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AGATA JURKOWSKA-GOMUŁKA

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Editorial foreword

The Editorial Board is pleased to present the 13th volume of the Yearbook of Antitrust and Regulatory Studies (YARS 2016, 9(13)). This is the first volume of YARS to be published in 2016 – a second volume is forthcoming at the end of the year. It is worth stressing that YARS is, starting from 2014, despite its formal name, a semi-annual journal.

This volume of YARS focuses on more than just antitrust issues also encompassing problems of consumer protection and sector-specific regulation. The opening article written by Kati Cseres is dedicated to the normative concept of 'the consumer' on the example of Poland and Hungary. This notion, applied in cases resulting from consumer law sensu stricto, should also be applied with regard to competition law, if consumer welfare is accepted as a fundamental value of competition rules.

Subsequently, Marek Rzotkiewicz writes about the recovery of State aid. He tackles the issue from the unique perspective of the impact of the rule of national identity (recognized in EU jurisprudence) upon the recovery process.

The article written by Dariusz Aziewicz concerns the evolution of antitrust assessment of resale price maintenance – (still) a hot topic for public enforcement of competition law. This problem is particularly controversial in Poland where the majority of the decisions issued by the National Competition Authority cover vertical restraints (mainly agreements on resale prices).

Ermal Nazifi and Petrina Broka analyze developments in private enforcement of competition law in Albania. The paper argues that the application of antitrust rules by civil courts is considered and discussed not only in EU Member States, but in all countries trying to protect sound competition within a free market economy.

In the following paper Ilona Szwedziak provides a rather critical assessment of the implementation of energy security strategies in selected CEE countries – Bulgaria, Hungary, Latvia, Lithuania, Poland and Romania.

In her article, Joanna Piechucka presents the so-called 'regulatory contracts' in the area of urban transport. The author refers mainly to French experiences in this regard yet the problem of a proper design of such contract is quite common to all EU Member States.

The second section of the Yearbook is devoted to national legal developments and contains two Polish contributions. Anna Laszczyk provides a detailed presentation of a set of newly issued Polish antitrust soft-laws. Subsequently, Anna Konert and Piotr Kasprzyk report on amendments to national aviation law – these changes brought the Polish legal order closer to the EU pattern, mainly in the area of air traffic management.

In addition, the current volume of YARS contains a number of jurisprudential reviews. It opens with a contribution prepared by Zurab Gvelesiani presenting the first cartel decision issued by the Georgian competition authority after its antitrust law, and in fact the authority itself, were re-established in 2012. Silvia Sramelova analyzes the national antitrust decision, and following appeal judgments, issued in the Slovak part of the gas insulated switchgear cartel. Finally, Orhan Ceku and Mentor Q. Shaquiri provide a case study of Kosovo's insurance market from the perspective of its national prohibition of anti-competitive agreements.

In its next section, YARS contains the reviews of two books published in 2015 in Poland – one concerning the rights of undertakings in antitrust proceedings, the other focuses on the financing of services of general economic interests. The third book reviewed in this volume of YARS is dedicated to legal challenges of new media societies; it was published in 2016 within Polish-Finnish cooperation.

YARS 2016, 9(13) contains three conference reports for events that took place in 2015: a Polish national conference on consumer law, a postal conference and a conference on the energy sector. The current volume provides also a detailed CARS activity Report for 2014–2015 as well as a report on the activities of the Center for Competition Law and Consumer Protection in Tbilisi, Georgia.

The Editorial Board would like to take this opportunity to encourage potential authors interested in competition law and regulatory issues in the CEE countries, the Balkans and the Caucasus to take part in the preparation of forthcoming volumes of YARS to be published in 2017.

A call for papers will be announced shortly on the YARS website.

Warsaw, July 2016

Prof. Agata Jurkowska-Gomułka
YARS Volume Editor

Ministry of Science and Higher Education
Republic of Poland

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The Regulatory Consumer in EU and National Law? Case Study of the Normative Concept of the Consumer in Hungary and Poland

by

Katalin J. Cseres*

CONTENTS**

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Abstract

This paper analyzes the question how EU and national laws implemented and how courts and regulatory authorities apply two opposing regulatory approaches and the corresponding legally defined images of consumers in market regulation: the active and responsible consumer concept on the one side along with the more protective concept of vulnerable consumers on the other side.

The paper examines the normative concept of the consumer from a broad perspective of market regulation by focussing on unfair commercial practices as this is a horizontal instrument involving a broad range of transactions in various markets and because the Unfair Commercial practices Directive 2005/29 specifically lays down the normative concept of the consumer (both 'average' and 'vulnerable') in its provisions. The analysis proceeds on the basis of the normative standard as developed in the ECJ's jurisprudence on free movement rules and further provides a case study of two Central and Eastern European Member States – Hungary and Poland. It examines how EU law and national laws implemented, and how the ECJ and national courts and regulatory authorities interpret the normative concepts of the consumer (both 'average' and 'vulnerable').

The specific questions the paper analyzes are: Do the existing normative notions of the 'average' consumer and the definition of consumers in EU and national law correspond to public policy discourse on consumers' active role in regulating markets? How do these laws address the vulnerability of consumers? How do the EU and national law notions conceptually link to each other? And most importantly how do courts and regulatory authorities interpret these notions?

The paper finds that while there are clear normative concepts of the consumer in the legislation and EU free movement jurisprudence, their application in other fields of EU consumer law, as well as in national law, demonstrate a more nuanced image of the consumer. The paper argues that the legal rules and the envisaged concepts of the consumer need to be enriched by insights from law enforcement. Moreover, both law and law enforcement must be informed both of how markets evolve and how the role of consumers changes as well as enriched by the results from other social sciences, most notably behavioural economics studying consumer behaviour.

Resumé

Cet article analyse la question comment le droit de l'Union européenne et le droit national mettent en œuvre, ainsi que comment les tribunaux et les autorités de régulation appliquent, deux approches réglementaires opposées à l'image légal du consommateur dans le domaine de la réglementation des marchés : d'une part le concept de consommateur actif et responsable, et d'autre part le concept plus protectrice de consommateur vulnérable.

L'article examine le concept normatif du consommateur dans une large perspective de régulation du marché en mettant l'accent sur des pratiques commerciales déloyales. C'est parce que c'est un instrument horizontal qui implique un vaste

éventail de transactions sur les différents marchés et parce que le Directive 2005/29 relative aux pratiques commerciales déloyales des entreprises prévoit le concept normatif du consommateur («moyen» et «vulnérable») dans ses dispositions. L'analyse est basée sur le standard normatif développé dans la jurisprudence de la Cour de justice de l'Union européenne concernant les dispositions sur la libre circulation, mais elle fournit aussi une étude de cas de deux États Membres d'Europe centrale et orientale – la Hongrie et la Pologne.
Il examine comment le droit de l'Union européenne et les droits nationaux mettent en œuvre, et comment la Cour de justice de l'Union européenne, les cours nationales et les autorités de régulation interprètent, les concepts normatifs du consommateur («moyen» et «vulnérable»).
Les questions spécifiques analysées dans l'article sont suivantes:
Est-ce que les notions normatives concernant le consommateur «moyen» et la définition du consommateur dans le droit de l'Union européenne et la législation nationale correspondent aux discours de la politique publique sur le rôle actif des consommateurs dans la régulation des marchés? Comment ces lois traitent la vulnérabilité des consommateurs? Comment les concepts utilisés dans le droit de l'Union européenne et le droit national sont liées? Et surtout, comment les tribunaux et les autorités réglementaires interprètent ces notions?
L'article constate que bien qu'il existe des concepts normatifs clairs du consommateur dans la législation de l'Union européenne et dans la jurisprudence de la Cour de justice de l'Union européenne concernant la libre circulation, leur application dans d'autres domaines du droit européen, notamment dans le droit du consommateur, ainsi que dans le droit national, démontrent une image plus nuancée du consommateur. L'article affirme que les règles juridiques et les concepts du consommateur doivent être enrichis par les expériences de l'application du droit. De plus, le droit et le système de son application doivent prendre en compte comment les marchés évoluent et comment le rôle des consommateurs change. De plus, le droit et le système de son application doivent être enrichi par l'expérience d'autres sciences sociales, notamment l'économie comportementale focalisé sur le comportement des consommateurs.

Key words: consumer protection; consumer image; EU; Central and Eastern Europe; law enforcement

JEL: K23, K12

I. Introduction

The image the consumer has long been associated with is that of a passive market actor who finds him/herself in a weak bargaining position *vis-à-vis* professional businesses. Consumers are thus believed to be unable to discipline

the market behaviour of firms because their lack information, power, voice and coordination. Accordingly, consumer laws and policies pro-actively intervened in markets by means of mandatory rules, while public authorities were given the mandate to assist and redress weak consumers[1].

However, as large scale liberalization and de-regulation took place and global economic restructuring processes and technological changes expanded consumer markets, a noticeable transformation of the traditional role and concept of the consumer materialized.

Accordingly, the background of that transformation is the deepening of global and EU integration, which has been associated with the retreat of the interventionist State and the rise of the neo-liberal model of economic regulation. For that reason, regulatory goals and techniques changed and the government's position became de-centred by shifting and sharing regulatory powers of the State with international and regional organizations, independent authorities, the industry, non-governmental organizations and individuals. The emerging re-regulation took shape as 'de-centred regulation' (Black, 2001, p. 103–146). For consumers, among others, this meant that they could more directly and actively participate in markets and their regulation. It has been argued that de-centred regulatory approaches 'responsibilised' consumers, who actively contribute to regulatory practices through their ordering role in markets, instead of the invisible hand of private preferences[2]. In other words, consumers are viewed as self-confident economic agents whose purchasing decisions are key to well-functioning markets.

Through active participation in markets, consumers contribute to public policy goals of market regulation such as EU market integration, market competitiveness, and to European society and the legitimacy of market processes. For example, in the financial services market, they contribute to its stability while in energy markets, consumers play a key role in promoting competition, ensuring affordable energy prices and security of supply, as well as contributing to European environmental and climate goals by engaging in more efficient energy use.

At the same time, technical and economic developments posed new risks to consumers in terms of their health, safety, well-being or even their privacy. The

[1] In fact, in Europe, the traditional mode of economic regulation was public ownership, which was justified by the need to protect consumers from private monopolies. However, this mode of economic regulation failed not only with respect to economic, social and political aspects but also in terms of consumer protection (Majone, 2010, p. 4–6; Hodges, 2016, p. 246).

[2] 'Responsibilisation' is, according to (Williams, 2007, p. 227) not the same as consumer empowerment. Consumer empowerment stands for reducing barriers to participation in markets and improving the accessibility of relevant information. 'Responsibilisation' increases individuals' exposure to risk and emphasizes consumers' ordering role in markets instead of the invisible hand of private preferences.

widening of consumer markets as well as technological developments, have significantly increased the amount and complexity of information consumers have to process, as well as the risks they take when entering transactions in the global marketplace. These developments, alongside the economic crisis, have pushed the public policy discourse towards greater consumer protection and the identification of a separate concept of the so-called 'vulnerable' consumer. What vulnerability exactly means is subject to extensive discussion, but it remains a concept to be filled with content by national legislators.

This paper analyzes the question how EU and national laws reflect these opposing regulatory approaches. In other words, how did EU and national laws implement, and how do courts and regulatory authorities interpret, the active and responsible consumer concept on the one side along with the more protective concept of vulnerable consumers on the other side. This question can be the best answered by analyzing the normative concept of the consumer as laid down in legislation and enforced by courts and regulatory authorities. The normative concept functions as a point of reference indicating the level of State intervention, and thus the level of protection consumers are provided by a certain legal system. The normative concept of the consumer establishes the balance between default and mandatory (consumer) rules, and thus defines the types of rights and legal instruments that give content to these rights. While earlier research has analysed the normative concept of the consumer (Mak, 2011; Duivenvoorde, 2015)[3], these projects focused on EU Member States of Western Europe such as the Netherlands, Germany, UK and Italy. Building on this research, this paper will examine the normative concept in a broader perspective of market regulation and public policy goals, as well as provide a case study of two Central and Eastern European (hereafter, CEE) Member States – Hungary and Poland. With respect to legislation and law enforcement, this analysis will focus on unfair commercial practices as this is a horizontal instrument involving a broad range of transactions in various markets and because the Unfair Commercial practices Directive 2005/29 specifically lays down the normative concept of the consumer (both 'average' and 'vulnerable') in its provisions and on the basis of the normative standard as developed in the ECJ's jurisprudence on free movement rules[4].

[3] Mak, V. The 'Average Consumer' of EU Law in Domestic Litigation: Examples from Consumer Credit and Investment Cases (November 16, 2011). TISCO Banking, Finance and Working Paper Series No. 003/2011; Tilburg Law School Research Paper No. 004/2012, Duivenvoorde, B. *The consumer benchmarks in the unfair commercial practices directive*., Springer, 2015.

[4] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (OJ L 149/22), recital 18 and Art. 5. Mak adds that the UCPD also shares practical and conceptual links with the field of intellectual property law in the sense that the 'unfair' character of advertising is determined

The questions the paper analyzes are: Do the existing normative notions of the 'average' consumer and the definition of consumers in EU and national law correspond to public policy discourse on consumers' active role in regulating markets? How do these laws address the vulnerability of consumers? How do the EU and national law notions conceptually link to each other?

The paper is structured as follows. The first section analyses the relevance of the normative concept of the consumer and makes a brief comparison between the EU and the US approach. The second section examines this concept in EU law as laid down in the Unfair Commercial Practices Directive (hereafter, UCPD) and most notably in the interpretation of the ECJ. The concept is broken down into two categories, the average consumer and the vulnerable consumer. The third section shifts the focus to the two chosen Member States, Hungary and Poland. It investigates their legislation concerning mainly the UCPD as well as the decision-making practice of their regulatory authorities and the jurisprudence of their courts. The fourth section closes with conclusions.

II. The normative concept of the consumer in law

The normative concept of the consumer has a fundamental function in any given legal system – it establishes the type of consumer the law protects. It outlines what the presumed expectations of an average consumer should be in a given situation. Accordingly, whether and what kind of State intervention is necessary and what kind of legal protection such a consumer needs. As a result, this concept defines the rights and obligations between parties in B2C contracts. By establishing the balance between default and mandatory rules, it designates the kind of regulatory and/or legal tools the envisaged consumer needs in order to enter into effective and efficient transactions in a specific situation. The fundamental dilemma for law and policy-making is to strike the 'right' balance between default and mandatory rules. That decision may depend on what the legislator considers to be the goal of consumer law. For some, it is about justice and dealing with inequalities, whilst for others, particularly within the law and economics approach, the law should be concerned with promoting efficient solutions within market transactions, for example, by

on the basis of consumer perception and thus both sets of rules rely on the risk of 'consumer confusion' as their touchstone for the applicability of the rules, and are not so much concerned with setting a general standard for the protection of consumers' interests in specific circumstances as the other Directives are (Mak, 2010).

improving the flow of information on the basis of which consumers make their market decisions (Scott, 2009)[5].

Legislators of consumer rules have to decide which trade practice or business behaviour harms consumers and thus should trigger state intervention, and whether such intervention should consist of introducing mere disclosure rules, mandatory standards or strict mandatory rules. The different models of consumer protection are thus determined by this fundamental relationship between State intervention and free market forces. The distribution of responsibilities, that is, rights and obligations between the State, individual consumers, consumer organizations and lobby groups, as well as suppliers and their organizations, illustrates the different models of regulatory policies. The adopted normative concept of the consumer is thus characteristic of a given legal system and illustrative of its underlying economic model. These models stand on the basis of different degrees of intervention and, accordingly, contain different combinations of market-conformity, market-complementary, and market-corrective tools (Reisch, 2004).

In EU law, as will be analyzed below, the normative concept of the consumer has evolved as the interpretation of the average consumer has emerged – and recently a second category of the 'vulnerable' consumer. Since the judgment in *Cassis de Dijon*[6], EU consumer protection has been characterized by a normative concept of a well-informed and confident consumer and by the adoption of information provisions[7]. The ECJ developed a neo-liberal concept of the consumer, by emphasizing the consumer's own responsibilities in the market and the beneficial working of market forces, such as the freedom of contracts and competition. This model is based on the idea that the consumer should be able to make informed choices, rather than his/her choice being defined by governmental regulations. Mandatory information disclosure creates a more informed bargaining environment and improves transparency.

Accordingly, the European normative concept is closer to free market mechanisms than social policy concepts, with its primary goal focused on the completion of the internal market. Consumer protection has been considered

[5] Whilst the pursuit of these objectives is sometimes harmonious, it is often revealing of tensions between contrasting positions as to the very purposes of consumer law.

[6] Case 120/78 *Rewe Zentral AG v. Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42. The ECJ acknowledged consumer protection as a *rule of reason* exception to the free movement rules. In this and similar cases, the ECJ found national consumer protection rules overprotective and (miss)using consumer protection as a justification for distorting market competition and holding back relevant information for consumers.

[7] Case C-362/88 *GB-INNO-BM,* ECLI:EU:C:1990:102; C-238/89 *Pall,* ECLI:EU:C:1990:473; C-126/91 *Yves Rocher,* ECLI:EU:C:1993:191; C-315/92 *Verband Sozialer Wettbewerb,* ECLI:EU:C:1994:34; C-456/93 *Langguth,* ECLI:EU:C:1995:206; C-470/93 *Mars,* ECLI:EU:C:1995:224.

as a 'market-promoting objective' (Benöhr, 2013, p. 36) of the EU and the consumer has primarily been seen in his/her capacity as an active market participant as the 'marketised consumer' (Micklitz, 2015, p. 23).

By way of comparison, in the US, the normative concept of the consumer has developed in deceptive trade practices as legislated by the Federal Trade Commission Act,[8] as amended by the Wheeler-Lea Act in 1938[9], and enforced by the US Federal Trade Commission (FTC). The consumer concept evolved in three stages – originating from the cognitively limited creature of a member of the general public[10] to later evolve to the 'reasonable consumer' based on standard economic rationality notably influenced by the Chicago school[11]. Finally, after the financial crisis, the concept of bounded rationality emerged. The normative concept of the bounded rational consumer is being promoted by new regulatory agencies such as the Consumer Financial Protection Bureau (CFPB) recently created by the Dodd-Frank Act or the 'US Behavioral Insights Team' at the White House (Zamir, Teichman, Feldman, 2014). While behavioural economics is clearly shaping the US policy agenda, the revision of the reasonable consumer standard as employed by US courts has not yet taken place (Hacker, 2015, p. 310).

It needs to be added that while behavioural insights may bring the abstract normative concept of the consumer closer to actual consumer behaviour on the market, the relevance of behavioural economics for consumer protection lies not only in the fact that consumers are inhibited from rational decision-making by biases and heuristics, but also that sellers are able to take advantage of consumers' reduced capabilities. Behavioural insights imply that government interventions might be justified even in competitive markets in order to help

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[8] 15 U.S.C. §§ 41–58 (2000).

[9] Wheeler-Lea Act of 1938, Pub. L. No. 75-447, § 3, 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45(a) (2000)).

[10] Hacker argued that from the 1940s onwards, it was sufficient for the FTC to show that a trade practice reveals a tendency or capacity to deceive *any* substantial portion of the general public. This reference group comprised 'that vast multitude which includes the ignorant, the unthinking, and the credulous, who, in making purchases, do not stop to analyse but too often are governed by appearances and general impressions'. The standard was geared not towards a rational machine but towards a cognitively limited creature. The test therefore boiled down to whether a substantial number of consumers, regardless of their cognitive endowments and attention deficits, were deceived. *quoted in FTC v. Sterling Drug, In.*, 317 F.2d 669, 674 (2d. Cir. 1963); see also *Charles of the Ritz Distributors Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944); Hacker, 2015, p. 308.

[11] FTC Policy Statement on Deception, Letter from James C. Miller III, Chairman of the FTC, to Rep. John D. Dingell, Chairman of the Commission on Energy & Commerce of the House of Representatives (Oct. 14, 1983); Cliffdale Associates, Inc., 106 F.T.C. 110, 161 (1984) in this case most of the FTC adopted the new standard of the reasonable consumer and both the federal and state courts have widely adopted the standard afterwards (Hacker, 2015, p. 309).

consumers in their decision-making, for example, by decreasing available options[12]. Information disclosure, one of the most preferred government interventions in consumer protection policy, needs to be reassessed in the light of behavioural biases. Consumers either do not use, or only partially use the available information. The individual capacity for accepting and processing information can be viewed as emotionally controlled and influenced by many environmental stimulants.[13] These insights of behavioural economics change the way information has to be disclosed to and framed for consumers (Thaler and Sunstein, 2008; Luth, 2010; Cseres, 2012).

Neo-classical economic literature is critical to state interventions, since individuals are said to know best their own preferences and act accordingly (Epstein, 2007; Epstein, 2006). As a result, regulatory approaches implementing behavioural economics have been developed that leave free choice uninhibited – the so-called soft paternalism[14]. It has been argued that soft paternalism nudges[15] individuals into welfare-enhancing decisions, without imposing a particular choice on individual consumers. When biases, heuristics and non-rational influences on behaviour render individual consumer decision-making sub-optimal, these light-handed intervention strategies can be designed to enhance these decisions. Individuals can be de-biased, nudged into rational decisions by, for instance, providing less and better information. Choice strongly depends on the context, provided alternatives, and the presentation of the various options. These factors represent the so-called 'choice architectures' framing consumer decision-making (Luth, 2010; Thaler and Sunstein, 2008).

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[12] Most notably behavioural economics has challenged the concept of the consumer as a rational market actor. This stream of economics points to the institutional constraints on individual choice by showing how individuals make decisions and respond to law and policy. It deals with endogenous aspects of consumer decision-making. Consumers exhibit imperfect information-processing skills and prove to be poor negotiators. These insights into the decision-making process of individuals prove that predictions based on traditional rational choice theory often do not hold. Empirical observations of behavioural economics pointed to cognitive constraints of consumers in perceiving and assessing decisional options as well as in being able to reach rational choices. Behavioural economics demonstrates that consumer decision-making is affected by several biases and heuristics (Kahneman and Tversky, 1979; Kahneman, 2003; Loewenstein, 2009).

[13] There are relevant determinants of search, acceptance and the processing of information. An increase of rationality of purchase decisions over additional information itself seems, therefore, to be subjected to specific constraints (Kahneman, 2003; Loewenstein, 2000; Ölander and Thøgersen, 1995).

[14] There are several names devoted to this regulatory approach. Lighter hand intervention (OECD, 2006), asymmetric paternalism (Camerer et al, 2003) or libertarian paternalism (Sunstein and Thaler, 2003).

[15] 'Nudges' is an acronym which stands for six subtle methods for improving choice, devising a good choice architecture: iNcentives, Understanding mappings, Defaults, Giving feedback, Expecting errors, and Structuring complex choices (Thaler and Sunstein, 2008).

This short overview and reflection on the EU and US approach shows that the point State intervention begins, and thus the application of consumer protection rules, crucially depends on the chosen normative concept of the consumer, and may considerably differ also in terms of the chosen legal provisions and their enforcement[16].

III. The normative concept of the consumer in EU law

1. Introduction

In EU law the normative concept of the consumer is directly linked to the notion of the internal market and as such it has been characterized as being both instrumental and protective (Micklitz, 2016, p. 23). Instrumental as its primary goal is to complete the internal market and to facilitate the functioning of free movement and competition rules. This goal has significantly influenced its protective function, shifting the European normative concept closer to free market mechanisms than social policy concepts.

The normative concept of the consumer in EU law has been developed by the ECJ in its free movement jurisprudence. Accordingly, EU law relies on the benchmark of an 'average' consumer who is a well-informed, reasonable and circumspect market actor. In cases such as C-238/89 *Pall Corp*, C-315/92 *Clinique*[17], C-470/93 *Mars* and C-373/90 *Procureur de la Republique v. X.*[18] the ECJ has condemned national rules on alleged consumer protection as being over-regulatory and relied on the 'reasonably circumspect consumer' who is able to process information and make informed choices.[19] In these cases, the Court, in fact, defined the limits of national legislation that aimed

[16] For a detailed comparison and overview of the various normative concepts see: (Hacker, 2015). Hacker shows how behavioural insights can be integrated into the consumer concept. He proposes three distinct wys: strcitly empirical, strictly normative and their mix.

[17] In *Clinique,* a German law prohibited the use of the name 'Clinique' on the grounds that it can mislead and confuse consumers so as to believe that it is a medical product and not a cosmetic one. The Court again found that the alleged consumer confusion did not justify the effects of the rule, namely the impediment on trade and the restriction of market communication.

[18] Case C-373/90 *Procureur de la Republique v. X*., ECLI:EU:C:1992:17.

[19] In *Yves Rocher,* the Court affirmed the relevance of market or product-related information and condemned a provision of the German law on unfair competition prohibiting individual price comparisons. The Court stated that '…the prohibition in question goes beyond the requirements of the objectives pursued, in that it affects advertising which is not at all misleading and contains prices actually charged, which can be of considerable use in that it enables the consumer to make his choice in full knowledge of the facts' (C-126/91 *Yves Rocher*, para. 17).

to provide a higher degree of protection *vis-à-vis* EU consumer protection. Mak convincingly showed how the concept functions as an analytical tool that mediates between the different levels of regulation in the EU, that is, between the different normative standards of EU and national laws (Mak, 2011).

