute to the development and general societal consent to competition policy and competition culture. Competition advocacy comprises a wide range of activities: the competition authority submitting its own comments to draft legislation or other documents within the inter-ministry comment procedure; publishing various initiative documents; as well as engaging in expert discussions with stakeholders etc.

3.1. Inter-ministry comment procedures

Through comments to draft legal acts and other documents, the Office seeks to eliminate potential barriers to the effective application of competition rules that are likely to cause a failure of the market and the competitive environment. The Slovak competition authority is quite active in this area and pays a lot of attention to these activities (comments submitted to 36 documents in 2011; 33 in 2012). In the recent period, the authority's comments concerned primarily the health sector, the draft Act on Advocacy and the draft Act on Public Procurement. Such comments can be of fundamental nature or have the nature of a recommendation.

3.2. Market studies

With the gradual shift from a formal to a more economic, effect-based approach to competition law enforcement, the importance of in-depth knowledge of particular sectors increases. Market studies can help competition authorities to become more familiar with specific features of given industries and markets. They help detect the causes of market deformations and to identify potential anticompetitive restrictions. They are particularly important in newly liberalised sectors that are gradually being opened to competition.

Railway transport services

In 2011, the Office finalised a sector inquiry in the area of railway transport – its results were later discussed with concerned undertakings and regulatory bodies¹⁹. The objective of this inquiry was to evaluate the rail-transport services sector from a competition point of view and to identify key problems that prevent or prevented the development of market competition.

The report focuses on rail-freight transport. The railway sector was recently liberalized – railway infrastructure (including railway lines) is administered by the state-owned company ŽSR, infrastructure access prices are regulated and private companies can operate alongside state carriers. According to the 2011 findings, competition on the rail-freight transport market did not develop despite liberalization. It was established that the incumbent carrier, the state-controlled company CARGO, held a higher than 90% market share while private carriers achieved very low market shares and grew at a low rate in spite of the fact that they have been operating since 2004.

According to the Office's findings, the main hindrances to the development of competition on the rail-freight transport market included excessive or unreasonably high entry barriers; access to modern electric locomotives and locomotive diesel fuelling systems was found to be particularly problematic. Regulation of the access fee for rail transport routes caused difficulties as well – the access fee is an important cost item for carriers, one that significantly affected the transport price. Since 1 January 2011, this fee was regulated in such a manner that it ranked among the highest in Europe lowering the overall competitiveness of rail-freight transport in comparison with road-freight transport. It also caused a fall in the competitiveness of the Slovak Republic in transit transport and an overall decrease in the volume of rail transport, which had a negative effect on new carriers.

Problems were identified also in certain aspects of the influence exercised on this sector by the Slovak state, especially the method by which subsidies and other financial support are being provided to state undertakings. The development of competition was also said to be potentially complicated by lacking interoperability (i.e. technical compatibility of the Slovak railway network with its neighbours) and low quality of railway infrastructure. Finally, the development of competition was also endangered by the conduct of state-owned companies – carriers trying to keep their market dominance by way of different practices such as access denial to infrastructure needed by private carriers as well as by various pricing practices.

¹⁹ Available at <http://www.antimon.gov.sk/files/23/2011/Problémy%20v%20sektore%20železničnej%20dopravy%20zo%20súťažného%20hľadiska.pdf>.

Gas sector

In 2010, the Office finalized a Sector report on the functioning of the gas market in the Slovak Republic²⁰ which was preceded by consultations with interested stake holders including representatives of the Office for Network Industries (i.e. the relevant regulatory body) and the Ministry of Economy and Construction. The competition authority focused its report on a comprehensive description of the market and its levels as well as the players acting thereon. Evaluated was the situation of gas supply to final consumers from the competition law point of view including the identification of factors affecting its further development. Competitors arrived in the area of gas supply in the Slovak Republic in 2009 – 2010 saw a continued growth in their market share to the detriment of the incumbent supplier SPP, a. s.. The Office established that it was necessary to focus its inquiry on the following areas: predictability and transparency of legislative measures and the analysis of their market impact; availability of comprehensive information on the market to all its participants; adoption of further measures to increase the liquidity and flexibility in the area of gas trading; revision and correct setting of regulatory measures according to real market needs; determination of specific plans for the interconnection of networks between the Slovak Republic and its neighbours. The final report was submitted as an informative material to the Slovak Government in November 2010.

IV. Significant judgments of the Slovak courts in competition matters

Case C-68/12 Slovenská Sporiteľňa (Preliminary ruling, Art. 267 TFEU)

In February 2012, the Supreme Court of Slovakia submitted a reference for a preliminary ruling to the Court of Justice of the European Union (C-68/12 *Slovenská Sporiteľňa*) related to a cartel case decided by the Antimonopoly Office in 2009. The authority investigated the conduct of three major banks, Slovenská Sporiteľňa, a.s. (hereafter, SLSP), Všeobecná úverová banka, a.s. (hereafter, VUB) and Československá obchodná banka, a.s. (hereafter, CSOB). It concluded that their agreement to terminate existing current account contracts and not to conclude new ones for the company Akcenta CZ, a.s. (hereafter, Akcenta) was aimed to illegally exclude the latter from the market of non-cash foreign exchange transactions, where it acted as their competitor. The Office imposed on SLSP, CSOB and VUB fines of app. 3.2, 3.2 and

²⁰ Available at <http://www.antimon.gov.sk/files/26/2011/VS%20PMÚ%20SR%202010.pdf>.

3.8 million EUR, respectively. Given that effect on trade between Member States was present in this case, Article 101(1) TFEU was applied in parallel to national competition rules.

Akcenta is a Czech non-bank financial institution providing cashless foreign exchange services. It held a licence of the Czech National Bank, but it did not have such licence from the National Bank of Slovakia. Akcenta was able to provide foreign exchange services by way of electronic means and to offer a better rate to those customers, who had an account in the same bank as the company. In order to carry out such services, Akcenta needed to have current accounts in multiple banks.

During the investigation, the Office gathered evidence of electronic communication and bank employees meetings where they agreed to simultaneously terminate Akcenta's current accounts and to refrain from opening them in the future. According to the Office's findings, the communication has also shown that the banks considered Akcenta as their competitor on the market of cashless foreign exchange services. In the course of the proceedings, the banks argued that Akcenta acted in the Slovak market illegally without a licence of the National Bank of Slovakia and that the said communication only had the aim to warn each other about the illegality of Akcenta conduct and its possible negative effects.

In September 2010, the Regional Court in Bratislava examined the decision of the Office in three independent proceedings and ultimately annulled it. The three resulting judgments contain divergences as to their legal opinion concerning the same offence. They also raised questions about coherent application of EU rules at the national level since the stance of the Slovak court concerning some elements of the offence differed from the attitude taken by EU case-law²¹.

The Office lodged an appeal to the Supreme Court. Due to the partitioning of the case by the Regional Court, three independent proceedings took place before the Supreme Court also. In the case of CSOB, the appellant court upheld the judgment of the Regional Court. Hence, the Office's decision with respect to this bank was dismissed. Concerning SLSP, the Supreme Court decided to stay the proceedings and submitted four questions concerning the interpretation of Article 101 TFEU to the Court of Justice of the European Union. Subsequently, the Supreme Court interrupted the VUB proceedings also.

Three of the questions submitted to the CJEU related to the issue whether it is relevant for the application of Article 101 TFEU that the competitor affected by a cartel acted on an illegal basis (without a licence) during the time

²¹ M. Nosa, 'Vec AKCENTA CZ, alebo dokazovanie kartelu' ['Case AKCENTA CZ, or to prove a cartel'] (2011) 1 Antitrust – Revue of Competition law.

when the cartel agreement was concluded, or if it is possible to take this fact into account pursuant to Article 101(3) TFEU. The last question concerned liability of an undertaking for the conduct of its employees who attended cartel meetings and participated in related e-mail communication.

The CJEU delivered its judgment on 7 February 2013. Concerning the alleged illegality of Akcenta's activities, the CJEU ruled that Article 101 TFEU must be interpreted as meaning that the fact that an undertaking that is adversely affected by an agreement whose object is the restriction of competition was allegedly operating illegally on the relevant market at the time when the agreement was concluded is of no relevance to the question whether the agreement constitutes an infringement of Article 101 TFEU. According to the Court, competition rules are intended to protect not only the said competitor but also the structure of the market and, consequently, competition as such. It is for public authorities, rather than for private undertakings, to ensure compliance with statutory requirements, the CJEU added.

As regards the question on liability, the CJEU referred to established case-law and observed that for Article 101(1) TFEU to apply, it is not necessary to demonstrate personal conduct on the part of a representative authorised under the undertaking's constitution or personal assent, in the form of a mandate, of that representative to the conduct of an employee of the undertaking who has participated in an anti-competitive meeting. According to settled case-law, the burden of proof is on the undertakings to put forward evidence to establish that their participation at a given meeting did not have an anti-competitive purpose.

The fourth question concerned the applicability of the exception under Article 101(3) TFEU. SLSP claimed that the conditions of Article 101(3) were satisfied since by preventing a competitor from acting illegally on the market, the agreement protects healthy competition and thus seeks to promote economic progress as required by Article 101(3) TFEU. The CJEU noted here that SLSP had only put forward one out of the four conditions required in Article 101(3) TFEU and that, in the case at hand, it did not appear that the other three conditions were met. In particular, the Court mentioned the third condition whereby an agreement must not impose restrictions which are not indispensable to the attainment of the objectives stipulated by the first condition. Therefore, the exception under Article 101(3) TFEU did not apply according to the CJEU.

The SLSP case is the first for the Slovak judiciary to turn to the CJEU with questions concerning EU competition law. Unlike the attitude of the panel of judges that dealt with the CSOB case, this clearly shows the effort of the Supreme Court to apply EU law appropriately and in a coherent manner. However, the CJEU reply is quite short and mainly refers to settled EU case-

law. As regards the substance of the answers, the alleged illegality of Akcenta's operation seems crucial to all of the three judicial proceedings, while the question of liability surfaced only in the case of SLSP. In fact, concerning both issues, the CJEU ruled in favour of the Slovak competition authority. After the CJEU delivered its ruling, the Supreme Court upheld the Office's decisions concerning SLSP and VUB banks. However, the earlier review of CSOB remains intact despite the fact that the findings of the Supreme Court are completely different to those delivered by the same court after the CJEU was consulted in the two related case.

Case ENVI-PAK (abuse of dominance, waste management sector, fines, amicus curiae intervention)

This case is an example of the Office's effort to shift from the traditionally formal to a more economic, effect-based approach in competition law assessment. The Office analysed here the behaviour of ENVI-PAK, a.s. (hereafter, ENVI-PAK) in the matter of granting sublicenses for the trademark 'Green Dot'. EU and national rules on the abuse of dominance were applied in parallel (Article 102 TFEU and its national counterpart).

Relevant market definition proved an interesting issue as far as the substance of the case is concerned. The Office defined the market of granting approval to use the trademark 'Green Dot' to third persons by means of individual licenses. For the first time in its practice, the Office defined a relevant market related to intellectual property rights (hereafter, IPR). ENVI-PAK's dominant position was established due to the fact that it was the only entity entitled to provide this trademark to third parties in the entire territory of the Slovak Republic. At the same time, there was no substitute to this trademark. Defining a relevant market on the basis of IPR is not often done; it is more common to define the relevant market as a market for goods or services that are the subject of the scrutinised IPR. Still, the former approach is not excluded. A market definition based on technology is admitted even in the DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses²². It provides that there is no general obligation for the IPR holder to license the IPR, not even where the holder acquires a dominant position in the technology or product market concerned.

The investigation and following administrative proceeding was based on complaints concerning the trade mark 'Green Dot' sublicensed by ENVI-PAK. Two relevant markets were defined where ENVI-PAK operated. The first was the market for the granting of approval to use the trade mark "Green Dot" to

²² See point 238 of the Discussion paper.

third parties by means of individual licences. ENVI-PAK was found to hold a dominant position on this market and it was this very dominance which was being abused. Impact of this abuse appeared on a second relevant market – market for the provision of packaging waste collection, recovery and recycling services through authorized organizations.

ENVI-PAK abused its dominant position by setting the payment system for the trade mark ‘Green Dot’ in such way that its service clients (those using packaging waste collection, recovery and recycling services) had the possibility to use ‘Green Dot’ for free. At the same time, ANVI-PAK’s licence clients (those interested in obtaining an approval to use the trade mark ‘Green Dot’ only) had to pay a fee for the licence as well as a fee for packaging without the ‘Green Dot’. The amount of the fee was not determined with respect to related costs. Instead it was so shaped that the final price which the potential licensee would have to pay was always higher than the price to be charged if it had also become ENVI-PAK’s service client. As a result, it was not economic to use other authorized services providers. Since an alternative did not exist, potential licensees were forced to accept conditions set by ENVI-PAK.

The Office concluded that by using its dominant position in the licence market, ENVI-PAK forced those using the ‘Green Dot’ to also use its services in the market of packaging waste collection, recovery and recycling services. A fine of € 18 394 was ultimately imposed on ENVI-PAK.

Upon appeal lodged by ENVI-PAK to the Regional Court in Bratislava, the court annulled the Office’s decision – the parallel application of national and EU competition law was confusing to the court. According to its view, the Office should be able to decide during the proceedings whether the base for application of EU law existed or not. It should consequently apply either EU or national law but not both at the same time. It has to be mentioned that this is the first time for the Slovak judiciary to voice such an opinion despite the fact that the courts had not challenged this issue on several occasions when it arose in the past. This approach is even more surprising since it occurred after the CJEU judgment in the *Toshiba* case (C-17/10), where the principles of parallel application were clarified.

Referring to previous judgments of the Slovak Supreme Court, the Regional Court stressed also that, when imposing a fine for an infringement of a general clause, the Office has to observe the principle of *nullum crimen sine lege*. In that light, it can only impose a fine if the conduct in question had already been subject to an earlier decision which the undertaking failed to comply with.

The Office challenged the judgment before the Supreme Court. Since the assessed conduct infringed Article 82 TEC (now Article 102 TFEU), the European Commission used the possibility to express its views on this

case as *amicus curiae*. The Commission's view was in line with the approach and argumentation of the Antimonopoly Office in its original proceedings. The Supreme Court ultimately changed the verdict of the Regional Court in Bratislava dismissing the lawsuit of ENVI-PAK. In other words, the Office's decision was upheld.

Abuse of a dominant position in the telecommunication sector, interplay between competition law and sector-specific regulation – judgment of the Regional Court in Bratislava

In 2009, the Office issued a decision imposing a fine of app. EUR 17,5 million on the undertaking Slovak Telekom, a.s. (hereafter, ST), former state monopoly, for committing an abuse of its dominant position. The incumbent controls the largest telecoms network of fixed telecommunication lines in Slovakia which covers its entire territory. According to the Office, the scrutinised behaviour consisted of a complex set of differentiated practices meant to exclude the incumbent's rivals from the provision of telephony and internet services through fixed lines. The Office applied in parallel both EU and national competition laws on the abuse of dominance.

Given that telecoms are subject to sector-specific regulation, the question of the Office's authority in this field was challenged both during the administrative proceedings as well as in judicial review. The incumbent objected, in particular, to the Office's competence to deal with alleged margin squeeze and tying practices. According to ST's argumentation, this behaviour was subject to sector-specific regulation in the form of individual regulatory decisions adopted by the Telecommunication Office of the Slovak Republic. The Antimonopoly Office concluded however, referring mainly to the Deutsche Telekom case (C-280/08), that sector-specific rules did not deprive it of its competence to apply both EU and national competition rules in this case.

At the time of the decision, the Slovak Competition Act contained, however, a specific provision stating that the Act was not applicable to competition restrictions falling under the competence of another authority ensuring the protection of competition pursuant to special legislation. It was this very provision which was the subject of a letter of formal notice sent by the European Commission to the Slovak Republic in 2008²³. From the Commission's point of view, the contested provision limited the ability of the Slovak Antimonopoly Office to effectively apply EU competition rules to anticompetitive behaviour which falls within the competences of a regulatory authority. This clause thereby excluded the application of the Competition Act to behaviour that would breach national regulatory laws. According to the

²³ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/200&format=HTML&aged=0&language=EN&guiLanguage=de>.

Commission, this was contrary to EU law that requires a parallel application of competition law and sector-specific regulation. Although the Antimonopoly Office responded to the formal notice with a statement that this provision has never stopped it from going against regulated sectors and that such attitude was consistently upheld by the courts, the Commission formally requested the Slovak Republic to amend the contested rule in 2009. In order to prevent future legal doubts as well as to prevent the opening of formal proceedings against Slovakia in this matter, the Office had this rule removed from the Competition Act in 2009.

In the appellate procedure, the Regional Court in Bratislava came to the conclusion that given the specific national rules on the interplay between competition law and sector specific regulation, the Office was not empowered to act pursuant national competition law. On the other hand, the court fully upheld the Office's competence to intervene pursuant to EU law. Currently, the case is pending before the Supreme Court.

V. Conclusion

Recent developments in competition law and policy in Slovakia show a clear tendency to adjust it to trends set at EU level. It is visible from recent amendments to the Competition Act that also procedural and fining mechanisms are to a great extent harmonised with the European model. A high degree of convergence with EU rules can also be observed in the field of soft law and policy documents. In so doing, the Office strives to ensure a coherent and effective application of competition rules in the internal market. The overview of national judgments shows certain divergences from, or lack of familiarity with, established concepts of EU competition law. Still, the latest rulings of the Supreme Court, which follow its recent interaction with the European Commission and CJEU, manifest an increased awareness of the importance of EU competition law. However, one cannot expect the use in every judicial proceeding of formal procedures such as a preliminary reference or *amicus curiae* interventions. Competition advocacy seems, therefore, to be a useful tool to achieve progress in this regard and the Office does pay a lot of attention to building an expert dialogue with the judiciary via workshops, conferences etc.

The latest reform of the internal organisation of the Slovak Antimonopoly Office aims at the same time to build a modern and flexible institution and a full-fledged member of the ECN. However, with its limited resources in terms of budget and staff, prioritization in all areas of competence appears to be inevitable.

**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)**

The Polish Supreme Court delivered in 2012 an important ruling with respect to the definition of unfair prices charged by a dominant firm. Imposing unfair prices was so far generally associated in Polish jurisprudence with either excessive prices (exploitive practices) or predatory pricing (exclusionary practices)¹. The Supreme Court held here, instead, that the lack of a reduction in a set service fee (toll) despite a decrease in quality of the service provided by a dominant company can also count as imposing unfair prices.

1. Facts of the case

The case at hand concerns the fees charged for the use of the A-4 toll dual-carriageway leading from Cracow (point X) to Katowice (point Y) managed by Stalexport Autostrada Małopolska S.A. (hereafter, Stalexport or plaintiff). Stalexport holds a concession which places the company under a duty to operate and maintain this section of the A-4 dual-carriageway.

It was found in the framework of the investigation that Stalexport charged car drivers a fixed fee of 13 PLN for the use of the toll road irrespective of the fact that its substantial part was periodically being renovated, leading to numerous traffic problems and reduced utility for car drivers. The Polish Competition Authority, the President of the Office for Competition and Consumer Protection (hereafter, UOKIK President) found this behaviour to be an abuse of a dominant position and imposed a fine of 1.300000 PLN (309.524 EUR) on Stalexport. The company appealed the decision to the Court of Competition and Consumer Protection (hereafter, SOKIK). However, SOKIK confirmed in its ruling the position of the UOKIK President. The plaintiff appealed the first instance judgment, but the ruling was once again upheld by the Court of Appeal. The dispute was eventually litigated before the Supreme Court.

¹ Cases of margin-squeeze are exceptionally rare.

2. Key findings of the Supreme Court

A new interpretation of unfair prices

The definition of excessive (and thus unfair) prices is central to the case. Pursuant to the Polish Competition Act², imposing unfair prices amounts to an abuse of dominance. Polish jurisprudence follows EU law to a great extent when defining unfair prices. According to a settled interpretation, ‘unfair prices’ are primarily those that bear no relation to the economic value of the product³. There is clear economic reasoning behind this formula: market power translates into prices above the competitive level thereby allowing higher profits to be earned. It is, however, extremely difficult (if not impossible) to determine whether a said price is excessive, given the need to identify what the competitive price level is⁴. That might be the reason why so very few excessive price cases exist under Article 102 TFEU.

Various methodologies have been used so far with respect to excessive prices, none of which is problem free. The most intuitive model relies on a comparison between the price and production costs. The question arises what range of profit is considered to be justified? Here economists cannot provide clear answer. They tend to underline that even in case of competitive markets it’s quite plausible for the company to have profits slightly above average profits made by the others in the sector. (As model of perfectly competitive markets does not exist in the reality). Moreover, there are also industries where price-costs relations are particularly difficult to measure (like those with intellectual property rights). Similar difficulty concerns industries with cyclical demand⁵.

EU case-law developed a method to test for excessive prices on the basis of price comparison models also. In *United Brands*, the Commission made a comparison across different regions and inferred that the price of bananas charged in Germany was excessive by comparison to those charged in Ireland. In *Deutsche Post*⁶, a comparison was made across different services offered by the dominant firm. In turn in *Scandlines*⁷ the Commission concluded that simple cost-plus approach is insufficient and compared the prices charged for other services provided in the same sea port as well as those charged in other ports.

The reasoning adopted by the Polish Supreme Court in this ruling is based on the notion of a ‘reference transaction’ – a transaction in which the plaintiff provides clients with full quality service (a full-fledged service) in exchange for a fee calculated so as

² Article 9(1)(1).

³ Case 27/76 *United Brands Continental BV v Commission (Chiquita Bananas)*, [1978] ECR I-207.

⁴ S. Bishop, M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, London 2012 para.6.14-6.19.

⁵ *Ibidem*

⁶ Commission Decision COMP/C-1/36.91 *Deutsche Post AG-Interception of cross-border mail*, OJ [2001] L 331/40.

⁷ Commission Decision Case COMP/A.36.568/D3 – *Scandlines Sverige AB v Port of Helsingborg*.

to cover the costs incurred by the plaintiff (in connection with the operation of the toll dual-carriageway) increased by a satisfactory rate of return on its investment⁸. With respect to a full quality service, the Court stated that this includes the possibility to drive according certain quality parameters: two driving lanes with an ease to overtake, collusion free junctions, a higher level of security etc. These parameters are meant to result in a shorter travel time in comparison to other types of roads.

According to this reasoning, a full quality service is not provided when the carriageway manager fails to provide these features due to renovation works when only one driving lane is open on certain sections of the road, for instance. In such cases, the plaintiff does no longer offer a full-fledged service (so-called reference transaction) seeing as its clients cannot achieve gains traditionally associated with the use of a toll dual-carriageway. Charging a non-reduced fee places them at an economic disadvantage and accounts for an abuse of dominance.

The reasoning adopted by the Court is consistent with the ‘equivalency test’ which has been applied in Polish jurisprudence in order to examine whether given prices (or contract conditions) are unfair⁹. Accordingly, reduced quality of the toll road (where the latter no longer holds the typical features of a paid-for dual-carriageway), should result in a proportional reduction in the fee which must be paid for its use. Charging the usual toll despite a fall in quality, is not equivalent to the service provided and thus unfair. As the Court emphasized, when such disproportion occurs in typical market conditions, clients can switch to another provider. This was not possible in this case because Stalexport holds not only a dominant, but a monopolistic position on the relevant market. It is the only provider of the scrutinized service – there is only one toll dual-carriageway leading from Cracow to Katowice. Car drivers have therefore no comparable alternative.

Consumer perspective was acknowledged by the Court as central to the case. It noted that the ultimate goal of competition law is to enhance *consumer welfare*. Car drivers have repeatedly lodged complaints demanding a price cut due to road-work related traffic restrictions, all of which were ignored by the plaintiff. State intervention was therefore fully justified. Likewise, the Court rejected arguments that consumers were informed about the renovations and resulting traffic difficulties before they entered the dual-carriageway. In the plaintiff’s opinion, they thus accepted a lesser service. The court stressed that in view of lacking alternatives, consumer choice was in any event limited.

Unfair price – the same price irrespective of the service quality

Interestingly, the Court made no reference to any of the usual excessive prices tests. In turn, one of the arguments raised by the plaintiff concerned price calculations. Stalexport claimed that the toll was calculated based on a specific price list (attachment

⁸ Commented judgment of the Supreme Court of 13 July 2012 (Ref. No. III SK 44/11), p. 19.

⁹ See judgment of the Supreme Court of 25 May 2004 (Ref. No. III SK 50/04); judgment of the Supreme Court of 12 February 2009 (Ref. No. III SK 29/08).

No 6 to the concession agreement). The price list was made taking into account the plaintiff's costs related to the carrying out of the duties conferred upon it by the State as well as the envisaged renovation works and their schedule. The Court dismissed this argument in its entirety. It stated, first of all, that rendering services based on the conditions set in the plaintiff's concession does not preclude the parallel application of competition rules. Stalexport, as a dominant firm, should implement a pricing policy that would ensure equivalency between the quality of the service rendered and its price.

The Court did not analyze the costs of the dominant firm, nor did it attempt to compare the scrutinized prices with another equivalent service. It stressed, however, that Stalexport had the right to set its fees based on maintenance costs increased by a rate of return on its investment. The Court noted also that it did not reach any conclusions on the prices being generally excessive. It pointed out, however, that in order for the transaction to remain equivalent, the deterioration of the passage conditions should have had resulted in a reduction of the usual toll. It noted also that construction works were carried out with varying intensity and thus consumers were faced with different traffic conditions although they paid the same fee. On this basis, the Court concluded that the price should have been reduced with respect to those consumers who had not been provided with a full-fledged service. Consequently, Stalexport abused its dominant position only with respect to those users.

Notwithstanding the fact that the Court repeatedly stressed the importance of a price reduction in light of a lower utility of the toll dual-carriageway, it chose not to define the appropriate size of such discount. On the one hand, this approach seems to be justified as courts cannot act as price regulators. On the other hand, however, lack of clear juridical direction might prove problematic for companies as they then have to decide for themselves how much to reduce the fee by in order to ensure the undisputable fairness of prices charged in times of lower service quality.

Relevant market

The judgment of the Supreme Court is of interest also with respect to its relevant market definition. The UOKiK President defined the relevant product market as the market for paid driving on the A-4 highway from point X to point Y. This definition was then confirmed by the courts, despite the objections of the plaintiff which claimed that the market was defined too narrowly. The Stalexport referred to an analysis of the product market in view of the objective of the service rendered. It thus applied for the broadening of the market so as to include alternative roads from X to Y as well as rail and bus connections.

The Supreme Court rejected this view stating that such criteria as service characteristics and price should prevail over the purpose of the service. It also expressly recognized that the only substitute for the scrutinized toll dual-carriageway from X to Y can be another toll road leading from X to Y with similar quality parameters. The Court went on to state that what allows for the qualification of a specific toll road as a separate product market is the payment that must be made for using it together with its higher driving standard as compared to other national roads. The Supreme Court

referred to rulings of foreign authorities and courts in that matter – a similar view was presented in a decision of the Portuguese competition authority DOPC-22/2005, *Via Oeste (Brisa)-Auto-Estradas do Oeste/Auto-Estradas do Atlântico* of 10 April 2006) as well as a US court judgment (*Endsley III v. City of Chicago*, 30 F.3d 276).

In accordance with the Court's rationale, unlike freely available national roads, toll dual-carriageways are distinctive as they are a paid-for service offered on a commercial basis. They offer to consumers more benefits than traditional roads do (e.g. possibility to drive substantially faster, freely overtake etc.).

The Polish legal doctrine raised doubts, however, with respect to the existence of those added benefits¹⁰. Whereas in typical conditions the toll dual-carriageway from X to Y managed by Stalexport had all of the above characteristics, it had hardly any of them during construction works (only one driving lane, no possibility to overtake.). The question, therefore, arises whether a national roads on the way from X to Y should not have been considered as a substitutes to the scrutinized paid-for dual-carriageway during the periods of its lower service quality. Both the Court of Appeal as well as the Supreme Court stressed that the scrutinized toll road bore none of its usual characteristic during renovation periods. It is thus also possible to argue that consumers had an alternative to the services provided by Stalexport in those periods – a freely available public road. Still, neither of the courts decided to consider those arguments when determining the possible relevant market definition.

Fee as a price and not a public tribute

Another interesting point in the judgment concerns the character of the prices charged by Stalexport. The plaintiff repeatedly argued that it runs its activities based on a concession conditions as well as on the Act on toll carriageways, which imposes upon it the obligation to charge fees for the use of the dual-carriageway it manages. Stalexport's actions are thus, in its view, beyond the scope of the Competition Act. The Court rejected this argument in its entirety. It acknowledged the plaintiff's right to charge fees, but at the same time stressed that competition rules apply in full to the pricing policy of the dominant firm.

Likewise the Court rejected the plaintiff's other claim which stated that the toll is a form of a public tribute rather than a price in terms of civil law. Stalexport referred to the mandatory character of the fee, imposed by the State and meant to cover the costs of the construction and maintenance of Polish paid-for roads. The Court stressed that the only conclusion that can be drawn from the mandatory character of the toll is that the mere fact of charging a fee does not, as such, constitute a practice restricting competition.

¹⁰ K. Kohutek, 'Cena nieobniżona mimo pogorszenia parametrów jakościowych usługi ceną nieuczciwą w rozumieniu art. 9 ust. 2 pkt 1 uokik Głosa do wyroku Sądu Najwyższego z 13 lipca 2012 r., III SK 44/11 Autostrada Małopolska' ['A steady price despite the fall in service quality as an unfair price under Article 9(2(1)) of the Competition Act'] (2012) 4(1) *iKAR* 102–107.

Similarly, the Court did not agree with the view that the toll was meant to constitute public revenue. It stressed that although the fee is charged within statutory obligations, it still belongs to Stalexport as a private investor that runs an economic activity and bears the financial risk associated with it. The mere fact that a public duty is placed upon a private entity does not classify it as part of the public sector.

Consumer welfare

Last but not least, another interesting argument raised in the comments to this judgment¹¹ concerned the issue of *consumer welfare* and the real consequences of public intervention into the behaviour of a dominant firm. During the entire administrative and juridical proceedings, Stalexport did not change the amount of the toll it charged – it did not introduce any price reductions for the time periods when construction works were being carried out. Concerns were also raised that the antitrust fine (1.300.000 PLN) could have been, at least indirectly, passed on to consumers seeing as the toll for car drivers now stands at 18 PLN as compared to 13 PLN which it used to be in the past.