More importantly, this concept puts the emphasis on the ability of consumers to process and use information. It has thus given preference to rules that require information disclosure instead of market intervention (Weatherill, 2001, p. 174). The current definition of the normative concept is based on *Gut Springheid* where the Court explained that '…in order to determine whether a particular description, trade mark, promotional description or statement is misleading, it is necessary to take into account the presumed expectations of an average consumer, who is reasonably well informed and reasonably observant and circumspect'[20].

According to this jurisprudence, the consumer is a well-informed and confident market actor that can effectively participate in markets with the help of information provisions instead of corrective legal measures. This concept sets the borderline in EU law between the rights and duties of private parties in B2C transactions (Mak, 2015). The average consumer is granted mandatory rights (Micklitz, 2002, p. 588) in order to participate in markets and to realise the EU goal of market integration. The ECJ developed a neo-liberal concept of the consumer by emphasizing their own responsibilities in the market and stressing the importance of information as the main regulatory tool in this new regulatory architecture. This model is based on the idea that consumers should be able to use information and participate actively in the market by making informed choices rather than their choices being defined by governmental regulation.

Moreover, these rules also amalgamate public and private law aims. On the one hand, they are based on public policy goals of competition, market regulation and EU integration, and thus mainly consist of regulatory law to complete the internal market and strengthen competition building a new 'horizontal' regime of consumer contract law. They transcend, in fact, the internal relationship between producers or service providers and consumers to the external dimension of the well-functioning of markets (Reich, 2011, p. 71). On the other hand, they regulate the internal relationship of B2C transactions and thus protect weak and vulnerable consumers.

The following section will analyze how positive integration Directives, and their interpretation by the ECJ as well as the enforcement of trade mark law deviate from the above examined 'average' consumer concept.

[20] C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung*, ECLI:EU:C:1998:369, para. 31, 32. See also C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, ECLI:EU:C:2010:660, para. 103.

2. Deviations from the 'reasonably well informed and reasonably observant and circumspect' consumer

Nevertheless, it has also been shown that the positive and negative measures of harmonization take significantly different stances on the image of the consumer and the level of intervention required at EU level (Unberath and Johnston, 2007; Mak, 2015, p. 382).

Positive measures of harmonization (legislation in the form of Directives) follow a more protective approach perceiving consumers as weak parties that need mandatory rules to be safeguarded. The interpretation of these Directives by the ECJ has, after an initial period of relying on the notion of an assertive consumer, has taken a more consumer friendly approach. This more consumer protective approach can be captured concerning the interpretation of Directive 13/93 on unfair contract terms. Already in *Océano Grupo*[21], and in a number of more recent cases such as *Pénzügyi Lízing*, the Court of Justice stressed that the system introduced by the Directive is based on the idea that the consumer is in a weak position *vis-à-vis* the seller or supplier as regards both its bargaining power and his level of knowledge. As a result, the consumer may agree to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms[22]. It is because of that weaker position of the consumer that Article 6(1) of the Directive provides that unfair terms are not binding on the consumer. This is a mandatory rule which aims to re-establish equality between the contracting parties[23].

Similarly, ECJ jurisprudence on consumer sales and distance contracts shows the same concern for the 'weak' consumers. With reference to consumer sales, national courts have to grant an *ex officio* price reduction when the consumer only invoked a rescission of the contract as illustrated in *Soledad Duarte Hueros v. Autociba*[24] and, more recently, concerning the notification duty in *Froukje Faber*[25]. With reference to distance contracts, the obligation of traders to inform the consumer about their withdrawal right has become a fundamental requirement of consumer protection. In *Pia Messner*, the ECJ

[21] Joined Cases C-240/98 and C-244/98 *Océano Grupo*, ECLI:EU:C:2000:346.

[22] Joined Cases C-240/98 and C-244/98 *Océano Grupo*, para. 25; see also C-168/05 *Mostaza Claro,* ECLI:EU:C:2006:675; C-40/08 *Asturcom Telecommunication,* ECLI:EU:C:2009:615, para. 29; C-243/08 *Pannon GSM,* ECLI:EU:C:2009:350, para. 25; C-137/08 *VB Pénzügyi Lizing v. Ferenc Schneider,* ECLI:EU:C:2010:659, para. 46.

[23] C-137/08 *VB Pénzügyi Lizing v. Ferenc Schneider,* para. 46-48.

[24] C-32/12 *Soledad Duarte Hueros v. Autociba*, ECLI:EU:C:2013:637. See also (Jansen, 2014).

[25] C-497/13 *Froukje Faber*, ECLI:EU:C:2015:357. The CJEU's approach was highly consumer friendly concerning notification duty in consumer sales law under Directive 1999/44. See for indepth analysis (Rott, 2016).

confirmed that consumers are in principle able to withdraw from distance contracts without paying usage compensation to the seller. The ECJ stated that a different judgment would harm the effectiveness and efficiency of the very right to withdraw by imposing a financial burden on consumers[26]. Moreover, in *Walter Endress*, the ECJ held that a national provision whereby a right to withdraw lapses, at the latest, one year after the payment of the first premium, where the policy-holder has not been informed about the right to cancel the contract, was contrary to EU law[27]. In *Heininger*[28] and *Schulte*[29], the ECJ went even so far as to extend the right of withdrawal concerning the Directive on doorstep selling to enable consumers not only to get out of contractual obligations years after the conclusion of the contract, but also to get out of so-called linked contracts.

In *Kásler*, the ECJ went also as far as to state that substituting an unfair term for a supplementary provision of national law is consistent with the objective of Article 6(1) of Directive 93/13, because according to settled case law, that provision is intended to substitute the formal balance established by the contract between the rights and obligations of the parties, by real balance re-establishing equality between them, rather than annul all contracts containing unfair terms[30]. Moreover, in cases such as *Mohamed Aziz*[31], the ECJ opened the door for increased 'proceduralization' of the judicial review of unfair terms, where the national court was allowed to suspend mortgage enforcement proceedings in order to establish the unfairness of a contested term (where enforcement was initiated with respect to such term). Such interim relief was considered to ensure the judicial review of unfair terms. This 'proceduralization' of the Directive was continued in *Sánchez Morcillo*[32] and *Kušionová*[33] by assessing whether national procedural law governing mortgage enforcement proceedings ensures the effective judicial review of unfair terms in consumer contracts.

[26] C–489/07 *Pia Messner v. Firma Stefan Krüge,* ECLI:EU:C:2009:502, para. 6.

[27] C-209/12 *Walter Endress v. Allianz Lebensversicherungs AG*., ECLI:EU:C:2013:864.

[28] 481/99 *Georg Heininger and Helga Heininger v. Bayerische Hypo- und Vereinsbank AG*, ECLI:EU:C:2001:684.

[29] C–350/03 *Elisabeth Schulte and Wolfgang Schulte v. Deutsche Bausparkasse Badenia AG*, ECLI:EU:C:2005:637.

[30] C-26/13 *Árpád Kásler, Hajnalka Káslerné Rábai v. OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282, para. 79; C-453/10 *Pereničová and Perenič,* ECLI:EU:C:2012:144, para. 31, and C-168/10 *Banco Español de Crédito* EU:C:2012:349, para. 40 and case-law cited.

[31] C–415/11 *Mohamed Aziz v. Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa),* ECLI:EU:C:2013:164; C–226/12 *Constructora Principado SA v. José Ignacio Menéndez Álvarez,* ECLI:EU:C:2014:10.

[32] C-169/14 *Juan Carlos Sánchez Morcillo and María del Carmen Abril García* v. *Banco Bilbao Vizcaya Argentaria SA*, ECLI:EU:C:2014:2099.

[33] C-34/13 *Monika Kušionová v. SMART Capital, a.s.*, ECLI:EU:C:2014:2189.

In trade mark law, where the ECJ interprets the way in which businesses try to influence consumer choice in the Trade Mark Directive (TMD)[34] and the Trade Mark Regulation[35], the jurisprudence of the ECJ is based on the average consumer test developed in free movement cases[36].

However, the Court did recognise that '[…] because of linguistic, cultural and social differences between the Member States a trade mark which is not liable to mislead a consumer in one Member State may be liable to do so in another'[37]. This implies that there is room for divergence from the average consumer concept in national law and enforcement. The Court also recognised that the level of attention of an average consumer is likely to vary according to the specific category of goods or services at stake, and thus the average consumer test should be assessed *in concreto*[38]. Moreover, ruling on the Trade Mark Regulation in *Koipe Corporacion v. OHIM*[39], the General Court considered that the average consumer is not circumspect but makes impulsive purchases without considering all the information[40]. This refers to insights from behavioural economics that looks at biases, heuristics and non-rational influences on behaviour which render individual consumer decisions sub-optimal. Consumers either do not use or only partially use the available information. The individual capacity for accumulating and processing information can be viewed as emotionally controlled and influenced by many environmental stimulants.[41] Accordingly, the way information is disclosed to and framed is crucial for consumers.

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[34] Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (codified version) (OJ L 299/25) replaces Directive 89/104.

[35] Council Regulation 40/94 of 20 December 1993 on the Community Trade Mark (OJ 1994 L 11/1), as amended, and eventually codified by Council Regulation 207/2009 of 26 February 2009 on the Community Trade Mark (OJ L 78/1).

[36] C-342/97 *Lloyd Schuhfabrik Meyer*, ECLI:EU:C:1999:323, para. 25.

[37] C-313/94 *F.lli Graffione SNC v. Ditta Fransa*, ECLI:EU:C:1996:450, para. 22.

[38] C-342/97 *Lloyd Schuhfabrik Meyer*, para. 26.

[39] T-363/04 *Koipe Corporación, SL v. OHIM*, ECLI:EU:T:2007:264.

[40] The case concerned a figurative trade mark used for olive oil. The figurative trade mark of a competitor was rather similar, but there were also obvious differences between the two signs. See further J Stuyck, Consumer concepts in EU secondary law, in: Klinck, F. Riesenhuber, K. (eds.), Verbraucherleitbilder, Interdisziplinäre und europäische Perspektiven, *Schriften zum Europäischen und Internationalen Privat-, Bank- und Wirtschaftsrecht* 51, 2015, pp. 115-136.

[41] There are relevant determinants of search, acceptance and the processing of information. An increase of rationality of purchase decisions over additional information itself seems, therefore, to be subjected to specific constraints (Kahneman, 2003; Loewenstein, 2000; Ölander and Thøgersen, 1995).

The above analysis clearly shows that the EU's normative concept of the average consumer is far from being homogenous. In fact, it seems to be deviating from the *Gut Springheide* test in various ways.

The fact that the average consumer is less of the rational, circumspect and well-informed person ['less of' ie less than expected?] has also been confirmed in a recent empirical study. In an extensive study on consumer vulnerability published in 2016[42], the EU Commission examined also the concept of the average consumer. The study looked at how the legal concepts of 'average' and 'vulnerable' consumers have been understood across EU Member States. It found that some level of divergence exists in their interpretation, even though these concepts have been used across a number of cases. The study examined the scope and the drivers of consumer vulnerability in the EU and while it focused on vulnerability, it also investigated the concept of the average consumer. It considered it in two ways – in relation to the indicators developed by the study to conceptualise consumer vulnerability, and in relation to the definition of the average consumer in the UCPD, that is, referring to the average consumer as reasonably 'well informed', 'observant' and 'circumspect'. The study found that the concept of the 'well informed' average consumer, as represented by the median consumer response per indicator, feels quite informed about prices, declares that he/she reads communications from the Internet, banking and energy providers (but admits to only glance over them or skim read them), and states that he/she does not rely on information from advertisements only.

Concerning the elements of the concept of the average consumer such as being 'observant' and 'circumspect', the study found that the median consumer sees him/herself as quite careful in dealing with people and in decision-making, as not very willing to take risks and that he/she does not believe that advertisements report objective facts.

The study argued that most of the above indicators reflect the self-reported average – as opposed to objective measures – of the concepts of being 'well-informed', 'observant' and 'circumspect' and should hence be interpreted with caution, as they are likely to be influenced – at least in part – by behavioural biases such as consumer overconfidence (EU Commission, 2016, p. 44).

EU law on the concept of the average consumer, who makes rational decisions in the marketplace, has been challenged from different perspectives in the last decade. First of all, the economic and financial crises of 2008 had a considerable impact on consumer confidence and purchasing power. Second, economic developments, such as the widespread liberalization of certain sectors,

[42] EU Commission (2016), Consumer vulnerability across key markets in the European Union. Retrieved from: http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/vulnerable_consumers_approved_27_01_2016_en.pdf.

significantly increased the amount and complexity of information consumers must now process when entering transactions in the global marketplace. Third, as a reaction to these economic and social changes, a new stream of economic theory developed – behavioural economics that challenges rational consumer behaviour[43]. And last, in the age of technological innovations, consumer law and the notion of the consumer faces fundamental challenges as a result of increased digitalization[44]. EU law needs to react and adapt to these changes: a growing number of disadvantaged consumers as well as the fact that the needs and interests of consumers are shifting, extending to issues such as ethical and social objectives, as well as the necessity to deal with the new insights on the irrational or bounded rationality of consumers in processing information.

The next section will analyze one of these challenges: the concept of the vulnerable consumer.

3. The 'vulnerable' consumer in EU law

The notion of the 'vulnerable' consumer was first addressed in *Buet* where the Court made reference to people who are behind in their education as the potential purchasers of educational material. That fact makes them particularity vulnerable *vis-à-vis* salesmen who can easily persuade them to buy educational material which will improve their employments prospects[45].

The notion of the disadvantaged or vulnerable consumer is now part of EU law, and yet the exact definition who exactly is a 'vulnerable' consumer, and what kind of intervention this position requires, is far from being decided. The definition of vulnerability remains within the competence of the Member States. Reich distinguishes three types of vulnerability: physical, intellectual and economic disability (Reich, 2016, p. 141). He clearly distinguishes the notion of 'vulnerability' from the concept of 'weakness'. While weakness is a typical characteristic of consumers, and also a frequent feature of B2C transactions, vulnerability is a distinct and rare category of consumers.[46]

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[43] Commission, 'A European Consumer Agenda – Boosting confidence and growth' (Communication), COM(2012) 225 final, 'Consumer policy as an essential contribution to Europe 2020'.

[44] See the COM(2015) 634 final. Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content.

[45] 382/87 *Buet*, ECLI:EU:C:1989:198, para. 13.

[46] Compare with Domurath, I. (2013). The Case for Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law. Journal of European Consumer and Market Law.

So far, the concept of a 'weak' consumer has mainly been interpreted by the CJEU, but other EU institutions also endorse the more protective policy that deals with the problem of vulnerable consumers. However, while both the European Parliament[47] and the Commission[48] have addressed the problem of vulnerable consumers this raises fundamental questions for both EU policy and law making[49] since, as a general principle, the definition of vulnerability remains a Member State competence.

In EU law reference to 'particularly vulnerable consumer' can be found in Article 5(3) of the UCPD 2005/29: vulnerable consumers are those more exposed to a commercial practice or a product because of their: (a) mental or physical infirmity, (b) age or (c) credulity. While Recital 34 of the Preamble of the Consumer Rights Directive 2011/83 also refers to vulnerable consumers, the notion has not been implemented in the text of the Directive. Recital 8 of the Preamble of the General Product Safety Directive 2001/95 also mentions vulnerable consumers (Waddington, 2013).

The notion of the vulnerable consumer has, however, been most notably recognized in sector specific Directives. The Universal Service Directive explicitly grants special rights to vulnerable consumers[50].

Both the Second and Third Energy and Gas Package, which focused on improving the operation of retail markets for both electricity and gas consumers, has introduced particular provisions for the protection of vulnerable consumers. Article 3(7) of Directive 2009/72[51] refers to necessary

[47] The European Parliament adopted on 22 May 2012 a non-legislative report on 'vulnerable consumers'. European Parliament resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)) .

[48] A European Consumer Agenda, cited supra 112. European Commission, Consumer vulnerability across key markets in the European Union Final Report, January 2016.

[49] The Parliament urged for horizontal and sectorial approach, while the Commission emphasized the empowerment of consumers in order to enhance knowledge for consumers. Commission Staff Working document on knowledge-enhancing aspects of consumers empowerment 2012-2014, SWD(2012)235 final, 19.07.2012.

[50] See both Article 2 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ L 108/51) and Articles 7 and 23a of Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ L 337/11).

[51] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211/55).

safeguards to protect vulnerable consumers with regard to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms and the switching of suppliers. Member States should also define the concept of vulnerability by referring to, for example, energy poverty and, *inter alia*, to the ban on disconnecting electricity supplies to such customers in critical times[52].

The gap between the 'vulnerable' consumer standard in EU legislation and the 'weaker' consumer standard of ECJ jurisprudence shows that the concept of vulnerability needs to be implemented and made concrete by national legislation and case law.

IV. Normative concepts of consumer in the Member States

1. Introduction

It has long since been acknowledged that the above analysed normative concept of the rational, empowered consumer can conflict with the more protective standard of the Member States[53]. With respect to the UCPD, which is the broadest legislation covering all kinds of commercial parties in B2C relationships, the CJEU has also acknowledged the existence of linguistic, cultural and social differences between EU Member States. This justifies a different interpretation of the message communicated in the commercial practice by the competent enforcement authority or court[54]. As part of the UCPD, almost every Member State implemented the concept and term of the

[52] Article 3(8) of Directive 2009/72 calls Member States to take appropriate measures, such as formulating national energy action plans, providing benefits in social security systems to ensure necessary electricity supplies to vulnerable customers, or providing support for energy efficiency improvements, to address energy poverty where identified, including in the broader context of poverty. Art. 36(h) also obliges NRAs to help to achieve high standards of universal and public services in electricity supply contributing to the protection of vulnerable customers and contributing to the compatibility of necessary data exchange processes for customer switching. See also (Lavrijssen, 2014).

[53] (Micklitz, 2015, p. 21–41) argues that EU consumer law is market bound while it is social policy bound in national law.

[54] In the *Estée Lauder* case (C-220/98 *Estée Lauder Cosmetics GmbH & Co OHG v. Lancaster Group GmbH*, ECLI:EU:C:2000:8), the emphasis was on the role of social, cultural and linguistic factors in advertising. Could the usage of the term 'lifting' mislead an average consumer when this term was used to promote cosmetics? In case C-313/*94 F.lli Graffione SNC v Ditta Fransa,* para. 22, the Court argued that 'In a prohibition of marketing on account of the misleading nature of the trade mark is not, in principle, precluded by the fact that the same trade mark is not considered to be misleading in other Member States. […] it is possible that because of

'average' consumer. However, there seems to be limited experience, and thus little interpretational practice, of the term in national case law[55]. Moreover, national interpretation differs considerably. For example, in the UK, the High Court of Justice stated that the term 'average consumer' relates to 'consumers who take reasonable care of themselves, rather than the ignorant, careless or over-hasty'. The High Court also concluded that one cannot assume that the average consumer will read the small print on promotional documents[56]. In Germany, the *Oberlandesgericht Karlsruhe* found that people with impaired eyesight can also be considered average consumers and printing information in a very small font can be considered a misleading commercial practice[57]. This reflects indeed two very distinct views on the same concept.

In the following section, the application of the normative concepts of the 'average' and 'vulnerable' consumer will be analyzed in two EU Member States of CEE – Hungary and Poland.

2. Hungary

In Hungary, the UCPD has been implemented by Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices against Consumers[58]. During the implementation process, the Hungarian legislator decided to break with the Hungarian legal tradition of protecting the interests of customers with regard to both B2C and B2B relations and the fairness of competition in the same piece of legislation. Instead, the legislator decided to transpose the UCPD in a single new act: Act XLVII of 2008 on Unfair Commercial Practices. Section 1 of this Act explicitly states that the scope of the Act extends to only consumers in B2C relations.

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linguistic, cultural and social differences between the Member States a trade mark which is not liable to mislead a consumer in one Member State may be liable to do so in another'.

[55] Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08). Available at: http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm, p. 141–142.

[56] [2011] EWCH 106 (Ch).

[57] (4 U 141/11) In 2010, the German Scientific Advisory Council to the Ministry of Food and Agriculture puplished a position paper distinguishing between trusting, vulnerable, and responsible consumers and calling for a more differentiated consumer policy in the context of the food sector. Statement of the Advisory Board for Food and Consumer Policy (2010): The trusting, vulnerable or responsible consumer? A plea for a diversified strategy in consumer policy. Berlin. Retrieved from: http://www.vzbv.de/sites/default/files/downloads/Strategie_verbraucherpolitik_Wiss_BeiratBMELV_2010.pdf.

[58] English version of the Act is available at: http://gvh.hu/data/cms998395/jogihatter_jogszab_gyujt_fttv_2008_m%C3%B3d_09_04_a_jav.pdf.

During the transposition of the UCPD, Hungary decided to broaden the group of regulatory agencies that would enforce the provisions of UCPD. The legislator conferred competences in this regard to three supervisory agencies: to the National Consumer Protection Authority, to the Hungarian Financial Supervisory Authority (to enforce the provisions on unfair commercial practices in the financial sector), and finally to the Hungarian Competition Authority (hereafter, GVH) which is enforcing the Act in those cases where a distortion of competition can be established[59]. The GVH is actively enforcing the Act XLVII of 2008 on Unfair Commercial Practices. Its decisional practice as well as jurisprudence of Hungarian courts will be reviewed and analysed below.

2.1. The 'average' consumer in Hungarian law

Even before the implementation of this Act, the practice of the GVH and the courts emphasized that the consumer is a central market actor as his/her decisions in choosing certain products and services fundamentally determine the outcome of economic competition[60].

While the Act does not contain a definition of the average consumer, Article 4 does state that '[I]n adjudicating on commercial practices the behaviour of the consumer shall be taken as a benchmark, who is reasonably informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors relating to the commercial practice or the goods in question'. The Curia of Hungary[61] has stated in a judgment concerning the question whether a specific advertising falls under the Act XLVIII of 2008 on Business Advertising Activity, that the national enforcement authority has to take account of the protective values of the society, the society's level of morality and tolerance[62]. In order to establish these factors, no scientific evidence or expert witness needs to exist.

The Metropolitan High Court of Appeal also emphasized that even though Article 4 of Act XLVII of 2008 does not contain a definition of the average consumer, the norm addresses the median consumer, the everyday man, the man on the street that represents the majority of the society, who has neither extraordinary capacities or knowledge nor people with interior capabilities. The Metropolitan High Court of Appeal ruled in a number of cases that a reasonable consumer is not suspicious and tends to trust in the fact that the information he/she received is valid and accurate. A reasonable consumer is neither a beautician nor a dermatologist, and accordingly does not possess

[59] Article 10 of the Act on Unfair Commercial Practices

[60] Legf. Bír. Kf.II.39.104/2000/3, (55/1998. VJ), Legf. Bír. Kf.II.39.580/2001/6. (196/1999. VJ).

[61] The Curia is the highest judicial authority in Hungary.

[62] FKMB a 12.K.30.711/2014/6. számú ítéletében (104/2012. VJ).

specialized knowledge. He relies on his/her own experience and is not obliged to further search for the entire accurate content of the message delivered to him/her, unless the sender of the message emphatically draws his/her attention to it, or there is strong reference to such a duty in the text of the message[63]. Moreover, the GVH has stated in its decision 3/2010 VJ, that the notion of a reasonably circumspect consumer does not mean that the consumer exclusively acts on the basis of rationality. The consumer, during his/her decision-making process, is influenced by various emotional and cognitive factors. Rationality is thus not absolute but relative. Furthermore, the GVH argued in case 54/2011 VJ that the same consumer may act differently concerning different products, services and commercial practices. This has been confirmed in a more recent case on credit cards (VJ/44/2013 para. 71–72) where the GVH argued that the relevant information the consumer needs to take a well-informed decision has to be available in an easy and consumer friendly manner (para. 75). By so doing, the GVH acknowledged the behavioural insight that it is often not the availability of the information as such, but its large amount, selection and filtering, that is crucial for the consumer to make a good decision (para. 75). While it can be expected that the consumer, during his/her decision-making endeavours meant to maximise his/her utility and accordingly, conducts a reasonable information search, the liability for information search cannot be unlimitedly shifted onto the side of the consumer (para. 88).

The GVH also argued in a case concerning loyalty agreements of one of the biggest Hungarian mobile operators, Telenor, that even though the operator failed to make reference to the loyalty agreement in its posters concerning a handset campaign, consumers were aware of these loyalty practices and they would ask for more information and learn about such products and services themselves[64].

2.2. Vulnerable consumers in Hungarian law

Article 4(2) of Act XLVII of 2008 defines the notion of susceptible consumers: '[…] certain characteristics such as age, credulity or physical or mental infirmity make consumers particularly susceptible to a commercial practice or to the underlying goods'. As can be seen, Hungary uses a modified wording for vulnerability. The GVH has clearly stated that the fact that the market is not transparent is, in itself, not a factor which can be taken into account when assessing whether a consumer is vulnerable according to

[63] Fővárosi Ítélőtábla, Magyar Telekom Nyrt and others, case ID: 2.Kf.27.171/2012/4. Fővárosi Ítélőtábla 2.Kf.27.298/2012/7. Fővárosi Ítélőtábla 2.Kf.27.024/2012/10. and Kfv.II.37.124/2013/8. GVH 145/2007. VJ.

[64] VJ/78/2012.

Article 4(2) of Act XLVII of 2008[65]. However, the GVH and the courts in their assessment of Article 4(2) created, in fact, an in-between category of vulnerability, which will be analyzed in the following section.

2.2.1. Consumers who are more vulnerable than the 'average', but not as vulnerable as falling under Article 4(2)

In a number of cases, a certain category of consumers has been distinguished that, without falling under Article 4(2) of Act XLVII of 2008 (which defines the notion of 'vulnerable' consumers) is nevertheless more vulnerable than the 'average' consumer. The fact that these consumers are more vulnerable than the average consumer, had to be taken into account when the relevant trade practice was assessed (Závodnyik, 2013, p. 113).

Many of these cases concerned financial products and services, characterized by significant information asymmetry between consumers and traders, where consumers have frequently limited knowledge about the numerous products on offer, where both the products and the available information is difficult to obtain and understand, and where consumer decisions involve high risks (Závodnyik, 2013, p. 114). For example, in one case, a financial service provider targeted consumers banned by credit institutions, and thus vulnerable in this specific situation, hence more easily attracted to the given advertisement. The case involved the omission of material information by a credit institution and specifically targeted consumers that had been banned by credit institutions due to their poor credit rating. As such, they were particularly susceptible to this specific offer[66]. Besides financial services, the GVH also considered trade practices in the field of cosmetics and pharmaceutical products, where the targeted consumers are often in a more vulnerable situation than the average consumer (without being vulnerable as defined in Article 2(4)) due to the confidential nature of the product or service). For example, consumers who want to lose weight or suffer infertility are more vulnerable concerning trade practices that advertise products or services targeting exactly this health issue[67] (Závodnyik, 2013, p. 114).

[65] VJ 41/2013.

[66] Decision Vj-5/2011/73 by the Hungarian Competition Authority, 10 November 2011. See also Decision VJ-111/2009. Fővárosi Törvényszék, 16.K.33.365/2010/23.

[67] VJ 89/2009. VJ 125/2010. VJ 103/2010. VJ 70/2011. VJ 96/2011. VJ 6/2012. VJ 98/2013. Vj 15/2011. VJ/36/2013, para. 55–56.

2.2.2. 'Really' vulnerable consumers

The Hungarian decisional practice includes several cases where trade practices specifically targeted elderly people and tried to exploit their credulity[68]. The elderly may, because of their health or financial situation, be more vulnerable, and accordingly more credulous, to buy a given product or service. Accordingly, the GVH has been paying close attention specifically to events which introduced new products on the market[69].

Concerning specifically children, there are several layers of protection outside the Act XLVII of 2008. Act LVIII of 1997 on Business Advertising Activity, Act CIV of 2010 on press freedom and audiovisual media services, Act CLXXXV of 2010 on Media Services and Mass Media all contain specific provisions for the protection of children's ethical, psychical and mental development. In fact, jurisprudence emphasizes that this is a constitutional value, which has to be enforced even before other constitutional freedoms such as freedom of press or free speech (Závodnyik, 2013, p. 122–123).

Regarding credulity, several cases on prohibited trade practices targeted seriously ill people, who were highly susceptible to such practices as they hoped to reduce their symptoms or facilitate recovery[70]. With regard to mental or physical vulnerability especially the financial services markets has been closely monitored. The purpose was to eliminate any potential disadvantages deriving from a person's disabilities and to ensure equal treatment and equal opportunities. Accordingly, in 2012 the Hungarian Financial Supervisory Authority (PSZÁF)[71] issued a recommendation concerning the conduct of financial organizations when providing service to people with disabilities. The purpose of the recommendation was to enforce the rights of people with disabilities in the widest possible context, encompassing a high level of access to services and the provision of additional services that actually ensure equal opportunity and to remove barriers as soon as possible in a targeted manner.[72]

Furthermore, in 2014, the Hungarian legislator amended the Consumer Protection Act of 1997 in order to strengthen the protection of vulnerable consumers – the elderly, disabled and younger consumers in particular. According to the new provisions, the consumer protection authority is obliged to impose a fine if identified infringements concern vulnerable consumers.

[68] VJ 165/2008. 35/2009.

[69] 12/2014. VJ.

[70] VJ8/2009, VJ 115/2009, VJ 13/2011, VJ 35/2012.

[71] Since 2013 the tasks of teh Authority has been passed on to teh Hungarian National Bank.

[72] A Pénzügyi Szervezetek Állami Felügyelete elnökének 12/2012. (XI. 16.) számú ajánlása a fogyatékos ügyfelekkel kapcsolatos bánásmódról.(Recommendation No. 12/2012 (XI. 16.) on the treatment of customers with disabilities). See also: Hungarian Financial Supervisory Authority Annual Report 2012 at: http://alk.mnb.hu/data/cms2405046/hfsa_annual_report_2012.pdf.

This illustrates that the protection of vulnerable consumers is increasingly becoming a priority within Hungarian consumer policy.

There are a number of specific measures relevant to consumer vulnerability in Hungary[73].

These relate mainly to the energy sector. Since 2008, energy law recognises vulnerable consumers on a social and on a health-related basis. In energy law, vulnerable customers mean those household customers who require special attention due to their social disposition, defined in the law, or some other particular reason, in terms of supplying them with electricity. Depending on their category, vulnerable consumers may benefit from deferred payments, pre-payment options and individual assistance to help them understand their bills. Moreover, consumers with disabilities whose life or health is directly jeopardized if disconnected from electricity supply system, including any service disruption, may not be disconnected in case of late payment or non-payment[74].

3. Poland

The relevant legislations on consumer protection in Poland are the Act of 16 February 2007 on competition and consumer protection[75] and the Act of 23 August 2007 on combating unfair commercial practices[76], which transposed the UCPD into Polish law. The Act of 16 February 2007 on competition and consumer protection contains neither the definition of the 'average' nor 'vulnerable' consumer while the Act of 23 August 2007 on combating unfair commercial practices contains both definitions. The Office for Competition and Consumer Protection (hereafter, UOKiK) is the key institution within the Polish consumer policy framework – it implements and enforces consumer policy in Poland, can initiate administrative proceedings against suppliers as well as monitor contract terms. It provides opinions on Polish legislation to ensure that consumer protection principles are sufficiently addressed and can initiate legislative measures in this area. Appeals against decisions issued by the UOKiK President are reviewed by the Court of Competition and Consumer Protection in Warsaw (hereafter, SOKiK) and then by the Court of Appeals in Warsaw and, on an extraordinary cassation complaint basis, by the Supreme Court (Bernatt, 2015, p. 9). SOKiK is a first-instance

[73] Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08). Available at: http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm. Hungary.

[74] https://ec.europa.eu/energy/sites/ener/files/documents/2014_countryreports_hungary.pdf,

[75] Consolidated text: Journal of Laws of 2015, item 184, 1618, 1634.

[76] Journal of Laws No 171, item 1206.

civil court (not an administrative court). SOKiK exercises judicial review of the administrative decisions issued by the UOKiK President – apart from annulling such a decision, SOKiK is entitled to change it in its judgment and review the case on a *de novo* basis (including facts).

3.1. Average consumer in Polish law

While previously the courts refereed to the average consumer both in unfair competition and trademark cases, it was only with the implementation of the UCPD through the Act of 23 August 2007 on combating unfair commercial practices that the concept of the 'average' consumer was first laid down in legislation. According to Article 2(8) of this Act, the average consumer is sufficiently well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors as well as the fact that a given consumer may belong to a clearly identifiable group of consumers who are particularly vulnerable to unfair commercial practices because of characteristics such as age or the fact of being mentally or physically handicapped. Accordingly, Polish law closely follows the UCPD as well as the jurisprudence of the CJEU.

(Sikorski, 2009, p. 50–55) argued that the fact that the definition of the 'average' consumer had been implemented into Polish law was a very welcome development, considering that the concept of an average consumer had not always been properly understood by Polish courts or administrative authorities. In fact, this situation sometimes resulted in courts wrongly dismissing claims of unfair competition (Sikorski, 2009, p. 52–53). For example, they argued that customers of airline operators were observant and circumspect, and thus capable of verifying that a cheap flight advertisement had misleading content (that is, that they had checked the exact schedule of the advertised flight, which clearly indicated that the flight from Warsaw to Vienna was going to land, in fact, in Bratislava[77]). In another case concerning a misleading price indication in pharmaceutical advertising leaflets, the judiciary dismissed claims of misleading adverts by referring to the concept of the well-informed, reasonably observant and circumspect consumer. The courts rejected the arguments favouring the view that an average consumer of pharmaceutical products is usually ready to do anything to improve his/her health, and that very often it is an elderly person who has difficulty reading information in small print at the bottom of the advertising leaflet. Both courts simply disregarded the fact that what matters in advertising is the first impression of the addressee, and that this impression in this case was one of a significant price cut (Sikorski, 2009, p. 53).

[77] Judgement of the Court of Appeals in Warsaw, VI Aca 42/07, of 6 December 2007, quoted after: (Michalak, 2008, p. 64–65).

Concerning the recent decisional practice of the UOKiK President, the NCA is especially active in relation to information asymmetry in the financial services and telecoms sector where consumers are provided with imprecise and incomplete information by institutions which offer complex credit, insurance, or investment products[78]. (Namysłowska, 2013) showed how the characteristics of the average Polish consumer have often been assessed in the telecoms and banking sectors. The UOKiK President frequently stated that there is not a specific kind of consumer, whois being addressed in telecoms advertising[79], or banking advertising on consumer credit[80] or time deposits[81]. Perhaps surprisingly, these decisions of the UOKiK President stated that the use of a mobile phone does not require any special skills nor knowledge of new technologies[82]. The acquisition of consumer credit, which is a basic financial product which, unlike other financial products, also does not require any specific knowledge of financial mechanisms[83].

As a result, the UOKiK President considers the average and not a specific consumer in its decisions. According to the decisions of the UOKiK President, the average Polish consumer understands the information addressed to him/her as well as the language used in advertising (such as metaphors, exaggerations, shortcuts or its conventionality). While the average consumer trusts well-known traders, his/her knowledge is incomplete and not professional. Similarly to Hungarian practice, Polish decisions represent the view that the average consumer is not considered a specialist in a given field, and thus does not need to know everything. Again similarly to the Hungarian decisional practice, the average consumer may assume that the information provided by the trader is clear, unequivocal and not misleading[84] (Namysłowska, 2013, p. 72).

The UOKiK President argued that the level of attention of the average consumer, which influences the assessment of (un)fairness, differs depending on the advertised product itself. With regard to mobile phones, which are commonly used and very familiar to the public, consumers can easily switch to other telecoms providers and the average consumer can take

[78] 2014 UOKiK Activity Report, Warsaw 2015, p. 15, 19–21.

[79] Decision of the UOKiK President No. RWA-44/2012 of 27 December 2012, p. 14; No. RWA-20/2011 of 14 December 2011, p. 9–10.

[80] Decision of the UOKiK President No. RPZ 46/2012 of 28 December 2012, p. 30.

[81] Decision of the UOKiK President No. 33/2008 of 12 December 2008.

[82] Decision of the UOKiK President No. RPZ 28/2010 of 9 December 2010, p. 12; No. RWA-44/2012, p. 14.

[83] Decision of the UOKiK President No. RPZ 46/2012, p. 30.

[84] See e.g. the decisions of the UOKiK President: No. DDK 14/2008 of 19 August 2008, p. 12; No. RPZ 28/2010, p. 13; No RWA-44/2012, p. 15; No. RPZ 2/2013 of 12 March 2013, p. 15.

decisions without carefully analysing the details of a telecoms offer[85]. Yet the consumer of banking products has the right to reliable, true and full information as his/her decisions in this regard have financial repercussions and should thus not be made on the basis of an unfair practice (Namysłowska, 2013, p. 72)[86].

However, it has also been argued that some Polish courts do not think that an average Polish consumer fits the established rules and standards. The Court of Appeals in Warsaw in its judgment of 13 January 2013 (case file VI ACa 1069/12) held that the average Pole, who is the average consumer, has low legal awareness mainly due to social and cultural backgrounds. This view is shared by the Polish legal community. The standard of an average Polish consumer cannot in any way be compared to the standard of the average consumer in Western Europe that has for many decades been subjected to intensive consumer education[87].

3.2. Vulnerable consumers

Even though the concept of the vulnerable consumer has already been in place within national consumer policy independently of the UCPD transposition, the concept of a vulnerable consumer is not clearly defined in Polish legislation. Article 2(8) of the Act on Combating Unfair Commercial Practices first defines the average consumer and adds that this definition is assessed by taking account of 'the belonging of the particular consumer to a specific consumer group' that is 'particularly receptive to the influence of a commercial practice or the product to which the commercial practice applies' providing specific examples: age, physical or mental disability. No further definition or details are provided.

The vulnerability concept has, however, received a prominent place in the UOKiK's latest consumer policy strategy document published in 2015. Older consumers, as well as children and minors have been identified as groups particularly vulnerable to certain marketing practices[88]. The UOKiK also initiated a campaign called 'My Consumer ABC' as early as 2006, which was

[85] Decisions of the UOKiK President: No. RWA-20/2011, p. 10; No. RWA-44/2012 of 27 December 2012, p. 15.

[86] Decision of the UOKiK President No. RWA-44/2012, p. 36.

[87] T.Rychlicki, Consumer protection, case VI ACa 1069/12, March 9th, 2013, available at: http://rychlicki.net/en/issue/consumer-protection-law/.

[88] The strategy acknowledges that both groups need to be targeted by appropriate informational and educational actions. It also identifies online marketing as a particularly problematic area for children and youth. https://uokik.gov.pl/download.php?plik=16694.

designed to equip weaker market participants with information on how to effectively deal with prevalent consumer problems.[89]

Despite the fact that there are no legislative instruments specifically addressing particular consumer groups, certain measures exist that take potential vulnerability into account. For example, in the telecommunications sector which require contracts to be presented in a clear and easily accessible manner. In the energy sector, vulnerable consumers are eligible for financial support, while in the financial sector new legislation is in progress, which will focus, among others, on so-called "reverse mortgages".[90]

The UOKiK has also taken action in specific cases linked to consumer vulnerability. It has in particular taken action against suppliers using small and illegible text in advertising aimed at older consumers, but concerning complex contracts in the construction industry, and actions against misleading information provided by the payday loan industry.[91]

The concept of consumer vulnerability is most clearly present in the energy sector where vulnerable consumer groups are entitled to financial support[92]. The Polish Energy Law Act of 1997, which was last amended in 2015, defines the notion of vulnerable consumers and the new law paid much attention to the issue of strengthening customer rights. The new law not only stressed that information addressed to customers must be formulated clearly and precisely, both when concluding a transaction and when the service is provided, but it has also emphasized that the way in which the gas and electricity supplier should inform consumers about price or rate increases (determined in approved tariffs) should also be specified.[93]

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[89] It is a campaign aimed at developing consumer awareness of Polish citizens: children, teenagers and adults. One of its key objectives was to teach children the practical skills needed to distinguish advertisements from other messages they encounter in the electronic media and in the press and also to utilize other sources of information on products available on the market. The campaign was devised to help consumers strengthen their assertiveness towards market offers, marketing tools and sales techniques. The topics addressed during the campaign were selected on the basis of public surveys and analysis of complaints reaching the UOKiK and the consumer ombudsmen (https://uokik.gov.pl/education_campaigns.php?pytanie=514#faq514).

[90] Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08). Available at: http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm; p. 514.

[91] Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08). Available at: http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm; p. 514.

[92] In the financial sector, the preparation of similar new legislation is in progress, which will focus, among others, on 'reverse mortgages'. Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08), p. 514.

[93] http://www.ure.gov.pl/en/communication/news/208,Amendment-to-the-Energy-Law-Act-entered-into-force.html.

The definition of 'vulnerable' customers has for the first time been introduced in this amended law. Vulnerable electricity consumers are persons, who were granted a housing benefit, are a party to a common service agreement, or a sale agreement concluded with an energy company, and live in the place to which electricity is supplied. The Energy Law Act states that a 'vulnerable' customer of electricity is a person who is eligible to a housing allowance (income support) because the level of his/her income remains below a certain level. This means that the concept of vulnerable customers is based on poverty[94].

It has been argued by stakeholders that even though the notion of the average consumer is interpreted in a wide range of practices[95], and the notion of vulnerable consumer is used and specific consumer groups being identified as target groups for consumer policy, there is no clear definition of both consumer vulnerability and the notion of average consumer, which could be interpreted in a number of ways depending on the situation[96].

V. Conclusions

The normative concept of the consumer is a core element of consumer law. It delineates the relationship between the State, markets and individuals. It defines the level of protection provided by the law and is decisive when it comes to which legal and non-legal tools are considered necessary to protect or enable consumers in their daily transactions with businesses.

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[94] INSIGHT_E, Energy poverty and vulnerable consumers in the energy sector across the EU: analysis of policies and measures, Policy Report May 2015. Retrieved from:: https://ec.europa.eu/energy/sites/ener/files/documents/INSIGHT_E_Energy%20Poverty%20-%20Main%20Report_FINAL.pdf.

Within the protection system, a vulnerable consumer of electricity is granted an energy allowance, which monthly amounts to 1/12 of the annual energy allowance published by the minister in charge of the economy. Such an allowance is granted by the head of a relevant local authority through a decision and at the customer's request. Concerning gas, a customer is recognized as vulnerable if he/she: was given fuel allowance and is a party to common service agreement or gas sale agreement concluded with an energy company and lives in the place to which the gas is supplied. Also, the regulation obliges distribution companies to install, upon a request of a vulnerable customer, prepayment metering and billing system. http://www.ure.gov.pl/en/communication/news/208,Amendment-to-the-Energy-Law-Act-entered-into-force.html.

[95] The concept of average consumer is also used in the context of payday loan advertising, where the UOKiK makes use the notion of 'average consumer' to identify problematic practices in the field, singling out advertising that is likely to mislead such a consumer.

[96] Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08), p. 514.

In the EU and its Member States, the normative concept of the average consumer has been adopted in the jurisprudence of the ECJ concerning free movement rules and later legislated on in the Unfair Commercial Practices Directive. While that jurisprudence has firmly regarded the average consumer to be well-informed, reasonably observant and circumspect, an analysis of consumer law Directives and their subsequent interpretation by the ECJ shows that in fact the consumer is perceived to be in a weak position *vis-à-vis* the seller or supplier, as regards both his bargaining power and his level of knowledge. Accordingly, the consumer may agree to certain contract terms drawn up in advance by the seller or supplier without being able to influence their content. Hence, the consumer should be protected, for example, by being able to withdraw from such contracts, even from linked contracts, or raise the claim of the unfairness of a contractual condition. Moreover, national courts must take action *ex officio* in order to re-establish a formal balance between the rights and obligations of contracting parties. In trademark law, the Court did first recognise that the average consumer standard may diverge across Member States due to linguistic, cultural and social differences. It then stated that the average consumer is not circumspect but, for example, makes impulsive purchases without taking note of all the information. A recent empirical study performed across all Member States confirmed these interpretations of the notion of the average consumer. It argued that the current concept of the average consumer concept should be interpreted with caution, as it is likely to be (partly) influenced by behavioural biases. The analysis of Hungarian and Polish legislation and cases showed that while the laws follow the EU normative concepts very closely, their interpretation does point to a more nuanced notion. Both legal systems acknowledge the consumer as a rational market actor, well-informed and circumspect, but they do emphasize that all these characteristics are relative. Consumers' rational behaviour is not absolute but relative.

Looking at the normative concept of the 'vulnerable' consumer, the legislative basis is limited to a few Directives, most notably on Unfair Commercial Practices and Consumer Rights, and its interpretation is scarce. The notion of the vulnerable consumer has been most notably recognized in sector specific Directives on energy and telecoms. There seems to be a gap between the 'vulnerable' consumer standard in EU legislation and the 'weaker' consumer standard in ECJ jurisprudence. The way the concept of vulnerability has been implemented by national legislation and enforced in their case law does confirm this gap. While a concept of vulnerable consumers exists in both Hungarian and Polish law, especially in the energy field, their interpretations seem to be far from clear. The Hungarian decision-making practice and jurisprudence developed, in fact, a separate category of consumers placed

somewhere between the 'average' and the 'vulnerable' consumer concept. This practice is rather similar to EU Directives' and ECJ's interpretation of the 'average' consumer as a weak market actor. Both countries are in the process of taking further legal and policy actions in order to address the vulnerability of their consumers.

This contribution thus comes to the conclusion that while there are clear normative concepts of the consumer in the legislation and EU free movement jurisprudence, their application in other fields of EU consumer law, as well as in national law, point to a more nuanced image of the consumer. The average consumer is rational, but his behaviour proves to be seen in law enforcement as that of the man or woman on the street who may also exhibit behavioural biases when taking his/her decisions. In certain markets, most notably in financial services, both EU courts as well as national enforcers consider consumers to be in a clearly weak position and, accordingly, lean towards more protective measures. The concept of vulnerable consumer is thus separate from that of weak consumers and often involves consumers with some kind of physical, intellectual or economic disadvantage.

This does not necessarily mean that legal rules should be changed but rather that their application, and the envisaged concepts of the consumer need to be enriched by insights from law enforcement. Moreover, they must be informed both of how markets evolve and how the role of consumers changes as well as enriched by the results from other social sciences, most notably behavioural economics studying consumer behaviour.

References

Benöhr, I. (2013). *EU Consumer Law and Human Rights*. Oxford: Oxford University Press, http://dx.doi.org/10.1093/acprof:oso/9780199651979.001.0001.

Bernatt, M. (2015). Menarini and Judicial Review in EU and Polish Competition Law. *Competition Law Working Papers*, 1.

Black, J. (2001). Decentring regulation: understanding the role of regulation and self regulation in a "post-regulatory" world. *Current Legal Problems, 54* (1), p. 103–146, http://dx.doi.org/10.1093/clp/54.1.103.

Cseres, K.J. (2012). Consumer protection in the European Union. In: R. van den Bergh and A.M. Pacces (eds). *Regulation and economics* (*Encyclopedia of law and economics*). Cheltenham: Edward Elgar, p. 163-228, http://dx.doi.org/10.4337/9781782540465.00012

Domurath, I. (2013). The Case for Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law. Journal of European Consumer and Market Law, 3, 124–137.

Duivenvoorde, B. (2015). *The consumer benchmarks in the Unfair Commercial Practices Directive*. Springer.

Epstein, R. A. (2006). Behavioral Economics: Human Errors and Market Corrections. *University of Chicago Law Review*, *73*(1), 111–132.

Epstein, R.A. (2007). The Neoclassical Economics of Consumer Contracts. *Minnesota Law Review, 92*, 803–835.

EU Commission (2012). A European Consumer Agenda – Boosting confidence and growth' (Communication), COM(2012) 225 final.

EU Commission (2016). Consumer vulnerability across key markets in the European Union. Brussells: EU Commission. Retrived from: http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/vulnerable_consumers_approved_27_01_2016_en.pdf.

Hodges, C. (2016). The consumer as regulator: In: D. Leczykiewicz, S. Weatherill (ed.). *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law.* Oxford: Hart Publishing, p. 21-41, http://dx.doi.org/10.5040/9781474202510.ch-010

Hacker, P. (2015). The Behavioral Divide. A Critique of the Differential Implementation of Behavioral Law and Economics in the US and the EU. *European Review of Contract Law, 11,* p. 299–345.

Kahneman, D. (2003). Maps of Bounded Rationality: Psychology for Behavioral Economics. *The American Economic Review*, *93*(5), 1449-1475, http://dx.doi.org/10.1257/000282803322655392.

Kahneman, D., Tversky, A. (1979). Prospect Theory: An Analysis of Decision under Risk. *Econometrica, 47*(2), 263–292, http://dx.doi.org/10.2307/1914185.

Lavrijssen, S.A.C.M. (2014). The Different Faces of Energy Consumers: Towards a Behavioral Economics Approach. *Journal of Competition Law and Economics*, *10*(2), 1-35, http://dx.doi.org/10.1093/joclec/nht046.

Loewenstein, G.F. (2009). Emotions in Economic Theory and Economic Behavior. *The American Economic Review, Papers and Proceedings*, 90(2), 426-432, http://dx.doi.org/10.1257/aer.90.2.426.

Luth, H. (2010). *Behavioural economics of consumer policy, The Economic Analysis of Standard Terms in Consumer Contracts Revisited*. Antwerpen: Intersentia.

Majone, G. (2010). The transformation of of the regulatory State, Osservatorio sull'Analisi di Impatto della Regolazione. Retrieved from: www.osservatorioair.it.

Mak, V. The 'Average Consumer' of EU Law in Domestic Litigation: Examples from Consumer Credit and Investment Cases (November 16, 2011). TISCO Banking, Finance and Working Paper Series No. 003/2011; Tilburg Law School Research Paper No. 004/2012.

Mak, V. (2010). Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights Directive. *European Review of Private Law*, 19(1), 25–42.

Micklitz, H.-W. (2002). An Expanded and Systemized Community Consumer Law as Alternative or Complement?. *European Business Law Review*, *13*(6), 583–598.

Micklitz, H.-W. (2016). The Consumer; Marketised, Fragmentized, Constitiutionlised. In: D. Leczykiewicz, S. Weatherill (ed.). *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law.* Oxford: Hart Publishing, p. 21-41, http://dx.doi.org/10.5040/9781474202510.ch-002.

Namysłowska, M. (2013). Fair B2C Advertising in the Telecommunications and Banking Sector in Poland – Mission: Impossible? In: T. Tóth (ed.), *Unfair Commercial Practices: The Long Road to Harmonized Law Enforcement.* Budapest: Pázmány Press.

Ölander, D. and Thøgersen, J.S. (1995). Understanding consumer behaviour as a prerequisite for environmental protection. *Journal of Consumer Policy*, *18*, 345–385, http://dx.doi.org/10.1007/bf01024160.