Conclusion

According to the ruling under review, the notion of excessive (and thus unfair) prices can be applied to cases where the level of prices remains unchanged irrespective of the decrease in the quality of the service rendered. If this practice is committed by a dominant firm, it can amount to abuse. When determining this practice, reference needs to be made to the model of a full-fledged service (so-called reference transaction). This test largely resembles the ‘equivalence test’ which compares the price and the value of the service provided in exchange.

The Supreme Court confirmed also the narrow relevant market definition established originally by the Competition Authority as the market for paid driving on the A-4 dual-carriageway from point X to point Y. The adopted reasoning is based on the features of paid-for dual-carriageways, which are largely different to national roads – they provide two driving lines that facilitate a faster driving speed and easier overtaking.

Elżbieta Krajewska

Centre for Antitrust and Regulatory Studies (CARS);
LLM candidate at College of Europe.

¹¹ *Ibidem*.

Regional Court in Brno on Cartels in 2012.

Case comments to judgments in *CRT* cartel and *GIS* cartel

In 2012, the Regional Court in Brno has delivered a couple of judgements in two globally notorious cases which were primarily dealt with by the European Commission: the gas insulated switchgear cartel (*GIS* cartel) and the cathode ray tubes cartel (*CRT* cartel). Czech authorities decided these cases because the duration of the scrutinised cartels extended to the time before the Czech Republic's accession to the EU.

The parties to both of the proceedings disputed the competences of the Czech Office for the Protection of Competition (hereafter, OPC or Office) to impose financial penalties upon them. They saw these fines as a breach of the *ne bis in idem* principle, seeing as the Commission has already fined the same cartels. The Office, as well as the reviewing courts,¹ stated first that the question of parallel prosecution of the cartels was clear and that the Czech authority had indeed jurisdiction to decide these cases². The Supreme Administrative Court cited in this context its older *RWE* judgement³. Following the jurisprudence of the Court of Justice, the Court confirmed that the purpose of national competition law is to protect effective competition on the domestic market. By contrast, the aim of EU competition law is not only to protect competition but also, through it, to protect the effective functioning of the common market against, in particular, activities sealing off national markets or affecting the structure of competition within the common market⁴. The Court reasoned that the *ne bis in idem* principle is subject to the threefold condition of identity of facts, unity of offender and uniformity of legal interest protected. The respective cartel decision of the European Commission repeatedly referred to the EC/EEA territory and did not cover the anti-competitive consequences of the said cartel in the territory of the Czech Republic before its accession to the EU. Therefore, the OPC had the competence to decide on this case.

Both courts, the Regional Court in Brno as well as the Supreme Administrative Court, held that the question of jurisdiction was an *acte claire* here. However, the

¹ The Regional Court in Brno as well as the Supreme Administrative Court.

² See e.g. the judgements of the Regional Court in Brno ref. no. 62 Ca 22/2007 of 25 June 2008 and of the Supreme Administrative Court ref. no. 2 Afs 93/2008 of 10 April 2009, both in the *GIS* cartel.

³ Judgment of the Supreme Administrative Court ref. no. 5 Afs 9/2008 of 31 October 2008 in the case of *RWE Transgas*.

⁴ Joined cases C-295/04, C-296/04, C-297/04 and C-298/04 *Manfredi* [2006] ECR I-06619.

Regional Court in Brno decided to refer this question for a preliminary ruling to the Court of Justice of the European Union (hereafter, CJEU) in the second ‘episode’ of the *GIS* cartel case⁵.

The jurisdiction of the Office was confirmed by the CJEU *Toshiba* judgement⁶ which stated that a decision of the OPC alongside a decision of the European Commission did not violate the *ne bis in idem* principle. The CJEU reasoned that ‘the Commission’s decision refers specifically, in many of its passages, to the consequences of the cartel at issue in the main proceedings within the European Community and the EEA, referring expressly to the ‘Member States of the time’ and the States ‘which were contracting parties’ to the EEA Agreement’⁷. The CJEU clarified also that the Commission’s decision does not penalize the possible anti-competitive effects produced by the scrutinized cartel in the Czech territory in the pre-accession period. It was also seen as apparent from the methods of the fine calculation that the Commission did not take account of the countries which entered the EU on 1 May 2004 in its decision⁸. The CJEU concluded therefore that the imposition of separate fines in the Czech Republic did not violate the *ne bis in idem* principle.

The judgements commented here concern procedural questions and questions of substantial law. They are especially interesting because they cover a set of rules how to proceed in cartel proceedings and cartel investigations. They also acknowledge that a range of procedural rules that was formulated for the European Commission by EU courts applies also to procedures conducted by the Office. The following text deals with the most important principles which the Czech competition authority must abide to.

Nemo tenetur

As a rule, the Office requests the parties to antitrust proceedings to provide it with information and documents needed to assess the relevant market, the conduct in question or its effects on the market and consumers. The authority sometimes asks the parties to provide such information in a certain form such as, for instance, filling in a pre-set table. In its requests, the Office regularly warns the parties that failure to comply may lead to the imposition of a fine of up to 1% of their yearly turnover.

One of the parties to the proceeding in the *CRT* case challenged before the Regional Court in Brno the possibility of using information provided by the parties upon such request. In its opinion, such approach violates the *nemo tenetur* principle. The company stated that the fact that it had to provide information, which it had to gather by itself under the threat of a considerable fine, regardless of the contents of such information, represented an infringement of the prohibition of self-incrimination.

⁵ I.e. after the Supreme Administrative Court quashed its previous ruling and returned it to the Regional Court in Brno for a renewed judgement.

⁶ C-17/10 *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže* (not yet reported).

⁷ See para. 101 of the judgement.

⁸ *Ibidem*.

The Regional Court in Brno declared in this context that both the European Court of Human Rights and the Czech Constitutional Court have considered forcing parties to the proceedings to cooperate under a threat of an administrative fine to be an inadmissible intervention. Nobody is thus obliged to contribute in an active manner, directly or indirectly, to his/her own condemnation. However, coercive measures may be applied in case of activities which do not require active conduct by the requested party. The Regional Court in Brno further stated that the prohibition to force self-incrimination is not an absolute right – it may be restricted by a certain method of coercion. The Czech Court mentioned here the General Court's ruling in the *Mannesmannröhren-Werke* case⁹ and stated that the Office may ask questions concerning facts. However, it cannot ask for subjective opinions, assessments or conclusions. It can certainly not ask the parties questions that might lead to them admitting their participation in an anti-competitive conduct.

The Regional Court in Brno thus reached the following conclusions:

- an absolute prohibition of self-incrimination is a hurdle to the fulfilment of the Office's mission;
- the Office may ask the parties questions, but only to the degree that they do not lead to the admittance of the existence of an illegal conduct;
- parties to the proceeding are obliged to provide the Office with all information concerning the facts of the case and all relevant documents that they have at their disposal, even if they might be used as evidence against them;
- however, the information requested may concern only factual questions and the documents requested have to be already in existence.

In the *CRT* case, the Office did not coerce the parties to create new documents, but only to provide existing materials (they had to provide documents from cartel meetings, the existence of which was noted in the leniency applications.) Furthermore, the Office stated that it proved the existence of the cartel solely on the basis of the two leniency applications. The documents obtained through the information requests did not form the basis for its decision. The Regional Court in Brno acknowledged that the sole fact that the requested documents were in the case file cannot lead to the illegality of the condemning decision, seeing as they did not constitute its basis. This is so even if they did violate the *nemo tenetur* principle.

Leniency applications as evidence

The Office's decision in the *CRT* cartel was based on leniency applications submitted by two parties to the cartel proceedings: Samsung (type I) and Chunghwa (type II). Other parties to the proceeding challenged the realisation that the facts of the case were established purely on the basis of data obtained from the leniency applications and accompanying documents. The claimants challenged the use of leniency applications as sole evidence for their anticompetitive conduct.

⁹ T-44/00 *Mannesmannröhren-Werke AG v Commission* [2004] ECR II-02223.

In line with the General Court *JFE Engineering Corp.* judgement¹⁰, which allowed a case to be based on a single leniency application only, the Regional Court in Brno argued that if one leniency application is enough, then two are sure to be even more acceptable as sole evidence of a cartel. According to the Czech Court, the question here should not have been whether a cartel decision can be based on a leniency application. Instead, it should be whether the facts obtained from leniency applications are sufficient to support the Office's conclusions and whether the facts declared in the applications are in fact credible. The trustworthiness of leniency applications determines its evidentiary value (see as well General Court judgement in *Mannesmannröhren-Werke*).

On the one hand, the credibility of a leniency application is reduced by the fact that it is submitted by an entity having a personal interest in its contents, seeing as it expects to get immunity from fines, or at least a fine reduction, in return for the submission. On the other hand, the Regional Court in Brno admitted that a competition authority would often find itself in a hopeless position without leniency applications. It would frequently be uncertain if it could at all manage to prove the existence of anticompetitive behaviour (prove that a cartel agreement was concluded and executed) in order to impose antitrust fines. Thanks to leniency applications, a competition authority finds itself in a dramatically different situation – being able to prove the facts of the case. The Court deduced from this that leniency participants have not an entirely personal interest in submitting their applications, seeing as they exposes themselves to the danger of receiving a condemning decision and, possibly even a fine.

However, one has to consider the specific situation in which a given leniency application is submitted. If it occurs before the authority has gained any knowledge of the cartel, or if the authority is unable to prove it, then the Regional Court in Brno is right to state that submitting a leniency application goes against the interests of the applicants. In the first case, they risk that their conduct will be exposed to the public and, if their application is rejected, they would have 'unnecessarily' drawn the authority's attention to their conduct. In the second case, the applicant provides the Office with evidence without which a condemning decision could not be rendered at all, even if it does not impose a fine on the applicant.

The situation is different when a competition authority is already in possession of a sizable amount of evidence concerning a cartel. Here, the adversity of the position of a leniency applicant, which would probably be fined anyway, cannot be labelled as adverse as easily. The same can be said in situations where a domestic competition body is deciding on a case already dealt with by the European Commission (as was the case here) or in fact by a different national authority. In the *CRT* cartel, the Commission has already initiated proceedings concerning the global cartel. The only problem that might have arisen domestically would thus have been to prove its effects on the Czech market. Samsung, the first leniency applicant, was aware of

¹⁰ Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering Corp., formerly NKK Corp., Nippon Steel Corp. JFE Steel Corp. and Sumitomo Metal Industries Ltd v Commission* [2004] ECR II-02501.

this fact when submitting its application to the Office. One has to wonder about the motivations of these parties – why did they submit their leniency applications? The only rationale here could be to avoid a fine, or having it reduced at least. Thus, in the author’s opinion, the Regional Court in Brno erred in affirming the credibility of the leniency applications in such a general way.

The Regional Court in Brno indicated also that in a situation where neither doctrine nor legislation solves the question whether a leniency application, as well as information provided in connection with it, is protected in civil law suits, the position of the applicant cannot be described as advantageous. The benefits of a fine immunity or reduction is relativized by the fact that the applicant may be sued under civil law and the information provided as part of a leniency application may be used against him.

This disadvantage was eliminated on 1 December 2012. Thanks to an amendment to the Act on the Protection of Competition, access to leniency applications is since then only possible for parties to the proceedings before the Office and their representatives. It is, however, doubtful whether this law can be upheld in light of this year’s CJEU *Donau Chemie* judgement¹¹. The CJEU formulated a requirement therein that national rules must leave it to the discretion of domestic courts to decide whether the public interest in the enforcement of competition law prevails over an individual’s right to compensation. The CJEU stated that a general rule that does not leave such decision to the discretion of the courts is contrary to EU law. It is therefore possible that the aforementioned provision of the Czech Act on the Protection of Competition will be challenged in the future.

Most importantly, the Regional Court in Brno found further that the evidentiary value of a proof should not be assessed according to where the evidence comes from but according to what follows from it. The Court concluded that the two existing leniency applications are enough to prove the alleged anticompetitive conduct, provided the Office has gained from them two sets of data that does not contradict each other. If the leniency applications show the functioning of the cartel, and at least some degree of participation therein by the parties to the proceeding, then it is not rebutted that each of these parties contributed to the pursuit of a common object at its own level. The existence of the cartel and the participation therein of the parties to the proceedings (alleged cartel participants) is thus proven, unless any of them has produced evidence to distance itself from the cartel.

Access to files – materials for the decision

Since the conclusion reached by the Office that a price cartel between the participants took place (and on what conditions) was based solely on leniency applications, other parties to the proceeding had a strong interest in accessing the case file – especially accessing the leniency applications and their related documents.

According to Czech administrative law (Section 38 Administrative Procedure Code), parties to the proceedings have access to the case file during the entire proceedings,

¹¹ C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* (not yet reported).

that is, from their very beginning (even before the statement of objections is issued). This is a solution unlike those before the European Commission or the German Bundeskartellamt. The Czech Act on the Protection of Competition, *lex specialis* to the Administrative Procedure Code, does not limit access to the case file by the parties. Clearly, business or bank secrets are generally not accessible. However, the practice of the Office in cartel cases shows that even business secrets are usually made accessible to other parties to the proceeding after the statement of objections is delivered, provided they will be used as a basis for the cartel decision¹².

Access to leniency applications and related documents constitutes the only exception to the above. Until approximately 2011, the Office kept leniency applications inside the case files but protected them from the eyes of other parties to the proceeding (under protection granted to business secrets). That was the case both in the CRT and GIS cartels. In view of the upcoming amendment to the Act on the Protection of Competition, the Office began in 2011 to keep leniency applications outside the case files. This approach was based neither on a statutory nor on a soft law rule. Since 1 December 2012, according to the new Section 21c(3) of the Act on Protection of Competition, the Office has legal backing for such solution.

The Office protected the leniency applications submitted in the CRT case as business secrets not only before the statement of objections was issued, but also after it was delivered to the parties. In other words, it protected them even at a time when it usually unveils all of the evidence that will be used as a basis for its forthcoming decision. Here, the parties never gained access to the leniency applications and could thus not check whether what the Office stated in its decision was actually reflected in the leniency applications. As a result, the parties challenged this approach before the Regional Court in Brno, which reviewed the Office's decision to refuse access to the leniency applications both considering the time before and after the statement of objections was issued. Acknowledging the right of access awarded by Section 38 of the Administrative Procedure Code, the Court reasoned that the access right has to be balanced against other interests also. The Regional Court in Brno arrived thus at the opinion that absolute access denial is possible but only before the statement of objections.

The Regional Court in Brno based its arguments in the CRT cartel case firstly on the CJEU *Pfleiderer* judgement¹³. Albeit the latter concerned a civil law claim, the Czech Court reasoned that the CJEU's arguments can be applied in this case as well, despite it having an administrative nature. The Regional Court in Brno did not oppose access to leniency applications and related documents but stated that all interests concerned must be balanced against each other. The general (public) interest has to be taken into consideration in particular, this being the interest in uncovering cartels.

¹² See A. Drbal, 'Z rozhodovací praxe Úřadu pro ochranu hospodářské soutěže' ['From the case-law of the Office for the Protection of Competition'] (2012) 2 *Antitrust* 123, citing the decision of the President of the Office ref. no. ÚOHS-R52/2012/HS-13543/320/HBt of 20 July 2012.

¹³ C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161.

The Regional Court in Brno raised three main arguments:

- Leniency applications are often the only reasonable means of uncovering cartels and so the programme should be sufficiently interesting for potential applicants. The approach used should thus be maximally favourable to the applicants.
- The Office will not be forced by a strict interpretation of the law to keep leniency applications outside the case files because fair process would suffer by this even more. However, keeping the leniency application outside the case files is exactly what the legislator introduced with the latest amendment on the Office's proposal. Keeping leniency applications in the case files but protected as business secret, is more transparent according to the Regional Court in Brno.
- Advocate-General Ján Mazák stated in *Pfleiderer* that the general (public) interest in uncovering cartels prevails over the interest of individuals in civil claims.

Thus, the Office had the right objections (with regard to the theory of games/prisoner's dilemma), to conceal the contents of leniency applications as business secrets before the statement of even though the information thus protected did not fulfil the prerequisites of a business secret, as it was a less intervening measure. However, access denial to case files even after the statement of objections is delivered would have to have a clear basis in the law. The Regional Court in Brno considered that not all of the information that was concealed even after the statement of objections fulfilled in this case the legal prerequisites of a business secret. This data should have been made available to other party to the proceeding.

Albeit the Office violated the right of the parties to access all information in the CRT case file, the Court found that this violation was not of sufficient intensity to influence the legality of the decision. The Court reasoned that access to case files is not an object in itself – the given statement of objections contained all essential information deriving from the concealed parts of the two leniency applications submitted in this case. The Regional Court in Brno came to this conclusion because the origin and authors of the documents were not concealed and the information was summarized correctly in the statement of objections, a fact ascertained by the Regional Court in Brno.

The parties argued further that they could not verify whether the concealed parts of the leniency applications did not actually contain data that spoke in their favour. Upon reviewing the documents, the Regional Court stated however that it did not consider this to be the case.

It follows from the above that according to the Regional Court in Brno, the Office may conceal from the parties to the proceedings evidence it will use to base its decision upon. It is sufficient that reviewing courts can verify the contents of such evidence in order to ascertain whether the Office's summary of the inaccessible evidence corresponds to its actual content and whether the Office did not deny access to evidence speaking in favour of the parties. However, in the author's opinion, a judge having no thorough knowledge of the domain cannot assess this question appropriately.

The practice of the Office today is that if a piece of information forms a basis for its decision, the authority grants access to it even if it is a business secret.¹⁴ Furthermore,

¹⁴ A. Drbal, 'Z rozhodovací praxe Úřadu...', p. 123.

the Office reviews business secrets of the parties to the proceeding continuously during the proceedings. If it finds that given information can no longer be classified as such with respect of others, it requests the party to the proceeding claiming the business secret to revise its categorization. In cases where the Office further considers that a piece of information identified by the interested party as a business secret does not, in fact, fulfil the legal prerequisites thereof, it makes the information accessible to other parties to the proceedings.

In the *GIS* case, the Regional Court in Brno dealt further with the question of how much time do the parties to the proceeding have at their disposal in order to familiarize themselves with the documents in the case file in situations where access was only given after the statement of objection was delivered. This issue concerns documents meant to form the basis for the cartel decision. The *GIS* statement of objections was issued in the course of January 2007; parties were granted 15 working days to react. They could get acquainted with the materials supporting the decision in the last week of January – the decision was issued on 9 February 2007. The parties were thus informed approximately one week before access to the relevant materials was granted. They had approximately one week afterwards to react. After two and a half years of the investigation, the parties had only days (few weeks) to familiarize themselves with the material (which often had to be translated seeing as the parties were not Czech undertakings) and to react adequately.

The Regional Court in Brno found that having such short deadlines cannot be considered unlawful in itself. Particular negative consequences of short deadlines for the parties have to be taken into account. The Court admitted that the deadlines set by the Office in this case may seem to be too short and inadequate at first sight. According to the Court, however, neither the content of the submissions made after access was granted, nor the appeal to the President of the Office suggest that the parties to the proceeding did not have sufficient time to prepare their argumentation. The Regional Court in Brno considered also the goal of the legal instrument of getting acquainted with the materials supporting the decision. Its goal is to get the parties familiar with all gathered data, on which the decision will be based. As such, this has to occur after the collection of evidence in the final phase of the proceedings and immediately before the issuing of the decision on the merits. Having regard to this goal, the Office evaluated the materials supporting the decision already amply in the statement of objections.

The Regional Court in Brno reasoned also that, in their reactions to the statement of objections, the parties primarily commented on the Office's position during the proceedings and on their procedural position towards the manner of dealing with the case. They also criticised the incompleteness of the gathered materials. The Court deduced that the parties did not need a longer deadline for delivering such statements, neither did they need time to comment on the opinions of other parties. Furthermore, the Regional Court in Brno stated that the parties had ample opportunity to present their views during appeal proceedings before the President of the Office. The Court concluded therefore that although the deadlines were very short, no procedural rights of the parties were violated so as to affect the legality of the decision.

In spite of the judgment, such a short time for comments on evidence may, in general, be in breach of the right to effective defence. If a party finds itself confronted with completely new evidence/argument, which it must soundly rebut, not having enough time to do so largely limits the scope of its defence. One week for finding new evidence seems too short. Moreover, under new legislation on access to leniency applications, parties do have access to these documents after the statement of objections is delivered, but they do not have the right to make copies of or at least takes notes from such documents. As a result, they must learn all relevant facts by heart and if they want to rebut them effectively, they would usually need to access the leniency documents several times. They must be awarded ample time to do this.

Liability of the concern

Several corporate groups were involved in the *GIS* cartel case. The Office fined both a parent company and its subsidiaries; it also fined the successor company of one of the cartel members and companies belonging to the group that it formerly belonged to.

Some of the parties to the proceedings claimed before the Regional Court in Brno that the original decision of the Office, as well as the appeal decision of the President of the Office, was based on evidence against corporate groups as a whole, rather than against particular companies within them. Some of the parties further stated that since they belong to these corporate groups, liability should have been established solely with the parent companies and not with them.

The Regional Court in Brno agreed with the Office that liability could not be found with a corporate a group (a non-person). If several entities commit an offence, even if they form one unit from an economic point of view, only an entity that has legal personality can be the bearer of liability. For that reason, the decision has to target a particular legal person, which needs to be determined on the basis of the rules on control within the specific corporate groups. The Court acknowledged that there are other methods of handling these situations, which make it possible to adjust the method used to the type of internal transactions present within a given group so as not to impede the enforcement of competition law. It was stressed that there can be no exception to the rule that it is necessary to identify those specifically liable for the activities within corporate groups. The Regional Court in Brno went on by applying the rules established by EU institutions.

In determining liability within a group, the degree of direct and active participation in the reviewed conduct of the particular entities has to be taken into account (see Commission decision in *Rubber Chemicals*¹⁵). The extent of consultations among group members in connection with important trade matters may be used as the criterion for the establishment and distribution of liability within a particular corporate group (see Commission decision in *Organic Peroxide*¹⁶). The participation of the parent company's

¹⁵ Decision of the European Commission No. 38.443 of 21 December 2005, *Rubber Chemicals*.

¹⁶ Decision of the European Commission No. 37.857 of 10 December 2003, *Organic Peroxide*.

managers in defining business strategies of its subsidiary may act as another factor for determining liability (see Court of Justice judgement in *Commercial Solvents*¹⁷). This, however, may not have discriminatory effects – liability shall be determined according to the cumulative principle (cumulative fines) rather than on the basis of solidarity (see General Court judgement in *Tokai Carbon*¹⁸).

The Regional Court in Brno then resumed that there are several methods how to take into account the concept of a single economic unit. It is necessary to choose the method that corresponds best with the concept of the given cartel and with reasonable sanctioning of cartel participation, without unjustifiably discriminating any of the cartel members. It is thus sometimes necessary to determine the individual degree of cartel participation of each given undertaking. In some cases, particular companies within the corporate group may be regarded as mere instruments of the cartel idea concluded among corporate groups. In this scenario, it is reasonable to establish liability of parent companies. However, it is unreasonable to cumulate liability in such a manner that it is established for the parent company and its subsidiaries. This cannot be viewed as establishing liability within the particular corporate group on the basis of solidarity, be it from the point of view of declaring that an infringement has been committed, or from the point of view of imposing a fine.

The Regional Court in Brno concluded on the basis of the administrative case file that the Office did not gather enough material to determine liability of individual companies within particular groups.

It must be stated for the sake of completeness that the Regional Court's judgement was reviewed by the Supreme Administrative Court in April 2013. The conclusions of the Regional Court in Brno were confirmed. The Supreme Administrative Court added also that it is indeed possible to determine liability of each of the undertakings party to the proceedings according to different methods, considering which of these methods is in each particular case the most appropriate.

Conclusions

It must be stated in conclusion that the two 2012 judgements of the Regional Court in Brno provided very useful guidelines for the Czech Competition Office and for parties to future cartel proceedings. They summarised the jurisprudence of EU courts on how the Commission is to conduct its proceedings in cartel cases and acknowledged its applicability to proceedings conducted by the Czech authority.

Although one cannot always agree with the conclusions reached by the Regional Court in Brno, its judgements in both the *GIS* cartel and the *CRT* cartel case provide helpful new guidance for the Office and parties to cartel proceedings.

Dr. Petra Joanna Pipková

Centre for Comparative Law, Law Faculty, Charles University Prague;
pipkova@prf.cuni.cz

¹⁷ 6-7/73 *Commercial Solvents* [1974] ECR 223.

¹⁸ T-71/03, T-74/03, T-87/03, T-91/03 *Tokai Carbon* [2005] ECR 00010.

Recent judgements of the General Court and the Supreme Court of the Slovak Republic in inspection matters – Landmark Decisions or Wasted Opportunities to Solve Problem?

CONTENTS

- I. Introduction
- II. Factual Background
 - 1. *Nexans* case and *Prysmian* case
 - 2. *ŠEVT* case
- III. Basic questions in issue
 - 1. Content of the inspection decisions/authorisations
 - 1.1. Legal background and previous jurisprudence
 - 1.2. Decision in *Nexans* and *Prysmian* case
 - 1.3. Decision in the *ŠEVT* case
 - 2. Removing image copies of hard drives from the premises of inspected undertakings
 - 2.1. Legal background
 - 2.2. Decision in *ŠEVT* case
 - 2.3. Decisions in *Nexans* and *Prysmian* cases
 - 2.4. Taking away of image-copies from the premises of inspected company and the ECtHR perspective (*Bernh Larsen Holding* case)
- IV. Conclusions

I. Introduction

On-the-spot investigations (inspections, dawn raids) are now an indispensable tool in the portfolio of a competition authority's investigative powers. They constitute a very efficient method of seizing documents and accumulating information of an undertaking regarding its alleged anticompetitive behaviour – information that the undertaking would not normally be willing, or in fact obliged to provide because of the right of non self-incrimination. On the other hand, inspections are a rather “uncomfortable” intrusion into the private sphere of undertakings. As a result, the violation of the principle of the ‘inviolability of the home’ has become a common objection against inspections carried out by competition authorities. It is not the aim

of this article to analyse differences, if any, between rights of natural and legal persons (undertakings) under human rights conventions and charters. For the purposes of this paper, the right of the ‘inviolability of the home’ shall be deemed to have the same content for both natural and legal persons. Inspections can thus be considered an invasion of the home. In order to be legal, three conditions must be met for an interference with the right to the protection of the private sphere by public bodies: the intrusion must be based on the law, it must have a lawful purpose and there must be protection against abuse.

The right to carry out inspections is based on Article 20 of Regulation 1/2003¹. This Regulation contains rules on the authorisation of inspections, issuing a decision ordering an undertaking to submit to an inspection, and on rights of inspectors during the inspection. The basic and only aim of inspections is to find evidence of competition law infringements in order to enable the authorities to put end to and prosecute such activities. Competition protection, as one of the policies that ensures the proper functioning of the economy, is considered a lawful purpose for an interference with an individual’s rights, a fact clearly confirmed in the *COLAS* Case². While the fulfilment of the first two conditions for the legality of inspections carried out by the European Commission seem to be satisfied, the fulfilment of the third (protection against abuse) depends on the application of the principles of non-arbitrariness and proportionality³.

The situation is similar regarding the legislation of inspections carried out by the Antimonopoly Office of the Slovak Republic (hereafter, AMO). Their legal basis is given by § 22(3) and § 22(3) of Act No. 136/2001 Coll. on Protection of Competition and on Amendments and Supplements to Act of the Slovak National Council No. 347/1990 Coll. on Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic as amended (hereafter, Competition Act). Subsequent subparagraphs regulate inspections carried out in private premises. The powers of the AMO are very similar to those of the Commission in the sphere of inspections; the same can be said about the powers granted to inspectors. Similar conclusions can therefore be drawn with respect to inspections in Slovakia and the EU regarding the fulfilment of the first two legality conditions of inspections (interference with the right of privacy). Similarly also, protection against abuse deserves further scrutiny. The main procedural difference between the powers of the Commission and those of the AMO is that the latter must issue a decision ordering an undertaking to submit to an inspection only when it is necessary to carry it out in non-business premises. In Slovakia, undertakings are generally obliged to submit to inspections under § 40 Competition Act and AMO inspectors are empowered to carry them out in business premises upon an authorisation of the Chairmen of the AMO.

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

² *Société Colas Est and Others v. France*, no. 37971/97, ECHR 2002-III.

³ F. Arbault, E. Sackers, ‘Cartels’ [in:] J. Faull, A. Nikpay (eds), *The EC Law on Competition*, 2nd edition, New York 2007, p. 894.

This paper will deal with two sets of questions regarding safeguards against abuse and solutions applied in European and Slovak jurisprudence. The first set of questions is bound to the content of inspection decisions/authorisations; the second set relates to the power to make a copy of data stored on electronic devices. Both of these groups of questions were raised in cases T-135/09 *Nexans France SAS, Nexans SA v European Commission*⁴ and T-140/09 *Prysmian SpA, Prysmian Cavi e Sistemi Energia Srl v European Commission*⁵ ruled by the General Court⁶ as well as in the *ŠEVT* case⁷ tried by the Supreme Court of the Slovak Republic (hereafter, Supreme Court). Analysing these three judgements makes it possible to compare their respective contribution to the clarification of the rules on inspections, seeing as both courts dealt with similar issues. The Commission and the AMO became aware of these judgements because they disturbed their long-term every-day enforcement practice. They forced the two competition authorities to rethink or improve (update) their administrative practices. However, did these judgements raise any novel insights or merely reconfirm past and present rules that the competition authorities had so far overlooked? Did the courts succeed in solving the legal questions brought before them considering that their human rights aspect cannot be ignored?

Every decision that deals with these questions has a chance to become a landmark case because these issues tend to be in the centre of interest of the theory of competition law⁸. Authors are usually more interested in analysing the very text of the legal provisions or the questions of human rights protection during the inspections (e.g. question of previous court authorisation).

II. Factual Background

1. *Nexans* case and *Prysmian* case

By Decision C (2009) 92/1 of 9 January 2009, the Commission ordered Nexans and all companies directly or indirectly controlled by it (hereafter, Nexans) to submit to an inspection in accordance with Article 20(4) Regulation 1/2003 (hereafter, the inspection decision). The subject-matter of the inspection was defined in Article 1 of the inspection decision as follows: ‘... potential participation in anti-competitive

⁴ Judgment of the General Court (Eighth Chamber) of 14 November 2012 in Case T-135/09 *Nexans France SAS and Nexans SA v European Commission* (not yet reported).

⁵ Judgment of the General Court (Eighth Chamber) of 14 November 2012 in Case T-140/09 *Prysmian SpA and Prysmian Cavi e Sistemi Energia Srl v European Commission* (not yet reported).

⁶ The *Nexans* case and the *Prysmian* case are identical in their reasoning so in the legal positions and arguments analysed in this paper referring to the *Nexans* judgement will not be repeated regarding the *Prysmian* case.

⁷ *ŠEVT, a.s. v Antimonopoly Office of the Slovak Republic*, No. 3 Sžz 1/2011, judgement of 5 April 2011.

⁸ Compare e.g. J. Faull, A. Nikpay (eds), *The EC Law on Competition*, 2nd edition, New York 2007; L. Ritter, W. D. Braun, F. Rawlinson F., *EEC Competition Law. A Practitioner's Guide*, Deventer, Boston, 1991; R. Whish, *Competition Law*. 6th Edition, Oxford 2008.

agreements and/or concerted practices contrary to Article 81 EC ... in relation to the supply of electric cables and material associated with such supply, including, amongst others, high voltage underwater electric cables, and, in certain cases, high voltage underground electric cables. Those agreements and/or concerted practices consist of the offering of concerted bids in public tenders, client allocation, as well as the illegal exchange of commercially- sensitive information relating to the supply of those products.’ In the reasoning of the inspection decision, the Commission stated that it ‘received information that electric cable suppliers, including the companies targeted in this decision, were participating or had participated in agreements and/or concerted practices in relation to the supply of electric cables and material associated with such supply, including, amongst others, high voltage underwater electric cables, and, in certain cases, high voltage underground electric cables’.

During the inspection, Commission inspectors examined, *inter alia*, the content of a computer hard drive used by employees of Nexans. From there, they recovered a number of files, documents and emails, as well as copied two sets of emails onto four data-recording devices (the DRDs). These DRDs were placed in envelopes which were sealed and then signed by one of the Nexans’s representatives. Inspectors decided to take the envelopes back to the offices of the Commission in Brussels and informed the inspected company that it would be notified of the date on which the inspection would be continued. The inspected company Nexans stated that it would prefer for the examination of the above DRDs to take place at the premises of Nexans, rather than at the Commission. Although the inspectors analysed one of the DRDs at the premises of Nexans, at all, and printed and kept two documents extracted from that DRD and returned this DRD to the representatives of Nexnas, the inspectors ultimately made three copy-images of the examined hard drive onto three DRDs and gave one of these to the Nexans representatives at their request. They placed the other two DRDs in sealed envelopes which they took back to Brussels, after taking formal note of the fact that Nexans disputed the legitimacy of their removal. The inspectors stated that the sealed envelopes would only be opened in the Commission premises in the presence of Nexans representatives. Ultimately, the envelopes sealed at the premises of Nexans were opened in the Commission’s offices in the presence of Nexans’ lawyers. The documents stored on the DRDs were examined and the inspectors printed out data which they considered relevant for the purposes of the investigation. A second paper copy of those documents and their list was given to Nexans’ lawyers. The office of the Commission in which the documents and the DRDs were examined was sealed at the end of each working day, in the presence of the inspected companies’ lawyers, and opened again the following day, also in their presence.

The decision addressed to the Prysmian group (decision C(2009) 92/2 of 9 January 2009) was almost identical to the inspection decision issued in the *Nexans* case regarding the subject-matter of the inspection and its reasoning. During the inspection of Prysmian’s premises, inspectors decided to extract image-copies of computer hard drives of three employees in order to examine them in the premises of the Commission in Brussels. The legitimacy of this approach was challenged also in this case on the basis of the argument that Article 20 Regulation 1/2003 is applicable

in the undertaking's premises only. The extraction of the copy-image of an entire hard drive was seen by the investigated company as contrary to the 'principle of proportionality', seeing as materials acquired during an inspection should only be pertinent to its object. However, the inspectors responded that an opposition to such extraction will be considered as an act of "non-collaboration" and continued to make the copies. Finally, the DRDs contenting the copy-images were envelope-sealed and taken to Brussels. The inspectors invited company representatives to the premises of the Commission where the copy-images were later examined. The envelopes were re-opened only in their presence and sealed again at the end of each day. These activities lasted for three day. The DRDs containing the copy-images were ultimately deleted.

In their court actions, both Nexans and Prysmian asked, *inter alia*, for the annulment of their respective inspection decisions because of their vagueness and extensive product and geographical scope. They also requested the Court to declare that the Commission's decision to physically remove copies of some computer files and copies of certain hard drives from company premises to Brussels was unlawful.

2. ŠEVT case

The AMO Chairwoman authorised its officers under § 22 Competition Act to carry out an inspection of the premises of ŠEVT because the company allegedly concluded an agreement restricting competition under § 4 Competition Act. The infringement was said to have consisted of a collusive practice in the public procurement field regarding the supply of stationery.

Among other things, a copy was made during the inspection of the entire content of a hard drive belonging to one of the managers (senior manager, but not a member of the Board of Directors) of the inspected company. The image-copy was recorded on hard drive of the AMO. This hard drive with forensic copy-image was sealed in an envelope and taken to the premises of the AMO. The inspected company and its manager were informed that the envelope would be opened in the presence of company representatives and that the content would be examined in AMO premises. During the procedure in AMO premises, the aforementioned manager of the inspected company contested such approach arguing that sensitive personal information might be leaked and asked the authority to provide security certification of the tools used. Furthermore, AMO offices were informed by the attorney of the inspected company that the disk contains ,attorney's secret'. During the examination of the image-copy, an email communication between the aforementioned manager and his attorney was indeed found but no printed copy was made.

In its court action, ŠEVT claimed that the AMO used its inspection powers too extensively when it seized an individual employee's entire hard drive seeing as it also contained private information belonging to that employee (the company permitted private use of the company computer). The hard drive could thus also contain information on that employee's political activities. The inspected company challenged also the depth of the investigation. However, case documentation is unclear in this

matter since the judgement is inconsistent mentioning both 20 and 50 key words used by AMO inspector for the purpose of their analysis. ŠEVT saw in this approach an infringement of its rights and asked the Supreme Court to order the AMO to refrain from the examination of the contested image-copy and requested for the content of the disk with the image-copy to be deleted.

III. Basic questions in issue

Comparing the judgements of the General Court in the *Nexans* and the *Prysmian* cases and the ruling of the Slovak Supreme Court in the *ŠEVT* case shows that they are, despite procedural matters, similar with respect to the issues that they tried to solve, or they should have solved.

First, they dealt with the content of inspection decisions/authorisations. While the content of inspection decisions was a substantial part of the claims of the applicants in the two EU cases, the Slovak Supreme Court examined the content of the domestic authorisation *ex officio*.

Second, the extraction of forensic image-copies, and their subsequent out-of-premises examination, extends human-rights scrutiny over the interference by competition authorities with the ‘right to protect the home’ not only to the question of abuse protection, but also to the question of the legal basis of such interference.

1. Content of the inspection decisions/authorisations

1.1. LEGAL BACKGROUND AND PREVIOUS JURISPRUDENCE

Article 20(4) Regulation 1/2003 defines the essential elements which must be present in a Commission decision ordering an inspection. Under that provision: ‘Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice’. Since the Commission orders an inspection by way of a decision, requirements of this act under the Treaty on the Functioning of the European Union must be followed. In particular, the decision has to be reasoned (Article 296 TFEU).

Slovak legislation specifies only one requirement for the authorisation of an inspection – the act must take a written form [§ 22(3) Competition Act]⁹. The Competition Act does not require the authorisation to be reasoned; it does not even define its content.

⁹ The legal provisions on the competences of the AMO and its officers regarding inspections are rather inconsistent and unsystematic. First, § 22(2) gives AMO officers powers to request company employees and representatives to provide any business documents or explanations. These powers are general and can be realised during both ‘on-site’ investigations (i.e. inspections) and ‘off-site’ investigation (i.e. written orders to provide information sent by post). In order to secure these documents or information, AMO officers are empowered by this subparagraph to seal the premises or their parts and to seize and take away documents and media storage in

It is clear that EU legislation is more precise in this context than Slovak provisions. This realisation is strengthened by the fact that legal requirements for inspection decisions have been well explained by established jurisprudence. The constitutional requirement to provide reasons for public decisions is meant to guarantee transparency of the decision-making process and enable courts to review their legality. The reasoning allows the addressee of a decision to assess whether the act is well founded, or whether there are insufficient grounds to make the addressee subject to duties conferred by the decision, or even whether the decision is a mere abuse of powers by the issuing authority. Although the scope of the duty to give reasons for a particular type of decision depends on the nature of the measure and on the context in which it is adopted¹⁰, lack of relevant reasons can enable the addressee to successfully contest its legality before a court

European judiciary explained that the need to specify the subject matter of an inspection is a safeguard for the addressees of an inspection decision to assess the scope of their duty to cooperate with the inspection while, at the same time, safeguarding their right of defence¹¹. It was confirmed also that the scope of the duty to give reasons in inspection decisions cannot be limited because of factors relating to the effectiveness of the investigation. On the other hand however, the Commission is not required to communicate all the information it possesses concerning the presumed infringements, or to precisely delimit the relevant market, or to set out the exact legal nature of the presumed violations, or to indicate the period during which they were allegedly committed¹². The Commission is thus obliged to balance between its aim to maintain the effectiveness of the investigation (provide the suspect with as little information as possible) and the addressees' right to defence as well as right for a well-grounded decision acting as a safeguard against the abuse of public power.

These requirements are also relevant for evaluating the legality of an interference with the addressee's privacy under the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, hereafter also ECHR) or the Charter of the Basic Rights of the EU. Providing enough safeguards against abuse is one of the cumulative requirements for the legality of such interference. So the Court requires the Commission to state as precisely as possible the presumed facts which it intends to investigate (what it is looking for and the matters to which the investigation relates). To that end, the Commission must state in an inspection decision the essential characteristics of the suspected infringement by indicating the market thought to be affected, the nature of the suspected restrictions of competition and the supposed degree of involvement of the undertaking concerned. It is also

order to copy them. The Competition Act states that AMO officers have these powers during inspections. Secondly, § 22(3) empowers AMO officers with a written authorisation of the AMO Chairman to enter the premises of an undertaking in order to carry out an inspection.

¹⁰ Case 185/83 *Instituut Electronenmicroscopie* [1984] ECR 3623, para. 38, and Case T-349/03 *Corsica Ferries France v Commission* [2005] ECR II-2197, paras 62 and 63.

¹¹ In relation to Regulation No 17, Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, para. 29, and Case 94/00 *Roquette Frères* [2002] ECR I-09011, para. 47.

¹² In relation to Regulation No 17, Case 85/87 *Dow Benelux v Commission* [1989] ECR 3137, para. 10; *Hoechst v Commission*, para. 41; and *Roquette Frères*, para. 48.

required to state the evidence sought and the matters to which the investigation must relate as well as the powers conferred on its inspectors¹³. It is clear that every element of the operative part of the decision shall be reasoned and grounds for its specific wording or element shall be given. However, the judiciary has given very few instructions on how much information should be provided regarding the subject-matter of the investigation, how deep the reasoning must be and how to balance between the effectiveness of the investigation and the rights of the investigated.

Another group of reasons of a decision ordering an inspection needs to explain why there is a need to violate the home and privacy of the addressee. European courts are more instructive in this matter. In order to establish that the inspection is justified, the Commission is required to show, in a properly substantiated manner, that it is in possession of information and evidence providing reasonable grounds for suspecting the alleged infringement by the undertaking subject to the inspection¹⁴. The above standards for reasoning inspection decisions could also be useful in establishing standards for the reasoning of the subject matter of the inspection itself.

It shall be noted that inspections are mostly carried out in the premises of alleged infringers or their managers. For that reasons, jurisprudence is not as well established on the possibility to carry out inspections in the premises of an entity that is not a suspect, but is merely presumed to be in possession of relevant documents or information. Still, the approach would be very similar in both scenarios. The Commission shall first explain the necessity of an inspection by declaring that it expects the addressee of an inspection decision to be in possession of information on a possible infringement of competition rules. The Commission shall then explain why it is likely that the addressee holds information regarding the infringement. Finally, if the Commission alleges that the addressee is in possession of information or evidence providing reasonable grounds for suspecting the infringement or for another hypothesis, the Commission must actually be in possession of documents and evidence that made it come to such conclusion when adopting the inspection decision.

Before the adoption of the *ŠEVT* judgment, inspections were carried out by the AMO only in two cases; neither the formal nor substantial grounds of their authorisations were questioned. It is thus likely that the AMO was never forced to adjust the rather formal and summary authorisation standards used in the past.

1.2. DECISION IN *NEXANS* AND *PRYSMLAN* CASE

The two companies challenged their respective inspection decisions because of two issues: first, the decisions were imprecise in their delimitation of the products concerned; second, the high voltage underwater cable sector was the only field where the Commission had reasonable grounds for suspecting an infringement of competition rules on the part of the scrutinised companies.

¹³ In regard to Regulation No. 17, Case 136/79 *National Panasonic v Commission* [1980] ECR 2033, para. 26, and *Roquette Frères*, paras 81, 83 and 99.

¹⁴ In relation to Regulation No. 17, *Roquette Frères*, paras 55, 61 and 99.

The General Court rejected the first allegation and confirmed that by referring in the inspection decision to all electric cables and all materials associated with those cables, the Commission has met its obligation to define the subject-matter of its investigation¹⁵. The Court scrutinised the definition of the subject-matter of the inspection only as far as its extent is concerned – if it enabled the applicants to assess the scope of their duty to cooperate with the inspection and if the delimitation of the matters covered by the investigation was sufficiently precise (in relation to all of their activities). It is with relation to that delimitation that the Court must be able to check whether the Commission had, at the time of the adoption of the inspection decision, reasonable grounds justifying the interference into the private activity sphere of the applicants. Regarding these questions, the Court considered it irrelevant that the wording of Article 1 of the inspection decision and its grounds were rather ambiguous¹⁶.

Regarding the second challenge, the Court analysed whether the Commission had at its disposal at the time of the adoption of the inspection decision information on a cartel covering all electric cables and all materials associated with those cables. The Court recalled here the need to balance the investigative powers of the Commission, the element of surprise of an inspection and the powers to search documents in the undertaking's premises on the one hand, with safeguards against the abuse of public power and 'fishing expeditions' on the other. The Commission believes that its powers of investigation would serve no useful purpose if it could do no more than ask for documents which it was able to identify with precision in advance. So its right to investigate implies the power to search for various items of information which are not already known to it or fully identified¹⁷. The Court confirmed that the Commission has the power to search and examine certain business records of the addressee of the inspection decision even if it is not known whether they relate to activities covered by that decision, in order to ascertain whether that is indeed the case as well as to prevent the undertaking from hiding evidence which is relevant to the investigation, under the pretext that that evidence is not covered by the investigation¹⁸.

Notwithstanding the above, it is clear that once the Commission has found after its inspection that a document or other item of information does not relate to the subject matter of the inspection, it is obliged to refrain from using it for the purposes of its investigation¹⁹. Not following this approach and extending searches to all activities of the inspected undertaking, despite having indicia concerning only a specific area of its business activity, in order to find 'any' infringement ('fishing expedition'), is seen by the Court as an interference into the private activities of a legal person. Such approach is incompatible with the guarantees of fundamental rights of a democratic society²⁰.

¹⁵ *Nexans*, para. 53.

¹⁶ *Nexans*, para. 54.

¹⁷ *Nexans*, para. 62.

¹⁸ *Nexans*, para. 63.

¹⁹ *Nexans*, para. 64.

²⁰ *Nexans*, para. 65.

After examining the content of the file as well as the submissions of the Commission and the parties, the General Court found that the authority did have enough indicia regarding a cartel covering high voltage underground and underwater cables and materials associated with those cables. Its reasoning concerning the whole market of electric cables and the materials associated with those cables was, however, insufficient. It must be stressed that the Court refused to accept the decision's reasoning not merely because the authority had no indicia regarding the whole market of electric cables. It also analysed whether the Commission's thinking process, which made it extend its suspicions to the entire electric cables market, was consistent and reasonable.

Once the General Court found that the Commission had no indicia, no evidence and no reasonable grounds to suspect the addressees of the two inspection decisions had participated in a cartel covering all electric cables and associated materials, it annulled the inspection decisions both with respect to Nexans and Prysmian in so far as they concerned anything other than high voltage underwater and underground electric cables and materials associated with those cables. The rest of the inspection decisions was upheld.

A question remains, however: did the rulings of the General Court bring anything new to EU jurisprudence on the evaluation of inspection decisions issued under Regulation 1/2003? More precisely, has the Court delineated the powers of the Commission in this context somewhat more restrictively than in the past?

First, the General Court confirmed *expressis verbis* or *via facti* that:

1. The Commission is not obliged to explain and give all its indicia and evidence regarding the alleged activity.
2. The Commission is prohibited to extend its inspection activities to documents and items of evidence outside the scope of the subject matter of the inspection.
3. Inspectors are not limited to only examine documents and items of evidence that *prima facie* correspond to the subject matter of the inspection.
4. In order to define the subject matter of the inspection, the Commission shall provide relevant assertions that can reasonably lead to suspicions regarding all the business activities and all the undertakings that are covered by the inspection decision.
5. The Commission is obliged to show to the court that assertions made in the reasoning of the inspection decision are based on relevant information in its possession in the form of documents, evidence or a consistent analysis.
6. If the Commission fails to show that it holds information that enables it to reasonably suspect the existence of an infringement regarding the whole market or its specific part, the court shall annul the inspection decision in its entirety or in part respectively.

It seems therefore that the General Court followed established jurisprudence, upheld strong investigative powers of the Commission and added no further safeguards for undertakings other than those that existed already. The General Court made also no theoretical analysis concerning the extent or quality of information that forms sufficient grounds for suspicion. It merely assessed on a case-by-case basis the documents, information and evidence provided by the Commission as well as

the consistency of its reasoning. Even if the General Court thus refused to accept the Commission's reasoning regarding markets other than those mentioned in the leniency application, this does not seem to mean that the judiciary will not accept arguments in favour of a subject matter other than that supported by 'hard' evidence. Otherwise the Court would not have bothered at all to analyse the consistency and reasonableness of the Commission's assessment on issues outside the subject matter of the leniency application.

Hence the Nexans and Prysmian judgements do not seem to be landmark decisions and shall not change the course of the inspection practice of the Commission. Their only outcome regarding this issue is that the authority is without a doubt obliged to provide correct information in the reasoning of its inspection decision. If the Commission was in fact known to have provided reasoning based on information that it did not actually possess, the two judgments could have resulted in a change in its practice. It is believed that there was no such practice in the first place, however, seeing as it would have amounted to an abuse of powers.

The Nexans and Prysmian judgments do not solve the question of what standards are to be followed for inspections in the premises of those not suspected of competition law infringements. The answer could, in theory, be very simple, but it provides no firm guidance for future practice. In a democratic society, the Commission is obliged to explain why it is necessary to interfere into the private sphere of undertakings and why is this interference proportionate to the aim sought by the authority. In other words, the Commission is obliged to explain why it expects that documents and information could be found in the premises of a non-suspect that may be necessary for the enforcement of the powers of the Commission to protect competition within the internal market, and why can they not be obtained by any other means than an inspection. All of these elements of proportionality and necessity shall be assessed by the court on a case by case basis.

1.3. DECISION IN THE ŠEVT CASE

Although formal questions regarding authorisation were not part of the action submitted by the plaintiff, the Slovak Supreme Court tried to deliver a precedent ruling in this case by analysing the form of the authorisation.

First, it noted that an element of surprise is used during an inspection. It is thus necessary that the undertaking shall have a 'legal possibility', but only by an immediate look at the authorisation, to check if and on what basis it is being examined²¹. The Supreme Court found that this possibility was disabled in the scrutinised case because the authorisation referred merely to § 22 Competition Act, which contains a total of 10 subparagraphs. The undertaking was thus not able to discern which of the powers enlisted in § 20 Competition Act (sic!, it seems to be an error of the court and it meant § 22) was being enforced against it. This failure was seen as a grave error

²¹ 'Podnikateľ musí mať právnu možnosť z poverenia okamžitým nahliadnutím si odkontrolovať, či a na základe akého ustanovenia zákona sa voči nemu takto postupuje'.

in the AMO's proceedings and a reason for the illegality of the inspection. It must be stressed, however, that § 22 Competition Act contains only one power of AMO inspectors – to inspect the premises of an undertaking under authorisation by the Chairman of the AMO.

The Supreme Court saw another reason for the illegality of the inspection in the fact that the authorisation was missing AMO's official seal. On the one hand, the Court admitted that the Competition Act does not require a seal on the authorisation for an inspection. On the other hand, it labelled the seal to be the basic prerequisite of the execution of powers of a public body as required by the Slovak Administrative Code (a fact of common knowledge in the practice of public bodies). According to the Court, the seal acts as the official sign manifesting that a given document is an actual public instrument. In the opinion of the Supreme Court, the seal makes it possible for the undertaking to realise that an official act is executed against it.

However, what is more interesting than a rather medieval insisting on the importance of the powers of a seal, is the reference to the prerequisites of a decision listed in § 47(5) Administrative Code in connection to its § 3(1) and § 3(6). They include: the designation of the public body that issued the decision, date of the decision, forename and surname or name of the addressee, official seal and signature with forename and surname of responsible official. These were seen by the Court as essential prerequisites stemming from general principles of intelligibility and certainty of acts of public bodies. As such, they applied not only to decisions but also to authorisations.

Although the Supreme Court referred to the prerequisites of a decision under § 47(5) Administrative Code and arrived at the conclusion that an authorisation shall meet the same criteria, its further arguments are rather inconsistent and can hardly serve as guidance for future enforcement practice of the AMO. The Supreme Court saw another fault of the scrutinised authorisation in the fact that it was missing an registration number. However, having registration number is neither listed as a prerequisite of decisions nor authorisations. A judicial extension of the list of prerequisites of legal acts of public bodies endangers the future practice of issuing such acts, seeing as they might end up be annulled by a court because they lack a prerequisite requested by that court specifically even if it is not prescribed by the law. This approach can undermine the will of the Slovak parliament as the sole legislator; it is also contrary to the principles of Continental law.

The Supreme Court remained silent on reasoning being an essential prerequisite of a decision, seeing as decisions without a reasoning are somewhat of an exemption. However, while silent on reasoning in general terms, it mentioned the necessity of reasoning an authorisation of an inspection. Its arguments here create, however, somewhat of a legal turmoil: 'During the inspection, it is necessary to distinguish between invasive and non-invasive acts. Invasive acts interfere into basic rights and freedoms. There is a difference between situations when the defendant during the investigation is asked to submit documentation regarding which it is clear that it does not contain private data, and in cases of copying data storage devices of employees which cannot be avoided but could be reasonably expected to also contain private

correspondence (e.g. hard drive PC, notebook, USB stick). In these cases, the authorisation shall be reasoned²².

It is hardly possible to distinguish between ‘invasive’ and ‘non-invasive’ actions during an inspection in the premises of a scrutinised undertaking since the inspection itself is an ‘invasive’ act. The Supreme Court acknowledged an ‘invasive’ act’s interference into basic rights, but it remained silent about acts other than those which are ‘invasive’. It also failed to answer the question if such interference into basic rights and freedoms can be considered legal. Moreover, it did not explain what acts are ‘invasive’ and what acts are ‘non-invasive’. Reading this paragraph of the judgment in its entirety and assuming that it deals with one question only, a demand to submit documentation regarding which it is clear that it does not contain any private data can be categorised as ‘non-invasive’. By contrast, copying information from data storage devices of employees, which cannot be avoided, but could be reasonably expected to also contain private correspondence, can be seen as ‘invasive’. However, this classification says nothing about rights and freedoms of the company itself, focusing instead on rights and freedoms of its employees.

Finally, although the Supreme Court ruled that authorisations shall be reasoned in the case of ‘invasive’ acts, it nevertheless, stopped here in its own reasoning leaving several questions unanswered. First, shall the reasons for the authorisation be contained in the very text of the authorisation or shall they be at the disposal of the AMO and be provided afterwards to the reviewing court? Second, shall the reasons of the inspection itself or the reasons for the interference into the privacy of employees be provided? Third, how can the AMO be able to give reasons in advance for its interference into the rights of employees without prior information on the internal structure of the inspected company and specific benefits enjoyed by each employee? Fourth, what could justify the inspection of the computer of an employee which is also used for private purposes? The Supreme Court gave no guidance on how to answer these questions and wasted an opportunity to formulate specific rules on inspections performed by the AMO.

However, Slovak officers and practitioners can seek some partial answers in Czech jurisprudence since the two neighbouring legal orders are in some aspects very similar. In a judgement of 2007²³, confirmed by the Supreme Administrative Court in 2009²⁴, the Regional Court in Brno admitted that inspectors of a competition authority are allowed to inspect a notebook found in the premises of the inspected company and

²² ‘Pri výkone inšpekcie je nevyhnutné rozlišovať invazívne a neinvazívne úkony. Invazívne úkony zasahujú do základných práv a slobôd. Je rozdiel, ak žalovaný v rámci šetrenia žiada obchodnú a účtovnú evidenciu a doklady, o ktorých je jednoznačné, že neobsahujú žiadne súkromné údaje a je rozdiel, ak ide o kopírovanie dátových nosičov zamestnancov podnikateľa, u ktorých nemožno vylúčiť a dôvodne možno predpokladať, že obsahujú i súkromnú korešpondenciu (napr. hard disk PC, notebook, USB Kľúče a pod.). V týchto prípadoch poverenie musí byť i odôvodnené’.

²³ Judgement of 27 September 2007, No. 62 Ca 1/2007.

²⁴ Judgement of 29 May 2009, No. 5 Afs 18/2008.

used even only partially for business, even if the employee claims that the notebook is also used for private purposes. In such situation, inspectors are allowed to take a cursory look at its documents and assess their *prima facie* private or business nature.

It can be concluded that the Supreme Court failed to give a clear explanation of its position regarding the prerequisites of an authorisation for an inspection and wasted a chance to deliver guidance for future inspections performed by the AMO. It also failed to perform a comprehensive legislative analysis and comparison even though the Competition Act does not stand alone in the Slovak legal system – several of its administrative bodies are empowered to perform authorised inspections. Their prerequisites are enumerated in various legal acts including those on audit of state administration, tax audit and financial sector surveillance. Hence, taking into account the ŠEVT judgment as well as the philosophy of acts regulating similar types of inspections, an authorisation of an inspection for the purpose of competition law enforcement shall contain the following:

1. indication of the authority which issued the authorisation – the Chairman of the AMO,
2. legal basis under which the authorisation is issued,
3. identification of the case in which the inspection is carried out,
4. formulation of the authorising order,
5. identification of the entity whose premises shall be inspected,
6. time scale of inspection, which shall be sufficiently certain and proportionate,
5. aim and scope of the inspection,
6. names and surnames of authorised staff,
7. name and signature of the person who issued the mandate,
8. official seal of the AMO.

In order to achieve more clarity and transparency, the authorisation shall also contain an explanation of the powers of the inspectors, possible remedies as well as reasons for the inspection, that is, statements why searching the premises of the inspected entity is necessary.

2. Removing image copies of hard drives from the premises of inspected undertakings

2.1. LEGAL BACKGROUND

Legal provisions on making copies are very similar in the European environment [Art. 20(2) Regulation 1/2003] and in the Slovak legislative framework [§ 22(2) Competition Act]. Both Commission and AMO inspectors have, *inter alia*, the right to examine the books and other records related to the inspected business, irrespective of the medium on which they are stored, and to take or obtain in any form copies of or extracts from such books or records. Additionally, under § 22(2)b) Competition Act, AMO inspectors have an explicit right ‘to take away this information and these documents for the necessary time with the aim of making copies or gaining access to information if the Office is unable, primarily for technical reasons, to gain access to information or make copies of documents during the performance of an

inspection'. Although the law does not explicitly empower inspectors to take away copies of documents and information other than those falling within the scope of the inspection defined in the inspection decision or authorisation, the practice of both the Commission and the AMO show that inspectors are used to removing copies of entire hard drives from the inspected premises. It is clear that such image-copies contain electronic documents that are outside the scope of the inspection and might even contain data of a non-business nature (e.g. private documents or communication of the employees).

Despite changes in wording, the Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003 revised on 18 March 2013 (hereafter, Explanatory Note) maintains the procedure of removing copies of electronic data from company premises. The Explanatory Note is neither a legally binding document nor is it published in the Official Journal, but it not only summarises the powers of inspectors under EU law, it also explains what the Commission believes itself to be empowered to do. The most controversial part of the act is a group of provisions dealing with IT forensics and the duty to cooperate during an inspection of electronic data. In paragraph 14 of the Explanatory Note, the Commission states its powers as follows: 'If the selection of the relevant documents for the investigation is not finished during the inspection on the undertaking's premises, the copy of the data still to be searched is secured by placing it in a sealed envelope and the undertaking will be provided with a duplicate. The Commission commits to return the sealed envelope to the undertaking or to invite the undertaking to attend the opening of the sealed envelope at the Commission premises and assist in the continued selection process.'

It is clear from the practice of the Commission and the AMO that both rely on the legality of the 'envelope procedure', similar to that which was confirmed by the Court in *AM&S*²⁵ and *Akzo Nobel*²⁶ with respect to legal professional privilege (LLP) issues. The rationale of this procedure seems to be that when the competition authority takes away documents in sealed envelopes, it creates a presumption that such documents are not in its full possession. Hence, it does not interfere with the LLP or fall outside the scope of the inspection.

2.2. DECISION IN *ŠEVČEK* CASE

Although the removal of a copy-image of an entire hard drive that also contained private documents and communications of employees was the main objection against AMO's inspection, the Supreme Court remained silent on this issue. In fact, it completely ignored this objection. The judgement was based on finding formal errors in the authorisation, an issue taken into consideration on an *ex officio* basis by the court (that fact was not subject to an objection by applicant). The Court did not give

²⁵ Case 155/79 *AM & S Europe v Commission* [1982] ECR 1575.

²⁶ Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals v Commission* [2007] ECR II-3523.

any guidance on this crucial issue, even though it had a rather good opportunity to do so. However, it is clear from the rationale of Slovak court actions against an illegal interference by public authorities that such an objection is admissible and that remedy against illegal actions during inspections could be sought separately from challenging the legality of an inspection order.