Reich, N. (2011). Harmonisation of European Contract Law: With Special Emphasis on Consumer Law. *China-EU Law Journal*, 1(1-2), 55–94, http://dx.doi.org/10.1007/s12689-011-0006-5.

Reich, N. (2016). Vulnerable consumers in EU Law. In: Leczykiewicz, S. Weatherill (ed.). *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law.* Oxford: Hart Publishing, http://dx.doi.org/10.5040/9781474202510.ch-005.

Reisch, L.A. (2004). Principles and visions of a new consumer policy. *Journal of Consumer Policy*, *27*(1), 1-42, http://dx.doi.org/10.1023/b:copo.0000014103.38175.df.

Rott, P. (2016). Improving consumers' enforcement of their rights under EU consumer sales law: *Froukje Faber*. *Common Market Law Review*, *53*(2), 509–525.

Scott, C. (2009). Enforcing Consumer Protection Laws (July 30, 2009). *UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper*, *15*.

Sikorski, R. (2009). Implementation of the unfair commercial practices Directive in Polish law. *Medien und Recht- International Edition*, *2*, 51–55.

Thaler, R.H. and Sunstein, C.R. (2008). *Nudge Improving Decisions about Health, Wealth and Happiness.* New Haven, CT: Yale University Press.

Unberath, H. and Johnston, A. (2007). The Double-Headed Approach of the ECJ Concerning Consumer Protection. *Common Market Law Review, 44*(5), 1237–1284.

Waddington, L. (2013). Reflections on the Protection of 'Vulnerable' Consumers under EU Law. *Maastricht Working Papers* 2.

Weatherill, S. (2001). Justifying Limits to Party Autonomy in the Internal Market – EC Legislation in the Field of Consumer Protection. In: S. Grundman, W. Kerber and S. Weatherill (ed.). *Party Autonomy and the Role of Information in the Internal Market*. Berlin: de Gruyter, http://dx.doi.org/10.1515/9783110873030.173

Williams T. (2007), Empowerment of Whom and for What? Financial Literacy Education and the New Regulation of Consumer Financial Services, Law & Policy, 29(2), 226-256, http://dx.doi.org/10.1111/j.1467-9930.2007.00254.x.

Závodnyik, J. (2013). *Nagykommentár a tisztességtelen kereskedelmi gyakorlat tilalmáról szóló törvényhez*. Budapest: Wolters Kluwer.

Zamir, E., Teichman, D. and Feldman, Y. (2014). Behavioral Ethics Meets Behavioral Law and Economics. In: E. Zamir and D. Te1ichman (ed.). *The Oxford Handbook of Behavioral Economics and the Law*. Oxford: Oxford University Press, http://dx.doi.org/10.1093/oxfordhb/9780199945474.013.0009.

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National Identity as a General Principle of EU Law and its Impact on the Obligation to Recover State Aid

by

Marek Rzotkiewicz*

CONTENTS**

Abstract

Unlike other general principles of EU law, which derive from the CJ jurisprudence, the principle of national identity is based on a clear legal provision. Article 4(2) TEU stipulates that the Union shall respect important State functions, like the territorial integrity of the State, maintaining law and order and safeguarding national security. The list of values covered by the national principle identity is open and it is for the Member State to decide what values should be protected by its national identity, while the CJ is only empowered to determine the relevance of national identity under EU law.
This article analyses if the principle of national identity could influence the EC examination of State aid and if the EC should refrain from issuing an order to recover incompatible aid, if that aid was to be protected by the Member State's national identity.

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There has not yet been a single judgment by the CJ on that issue and the question stays open. The analysis also focuses on the division of competences between Member States and EU institutions in carrying out that analysis, as well as on the requirements for that analysis, including the scope of an examination carried out by EU institutions.

Resumé

Contrairement aux autres principes généraux du droit de l'Union européenne, qui découlent de la jurisprudence de la Cour de justice de l'Union européenne, le principe de l'identité nationale est basé sur une disposition légale claire. L'article 4(2) du Traité sur l'Union européenne prévoit que l'Union doit respecter les fonctions essentielles de l'État, comme l'intégrité territoriale de l'État, le maintien de l'ordre public et la sauvegarde de la sécurité nationale. La liste des valeurs couvertes par le principe de l'identité nationale est ouverte et c'est aux États membres de décider quelles valeurs doivent être protégées par son identité nationale, tandis que la Cour de justice de l'Union européenne est uniquement compétente à déterminer la pertinence de l'identité nationale en vertu du droit de l'Union européenne.
Cet article analyse si le principe de l'identité nationale pourrait influencer l'examen d'aide d'État par la Commission européenne et si la Commission européenne devrait s'abstenir d'ordonner la récupération de l'aide incompatible, et à la fin si cette aide devait être protégée par l'identité nationale de l'État membre. Vu que jusqu'au présent il n'y avait pas un seul jugement de la Cour de justice de l'Union européenne concernant ce problème, la question reste ouverte. L'analyse entrepris dans cet article se focalise également sur la répartition des compétences entre les États membres et les institutions de l'Union européenne dans le traitement de ce problème, ainsi que sur les exigences pour l'analyse entrepris par l'autorité compétente, y compris sur la portée d'un examen effectué par les institutions de l'Union européenne.

Key words: general principle of EU law; national identity; recovery; state aid.

JEL: K21; K40

I. Introduction

Where the European Commission (hereafter, EC) finds aid incompatible with the Internal Market (incompatible aid), it shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary[1] (recovery order). Once the EC finds the aid to be incompatible, it

[1] Article 16(1) first sentence of Council Regulation (EU) No. 2015/1589 of 13 July 2015, laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248/9) (hereafter, Procedural Regulation).

is bound to issue a recovery order[2], unless this would be contrary to a general principle of EU law[3]. In such a case, the EC should restrict itself to finding that the aid is incompatible (issuing a 'negative decision') and refrain from ordering its recovery. An example of such a solution can be found in the case of *France Télécom*[4], or in the Italian scheme on the municipal real estate tax exemption covering properties used by non-commercial entities for specific purposes[5]. Those and other cases posted on the EC website provide evidence that the issue of a negative decision does not have to mean that a Member State has been ordered to recover the aid[6].

Although this paper is devoted to the principle of national identity, it is necessary to first clarify the very idea of general principles of EU law. This can greatly improve the understanding of the notion of the national identity principle, and its place among other general principles of EU law. It can also help clarify the differences between national identity and other EU principles with regard to the recovery of State aid. In light of the above considerations, and after this introduction (Point I), the paper will first refer to the notion and development of general principles of EU law overall (Point II), followed by its evolution in the area of State aid law (Point III). Next, the paper will deal with the national identity principle in general (Point IV), and in the area of State aid law in particular (Point V). The role of the national identity principle in the system of EU law will be discussed next (Point VI), followed by the requirements for its use (Point VII). The paper will close with conclusions (Point VIII). Still, although it is necessary to make references in this paper to the notion of general principles of EU law, any such references are made solely in order to make the national identity principle more understandable. For this reason, the general principles of EU law are not examined in this paper in an exhaustive manner considering that they deserve a separate and detailed examination (Tridimas, 2006).

This paper will therefore provide an attempt to answer certain questions concerning the meaning and boundaries of the national identity principle, as well as its impact on the issuance by the EC of recovery orders. Those questions relate to the idea of who has the right to find that a certain value is protected by this principle – a Member State or an EU institution? If that

[2] It is then possible to make an application against the EC to the Court of Justice (hereafter, CJ) under Article 263 TFEU and make a claim that on the basis of objective evidence the EC should have issued a recovery order, and by not doing so it has breached EU law.

[3] Article 16(1) second sentence of the Procedural Regulation.

[4] Decision C (2004) 3060, para. 261-262.

[5] Decision C (2012) 9461, para. 181.

[6] Until 20 May 2016 the EC issued 144 negative decisions, in which it found the aid to be incompatible, but refrained from ordering its recovery (see: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result).

right lies with an EU institution, should the latter raise the issue of national identity on its own or only after a Member State claimed a breach of that principle and the necessity of its protection? Alternatively, if that right lies with a Member State, when should it make such a reference? These and many other, much more detailed questions deserve to be addressed in this context. It is not, however, the aim of this paper to seek an answer to all of the above questions but rather to examine the notion of national identity and its impact on the obligation to recover State aid. However, as national identity is just one of the many general principles of EU law, this paper examines national identity from the perspective of general principles of EU law.

II. The notion of general principles of EU law and its development

It is noteworthy that although the Procedural Regulation refers to the notion of general principles of Union law, it does not clarify the meaning of that concept. This is all the more striking, as the very idea of general principles of Union law is a vague concept – not defined in any laws or regulations[7]. It is the result of the jurisprudence of the Court of Justice (hereafter, CJ) (Cieśliński, 2003, p. 11; Mik, 2000, p. 486), which has developed a relatively autonomous meaning of that notion on a case by case basis. The CJ (formerly referred to as European Court of Justice, ECJ) has on many occasions referred to general principles of EU law; one may even find judgments and opinions on the concept of national identity[8], however scarce they may be. The CJ has referred to the principles of: non-discrimination[9], proportionality[10], direct effect[11], and right to defence[12]. The CJ has also taken a closer look at fundamental human rights[13] and at the constitutional traditions common to

[7] The term 'regulation' in this paper is used with regard to soft law.

[8] C-473/93 *Commission v. Luxemburg*, ECLI:EU:C:1996:263, para. 36; opinion AG Maduro in *Michaniki*, C-213/07, ECLI:EU:C:2008:544, para. 31; C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806, para. 83 and 92; C-391/09 *Runevič-Vardyn*, ECLI:EU:C:2011:291, para. 86; C-51/08 *Commission v. Luxemburg*, ECLI:EU:C:2011:336, para. 124; C-393/10 *O'Brien*, ECLI:EU:C:2012:110, para. 49; C-202/11 *Las*, ECLI:EU:C:2013:239, para. 26; C-58/13 and C-59/13 *Torresi*, ECLI:EU:C:2014:2088, para. 56-59.

[9] 8/55 *Fédération Charbonière Belgique v. High Authority*, ECLI:EU:C:1956:11.

[10] 14/59 *Pont-à-Mousson v. High Authority*, ECLI:EU:C:1959:31.

[11] 6/64 *Costa v. E.N.E.L.*, ECLI:EU:C:1964:66.

[12] 32/62 *Alvis v. Council*, ECLI:EU:C:1963:15.

[13] 29/69 *Erich Stauder v. City of Ulm*, ECLI:EU:C:1969:57.

EU Member States[14]. Accordingly, the CJ has stated that it cannot uphold measures incompatible with fundamental rights recognized and protected by the constitutions of those States. Finally, the CJ has recognized the European Convention of Human Rights as binding on Member States[15], as well as the Charter of Fundamental Rights, which may have direct effect on the national legal systems of Member States (Fontanelli, 2011).

Those cases derive from a wide range of economic sectors, including the coal and steel industry[16], distribution of electricity[17] or agriculture[18]. They also stem from various legal areas such as: staff cases[19], competition[20] and free movement of workers[21]. In all these types of cases, the CJ has frequently referred to general principles of law and confirmed its attachment to them.

III. General principles of EU law in the State aid area

The aforementioned interest of the CJ in general principles of law is also evident in State aid cases. In this area, EU courts have frequently referred to the right to defence[22], the right to ownership[23], legitimate expectations[24], *ne bis in idem*[25], the right to good administration[26], *the res judicata*[27], as well as to other principles. The number of those references does not, however, mean that general principles of EU law play a particularly prominent role in the State aid area.

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[14] 4/73 *Nold, Kohlen and Baustoffgrosshandlung v. Ruhrkohle Aktiengesellschaft*, ECLI:EU:C:1974:51.

[15] 36/75 *Rutili v. Ministre de lIntérieur*, ECLI:EU:C:1975:137.

[16] 14/59 *Pont-à-Mousson v. High Authority*; 8/55 *Fédération Charbonière Belgique v. High Authority*.

[17] 6/64 *Flaminio Costa v. E.N.E.L.*.

[18] 11/70 *Internationale Handelsgesellschaft mbH/Einfuhr und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114.

[19] 32/62 *Alvis v. Council*, ECLI:EU:C:1963:15.

[20] T-30/91 *Solvay S.A*, ECLI:EU:T:1995:115, according to which 'Respect for the rights of the defence in all proceedings in which sanctions may be imposed is a fundamental principle of Community law which must be respected in all circumstances, even if the proceedings in question are administrative proceedings'.

[21] 152/73 *Giovanni Maria Sotgiu v. Deutsche Bundespost*, ECLI:EU:C:1974:13.

[22] T-309/04, T-317/04, T-329/04 and T-336/04*TV2/Denmark et al.*, ECLI:EU:T:2008:457.

[23] T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale et al.*, ECLI:EU:T:2006:405.

[24] T-62/08 *ThyssenKrupp Acciai Speciali Terni SpA*, ECLI:EU:T:2010:268.

[25] T-68/03 *Olympiaki Aeroporia Ypiresies AE*, ECLI:EU:T:2007:253.

[26] T-25/04 *González y Díez SA*, ECLI:EU:T:2007:257.

[27] C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato/Lucchini SpA,* ECLI:EU:C:2007:434.

Practically, the proportionality principle has no significance as the CJ consistently states that the recovery of unlawful aid is the logical consequence of finding that a given State measure is unlawful[28]. Consequently, the recovery of unlawfully granted State aid, in order to establishing pre-existing market conditions, cannot in principle be regarded as disproportionate to the objectives of the Treaty[29]. Similarly, the *ne bis in idem* principle has no bearing following the view that the recovery is not a penalty (Brandtner, 2013). When it comes to other principles, the right to defence cannot be used by a beneficiary as the latter is not a party to the administrative proceedings before the EC – this principle can only be used by the Member States[30].

Among the many principles invoked by the parties to the disputes before EU courts in the State aid area, the following principles have the greatest chances for success: legitimate expectations[31], legal certainty[32], and the right to defence[33] when used by a Member State. Nonetheless, it is not an easy task to use them successfully (Giraud, 2008).

IV. The national identity principle and its development

Unlike other general principles of EU law, which derive from the CJ jurisprudence (Cieśliński, 2003, p. 11; Mik, 2000, p. 486), the national identity principle is based on a clear legal provision. It was introduced into EU law in 1992 by the Maastricht Treaty, Article F (1): 'The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy'. The clause was later revised by the Amsterdam Treaty of 1997 which removed the second part of the sentence and left its first part stating: 'The Union shall respect the national identities of its Member States'. The provision in question was finally given its current

[28] Although the CJ refers to unlawful aid, it is necessary to comment that the decisive factor for issuing the recovery order is not the unlawfulness of the aid but its incompatibility with the Internal Market. Even if the EC finds the aid to be unlawful (granted without EC approval), it still has to examine its compatibility with the Internal Market in order to order its recovery.

[29] C-142/87 *Tubemeuse v. Commission*, ECLI:EU:C:1990:125, para. 66; T-459/93 *Siemens*, ECLI:EU:T:1995:100, para. 96; C-169/95 *Spain v. Commission*, ECLI:EU:C:1997:10, para. 47; T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, *Alzetta Mauro et al*., ECLI:EU:T:2000:151, para. 169.

[30] T-613/97 *Union française de l'express (Ufex), DHL International, Federal express international and CRIE*, ECLI:EU:T:2000:304, para. 85–86.

[31] Decision C (2004) 3060, para. 263.

[32] T-308/00 *Salzgitter*, ECLI:EU:T:2004:199, para. 166.

[33] Decision C (2004) 3060, para. 261–262.

reading by the Lisbon Treaty. The latter not only renumbered the articles of the TEU[34] but also gave Article 4(2) TEU its current shape: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State'.

It is discernible from the above reading of Article 4(2) TEU that the principle of national identity stems from fundamental structures of Member States and their constitutions, including their regional and local self-governments. It appears that the range of values which might seek protection under this principle is not limited in scope, and that it is for Member States to decide which values are sufficiently important for a given State that they must be protected by the national identity principle. Hence, for instance, while Austria claimed in *Sayn-Wittgenstein* that the removal of the title of nobility and nobiliary particle forming part of surnames is necessary for the protection of its national identity, it is possible that in another Member State, for example in the United Kingdom, the exact opposite (not the removal but in fact maintaining such title or particle) would be covered by that State's national identity.

A Member State's decision on matters concerning EU law does not generally[35] bind EU institutions, although EU courts have the jurisdiction to adjudicate any disputes deriving from it. As a result, EU courts can state that although a certain value put forward by a Member State does in fact deserve protection under the national identity principle, in the case before the Court, the Member State concerned cannot rely on that principle due to, for instance, lack of proportionality of the national measures[36].

Even though the national identity principle has been part of EU law since the Maastricht Treaty, and both parties to disputes before EU courts as well as Advocates General have on certain occasions referred to that principle, EU courts have extremely rarely recognized the duty of the EU to respect this principle. Cases in which the CJ has found this principle worthy of judicial protection are even scarcer. To the Author's knowledge, the CJ has expressly referred to this principle only once before the Treaty of Lisbon entered into force. The CJ stated that although the national identity principle cannot justify the exclusion of nationals of other Member States from all the posts in an area

[34] Article F TEU became its Article 4.

[35] Unless EU law provides otherwise.

[36] Opinion AG Maduro, *Michaniki*, C-213/07, ECLI:EU:C:2008:544.

such as education, this is not the case with regard to posts involving direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities[37].

It must also be noted that although the CJ considered, on some occasions, this principle as a means of adjudication of cases before it, and it has, in fact, based its judgments on this principle, it nevertheless strayed from making any reference to it[38]. In those cases, the CJ obliquely referred to national constitutions.

The CJ's reluctance to employ the national identity principle in its considerations seems to have changed after the Treaty of Lisbon came into force. Since that date, the CJ referred to the national identity principle on six occasions[39] – as compared to only one such example before[40]. However, three of those new cases were unsuccessful for the parties attempting to invoke the national identity principle. In *Commission v. Luxemburg*, the CJ rejected arguments based on this principle because of the disproportionality of the national measures in question[41]. In *O'Brien*, although the Latvian Government in its written submissions invoked the national identity principle, the CJ found that remuneration of part-time judges on a daily-fee-paid basis could not have any effect on national identity. According to the CJ, this manner of establishing their pay level merely aims to extend to them the scope of the principle of equal treatment and to protect them against discrimination as compared with full-time judges[42]. In the third of the unsuccessful cases, *Torresi*, the CJ held that Article 3 of Directive 98/5[43] concerns solely the right of establishing legal practice in a Member State in order to practice the profession of a lawyer under the professional title obtained in the home Member State. That provision regulates neither access to the profession of lawyer nor the practice of that profession under the professional title issued in the host Member State, and it therefore cannot affect the Member State's national identity[44].

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[37] C-473/93 *Commission v. Luxemburg*, para. 36.

[38] C-213/07 *Michaniki*, EU:C:2008:731; C-36/02 *Omega*, ECLI:EU:C:2004:614.

[39] C-208/09 *Sayn-Wittgenstein*, para. 83 and 92; C-391/09 *Runevič-Vardyn*, para. 86; C-51/08 *Commission v. Luxemburg*, para. 124; C-393/10 *O'Brien*, para. 49; C-202/11 *Las*, para. 26; C-58/13 and C-59/1 *Torresi*, para. 56–59.

[40] See the footnote no 37.

[41] C-473/93 *Commission v. Luxemburg*, para. 124.

[42] C-393/10 *O'Brien*, para. 49.

[43] Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ L 77/36).

[44] C-58/13 and C-59/13 *Torresi*, ECLI:EU:C:2014:2088, para. 56–59.

On the other hand, of those cases where parties managed to successfully invoke the national identity principle, special regard (also from the Polish perspective[45]) should be given to *Runevič-Vardyn.* The CJ stated therein that the EU must respect the national identity of its Member States which includes the protection of their official national languages[46]. Therefore, according to the CJ, national rules that provide that a person's surnames and forenames may be entered on civil status certificates of a given State only in a form which complies with the rules governing the spelling of its official national language relate to a situation which does not come within the scope of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons, irrespective of their racial or ethnic origins[47]. That reasoning was later reiterated in *Las*[48] where the CJ referred to *Runevič-Vardyn* stating that the EU must respect the national identity of its Member States, which includes the protection of their official language or languages. In the third successful case after the Lisbon Treaty, albeit chronologically the first, (*Sayn-Wittgenstein*), the CJ accepted Austria's claim that it had sought to protect its constitutional republican identity. The CJ agreed that the law on the abolition of nobility constitutes a fundamental decision in favour of formal equality of treatment of all citizens before the law[49].

In order to complete the above discussion, it is also worth mentioning the recently adjudged case *Poland v. European Parliament and Council*. Poland sought therein the annulment of Directive 2014/40/EU concerning the manufacture, presentation and sale of tobacco and related products (menthol cigarettes). Although Poland has not invoked the national identity principle, but reference to it was made by the Advocate General. The AG stated that the CJ's considerations must always be applied considering the general interest of the EU, while the situation of any particular Member State taken individually is, as a rule, not relevant. Any exceptions may be applied only where the action envisaged by EU institutions affects the national identity of a given Member State or its fundamental interests. However, in the opinion of the AG, it would be startling if the problems relating to the manufacture, sale and consumption of menthol cigarettes were to be regarded seriously as a matter of national interest or national identity[50]. Although the CJ did not refer at

[45] The Author of this text lives and works in Poland.

[46] C-391/09 *Runevič-Vardyn*, ECLI: EU:C:2011:291, para. 86.

[47] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180/22).

[48] C-202/11 *Las*, para. 26.

[49] C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806.

[50] Opinion AG Kokot, C-358/14 *Poland v. European Parliament and Council*, ECLI:EU:C:2015:848, para. 166.

all in its judgment to this principle[51], the AG opinion may be a valuable indication as to how to understand this principle (or, more precisely, how not to understand it).

It is striking that the number of cases where the CJ has referred to the principle of national identity has risen only after the Treaty of Lisbon came into force. It is thus justifiable to ask why the CJ has previously been reluctant to consider this issue. The argument has been put forward, as a possible answer to this question, that the CJ did not have jurisdiction to adjudicate claims based on the national identity principle before the entry into force of the Treaty of Lisbon. According to this line of argumentation, the pre-Lisbon version of Article 46 TEU exhaustively listed matters that fell under the jurisdiction of the CJ – and national identity was not one of them – hence, the CJ could not hear such cases (Besselink, 2012).

This approach is unconvincing, however. First of all, one must point out that in *Commission v. Luxemburg*, the CJ clearly and unequivocally based its judgment on the national identity principle[52]. The CJ found therein that it had jurisdiction to adjudicate national identity-based claims, regardless of the lack of any such references in the then applicable Article 46 TEU. Should, however, anyone still wish to defend the argument that the CJ did not have jurisdiction to adjudicate on national identity issues before the Lisbon Treaty entered into force, then he/she must also be ready to defend all CJ judgments based on the fundamental rights clause issued during that time period. He/she must then be prepared to demonstrate that all those judgments have not been issued *ultra vires*. The national identity clause, included in Article 4(2) TEU and the requirement that the EU should respect fundamental rights embedded in Article 6(3) TEU, bear a strong resemblance. Also, the fundamental rights clause, similarly to the national identity clause, was originally excluded from the then applicable Article L, which preceded Article 46 TEU. Nonetheless, it had not stopped the CJ from adjudicating on fundamental rights (Cloots, 2015, p. 66).

V. The national identity principle in the State aid area

This paper aims to examine the impact the national identity principle can have on the obligation to recover State aid, and specifically whether it can stop the EC from ordering a Member State to recover the aid. However, according to the Author's best knowledge, there has never been a case yet

[51] C-358/14 *Poland v. European Parliament and Council*, ECLI:EU:C:2016:323.
[52] C-473/93 *Commission v. Luxemburg*, ECLI:EU:C:1996:263, para. 36.

where the EC, or EU courts, have actually confirmed such a possibility. Although the CJ has referred on some occasions to national identity[53], it has not dealt with such a case specifically in the State aid area so far. On the other hand, neither the courts nor the EC have actually ruled out such a possibility. Moreover, as mentioned before, the CJ based its *Commission v. Luxemburg* judgment on the principle of national identity[54] regardless of the lack of any references to national identity in the then applicable version of Article 46 TEU. Lastly, the very notion of general principles of EU law is the result of the CJ jurisprudence, not of EU legislation.

It can thus be argued that there is a possibility to successfully invoke the national identity principle in State aid cases. Still, this does not mean that such cases would be numerous. Current CJ jurisprudence suggests that cases where the EC should refrain from ordering the recovery of aid due to its incompatibility with the national identity principle would, in fact, remain an exception. They would need to meet strict requirements, especially because applying the national identity principle in order to stop the EC from ordering a Member State to recover the aid would mean giving precedence to national interests over the interests of the EU. This is particularly noteworthy since according to the CJ jurisprudence, EU interest in restoring pre-existing market conditions by recovering incompatible aid must normally, if not always, take precedence over the interest of avoiding enforcement of the obligation to repay it[55].

VI. The role of the national identity principle in the EU law system

According to well-established jurisprudence of EU courts, EU law has absolute primacy over national legislation regardless of its nature[56] – this means absolute supremacy also over national constitutions[57]. However, this conclusion differs from positions taken by national constitutional or supreme courts[58] including, for example, those frequently taken by German[59] or Polish[60]

[53] See the footnote no. 8.

[54] C-473/93 *Commission v. Luxemburg*, para. 36.

[55] T-198/01 R *Technische Glaswerke Ilmenau GmbH*, para. 114.