2.3. DECISIONS IN *NEXANS* AND *PRYSMIAN* CASES

The General Court rejected as inadmissible the objections of the applicants regarding the making of image-copies of entire hard drives and their physical removal from company premises in order to be inspected in Brussels. The General Court found that the challenged actions (taking away from the inspected premises) did not constitute a decision within the meaning of Article 230 Treaty Establishing European Community (now Article 263 TFEU). An answer to the question of the legality of the ‘envelope procedure’ regarding image-copies of whole hard drives was therefore not given, even in the form of *obiter dictum*.

The General Court suggested three situations when inspectors’ actions taken during an inspection can be challenged: action for annulment of the final decision on a competition law infringement, action for annulment of the procedural decision ordering to submit certain documents or information, and action against the Commission for non-contractual liability if the removal caused harm to the inspected company or other person. Thus, the Court not only refused to rule on the legality of the ‘envelope procedure’ regarding image-copies, but also took the view that there is no effective immediate remedy against actions of Commission inspectors during the inspection. This last conclusion could be more alarming than the stand taken in the case itself because it could result in the withholding, or at least limiting, of safeguards against abuse required by the principle of proportionality under Article 8(2) ECHR.

2.4. TAKING AWAY OF IMAGE-COPIES FROM THE PREMISES OF INSPECTED COMPANY AND THE ECtHR PERSPECTIVE (*BERNH LARSEN HOLDING* CASE)

What must be mentioned when dealing with the legality of taking image-copies of entire hard drives is a recent judgment of the European Court for Human rights (ECtHR) in the *Bernh Larsen Holding* case²⁷. This ruling could be relevant here from two points of view: first, it deals with the conformity of removing from company premises of a copy of an entire disk; second, the facts and legal basis of the case are very similar to those in *Nexans*, *Prysmian* and *ŠEVT*.

The applicants complained under Article 8 ECHR about a demand made by Norwegian tax authorities to submit for inspection, at the premises of the tax office, a backup copy of a computer server used jointly by three companies (in the context of a tax audit at Bernh Larsen Holding). The similarities with the above competition cases were as follows: there was no explicit legal provision empowering inspectors

²⁷ *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, 14 March 2013.

to take away a copy of an entire disk²⁸, the copy also contained documents outside the scope of the tax audit and finally, the authorities used the ‘envelope procedure’.

First, the ECtHR found that, without any explicit provisions, the rationale of Norwegian tax law makes it possible to consider the contested actions of tax inspectors as ‘in accordance with the law’ in the sense of Article 8 ECHR.

Second, the ECtHR assessed the ‘envelope procedure’ as a sufficient safeguard to maintain proportionality of public interference into the private sphere. On the one hand, the intrusion was particularly far-reaching in that the backup contained copies of all existing documents on the server, including large quantities of material that was not relevant for tax assessment purposes, *inter alia*, private correspondence and other documents belonging to employees and persons working for three different companies. On the other hand, the ECtHR recalled various limitations in existence in Norwegian tax law to the effect that section 4-10 (1) Tax Assessment Act did not confer on tax authorities an unfettered (unencumbered) discretion, notably with regard to such matters as the nature of the documents that tax authorities were entitled to inspect, the object of requiring access to archives and of authorising the taking of a backup recording. Norwegian tax law contained the following limitations and safeguards in particular: a right to complain, the backup copy being placed in a sealed envelope that was deposited at the tax office pending a decision on the complaint, the right of the investigated subject to be present when the seal is broken (except where that would cause considerable delay); the duty of those responsible for the audit to draw up a report, the right of the investigated tax subject to receive a copy of the report; and the duty of the authorities to return irrelevant documents as soon as possible. After completing the review, the data copy would either have to be deleted or destroyed and all traces of the contents would have to be deleted from the tax authorities’ computers and storage devices. The authorities would also not be authorised to withhold documents from the material that had been taken away unless the tax subject agreed to it. The Court stressed additionally that the use of the disputed measure had in part been made necessary by the applicant companies’ own choice seeing as it opted for “mixed archives” on a shared server, making the separation of user areas and document identification more difficult for the tax authorities²⁹.

The administrative nature of the inspection and the administrative character of sanctions resulting for its obstruction was seen by the ECtHR as a further reason for a more lenient approach to the infraction of privacy. ‘It should also be observed

²⁸ Under section 4–10 (1) Tax Assessment Act (*ligningsloven*) of 13/06/80, tax authorities are authorised to order a taxpayer: ‘(a) To present, hand out or dispatch its books of account, vouchers, contracts, correspondence, governing board minutes, accountancy minutes and other documents of significance with respect to the tax assessment of the taxpayer and the audit thereof. ... (b) To grant access for on-site inspection, survey, review of the companies’ archives, estimation etc. of property, constructions, devices with accessories, counting of livestock, stock of goods and raw materials, etc.’ Under section 4–10 (3), when so required by the tax authorities, the taxpayer had a duty to attend an investigation as described in section 4–10 (1), to provide necessary guidance and assistance and to give access to office and business premises.

²⁹ *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, § 173, 14 March 2013.

that the nature of the interference complained of was not of the same seriousness and degree as is ordinarily the case of search and seizure carried out under criminal law, the type of measures considered by the Court in a number of previous cases (see, for instance, the following cases cited above: *Funke*; *Crémieux*; *Miailhe*; *Niemietz*; *Société Colas Est and Others*; *Buck*; *Sallinen and Others*; *Wieser and Bicos Beteiligungen GmbH*; and also *Robathin v. Austria*, no. 30457/06, 3 July 2012). As pointed out by the Supreme Court, the consequences of a tax subject's refusal to cooperate were exclusively administrative³⁰.

It must be noted in conclusion that the *Bernh Larsen Holding* ruling was in fact opposed by the president of the chamber, Isabelle Berro-Lefèvre, as well as Judge Julia Laffranque. They both were of the opinion that the contested legislation was not sufficiently precise to support the approach of the Norwegian tax authorities. The measures taken were seen as non-proportionate to the objectives and interests of those being interfered with: 'In sum, we consider that the order to hand over a backup tape on which all or most of the companies' documents were kept greatly exceeded the wording of the legal provision, from which no such power could be deduced. We conclude that the domestic law does not indicate with sufficient clarity the scope and manner of exercise of the authorities' discretion in the area under consideration, and that the interference was in any event disproportionate. There has been a violation of Article 8 of the Convention'³¹. From the reasoning of the majority a tendency seems to be evident of taking into account the effectiveness of the investigation performed by administrative bodies. By contrast, the minority spoke in favour of scrutinising every instance of interference into an individual's rights and freedoms without regard to the effectiveness of the investigation or the comfort of public authorities.

In order to be legal under Article 8(2) ECHR, the following prerequisites for taking copies of entire storage media (also including data outside the scope of the investigation) are crucial in ECtHR's opinion: the possibility to make a copy of an entire storage media shall be clearly deducible from legislation, access to data other than that within the scope of the investigation shall be procedurally and technically limited, effective safeguards against abuse and judicial control shall be provided, all data outside the scope of the investigation shall be destroyed as soon as it is not necessary to hold the whole copy of the storage medium. Concerning requirements laid down by the ECtHR, judicial control shall be effective and immediate, that is, courts should be able to order, already in the early stage of the investigation, to preclude the use of a copy or to have it destroyed. Hence, the combination of the exclusivity of the powers of the Court of Justice of the EU to scrutiny Commission inspections in competition matters and the lack of the possibility to file an actions against Commission measures other than its decisions (confirmed by the General Court in *Nexans* and *Prysmian* cases) means that there is no immediate judicial remedy against actions performed by Commission inspectors during the inspection.

³⁰ *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, § 173, 14 March 2013.

³¹ Dissenting Opinion of Judges Berro-Lefèvre and Laffranque, *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, § 173, 14 March 2013.

IV. Conclusions

Both the General Court and the Slovak Supreme Court had in their respective cases an opportunity to scrutinize the practices of competition authorities (the Commission and the AMO respectively) regarding the reasoning of inspections as well as regarding powers of the competition authorities to remove an image-copy of an entire storage media (notwithstanding the fact that it contains data that is not within the scope of the inspection) from the premises of the inspected undertaking and to analyse it at the premises of the competition authority.

Although parts of the *Nexans* and *Prysmian* judgments concerning the reasoning of inspection decisions might cause unease for competition authorities, they have ultimately brought nothing new to the EU legal order and merely confirmed well-established jurisprudence. They do not make it so that the Commission must provide specified evidence of an infringement or that it is only allowed to inspect suspected offenders. These judgements mean only that the Commission shall diligently provide grounds for every part of its inspection decisions and that these grounds shall be based on relevant indicia. In other words, the Commission cannot base its reasoning on non-existing evidence.

The Commission shall refrain from ‘fishing expeditions’, that is, ungrounded inspections without a certain subject matter. However, this does not stop the authority from extending the scope of its investigation and inspections to other sectors or geographic areas than those specified in the leniency application or complaint (that might have caused the inspection in the first place). Still, an extension of such sort should be grounded in a sound economic analysis or other theory that makes it possible, on the grounds of existing indicia, to expect a broader scope of the infringement than that already known to the authority. Furthermore, the level of the precision of reasoning given grows in proportion to the seriousness of the interference into an individual’s rights. As a result, relevant grounds for an inspection (seen as a privacy intrusion) act as the basic safeguard against abuse. The necessity and proportionality of the measure must thus be evident from the reasoning of the inspection.

Though the Slovak Supreme Court analysed the formal prerequisites for an authorisation of inspections on its own initiative, it did little more but note that the Administrative Code shall be applied accordingly, and that the authorisation shall contain an official seal and evidence number. There is no reference here to reasons for the authorisation. The Supreme Court wasted therefore an opportunity to provide guidance on this problematic issue.

Neither the General Court nor the Slovak Supreme Court solved the problem or gave answers to the applicants’ complaints regarding the issue of making image-copies of entire hard drives. The General Court did it because it lacks competence in this matter (inadmissibility of such action according to EU law). The Supreme Court simply ignored this objection and no further ruling can be expected here because of the one-instance procedure applicable to the Slovak case. By contrast, *Nexans* appealed the 1st instance judgement of the General Court. It will be interesting to see what approach the Court of Justice will take when reviewing this matter in the future (case C-37/13 P).

The ECtHR found the ‘envelope procedure’ to be an efficient safeguard against abuse, but it also spoke of another necessary safeguard in this context – the availability of immediate judicial review of the procedure. It is unlikely that the Court of Justice will consider annulling a part of the General Court’s judgement on this ground because this issue does not seem to be mentioned in the appeal. So whilst the Court of Justice of the European Union opted for a narrower interpretation of the notion of the act reviewable by the action for annulment, the legality of the inspection procedure will be put in danger because of the lack of effective judicial remedy required under Article 8 ECHR designed to scrutiny performance of the inspection.

Ondrej Blažo, PhD

Comenius University in Bratislava, Faculty of Law, Institute of International and Comparative Law; ondrej.blazo@gmail.com.

B O O K R E V I E W S

**Dawid Miąsik, *Stosunek prawa ochrony konkurencji do prawa własności intelektualnej [The relationship between competition law and intellectual property law]*,
Warszawa 2012, 586 p.**

The relationship between intellectual property law and competition law is certainly a fascinating one. It is therefore not surprising that it has attracted the attention of many scholars. Leading Polish jurisprudence on the relationship between intellectual property rights (IPRs) and competition law has also, and unsurprisingly, attracted the attention of numerous academics and commentators. However, there has never been a comprehensive analysis of this relationship. Dawid Miąsik's excellent book certainly fills this important gap.

The author properly points out that the exercise of such exclusive rights as IPRs can potentially have negative effects on the market. This is particularly so, as the author rightly notices, when an IP holder is capable of excluding others from the market by exercising his/ her exclusive right. Indeed, the way in which the IPR is exercised might not be the most desired one from the perspective of satisfying the public interest in the proper functioning of the market¹.

As the author correctly states, the key issue at the intersection of IPRs and competition law is the importance that should be attached to the fact that a given activity, which is considered potentially anticompetitive, is in fact a form of the exercise of an IPR². One should not forget that exclusive IPRs are granted as a reward for investments already incurred and as an incentive for further innovation. This suggests that a dynamic competition perspective must be taken into account when an intervention by way of competition law is being considered. Having studied Dawid Miąsik's book, I believe that this is the view taken by its author. The question remains, however, whether dynamic competition concerns are the only valid ones here or whether, and if so in what circumstances, should static competition issues also be addressed.

The author provides the readers with a comprehensive analysis of the relationship between IP and competition law in US, EU and Polish law. The thorough analysis of this relationship in the above jurisdictions is preceded by the presentation of leading theories that explain the relationship between these two legal fields. Although some of these doctrines are no longer in use, their presentation remains useful as it helps to

¹ D. Miąsik, *Stosunek prawa*, p. 67.

² D. Miąsik, *Stosunek prawa*, p. 75.

understand the evolution of the relationship between IP and competition law. In this part of the book, the author also analyzes the meaning of the concept of ‘competition’ as well as the aims pursued by competition laws. Thus, chapters II and III provide useful tools for the following in-depth analysis of the three chosen jurisdictions.

It needs to be stressed that the selection of Polish, US and EU laws as the basis for this analysis is by no means coincidental. The reason for choosing Polish law is obvious. The selection of the US and the EU is also not just a choice of two leading legal systems; it is also justified by the realization that EU competition law evolves under a strong US influence. Indeed, developments in the US antitrust field are sooner or later taken into account in EU law both by the European Commission as well as the Court of Justice. Understanding US law certainly helps to grasp the developments in the EU.

This critical review shall concentrate on selected issues discussed in chapter V of Dawid Miąsik’s book where the author analyzes the relationship between IP and competition in EU law. The assessment starts from the assumption of the supremacy of EU competition law over IPRs, which makes it possible to control the exercise of IPRs by the TFEU provisions on competition. As such, EU competition law sets limits on the exercise of IPRs in the public interest and, indirectly, also in the interests of competitors. The author presents the evolution of the relationship between IPRs and EU competition law. While the Treaty is silent on this issue, the relationship is shaped by the jurisprudence and case law of the CJEU and the Commission.

Initially, many authors advocated the immunity of IPRs from competition law interference. The exclusivity theory seemed to be the basis for such thinking³. This approach was however rejected in cases such as *Grundig* or *Sirena Eda*⁴. What followed were the ‘existence/exercise’ and the ‘specific subject matter’ doctrines. In this context, the author accepts the criticism of the existence/exercise doctrine and admits that its application makes it very difficult to predict the outcome of CJEU rulings in particular cases⁵.

The author also rightly observes that competition law enforcement in the area of IPRs was largely influenced by the specific aims of EU competition law, that is, its primary aim to eradicate obstacles to European integration raised by private parties⁶. This resulted in a very strict approach to exclusivity and sales restrictions. Indeed, it was primarily the Commission that advocated a strictly integrationist perspective towards the exercise of IPRs. This approach was not always correct and it was the Court of Justice who gradually modified it. As the author points out, this approach is certainly no longer dominant.

The author analyzes the relationship between IP and competition primarily in the context of such exclusionary practices as refusals to deal. He refers to a number of cases in this context including: *Magill*, *Volvo/Renault*, *Ladbroke*, *IMS Health* and *Microsoft*. Less attention is paid to exploitative practices such as demanding excessive

³ D. Miąsik, *Stosunek prawa*, p. 361.

⁴ D. Miąsik, *Stosunek prawa*, p. 362–363.

⁵ D. Miąsik, *Stosunek prawa*, p. 367.

⁶ D. Miąsik, *Stosunek prawa*, p. 396 and the following.

royalties for granting access to immaterial goods protected by IPRs. Such practices might also lead to the exclusion of competitors, who are either incapable or unwilling to get a license in such circumstances. In this context, reference is made to the *Syfait II* judgment where the CJEU declined to treat high prices as an indicator of a negative effect on competition.

However, these types of practices seem to attract an increasing amount of attention from the European Commission⁷. This is shown, among other things, in its *Rambus* and *Qualcomm*⁸ cases. Both came up in a standard-setting context and concerned alleged exploitative practices by the above companies, which were believed to be holding a dominant position on their respective technology markets. The Commission alleged that the royalties charged were in breach of competition law mandated obligations to license their standard essential patents on FRAND terms (fair, reasonable and non-discriminatory). In a similar and recent case, the Commission initiated at the end of 2012 proceedings relating to the abuse of a dominant position against Samsung⁹.

The use of FRAND obligation relates, *inter alia*, to royalties that may be charged by IP holders. It covers exclusionary practices such as discriminatory treatment of licensees, but it also addresses exploitative behavior. The perspective of obtaining high royalties is seen both as a reward and an incentive to innovators. Adopting such a perspective calls for a cautious competition law intervention in this area. The European Commission, unlike its US counterparts, seems to be eager to intervene in such cases. The fair and reasonable component of the Article 102 TFEU mandated FRAND obligation of IP holders would require more attention.

Chapter III contains an analysis of what seems to be the key issue in this field – when is the refusal to grant an IPR an abuse of a dominant position. This is particularly vital when many of the refusal cases relate to access to IPRs which are essential in order to employ widely used technical standards in the area of telecommunications and electronics. It seems that the author follows the jurisprudence of the Court of Justice here and accepts that a refusal to license may be regarded as an abuse of dominance within the meaning of Article 102 TFEU only if it hinders the appearance of a new product.

This approach follows the CJEU jurisprudence in *Magill* and *IMS Health* as well as, to a certain degree, its approach in the *Microsoft* judgment. It is true that in *Magill* the refusal to license weekly TV program information made it impossible for a new product to appear on the market. In the *IMS Health* case, however, the purpose of the request to license a copyright protected sales data presentation structure was not to bring a new product on the market, but to provide the same product as the IP holder. Consumers (large pharmaceutical companies) did not want a new product – in this case,

⁷ Both the Technology Transfer and the Horizontal Guidelines explicitly mention the obligation to license on FRAND terms in the context of patent pools and standard setting.

⁸ European Commission – MEMO/07/389 of 01/10/2007 Antitrust: Commission initiates formal proceedings against Qualcomm European Commission.

⁹ European Commission – IP/12/1448 of 21/12/2012 Antitrust: Commission sends Statement of Objections to Samsung on potential misuse of mobile phone standard-essential patents.

a new format of presenting pharmaceuticals sales data – they were accustomed to the existing model developed by IMS Health. Its format became a widely accepted industry standard and the market did not need an alternative model. In such cases, there is no room for dynamic competition. Still, while competition by substitution is not what the market wants, what can be improved is price competition. Consumers would ultimately be better off if they had a chance to buy the same product, but at a lower price.

This is the case with IP protected standards. Access to IPRs relating to a standard technology are not required by competitors to offer a new product to consumers (as in, a product which could not be offered by the IP holder). Dawid Miąsik, seemingly motivated by dynamic competition concerns, seems to accept this strict approach to the ‘new product requirement’. This is where I have a problem with the analysis. It seems that the author would not be ready to accept competition by imitation in this case. Instead, he would rather stay with the idea that what is required here is a new product. This would mean that the author accepts competition only if it is competition by substitution.

The obvious problem here is that the concept of a ‘new product’ is vague. There would certainly not be a new product in the circumstances of *IMS Health*. In truth, a new product could be offered in this case, but no one would be likely to buy it because nobody wanted their sales data to be presented in a manner different to what they were used to. However, if access to an established sales data presentation model is not granted, a long period of time of possible price competition might be lost, and consumer welfare is likely to be reduced as a result. There is no evidence that losses in dynamic competition resulting from granting a compulsory license would be higher than losses in static efficiency. It is doubtful that consumers would be better off if competitors are refused a license.

Electronic or telecommunication markets show that granting access to IP that protects technologies, which are considered to be standards, results in hardly any losses in dynamic efficiency. Access to standards opens up new markets and leads to vibrant dynamic and price competition within that IP protected standard. This realization is best illustrated by smart phones and tablets. Would consumers be better off if Nokia, Samsung or Motorola refused to license their standard essential patent technologies to Apple and *vice versa*? Certainly not. Though the products are the same and they satisfy similar consumer needs, dynamic competition is hardly reduced – it is just that it is now conducted within a set standard. Additionally consumers benefit from fierce price competition. This leads me to the conclusion that refusal to grant access to IP protected standards would be damaging both to static and to dynamic competition. Ultimately, it would be damaging to consumers.

I would also like to make a comment on the author’s treatment of the ordoliberal school. Ordoliberal ideals provided a solid ground for European Community competition law and its enforcement. It is true that ordoliberals equated restrictions of competition with restrictions of competitors’ freedom to act on the market, that is, in fact, rivalry between competitors. It is also true that they intended to protect a certain structure of the market because they believed that a concentrated market results in some market players gaining too much power. They feared that economic power would turn into political power, which could be abused.

It seems that the author's approach to the ordoliberalism is rather critical, in particular with respect to the manner in which ordoliberals approached the concept of competition restrictions and, as a result, the importance they attached to rivalry between competitors. This criticism is indeed widely accepted today. Protecting rivalry, which results in a certain market structure, might in the long run be positive for competition, also if competition is understood in terms of economic efficiency. *Microsoft* seems to prove ordoliberal concerns about market players gaining too much economic power. Lack of rivalry affected competition in a negative manner by depriving consumers of products, in this case software, capable of satisfying their needs to a much greater extent.

Concerns over structure should not be abandoned. Indeed, EU competition law makes reference to market structure. It must be stressed that Article 101(3) TFEU not only refers to 'promoting technical progress' and 'allowing consumers fair share of the benefits' but also stresses that competition should not be eliminated with 'respect of a substantial part of the products concerned'. By making a reference to technical progress, the TFEU indicates that dynamic competition concerns must be taken into account. By underlining at the same time that competition should not be eliminated, it points to market structure as well.

I would also like to address comments made by the author when referring to the *Masterfoods* case. The CJEU states therein that it is possible to place restrictions on the exercise of an IPR if these restrictions are proportional and do not affect the specific subject matter of that right¹⁰. The author then adds that forcing IP holders to make their immaterial property available without compensation could be regarded as overly excessive interference with the exercise of their right. Generally, this is correct but there are circumstances where this will not be an accurate assumption. An IP holder who additionally holds a dominant position is required to license on FRAND terms. In the context of standardization, as well as patent pools, an obligation to license on FRAND terms dictates non-discriminatory treatment with respect to setting conditions for access to technologies controlled by dominant undertakings. If an IP holder decides to license royalty free, which is by no means uncommon, subsequent licenses must also be granted on royalty free terms. A different approach would result in discrimination and the conditions of competition on the downstream product markets would not be the same for all market participants.

Finally let me say that Dawid Miąsik's book is both a must have and a must read for all those who deal with IP law. It is now no longer possible to operate in many markets without properly understanding how competition law affects the exercise of IPRs. Dawid Miąsik's book helps the reader to understand this complicated relationship. It is not easy to read, but getting through it certainly gives a lot of satisfaction.

Dr. Rafał Sikorski

Adam Mickiewicz University, Poznań

¹⁰ D. Miąsik, *Stosunek prawa*, p. 354–355.

**Dušan Popović, *Isključiva prava intelektualne svojine i slobodna konkurencija*
[*Exclusive Intellectual Property Rights and Free Competition*],
Faculty of Law of the University of Belgrade 2012, 284 p.**

The monograph entitled *Exclusive Intellectual Property Rights and Free Competition* by Dr. Dušan Popović, Assistant Professor of Intellectual Property Law and Competition Law at the Faculty of Law of the University of Belgrade (Serbia), is one of Serbia's first to examine, in detail, the complex relationship between the protection of intellectual property and the protection of free and undistorted competition. It is not surprising that Dušan Popović has decided to tackle this complex issue. In the course of his career he has demonstrated the courage and the capacity to examine, analyze and competently comment on cross-cutting issues concerning competition law. Over the past years, the issue analyzed in the monograph has become a topical one in comparative law, given the increase in the number of decisions of competition authorities which limit intellectual property rights. Such practice results in an external limitation of subjective IP rights that goes alongside the exemptions inherent to intellectual property law itself. However, the author does not perceive the relationship between competition law and IP rights as a necessarily disharmonious one – quite to the contrary. The monograph first analyses this relationship through examples of successful coexistence (in the first part). It is only after that the author singles out the cases which he finds to be an impressive incursion of competition law into the system of IP rights protection (second part).

Given the lack of relevant Serbian case-law, Dušan Popović focuses on EU law and, to a lesser extent, US law as well as national legal systems of certain European countries. Since Serbia signed the Stabilization and Association Agreement with the European Union, the analysis of the *acquis communautaire* in this area is of the utmost importance to Serbian readers. International scholars will particularly benefit from the detailed and insightful comparative analysis contained in this book.

In the first part is entitled “Intellectual property rights as possible means of competition infringement”. Analyzed here is the possible outcome of the application of competition rules to market participants which own IP rights, relying mostly on the practice of the European Commission and the Courte of Justice of the European Union. The first chapter deals with the prohibition of anti-competitive agreements. The author assesses the treatment of certain clauses contained in license agreements concluded by the owners of IP rights such as: exclusivity clauses, non-compete clauses, exclusive supply clauses, confidentiality clauses etc. It is concluded that

the application of competition rules does not necessarily lead to a limitation of IP rights as it is often possible to exempt the relevant clauses from the prohibition of anti-competitive agreements. The following chapter focuses on the prohibition of the abuse of a dominant position. The author first analyses the way in which the European Commission and other competition authorities define relevant markets in cases involving the use of IP rights. The conclusion is presented here that the competition authorities err in certain cases in defining the relevant product market, especially when the relevant market is defined in respect of copyrighted products. The claim is made here that competition authorities tend to confuse the criteria for market definition with that for copyright protection, leading automatically to the definition of a “single product market” in which the right-holder occupies a dominant position. The author further examines the process of determination of a dominant position as well as certain typical cases of its abuse. Dušan Popović freely and competently formulates his stand points, even when they differ from the established practice of competition authorities, for example, concerning the definition of the relevant product market with regards to copyright.

The second part of the monograph is entitled “Special cases of limitation of IP rights”. Analyzed therein is the relationship between IP and competition protection on the example of compulsory license and parallel trade. The author argues that the limitation of IP rights is significant in these two cases, especially through competition law enforcement which is not always based on clear and well-established grounds. The opening chapter is dedicated to compulsory license, assessed first in the context of patent law and subsequently in light of competition rules. Further to a comparative law approach, the author analyzes Serbian patent law and detects certain conflicts between the rules governing the delivery of compulsory licenses for competition infringement under the 2011 Serbian Patent Act and competition rules laid down in the Serbian Competition Act 2009. The chapter is enriched by the results of an analysis of the number of compulsory licenses delivered worldwide, which remains rather low. Examined further is the EU and US case-law related to “compulsory licenses” delivered in competition cases in the form of behavioral remedies. It is argued that the approach of competition authorities, based on the “special circumstances” criterion, generates legal uncertainty for IP rights owners because the interpretation of this criterion is very much case-specific.

The following chapter is dedicated to parallel trade which may significantly interfere with the exclusive and territorial character of intellectual property rights. Dušan Popović first analyses under which circumstances may the owners of IP rights restrict parallel trade relying on the exclusive protection conferred to them by intellectual property law. Special attention is accorded to cases involving repackaging. Subsequently, the author examines, on the grounds of competition law, whether the owners of IP rights may restrict parallel trade. The standpoint is presented here that such actions may easily be caught by the prohibition of anti-competitive agreements or the abuse of a dominant position.

The monograph concludes with an outlook in which Dušan Popović argues in favor of the adoption of an international convention in the area of competition law

that would allow for the harmonization of national competition rules and, possibly, the creation of a world-wide competition authority. Meanwhile, owners of IP rights participating in the global economy remain exposed to multiple competition law regimes. The outcome of proceedings undertaken by different national or regional competition authorities may differ significantly and further generate legal uncertainty for IP rights owners.

Dušan Popović writes systematically and precisely; his arguments are easy to follow and convincing, and while dealing with complex legal issues, the monograph is easy to read.

Dr. Ana Knezevic Bojovic

Institute of Comparative Law in Belgrade

C O N F E R E N C E R E P O R T S

Entrepreneur's rights in antitrust cases. Conference Report Warsaw, 23 April 2012

A conference entitled 'Entrepreneur's rights in antitrust cases' was held in Warsaw on the 23rd of April 2012 gathering around 150 participants. The conference was co-organized by the Centre for Antitrust and Regulatory Studies (CARS) and the Institute of Law Studies of the Polish Academy of Sciences. It was co-financed by the Polish Science Foundation.

The opening speech was delivered by Professor Władysław Czapliński, Director of the Institute of Law Studies. The conference was divided into three sessions. The first session was chaired by Professor Tadeusz Skoczny, Director of CARS and contained four presentations, two of them related to the classification of antitrust proceedings (cases) as administrative and/ or criminal proceedings.

Professor Małgorzata Król-Bogomilska (Institute of Law Studies) spoke of 'Entrepreneur's rights standards in antitrust cases – administrative and criminal problems?' She concluded that 'the necessity to respect certain rights of entrepreneurs, sanctioned on the basis of antitrust law, cannot be put into question, irrespective of the extent to which the thesis is accepted on the criminal character of fines and antitrust proceedings'. The speaker noted in particular that the Lisbon Treaty made the criminalization process of antitrust violations more dynamic in EU Member States, because it introduced a direct legal basis for co-operation in criminal matters in the EU.

Dr. Anna Błachnio-Parzych (Institute of Law Studies) entitled her presentation 'Character of entrepreneur's liability in antitrust proceedings and the concept of accusation in the case law of the European Court of Human Rights'. In the analysed jurisprudence, she found under which conditions liability for particular legal breaches would be criminal in nature; one of these conditions was the seriousness of the resulting sanctions.

Dr. Rafał Stankiewicz (Faculty of Law and Administration, University of Warsaw) delivered a speech on 'The scope of the application of the Code of Administrative Procedure in antitrust proceedings'. He stressed therein, among other things, that 'the general reference included in Article 83 CAP is related to the creation of strong personal rights in antitrust proceedings'.

Aleksander Stawicki (LL.M) spoke of 'Court proceedings on an appeal from a decision of the UOKiK President and constitutional guarantees for the protection of entrepreneur's rights'. He addressed the necessity of the verification by the Court of

Competition and Consumer Protection of decisions issued by the Polish competition authority (UOKiK President) not only from the perspective of their merits, but also considering their procedural correctness.

In the discussion summing up the first session of the conference, many noted the lack of juridical control over the procedural dimension of the decisions issued by the Polish NCA and the fact that this results in a low standard of entrepreneurs' rights protection in domestic antitrust cases. Some commentators spoke however also of the danger of paralysing the activity of the competition authority by way of an overly restrictive approach to procedural breaches. In relation to the criminalization of antitrust violations, Professor Sławomir Dudzik (Jagiellonian University) stressed that the economization of competition policy means that the assessments of market behaviours are increasingly less clear cut. It is thus often really difficult to attribute liability for a given practice to a specific entrepreneur, because antitrust practices can result from the dynamics of market changes, independent from entrepreneurs.

Dr. Dawid Miąsik (Institute of Law Studies) moderated the second panel of the conference entitled 'Entrepreneur's rights in antitrust cases and European standards'.

Dr. Maciej Bernatt (Faculty of Management, University of Warsaw; CARS) started with a critical analysis of the right to a hearing in proceedings before the UOKiK President. Referring to current Polish legislation, he spoke of the need to interpret existing legal provisions in such a way as to guarantee the right to a hearing in antitrust proceedings. With regard to the planned changes of the Competition Act, he stated that the amendment should not only aim to increase efficiency, but also improve the level of respect of procedural fairness. Such changes were said to be required by the criminal (in the light of Article 6 ECHR) character of antitrust proceedings on competition restricting practices.

Bartosz Turno (LL.M, Adam Mickiewicz University) presented a speech prepared jointly with Agata Zawłocka-Turno (LL.M) under the titled 'Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?' In the opinion of the authors, the Lisbon Treaty established 'a new legal environment' (binding force, equal to the Treaties, for the Charter of Fundamental Rights as well as the signing of the ECHR by the EU). This development should result in the compliance of the LPP and the privilege against self-incrimination with the case law of the European Tribunal of Human Rights. Changes should cover, among others, the enlargement of the scope of the LLP, under certain circumstance, to in-house lawyers and communications related to compliance programmes as well as granting the LLP to lawyers from non-EU jurisdictions. Within the privilege against self-incrimination, the authors spoke in favour of an absolute right to remain silent.

Dr. Grzegorz Materna (Institute of Law Studies) spoke of 'Judicial control over dawn raids during antitrust proceedings before the UOKiK President'. In his opinion, the current scope and method of regulating judicial control over dawn raids 'cannot be assessed in a decisively positive manner'. This is so neither from the perspective of the entrepreneurs subject to unannounced controls, nor from the perspective of the competition authority. Dr. Materna criticized also the fact that current provisions on

dawn raids for antitrust proceedings are to be found in two separate legal acts: the Act on Economic Freedom and the Competition Act.

The last speech in the second session, entitled 'Impact of the *ne bis in idem* rule on proceedings of the European Commission and the UOKiK President in cases of anticompetitive agreements', was delivered by Przemysław K. Rosiak (legal advisor). The author outlined the conditions for the application of the *ne bis in idem* rule in EU competition law. Mentioned were also the many problems arising in this context in situations such as a concurrence of proceedings before the Commission, Member States' NCAs and competition bodies of 3rd countries as well as the concurrence of fines imposed on entrepreneurs in such cases.

In the closing discussion, Jarosław Sroczyński claimed that the Polish Competition Act contains an element guaranteeing the right not to self incriminate. Commentators held that the LPP should be protected in Poland even now, despite the lack of appropriate legislation, in the application practice of the Competition Act by the UOKiK President, mainly during dawn raids.

The last session of the conference, 'Entrepreneurs' rights and legal solutions in the EU', was chaired by Dr. Agata Jurkowska-Gomułka (Faculty of Law, University of Warsaw; CARS).

Dr. Inga Kawka (Pedagogical University of Cracow) delivered first a speech on 'Entrepreneurs' rights in proceedings that result in a commitment decision in EU competition law'. She argued for the need to positively establish the scope of the binding force for NCAs and courts of commitment decisions issued by the Commission. She also spoke in favour of the introduction of the requirement of proportionality of commitments and the seriousness of the infringements, as well as for the use of a specialized competition court competent to judge antitrust cases on their merits. Some of her postulates were considered 'far-reaching' in the closing discussion.

The next presentation was entitled 'Exchange of information and evidence among competition authorities and the protection of entrepreneurs' rights'. Its authors, Sonia Jóźwik (University of Silesia) and Dr. Mateusz Błachucki (Institute of Law Studies), focused on key doubts surrounding the standards of entrepreneurs' rights protection in the practice of information and evidence exchange within two biggest European organizations gathering national competition bodies: European Competition Authorities and the European Competition Network. They stated that these doubts arise mainly in the area of cooperation on anticompetitive practices and regard, for instance, the awareness of entrepreneurs that cooperation in information and evidence exchange takes place at all, as well as the scope of the protection of entrepreneurs' secrets. Cooperation in merger cases is far less controversial as it is based on the free will and engagement of the interested entrepreneurs.

Mariusz Baran and Adam Doniec (both from Jagiellonian University) spoke of problems related to the scope of the jurisdiction of EU courts ruling on the legality of decisions imposing fines. Identified first were two judicial control models over Commission decisions that impose sanctions – the model of 'unlimited' and the model of 'limited' control. The speakers stated that limiting the scope of the control of decisions imposing sanctions in the unlimited control model might infringe

the rule of effective legal protection and Convention-based standard of a right to a fair trial.

Dr. Krystyna Kowalik-Bańczyk (Technical University in Gdańsk, Institute of Law Studies) dedicated her speech to ‘Procedural autonomy of Member States and EU rights of defence in antitrust proceedings’. The paper meant to answer the question whether EU ‘procedural *aquis*’, resulting from the jurisprudence of EU courts and concerning proceedings before the Commission, should become the standard applicable to national antitrust proceedings concerning Article 101 and 102 TFEU. The authors concluded that reference to EU jurisprudence is necessary when it improves the level of entrepreneurs’ protection.

Among the many comments made during the concluding discussion, special note should be taken of the views expressed by Professor Sławomir Dudzik (Jagiellonian University). When analysing entrepreneurs’ rights in antitrust proceedings in the context of ECHR’s jurisprudence and EU *aquis*, Professor Dudzik stressed that the fact should not be forgotten that proceedings before the UOKiK President, also in EU-related matters, are first and foremost subject to the provisions of the Polish Constitution. Constitutional standards cannot be lowered in comparison to EU standard.

Prof. Małgorzata Król-Bogomilska raised the problem of fines for antitrust violations, especially as far as their concurrence is concerned (for instance, in the case of bid-rigging which can be sanctioned on multiple legal bases, not just the Competition Act).

In conclusion, Dr. Krystyna Kowalik-Bańczyk summarized the most important issues raised in the speeches delivered during the conference as well as thanked a number of persons for their contribution to the organization of the conference.

The decisive majority of the papers delivered during the conference were based on articles published in the Yearbook of Antitrust and Regulatory Studies 2012, vol. 5(6). Its content is available at <http://www.yars.wz.uw.edu.pl>.

Dr. Agata Jurkowska-Gomulka
CARS Scientific Secretary

2nd International Competition Law Forum. Report Warsaw, 27 September 2012

A conference took place on 27 September 2012 organized by the Polish Competition Authority (hereafter, UOKIK) in the premises of the Warsaw School of Economics. The conference was dedicated to most important challenges in the enforcement of competition law. It brought together prominent experts from foreign competition authorities (including the European Commission, OECD and UNCTAD), Polish officials and law practitioners.

After welcoming the participants, Małgorzata Krasnodębska-Tomkiel (UOKIK President) described the background and objectives of the meeting emphasizing that the opinions gathered during the conference were especially valuable in light of the amendment process to the Polish Competition Act underway at the time. It was also stressed that the conference was only the beginning of a broader debate to be continued at a meeting of the International Competition Network planned to take place in Warsaw in April 2013.

Piotr Ostaszewski (Vice-Rector, Warsaw School of Economics) took the floor next. By recalling the words of Margaret Thatcher: “*the manner of winning is a matter of honor*”, he highlighted the importance for companies of achieving their business goals by honest means. Joaquín Almunia (Vice-President, Commissioner for Competition, European Commission) presented the main challenges for competition policy in the European Union. He drew attention to the liberalization of the telecommunication sector and to current attempts to create a single energy market. He also introduced recent activities of the Commission in the *Google* and *Universal* case and noted the *Memorandum of Understanding* that has been signed with China.

Eduardo Perez Motta (Chairman, Mexican Federal Competition Commission, ICN Chair) discussed the main activities of the International Competition Network. He stressed, on the one hand, that the observed economic slowdown cannot be treated as an excuse for a relaxation of competition enforcement. He argued that such approach would be to the detriment of consumers who pay prices higher by 40% on average on non-competitive markets. On the other hand, policy must be balanced so as not to intervene where the mere costs of intervention outweighs the possible harm for consumers. To avoid this, OECD seeks to identify those sectors where over-regulation may restrict competition. One possible example is the area of credit or debit cards.

Finding the right balance between effective cartel detection and fair, legal procedure

The first panel, chaired by Marta Sendrowicz (Warsaw University, Partner at Allen&Overy, A. Pędzich), was devoted to maintaining a balance between efficient cartel detection and respecting the right to fair trial. Kris Dekeyser (representative of DG COMP) presented the main actions undertaken in this context in the framework of DG COMP proceedings. He stressed that the requirements of *due process* cannot be discussed in isolation from efficiency. Although, rights of different participants are not easy to reconcile, the current system is in line with the ECHR and within the Commission as such there are many mechanisms of mutual control, which are intended to ensure objectivity. Moreover, Commission notice on best practices for the conduct of proceedings broadened the scope of the right to be heard as well as increased the role of the Hearing Officer. This is not to say that the current system is perfect, there is, however, still room for improvement without radical institutional change.

Grzegorz Materna (Director of Competition Protection Department, Polish Office of Competition and Consumer Protection) presented the Polish perspective on this issue. He stressed that there is no contradiction between procedural fairness and efficiency, but with multiple equivalent solutions, the most effective should be chosen. He also indicated that the Polish Competition Authority (UOKiK President) strives to mitigate legislative failures in its decisional practice. A significant step to strengthening the guarantee procedural fairness in Polish legislation was taken when drafting the new amendment. In this respect, the Authority proposed to clarify the rules governing *legal professional privilege* (LPP). A substantial change should occur also with respect to control and search operations, the latter should not be used in preliminary proceedings and only be conducted upon court approval. In addition, the office proposed to clarify the methods of setting fines, as well as to extend the term in which an appeal can be lodged against a decision of the competition authority.

Jolanta Tropaczyńska (Director of Legal Office, Orange) considered procedural fairness from the perspective of Polish entrepreneurs. She indicated, as regards *legal professional privilege* (LPP), that the current arrangements are inadequate and that, much to the disappointment of entrepreneurs, the originally envisaged legal improvements were ultimately abandoned. She stressed that the postulated right to access all electronic data in the course of search operations is excessive. Raising the issue of confidentiality of the search, she pointed out that involving the public opinion in the search should be eliminated so as to prevent a premature loss of the investigated company's good name.

Jacques Steenbergen (Director General, Belgian Competition Authority, Directorate General for Competition) talked about finding the right balance between effective cartel detection and fair, legal procedure. He described the rationale of complaints and the approach that competition authorities should take towards them. Much attention was given to leniency applications and the need for a cautious use of information obtained therein. Noted was also the need to protect the legitimate interests of applicants. The speaker highlighted in addition, the controversies surrounding the

use by authorities of other inquiry methods such as eavesdropping, information from whistleblowers etc.

Competition law in the process of reforms: new trends in sanctioning policy

Efficiency of fines

The second panel was moderated by John Davis (Head of the Competition Division, Directorate for Financial and Enterprise Affairs, OECD) and devoted to new sanctioning trends. Efficiency of fines was discussed first. Grzegorz Kaniecki (Vice-President, Polish Association of In-House Lawyers) stressed that no direct relationship between the level of antitrust fines and the degree of law compliance is being observed. It is also problematic to see who is the actual addressee of the deterrence effect seeing as there is a significant dispersion of responsibility in the case of transnational corporations. There might, perhaps, be a need for the authorities to reformulate the noble objective of 'effective' law enforcement and set out a system of small steps, that is to say, the promotion of compliance programs and assisting companies in their effective implementation. The speaker stressed that the only way to influence large corporations is to attempt to change the way in which they operate, rather than pursue deterrence.

This subject was continued by Andreas Reindl (Professor, Leuphana University, Lueneburg). He stressed that the test of 'effectiveness' of deterrence is the extent to which it is capable to change the behavior of entrepreneurs. A reward system for those who implement and improve compliance programs should be introduced. Hassan Qaqaya (Head of Competition and Consumer Policies Branch, UNCTAD) stressed on the other hand that effective protection of competition means not only sanctions, but also compensation for the infringement. But here arises the problem of estimating damages as well as the question whether the possessed information is sufficient to determine the overall impact of an antitrust violation. A big challenge is also to find the best way to compensate the victims the harm they suffered. Considering the huge sizes of administrative fines, it is difficult to find optimal solutions. Economic analysis does not always offer an answer since a given number, calculated on the basis of probability calculus, does not guarantee that principles such as equal treatment will be respected.

Responsibility of individuals

The second part of the panel was devoted to the responsibility of individuals for breaches of competition law. Piotr Milczarek (Counsel, Attorney-at-law, British Polish Chamber of Commerce) posed the question here of the legitimacy of imposing such fines and noted a number of concerns with particular emphasis on the discussed draft amendments to the Polish Competition Act. In his view, the current circle of persons facing such responsibility is too broad and may potentially include the majority of a company's employees. Controversial is also the administrative character of the penalty

imposed. The main questions that remain are the circumstances in which penalties are imposed, their character and, above all, their aim.

David McFadden presented Irish experiences in this field. He stated that the main objective of penalties for individuals is to sanction the behavior of those, who are directly responsible for the infringement. A deterrent function is achieved by the introduction of imprisonment as well as deprivation of rights. It is worth noting that a court found it acceptable to punish individuals without sanctioning the company – this made it possible to punish offenders whose company ceased to do business. As a result, the attractiveness of the leniency programs has grown for both individuals applying individually or together with their companies.

Settlement procedure

The third part of the discussion was devoted to settlements as an alternative method of terminating antitrust proceedings. The EU law perspective was presented by Jean-François Bellis (Professor of University of Brussels, Partner, Van Bael & Bellis). He stressed that this procedure has always been controversial due to the number of procedural rights which must be waived by the participating companies. In addition, the EU procedure has for many years lacked a predictable method of fine calculation. Settlement is used only when facts of the case are not disputed between the participants. Although the amount of the penalty is not subject to negotiation, it is possible to discuss within the procedure the factors based on which it is calculated overall. This fact appears to be an advantage of settlement, alongside the 10% penalty reduction provided by the law. A disadvantage of the system lies in the fact that the Commission is reluctant to apply settlement if all parties do not agree to participate in the procedure (so-called hybrid settlements).

Portuguese experiences were described by Marina Tavers (Director of the International Relations Bureau, Portuguese Competition Authority). She stressed that the main objective of settlement is to accelerate proceedings while maintaining their effectiveness and respecting the participants' right to defense. Therefore, it is mandatory to conduct a full investigative process where cooperation with the parties can facilitate the accumulation of evidence. Questions on the fixed level of fine reductions as well as whether settlement should be available to all types of violations are left open.

The next speaker, Wojciech Graczyk (Director of Legal Affairs and Regulatory Management/Compliance Officer, RWE Polska S.A) highlighted the fact that terminating antitrust proceedings by way of settlement can be both faster and more efficient than litigation. In this context, it would be advisable for the Polish Competition Authority to issue Guidelines on the application of commitment decisions. He also noted that entrepreneurs often face significant difficulties in complying with commitments, especially if their activity is controlled by multiple regulators, the actions of which are not consistent.

Review process – effective case presentation in the courtroom

The last panel was chaired by Małgorzata Krasnodębska-Tomkiel (UOKiK President). It was dedicated to the effective presentation of antitrust cases before the judiciary. Frédéric Jenny (Chairman, Competition Committee, OECD) described the challenges associated with the economization of competition law and the difficulties in delivering an economic expertise in the courtroom. It is clear that providing judges with appropriate training plays a central role here. However, much depends also on the manner in which economic arguments are being presented. It is important that they are based on suitable methodology, combined with an objective justification of their application to a particular case. In addition, the analysis should refer to well-established economic theories so that it is possible to confront a variety of views. Finally, it is essential to remember that the obtained results are a reflection of a certain probability only – the court cannot be expected to accept them without reservations.

A number of practical remarks were given by William McKechnie (President, The Association of European Competition Law Judges). He pointed out that the primary task of judges is to determine whether the alleged violation has actually taken place. Economic expertise should thus be presented in a way that enables the judiciary to assess the assumptions as well as the quality of the obtained parameters. In the case of a plurality of opinions, their confrontation is advisable. Moreover, economists should draft a special memorandum, containing information about the applied fields and justifying disparities in their arguments.

Pierre Horn (Officer in charge of the COMPAL Programme, UNCTAD) presented the conclusions gathered within the framework of UNCTAD in the area of effective cooperation between competition authorities and courts. He stressed that antitrust decisions should be based on an adequate and effective investigation strategy. Errors committed at this earliest of stages increase the probability of drawing incorrect conclusions in the decision and might result in courtroom defeat. Close cooperation between lawyers and economists seems to be essential at every stage of the administrative procedure. It should also be kept in mind that direct evidence is always more convincing than circumstantial one, especially if the latter takes the form of ambiguous economic opinions, which can be interpreted in multiple ways.

Monique van Oers (Director of the Legal Service, Netherlands Competition Authority) presented the practical implementation of the aforementioned rules by the Dutch competition authority. She emphasized how important it is that decisions in antitrust cases are drafted by the same people who will later defend them in court. By doing so, antitrust officials gain litigation experience and can more easily identify arguments which, supported by evidence, will be convincing for the courts in future cases.

Jolanta de Heij-Kaplińska (Judge, Court of Competition and Consumer Protection) considered the above relationship from the Polish perspective describing the appeal path applicable to decisions of the Polish Competition Authority. She highlighted the distinction between partial judicial review as regards administrative proceedings and full control in the area of substantive law and the facts of the case. Particular attention was drawn to the burden of proof and the fact that the UOKiK President should not

only present evidence supporting his/her position but also respond to the allegations of the plaintiff. The speaker mentioned also changes connected to a recent amendment to the Polish Civil Procedure Code.

The President of the UOKiK summarized the conference emphasizing the value of the discussion that has taken place, especially in view of the debate concerning the planned amendment to the Polish Competition Act (The bill is currently being discussed in Polish Parliament, it is expected to come into force in 2014).

More information on the conference together with a choice of its presentations is available at <http://competitionforum.uokik.gov.pl/2012/en>.

Elżbieta Krajewska

Centre for Antitrust and Regulatory Studies (CARS)

LLM candidate at College of Europe

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

CARS Activity Report 2012

1. General information

In the sixth year of its activities, CARS focused once again on the pursuit of key scientific goals specified in its founding documents. The first CARS Award for an outstanding books on legal and economic aspects of competition protection was granted in 2012 to Professor Marek Szydło, University of Wrocław (sponsored by PKO BP).

2012 was especially active in the publishing field. CARS started to issue a new journal: ‘internet Quarterly on Antitrust and Regulation’ (*internetowy Kwartalnik Antymonopolowo-Regulacyjny*) – iKAR). It published at the same time two separate volumes of the ‘Yearbook of Antitrust and Regulatory Studies’: a special edition, vol. 5(6) and a regular volume, vol. 5(7). The CARS Publishing Series, Antitrust and Regulatory Monographs and Textbooks, was expanded by another publication also.

Two CARS Open PhD Seminar meetings took place in 2012 as well as two scientific seminars. CARS co-organized also a conference in conjunction with the Institute of Law Studies of the Polish Academy of Sciences.

Importantly also, CARS participated in 2012 in public consultations announced by the Polish Competition Authority on a draft amendment to the current Competition Act as well as in public consultations announced by the European Commission concerning General Block Exemption Regulation on State Aid Measures.

2. Open PhD Seminar

2.1. Judicial review of decisions issued by the President of the Polish Office of Electronic Communications

The fourteenth meeting of the CARS Open PhD Seminar was held on 18 September 2012. The opening speech was delivered by Mateusz Chołodecki, PhD candidate (Faculty of Law, Adam Mickiewicz University in Poznań) and commented on by Professor Stanisław Piątek (Faculty of Management, University of Warsaw). The focus of the seminar was on the dual character of the juridical review model applicable to regulatory decisions of the Polish Telecoms regulator (President of the Office of Electronic Communications) – depending on the type of decision issued, judicial control is exercised by administrative courts or by the Court of Competition and Consumer Protection. The key speaker outlined the legal basis of both forms of

juridical review, their similarities and differences as well as the varied consequences resulting from the two models. Different types of regulatory decisions were analyzed in light of the judicial control model applicable.

2.2. Leniency as an instrument for combatting anti-competitive agreements in the Polish system of competition protection

The fifteenth meeting of the Open PhD Seminar, held on 10 October 2012, was dedicated to practical problems associated with the use of leniency in the Polish competition protection system. Dr. Bartosz Turno (law firm WKB, Wierciński, Kwieciński, Baehr) presented the results of his extensive research in this field outlining, most importantly, the foundations of an 'optimal' leniency programme that he formulated for application in Poland. Particular elements of the model were defined within the legislative sphere, application practice and antitrust policy. A key part of the analysis of the proposed model was devoted to a critical appraisal of past experiences with the use of leniency for competition protection in Poland.

3. Publications

3.1. Yearbook of Antitrust and Regulatory Studies (YARS)

A special volume of YARS [vol. 5(6)] was published in April 2012 followed by a regular volume [vol. 5(7)] in December 2012.

The special volume focused on the protection of entrepreneurs' rights in antitrust proceeding before Polish and EU antitrust authorities. The periodical contains twelve articles based on papers delivered during a conference co-organized in April 2012 by CARS and the Institute of Law Studies of the Polish Academy of Science. The volume contained also two case comments (one of them referring to a merger prohibition issued by the Polish Competition Authority), a book review and Polish bibliography on antitrust procedure.

The 2012 regular volume of YARS was the first to contain articles submitted not only by Polish authors, but also by specialists from other Central European countries (Croatia and Slovakia). YARS 2012, vol. 5(7) contains six articles, seven legislative and jurisprudential reviews on antitrust and sector-specific regulation (among them an exhaustive review of ECJ judgments in competition cases), three case comments and three book reviews, CARS annual activity report 2011 and a bibliography of Polish publications on antitrust and sector-specific regulation.

3.2. internetowy Kwartalnik Antymonopolowy i Regulacyjny (iKAR) [internet Quarterly on Antitrust and Regulation]

CARS started publishing a completely new e-periodical in 2012 – iKAR – which is available at <http://www.ikar.wz.uw.edu.pl>. The basic (reference) version of the journal is electronic in nature, paper copies play a marketing role only. iKAR (acronym

for *internetowy Kwartalnik Antymonopolowy i Regulacyjny*) is open to both legal and economic publications as well as papers bordering on either/both of these areas as well as on management or even technical disciplines. iKAR's two basic fields of interest are: (1) antitrust (including restrictive practices and merger control) and (2) sector-specific regulation. The second area was initially limited to infrastructure sectors only, but with the development of the periodical it now also covers other sectors (such as audiovisual and financial services) or related areas (e.g. state aid, consumer protection, relationships between competition and IPRs etc.). iKAR contains both full articles and smaller texts such as case comments or book reviews, related to Polish, European and global problems.

Six volumes of iKAR were published in 2012, two of them [vol. 5(1) and 6(1)] are dedicated to telecommunications.

3.3. 'Special clearances in the law on merger control' (ISBN: 978-83-61276-99-9)

The tenth monograph published in the CARS 'Textbooks and Monograph' series written by Professor Tadeusz Skoczny is devoted to the key element of pre-emptive merger control – the material and formal legal basis for the issue of special clearances. The analysis is centered on the theoretical concept of 'special' clearances for the issue of which it is not sufficient to establish that a notified merger is not likely to lead to a significant impediment of competition (as is the case for ordinary clearances) or to clearances that must be issued despite the fact that the notified operation will in fact lead to a significant impediment of competition and thus should be prohibited. The analysis covers 3 types of special clearances: exceptional clearances issued when a prohibitive decision is inappropriate due to the fact that the expected significant impediment of competition will occur even if the merger is prohibited; extraordinary clearances for anti-competitive mergers that must be permitted for public policy reasons other than competition protection; and finally conditional clearances issued in order to avoid a prohibitive decision in situations when the parties modify their operations so as to eliminate the expected impediment of competition. The Author proves that special clearances, and in particular conditional clearances, should be seen as a preferred option before prohibitive decisions.

4. Conferences and seminars

4.1. *Entrepreneurs' rights in antitrust proceeding*

A conference held on 23 June 2012 was co-organized by CARS and the Institute of Law Studies of the Polish Academy of Sciences and financed from the Foundation for Polish Science programme Pomost/Powroty/2010-1/1/NQC.

The conference focused on the discussion of entrepreneurs' rights in national and European antitrust proceedings. Participants debated over such problems as: legal character of antitrust proceedings; applying the European Convention on Human Rights in antitrust cases; particular rights and guarantees for entrepreneurs that are a

'party' to antitrust proceedings (access to the file, right to fair hearing, etc.); juridical control of decisions issued by competition authorities as a tool for the formulation of standards for the activities of the competition bodies concerned etc.

A set of articles based on the specific papers presented during the conference were published in YARS 2012, vol. 5(6) [see point 3.1. above].

4.2. Safety/security and effectiveness of airports

A seminar co-organized by CARS and the State Enterprise 'Polish Airports' (PPL) was held on 24 May 2012. It was a platform for the presentation of the results of a major research project entitled 'Airport services in the European Union and Poland – selected problems'. These results were published in a book (under the same title) included in the CARS Publishing Series, Antitrust and Regulatory Monographs and Textbooks.

Papers were delivered by researchers from the Faculty of Management, University of Warsaw as well as by Professor Anna Fornalczyk (Technical University of Lodz), Krzysztof Banaszek (President of Polish Air Navigation Services Agency) and Filip Czernicki (PPL). Speakers focused on safety of air traffic, personal control at airports as well as building a business strategy for airports. The benchmarking of selected airports located in the EU was also presented.

4.3. Juridical control model applicable to antitrust and regulatory cases

A conference organized by CARS on 4 July 2012 gathered academics and practitioners interested in the problems surrounding juridical control of decisions issued by the Polish Competition Authority (President of the Office of Competition and Consumer Protection) and other regulatory authorities. Panelists participating in the debate included: Professor Zbigniew Kmiecik (judge of the Supreme Administrative Court), Professor Stanisław Piątek (Chair of Legal Problems of Administration and Management, Faculty of Management, University of Warsaw), Professor Tadeusz Skoczny (CARS), Professor Karol Weitz (member of the civil law codification commission) and Professor Andrzej Wróbel (judge of the Constitutional Tribunal).

Participants discussed problems such as: constitutional and European Convention-based requirements for juridical control of administrative proceedings; full and specialized jurisdiction of courts in cases related to the control of administrative proceedings in competition and regulatory cases in the current model; juridical control of proceeding before the European Commission; juridical control of proceedings in antitrust and regulatory cases from the perspective of administrative courts and legislation.

5. Consulting

In May 2012, CARS presented its expert opinion on the draft amendment to the current Polish Competition Act prepared by the Polish Competition Authority (President of the Office of Competition and Consumer Protection). The opinion was

jointly written by a Working Group, founded by CARS, consisting of academics and practitioners active in this field. The opinion extended beyond merely commenting on the amendments proposed by the Competition Authority. Contained therein were also alternative ideas for potentially more desirable legislative solutions. The full paper is available on the CARS website (http://www.cars.wz.uw.edu.pl/tresc/doradztwo/06/Opinia_GR_CARS-fin.pdf) and became the starting point for a wider discussion on the proposed draft that continued in iKAR (internet Quarterly on Antitrust and Regulation).

In September 2012, CARS submitted also to the European Commission a Questionnaire providing its comments on the application of a General Block Exemption Regulation ('GBER') exempting state aid programmers/projects from the mandatory notification duty set in Article 108(3) TFEU. The submitted comments were part of the 2013 GBER review. The opinion prepared by the CARS Working Group chaired by Dr. Łukasz Grzejdziak (Faculty of Law and Administration, University of Lodz) is available on the CARS website (http://www.cars.wz.uw.edu.pl/tresc/doradztwo/07/gber_questionnaire_pl_CARS_final.pdf).

Dr. Agata Jurkowska-Gomułka
CARS Scientific Secretary

Warszawa, August 2013

B I B L I O G R A P H Y 2 0 1 2

POLAND*

Books (2012)

- Błachucki M., *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców* [System of antitrust proceeding in merger cases], UOKiK, Warszawa 2012.
- Bogdanowicz P., *Interes publiczny w prawie energetycznym Unii Europejskiej* [Public interest in EU energy law], C.H. BECK, Warszawa 2012.
- Czarnecka M., Oglódek T., *Prawo energetyczne. Komentarz* [Energy Law. Commentary], C.H. BECK, Warszawa 2012.
- Dzierżanowski W., *Ochrona konkurencji w prawie zamówień publicznych* [Protection of competition in public procurement law], LEX a Wolters Kluwer business, Warszawa 2012.
- Fornalczyk A., *Biznes a ochrona konkurencji* [Business and competition protection], OFICYNA a Wolters Kluwer bussiness, Warszawa 2012.
- Giedrewicz-Niwińska A., Piszcz A. (eds), *System ochrony prawnej konkurencji: zagadnienia wybrane* [System of legal protection of competition: selected issues], Wyd. Adam Marszałek, Toruń 2012.
- Grossmann T., Knopkiewicz W., Sebzda-Załużka J., Szydło M., Wilczewski J., *Ustawa o wspieraniu rozwoju usług i sieci telekomunikacyjnych. Komentarz* [Act on supporting a development of telecommunications services and networks], C.H. BECK, Warszawa 2012.
- Gorlewski B., *Kolej dużych prędkości. Uwarunkowania ekonomiczne* [High speed rail. Economic conditions], Oficyna Wydawnicza SGH, Warszawa 2012.
- Hoszman A., *Wpływ regulacji na sektor pasażerskiego transportu lotniczego* [Impact of regulation on air paasenger transport], Oficyna Wydawnicza SGH, Warszawa 2012.
- Jurczyk Z., *Kartele w polityce konkurencji Unii Europejskiej* [Cartels in EU competition policy], C.H. BECK, Warszawa 2012.
- Kohutek K., *Praktyki wykluczające przedsiębiorstw dominujących. Prawidłowość i stosowalność reguł prawa konkurencji* [Exclusionary practices of dominant undertakings. Correctness and applicability of competition law], LEX a Wolters Kluwer business, Warszawa 2012.
- Kowalik-Bańczyk K., *Prawo do obrony w unijnych postępowaniach antymonopolowych. W kierunku unifikacji standardów proceduralnych w Unii Europejskiej* [Right to defence in EU antitrust proceedings. Towards unification of procedural standards in the EU], LEX a Wolters Kluwer business, Warszawa 2012.
- Krzykowski M., *Zasada dostępu stron trzecich w prawie energetycznym Unii Europejskiej i Polski* [Principle of third party access in EU and Polish energy law], Difin, Warszawa 2012.
- Małowski M., Wieczorek A., Sosnowska H., *Konkurencja i kooperacja. Teoria gier w ekonomii i naukach społecznych* [Competition and cooperation. Game theory in economics and social sciences], Wydawnictwo Naukowe PWN, Warszawa 2012.