[56] 6/64 *Flaminio Costa v. E.N.E.L.*; 106/77 *Simmenthal*, ECLI:EU:C:1978:49, para. 17.

[57] 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114.

[58] Not all Member States of the EU have specialized constitutional tribunals, and in some Member States this role is assigned to their supreme courts.

[59] Judgment BVerfGE 37; judgment BVerfGE 73; judgment BVerfGE 89.

[60] Judgment K 18/04; judgment K 32/09; judgment K 45/09.

constitutional courts (later noted and discussed by European scholars (Cloots, 2015, 5). Those constitutional or supreme courts do not, as it must be stressed, reject the primacy of EU law over national laws of EU Member States, but they stress that the primacy of EU law does not apply to national constitutions. Effectively therefore, they disagree with the CJ over the character and scope of that primacy and stress that it is not absolute, as the CJ would like, but rather relative and limited in scope.

The question whether such conflicting positions can be reconciled depends on what character one attributes to the EU law system. If one believes that its character is hierarchical, then it is justifiable to say that the positions taken by national constitutional or supreme courts have no legal basis. One must also remember that the supreme and final judge, which will hear and adjudicate such disputes, sits in Luxemburg and he/she will be adjudicating cases according to EU law – a law that favours the view on its own absolute primacy. That is, that the system of EU law is of hierarchical character.

If, on the other hand, one believes that the EU law system, which is composed of the law made by EU institutions and by the law made by EU Member States, is not hierarchical but rather multi-centric (Łętowska, 2008a; Łętowska, 2008b), or composite (Thym, 2009; Von Bogdandy and Schill, 2011), then it is possible that those differing positions can be abridged. It would be not necessary in such case for the sake of the effectiveness of EU law to grant EU law absolute primacy over national laws of EU Member States. 'The characteristic feature of a composite structure (Verbund) is the intertwining of cooperation and hierarchy as ordering paradigms for the conduct of actors in the European legal space. The concept of composite constitutionalism transcends traditional and somewhat simplistic ideas about the relationship between different constitutional orders, especially those that operate with simple supra- and subordination, where one legal order necessarily trumps another. Instead, the Verbund concept highlights both the autonomy of the actors at EU and national levels, and their mutual dependence in their quest to achieve common aims, thus requiring loyal cooperation and the submission to a uniform legal regime' (Von Bogdandy and Schill, 2011).

This view gains support from the national identity clause, as well as from the CJ jurisprudence where the latter starts to notice the need to protect the national identities of EU Member States. Even though the CJ has only in extremely exceptional cases found that it would be justifiable for national constitutions to take precedence over EU law[61], and only if strict requirements were to be met, the very acceptance of that notion suggests that the primacy of EU law has lost its absolute character.

[61] Opinion AG Maduro, C-213/07 *Michaniki*, para. 31; C-208/09 *Sayn-Wittgenstein*, para. 83 and 92.

VII. The requirements for invoking the national identity principle

The national identity principle is one of the general principles of EU law. It could thus be argued, similarly to other general principles (Jaros and Ritter, 2004, p. 1; Sinnaeve, 2010, p. 642), that EU institutions should examine (even *ex officio*[62]) whether in a case at hand the national identity of a Member State is endangered. As a result, it would be for EU institutions not only to conduct such an examination (procedural aspect), but also to decide on what deserves protection under that principle (substantive aspect). Support for the above approach could derive from the fact that Article 4(2) TEU, like other provisions of EU law, is subject to the interpretation and control of the CJ. By contrast, it could also be argued (frequently so, for example by the German Federal Constitutional Court[63] and by the Polish Constitutional Tribunal[64]) that it is for the national constitutional courts to decide these issues and that the compliance of actions taken by EU institutions with the national identity clause cannot be effectively controlled by EU institutions.

An opinion is also expressed that neither of the above views is fully convincing and that a third approach should be applied instead (Von Bogdandy and Schill, 2011). Accordingly, the appropriate way to settle this dispute is to apply the principle of sincere cooperation[65]. The CJ and national constitutional courts must fully and loyally cooperate in determining whether a particular value, promoted by a Member State, is covered by its national identity. During that cooperation, it is for the Member State to decide on the 'content' of its national identity, while the CJ is only empowered to determine the relevance of national identity under EU law (Von Bogdandy and Schill, 2011). The CJ cannot, however, replace the assessment carried out by the Member State with its own examination.

The justification for this solution can have pragmatic grounds also. EU institutions do not have the duty to know all of the Member States' constitutional systems, especially issues which individual States themselves regard to be crucial enough for them to be covered by the notion of their national identities. The EU, including the CJ, is not competent to decide what is covered by the national identity of each Member State (Von Bogdandy and Schill, 2011) – especially since the constitutional law of a given State Can reflect its historical, cultural, religious and other kinds of heritage which differentiates States from each other. Indeed, even if multiple States had similar historical

[62] Decision C (2004) 3060, para. 261–262.
[63] Judgment BVerfGE.
[64] Judgment K 32/09.
[65] Article 4(3) TEU.

experiences, their attitude towards them would not necessarily be analogues – different States can demonstrate different sensibilities towards similar values.

It must thus be left to the Member State concerned to submit a claim when to deem its national identity to be endangered. One may even say that if a Member State does not raise a claim that a particular value is so important to that country that it must be protected by the national identity principle, then such value is not in fact of such an importance for that State, or is not in fact at all endangered. Otherwise, the State would have invoked the need the national identity principle. The Member State does not, however, have to raise such a claim at a specific time in the procedure – it retains this right within the judicial proceedings held before EU courts even if it has not raised such a claim in the earlier administrative proceedings before the EC. Should such claim be raised, an EU institution (be it the EC during administrative proceedings, or EU courts in its judicial proceedings) has the legal duty to examine it thoroughly before deciding the case.

It is for the Member State to decide what values it seeks to protect, while the CJ is the institution empowered to adjudicate if in the case at hand a particular value is protected by the national identity principle. However, the finding that it is for the Member State concerned, rather than for EU institutions, to decide what values are covered by a given State's national identity, does not provide an answer to the question whether it has any significance who in that State decided that such value is covered by national identity or who represents that State before the CJ. Current CJ jurisprudence suggests that this answer is, in fact, important since the scope and intensity of the examination exercised by the CJ can vary depending on if, in the case at hand, it received an opinion from a national constitutional or supreme court. 'The ECJ may be a more active censor than national constitutional courts, but Sayn-Wittgenstein (and Omega) suggests that it is more indulgent and tolerant if the national constitutional court has pronounced on the matter. In the cases mentioned above where an appeal to national constitutional identity was rejected, no national constitutional court had clarified the national status and meaning of the constitutional norm or principle.' (Besselink, 2012).

The above quote refers to the CJ jurisprudence on national identity. Importantly, another conclusion can be drawn from that jurisprudence other than that the intensity of the CJ's examination depends on the involvement of national constitutional or supreme courts. Of relevance is also the very nature of the disputes where claims concerning national identity were in fact successful, especially where the examined cases had an economic character.

Hence, for example, the abovementioned *Sayn-Wittgenstein* and *Omega*[66] concerned free movement of persons and the freedom to provide services respectively. Therein, even though their areas touched upon the very foundations of the EU legal system, the examined disputes did not have an economic character (*Sayn-Wittgenstein*) or their economic character was found to be marginal (*Omega*). In those cases, the CJ carried out hardly any examination concerning the proportionality of the national measures (*Sayn-Wittgenstein*) or its examination was very light (*Omega*). This line can also be found in *Runevič-Vardyn* where the CJ linked national identity with the protection of a State's official national language[67] and in *Las*[68] where it stated that the EU must respect the national identity of its Member States, which includes the protection of its official language or languages. The aforementioned cases did not have an economic character.

By contrast, the *Michaniki* case had a strong economic character. Although the CJ did not directly refer to national identity (the examination of which was the core of the opinion of the AG), it nevertheless followed the opinion of the AG and carried out an extensive examination of the proportionality of the national measures at hand. Ultimately, the CJ found them to be disproportional. Also in *Commission v. Luxemburg*, which concerned the freedom of establishment, the CJ rejected arguments concerning the need to use the national language, and decided that the contested national measures were disproportionate[69]. In *O'Brien*, the CJ failed to find any link connecting the case to national identity[70] stating that applying EU law to the national judiciary which, according to national rules, plays an essential role in the national constitutional order of a Member State, does not automatically mean that its national identity has been breached.

Although neither of the above findings were made in State aid cases, they nonetheless can provide some indications as to what to expect from EU courts should they be tasked with conducting an examination of the compatibility of a recovery order against a Member State's national identity. State aid cases have a strong economic character and, by definition, may have an impact on the Internal Market. According to the CJ, a recovery order is the logical consequence of finding that a given aid is unlawful, and it is granted for the purpose of re-establishing pre-existing market conditions. A recovery order is a form of public intervention meant to improve the legal situation of

[66] In this case, the CJ did not directly refer to national identity but still referred to the national constitution.

[67] C-391/09 *Runevič-Vardyn*, para. 86.

[68] C-202/11 *Las*, para. 26.

[69] C-51/08 Commission v. Luxemburg, para. 124.

[70] C-393/10 *O'Brien*, para. 49.

entrepreneurs whose competitor was granted unlawful aid. Deciding not to recover such incompatible aid would result in maintaining the distortion on the Internal Market. Hence, the examination concerning the compatibility of the recovery order with the principle of national identity is to include a detailed examination of proportionality. As the EU interest in restoring pre-existing market conditions by recovering the unlawful aid must normally take precedence over the interests of the beneficiary (as well as that of the Member State) in avoiding the enforcement of the repayment duty[71], the proportionality test in State aid cases is to be rather strict.

That test does not, however, refer to the examination of compatibility of a recovery order with the principle of proportionality (general principle of EU law) as, according to EU courts, recovery of unlawful aid is the logical consequence of finding the aid to be unlawful. Recovery of such aid cannot in principle be regarded as disproportionate to the objectives of the Treaty. In applying the proportionality test in order to carry out the examination of a national identity claim against a recovery order, the EU institution (be it EU courts or the EC) should[72] apply this test as a way of examining if refraining from recovering the aid would be proportional to the objectives of the Treaty; that is to say, not if recovery is proportional, but if refraining from it is. The obligation of the EU to respect the national identities of its Member States derives explicitly from Article 4(2) TEU, and therefore their national identity deserves protection. No Member State has to prove it. But that does not mean that in particular cases giving protection to certain values would be proportional to the objectives of the Treaty and so it must be tested.

VIII. Conclusions

The above observations suggest that, according to the current state of the CJ jurisprudence, it would be highly unlikely for EU courts to adjudge that the EC have breached the principle of national identity by ordering a Member State to recover unlawful State aid. This view gains support from the fact that the EU judiciary has yet to render even a single judgment ruling that the EC breached the national identity principle by ordering a Member State to recover unlawful aid. Moreover, the CJ has so far only acknowledged values which do not have an economic nature, or the economic character of which is lower than the value said to be covered by national identity. In cases where

[71] T-198/01 R *Technische Glaswerke Ilmenau GmbH*, para. 114.

[72] Since EU courts have not yet carried out such an examination in State aid cases, this is more of a *de lege ferenda* argument.

the CJ rejected arguments based on the national identity principle, it carried out extensive examinations of the proportionality of limiting the scope of EU law against the national identity of a Member State.

On the other hand, the fact that EU courts have not yet referred to the national identity principle in State aid cases, and that they carry out extensive proportionality examinations in cases of an economic character, cannot serve as conclusive evidence that such a verdict is not to be made. Unlikely does not mean impossible.

It must be stressed first of all that the national identity clause is not limited (formally) to particular legal areas, and it is for Member States to decide what values are covered by the scope of their national identity. Furthermore, even though the CJ has delivered seven judgments referring to the national identity principle so far, this can still be seen as only the beginning of this jurisprudential line with more rulings to be expected. Although the CJ carries out stricter proportionality tests in cases of an economic nature (which would also cover State aid) than in those of a non-economic character, the intensity of such examinations is yet to be established.

Lastly, even State aid cases can vary among themselves and it is not unlikely that by ordering a recovery of an aid the EC would endanger higher values, which ought to be protected under national constitutions. Those values could possibly be of such a status that their protection could be seen as necessary in order to protect the national identity of a Member State. It is worth mentioning that the cases adjudged so far, where the CJ rejected arguments based on national identity, have not been supported by views and opinions made by national supreme or constitutional courts. One may not deny the view expressed by Besselink that the participation in a European case of national supreme or constitutional courts can influence the intensity of the examination carried out by the CJ.

It is thus fair to say that it is not impossible, albeit it would be an extremely rare case, to successfully invoke the national identity principle in State aid cases in order to evade the recovery of unlawful aid. One purely theoretical example (although it may be seen differently by EU courts) may concern the situation of public television benefiting from public funding. The rules and limits according to which public television can be publicly financed are contained in the Communication from the Commission on the application of State aid rules to public service broadcasting[73]. Should those rules and limits be exceeded, the financing provided to such a broadcaster could be found to be unlawful State aid subject to recovery. It is not impossible, however, to imagine a situation where in a particular situation the recovery of such an

[73] OJ C 257, 27.10.2009, p. 1.

aid could affect the national identity of a Member State, as the main task of such a broadcaster would be, for example, the promotion of a Member State's culture, history and keeping community bonds between citizens dispersed throughout the world. In such a situation, even though the financing provided to public television would be considered aid, and what's more, aid incompatible with the Internal Market, issuing a recovery order could be contrary with that Member State's national identity.

References

Besselink, L.F.M. (2012). Respecting Constitutional Identity in the EU, Case Note to Case C-208/09, Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010, nyr. *Common Market Law Review, 49*(2), 671–693.

Brandtner, B. (2013). *Recovery and Insolvency – A case for greater flexibility*? GCLC Lunch Talk. Retrived from: https//www.coleurope.eu.

Cieśliński, A. (2003). *Wspólnotowe prawo gospodarcze*. Warszawa: Wydawnictwo C.H. Beck.

Cloots, E. (2015). *National Identity in EU Law*. Oxford: Oxford University Press, http://dx.doi.org/10.1093/acprof:oso/9780198733768.001.0001.

Fontanelli, F. (2011). The European Union's Charter of Fundamental Rights two years later. *Perspectives on Federalism*, 3(3).

Giraud, A. (2008). A study of the notion of legitimate expectations in State aid recovery proceedings: „Abandon all hope, ye who enter here"? *Common Market Law Review*, 45(5), 1399–1431.

Jaros, K., Ritter, N. (2004). Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid – What are the Recent Developments in Case Law and the Commission's Practice? *European State Aid Law*, 4.

Łętowska, E. (2008a). Dialog i metody. Interpretacja w multicentrycznym systemie prawa (cz. I). *Europejski Przegląd Sądowy*, 11.

Łętowska, E. (2008b), Dialog i metody. Interpretacja w multicentrycznym systemie prawa (cz. II), *Europejski Przegląd Sądowy*, 12.

Mik, C. (2000). *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki. T. 1*. Warszawa: Wydawnictwo C. H. Beck.

Sinnaeve, A. (2010), Procedure Regarding Unlawful Aid. In: Heidenhain, M. (ed.). *European State Aid Law*. München: Verlag C.H. Beck.

Thym, D. (2009). In the name of Sovereign Statehood: a critical introduction to the Lisbon judgement of the German Constitutional Court. *Common Market Law Review, 46*(6), 1795–1822.

Tridimas, T. (2006). *General Principles of EU Law*, Oxford: Oxford University Press.

Von Bogdandy, A. and Schill, S. (2011). Overcoming absolute primacy: respect for National identity under the Lisbon Treaty, *Common Market Law Review, 48*(1), 1–38.

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Grounds for Private Enforcement of Albanian Competition Law

by

Ermal Nazifi[*] and Petrina Broka[**]

CONTENTS[***]

Abstract

Infringements of competition law can cause serious harm to both consumers and undertakings. Aside from the development of public enforcement of competition law, much focus has been placed in recent years in the European Union on private competition law enforcement. Lawsuits raised by undertakings that sustained damages from anti-competitive practice concerning the compensation of such damages have historically not been widespread in Europe.
No such cases have been recorded in Albania at all yet, despite the fact that its competition protection legislation has provided this possibility since 1995. The main

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causes of the lack of private competition law enforcement in Albania include the absence of judicial practice and doctrinal approaches in this area. Relevant here is also the inability of Albanian businesses and consumers to react to competition protection cases as they still lack competition law knowledge and as a result of the absence of an appropriate legal framework for class actions.
The scope of this article is to analyze the current situation of private competition law enforcement in Albania. The paper emphasizes the current legal framework including existing obstacles to private competition law enforcement and improvements that should be introduced in the context of its competition law, the law of civil procedures and the law of obligations.

Resumé

Les violations du droit de la concurrence peuvent causer un préjudice grave aux consommateurs et aux entreprises. À part du développement de l'application publique du droit de la concurrence, beaucoup d'attention a été consacrée les dernières années à l'application privée du droit de la concurrence dans l'Union européenne. Néanmoins, les actions en indemnisation introduites par les entreprises qui ont subi des dommages résultant de la violation du droit de la concurrence n'étaient pas trop répandues en Europe.
Malgré le fait que depuis 1995 la loi albanaise sur la protection de la concurrence prévoit la possibilité d'introduire les actions en indemnisation par les entreprises qui ont subi des dommages resultant de la violation du droit de la concurrence, aucune de ces actions n'était pas été introduite en Albanie jusqu'à présent. Les raisons principales du non-développement de l'exécution privée du droit de la concurrence en Albanie sont: l'absence de la pratique judiciaire et l'absence de la doctrine juridique dans ce domaine. il faut aussi mentionner sur ce point l'incapacité des entreprises et des consommateurs albanais de répondre aux actions privées ce qui résulte du manque de connaissances en droit de la concurrence et l'absence d'un cadre juridique approprié pour les actions collectives.
Le but de cet article est d'analyser l'état actuel de l'exécution privée du droit de la concurrence en Albanie. L'article met l'accent sur le cadre juridique actuel, y compris les obstacles à l'exécution privée du droit de la concurrence, et propose les améliorations qui devraient être introduites dans le droit de la concurrence, dans la procédure civile et dans le droit des obligations afin de changer cette situation.

Key words: causal link; civil law; damages; fault; private enforcement of competition law.

JEL: K21; K41

I. Introduction

An efficient competition law and policy system is of utmost importance for the economic development of Albania, which is an economy in transition that looks forward to being part of the European Internal Market. Effective competition law application is essential to the establishment of a free and competitive market for undertakings and consumers, which will in turn profit from better products and services, lower prices, innovation, etc. The protection and welfare of consumers is one of the most important goals of competition law (Cengiz, 2010, p. 49; Hutchings and Wheeelan, 2006). Competition law and policy is thus of particular importance to the entire Albanian economic system.

For better protection of free and effective competition, it is not sufficient however to have well-crafted legislation in line with the developments of *acquis communautaire* – the most important issue here is the correct and efficient application of that law in practice. In this context, the application of competition law can be done either through public enforcement or through its private enforcement. While the former can be considered to be on the right track in Albania (UNCTAD, 2015, p. 26), no cases of private enforcement of competition law have been recorded yet. An increase in awareness is thus essential in this context for all stakeholders: consumers, lawyers, judges and policy-makers in Albania. They should be informed of the advantages of private competition law enforcement alongside of those of its public enforcement.

In the Albanian competition law system, public enforcement takes place through an intervention of the Albanian Competition Authority. By contrast, private enforcement of competition law can be performed directly by those who have suffered damages from an anti-competitive practice. In this case, the injured party has the right to demand not only the prohibition of the anti-competitive practices, but also demand compensation for the damage caused by that practice before a court. Such a right was first recognized in Article 62 of the Law on Competition of 1995[1] (Albania's first law in the field of competition protection), now abolished by the current Law on Competition Protection of 2004 (hereafter, ACPL). However, despite the fact that such a possibility is legally in operation for more than 20 years, there has never been a private enforcement case in Albania.

[1] Law No. 8044 of 22 December 1995 on competition (Official Journal no. 27, p. 1153).

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II. Private enforcement of competition law

1. Introductory remarks

According to the provisions of the Albanian Civil Code, those injured by an anti-competitive practice in order to be successful in raising before a court an action for damages deriving from an anti-competitive practice must cumulatively prove that:

1. There has been an illegal act (in the form of a prohibited agreement or an abuse of a dominant position)
2. The claimant has suffered damages,
3. There has a been fault[2] and
4. There is a causal link between them[3].

It is not easy to offer convincing evidence that these conditions were met in competition law cases. A thorough analysis is needed from the parties and from the courts.

2. The 'illegal act'

Restriction, distortion or obstruction of competition can occur through an agreement prohibited by Article 4 ACPL or through an abuse of a dominant position performed by one or more undertakings, prohibited by Article 9 ACPL. The prohibition of anti-competitive agreements is a key priority of competition law enforcement policies worldwide seeing as they undermine social welfare, create inefficiencies and shift benefits from consumers to the participants of the agreements.

Article 4(1) ACPL[4] lists a number of agreements considered especially dangerous for free and effective competition. Some of them can be considered "hardcore" cartels, especially price-fixing and market sharing agreements. However, this is not an exhaustive list as it is impossible to anticipate all agreements that may restrict, impede or distort competition. Such definition would potentially limit possible anti-competitive agreements from being stopped by the competition authority or courts. In so doing, the Albanian legislator gives a broad definition of the notion of prohibited agreements in

[2] Article 608 of the Civil Code of the Republic of Albania, states that: 'The person who illegally and due to his fault, causes damage to another person or to his property, is obliged to compensate the damage caused.'

[3] Article 609 of the Civil Code of the Republic of Albania states that: 'The damage must be an immediate and direct consequence of a person's action or failure to act.'

[4] Section 4(1) of the ACPL.

line with the definition given in Article 101 TFEU. The applicable definition corresponds also to the general attitude of modern legislators to avoid defining every detail, or giving exhaustive lists, a fact that can easily be turned into an obstacle for the implementation of the law.

Another illegal behavior to be considered in the framework of private competition law enforcement in Albania is the abuse of dominance[5] by a particular enterprise, or several undertakings jointly (joint dominance). Such practice can be very harmful to competition. Dominant companies may have the ability to raise prices above competitive levels, reduce the quality of products while still being able to secure profits, exclude competitors from the markets, etc. It should be emphasized that according to Albanian legislation, a dominant position is not prohibited *per se* – what is prohibited is its abuse[6].

Dominant companies have a special responsibility, because of their ability to disrupt free and effective competition, to consider the interests of competitors, suppliers, customers and clients. For this reason, in Article 9 ACPL as well as Article 673 of the Albanian Civil Code, undertakings with a dominant position are deprived of the right to behave in a certain way, which for non-dominant companies can be considered a normal market behavior (Gal, 2003)[7].

Dominance, especially in small markets like Albania, is often the result of legitimate competitive behavior[8]. However, it is not relevant how dominance was created if one abuses such position. What is prohibited by competition law is the intentional abuse of a dominant position in order to harm competitors and/or clients in its different forms (exclusionary or exploitative abuse).

3. Damage caused by an anticompetitive practice

The assessment and evaluation of damages suffered from an anti-competitive practice may be a major problem for private competition law enforcement. According to Albanian legislation, an injured person can submit a claim for the compensation of the actual damage, loss of profits as well as interest[9].

[5] See in general, Chapter II of the law No. 9121 of 28 July 2003 on competition protection.

[6] Article 9 of the law No. 9121.

[7] Article 673 of the Civil Code of the Republic of Albania states that: 'An enterprise that has a dominant position in the market is obliged to contract with anyone who seeks a contract within its field of activity, according to the laws and commercial customs.' Hence, a dominance company cannot refuse to deal without a legal reason.

[8] Small economies are often characterized from an oligopolistic market structure which affects the implementation of competition law.

[9] Article 640 of the Civil Code of the Republic of Albania, states that: 'Compensation for property damage consists of the damage that has been caused and the expected profit. The expenses done reasonably to avoid or reduce the damage are compensated, as are those

This approach is in line with the approach of the European Court of Justice in the *Manfredi* judgment[10]. Importantly, the jurisprudence of the CJ is not only important for the interpretation of the law from a theoretical point of view (that is, by academics and legal practitioners). In practice, the Stabilization and Association Agreement between Albania and the EU[11], provides also that in the field of competition, interpreting mechanisms of the European Treaties (Borchardt, 2010, p. 70)[12] should be used for the interpretation of this agreement despite the fact that Albania is not actually a member of the European Union.

While in general the legal framework and practice is somewhat clearer for *damnum emergens* and *lucrum cessans*, the Albanian legal framework needs to be clarified when it comes to the question how to set interest rates. In practice, this issue is determined by economic experts assigned by the judge in such cases. The Albanian Civil Code provides that the interest rate should be specified by the law[13], yet such law has not been enacted despite the fact that the Civil Code has been in operation since 1994.

In practice, plaintiffs are not always able to prove the exact amount of the damage sustained and/or the causal link between the unlawful conduct and the alleged damage because of problems in determining whether the damage and the losses came from the alleged anti-competitive practices or other factors (such as lack of resources, miss-management, etc.) (Oxera, 2009, p. 6).

Currently there are no guidelines or professional recommendations on how to calculate damages in competition law cases. The Albanian Competition Authority can, and should provide a positive contribution in this field by issuing a specific guideline on the calculation of damages in the framework of public enforcement. Such soft law could be used, *mutatis mutandis,* by analogy in private enforcement cases also. Albanian competition law stipulates that its Competition Authority shall calculate the fine based on the illegal gains of the undertaking concerned[14]. A guideline on how to calculate illegal gains could serve as a basis for the approximation of the EU guidelines in this

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necessary to define the liability and the amount of damage and the reasonable expenses done in order to obtain compensation through extra-judiciary ways.'