- Miąsik D., *Stosunek prawa ochrony konkurencji do prawa własności intelektualnej [Relationship between competition law and intellectual property law]*, LEX a Wolters Kluwer business, Warszawa 2012.
- Nowak B., *Gas market liberalization and energy security. Legal and institutional aspects*, LEX a Wolters Kluwer business, Warszawa 2012.
- Pach-Gurgul A., *Jednolity rynek energii elektrycznej w Unii Europejskiej w kontekście bezpieczeństwa energetycznego [Single market for energy in the EU in the context of energy security]*, Difin, Warszawa 2012.
- Pijet-Migoń E., *Zmiany rynku lotniczych przewozów pasażerskich w Polsce po akcesji do Unii Europejskiej [Changes in market of air passenger transport in Poland after EU accession]*, Instytut Geografii i Rozwoju Regionalnego Uniwersytetu Wrocławskiego, Wrocław 2012.
- Przybylska M., *Pozycja ustrojowa i funkcje organów regulacyjnych [Position in institutional system and functions of regulatory authorities]*, MADO, Toruń 2012.
- Sieradzka M., *Pozew grupowy jako instrument prywatnoprawnej ochrony interes konsumentów z tytułu naruszenia reguł konkurencji [Collective redress as a tool for private protection for consumers' interests in antitrust cases]*, Warszawa 2012.
- Skoczny T., *Zgody szczególne w prawie kontroli koncentracji [Special clearances in the law on merger control]*, Wyd. Naukowe WZ, Warszawa 2012.
- Sylwestrzak D., *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów [Proceeding before the President of Office for Competition and Consumer Protection]*, LexisNexis, Warszawa 2012.
- Szwaja J. (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz [Combating Unfair Competition Act. Commentary]*, Warszawa 2012.
- Wojtkowska-Łodej G., Michalski D., Hawranek P., *Zmiany uwarunkowań funkcjonowania przedsiębiorstw na rynku energii elektrycznej w Unii Europejskiej [Changes of conditions for functioning of enterprises on energy market in the EU]*, Oficyna Wydawnicza SGH, Warszawa 2012.

Chapters in books (2012)

- Brzezińska-Rawa A., 'O granicach interwencji państwa w gospodarkę wyznaczanych przez normy unijnego prawa konkurencji' ['On limits of state intervention in economy indicated by norms of EU competition law'] [in:] Brzezińska-Rawa A., Nowicki H. (ed.), *Państwo a gospodarka [State and economy]*, Toruń 2012.
- Jurkowska-Gomułka A., 'Odpowiedzialność prawna menadżerów za antykonkurencyjne praktyki przedsiębiorców' ['Criminal liability of managers for anticompetitive practices of undertakings'] [in:] *Księga jubileuszowa z okazji 40-lecia Wydziału Zarządzania UW [Jubilee Book of the Faculty of Management, University of Warsaw]*, Wyd. Naukowe Wydziału Zarządzania UW, Warszawa 2012.
- Mamrot M., 'Decyzja zakazująca dokonania koncentracji' ['Decision prohibiting concentration'] [in:] Brzezińska-Rawa A., Nowicki H. (eds), *Państwo a gospodarka [State and economy]*, Toruń 2012.
- Materna G., 'Pozyskiwanie dowodów w sprawach antymonopolowych – granice uprawnień Prezesa UOKiK' ['Collecting evidence in antitrust cases – limits of competence of the President of Office of Competition and Consumer Protection'] [in:] Brzezińska-Rawa A., Nowicki H. (eds), *Państwo a gospodarka [State and economy]*, Toruń 2012.

- Targański B., 'Prawo ochrony konkurencji jako źródło ograniczeń w wykonywaniu praw własności intelektualnej' ['Competition law as a source of restraints in executing IPRs'] [in:] Mokrysz-Olszyńska A., Targański B., *Uwarunkowania prawne marketingu w społeczeństwie informacyjnym* [Legal conditions for marketing in information society], Oficyna Wydawnicza SGH, Warszawa 2012.
- Wiśniewski A., 'Pojęcie nieuczciwej ceny w prawie antymonopolowym' ['Concept of unfair price in antitrust law'] [in:] Brzezińska-Rawa A., Nowicki H. (eds), *Państwo a gospodarka* [State and economy], Toruń 2012.

Articles (2012)

- Bagdziński T., 'Differentiation between entrepreneurs (on the basis of the public task criterion) and its legal consequences. Case comment to the judgment of the Court of Appeals in Warsaw of 21 April 2011 *UOKiK President v Polish Football Association and Canal + Sp. z.o.o.* (Ref no. VI ACa 996/10)' (2012) 5(7) *YARS*.
- Baran M., Doniec A., 'EU Courts' Jurisdiction over and Review of Decisions Imposing Fines in EU Competition Law' (2012) 5(6) *YARS*.
- Bator T., 'Nowe podejście do regulacji MTR w Unii Europejskiej – wybrane zagadnienia' ['New approach to MTR regulation in European Union – selected problems'] (2012) 5(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Bernat M., 'Środki tymczasowe w prawie pomocy publicznej' (cz. I i II) ['Interim remedies in state aid law' (part I and II)] (2012) 7 *Europejski Przegląd Sądowy*; (2012) 8 *Europejski Przegląd Sądowy*.
- Bernatt M., 'Can the Right To Be Heard Be Respected without Access to Information about the Proceedings? Deficiencies of National Competition Procedure' (2012) 5(6) *YARS*.
- Bernatt M., 'Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku (na tle art. 6 EKPC)' ['The right to fair legal proceedings in the cases involving competition protection and market regulation (referring to Article 6 of the European Convention on Human Rights)'] (2012) 1 *Państwo i Prawo*.
- Bernatt M., 'Ustawa o ochronie konkurencji i konsumentów – potrzeba nowelizacji. Perspektywa sprawiedliwości proceduralnej' ['Need for revision of the Act on competition and consumer protection. A perspective of procedural fairness'] (2012) 1(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Będkowski-Koziół M., 'Kilka uwag o dogmatyce prawa energetycznego' ['Some remarks on the dogmatic jurisprudence of energy law'] (2012) 4 *Przegląd Ustawodawstwa Gospodarczego*.
- Błachnio-Parzych A., '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' (2012) 5(6) *YARS*.
- Błachucki M., 'Umiejscowienie procesów kontroli koncentracji przedsiębiorców' ['Internationalization of processes of merger control'] (2012) 1 *Ekonomia i Prawo*.
- Błachucki M., Józwiak S., 'Exchange of Information and Evidence between Competition Authorities and Entrepreneurs' Rights' (2012) 5(6) *YARS*.
- Bolecki A., 'Porozumienia zakazane ze względu na cel lub skutek – aktualne tendencje w orzecznictwie UE' ['Agreements by object or effect – current trends in EU case law'] (2012) 3(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.

- Bolecki A., 'Porozumienia zakazane ze względu na cel lub skutek w aktualnej polskiej praktyce orzeczniczej' ['Restrictions of competition by object or by effect in recent Polish case law'] (2012) 1(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Bolecki A., 'Ustalanie cen odsprzedaży. Głosa do wyroku Sądu Najwyższego z 23.11.2011 r. w sprawie III SK 21/11 *Röben Ceramika Budowlana*' ['Resale Price Maintenance – Time for Changes. Case comment to the judgment of the [Polish] Supreme Court of 23 November 2011 in case III SK 21/11 *Röben Ceramika Budowlana*'] (2012) 3(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Bożekowska-Zawisza K., 'Legislative Developments in Rail Transport in 2011' (2012) 5(7) *YARS*.
- Burdziak A., Grzybkowski M. J., Więcek D., 'Nowe możliwości liberalizacji sektora telekomunikacyjnego w aspekcie technik kognitywnych' ['New possibilities of liberalization of telecommunication sector in the context of cognitive technologies'] (2012) 5(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Chołodecki M., 'The model of judicial review of decisions issued by President of Electronic Communications Office' ['Model kontroli sądowej decyzji Prezesa Urzędu Komunikacji Elektronicznej'] (2012) 6(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Ciupak K., 'Niech się stanie dywersyfikacja. Decyzja Komisji Europejskiej z 5.10.2011 r. o niewnoszeniu zastrzeżeń do projektu pomocy publicznej na budowę gazoportu w Świnoujściu' ['Let there be diversification. Decision of the European Commission of 5 October 2011 clearing state aid for the construction of liquefied natural gas terminal in Świnoujście'] (2012) 1(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Ciupak K., 'Występowanie i reguły zgodności pomocy publicznej w publicznym finansowaniu infrastruktury portów morskich' ['State aid or not? Legal dilemmas connected with the assessment of public financing of sea ports infrastructure'] (2012) 2(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Czernicki F., 'Legislative Developments in the Aviation Sector in 2011' (2012) 5(7) *YARS*.
- Czyżak M., 'Kara pieniężna jako instrument regulacji rynku telekomunikacyjnego' ['Financial penalty as instrument of regulation of telecommunications market'] (2012) 6(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Danek M., 'Korzyści efektywnościowe w kontroli koncentracji przedsiębiorstw w systemach ochrony konkurencji Unii Europejskiej i Stanów Zjednoczonych Ameryki – porównanie prawno-ekonomiczne' ['Efficiencies in control of mergers between undertakings in the competition law systems of the European Union and the United States – a legal and economic comparison'] (2012) 3 *ZNUJ*.
- Elżanowski F., 'Legislative and Jurisprudential Developments in the Energy Sector in 2011' (2012) 5(7) *YARS*.
- Fidala J., 'Narzucenie minimalnych i sztywnych cen odsprzedaży z punktu widzenia celu oraz skutków rynkowych' ['Imposing minimum and fixed resale prices from the perspective of its object and market effects'] (2012) 3(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Fronczak E., 'Rola sądów krajowych w postępowaniu z zakresu pomocy państwa' ['The role of national courts in EU state aid proceedings'] (2012) 8 *Europejski Przegląd Sądowy*.
- Długosz T., 'Regulacja publicznoprawna cen energii elektrycznej i gazu w świetle orzeczenia TS w sprawie C-265/08 *Federutility*' ['Public law regulation of prices for electricity and gas in the light of the judgment of the Court of Justice in case C-265/08 *Federutility*'] (2012) 9 *Europejski Przegląd Sądowy*.

- Dyl K., 'Regulacja telekomunikacji – decyzje Prezesa UKE w porozumieniu z innym organem. Głosa do wyroku Sądu Najwyższego z dnia 24.01.2012 r., III SK 23/11' ['Telecommunications regulation – decisions of President of UKE agreed with other body'] (2012) 6(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Gac M., 'Programy zgodności z prawem konkurencji – efektywny mechanizm w tworzeniu europejskiej kultury compliance?' ['Competition law compliance programmes – an effective mechanism in creating European compliance culture?'] (2012) 2(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Gałkowski Vignolo Laureti P., 'Usługi świadczone w ogólnym interesie i prawo antymonopolowe, włoskie i polskie rynki lokalne' ['Services of general interest and antitrust law, Italian and Polish local markets'] (2012) 1 *Przegląd Prawa Publicznego*.
- Gołąb Ł., 'Kilka uwag o potrzebie zmian w systemie sądowej kontroli decyzji i postanowień Prezesa Urzędu Transportu Kolejowego' ['A few remarks on a necessity of changes in a system of juridical control of decision of the President of Rail Transport Office'] (2012) 3 *Kwartalnik Prawa Publicznego*.
- Gołąb Ł., 'Umowa jako instrument realizacji prawa dostępu do infrastruktury kolejowej' ['Agreement as an instrument for enforcement of the right to get access to railway infrastructure'] (2012) 2 *Przegląd Ustawodawstwa Gospodarczego*.
- Górska M. A., 'Concurrence of wills – a necessary ingredient of an agreement restricting competition. Case comment to the judgment of Court of Competition and Consumer Protection of 8 February 2011 – ZST Gamrat S.A. v President of the Office of Competition and Consumer Protection (Ref. No. XVII Ama 16/10)' (2012) 5(6) *YARS*.
- Hoff W., 'Book review: Stanisław Piątek, *Sieci szerokopasmowe w polityce telekomunikacyjnej*' [*Broadband Networks in Telecommunications Policy*], Wydawnictwo Naukowe Wydziału Zarządzania, Warszawa 2011' (2012) 5(7) *YARS*.
- Jurkowska-Gomułka A., 'Key Legislative and Jurisprudential Developments of Polish Antitrust Law in 2011' (2012) 5(7) *YARS*.
- Jurkowska-Gomułka A., 'Między efektywnością walki z kartelami a efektywnością dochodzenia roszczeń z tytułu naruszenia art. 101 ust. 1 TFUE – głosa do wyroku TS z 14.06.2011 r. w sprawie C-360/09 Pflaiderer AG v. Bundeskartellamt' ['Between efficiency of fight against cartels and efficiency of pursuing claims for infringement of Art. 101(1) TFEU – commentary on CoJ judgment of 14 June 2011 in case C-360/09 Pflaiderer AG v. Bundeskartellamt'] (2012) 7 *Europejski Przegląd Sądowy*.
- Jurkowska-Gomułka A., 'Stosowanie zakazu porozumień ograniczających konkurencję zorientowane na ocenę skutków ekonomicznych? Uwagi na tle praktyki decyzyjnej Prezesa Urzędu Ochrony Konkurencji i Konsumentów w odniesieniu do ustawy o ochronie konkurencji i konsumentów z 2007 roku' ['Effects-oriented application of the prohibition of competition restricting agreements? Some comments on the decisions issued by the Polish competition authority on the basis of the Competition Act of 2007'] (2012) 1(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Karski L., 'Podsystem wsparcia odnawialnych źródeł ciepła w ramach systemów ciepłowniczych, ze szczególnym uwzględnieniem instrumentów pośrednich – aspekty prawne' ['The sub-system of support for renewable heat sources in the district heating systems, with particular focus on indirect instruments – legal aspects'] (2012) 3 *Przegląd Ustawodawstwa Gospodarczego*.
- Karski L., 'Podstawowe instrumenty wsparcia odnawialnych źródeł ciepła w ramach sieci ciepłowniczych – aspekty prawne' ['The main instruments to support renewable heat

- sources in the district heating networks – legal aspects’] (2012) 8 *Przegląd Ustawodawstwa Gospodarczego*.
- Kawka I., ‘Commission guidelines on market analysis and the assessment of significant market power do not impose obligations on individuals. Case comment to the preliminary ruling of the Court of Justice of the European Union of 12 May 2011 *Polska Telefonia Cyfrowa sp. z o.o.(PTC) v Prezes Urzędu Komunikacji Elektronicznej*’ (2012) 5(7) *YARS*.
- Kiljański K., Bakhtieva D., ‘Universal Service Obligation and Loyalty Effects: An Agent-Based Modelling Approach’ (2012) 5(7) *YARS*.
- Kawka I., ‘Rights of an Undertaking in Proceedings Regarding Commitment Decisions under Article 9 of Regulation No. 1/2003’ (2012) 5(6) *YARS*.
- Klehr K., ‘Polityka rabatowa przedsiębiorców dominujących w świetle orzecznictwa z zakresu prawa konkurencji – przegląd orzecznictwa [‘Rebate policy of the dominant entrepreneurs in the light of judicial decisions in the area of competition law – case law review’] (2012) 4 *Glosa*.
- Kohutek K., ‘Aprobata testu efektywności i odrzucenie warunku niezbędności dla oceny praktyki nożyc cenowych w świetle art. 102 TFUE – glosa częściowo krytyczna do wyroku Trybunału Sprawiedliwości z 17.02.2011 r. w sprawie C-52/09 *Konkurrensverket v. TeliaSonera*’ [‘Approval of efficiency test and rejection of the indispensability condition for the purpose of legal assessment of margin squeeze under Art. 102 TFEU – partially critical commentary on Court of Justice judgment of 17 February 2011 in case C-52/09 *Konkurrensverket v TeliaSonera*’] (2012) 4 *Glosa*.
- Kohutek K., ‘Cena nieobniżona mimo pogorszenia parametrów jakościowych usługi ceną nieuczciwą w rozumieniu art. 9 ust. 2 pkt 1 uokik Glosa do wyroku Sądu Najwyższego z 13 lipca 2012 r., III SK 44/11 *Autostrada Małopolska*’ [‘A steady price despite the fall in service quality as an unfair price under Article 9(2(1)) of the Competition Act. Case comment to the judgment of the Supreme Court of 13 July 2012, III SK 44/11 *Autostrada Małopolska*’] (2012) 4(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Kociubiński J., ‘Kryterium korzyści w kontroli pomocy publicznej w prawie UE’ [‘Advantage criterion in state aid control in EU law’] (2012) 12 *Europejski Przegląd Sądowy*.
- Kociubiński J., ‘Prywatyzacja zadań władzy publicznej w świetle unijnego prawa konkurencji’ [‘Privatisation of public service tasks in the light of EU competition law’] (2012) 9 *Przegląd Ustawodawstwa Gospodarczego*.
- Kociubiński J., ‘Szczególne kategorie przedsiębiorstw w europejskim prawie konkurencji’ [‘Special categories of undertakings in European competition law’] (2012) 5-6 *Palestra*.
- Kohutek K., ‘Pięciolecie stosowania zakazu nadużywania pozycji dominującej w świetle uokik z 2007: kształtowanie się wykładni kluczowych pojęć’ [‘Five years of the application of the prohibition of a dominant position abuse in the light of the Competition Act 2007: the evolution of the interpretation of its key concepts’] (2012) 1(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Kolasiński M.K., ‘Dopuszczalność ograniczania tajemnicy adwokacko-radcowskiej w imię zapewnienia skuteczności prawa konkurencji Unii Europejskiej – glosa do wyroku Trybunału Sprawiedliwości z 14.09.2010 r. w sprawie C-550/07 P *Akzo Nobel Chemicals Ltd i Akros Chemicals Ltd v. Komisja Europejska*’ [‘Permissibility of limiting the scope of legal professional privilege in order to ensure the efficiency of the EU competition law – commentary on CoJ judgment of 14 September 2010 in case C-550/07 P *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*’] (2012) 2 *Glosa*.

- Kolasiński M.K., 'Polityka kontroli koncentracji w Polsce – stan obecny i możliwe zmiany' ['Polish merger control policy – current state of play and possible changes'] (2012) 1(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Kolasiński M.K., 'Maciej Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [Procedural fairness in the proceedings before the competition authority], Wydawnictwo Naukowe Wydziału Zarządzania, Warszawa 2011' (2012) 5(7) *YARS*.
- Koźnierzak L., 'Stosowanie kar pieniężnych z tytułu naruszenia ustawy antymonopolowej – praktyka i postulaty de lege ferenda' ['Application of fines for Competition Act infringements – practice and de lege ferenda proposals'] (2012) 1 *Kwartalnik Prawa Publicznego*.
- Koralewski P., 'Usługi oparte na przetwarzaniu danych geograficznych' ['Services based on processing geographical data'] (2012) 6(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Korn K., 'Określanie rynku właściwego w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej w latach 1997–2010' ['Relevant market definition in case law of the Court of Justice of the European Union in 1997–2010'] (2012) 2 *ZNUJ*.
- Kosmala K., 'Legislative and Jurisprudential Developments in Telecommunications Sector in 2011' (2012) 5(7) *YARS*.
- Kostecka-Jurczyk D., 'Nożyce kosztowo-cenowe jako nadużycie pozycji dominującej. Glosa do wyroku TSUE z 17.02.2011 w sprawie C-52/09 *Konkurrensverket przeciwko TeliaSonera Sverige AB*' ['Margin squeeze as abuse of dominant position. Case comment to the judgment of the Court (First Chamber) of 17 February 2011, *Konkurrensverket v TeliaSonera Sverige AB*'] (2012) 5(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Kowalik-Bańczyk K., 'Jednolite stosowanie unijnego prawa konkurencji jako ograniczenie dla autonomii proceduralnej krajowych organów ochrony konkurencji – glosa do wyroku TS z 3.05.2011 r. w sprawie C-375/09 *Prezes UOKiK v. Tele 2 (obecnie Netia)*' ['Uniform application of EU competition law as restriction of procedural autonomy of national competition protection authorities – commentary about CoJ judgment of 3 May 2011 in case C-375/09 *Prezes UOKiK v Tele 2 (now Netia)*'] (2012) 2 *Europejski Przegląd Sądowy*.
- Kowalik-Bańczyk K., 'Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings' (2012) 5(6) *YARS*.
- Kozak M., 'Odmowa statusu autoryzowanego dystrybutora w systemie dystrybucji selektywnej – glosa do wyroku TS z 14.06.2012 r. w sprawie C-158/11 *Auto 24 SARL v. Jaguar Land Rover France SAS*' ['Refusal of a status of authorized distributor in a selective distribution system' – commentary about CoJ judgment of 14 June 2012 in case C-158/11 *Auto 24 SARL v. Jaguar Land Rover France SAS*'] (2012) 12 *Europejski Przegląd Sądowy*.
- Kozak M., 'Umowa agencyjna w świetle artykułu 101 TFUE. Jak gonić króliczka, aby go nie złapać' ['Agency in the light of Article 101 TFEU. How to chase a rabbit without actually catching it?'] (2012) 4(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Krajewska E., 'Settlement w świetle doświadczeń europejskich – w poszukiwaniu najlepszych rozwiązań' ['Settlement in the light of European experiences. In search of optimal solutions'] (2012) 4(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Król-Bogomiłska M., 'Program łagodzenia kar (leniency) w polskim prawie antymonopolowym – po pięciu latach obowiązywania ustawy' ['Leniency programme in the Polish

- anti-monopoly legislation – after five years of application of the law’] (2012) 4 *Europejski Przegląd Sądowy*.
- Król-Bogomilska M., ‘Standards of Entrepreneur Rights in Competition Proceedings a Matter of Administrative or Criminal Law?’ (2012) 5(6) *YARS*.
- Kwiatkowska E.M., ‘Ilościowe i jakościowe metody oceny konkurencyjności rynków telekomunikacyjnych w postępowaniach antymonopolowych i regulacyjnych’ [‘Competitiveness of the telecommunication markets – quantitative and qualitative evaluation methods in antitrust and sector specific regulations proceedings’] (2012) 6(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Kuik K., ‘Book review: Ewelina D. Sage, *European Audiovisual Sector – Where business meets society’s needs*, Wydawnictwo Naukowe Wydziału Zarządzania, Warszawa 2011’ (2012) 5(7) *YARS*.
- Kuik K., Mościbroda A., ‘2010 and 2011 EU Competition Law and Sector-specific Regulatory Case Law Developments with a Nexus to Poland’ (2012) 5(6) *YARS*.
- Lewandowski M., ‘Sankcja nieważności w ustawie antymonopolowej – problematyka kompetencji organów w przedmiocie ustalania naruszenia zakazów antymonopolowych’ [‘Invalidity sanction in antitrust law – analyzing competences of institutions in verifying violations of antitrust ban’] (2012) 2 *Przegląd Prawa Handlowego*.
- Marszałek M., ‘Brak uniijnego jednolitego modelu wsparcia wytwórców energii elektrycznej z odnawialnych źródeł lub kogeneracji – normatywne zakłócenie konkurencji’ [‘The Lack of a Uniform UE Model of Support for Producers of Electricity from Renewable Sources or Cogeneration – How Legal Acts May Disrupt the Competition’] (2012) 12 *Europejski Przegląd Sądowy*.
- Materna G., ‘Granice zastosowania zakazu nadużywania pozycji dominującej do działalności organizatorskiej samorządu terytorialnego – przegląd orzecznictwa Sądu Najwyższego’ [‘Limits of application of the rules on the abuse of dominant position to the organisational activities of local government units – review of Supreme Court case law’] (2012) 2 *Glosa*.
- Materna G., ‘Prowadzenie postępowań antymonopolowych w sprawach antykonkurencyjnych porozumień dystrybucyjnych przeciwko ich organizatorom’ [‘Conducting antimonopoly proceedings in the cases of distribution agreements solely against organizers of distribution systems’] (2012) 5 *Przegląd Prawa Handlowego*.
- Materna G., ‘Sądowy nadzór nad wykonywaniem kontroli (przeszukania) u przedsiębiorcy w toku postępowania przed Prezesem UOKiK’ [‘Juridical supervision on control (search) execution in entrepreneur’s seat during the proceeding before President of Consumer and Competition Protection Office’] (2012) 7 *Przegląd Ustawodawstwa Gospodarczego*.
- Maziarz A., ‘Eksterytorialne stosowanie uniijnego prawa konkurencji’ [‘Extraterritorial application of EU competition law’] (2012) 5 *Państwo i Prawo*.
- Maziarz A., ‘Ewolucja ustalania kolektywnej pozycji dominującej w prawie UE’ [‘Evolution of setting a collective dominant position in EU competition law’] (2012) 5. *Przegląd Ustawodawstwa Gospodarczego*.
- Mednis A., ‘Zmiana stawek opłat z tytułu dostępu telekomunikacyjnego – wybrane zagadnienia’ [‘Change of rates for telecommunications access – selected problems’] (2012) 6(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Miąsik D., ‘Ustawa o ochronie konkurencji i konsumentów a prawo własności intelektualnej – czy art. 2 ustawy jest w ogóle potrzebny?’ [‘Is a normative regulation of the

- IP/antitrust interface really needed?'] (2012) 1(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Nesterowicz M.A., 'Nowa brazylijska ustawa o systemie ochrony konkurencji' ['New Brazilian Act on Competition Protection System'] (2012) 4(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Nowak B., 'Shortcomings of the Energy Market Liberalization in the European Union' (2012) 4 *European Public Law*.
- Olender-Skorek M., 'To Regulate Or Not to Regulate? – Economic Approach to Indefeasible Right of Use (IRU)' (2012) 5(7) *YARS*.
- Piątek S., 'Nowa strategia regulacyjna na rynku telekomunikacyjnym' ['New regulatory strategy for telecommunications market'] (2012) 6(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Piątek S., 'Usługi telekomunikacyjne o podwyższonej opłacie' ['Premium Rate Services'] (2012) 5(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Piszcz A., 'Kilka uwag do projektu założeń ustawy o zmianie ustawy o ochronie konkurencji i konsumentów' ['A few remarks on the draft assumptions for an Act amending the Act on competition and consumer protection'] (2012) 2(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Piszcz A., 'Uwagi do Wyjaśnień w sprawie wydawania decyzji zobowiązującej w sprawach praktyk ograniczających konkurencję oraz praktyk naruszających zbiorowe interesy konsumentów' ['Remarks to the Guidelines for issuance of commitment decisions in cases of competition-restricting practices and practices infringing collective consumer interests'] (2012) 4(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Piszcz A., 'Zmiany w polskim prawie antymonopolowym w latach 2010-2011' (część 1 i 2) ['Review of changes to Polish competition law in 2010-2011' (part 1 and 2)] (2012) 1(1) and 2(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Piszcz A., 'Przegląd polskiego orzecznictwa antymonopolowego za lata 2010-2011' (część 1 i 2) ['Review of Polish antitrust case law from 2010-2011' (part 1 and 2)] (2012) 1(1) and 1(3) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Piszcz A., 'Still-unpopular Sanctions: Developments in Private Antitrust Enforcement in Poland After the 2008 White Paper' (2012) 5(7) *YARS*.
- Przybojewska I., 'Poszukiwanie i wydobywanie gazu niekonwencjonalnego w Polsce' ['The exploration and exploitation of unconventional gas in Poland'] (2012) 7 *Europejski Przegląd Sądowy*.
- Radomyski M., 'The *EMPiK* and *Merlin* concentration prohibition: Would the European Commission reach a similar verdict? Case comment to the decisions of the President of the Office of Competition and Consumer Protection of 4 November 2010 *Polska Telefonii Cyfrowa Sp. z o.o.* (DOK-9/2010) and of 24 February 2011 *Polkomtel SA* (DOK-1/2011)' (2012) 5(6) *YARS*.
- Rogalski M., 'Zmiany w zakresie umów o świadczenie usług telekomunikacyjnych' ['Changes in the Telecommunications Law concerning agreements on the provision of telecommunications services'] (2012) 5(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Rosiak P., 'The *ne bis in idem* Principle in Proceedings Related to Anti-Competitive Agreements in EU Competition Law' (2012) 5(6) *YARS*.
- Różyk-Rozbicka I., 'Możliwości kwestionowania decyzji regulacyjnych Prezesa UKE na gruncie prawa ochrony konkurencji' ['The opportunities to challenge regulatory decisions

- of the President of the Office of Electronic Communications pursuant to the provisions of competition law'] (2012) 5(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Rudolf S., 'Recenzja książki B. Borkowskiej *Regulacja monopolu naturalnego w teorii i praktyce*' ['Review of a book by B. Borkowska *Regulation of natural monopoly in theory and practice*'] (2012) 1 *Ekonomista*.
- Rutkiewicz K., 'System kontroli i egzekwowania prawa pomocy publicznej w Unii Europejskiej – kompetencje Komisji Europejskiej i jej współpraca z sądami państw członkowskich w latach 2000–2010' ['System of control and enforcement of state aid law in the EU – competences of the European Commission and its cooperation with courts in member States'] (2012) 2 *Ekonomia i Prawo*.
- Sage E.D., 'Book review: Katarzyna Chałubińska-Jentkiewicz, *Media audiowizualne. Konflikt regulacyjny w dobie cyfryzacji* [*Audiovisual Media: regulatory conflict in the digitalisation era*], Wolters Kluwer Polska – LEX, Warszawa 2011' (2012) 5(7) *YARS*.
- Sieradzka M., 'Dochodzenie roszczeń odszkodowawczych z tytułu naruszenia unijnego i krajowego prawa konkurencji' (część 1 i 2) ['Pursuing claims on the grounds of infringement of the EU and national competition law' (part I and II)] (2012) 1 *Przegląd Ustawodawstwa Gospodarczego*; (2012) 2 *Przegląd Ustawodawstwa Gospodarczego*.
- Sieradzka M., 'Instrumenty ochrony konsumentów w ustawie o ochronie konkurencji i konsumentów z 2007 r. – potrzeba zmian?' ['Consumer protection instruments in the Competition and Consumer Protection Act 2007 – the need for changes?'] (2012) 2(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Sieradzka M., 'Wykładnia pojęcia rażąco niskiej ceny w świetle orzecznictwa z zakresu zamówień publicznych – przegląd orzecznictwa' ['Interpretation of the term predatory pricing in the light of public procurement judicial decisions – case law review'] (2012) 1 *Glosa*.
- Skurzyński P., 'Nowe wytyczne Komisji w sprawie ograniczeń wertykalnych a pobieranie innych niż marża handlowa opłat za przyjęcie towaru do sprzedaży' ['New Commission's Guidelines on Vertical Restraints and charging fees other than the trade margins for accepting goods for sale'] (2012) 6 *Przegląd Prawa Handlowego*.
- Sroczyński J., 'Naruszenie zbiorowych interesów konsumentów: decyzja zobowiązująca (uwagi praktyczne i *de lege ferenda*)' [Violations of collective consumer interests: commitment decisions (practical remarks and *de lege ferenda* proposals)] (2012) 1(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Stankiewicz R., 'Między ochroną konkurencji a regulacją sektorową. Ustrojowe granice rozdzielania obszarów ingerencji państwa w gospodarce' ['Between competition protection and sector-specific regulation. Delimitation of areas of state intervention'] (2012) 1 *Ekonomia i Prawo*.
- Stankiewicz R., 'O konieczności zwiększenia partycypacji podmiotów trzecich w postępowaniu antymonopolowym' ['About the need to increase the participation of the third subjects in anti-monopoly proceedings'] (2012) 2(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Stankiewicz R., 'The Scope of Application of the Provisions of the Administrative Procedure Code in Competition Enforcement Proceedings' (2012) 5(6) *YARS*.
- Stawicki A., 'Competence of Common Courts in Poland in Competition Matters' (2012) 5(6) *YARS*.