[10] The court noted that: 'the damage award includes not only effective damage *(damnum emergens)*, but also loss of profit *(lucrum cessans)* and related interests' – C-295/04 to C-298/04 *Vincenzo Manfredi and others v. Lloyd AdriaticoAssicurazioniSpA and others*, ECLI:EU:C:2006:461, para. 95.

[11] According to the Article 71/2 of the Stabilization and Association Agreement between Albania and the EU, 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, and interpretative instruments adopted by the Community institutions.

[12] The interpretation of EU law is one of the key work areas of the Court of Justice.

[13] Article 450 of the Albanian Civil Code.

[14] Article 75 of the Albanian Competition Law.

field[15] that can be used by the court and the court experts on the quantification of the harm.

4. Causal link and fault

For the emergence of civil liability for the compensation of damages arising from an anti-competitive practice it is necessary to establish a causal link between the damages and the offender's fault. Albanian legislation on the requirement of fault is in line with that of the EU by presuming the existence of fault. It leaves the burden of proving that the damage has occurred without the fault to the defendant, and therefore that the defendant is not responsible for its compensation, to the defendant himself[16]. Such approach is in favour of the development of private competition law enforcement because the plaintiff is not charged with the burden of proving fault on the side of the defendant, which might be extremely difficult.

In the framework of an action for damages arising from an anti-competitive behavior, it must be established however what practice has caused the damages, as well as if the damage was caused by such practice. The fact must be acknowledged that the mere existence of an anti-competitive practice does not, automatically, mean that damages were caused by it. Indeed, damages can be caused by other reasons rather than as a consequence of the anticompetitive practice. It is important to note that the determination of a causal link between the anti-competitive practice and its effect is relevant also for the method used to calculate the amount of the damage, from the appropriate economic expert and quality of data used (Fummagalli, Padilla, and Polo, 2010).

However, finding a causal link is difficult in practice and still poses problems, which theoretically has not been solved yet (Muskaj, 2013). Contrasting opinions are presented regarding this issue (Muskaj, 2013). In fact, there is no precise scientific definition of a causal link, thus living its assessment to the practical experiences and evaluation of the courts (Muskaj, 2013). Individual competitors are likely to be among those most interested to lodge an action for damages[17]. The existing 'material' legal framework is certainly not making things easier for them.

[15] See in general the Practical Guide: Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the treaty on the functioning of the European Union accompanying the communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union {C(2013) 3440}.

[16] Article 608(2) of the Civil Code states that: 'The person who has caused the damage is not liable if he proves that he is not at fault'. Therefore the burden of proof lies on the defendant.

[17] C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v. Courage Ltd and Others*, ECLI:EU:C:2001:181.

5. Procedural aspects

The lack of damages action cases arising from anti-competitive practices in Albania is mainly caused by problems or deficiencies in its procedural rather than material law, seeing that several procedural tools that could facilitate this process are absent from the Albanian legal system.

One of the most important roots of the lack of private enforcement in Albania is that is has no legal mechanisms for collective redress for damages suffered from anti-competitive practices. Most of the victims of anti-competitive practices are consumers. Consumers cannot 'pass-on' the damages that they have sustained from competition law violations because they are already at the very 'bottom' of the purchasing chain, and yet they rarely have the interest and the ability to sue the offenders individually. In truth, consumers are often even unaware of the damage that they may have suffered from an anti-competitive practice – they may face difficulties in identifying the harm suffered. Alternatively, they may know about the harm, but might not take the initiative to seek appropriate redress since the value of the damage in question is so small that it does not justify the efforts of court litigation for seeking compensation. Therefore, by assessing the costs and benefits of an action for damages suffered as a result of an anti-competitive practice, most consumers will conclude that the costs of seeking compensation are higher than its benefits (Dayagi-Epstein, 2007).

In such cases, companies involved in an anti-competitive practice causing large cumulative damages to many consumers gain large profits from the implementation of such a violation, while many individual consumers suffer small individual damages. Potential competition law infringers might thus see the unlikelihood of being held liable by individual consumers as a reason for engaging in a business strategy involving an anti-competitive practice.

For these reasons, it is necessary to provide as many collective redress mechanisms for damages as possible, in order to make up for their deficiencies and difficulties. Such collective redress mechanisms, called 'complex claims' (Broka, 2013), may include public interest lawsuits, collective actions under the 'opt in' model , or class claims under the 'opt out' model, as well as any other 'hybrid model' that bears such overlapping features (Ashurst, 2004). If consumers have varied possibilities to combine their claims for compensation, they would find it easier to demand compensation for damages suffered from anti-competitive behaviors, even if each of their individual loss was very small. This possibility would not only be a great tool to ensure compensation for damages actually sustained, but it would also serve as a strong deterrent against companies getting involved in anti-competitive behaviors (Lande and Davis, 2008).

The current Albanian legal system offers some collective redress possibilities. First, the Albanian Code of Civil Procedure makes it possible for a person to raise an action to protect a right of a third party if it is so explicitly allowed by the law[18]. However, such a possibility is not recognized by the ACPL. According to Article 65 ACPL, only those actually injured by an anti-competitive practice can turn to the courts with an action for damages.

Second, Article 161 of the Albanian Code of Civil Procedure speaks of the possibility of co-litigation (*litis consortium*)[19]. Two types of co-litigation are provided – facultative and obligatory[20]. In the case of facultative co-litigation, each party acts independently and therefore there is no gain or harm caused to other co-litigators[21]. In the case of obligatory co-litigation, the decision of the court and the actions of co-litigators affects the other parties[22]. Yet such obligatory co-litigation is allowed only when it so provided by the law, or on the basis of the nature of a relevant legal relationship such as obligatory co-ownership (condominium). In cases of damages suffered from anti-competitive behavior, it would be very difficult to convince the court that it is a case of obligatory co-litigation without having a special law stating so. The complete absence of such cases supports this conclusion.

Third, an example of representative actions to protect collective interests is foreseen in Albanian Consumer Protection Law[23]. According to its Article 54, consumer associations may address the court if consumer rights are breached. Yet the right of consumers to competition protection is not expressly recognized. However, given the importance of competition to consumers, it can be implied that free and effective competition is a pre-requisite for the enjoyment of consumer rights specifically mentioned in the Consumer Protection Law. Albanian Consumer Protection Law serves as a law that sets minimal standards to be met (*lex generalis*). It does not exempt the relations between consumers and traders regulated with other specific laws that offer higher standards of protection (*lex specialis*)[24].

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[18] Article 95 of Albanian Code of Civil Procedure, emphasis added.

[19] Article 161 of the Albanian Civil procedure code states that 'Actions may be taken jointly by many plaintiffs or against many defendants if: (a) they have common rights or obligations on the subject of the claim; (b) the rights and obligations in terms of fact or of law have the same basis'.

[20] See Article 162 of the Albanian Code of Civil Procedure.

[21] Article 162(1) of the Albanian Code of Civil Procedure.

[22] Article 162(2) of the Albanian Code of Civil Procedure.

[23] Law No. 9902 of 17 April 2008 on consumer protection, Fletore Zyrtare (Official Gazette) No. 61, p. 2703.

[24] See: Article 1 of the Law No. 10 444 of 14 July 2011 on some amendments and additions of the Law No. 9902 of 17 April 2008 on consumer protection.

The ACPL can be considered one of these specific laws (*lex specilis*). Hence, consumer law will be applied for customers affected by an anti-competitive practice, depending on whether the provisions of the ACPL offer better protection of consumer rights. Therefore, there might be some room for collective redress by consumer associations for the protection of consumers through a representative action under the current legal system in Albania. However, these rules are not clear enough to assure standing for consumer associations.

It should be noted, however, that under current legal provisions, consumer associations may address the court, through a representative action, only to request the cessation of a violation of consumer rights by a company – they do not have a right guarantying a claim for damages compensation. Therefore, there is no clear mechanism in place that enables collective redress for seeking damages for breaches of competition law based on Albanian Consumer Protection Law. For a more efficient application of competition law in Albania, this possibility should be, as soon as possible, clearly granted to consumer associations. They should not only be able to ask for the cessation of an anti-competitive behavior, but also to seek compensation for damages suffered by consumers. By doing so, the impact of actions for the protection of consumer rights will increase – they will assure better consumer protection as well as greater deterrence.

Even in the EU, associations representing consumer rights have played a very limited role in enforcing competition law in general and Article 102 TFEU in particular (Chacafeiro, 2008). Enforcement practice from different EU Member States shows that representative claims from consumer associations achieve only partial success. It is noticeable that although several EU countries provide such possibility, consumer associations are reluctant to file lawsuits against competition breaches because they are financially unable to fund such claims, or to pay their legal costs in the event of an unsuccessful outcome of the case (Hodges, 2007).

However, the Albanian lawmakers can benefit from both the positive and the negative experiences of EU Member States when it comes to collective actions and take the necessary measures to overcome the identified difficulties. Albania should transpose the recommendation on collective redress mechanisms[25]. The main goal of this initiative is to facilitate access to justice, to prevent illegal practices and to compensate injured parties in a situation of collective damages caused by the violation of rights recognized in the EU, as well as to provide appropriate procedural tools to avoid abusive litigation[26].

Nevertheless, the fact should be highlighted that consumers are not the only injured group that should be encouraged to file damages claims – so should

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

[26] Para. 1 of the above Recommendation.

businesses. Competitors and direct purchasers, for example, are potential private enforcers also[27]. In fact, businesses might be more inclined and less deterred than consumers to demand compensation for damages caused to them by a rival which has infringed competition rules. And yet Albania has not seen a single such case so far. The introduction of a mechanism to incentivize private enforcement especially by small businesses (EC, 2014)[28] should be considered. One possible measure that would help businesses engage in private competition law enforcement could be the provision of special rules for facilitating representative action by business associations.

Considering that Albania is a country where private competition law enforcement is totally undeveloped, it is necessary that its legislation foresees as wide a range of 'complex' civil law claims as possible, in order to provide better protection for victims of anticompetitive practices. This will facilitate access to justice for parties that have been damaged by such practices. It will also serve as deterrent to prevent anti-competitive practices in the future, improve judicial economy and assures more uniformity in judicial practice. But all this must be done through a qualitative legal reform, providing appropriate procedural means, well designed and well thought through, in order to avoid possible rights' abuses.

6. Missed opportunities for the development of private enforcement in Albania

6.1. Ease of proving the anti-competitiveness of 'naive' cartels

One of the main known obstacles for the development of private competition law enforcement is information asymmetry between the plaintiff and the defendant (Siraguza and D'Ostuni, 2006). In an action for damages caused by an anti-competitive practice, parties do not have the same position or opportunities when it comes to access to the evidence necessary to prove the anti-competitive practice. It is a widely accepted fact that the difficulty plaintiffs face in order to get all the evidence they need constitutes one of the fundamental obstacles for actions for the compensation of damages arising from competition law violations in many EU Member States.[29] It is likely to be one of the main reasons for the lack of such actions in Albania also.

[27] See for example C-453/99 *Courage v. Crehan*.

[28] SMEs in Albania account for 81% of employment (EU average: 67%) and generate about 70% of added value (EU average: 58%).

[29] See Chapter II of the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349/1).

The enforcement practice of developed countries shows that finding relevant evidences is especially difficult when it comes to anti-competitive agreements. Usually, parties involved in such practice do their very best to conduct such practices in great secrecy. They do so not only to avoid legal liability, but also to deceive consumers who fail to realize that they are being overcharged. Yet secrecy is ensured only when offenders have a high level of competition law awareness and knowledge, which makes them more careful in the implementation of their anti-competitive practices.

In countries where competition law is still under development, prohibited agreements may sometimes be carried out 'in the open' simply as a result of legal ignorance. Such agreements are known as 'naive cartels' – their participants not only fail to conceal the prohibited practice, they go so far as to announce it in the media (Nazifi, Broka, 2013). The Albanian Competition Authority has identified several such cases notably with respect to agreements intended to increase the price of bread concluded by *Fier*[30], *Korca*[31] and *Vlora*[32]. In all of these cases, the majority of the enterprises operating in the market participated in a meeting where a decision was made to fix the price of bread. The organizers of this meeting made statements to the media announcing the price increase as well as justifying it with wheat price increases on international markets and tax issues.

Another case of a 'naive cartel' was discovered in the market for the production of ready-mixed concrete in the Tirana region[33]. Here, the Concrete Producers Association not only made statements in the media announcing the agreement but even advertised it[34]. Yet despite the fact that the public was fully aware of these agreements, only the Albanian Competition Authority acted against them – no actions for damages were lodged by individual consumers, any of the affected businesses or even by a consumer association. This shows once again that there is an urgent need for the introduction of collective redress mechanisms.

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[30] Albanian Competition Authority decision no. 57 of 1 October 2007 on the prohibition of the agreement in the market of the production of bread in the Fier Circuit.

[31] Albanian Competition Authority decision no. 146 of 17 June 2010 on the closing of the preliminary investigation in the market of the production and sale of bread in the Korca City,

[32] Albanian Competition Authority decision no. 191 of 31 May 2011 on the opening of the in-depth investigation in the market of the production and sale of bread in the Vlora city.

[33] Albanian Competition Authority decision no. 56 on the abolishment of the agreement in the concrete production Market in Tirana Region.

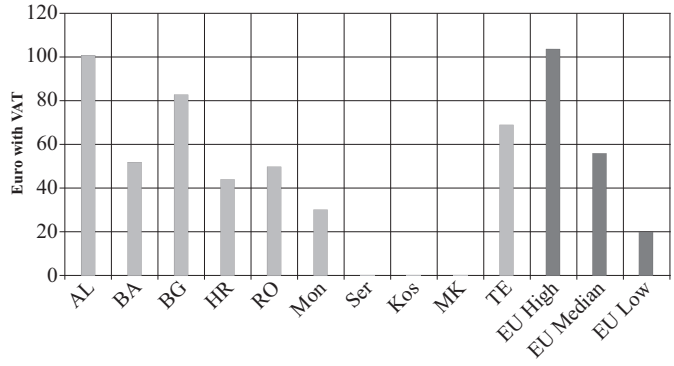
[34] See: *Forumi Shqiptar.* 2006. forumishqiptar.com (accessed December 1, 2012). In the case of the ready mixed concrete cartel, the undertakings were fined on procedural ground for refusing the delivery of information.

6.2. The mobile telephony case

In cases when the damage is caused by an anti-competitive practice in the form of an abuse of a dominant position, the plaintiff has to, first, prove the existence of the dominant position of the undertaking (or undertakings) and then, second, prove that such position was abused. Expert testimony and evidences are key to prove abuse, which largely rely on an economic analysis. Such analysis should thus be performed by economic experts, preferably ones with specific knowledge in the field of competition (industrial economics). Having said that, in the case of follow-on actions the burden of proof is much lighter for the plaintiff since a final decision of the Albanian Competition Authority is considered full evidence for the damages action[35].

In one of the most interesting cases investigated by the Albanian Competition Authority so far, two operators in the national mobile telephony market (AMC sh.a. and Vodafone sh.a.) were fined for an abuse of a dominant position in the mobile market. The Authority found that these companies held a joint dominant position and applied unfair prices. The Authority found that the price paid by Albanian consumers were among the highest in Europe, and the highest in the region of southeastern Europe, which includes countries comparable with Albania. Using Bulgarian prices as comparison (second highest in the region) Albanian customers paid around 20% more. Using the EU median used, Albanian consumers paid around 40% more.

Table 1. Average tariffs for high usage customers of mobile telephony services in Albania and in the countries of the region and European Countries in 2005.



Source: Albanian Competition Authority decision no 59 of 9 November 2007 on the Abuse of dominant position in the Mobile Telecommunications Market by the Albanian Mobile Communication sh.a. and Vodafone Albania sha, p. 20.

[35] See article 254 of the Albanian Civil Procedure Code (law no. 8116 of 29 March 1996 on Code of Civil Procedure), as amended.

This case constitutes a lost opportunity for Albanian consumers to seek compensation for damages suffered from the anti-competitive behavior of these two companies. The fact that they did not know about this possibility, as well as the absence of collective redress mechanisms, are the main reasons that caused it. Bulk users of mobile telephony, such as large companies and the Albanian government, should have started such actions to recover the damages.

6.3 Bid rigging and the Albanian Competition Authority

The Albanian Competition Authority has imposed a fine on 4 distributors of new cars and original spare parts for Volkswagen, Hyundai and Mitsubishi, for rigging a number of bids for the public procurement of new cars by several public bodies in Albania, including the Competition Authority itself. The Albanian government is one of the largest purchasers of new cars in the country since most of the cars sold in Albania are used.

When only the investigated companies took part in the tenders, the final price of the winning bids varied between 95% and 99% of the price cap set for the public procurement procedure. When other companies took part in the tender, the final price of the winning bid varied between 75% and 89% of the available public funding (Broka 2012a; Broka 2012b). The Albanian Competition Authority discovered in its investigation that Albanian public authorities paid an overcharge of between 10%-20%. One of the victims of this cartel was the Competition Authority itself. Unfortunately, none of the victims, not even the Albanian Competition Authority, lodged a damages action to seek compensation for this overcharge.

In a similar case at the EU level, the European Commission started an action for damages against several elevator and escalator companies involved in a price fixing cartel which also victimised EU institutions. The CJ decided in a preliminary ruling that the Charter of Fundamental Rights does not prevent the Commission from bringing an action, on behalf of the EU, before a national court for compensation for loss caused to the EU by an agreement or practice contrary to EU law[36].

III. Conclusions

An effective system for the enforcement of competition law in Albania is very important for the development of its free market economy. It is also one of the conditions for Albania's integration into the EU. Although its national

[36] C-199/11 *Rechtbank van koophandelte Brussel (Belgium),* ECLI: ECLI:EU:C:2012:684.

legal framework is similar to that of developed countries, private enforcement of competition law is still non-existent.

In order to improve this situation, it is important to raise competition law awareness of all stakeholders including businesses, consumers and public institutions that might have been, or can be damaged by an anti-competitive practice. They must be aware of the possibility of private competition law enforcement as well as of the consequences of their failure to react to a competition restriction. Awareness should also be improved among legal professionals such as attorneys and judges.

However, increasing awareness among stakeholders about the importance of competition law will not be enough to develop its private enforcement. A review of several aspects of Albania's substantive and procedural law is also needed in line with the developments of *acquis* as well as that of EU Member States. This way, private enforcement of competition law will have the chance to develop so as to assure compensation for victims of anti-competitive practice but also to deter potential offenders from engaging in such practices in the future.

References

Ashurst. (2004). Study on the conditions of claims for damages in case of infringement of EC competition rules: Comparative report. Brussels: Ashurst.

Borchardt, C. (2010). *The ABC of European Union Law*. Luxembourg: Publications Office of the European Communities.

Broka, P. (2012a). The Tirana Court of Appeals confirms NCA decision that fined companies involved in bid rigging in a public procurement case (Classic/Noti). *E-Competition Bulletin*, *10*. Broka, P. (2012b). The Tirana District Court quashes the decision of the Albanian Competition Authority on bid rigging in the new cars public procurement (Classic/Noti). *E-Competition Bulletin*, 3.

Broka, P. (2013). *Zgjidhja e konflikteve midis palëve private në të drejtën e konkurrencës në Shqipëri (Private enforcement of competition law in Albania).* Unpublished Doctoral Dessertation, University of Tirana, Tirana.

Cengiz, F. (2010). Antitrust damages actions: lessons from American indirect purchasers' litigation. *International and Comparative Law Quarterly*, *59*(1), 39-63, http://dx.doi.org/10.1017/s0020589309990030.

Chacafeiro, F. (2008). The role of consumer associations in the enforcement of Article 82 EC. In: Mackenrodt, M., Gallego, B. and Enchelmaier, S. (ed.), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* Berlin Heidelberg: Springer-Verlag, http://dx.doi.org/10.1007/978-3-540-69965-1_8.

Dayagi-Epstein, O. (2007). Representation of Consumer Interest by Consumer Associations – Salvation for the Masses? *The Competition Law Review, 3*(2)*,* 209-249.

European Commision. (2014). Small Business Act for Europe Fact Sheets. Publication place: Brussels. Institution: DG Enterprise and Industry, European Commision.

Forumi Shqiptar. (2006). forumishqiptar.com (accessed December 1, 2012).
Fummagalli, C., Padilla, J. and Polo, M. (2010). *Damages for exclusionary practices: a primer*. Delivered at Workshop on the quantification of antitrust harm in actions for damages, Brussels.
Gal, M. (2003). *Competition Policy for Small Market Economies.* Boston: Harvard University Press.
Hodges, C. (2007). Europeanisation of Civil Justice: Trends and Issues. *Civil Justice Quarterly*, *26*(1), 96–123.
Hutchings, M. and Wheelan, P. (2006). Consumer interest in competition law cases. *Consumer Policy Review*, 16, 182-188.
Lande, R. and Davis, J. (2008). Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases. *University of San Francisco Law Review*, *42*(1), 1–15.
Muskaj, A. (2013). *Përgjegjësia Civile nga shkaktimi i dëmit jo pasuror.* Unpublished Doctoral Dessertation, University of Tirana, Tirana.
Nazifi, E. and Broka, P. (2013). Fighting Cartels "Albanian Style": The Pratice of the Albanian Competition Authority Against Anticompetitive Agreements. *International Masaryk Conference for Ph.D. Students and Young Reseachers* Vol. IV. Hradec Kralove.
OXERA. (2009). Quantifying antitrust damages. Towards non-binding guidance for courts: Study prepared for the European Commission. Luxemburg: Publications Office of the European Union.
Siraguza, M. and D'Ostuni. M. (2006). *A reflection on some private antitrust enforcement issues*. EU Competition Law and Policy Workshop/Proceedings. European University Institute, Robert Schuman Centre for Advanced Studies. Fiesole, Italy.
UNCTAD. (2015). Voluntary Peer Review of Competition law and Policy: Albania Overview. Geneva: UNCTAD.

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Resale Price Maintenance in Poland – Further Steps to Its Liberalization or Stuck in a *Status Quo*?

by

Dariusz Aziewicz*

CONTENTS**

Abstract

Due to the recognition of their positive market effects, the evolving approach to minimum or fixed resale price maintenance (RPM) creates, in many countries, the requirement of analyzing their true economic outcomes. In the light of newest judgments delivered by the Polish Supreme Court, the purpose of this article is to analyze if it is still justified to qualify RPM as a multilateral practice that restricts competition 'by object' under Polish law.

Resumé

L'approche évolutive à l'égard de l'imposition de prix de revente fixes, ou de prix de revente minimaux, en raison de la reconnaissance de leurs effets positifs sur

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le marché, constitue dans de nombreux pays une obligation d'analyser les vrais résultats économiques de cette pratique.
Cet article vise à analyser si, à la lumière des plus récents jugements de la Cour suprême en Pologne, il est toujours juste de qualifier le maintien des prix de revente en vertu de la loi polonaise de la concurrence comme un accord, qui a pour son objet de restreindre le jeu de la concurrence.

Key words: consumer welfare; economic approach; Resale Price Maintenance; restrictions by effect; restrictions by object; vertical agreements

JEL: K21

I. Introduction

Minimum or fixed resale price maintenance (hereafter, RPM) is among the most commonly used market practices that may potentially bring harm to competition. As such, such market behaviors are one of the most interesting aspects of competition law when it comes to the implementation of appropriate evaluation standards[1]. In 2007, the U.S. Supreme Court delivered the seminal *Leegin Creative Leather Products Inc. v. PSKS, Inc.* judgment[2]. Therein, it applied the *rule of reason* evaluation standard to RPM, despite the fact the *per se* standard has been applied to such cases in the past. The *Leeging* judgment retained RPM's status of one of the issues most widely analyzed by competition law scholars and competition protection authorities.

This article will first analyze the standards of assessment of RPM applied under US federal antitrust law and EU competition law, together with their economic grounds. Presented next will be the two latest judgments of the Polish Supreme Court, which concern the evaluation of RPM. Simultaneously, the paper will analyze how the shift in the approach to RPM taken by US and EU authorities influenced Polish competition law practice, in particular the judgments of the Polish Supreme Court. Finally, an attempt will be made to evaluate if it is still justified to qualify minimum or fixed RPM in Poland as an agreement that restricts competition 'by object'.

[1] On the other hand maximum resale prices are mostly recognized as legal until no anticompetitive effects arise.

[2] *Leegin Creative Leather Products, Inc. v. PSKS, Inc*., 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007).

II. Standards of assessment for minimum or fixed RPM – a long way to economic understanding

Minimum (or fixed) RPM is an agreement concluded between undertakings on different levels of the distribution chain (upstream and downstream) that, as a condition of being able to sell a product, creates a price floor (or fixed price level) for the retailer below which the latter cannot go. It has long since been recognized that the only goal of RPM is to impede competition by eventually raising prices above their competitive level. US federal antitrust law, EU competition law as well as Polish competition law regimes have all recognized RPM as a restriction which impedes competition *prima facie*. Thus, as one of the most dangerous multilateral practices from the perspective of competition protection, RPM was seen as a restriction that should always be banned.

Following the *Dr. Miles* judgment of 1911, US federal antitrust law has for over 90 years recognized that 'Contracts between a manufacturer and all dealers whom he permits to sell his products, comprising most of the dealers in similar articles throughout the country, which fix the price for all sales, whether at wholesale or retail, operate as a restraint of trade, unlawful both at common law and as to interstate commerce, under the antitrust act of July 2 1890'[3]. This statement has been later recognized as constituting a *per se* standard of evaluation for RPM in US federal antitrust law[4]. Therefore, the illegality of RPM has been assumed regardless of its market effects and without the necessity of analyzing them[5]. However, not all practices constituting a *de facto* RPM have been illegal *per se* under US antitrust laws. This was the case as the Fair Trade Acts[6] and the *Collgate* doctrine[7] have been established by US

[3] *Dr. Miles Med. Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 378, 31 S. Ct. 376, 377, 55 L. Ed. 502 (1911).

[4] See: *United States v. Colgate Co.,* 250 U.S. 300 (1919); *FTC v. BeechNut Packing Co*., 257 U.S. 441 (1922).

[5] See: *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958): 'However, there are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable, and therefore illegal, without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken'.

[6] See: Miller-Tydings Fair Trade Act 50 Stat. 693, and Mcguire Act, 66 Stat. 631.

[7] See: *United States v. Colgate Co.,* 250 U.S. 300 (1919).

Congress and the US Supreme Court in the XX Century[8]. Moreover, the *per se* standard of evaluation for RPM has been criticized by most competition law scholars. Criticism started in the works of (Telser, 1960) while (Hovenkamp, 2005) described the *Dr. Miles* judgment as 'The most unfortunate development in the law of RPM'. In 2007, the US Supreme Court finally overruled the Dr. Miles *stare decisis* (Elhauge, 2007). In the aforementioned *Leegin* judgment, the US Supreme Court stated in accordance to RPM that 'the accepted standard for testing whether a practice restraints trade in violation of (sec) 1 is the rule of reason'[9]. It is important to note that after the shift to the rule of reason standard the burden of proof (of anticompetitive effects) is imposed on the plaintiff, not the undertaking suspected of breaching competition law provisions.

The US Supreme Court criticized in the *Leegin* case the old common law rule ('general restraint upon alienation is ordinarily invalid') used as a basis for the Dr. Miles judgment and stated that it may not constitute grounds for evaluation of minimum RPM in an economic environment of the XXI Century[10]. It declared that the reason for this shift was that the formalistic *per se* approach fails to demonstrate any economic effects of RPM[11]. The US Supreme Court emphasized also that it has unjustly treated vertical restraints analogously to those of a horizontal nature pointing out that *Dr. Miles* failed to consider the differences in their economic consequences[12].

The US Supreme Court justified the shift to the *rule of reason*[13] by stating that economic literature is full of pro-competitive justifications for minimum RPM[14]. In its judgment, it recognizes three basic pro-competitive effects of RPM.

The first is the stimulation of inter-brand competition, which means competition among manufacturers selling different brands in the same product

[8] See also: *United States v. General Electric Co*.272 U.S. 476 (1926) on usage of RPM in the consignment agreements; as well as *Simpson v. Union Oil Co*. 377 U.S. 13 (1964); *Morrison v. Murray Biscuit Co*., 797 F.2d 1430, 1436 (7th Cir. 1986).

[9] *Leegin, Creative Leather Products, Inc*., 551 U.S. 877.

[10] Ibidem at 888.

[11] Ibidem,

[12] Ibidem.

[13] *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683 (1918): 'the true test of legality under § 1 of the Sherman Act, which prohibits a contract, combination, or conspiracy in restraint of trade, is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition, and to determine that question the court must ordinarily consider: the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; and the nature of the restraint and its effect, actual or probable'.

[14] *Leegin, Creative Leather Products, Inc*., 551 U.S. 888.

market[15]. The US Supreme Court applied here the reasoning from the earlier *Kahn* case where (while using the *rule of reason* standard for maximum RPM) it had stated that 'the primary purpose of the antitrust laws is to protect [this type of] competition'[16]. Minimum RPM stimulates inter-brand competition by reducing intra-brand competition, competition among retailers selling the same brand of products. This approach is based upon an assumption that if all dealers have the same prices, then all of them will look for different areas of competition to win the market game. As a result, after the imposition of minimum RPM, retailers will mostly compete on the services level. This will lead to an increase of the number of services in stores to the optimal level. Hence, the number of sales should increase (Telser, 1960). It is so because the demand for a differentiated product is not only stimulated by the price but also by other factors such as: quality, design, or customer service[17]. Better customer service increases consumers demand (Elzinga and Mills, 2010). Finally, even though empirical studies show that price in markets containing minimum RPM is usually higher than on markets without it, the price level is not the only factor determining consumer welfare[18]. Hence, the US Supreme Court stated that even though minimum RPM may lead to higher prices, it does not necessarily tell us everything about welfare effects since its final result is generally based upon the existence of both pro- and anti-competitive effects[19]. This, so called '*service hypothesis*' indicates that the 'increase in demand resulting from enhanced service, elicited trough a protected retail margin, will more than offset a negative impact on demand of a higher retail price' (Mathewson and Winter, 1998).

The second pro-competitive effect mentioned in the *Leegin* judgment is the fact that minimum RPM is a reasonable defense against *free-riders* (Bork, 1978). *Free-riders* are maverick market players who capture demand generated by services of other players. Lack of services in their (*free-riders*) stores, allows them to offer discounts. For instance, the customer will go to a well-equipped retailer whose knowledgeable staff explains the product. Afterwards, the customer leaves and buys the product in a *free-rider's* store below the initial distributor's price, since the customer no longer needs an explanation. Eventually, the result of a *free-riders* problem is a drop in the sales as well as service effort by all retailers, and in fact, a reduction in consumer welfare, as the amount of services decreases since they are unprofitable (Bork, 1978). A *free-rider* can also affect the image of the manufacturer's product

[15] Ibidem 890.
[16] *Cont'l T. V., Inc.*, 433 U.S. at 51–52.
[17] Ibidem.
[18] Ibidem.
[19] *Leegin, Creative Leather Products, Inc.,* 551 U.S. at 895.

and, ultimately, its effectiveness (Hovenkamp, 2005). Some manufacturers want to maintain a high level of services to protect the margins of retailers with a good reputation.

The third pro-competitive effect mentioned in the *Leegin* judgment is the facilitation of new market entry since entrepreneurs can use RPM as part of an aggressive distribution program that induces retailers to make capital and labor investments[20]. RPM will assure new entrants that prices will not go below a specified level so that they will be able to recover their expenses made on advertising and entry costs[21].

On the other hand, the US Supreme Court also indicated situations which cause anti-competitive effects of minimum RPM. First, minimum RPM may be qualified as cartel facilitators on both retail and manufacturers' levels (it may prevent cheating within a cartel). It may work as a tool for a *hub-and-spoke* cartel where retailers are fixing prices and are simultaneously supervised (monitored) by a manufacturer who is setting a minimum RPM. It may also facilitate collusion by manufacturers due to retail price transparency. The US Supreme Court also indicated that a dominant manufacturer may foreclose other manufacturers from the market (*market foreclosure*) ensuring that some retailers retain attractive profit margins in exchange for refusing to deal with other manufacturers[22].

III. A more liberal approach to minimum or fixed RPM taken by the European Commission?

The described turn in the *Leegin* case started a world-wide discussion over the most appropriate evaluation standard for RPM. Today, pro-competitive effects of RPM identified by antitrust scholars are explicitly recognized by other than US antitrust authorities. For instance, a liberalized approach has been incorporated into the soft law of the European Commission. Importantly however, while US antitrust law applies the economic evaluation standard based on the total welfare approach, EU law is mostly basing its approach on the consumer welfare standard. In practice therefore, their approaches to the same market practices may vary. Still, approaches based on the evaluation of market effects are possible under both regimes.

European competition law recognizes two standards applied to multilateral market practices – (i) restrictions 'by object' and (ii) restriction 'by effect'

[20] *Leegin, Creative Leather Products, Inc.…,* 551 U.S. 890.
[21] Ibidem at 891.
[22] Ibidem.

(Jones, 2014).The European Commission indicated a liberalized approach to RPM just three years after the *Leegin* judgment in its Guidelines on Vertical Restraints of 2010[23]. The latter lists, on the one hand, the anti-competitive effects of RPM. On the other hand, they directly give examples of cases when RPM may lead to efficiencies and may thus be assessed under Article 101(3) TFEU (in fact, a structured *rule of reason*)[24]. These examples include: (i) when a manufacturer introduces a new product, RPM may be helpful during the introductory period of expanding demand to induce distributors to better take into account the manufacturer's interest to promote the new product; (ii) when it is necessary to organize in a franchise system or similar distribution system applying a uniform distribution format, a coordinated short term low price campaign (2 to 6 weeks in most cases); (iii) in some situations, the extra margin provided by RPM may allow retailers to provide (additional) presales services, in particular in case of experience or complex products (elimination of the *free rider* problem)[25].

The above examples clearly shows that the European Commission took into account the reasoning provided by economic literature while drafting its new Vertical Guidelines. However, in EU competition law, RPM seems to be still qualified as a restriction 'by object', which based on the above examples may be rehabilitated only under Article 101(3) TFEU. This maintains a standard of presumptive illegality for minimum RPM and, most importantly, shifts the burden of proof (of its pro-competitiveness) onto undertakings[26]. Moreover, the standard of proof in accordance with the necessity of jointly meeting all of the prerequisites established in Article 101(3) TFEU is very high[27].

IV. Minimum or fixed RPM in Poland – current approach

Like most competition law regimes, Polish legislation distinguishes two types of standards for evaluating multilateral market practices – those prohibited only for the fact of their very existence, and those, which the effects of which must be tested. Polish law follows in this context the rules of EU competition

[23] Commission notice – Guidelines on Vertical Restraints (OJ 2010 C 130/01).

[24] Article 101(3) of the Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union (OJ 2016 C 202).

[25] Guidelines on Vertical Restraints, para. 225.

[26] 26/76 *Metro-SB-Grossmarkte GmbH v. Commission*, ECLI:EU:C:1977:167, para 21: 'price competition is so important the it can never be eliminated'.

[27] See for e.g: Commission Decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428 – *VBBB/VBVB*) (OJ L 54/36).

law. It divides anti-competitive multilateral practices into (i) those restricting competition 'by object', and (ii) those restricting competition 'by effects'. The first type covers mostly the so-called *hardcore* restrictions which, to be prohibited, do not require evidence of any anti-competitive influence on the relevant market. The second type of restrictions are those with reference to which the antitrust authority – before indicating their anti-competitiveness in an administrative decision – has to prove an anti-competitive influence (effect) on competition.

Like in EU competition law, according to Polish legislation an undertaking may always try to prove that a multilateral practice ultimately brings positive effects for competition. Also in this case, the burden of proof shifts to the defendant who has to meet all of the prerequisites established in Article 8(1) of the Act on Competition and Consumers Protection (hereafter, uokik) (in fact, a *structured rule of reason*)[28]. In practice, such an 'individual' exemption is hardly ever proven for practices restricting competition 'by object'[29].

In the decisional practice of the Polish Competition Authority (hereafter, UOKiK), RPM has been recognized as an agreement restricting competition 'by object'[30]. On the other hand, scholars mostly argue that RPM should be treated as an agreement restricting competition 'by effect' (Jurkowska Gomułka, 2012; Grzejdziak, 2009; Aziewicz, 2013), albeit other opinions are also expressed (Turno, Zawłocka -Turno, 2011; Bolecki, 2013).

At this point, it is worth analyzing two judgments of the Polish Supreme Court concerning RPM. First, in the opinion delivered by the Supreme Court in the judgment of 23 November 2011 (Ref. No. III SK 21/11)[31] it is possible to find statements that express at least the recognition of a more liberal approach to RPM.

To clarify the context of the judgment, in a decision issued on 29 June 2007 the President of UOKiK held that an agreement concluded between Roben Ceramika Budlowlana (a tile manufacturer) and twenty of its distributors constituted an anti-competitive vertical agreement setting fixed resale prices[32].

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[28] Article 8 (1) and (2) of the Act of 16 February 2007 on Competition and Consumer Protection (Consolidated text: Journal of Laws 2015, items 184, 1618, 1634).

[29] For RPM see decisions of the UOKiK President: of 16 July 2010, No. DOK-6/2010; of 4 November 2011, No. RKT-33/2011.

[30] See decisions of the UOKiK President: of 27 December 2012, No. DOK-8/2012; of 30 December 2008, No. RPZ-50/2008 and judgment of the Court of Appeals in Warsaw of 5 September 2012, Ref. No. VI ACA 363/12. Also the Polish Block Exemption excludes RPM from its scope see: para. 11 of the Regulation of the Council Of Ministers of 30 March 2011 on the exemption of certain types of vertical agreements from the prohibition on competition restricting agreements (Journal of Laws 2011 No. 81, item 441).

[31] Judgment of the Polish Supreme Court of 23 November 2011, Ref. No. III SK 21/11.

[32] Decision of the UOKiK President of 29 June 2009, No. RWR-20/2007.

The agreement concerned letters sent by the manufacturer to its distributors informing them that starting from 12 July 2005 Roben was going to introduce a promotion on one of its tile types. The promotion was construed in such a way that the distributors had to sell this specific type of tiles for a fixed price per square meter. Later on, the distributors confirmed the implementation of the promotion by way of letters sent-back to the manufacturer.

First of all, the Polish Supreme Court stated that as a rule, vertical agreements between entrepreneurs in a free market economy are a key tool for the distribution network and are generally pro-competitive[33]. This is mainly because of their positive influence on competition between manufacturers of substitutable products, at the expense of decreasing intra-brand competition. Thus, interestingly, the Supreme Court attempted to state that the importance of inter-brand competition exceeds the importance of intra-brand competition. Hence, it presented an approach which is close to the pro-competitive justifications of RPM used for example in US antitrust law. Moreover, the Polish Supreme Court emphasized that having its own distribution chain might be too expensive for each particular manufacturer and so acting through distributors is a useful alternative to vertical integration. From an economic perspective, a distributor is in fact recognized as an entity acting on behalf of a manufacturer representing the latter before the clients; as such, the manufacturer wants to keep a certain level of control over distributors[34]. The Polish Supreme Court recognized therefore the basic economic aspects of distribution chains based upon transaction costs economics (Coase, 1937).

Despite such argumentation, the Supreme Court did not go any further in its assessment, in other words, it did not directly weight the pro- and anti-competitive effects of the agreement. The opposite is true in fact. The Court emphasized that vertical agreements, which have as their subject the setting of resale prices, are generally recognized as agreements having the restriction of competition as their object. According to the judgment, this is the 'traditional approach' based upon the assumption that this type of agreement limits the freedom of the distributors to create their own pricing policy. Hence, the price policy is recognized in this judgment as important (or even crucial) from the perspective of competition protection.

Finally, the Polish Supreme Court stated also that alternatively to the *Leegin* judgment, RPM even nowadays should be recognized as an obvious competition restriction, irrespectively of their market effects. To support this position, the Court articulated specific anti-competitive effects of RPM. Despite the fact that in the first part of its opinion it indirectly recognized that inter-brand competition may be more important than intra-brand competition,

[33] Judgment of the Polish Supreme Court of 23 November 2011, Ref. No. III SK 21/11.
[34] Ibidem.

it eventually stated the opposite. It also noted that a fixed resale price provokes a higher price than a price created by a fully competitive environment. Furthermore, the Polish Supreme Court emphasized that RPM prohibits competition between distributors of the same brand as well as between other brands. It stressed that vertically fixed prices may work as a cartel facilitator. It noted that fixed prices may negatively affect the level of production efficiency (if there is no price competition between sellers, the manufacturer will fell less of a price pressure to decrease the wholesale price). According to the Supreme Court, the same is true for distributors who will not be willing to decrease their operational costs if they do not feel a price pressure from other distributors.[35] Again, all of the aforementioned anti-competitive effects focus on price competition as the key of competition protection. Conclusively, the Polish Supreme Court held that fixed resale prices raise concerns no matter what the values protected by competition law are. These findings lead the Court to the final conclusion that fixed resale prices restrict competition 'by object'.

Despite the fact that the 'traditional approach' to RPM was ultimately applied, this was the first time for the Polish Supreme Court to take a broad and detailed note of pro-competitive effects of fixed resale prices. These mentioned effects reflect, in fact, the pro-competitive justifications articulated by the European Commission in its Guidelines on Vertical Restrains of 2010. These are, first, easier market entry for certain producers – entrance of a new market player will always be pro-competitive because other market players will react by cutting their prices, or in any other way desired by consumers. Second, the Supreme Court recognized the economic concept of the *free-riding effects*, that is, the protection of a distributor who is providing a broad-scope of services against sellers not doing so (but charging lower prices). Yet the Polish Supreme Court stated that the *free-rider effect* is not working on all types of markets and that it does not have to effectively lead to better services of distributors since it is not requiring them directly to do so. Conclusively, in the Court's opinion, avoiding the free-rider effect may justify the use of RPM only in exceptional circumstances. Third, it was noted in the judgment that RPM might have pro-competitive effects as they may lead to a uniform image and character of the sales network as well as effective advertising campaigns charging lower prices.

Finally, the Polish Supreme Court declared that it has to respect the established standards of importance associated with price competition, which plays a foreground role for competition law enforcement. It stated that the independence in creating a pricing policy by market participants is one of the

[35] Ibidem.

most important issues for competition protection. Therefore, given the fact that the Polish Block Exemption Regulation states that pricing agreements are *hardcore* restrictions, the pro-competitive effects of such agreement may be analyzed only under the individual exemption rule.

The second judgment of the Polish Supreme Court worth noting here was delivered on 15 May 2014 (Ref. No. III SK 44/13[36]). This judgment referred to the decision of the UOKiK President issued on 31 December 2008 concerning an anti-competitive price agreement on fixed resale prices between Zakłady Chemiczne Hajduki S.A. and its distributors on the Polish market of paints[37]. In the judgment, the Supreme Court consider mainly the issue of the amount of fine imposed by the UOKiK President, albeit the content of the judgment included also an important statement on the general treatment of RPM.

While delivering its opinion on the merits, the Polish Supreme Court stated that there are no grounds to accept the appeal. It implied that a multi-threaded argumentation on the status of RPM has already been delivered in the aforementioned judgment III SK 21/11. It supported this argumentation by establishing a general classification of RPM as an agreement restricting competition 'by object'. However, the Polish Supreme Court also noted that such a qualification does not justify a uniformly rigorous approach to sanctions (financial fines) imposed by the UOKiK President for vertically fixed prices. While supporting this position, the Court stated that not every agreement stipulating fixed prices threatens the public interest or other values important for competition law as well as justifies the imposition of a fine (which is motivated each time be the realization of the public interest). The Polish Supreme Court held that there is a question of a public sense of a fine imposition on a concrete participant in an agreement in a situation when the direct income from the agreement constituted only a small amount of his total revenue.

V. Is it still justified to qualify minimum or fixed Resale Price Maintenance in Poland as an agreement restricting competition by object?

Arguments presented in the above judgments give room for an assessment whether it is still justified to qualify RPM as a practice restricting competition by 'object' under the Polish competition law regime.

[36] Judgment of the Polish Supreme Court of 15 May 2014, Ref. No. III SK 44/13.
[37] Decision of the UOKiK President of 31 December 2008, No. RKT 114/2008.

First the realization should be recognized as correct that the Polish Supreme Court articulated in judgment III SK 44/13 that the amount of antitrust fine may not always be of the same height for each entrepreneur taking part in an anti-competitive practice. A fine should be calculated individually (*case-by-case*). However, the Court did not stop its argumentation here and went one-step further touching upon the potential restrain by RPM of the public interest, or other values important for competition law. This is a crucial statement since under Polish competition law 'values important for competition law' should be recognized as consumer welfare.

In order to analyze the aforementioned cases it is important to note the following arguments. First, the Competition and Consumer Protection Act determines the conditions for the development and protection of competition as well as the principles of protecting the interests of undertakings and consumers in the public interest[38]. Polish competition law scholars generally state that the protection of competition is not a goal in itself. The ultimate goal of competition law in Poland is the protection of consumer welfare. Such approach has been followed by the Polish Supreme Court which stated in the judgment of 19 October 2006 that: 'under this interpretation competition is a process of rivalry, which is protected in the scope in which it is connected with implication of stipulated, positive effects for consumers'[39]. Consumer welfare as the central goal of Polish competition policy is also articulated in the latest official documents of the Polish Competition Authority – the UOKiK President (UOKiK, 2014, p. 18)[40]. On the other hand, the President of UOKiK defines the notion of consumer welfare in his administrative decisions as 'final benefits which are coming from competition, as broader scope of choice, better quality, lower prices and higher innovation of products and services offered on the market'[41]. Thus, significantly, low prices are not recognized as the sole measure which at the end of the day makes consumers better off.

Second, in the light of the Competition and Consumer Protection Act, public interest constitutes a prerequisite for regulatory actions serving the protection of entrepreneurs and consumers (Skoczny, 2014). Public interest is a jurisdictional and interventional prerequisite. It makes the identification of the ultimate goal of competition protection, or its additional goals, possible[42]. Also in the light of the Polish Constitution, limitations upon the freedom of economic activity may be imposed only by means of a statute, and only for

[38] Article 1 of the Act on Competition and Consumers Protection.

[39] Judgment of the Polish Supreme Court of 19 October 2006, Ref. No. III SK 15/06 (OSNP 2007, No. 21-22, item 337).

[40] UOKiK, *Polityka konkurencji na lata 2014-2018*, p. 18.

[41] Decision of the President of UOKiK of 30 December 2011, No RPZ-39/2011.

[42] Ibidem.

important public reasons. Jurisprudence indicates moreover a 'correction role' of public interest, while it is serving as the prerequisite for intervention. This approach may apply when actions of entrepreneurs are formally breaching rules stipulated by the law, yet it may be deduced from the statements of facts that an intervention of the UOKiK is not necessary (in the light of *ratio legis* of the Competition and Consumer Protection Act)[43].

Finally, Polish scholars indicate that the 'object' of an agreement is understood 'not only as subjective or objective motivation to actions of the parties to the agreement, but as an objective object of the agreement identical with its subject' (Stawicki, 2010). Polish courts, including the first instance court responsible for competition cases – the Court of Competition and Consumers Protection (hereafter, SOKiK)[44], are off the opinion that when 'the object' is detected 'there is no need to prove the factual usage of an agreement by the entrepreneur'[45]. Polish jurisprudence also implies that it is not important if the parties have been implementing the agreement of not[46]. Furthermore, statements can be found which emphasize that there is no necessity to analyze the impact of such agreement's effects[47] and its anti-competitive character is present even if the parties have not achieved the expected financial benefits[48]. It should thus be recognized that anti-competitive agreements are qualified as 'restriction by object' only if they are of such kind that in most situations they harm consumer welfare, and this fact is so obvious that there is no need to prove it during administrative proceedings.

As (Faull and Nikpay, 2007) state (in accordance with agreements restricting competition 'by object' under EU law) – agreements of such kind 'prima facie' have as their object the restriction of competition. Thus, it is in fact the closest standard of evaluation to the US federal antitrust law *per se* standard. The *per se* standard in the US covers restrictions harming competition 'on its face', also called 'naked restrains', because they do nothing but harm competition without any offsetting benefits (Hovenkamp, 2005). Thus, it may be recognized that if it is 'the object' of an agreement to restrict competition, than it will always harm the values protected by competition law (consumer or total welfare). If (in case of Polish law) it always harms consumer welfare, it shall be excluded from the market by administrative actions taken by the relevant competition authority in the public interest. Yet the Polish Supreme Court directly states in

[43] Judgment of the Polish Supreme Court of 3 October 2013, Ref. No. III SK 51/12.

[44] Court of Competition and Consumers Protection (SOKiK) is a civil court who acts in the first instance in appeals from administrative decisions issued by the President of UOKiK.

[45] Judgment of SOKiK of 5 September 2005, Ref. No. VI ACa 76/06.

[46] Judgment of SOKiK of 10 September 2003, Ref. No. XVII Ama 136/02.

[47] Judgment of the Court of Appeals in Warsaw of 4 December 2007, Ref. No. VI ACa848/07.

[48] Judgment of SOKiK of 7 November 2005, Ref. No. XVII Ama 26/04.

the III SK 44/13 judgment that RPM is not always harming the public interest and other values important for competition law, and so it must be argued that it indirectly also states that RPM does not always harm consumer welfare.

Given the above, two approaches are possible. First, the court is open for an argumentation concerning the efficiencies of RPM based upon Article 8(1) of the Competition Act[49] in situations described in the III SK 21/11 judgment. Simultaneously, this option envisages (as stated in the III SK 21/11 judgment) that RPM is still qualified as a competition restriction 'by object'. This approach opens however the door to the argumentation that an automatic shift of the burden of proof to the undertaking suspected of breaching competition law provisions may be contrary to Article 22 of the Polish Constitution. Article 22 of the Polish Constitution states that limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons (in case of the Competition and Consumer Protection Act – public interest) (Grzejdziak, 2009). However, such limitations should be also proportionate. Due to the fact that shifting the burden of proof in practice makes a justification of RPM rarely possible (especially in the light of the indispensability prerequisite), and on the other hand that their pro-competitive effects are widely recognized, such shift should not necessarily be proportionate in the light of constitutional provisions.