- Stawicki A., 'Porozumienia zakazane ze względu na cel a porozumienia zakazane ze względu na skutek' ['Restrictions by "object" and restrictions by "effect" under Polish competition law: in search of delineation'] (2012) 1(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Stefanicki R., 'Zasada *ne bis in idem* w procesie wykonywania prawa konkurencji' ['*Ne bis in idem* principle in the competition law in action'] (2012) 8 *Przegląd Prawa Handlowego*.
- Syp Sz., 'Doktryna upadającej firmy' ['Failing firm doctrine'] (2012) 5 *Państwo i Prawo*.
- Syp Sz., 'O odpowiedzialności finansowej osób fizycznych w polskim prawie konkurencji – de lege lata i de lege ferenda' ['On the issue of financial liability of managers in the new Polish Competition Act'] (2012) 4(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Syp Sz., 'Postulowane zmiany w prawie kontroli koncentracji – uwagi na tle propozycji Prezesa Urzędu Ochrony Konkurencji i Konsumentów' ['The proposed changes in the merger control law – a few remarks on the proposal of the Office of Competition and Consumer Protection'] (2012) 2(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Szablewski A., 'Liberalizacja rynku a bezpieczeństwo dostaw gazu' ['Market liberalization and security of gas supplies'] (2012) 5–6 *Gospodarka Narodowa*.
- Szanciflo T., 'Stosowanie wzorca operatora publicznego do operatora niepublicznego a ochrona interesów konsumentów' ['The use of standard of publi operator to the non-public operator to protect the interests of the consumers'] (2012) 3 *Studia Prawnicze*.
- Szczodrowski J., 'Standard of Judicial Review of Merger Decisions Concerning Oligopolistic Markets' (2012) 5(6) *YARS*.
- Szot P., 'Microsoft – unijny standard uznawania odmowy udzielenia licencji za nadużycie pozycji dominującej – glosa do wyroku Sądu z 17.09.2007 r. w sprawie T-201/04 Microsoft v. Komisja WE' ['Microsoft – EU standard of recognizing refusal to grant license as abuse of dominant position – commentary on CFI judgment of 17 September 2007 in case T-201/04 Microsoft v Commission of the EC'] (2012) 3 *Europejski Przegląd Sądowy*.
- Szot P., Zięba A., 'Umowy dystrybucyjne w przemyśle samochodowym w nowym systemie wyłączeń grupowych' ['Distribution agreements in the motor vehicle industry in the new system of block exemptions'] (2012) 3(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Szwedziak I., 'Program Leniency w unijnym prawie ochrony konkurencji' ['Leniency Programme in the EU competition law'] (2012) 1 *Kwartalnik Prawa Publicznego*.
- Szwedziak I., 'Is the parallel competence set out in Regulation 1/2003 totally clear? Case comment to the preliminary ruling of the Court of Justice of 3 May 2011 *Tele 2 v President of Office of Competition and Consumer Protection* (Case C-375/09)' (2012) 5(7) *YARS*.
- Śliwa R., 'Separacja operatora telekomunikacyjnego jako narzędzie regulacji rynku. Przypadek sektora telekomunikacyjnego w Polsce' (2012) 1 *Ekonomia i Prawo*.
- Turno B., 'Model sądowej kontroli decyzji Prezesa Urzędu Ochrony Konkurencji i Konsumentów' ['The model of judicial control of decisions of the President of the Office of Competition and Consumer Protection'] (2012) 10 *Państwo i Prawo*.
- Turno B., 'Kategoria porozumień zakazanych ze względu na cel w unijnym oraz polskim prawie ochrony konkurencji' ['Category of agreements prohibited by object in EU and Polih competition law'] (2012) 2 *Kwartalnik Prawa Publicznego*.

- Turno B., Zawłocka-Turno A., 'Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?' (2012) 5(6) *YARS*.
- Walaszek-Pyziół A., 'ENTSO E – nowa forma instytucjonalnego współdziałania w celu stworzenia wspólnego rynku energii elektrycznej na obszarze Unii Europejskiej' ['ENTSO-E – a new form of institutional co-operation in order to create common electricity market in EU region'] (2012) 9 *Przegląd Ustawodawstwa Gospodarczego*.
- Wolski D., 'Wybrane zagadnienia z zakresu wydawania i realizacji decyzji udzielających warunkowej zgody na dokonanie koncentracji przedsiębiorców' ['Selected issues from the scope of issuing and fulfillment of decisions on conditional consent to concentration of entrepreneurs'] (2012) 2(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Zawisza-Bożekowska K., 'Czy wciąż potrzebne jest nam krajowe prawo konkurencji? Głosa do wyroku Trybunału Sprawiedliwości UE z dnia 14 lutego 2012 r. w sprawie C-17/10 *Toshiba Corporation i inni przeciwko Úřad pro ochranu hospodářské soutěže*' ['Do we still need national competition laws? Case comment to the judgment of the Court of Justice of 14 February 2012 C-17/10 *Toshiba v Úřad pro ochranu hospodářské soutěže*'] (2012) 1(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Zawłocka-Turno A., 'Zmowa przetargowa czy działanie zgodne z prawem? Problemy na styku prawa konkurencji i prawa zamówień publicznych' ['Bid rigging or action allowed by law? The interplay between competition law and public procurement law'] (2012) 4(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny*.
- Zielińska M., 'Legislative and Jurisprudential Developments in the Postal Sector in 2011' (2012) 5(7) *YARS*.
- Żurawik A., 'Klauzula interesu publicznego w prawie gospodarczym krajowym i unijnym' ['Public interest clauses in Polish and EU commercial law'] (2012) 12 *Europejski Przegląd Sądowy*.

CROATIA*

Chapters in books (2012)

- Cerovac M., 'Nadzor koncentracija poduzetnika: novine u hrvatskom zakonodavstvu' ['Merger control: novelties in Croatian law'], [in:] Pecotić Kaufman J. (ed.), *Pravo tržišnog natjecanja: novine u hrvatskom i europskom zakonodavstvu i praksi: zbornik radova* [*Competition Law: Novelties in Croatian and European Law and Practice: The Collected Papers*], Zagreb, Ekonomski fakultet, 2012.
- Liszt M., 'Ugovori o isključivoj distribuciji i poduzetnici s tržišnim udjelom većim od 30 %' ['Exclusive distribution agreements and undertakings with more than 30% market share'] [in:] Pecotić Kaufman J. (ed.), *Pravo tržišnog natjecanja: novine u hrvatskom i europskom zakonodavstvu i praksi: zbornik radova* [*Competition Law: Novelties in Croatian and European Law and Practice: The Collected Papers*], Zagreb, Ekonomski fakultet, 2012.

* Compiled by Kristijan Poljanec, Jasminka Pecotić Kaufman, University of Zagreb, Faculty of Economics and Business, Department of Law.

- Marušić Kontent G., 'Kriteriji za izricanje kazneno-upravnih mjera: novine u hrvatskom zakonodavstvu' ['Criteria for pronouncing administrative fines: novelties in Croatian law'], [in:] Pecotić Kaufman J. (ed.), *Pravo tržišnog natjecanja: novine u hrvatskom i europskom zakonodavstvu i praksi: zbornik radova* [Competition Law: Novelties in Croatian and European Law and Practice: The Collected Papers], Zagreb, Ekonomski fakultet, 2012.
- Patrlj V., 'Vertikalni sporazumi: novine u hrvatskom zakonodavstvu' ['Vertical agreements: novelties in Croatian law'], [in:] Pecotić Kaufman J. (ed.), *Pravo tržišnog natjecanja: novine u hrvatskom i europskom zakonodavstvu i praksi: zbornik radova* [Competition Law: Novelties in Croatian and European Law and Practice: The Collected Papers], Zagreb, Ekonomski fakultet, 2012.
- Pecotić Kaufman J., 'Kartelni sporazumi i usklađeno djelovanje: kad je paralelno ponašanje poduzetnika nezakonito?' ['Cartel agreements and concerted practice: when is parallel behaviour of undertakings illegal?'] [in:] Pecotić Kaufman J. (ed.), *Pravo tržišnog natjecanja: novine u hrvatskom i europskom zakonodavstvu i praksi: zbornik radova* [Competition Law: Novelties in Croatian and European Law and Practice: The Collected Papers], Zagreb, Ekonomski fakultet, 2012.
- Pecotić Kaufman J., 'Nadzor koncentracija poduzetnika na tržištu robe široke potrošnje u Hrvatskoj' ['Merger control in grocery market in Croatia'], [in:] Knego N., Renko S., Knežević B, (eds), *Promjene u trgovini na malo u Hrvatskoj* [Changes in grocery retail sector in Croatia], Zagreb 2012.
- Petrović S., 'Nadležnost tijela za zaštitu tržišnog natjecanja: aktualni prijepori' ['Competence of the competition authority: recent controversies'], [in:] Pecotić Kaufman J. (ed.), *Pravo tržišnog natjecanja: novine u hrvatskom i europskom zakonodavstvu i praksi: zbornik radova* [Competition Law: Novelties in Croatian and European Law and Practice: The Collected Papers], Zagreb, Ekonomski fakultet, 2012.
- Porobija B., 'Odbijanje poslovanja kao oblik zloporabe vladajućeg položaja' ['Refusal to deal as a form of abuse of dominant position'], [in:] Pecotić Kaufman J. (ed.), *Pravo tržišnog natjecanja: novine u hrvatskom i europskom zakonodavstvu i praksi: zbornik radova* [Competition Law: Novelties in Croatian and European Law and Practice: The Collected Papers], Zagreb, Ekonomski fakultet, 2012.
- Tot I., 'Kazna zatvora za kaznena djela protiv slobode tržišnog natjecanja u hrvatskom pravu de lege ferenda' ['Prison sentence for crimes against free competition in Croatian law de lege ferenda'], [in:] Pecotić Kaufman J. (ed.), *Pravo tržišnog natjecanja: novine u hrvatskom i europskom zakonodavstvu i praksi: zbornik radova* [Competition Law: Novelties in Croatian and European Law and Practice: The Collected Papers], Zagreb, Ekonomski fakultet, 2012.

Articles (2012)

- Anić I.-D., Budak J., Pecotić Kaufman J., Radas S., Rajh E., Slijepčević S., *Studija: Mjerodavno tržište i tržišni udjeli u trgovini na malo u Hrvatskoj i EU* [Study: relevant market and market shares in grocery retail sector in Croatia and EU], Ekonomski institut, Zagreb, Zagreb, March 2012 (available at <http://www.eizg.hr/hr-HR/Mjerodavno-trziste-i-trzisni-udjeli-u-trgovini-na-malo-u-Hrvatskoj-i-EU-810.aspx>)
- Bouček V., 'Europsko kartelno privatno pravo u Uredbi Rim II' ['European Cartel Private Law in Regulation Rome II'] (2012) 62(5-6) *Zbornik Pravnog fakulteta u Zagrebu*.

- Dumičić K., Pavković A., Akalović Antić J., 'Mjerenje koncentracije u bankarstvu u Republici Hrvatskoj' ['Measuring Concentration in Banking Sector in the Republic of Croatia'] (2012) 10(2) *Zbornik Ekonomskog fakulteta u Zagrebu*.
- Pecotić Kaufman J., 'How to Facilitate Damage Claims? Private Enforcement of Competition Rules in Croatia – Domestic and EU Law Perspective' (2012) 5(7) *YARS*.
- Pošćić A., 'Dokazivanje predatornih cijena u europskom pravu tržišnog natjecanja' ['Proving predatory prices in European Competition Law'] (2012) 4, 3(105) *Zbornik radova Pravnog fakulteta u Splitu*.
- Pošćić A., 'Utvrđivanje mjerodavnog tržišta proizvoda u okviru članka 102. Ugovora o funkcioniranju Europske unije s naglaskom na odabir potrošača' ['Defining Relevant Product Market within the Framework of Article 102 TFEU with emphasis on consumer's choice'] (2012) 62(5-6) *Zbornik Pravnog fakulteta u Zagrebu*.
- Prebežac D., 'Državne potpore kao instrument poticanja zračnog prometa: studija slučaja Europske unije i Republike Hrvatske' ['State Aid as an Instrument of Encouraging Air Traffic: European Union and the Republic of Croatia Case Study'] (2012) 10(2) *Zbornik Ekonomskog fakulteta u Zagrebu*.
- Spevec O., 'Reforma i modernizacija politike državnih potpora u EU i posljedice za Hrvatsku' ['Reform and Modernisation of State Aid Policy in the EU and impacts on Croatia'] (2012) 58(9) *Računovodstvo i financije*.

CZECH REPUBLIC*

Books (2012)

- Černoch F., Zapletalová V., *Energetická politika Evropské unie [Energy policy of the European Union]* Masarykova univerzita, Brno 2012.
- Janků M., Mikušová J., *Veřejné podpory v soutěžním právu EU [State aid in EU competition law]*, C.H.Beck, Praha 2012.
- Munková J., Kindl J., Svoboda P., *Soutěžní právo [Competition law]*, C.H.Beck, Praha 2012.
- Ondřejová A., *Zásada ne bis in idem v konání o porušení sůtažného práva [Ne bis in idem rule in antitrust proceedings]* Key Publishing, Ostrava 2012.
- Poláček B., *Mezinárodní říční doprava [International transport law]*, C.H.Beck, Praha 2012.
- Vlček T., Černoch F., *Energetický sektor České republiky [Energy sector of the Czech Republic]*, Masarykova univerzita, Brno 2012.

Articles (2012)

- Bartáková H., Skalka P., 'Z rozhodnutí českých soudů v oblasti ochrany hospodářské soutěže' (2012) 3 *Antitrust*.
- Brodec J., Trnka O., Stanková E., 'Veřejné podpory podle nových pravidel' ['New rules for state aid'] (2012) 9 *Právní rádce*.
- Brouček M., 'Analýza kritické ztráty a vymezení relevantního trhu' ['Analysis of critical loss and an identification of relevant market'] (2012) 1 *Antitrust*.

* Compiled by Roman Svetnický, Havel, Holásek & Partners.

- Brouček M., 'Případ Post Danmark: Vyjasnil Soudní dvůr pravidla pro posuzování selektivního snižování cen dominantními podniky?' ['Post Denmark case: did ECJ explained rules for assessing selective price decreases by dominant firms?'] (2012) 2 *Antitrust*.
- Brouček M., 'Více ekonomický přístup a Úřad pro ochranu hospodářské soutěže' ['More economic approach and Czech competition authority'] (2011/2012) *Antitrust – ročenka*.
- Donathová B., Majer O., 'Kontrola koncentrací v regionu střední a východní Evropy' ['Merger control in Central and Eastern Europe'] (2011/2012) *Antitrust – ročenka*.
- Drbal A., 'Z rozhodovací praxe Úřadu pro ochranu hospodářské soutěže' ['From decisional practice of Czech competition authority'] (2012) 1 *Antitrust*; (2012) 2 *Antitrust*; (2012) 3 *Antitrust*.
- Glogarová J., 'Koncernová propojení obecně a z hlediska ochrany hospodářské soutěže' ['Holding interconnections generally and from the competition law perspective'] (2012) 3 *Právní fórum*.
- Houška T., 'Soutěž s lidskou nedokonalostí (Behaviorální ekonomie v hospodářské soutěži)' ['Competition with human imperfection (behavioral economy in competition)'] (2012) 2 *Antitrust*.
- Jandová K., Pávková L., 'Komentovaný výběr z rozhodnutí Soudního dvora a Tribunálu' ['Comments on selected judgments of CEUJ'] (2012) 3 *Antitrust*.
- Jandová K., Svejovský V., 'Komentovaný výběr z rozhodnutí Soudního dvora a Tribunálu' ['Comments on selected judgments of CEUJ'] (2012) 1 *Antitrust*; (2012) 2 *Antitrust*.
- Januš J., 'Energetické právo' ['Energy law'] (2012) 9 *Právní rádce*.
- Kindl J., 'Cenová diskriminace je „zlem“ opravdu jen výjimečně' ['Price discrimination is bad only in exceptional circumstances'] (2012) 3 *Antitrust*.
- Musil A., 'Application of Competition Law in the Food Sector in the European Union' (2012) 2 *Antitrust*.
- Musil A., 'Interface between Competition policy and Consumer policy' (2012) 1 *Antitrust*.
- Musil A., 'Regulation vs Competition in Energy Sector' (2012) 3 *Antitrust*.
- Oberfalcerová K., 'Ochrana žadatele o Leniency a přístup do spisu v rámci řízení před ÚOHS' ['Protection of leniency applicant and an access to documents in the proceeding before Czech competition authority'] (2012) 1 *Antitrust*.
- Oberfalcerová K., 'Pokřivená aplikace doktríny EssentialFacilities v EU a ČR' ['Distorted application of essential facilities doctrine in EU and Czech Republic'] (2011/2012) *Antitrust – ročenka*.
- Pelikán R., 'Mobilní telefonie v ČR z pohledu práva hospodářské soutěže' ['Mobile phones in the Czech Republic from a point of view of competition law'] (2012) 3 *Antitrust*.
- Petr M., 'Významná rozhodnutí českého soutěžního úřadu v roce 2011' ['Significant decisions of Czech competition authority in 2011'] (2011/2012) *Antitrust – ročenka*.
- Pomahač R., 'Soudní dvůr EU: Souběžné trestání účastníků kartelových dohod' ['CEUJ: simultaneous fining of cartel participants'] (2012) 6 *Obchodně právní revue*.
- Poremská M., 'Může se při podání společné nabídky po prokázání splnění kvalifikace v užším řízení vyskytnout bid-rigging?' ['Could bid-rigging occur in case of joint offers after proving the qualification in the procedure?'] (2012) 11 *Právní fórum*.
- Příb J., 'K problematice bid-riggingu ve veřejných zakázkách v České republice' ['On bid-rigging in public procurement in the Czech Republic'] (2012) 2 *Antitrust*.
- Schenkova K., 'Výměna informací v rozhodovací praxi Evropské komise a národních soutěžních úřadů' ['Information exchange in decisional practice of the European Commission and national competition authorities'] (2012) 2 *Antitrust*.

- Skalka P., 'Judikatura českých soudů v oblasti ochrany hospodářské soutěže v uplynulém roce' ['Jurisprudence of Czech courts in competition cases in a previous year'] (2011/2012) *Antitrust – ročenka*.
- Skalka P., 'Z rozhodnutí českých soudů v oblasti ochrany hospodářské soutěže' ['From practice of Czech courts in competition cases'] (2012) 1 *Antitrust*; (2012) 2 *Antitrust*.
- Smolek M., 'Toshiba – Přelet nad kukaččím hnízdem? (Ke vztahu unijního a vnitrostátního práva hospodářské soutěže ve čtyřech nefilmových obrazech)' ['Toshiba – One Flew Over the Cuckoo's Nest (Relationships of EU and national competition law in four non-film pictures)'] (2012) 1 *Antitrust*.
- Valušková Z., Prunner V., 'Zákon o významné tržní síle nově a lépe?' ['Act on a significant position, new and better?'] (2012) 1 *Antitrust*.
- Vaníček Z., 'Regulace elektronických komunikací ex ante a ex post' ['Regulation of electronic communications *ex ante* and *ex post*'] (2012) 3 *Antitrust*.

ESTONIA*

Chapters in books (2012)

- 'The interface between European Union energy, environmental and competition law' [in:] *Reports of the XXV FIDE Congress Tallinn 2012*, Volume 1, editor Julia Laffranque; general rapporteur Peter D. Cameron, Tartu University Press, 2012.
- 'The interface between European Union energy, environmental and competition law' [in:] *Reports of the XXV FIDE Congress Tallinn 2012*, Volume 2, editor Julia Laffranque; general rapporteur Peter D. Cameron, Tartu University Press, 2012.

Articles (2012)

- Annus-Anijärv, L., 'Ettevõtjate kokkuleppe vormid, mis võivad kahjustada või kahjustavad konkurentsist' ['Forms of agreements by Entrepreneurs that May Affect Competition'] (2012) 7/8 *Eesti Majanduse Teataja*.
- Annus-Anijärv, A., 'Konkurentsist kahjustavate kokkulepetega kaasnevad tagajärjed ettevõtjale' ['Effects of anti-competitive agreements on entrepreneurs'] (2012) 9 *Eesti Majanduse Teataja*.
- Ginter, C., Parrest, N., Simovart, M-A., 'Kontsessiooni vastuoluline regulatsioon Eesti õiguses' ['Contradictory Regulation of Concession in Estonian Law'] (2012) VI *Juridica*.
- Linnart, K., 'Tõendamisvõimaluste erinevused kartellide uurimisel. Kas võrdse kohtlemise põhiõiguse rikkumine?' ['Differences in Possibilities of Proof in Investigating Cartels. Violation of the Fundamental Right for Equality of Treatment?'] (2012) VI *Juridica*.
- Luhaäär, T., 'Millal on konkurentide koostöö lubatud?' ['When is cooperation between competitors allowed?'] (2012) 1 *Forbes Eesti*.
- Lumiste, R., 'How Expensive Is It to Support Renewable Energy in Estonia? (2012) 2(1) *Baltic Journal of European Studies*.

* Compiled by Dr. Alexandr Svetlicinii, Tallinn University of Technology, Tallinn Law School; Senior Research Fellow at the Jean Monnet Chair of European Law.

- Nežerenko, O., Koppel, O., 'Some Implications of the EU Rail Transport Policy on Rail Business Environment in CEE Countries' (2012) 2(2) *Baltic Journal of European Studies*.
- Nömper, A., 'Tervise kaitse põhiõigusest apteekide asutamispäringute näitel' ['On the Fundamental Right to Protection of Health on the Example of Restrictions on Freedom of Establishment of Pharmacies'] (2012) X *Juridica*.
- Paas-Mohando, K., 'Estonia: anti-competitive agreements – vodka' (2012) 33(2) *European Competition Law Review*.
- Paas-Mohando, K., 'Estonia: anti-competitive agreements' (2012) 33(8) *European Competition Law Review*.
- Paas-Mohando, K., 'Estonia: anti-competitive agreements – tyres – distribution' (2012) 33(12) *European Competition Law Review*.
- Paas-Mohando, K., Tammo, E., 'Estonia: Current Developments in Member States' (2012) 8(1) *European Competition Journal*.
- Pihor, K., Timpmann, K., 'Charging for Local Social Services: the Case of Estonia' (2012) 20(1) *Discussions on Estonian Economic Policy: Theory and Practice of Economic Policy*.
- Reiljan, J., Ülper, A., Puolokainen, T., 'Demand Side Factors of Local Public Services in Estonia' (2012) 20(1) *Discussions on Estonian Economic Policy: Theory and Practice of Economic Policy*.
- Sepp, J., Ernits, R., 'The Liberalisation of the Postal Service Market in Estonia and Its Effect on Competition' (2012) 20(2) *Discussions on Estonian Economic Policy: Theory and Practice of Economic Policy*.
- Svetlicinii, A., Lugenberg K., 'Merger remedies in a small market economy: the Estonian experience' (2012) 33(10) *European Competition Law Review*.
- Tamm, E., 'Estonia: Tallinn Administrative Court's ruling: it is not possible to contest the reasoning of Competition Authority's decision' (2012) 5(3) *Global Competition Litigation Review*.

HUNGARY*

Books (2012)

- Balogh V., Nagy C. I., Pázmándi K., Verebics J., Zavodnyik J. (szerk.: Pázmándi Kinga), *Magyar Versenyjog [Hungarian Competition Law]*, HVG-ORAC Lap- és Könyvkiadó Kft., 2012.
- Kisfaludi A., *Versenyjogi jogsértések – magánjogi jogkövetkezmények [Competition law infringements – private law penalties]*, ELTE Eötvös Kiadó Kft., 2012.
- Koltay A., Nyakas L. (eds), *Magyar és európai médiajog [Hungarian and European media law]*, CompLex Kiadó, Budapest, 2012.
- Kovács A. G., *Piacszabályozás és jogorvoslat – A piacszabályozói döntések bírói gyakorlata, különös tekintettel az elektronikus hírközlésre [Market regulation and legal remedies – The judicial case law of the decisions of the market regulator, particularly with respect to the electronic communications]*, HVG-ORAC Lap- és Könyvkiadó Kft., 2012.

* Compiled by Aranka Nagy, PhD Candidate (Pázmány Péter Catholic University, Faculty of Law and Political Sciences).

- Miskolczi Bodnár P., Sándor I., *A fogyasztóvédelmi jog európai gyökerű szabályozása I–II.* [The European law-rooted regulation of consumer protection law I–II.], Patrocinium Kiadó, Budapest 2012.
- Nagy C. I., *EU and US Competition Law: Divided in Unity?*, Ashgate Publishing, 2012.
- Osztovits A. (ed.), *Recent developments in European and Hungarian competition law.* Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar – GVH VKK, 2012/Acta Caroliensia Conventorum Scientiarum Iuridico-politicarum I./ European Competition Day Plus conference, held on 31th May, 2011.
- Rixer Á. (ed.), *Állam és közösség. Válogatott közjogi tanulmányok Magyarország Alaptörvénye tiszteletére* [State and community. Selected public law studies in honour of the Fundamental Law of Hungary], Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, Lőrincz Lajos Közjogi Kutatóműhely, 2012.
- Valentiny P., Kiss Ferenc L., Nagy C. I. (eds), *Verseny és szabályozás 2011* [Competition and regulation 2011], MTA KRTK Közgazdaság-tudományi Intézet, 2012.

Chapters in books (2012)

- Édes B., Gerhardt E., Micski J., 'A liberalizáció első időszakának versenyszempontú értékelése a magyar vasúti teherszállítási piacon' ['The competition-oriented evaluation of the first period of the liberalisation on the Hungarian rail freight market'], [in:] *Verseny és Szabályozás 2011* [Competition and regulation 2011], Valentiny P., Kiss Ferenc L., Nagy C. I. (eds), *Verseny és szabályozás 2011* [Competition and regulation 2011], MTA KRTK Közgazdaság-tudományi Intézet, 2012.
- Grad-Gyenge A., 'The EU concept of the special subject-matter of copyright and the Premier League case', [in:] Osztovits A. (ed.), *Recent developments in European and Hungarian competition law.* Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar – GVH VKK, 2012.
- Halpern L., Muraközy B., 'A verseny és a K+F összefüggései – elméleti megközelítések és számszerű eredmények' ['The connection between competition and R&D – theoretical approaches and quantitative results'], [in:] *Verseny és Szabályozás 2011* [Competition and regulation 2011], Valentiny P., Kiss Ferenc L., Nagy C. I. (eds), *Verseny és szabályozás 2011* [Competition and regulation 2011], MTA KRTK Közgazdaság-tudományi Intézet, 2012.
- Mérő K., 'A bankszabályozás kihívásai és változásai a pénzügyi-gazdasági válság hatására' ['The challenges and changes of bank regulation as a result of the economic crisis'], [in:] *Verseny és Szabályozás 2011* [Competition and regulation 2011], Valentiny P., Kiss Ferenc L., Nagy C. I. (eds), *Verseny és szabályozás 2011* [Competition and regulation 2011], MTA KRTK Közgazdaság-tudományi Intézet, 2012.
- Miskolczi Bodnár P., 'Indemnification and harm caused by infringement of antitrust rules from private law point of view', [in:] Osztovits A. (ed.) *Recent developments in European and Hungarian competition law.* Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar – GVH VKK, 2012.
- Nagy C. I., 'A viszonteladási ár rögzítésének megítélése az amerikai, az EU és a magyar versenyjogban: kihasznált és kihagyott lehetőségek' [Resale price maintenance from the perspective of the US, European and Hungarian competition law: used and missed opportunities] [in:] *Verseny és Szabályozás 2011* [Competition and regulation 2011], Valentiny P., Kiss Ferenc L., Nagy C. I. (eds), *Verseny és szabályozás 2011* [Competition and regulation 2011], MTA KRTK Közgazdaság-tudományi Intézet, 2012.

- Nagy C. I., III. Fejezet: Antitröszt jog [Chapter III: Antitrust law] [in:] Pázmándi K. (ed.), *Magyar versenyjog [Hungarian Competition Law]* HVG-Orac, Budapest, 2012.
- Nagy C. I., IV. Fejezet: A Gazdasági Versenyhivatal jogállása és eljárása [Chapter IV: The legal status and procedures of the Hungarian Competition Authority] [in:] Pázmándi K. (ed.), *Magyar versenyjog [Hungarian Competition Law]* HVG-Orac, Budapest, 2012.
- Neményi J., 'A pénzügyi válság hatása a központi bankok szabályozására' [The effects of the economic crisis on the regulation of central banks], [in:] *Verseny és Szabályozás 2011 [Competition and regulation 2011]*, Valentiny P., Kiss Ferenc L., Nagy C. I. (eds), *Verseny és szabályozás 2011 [Competition and regulation 2011]*, MTA KRTK Közgazdaság-tudományi Intézet, 2012.
- Osztovits A., 'Quantifying harm in action for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union – some remarks on the Draft Guidance Paper of the European Commission', [in:] Osztovits A. (ed.), *Recent developments in European and Hungarian competition law*. Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar – GVH VKK, 2012.
- Paizs L., 'Kiskereskedelmi verseny és szolgáltatóváltás a magyarországi árampiacon' [Retail competition and switching suppliers on the Hungarian electricity market'], [in:] *Verseny és Szabályozás 2011 [Competition and regulation 2011]*, Valentiny P., Kiss Ferenc L., Nagy C. I. (eds), *Verseny és szabályozás 2011 [Competition and regulation 2011]*, MTA KRTK Közgazdaság-tudományi Intézet, 2012..
- Szatmáry I., 'A kategóriamenedzsment versenyjogi kérdései' ['The competition law aspects of the category management'], [in:] *Verseny és Szabályozás 2011 [Competition and regulation 2011]*, Valentiny P., Kiss Ferenc L., Nagy C. I. (eds), *Verseny és szabályozás 2011 [Competition and regulation 2011]*, MTA KRTK Közgazdaság-tudományi Intézet, 2012.
- Szilágyi P., 'A médiapiac versenyjogi szabályozása' ['Regulation of Competition in Media Markets'], [in:] Koltay A., Nyakas L. (eds), *Magyar és európai médiajog [Hungarian and European media law]*, CompLex Kiadó, Budapest, 2012.
- Szuchy Róbert, 'State aid and competition in the East-Central European electricity market' [in:] Osztovits András (ed.), *Recent developments in European and Hungarian competition law*. Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar – GVH VKK, 2012.
- Tóth A., 'A médiaszabályozás elektronikus hírközlésjogi vonatkozásai' ['The electronic communication aspects of the media regulation'], [in:] Koltay A., Nyakas L. (eds), *Magyar és európai médiajog [Hungarian and European media law]*, CompLex Kiadó, Budapest, 2012. Tóth A., 'Competition law aspects of minority shareholdings', [in:] Osztovits A. (ed.), *Recent developments in European and Hungarian competition law*. Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar – GVH VKK, 2012.
- Valentiny P., 'Válságban a verseny – válságban a verseny?' ['Crisis in competition – competition in crisis?'], [in:] *Verseny és Szabályozás 2011 [Competition and regulation 2011]*, Valentiny P., Kiss Ferenc L., Nagy C. I. (eds), *Verseny és szabályozás 2011 [Competition and regulation 2011]*, MTA KRTK Közgazdaság-tudományi Intézet, 2012.
- Várhegyi É., 'A magyar bankszektor szabályozása és versenyhelyzete a válságban' [The regulation and the competitive situation of the Hungarian bank sector in the crisis], [in:] *Verseny és Szabályozás 2011 [Competition and regulation 2011]*, Valentiny P., Kiss Ferenc L., Nagy C. I. (eds), *Verseny és szabályozás 2011 [Competition and regulation 2011]*, MTA KRTK Közgazdaság-tudományi Intézet, 2012.

- Vincze J., 'Fogyasztóvédelem a pénzügyi piacokon és a viselkedés-gazdaságtan' [Consumer protection on the financial markets and behavioral economics], [in:] *Verseny és Szabályozás 2011* [Competition and regulation 2011], Valentiny P., Kiss Ferenc L., Nagy C. I. (eds), *Verseny és szabályozás 2011* [Competition and regulation 2011], MTA KRTK Közgazdaság-tudományi Intézet, 2012.
- Vince P., 'Árszabályozás és versenyhelyzet a magyarországi energiapiaci nyitás után' [Price regulation and competition after the opening of the Hungarian energy market], [in:] *Verseny és Szabályozás 2011* [Competition and regulation 2011], Valentiny P., Kiss Ferenc L., Nagy C. I. (eds), *Verseny és szabályozás 2011* [Competition and regulation 2011], MTA KRTK Közgazdaság-tudományi Intézet, 2012.

Articles (2012)

- Bakó B., Kálec-Simon A., 'Vertikális korlátozások – növelik vagy csökkentik a jólétet? Érvek az irodalomból' ['Vertical restrictions – do they increase or decrease welfare? Literary arguments'] (2012) 10 *Közgazdasági Szemle*.
- Bartóki-Gönczy B., 'Conncted TV – Átalakuló piaci értéklánc és új szabályozói kihívások a horizonton' ['Transforming market value chain and new challenges for regulators envisaged'] (2012) 52 *Infokommunikáció és Jog*.
- Bolf-Galamb Z., 'Az európai uniós versenyjogi értelemben vett állami támogatási és a közbeszerzési szabályok kapcsolata' ['The relation between State Aid (from European competition law perspective) and public procurement'] (2012) 6 *Közbeszerzési Szemle*.
- Bónis Csilla–Zsohár Á., 'Viselkedés-gazdaságtan és versenypolitika' ['Behavioural economics and competition policy'] (2012) 2 *Versenytitűkőr*.
- Dömötörfy Borbála T., 'Versenyjog és választottbíráskodás az Európai Unióban' ['Competition law and arbitration in the European Union'] (2012) 2 *Iustum, Aequum, Salutare*.
- Dömötörfy Borbála T., 'Árdiszkrimináció és párhuzamos kereskedelem a gyógyszeriparban: innovatív iparágak versenyjogi megítélése' ['Price discrimination and parallel trade in the pharmaceutical industry: innovative industries from the perspective of competition law'] (2012) 2 *Versenytitűkőr*.
- Fazekas B., Tóth A., Réczicza I., 'Az Európai Unió elektronikus hírközlés-szabályozásának 2009-es reformja és a reform utóélete' ['The 2009 European reform of the electronic communication regulation and its afterlife'] (2012) 50 *Infokommunikáció és Jog*.
- Fejes G., 'Round up' (2012) 3(4) *Journal of European Competition Law&Practice*.
- Gadó G., 'A fogyasztói kölcsönszerződések egyoldalú módosításáról' ['Unilateral modification of the consumer loan contracts'] (2012) 10 *Gazdaság és Jog*.
- Gyekiczky T., 'Kit védünk? A fogyasztó közösségi jogi fogalmának társadalmi összefüggéseiről' ['Who do we protect? The social context of Community law concept of the consumer'] (2012) 12(1) *Európai Jog*.
- Hegymegi-Barakonyi Zoltán–Horányi M., 'A Gazdasági Versenyhivatal határozatainak kötőereje polgári perekben' ['The binding force of the resolutions of the Gazdasági Versenyhivatal in civil trials'] (2012) 2 *Versenytitűkőr* 2012/2.
- Juhász M., 'Recent developments in Hungarian competition policy' (2012) 2 *Competition Policy International-Antitrust Chronicle*.
- Keszericzke A., 'A verseny tisztaságát sértő ajánlattevői cselekmények megítélése, az eljárás eredménytelenné nyilvánítása' ['The evaluation of the acts of bidders infringing fair competition, declaring the procedure inefficient'] (2012) 8-9 *Közbeszerzési Szemle*.

- Kovács A., Polyák G., 'Alternatív piacszabályozási eszközök. A hatósági szerződések, valamint az ön- és társszabályozás térnyerése' ['Alternative tools for market regulation. The expansion of the official agreements and self-and co-regulation'] (2012) 50 *Infokommunikáció és Jog*.
- Kovács A. G., Rozsnyai K., Varga I., 'A közigazgatási perorvoslatok szabályozásának lehetőségei európai perspektívában' ['The possibilities of regulating administrative lawsuit from the european perspective'] (2012) 59 *Magyar Jog*.
- Lanchidi P., 'The CISAC case under the Wouters exception' (2012) 33(3) *European Competition Law Review*.
- Miks A., 'Az engedékenységi iratok kezelésével kapcsolatos legújabb fejlemények' ['The newest developments relating to the handling of leniency documents'] (2012) 1 *Versenytükkör*.
- Nagy A. D., 'Az engedékenységi programok védelme vs. kártérítéshez való jog' ['Protection of leniency programmes vs. right to compensation'] (2012) 1 *Versenytükkör*.
- Nagy A., Bak L., 'A versenyjog a közbeszerzés terén – szemelvények' ['Competition law in the field of public procurement – extracts'] (2012) 10 *Közbeszerzési Szemle*.
- Nagy C. I., 'A versenykorlátozó megállapodásokkal kapcsolatos versenyjogi tilalom szerkezete' ['The structure of competition law prohibition relating to restrictive agreements'] (2012) 9 *Jogtudományi Közlöny*.
- Nagy C. I., 'Commitments as surrogates of civil redress in competition law: the Hungarian perspective' (2012) 33(11) *European Competition Law Review*.
- Nagy C. I., 'Recognition and enforcement of US judgments involving punitive damages in Europe' (2012) 1 *Nederlands Internationaal Privaatrecht*.
- Nagy C. I., 'The Hungarian Supreme Court pronounces a document acquired from an unspecified source as admissible in a bid rigging case concerning tenders published by the Municipality of Budapest for construction and renovation works' (2012) *e-Competitions Bulletin* No. 51107.
- Nedeczky A., 'Mindent a maga idejében, avagy – a csatlakozást követően – a párhuzamos jogalkalmazásból adódó problémák a Toshiba és társai – C-17/10. sz. ügy kapcsán' ['First thing first – after the accession – problems resulting from the parallel application of law in relation to the C-17/10. case (Toshiba and others)'] (2012) 2 *Versenytükkör*.
- Németh Z., Tamás O., 'The Hungarian Competition Office approves the creation of a joint venture for mobile phone services (MPVI Mobil)' (2012) *e-Competitions Bulletin* No. 45894
- Németh Z., 'The Hungarian Competition Office clears the acquisition of the prospective owner and operator of the gas interconnector between Slovakia and Hungary by two state owned companies (Magyar Villamos Művek/MFB Invest Befektetési és Vagyonkezelő/Magyar Gáz Tranzit)' (2012) *e-Competitions Bulletin* No. 49212.
- Németh Z., 'The Hungarian Competition Office approves an acquisition in the food sector and rules on the interim control over the target company before its approval (Bonduelle Central Europe/Kelet-Food)' (2012) *e-Competitions Bulletin* No. 49213.
- Ottlakán J., 'Az egészségre ható és gyógyhatás állítások a Gazdasági Versenyhivatal gyakorlatának tükrében' ['Health-affecting and medicative statements in the light of the practice of the Gazdasági Versenyhivatal'] (2012) 1 *Fogyasztóvédelmi Szemle*.
- Pánczél M., 'Régi-új szabályok és értelmezési kérdések a gépjárműszektorban a C-158/11. sz. ügy kapcsán' ['Old-new rules and interpretation questions in the motor vehicle industry relating to case C-158/11'] (2012) 2 *Versenytükkör* 2012/2

- Réger Á., 'The Hungarian Competition Authority puts an end to a long running investigation into a possible cartel infringement by sugar producers (Sugar Cartel)' (2012) *e-Competitions Bulletin* No. 52244.
- Rippel-Szabó P., 'A sporttevékenységgel összefüggő vagyoni értékű jogok jogtulajdonosi és értékesítési kérdései' ['The right holding and marketing issues of property rights relating to sport activities'] (2012) 59 *Magyar Jog*.
- Ritter E., 'The Hungarian Supreme Court upholds second instance judgment in the Budapest road construction cartel case and rules on the admissibility of evidence and the applicability of the ECHR to cartel proceedings (Betonút)' (2012) *e-Competitions Bulletin* No. 45018.
- Ritter E., 'The Hungarian Metropolitan Court of Appeal rejects follow-on damages claim on the basis of the passing-on defence' (2012) *e-Competitions Bulletin* No. 48224.
- Ritter E., Németh Z., 'The Hungarian Metropolitan Court dismisses a claim for damages on the basis of bid-rigging established by the Hungarian Competition Office (Közlekedésfejlesztési Koordinációs Központ v Strabag Építő and Debreceni Magas, Mély és Útépítő)' (2012) *e-Competitions Bulletin* No. 50300.
- Ritter E., 'The Hungarian Competition Office rules on ancillary restraints and provides an overview of its related practice (Waberer/Szemerey)' (2012) *e-Competitions Bulletin* No. 51292.
- Ritter E., Oláh T., 'The Hungarian Competition Office holds in a cartel case that the statutory immunity relating to agricultural products may be in violation of EU competition law (Watermelon cartel)' (2012) *e-Competitions Bulletin* No. 52708.
- Simon B., 'A koordinatív hatások megjelenése a magyar joggyakorlatban' ['The appearance of the coordinated effects in the Hungarian case law'] (2012) 2 *Versenytükör*.
- Szakadát L., 'Szankciók antitröszt eljárásokban' ['Sanctions in antitrust procedures'] (2012) 2 *Versenyjogi Kutatóközpont, Versenyjogi tanulmányok*.
- Szentlélek S., 'A hálózatsemlegesség problematikája versenyjogi szempontból' ['Net neutrality from the perspective of competition law'] (2012) 52 *Infokommunikáció és Jog*.
- Szilágyi P., 'Hungarian Competition Law & Policy: The Watermelon Omen' (2012) 10(2) *Competition Policy International-Antitrust Chronicle* 10(2) pp. 2–5. (2012)
- Szilágyi P., 'A kétoldalú piacok versenyjogi megítélése a médiapiacokra tekintettel' ['The competition law perception of the two-sided markets, having regard to the media markets'] (2012) 1(1) *In Medias Res*.
- Szilágyi P., 'Catalin Stefan Rusu, European Merger Control. The Challenges Raised by Twenty Years of Enforcement Experience. Alphen aan den Rijn: Kluwer Law International, 2010.' (2012) 49(2) *Common Market Law Review*.
- Tari Z., 'Versenyjog és választottbíráskodás' ['Competition law and arbitration'] (2012) 1 *Versenytükör*.
- Tárczy E. Z., 'Vásárlásra való felhívás – az Európai Unió Bíróságának megállapítása' ['Invitation to purchase – the conclusion of the Court of Justice of the European Union'] (2012) 2 *Versenytükör* 2012/2.
- Tóth A., 'TEU competition law aspects of minority shareholding' (2012) 35(4) *World Competition*.
- Tóth A., 'Magyarország gazdasági rendje az Alaptörvény és a piaci verseny viszonyára tekintettel' ['The economic order of Hungary having regard to the relation between Fundamental law and competition'] (2012) 1 *Versenytükör*.
- Tóth A., 'A nemzeti versenyhatóságok szerepe a gazdasági válság kezelésében' ['The role of national competition authorities in handling economic crisis'] (2012) 2 *Versenytükör* 2012/2.

- Tóth T., 'Összegző tanulmány a verseny szerepéről az EU tag Magyarországon' ['Summing study on the role of competition in the EU-member Hungary'] (2012) 4 *Versenyjogi Kutatóközpont, Versenyjogi tanulmányok*.
- Tóth T., 'Állami versenykorlátozások és esélyegyenlőség: a görög lignitbányászati jogokról született ítélet' ['Public restrictions on competition and equality: the judgment delivered on Greek lignite miner rights'] (2012) 2 *Versenytükör*.
- Udvarý S., 'Some Remarks on Class Action in Antitrust Cases in the US and EU' (2012) 2 *Versenytükör*.
- Váci N., 'Magatartási jellegű fúziós feltételek és kötelezettségek a GVH közelmúltbeli gyakorlatában' ['Behavioural remedies in the recent practice of the GVH'] (2012) 1 *Versenytükör*.
- Verebics J., 'Szerződések az elektronikus kereskedelem körében és a fogyasztóvédelem' ['Contracts in the field of electronic commerce and consumer protection'] (2012) 2 *Gazdaság és Jog*.
- Vincze J., 'A tartós fogyasztási cikkek javítása és alkatrészellátása versenyjogi szempontból' ['The repair and component supply of durable consumer goods from competition law perspective'] (2012) 56(7-8) *Külgazdaság*.
- Virág P., 'A Telefónica-ügy – avagy az árprésnek is két oldala van?' ['The Telefónica case – does margin squeeze have two sides?'] (2012) 1 *Versenytükör*.
- Wallacher L., 'Az uniós versenyjog érvényesítési rendszerének hatékonysági előnyei és hátrányai a Bíróság Tele2 Polska ügyben hozott ítélete fényében' ['Efficiency benefits and disadvantages of EU competition law enforcement system in relation to the judgment delivered by the Court in the Tele2 Polska case'] (2012) 12(2) *Európai Jog* 12.2.

MACEDONIA*

- Galev G., 'Posebno o odnosu između nacionalnog prava konkurencije zemalja-članica evropske zajednice i komunitarnog prava' ['In particular about the relations between National competition law of the Member States of the European communities and Community Law'] (2012) *Shkolla Prirodnog Prava, Kopaonik, Srbia*.
- Jashari A., Memeti N., 'Important aspects of concentrations in Macedonia' (2012) 2(2) *International Journal of Business and Social Research*.
- Jashari A., Memeti N., 'Competition Law in Macedonia: An Important Factor for Economic Development' (2012) 2(3) *International Journal of Business, Humanities and Technology*.

SLOVAKIA**

Books (2012)

- Kalesná K., Blažo O., *Zákon o ochrane hospodárskej súťaže, komentár* [Act on Protection of Competition, commentary], C.H. Beck, 2012.
- Králičková B., *Súkromnoprávne aspekty protimonopolného práva* [Private Law aspects of Competition law] Bratislava, Veda, 2012.

* Compiled by Nora Ziba Memeti, FON university, Skopje.

** Compiled by Zuzana Sabova, Slovak Antimonopoly Office.

Articles (2012)

- Blažo O., 'What do limitation periods for sanctions in antitrust matters really limit?' (2012) 5(7) *YARS*.
- Blažo O., 'Rule of Reason, pridružené obmedzenia a systém výnimiek v príprave dohôd obmedzujúcich súťaž v európskom a slovenskom práve' ['Rule of Reason, ancillary restraints and the system of exemptions concerning the agreements restricting competition in European and Slovak competition law'] (2012) 1 *Acta Facultatis Iuridicae Universitatis Comenianae*.
- Blažo O., 'OSN a medzinárodné súťažné právo' ['UNO and the international competition law'] (2012) *Mílniky práva v stredoeurópskom priestore, Univerzita Komenského v Bratislave, Právnická fakulta*.
- Kalesná K., 'Zneužívanie dominantného postavenia v teórii a aplikačnej praxi' ['Abuse of dominant position in theory and case law'] (2012) 4 *Právny Obzor* 4/2012.
- Demčák P., 'Novela zákona o ochrane hospodárskej súťaže, manuál k inštitútu urovanie, civilné spory' ['New amendments to the Competition Act, Settlements and Private enforcement of competition Law'] (2012) *Forum*.
- Demčák P., 'Súťaž vs. regulácia na slovenský spôsob – stále s otáznikom?' ['Competition vs. regulation in Slovakia – still a question?'] (2012) 3 *Antitrust*.
- Králik A., 'Vývoj súkromnoprávneho presadzovania súťažného práva v judikatúre Súdneho dvora Európskej únie' ['Development of private enforcement of competition law in the case-law of the Court of Justice of the European union'] (2012) 6 *Zo súdnej praxe*.
- Oravec P., Telepčák I., 'Nezákonná inšpekcia Protimonopolného úradu? Pár poznámok k jednému rozhodnutiu' ['An illegal dawn raid? Some comments to one decision'] (2012) 1 *Antitrust*.
- Oršulová A., 'Používanie soft law nástrojov při presadzovanísúťažných pravidiel vosvetle-princípov právniho štátu' ['Application of soft law in enforcement of competition law from a perspective of state of law'] (2012) 2 *Antitrust*.
- Šabová Z., 'Vybrané rozhodnutia slovenských súdov v súťažnom práve' ['Selected judgments of the Slovak courts in competition law'] (2012) 1 *Antitrust (Revue soutežního práva)*; (2012) 2 *Antitrust*; (2012) 3 *Antitrust*; (2012) 4 *Antitrust*.
- Šabová Z., 'Regulácia profesijných služieb a súťažné právo (prax Protimonopolného úradu SR v kontexte európskeho práva)' ['Regulation of the professional services (decision-making practice of the Slovak Antimonopoly Office in the light of the European law'] (2012) 1 *Antitrust*.
- Šabová Z., 'Competition Law in Slovakia: An Authority Viewpoint', (2012) 2 *Competition Policy International*.
- Šabová Z., Lovásová E., 'Prístup do spisu – ochrana leniency dokumentov vs. právo na obhajobu' ['Acces to file – protection of leniency documents vs. rights of defence'] (2012) 4 *Antitrust*.
- Šramelová S., Šupáková A., 'Development of the Judicial Review of the Decisions of the Antimonopoly Office of the Slovak Republic' (2012) 5(7) *YARS*.
- Zemanovičová D., 'Nezávislosť súťažných autorít' ['Independence of competition authorities'] (2012) 3 *Antitrust*.

REVIEWERS OF YARS IN 2012 AND 2013

Prof. Bożena Borkowska (Wroclaw University of Economics)
Dr. Mateusz Błachucki (Institute of Law Studies, Polish Academy of Sciences)
Dr. Maja Brkan (referendaire, Court of Justice of the European Union)
Doc. Vlatka Butorac Malnar (Univeristy of Rijeka)
Prof. Eugene Buttigieg (University of Malta; EU General Court)
Dr. K.J. Cseres (University of Amsterdam)
Prof. Sławomir Dudzik (Jagiellonian University, Krakow)
Dr. Michał Jakubczyk (Warsaw School of Economics)
Prof. Marc Jegers (Vrije Universiteit Brussel)
Prof. Ireneusz Kamiński (Jagiellonian University, Krakow)
Dr. hab. Konrad Kohutek (Andrzej Frycz-Modrzewski Krakow University)
Dr. Krystyna Kowalik-Bańczyk (Institute of Law Studies, Polish Academy of Sciences)
Dr. Małgorzata Kozak (legal adviser)
Dr. Justyna Łacny (Institute of Law Studies, Polish Academy of Sciences)
Dr. Jurgita Malinauskaite (Brunel University, London)
Dr. Grzegorz Materna (Institute of Law Studies, Polish Academy of Sciences)
Prof. Dawid Miąsik (Institute of Law Studies, Polish Academy of Sciences)
Dr. Monika Namysłowska (University of Lodz)
Prof. Paul Nihoul (Catholic University of Louvain)
Prof. JUDr. Mária Patakyová (Comenius University, Bratislava)
Dr. Eur LL.M Petra Pipkova (Charles University, Prague)
Dr hab. Anna Piszcz (University of Białystok)
Dr. hab. Paweł Podrecki (Jagiellonian University, Krakow)
Doc. Dr. Jana Planavova (University of Warsaw)
Dr. Dusan Popovic (University of Belgrade)
Dr. hab. Nina Półtorak (Jagiellonian University, Krakow)
Dr. Aleksander Rutkowski (European Commission, DG Markt)
Prof. Barry J. Rodger (University of Strathclyde, Glasgow)
Dr. Jarosław Sroczyński (Markiewicz & Sroczyński, Krakow-Warsaw)
Dr. hab. Maciej Szpunar (University of Silesia, Katowice)
Dr. Monika Szwarc-Kuczer (Institute of Law Studies, Polish Academy of Sciences)
Katarzyna Szychowska (referendaire, General Court)
Dr Alexandr Svitlicini (University of Tartu)
Dr. Małgorzata Wąsek-Wiaderek (Maria Curie-Skłodowska University, Lublin)
Prof. Andrzej Wróbel (Institute of Law Studies, Polish Academy of Sciences)

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES

VOL. 2012, 5(7)

ARTICLES

JASMINKA PECOTIČ 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)

ARTICLES

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 JÓŹWIAK, **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-BAŃCZYK, **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)

ARTICLES

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 GRZEJDZIAK, 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)

ARTICLES

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 OGLÓDEK, 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)

ARTICLES

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 KOZIEL, *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 SROCYŃSKI, *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)

ARTICLES

OLEK 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)

ARTICLES

IAN S. FORRESTER, QC, ANTHONY DAWES, **Parallel Trade in Prescription Medicines in the European Union: The Age of Reasons?**

DAWID MIĄSIK, **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**

**UNIVERSITY OF WARSAW
FACULTY OF MANAGEMENT PRESS**



University of Warsaw, Faculty of Management Press was established in 2003 following the idea of the Faculty's present Dean, Professor Alojzy Z. Nowak. Since its creation, the economist, sociologist and journalist Jerzy Jagodziński has been its Editor-in-Chief.

The publishing house primarily aims to ensure proper use of the many strengths of the Faculty of Management, in particular, its teaching staff which includes as many as 35 Professors and higher-degree Doctors many of whom are internationally respected scholars with considerable academic records. At the same time, the Faculty has many foreign students originating from: the United Kingdom, Austria, France, Finland, Russia, Belarus, USA, Canada, India, Iran, Saudi Arabia, Nigeria, Georgia, Azerbaijan, Armenia, Taiwan and China. The number of students applying for the International Business Program has been increasing over recent years. This fact alone makes the market for foreign language publications grow with each year, even within the Faculty itself.

The Faculty of Management Press is encouraged therefore, quite understandably, to primarily publish books written by members of the Faculty's academic staff including: monographs, textbooks, periodicals and working papers. It is worth noting in particular the quarterly entitled "Problemy Zarządzania" ("Problems of Management") which has been published since 2003 and which enjoys a high status among academic periodicals.

The number of publications in foreign languages (mainly in English) has also been constantly growing. We would like to recommend to the Readers of the YARS some of the most recent releases in English of the Faculty of Management Press:

Management in Poland after accession to the EU – selected aspects. Edited by A. Z. Nowak, Beata Glinka, Przemysław Hensel

Management: Qualitative and Quantitative research, edited by Alojzy Z. Nowak, Beata Glinka

Selected problems of Information Technology Development, by Witold Chmielarz

Knowledge Management: Development, Diffusion and Rejection, by Krzysztof Kłincewicz

The Essential of Financial Markets, by Andrzej Sopoćko

European Economic Integration: Chances and Challenges, by Alojzy Z. Nowak

The EU through the eyes of Asia, edited by Martin Holland, Peter Ryan, Alojzy Z. Nowak and Natalia Chaban.

Global Economy: In search for solutions to stabilize the global economy. The role of infrastructure, culture and international education. Volume 5, edited by Mina Baliadoune-Lutz, Alojzy Z. Nowak, Jeff Steagell, annual publication, prepared in cooperation with Coggin College of Business, University of North Florida, USA.

Interdisciplinary Journal of Economics and Law. Editor Ruth Taplin, University of Leicester, Associate Editor Alojzy Z. Nowak, University of Warsaw, CJEAS, 2011, Issue 1 and 2.

European Integration Process in the Regional and Global Settings. Irena E. Kotowska, Ewa Łatoszek, Alojzy Z. Nowak, Andrzej Stepniak (editors), Warsaw, 2011.

DISTRIBUTION

Economic Bookstore

PL – 02-094 Warsaw, 67 Grójecka St.

Tel. (+48-22) 822-90-42; Fax. (+48-22) 823-64-67

E-mail: info@ksiegarnia-ekonomiczna.com.pl

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES

Established 2008

RECOMMENDED CITATION

YARS

INFORMATION FOR AUTHORS

Manuscripts should be submitted to the Editor, accompanied by an assurance that the article has not been published or accepted elsewhere. Apart the main body, articles should include contents, abstracts, key-words and classifications, and literature. Articles should not include information about the authors. Authors are expected to deliver proposed articles written in correct English (British standard). Articles will be subjected to a double blind peer review procedure.

The maximum length of an article is 9000 words.

Manuscripts are expected to be submitted as electronic documents, formatted in MS Word (1998/2000/XP/2003) or in Open Office

COPYRIGHT

The acceptance of a manuscript for publications implies that the Author assigns to the Publisher the copyright to the contribution whereby the Publisher shall have exclusive right to publish it everywhere during the full term of copyright and all renewals and extensions thereof. The rights include mechanical, electronic and visual reproductions, electronic storage and retrieval; and all other forms of electronic publication including all subsidiary right.

The Author retains the right to republish the article in any other publication one year after its publication in the journal, provided that the Author notifies the Publisher and ensures that the Publisher is properly credited and that the relevant copyright notice is repeated verbatim.

DISTRIBUTION

Economic Bookstore

PL – 02-094 Warsaw, 67 Grójecka St.

Tel. (+48-22) 822-90-42; Fax (+48-22) 823-64-67

E-mail: info@ksiegarnia-ekonomiczna.com.pl

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
VOL. 2013, 6(8)

ARTICLES

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

CENTRE FOR ANTITRUST AND REGULATORY STUDIES (CARS)

www.cars.wz.uw.edu.pl

CARS came into being by the order of the Council of the Faculty of Management of the University of Warsaw of 21 February 2007. It was founded in accordance with para. 20 of the University of Warsaw Statute of 21 June 2006 as an ‘other unit, listed in the faculty rule book, necessary to achieve the faculty’s objectives’. CARS conducts cross- and inter-disciplinary academic research and development as well as implementation projects concerning competition protection and sector-specific regulation in the market economy. It also prepares one-off and periodical publications, organises or participates in the organisation of conferences, seminars, work-shops and training courses. In the future CARS will also act as a patron of post-graduate studies.

CARS consists of Ordinary Members (academic staff of the Faculty of Management of the University of Warsaw), Associated Members (academic staff of other faculties of the University of Warsaw, mostly the Faculty of Law and Administration and the Faculty of Economics as well as other Polish and foreign universities and research institutes) and Permanent Co-operators (including employees of Polish and foreign companies and public and private institutions).