Second, the alternative approach would be to recognize that the application of the 'by object' evaluation standard to RPM is not correct and that RPM should be recognized as a competition restriction 'by effect'. Three reasons support this statement, all of which contradict the argumentation grounds for the application of the 'by object' evaluation standard to RPM. First, the III SK 21/11 judgment mentions the key importance of intra-brand competition, yet competition is not the subject of protection by Polish antitrust law in itself – its ultimate goal is the protection of consumer welfare. The UOKiK President should thus each time separately evaluate which market circumstances are leading to the maximization of consumer welfare. In some cases, the stimulation of intra-brand competition may have a positive effect on consumer welfare. Other times, consumer welfare may benefit from the stimulation of inter-brand competition, even at the cost of intra-brand

[49] Article 8 (1) of the Act states that: 'The prohibition referred to in Article 6, paragraph 1 shall not apply to agreements which at the same time:

1) contribute to improvement of the production, distribution of goods or to technical or economic progress;
2) allow the buyer or user a fair share of the resultant benefits;
3) do not impose upon the undertakings concerned such impediments which are not indispensable to the attainment of these objectives;
4) do not afford these undertakings the possibility to eliminate competition in the relevant market in respect of a substantial portion of the goods in question'.

competition. It has to be argued that there is no reason to give the protection of inter- or intra-brand competition overall priority under Polish competition law. Second, RPM only reduces intra-brand price competition but it does not reduce, or enhances, other areas (dimensions) of competition between retailers. Economic literature shows that there may be different ways to achieve the optimal level of consumer welfare, depending on market circumstances and the practices under assessment. The Polish Competition Authority or courts should thus always remember what benefits the ultimate goal of its antitrust law in every particular case. Finally, as indicated above, the Polish judiciary states that the reason why RPM should always be banned is their negative effect on prices. However, as already mentioned, the Polish Supreme Court is clearly of the opinion that price competition (thus lowest prices for consumers) is not the only determinant of consumer welfare. It is so clearly because the demand curve (reflecting consumers' choices) may shift to the right not only because of low prices but also due to other aspects (Aziewicz, 2013). Therefore, giving priority to price competition is not only economically unreasonable, but also creates jurisprudential inaccuracy.

Finally, it is worth noting the contents of the new Competition Policy of the UOKiK President adopted by the Polish Council of Ministers in 2015 which indicates the policy trends for national competition law for forthcoming years. Therein a statement can be found whereby the assessment of vertical restrains should be conducted on an individual basis because such practices may generate benefits for consumers. Incidentally, the document makes that statement binding (a case-by-case analysis) on the Polish Competition Authority but not on market players. Moreover, the UOKiK President directly expressed the view that an intervention by the Authority against vertical relationships is only justified if an economic analysis shows that their anti-competitive effects are not countervailed by consumer benefits (UOKiK, 2015, p. 32). The UOKiK President has not said if this approach is (or is not) applicable to only specific market practices of a vertical character and so it should be assumed that RPM are also covered by its scope. The question however arises whether this approach will be sustained after recent change of the President of Polish competition authority.

VI. Conclusions

Considering all of the above, it is not totally clear what type of evaluation standard is currently applicable to RPM under the Polish competition law regime. On the one hand, the Polish Supreme Court is clearly off the opinion

that RPM are still considered to be a competition restriction 'by object'. On the other hand, an in-depth analysis of the text of its jurisprudence, in the light of an economic understanding of RPM, as well as the goals of Polish competition law, may lead to different conclusions. It is not clear in particular why the 'by object' designation should be applicable to market practice which may not always harm the public interest, or in fact other values important for competition law (consumer welfare). It is justified to say that Polish courts should apply the 'by effect' standard to RPM, especially as the fact is widely recognized that RPM generate, economically speaking, both positive and negative effects for consumers. Most importantly however, the burden of assessing their actual market effects should be placed on the Competition Authority rather than on market players.

References

Areeda, P. E. and Hovenkamp, H. (2004). *Antitrust law. An Analysis of Antitrust Principles and Their Application.* New York: Aspen Publishers.

Aziewicz, D. (2013). Pytanie o zasadność stosowania analizy ekonomicznej wobec minimalnych cen odsprzedaży w polskim prawie konkurencji, *internetowy Kwartalnik Antymonopolowy i Regulacyjny, 3*(2), 8–22.

Bolecki, A. (2013). Cechy szczególne franczyzy w prawie ochrony konkurencji. *internetowy Kwartalnik Antymonopolowy i Regulacyjny, 7*(2), 61–79.

Bork, R. (1978). *The Antitrust Paradox, a policy at war with itself*. New York: The Free Press.

Coase, R. H. (1937). The Nature of the Firm. *Economica*, *4*, 16.

Elhauge, E. (2007). Harvard, not Chicago: Which antitrust school drives recent supreme court decisions?. *Competition Policy International*, *3*(2), 59–77.

Elzinga, K. G. and Mills, D. E. (2010). Leegin and procompetitive resale price maintenance. *The Antitrust Bulletin*, *55*, 2, 349-379, http://dx.doi.org/10.1177/0003603x1005500204

Faul, J. and Nikpay, A. (2007). *The EC Law of Competition*. Oxford: Oxford University Press.

Grzejdziak, Ł. (2009). Zakaz ustalania cen odsprzedaży towarów. Warunek sine qua non efektywnej konkurencji czy nieproporcjonalne ograniczenie wolności gospodarczej, In: W. Szwajdler, H. Nowicki (ed.), *Konstytucyjna zasada wolności gospodarczej*. Toruń: TNOiK.

Hovenkamp, H. (2005). *The Antitrust Enterprise, The principle and execution.* Harvard: Harvard University Press, http://dx.doi.org/10.4159/9780674038820

Jones, A., Sufrin, B. (2009). *EC Competition Law, Text, Cases, and Materials*. Oxford: Oxford University Press.

Jurkowska Gomułka, A. (2012). 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. *internetowy Kwartalnik Antymonopolowy i Regulacyjny, 1(1)*, 33–49.

Mathewson F. and Winter, R. (1998). The law and economics of resale price maintenance. *Review of Industrial Organization*, *13*(1), 57–84.

Telser, L. (1960). Why Should Manufacturers Want Fair Trade. *Journal of Law and Economics*, 3, 86-105, http://dx.doi.org/10.1086/466564.

Turno, B. and Zawłocka –Turno, A. (2011). Ustalanie sztywnych lub minimalnych cen odsprzedaży jako porozumienie ograniczające konkurencję ze względu na cel (przedmiot) w prawie unijnym. *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, *73*(4), 71–87.

Skoczny, T. (ed.) (2014). *Ustawa o ochronie konkurencji i konsumentów, Komentarz*. Warszawa: C.H. Beck.

Stawicki, A. and Stawicki, E. (2010). *Ustawa o ochronie konkurencji i konsumentów Komentarz*. Warszawa: LexisNexis.

UOKiK (2014). *Polityka konkurencji na lata 2014-2018*. Warszawa: UOKiK.

UOKiK (2015), *Polityka ochrony konkurencji i konsumentów*, Warszawa: UOKiK.

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Energy Security as a Priority for CEE countries. Is the King Naked?

by

Ilona Szwedziak-Bork*

CONTENTS**

Abstract

The aim of this article is to assess the implementation process of the EU energy security policy in Central and Eastern European (CEE) countries. In the EU, energy security remains a crucial issue for European Energy Strategy, the fundamental goals of which include the security of supply, sustainability and competitiveness. Security of supply should be considered the most important aspect in this context, because it is connected to deep interdependencies between markets and economies, often based on political or even geo-political considerations. This is currently particularly noticeable, among other things, in the relations between the EU and Russia, where – in the event of any potential energy supply disturbances – some CEE countries are considered to be the most exposed.

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By analysing matters referred to the security of energy supplies, the article aims to determine the scope of activities undertaken by selected CEE countries which are also EU Member States in order to achieve this goal. The paper stresses the significance of cooperation by CEE countries at regional level, and focuses on initiatives and projects meant to ensure the security of their energy supplies.
The conclusions of the paper assess some of the success stories as well as failures experienced by CEE countries in the process of building their energy independence.

Resumé

Le but de cet article est d'évaluer la mise en oeuvre de la politique de sécurité énergétique de l'Union européenne dans les pays de l'Europe centrale et orientale (PECO). Dans l'UE, la sécurité énergétique est un enjeu crucial pour la Stratégie énergétique européenne qui contient parmi ces objectifs fondamentaux la sécurité de l'approvisionnement, la durabilité et la compétitivité.
La sécurité de l'approvisionnement doit être considérée comme l'aspect le plus important dans ce contexte, car elle est liée aux interdépendances profondes entre les marchés et les économies, souvent basées sur des considérations politiques ou même géo-politiques. Ceci est actuellement particulièrement visible, entre autres, dans les relations entre l'UE et la Russie, où – dans le cas de perturbations concernant l'approvisionnement en énergie – certains PECO sont considérés comme le plus exposés.
En analysant les questions concernant la sécurité de l'approvisionnement énergétique, l'article vise à déterminer l'étendue des activités entreprises par certains PECO [qui sont aussi les États Membres de l'Union européenne] afin d'atteindre cet objectif. L'article souligne l'importance de la coopération des PECO au niveau régional et se focalise sur les initiatives et les projets visés à assurer la sécurité de l'approvisionnement énergétique de ces pays.
Les conclusions de cet article évaluent des réussites, ainsi que les échecs des PECO, dans le processus de la construction de leur indépendance énergétique.

Key words: energy policy; energy security; Energy Union; European Energy Security Strategy.

JEL: L51; L94

I. Introduction – energy security as a concept

Traditionally, energy security has been associated with the securing of access to oil supplies and with the impending fossil fuel depletion (Kruyt, van Vuuren, de Vries, Groenenberg, 2009, p. 2166). Yet for many years now, the issue of energy security has been subject to a broader analysis covering

many contexts as well as various dimensions, including the assessment of an increasing number of factors that might contribute to the issue of 'security'. This broader approach presented in literature encompasses, for instance, security of supply and demand, affordability issues and energy revenues, geo-political considerations correlated with security and defence policy, other political risk factors, economic risk factors and energy poverty, as well as technological and environmental risk factors (Jonsson et. al., 2015, p. 48). Still, it has also been noted that the concept of energy security cannot completely cover all possible risks and vulnerabilities, albeit it should provide a framework for identifying, measuring and managing them (Cherp and Jewell, 2014, p. 418). Literature indicates that contemporary energy security studies are based on the identification and exploration of connections between energy systems and important social values (Cherp and Jewell, 2014, p. 418). Energy security is also identified as part of a broadly understood concept of security, often described as national security (Pach – Gurgul, 2012, p. 148).

There is no universally acceptable or bounding definition of 'energy security'. Literature stresses that the absence of a clear definition makes this notion an umbrella term for many different policy goals (Winzer, 2011, p. 2). The International Energy Agency (IEA) defines energy security as 'the uninterrupted availability of energy sources at an affordable price'[1]. Without delivering its own definition of energy security, the Organisation for Economic Cooperation and Development (hereafter, OECD) points to the factors of 'risk' and 'uncertainty' as the basis for the construction of any definition in this context. Here, supply disruptions (either at production or during the course of transport or storage) should be described as the main sources of the risk[2]. Documents of the United Nations Development Programme (UNDP) describe energy security as the continuous availability of energy in varied forms, in sufficient quantities, and at reasonable prices[3]. Energy security may also be defined as the ability of energy industries, primarily electricity and gas, to provide their respective services throughout the EU to a high standard and at a reasonable cost in a competitive, fully liberalized pan-European market (Cameron, 2007, p. 517-518). Although there is no binding definition of energy security, it is worth noting that definitions are also provided at the national level, for example, in Poland (Bogdanowicz, 2012, p. 189).

[1] http://www.iea.org/topics/energysecurity/.

[2] OECD Policy Roundtables. Energy Security and Competition. DAF/COMP(2007)35. https://www.oecd.org/competition/abuse/39897242.pdf.

[3] World Energy Assessment, energy and the challenge of sustainability, United Nations Development Programme http://www.undp.org/content/undp/en/home/librarypage/environment-energy/sustainable_energy/world_energy_assessmentenergyandthechallengeofsustainability.html

This article aims, first, to present energy security as a crucial part of the energy policy of the European Union. One specific aspect of energy security is analysed in this context, that is – the security of supply. Discussing this issue serves as a starting point which allows the paper to focus on its main objective, that is, the issue of energy security in selected CEE countries[4] in the even more specific context of security of supply. Incidentally, the significance of security of supply issues are currently never far from the top of the priority list of legislators and politicians involved with the energy industry (Jones, Gräper, Schoser, 2010, p. 535).

The ultimate aim of this article is to present the steps taken by CEE countries in order to fulfil goals set out by the EU in order to ensure energy security. On this basis it is possible to assess whether (and if so, to what an extent) they have made progress in implementing EU energy policy objectives relating to the security of supply. For the purposes of this article, selected CEE countries were scrutinized that is: Poland, the Czech Republic, Slovakia, Bulgaria, Romania, Hungary and the Baltic Countries: Lithuania, Latvia and Estonia.

This broad scope of the analysis has made it possible to assess their individual initiatives as well as to evaluate their cooperative actions not only on the matter of the diversification of their supply sources, but also on building modern infrastructure and cross-border connections.

II. Energy security as a pillar of the energy policy of the EU

Energy policy has enjoyed a special status in the European integration process from the very beginning of its existence. Importantly in this context, the first two 'fruits' of European integration both dealt with energy: the European Coal and Steel Community (ECSC) ensured cross jurisdictional control of the two key resources of that time – coal and steel while the European Atomic Energy Community (Euratom) promoted, among other things, the peaceful use of nuclear energy (Kannelakis, Martinopoulos, Zachariadis, 2013, p. 1020). It is vital to point out that Article 3 ECSC introduced the concept of 'security of supply' as a main objective into Community law[5] (Maltby, 2013).

[4] Central and Eastern European Countries (CEECs) is a term for the group of countries comprising: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Hungary, Montenegro, Poland, Romania, Serbia, the Slovak Republic, Slovenia, The Former Yugoslav Republic of Macedonia, and the three Baltic States: Estonia, Latvia and Lithuania.

[5] Article 3 of the ECSC stated *i.a.* that within the framework of their respective powers and responsibilities and in the common interest, the institutions of the Community shall: (a) see that the common market is regularly supplied, taking account of the needs of third countries.

The matter of energy security is a recurrent issue in all EU activities at the moment. The European Union is the world's largest energy importer. The majority of its Member States is highly dependent on imports of oil and gas[6] from non-EU countries, exposing them to changes in external political environments and fluctuations in world economies. Having said this, some EU countries are self-sufficient in one (or more) energy sources or have a position of a net exporter (Kannelakis, Martinopoulos, Zachariadis, 2013, p. 1026). Such status is nevertheless rather rare and, considering the growing level of energy consumption in the EU, should be seen as a declining trend. The current demand for energy and energy services exceeds the supply available on those markets.

In this context it is also important to make a distinction between gas and electricity security since electricity can be produced in every EU country while gas sources are available only in a few (Nowak and Grzejszczak, 2011, p. 44). This distinction could be seen in such features like, for instance: storage, transportation infrastructure, geographic markets or switching to alternative energy supplies (Johnston, Block, 2012, p. 234-235).

Energy security has become the subject of increasing discussions over recent years as the EU has intensified its activities concerning this aspect of its energy policy. A landmark step in the context of energy security was taken with the adoption of the European Energy Security Strategy (hereafter, EESS). The EESS was launched in 2014 as a response to the situation in the Ukraine and the threats concerning the reliable transit of Russian gas through this country[7]. Importantly, the European Commission (hereafter, EC) Communication concerning the EESS specifically listed two key activities that could strengthen energy security in Europe. First, the EC advocated the use of more of a collective approach through the existing Internal Market and greater cooperation at regional and European levels and second, it spoke for more coherent external actions[8].

The EESS established a set of specific areas where decisions and actions should be taken, classifying them into respective timeframe categories (short, medium, long). A number of priority actions were indicated including: strengthening emergency mechanisms (such as coordination of risk assessments and contingency plans and protecting strategic infrastructure); building a well-functioning and fully integrated Internal Market; increasing energy production

[6] EU Energy Markets in 2014, available at: https://ec.europa.eu/energy/sites/ener/files/documents/2014_energy_market_en_0.pdf.

[7] https://ec.europa.eu/energy/en/topics/imports-and-secure-supplies.

[8] Communication from the Commission to the European Parliament and the Council, European Energy Strategy Security, Brussels, 28.5.2014, COM (2014) 330 final, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2015%3A80%3AFIN.

in the EU or the diversification of external supplies and related infrastructure[9]. In order to help create an integrated EU energy market, the EC has made a list of 195 key energy infrastructure projects known as Projects of Common Interest (hereafter, PCIs) which are seen as essential for the completion of the European Internal Energy Market and for reaching EU energy policy objectives[10]. Moreover, building strategic infrastructure has been the subject matter of a number of secondary EU legislation: the earlier Decision No 1364/2006/EC[11] that laid down guidelines for trans-European energy networks (TEN-E); the more current Regulation No 347/2013 on guidelines for trans-European energy infrastructure[12] (TEN-E Regulation) as well as Regulation No 994/2010 concerning measures necessary to safeguard security of gas supply and to support the development of key infrastructure project[13]. Indisputably, these actions set out the foundations not only for the strengthening of the common energy policy but also for the realization of its main assumptions in an actual manner (that is, by building infrastructure).

The final step for strengthening the above concept was the Energy Union adopted in February 2015. The Energy Union concerns the development of a new electricity market design that will support the integration of renewable energy, improve the price signal for investment, ensure that public intervention is compatible with the Internal Market, and enhance regional cooperation[14]. According to the Communication on the state of the Energy Union 2015[15], the EU is making progress in diversifying energy sources, routes and suppliers. Yet about 40% of EU gas imports in 2013 still came from Russia, with a number of Member States remaining totally, or predominantly dependent on Russian

[9] Communication from the Commission to the European Parliament and the Council, European Energy Strategy Security, Brussels, 28.5.2014, COM (2014) 330.

[10] https://ec.europa.eu/energy/en/topics/infrastructure/projects-common-interest.

[11] Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC, (OJ L 262/1).

[12] Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (OJ L 115/39).

[13] Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC (OJ L 29/1).

[14] Commission Staff Working Document. Member States Investment Challenges, available at: http://ec.europa.eu/europe2020/pdf/2016/ags2016_challenges_ms_investment_environments_en.pdf.

[15] Communication from The Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank State of the Energy Union 2015, COM/2015/0572.

supplies. They must thus reinforce regional cooperation with regard to security of electricity supply and generation adequacy[16]. According to the EC, cooperation between neighbouring Member States should also be reflected in national plans concerning energy[17].

III. Security of energy supply in the EU

J. Ciborski indicates that while there are differences in approach to the issue of energy security, their basic or common part lies always in their concern about the security of supply with respect to all forms of energy and quantity capable of covering demand (Ciborski, 2006, p. 129). Indeed, energy security can be presented as a single-dimensional problem, based on the security of supply (narrow definition), or as a multi-dimensional issue (broader definition). Literature has also provided a division based on an internal dimension, characterized by secondary legislation, and an external dimension characterized by a disparate hierarchy of objectives embedded in various hard law and soft law measures (Glachant, Ahner, 2012, p. 17–18).

EU regulations on security of supply covers areas such as: oil, natural gas and electricity as well as infrastructure as such (Talus, 2013, p. 99). In other words, security of supply requires the availability of energy resources, a capacity to exploit and convert these resources to suitable energy carriers, as well as the existence of a secure system for energy distribution (Jonsson et al., 2015, p. 49). The approach was to address supply security issues in both the general energy market directives, as well as in a number of specific instruments focusing on security of supply (Talus, 2013, p. 99).

Although equating energy security to ensuring security of supply is sometimes seen as the incorrect approach (Nowacki, 2010) since it is but one among many issues covered by EU energy policy, yet it is fair to say that the greatest importance should be attached specifically to this very matter. This stance is driven by at least two factors. First, security of supply should be treated as the basis or starting point for all other elements that build the concept of energy security. Only uninterrupted access to energy resources can ensure security at every stage (from the national level to households) and through this – its sustainability or competitiveness. Second, as the latter can be achieved by using national tools like legislation, security of supply is based on, at least, regional cooperation, since diversification of suppliers depends on many external factors. These two key factors support the view

[16] Ibidem.
[17] Ibidem.

that energy security equated with security of supply should be immanently and inseparably connected with the development of a single, competitive energy market in the EU (Rewizorski, Rosicki, Ostant, 2013, p. 63). In addition, as it was indicated in the EC Communications on the EESS and the Energy Union Framework Strategy, 'energy security is inseparable from a well – functioning and fully integrated internal market, moderation of energy demand, increasing energy production in the EU, i.a. through renewable energy sources, as well boosting research and innovation in the Energy Union'[18].

Definitions of 'security of supply' (or 'security of energy supply') can be found in both hard law and soft law issued by EU institutions. The EC Green Paper of 1994 defined security of supply as 'ensuring that future essential energy needs are satisfied by means of sharing of the internal energy resources and strategic reserves under acceptable economic conditions and by making use of diversified and stable externally accessible sources'[19]. According to the Green Paper of 2000 'the overriding goal of security of supply in the energy field is to ensure, for the good of the general public and the smooth functioning of the economy, the uninterrupted physical availability on the market of energy products at prices for all consumers (both private and industrial), in the framework of the objective of sustainable development enshrined in the [Amsterdam] Treaty'[20]. The EC Green Paper of 2006 proposed a common European energy policy which would enable Europe to face future energy supply challenges and their effects on economic growth and the environment. The EC indicated three crucial objectives in this context: sustainability, competitiveness and security of supply[21]. Voices are also frequent that point to the pressures to rebalance energy priorities in order to accommodate the security of supply aim, which could also be an indication of a more paradigmatic shift in which energy security is found to be so prioritized as to systematically override other energy-related aims (Herranz – Surrallés, Natorski, 2012, p. 133).

Ensuring energy supply security in the EU is seen as the core aim of Europe's energy policy on the basis of Article 194(1) TFEU[22], which provides the legal basis for the development of the common energy policy in its external

[18] European Energy Security Strategy COM (2014) 330 adopted on 28 May 2014 and Energy Union Framework Strategy COM (2015) 80.

[19] Green Paper – For European Union Energy Policy, COM (94) 659, Brussels 23.02.1995.

[20] Green Paper – Towards a European strategy for the security of energy supply, COM/2000/0769.

[21] Commission Green Paper of 8 March 2006: A European strategy for sustainable, competitive and secure energy [COM(2006) 105 final – not published in the Official Journal], available at: http://eur-lex.europa.eu/legal-content/PL/TXT/?uri=celex:52006DC0105.

[22] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ 2012 C 326. According to this provision: 1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve

dimension in the spirit of solidarity among EU Member States (Nowak, 2012, p. 62-73). EU secondary legislation contains a variety of definitions of 'security of supply'. For instance, Directive 2005/89/EC on the safeguarding of the security of electricity supply and infrastructure investment[23] speaks of 'security of electricity supply' as the ability of an electricity system to supply final customers with electricity. Directives 2009/72/EC and 2009/73/EC (respectively concerning common rules for the internal market in electricity[24] and natural gas[25]) take on a broader approach and describe 'security' as both security of supply and the provision of electricity, as well as technical safety. According to literature, security of supply arguments are used in both of these directives to justify the imposition of unbundling requirements upon attempts of third countries, which are undertaken in order to acquire transmission system operators in the EU (Johnston, Block, 2012, p. 259).

Although security of supply seems to be deeply rooted in EU legislation, the same notion can also be a matter of some constraints and limitations. In this context, certain national rules dedicated to the domestic promotion of security of supply can raise questions under EU rules on free movement in the Internal Market or those on market competition. Any measures introduced into national legislation must be based on the requirements developed by the Court of Justice of the EU (hereafter, CJEU), which may justify, *prima facie,* trade restrictions[26] and the principle of proportionality (Johnston, Block, 2012, p. 241). The jurisprudence of CJEU provided, on the one hand, examples such as *Campus Oil*[27], where security of supply justified a restriction falling within the notion of 'public security' within the meaning of the Treaties. On the other hand, CJEU recognized cases where the Campus Oil approach was assessed

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and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

(a) ensure the functioning of the energy market;

(b) ensure security of energy supply in the Union;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks.

[23] Article 2b of the Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment (OJ 2006 L 33, 4.02.2006, p. 22).

[24] Article 2 of the Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55).

[25] Article 2 of the Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ C 252, 27.8.2011, p. 94).

[26] See: 120/78 *Rewe – Zentral AG v. Bundesmonopol für Branntwein*, ECLI:EU:C:1979:42.

[27] 72/83 *Campus Oil v. Ministry for Industry and Energy*, ECLI:EU:C:1984:256.

as a gate for potential exceptions[28]. This refers not only to the free movement of goods, but also to the free movement of capital and as an example in cases concerning 'golden shares' (Johnston, Block, 2012, p. 242–244).

The same doubts have arisen with reference to competition issues and energy market liberalization. The *Poseidon*[29] case regarding a gas pipeline is a good example here where the EC, before conditionally granting a derogation, had analysed not only the increase of security of supply at national and EU level (that is the positive effect) but also other elements. A derogation was foreseen in Article 22 of the Gas Directive (2003/55/EC) which exempts major new infrastructures from the third party access rules provided in that Directive for a limited period of time in order to make the investment possible[30]. Comments found in literature indicate that although security and internal market conditions speak in favour of granting such exemptions, the EU competition objective of the liberalization process, and the need to balance long-term and short-term efficiencies, mean that proportionality constraints are increasingly rigid (Talus, 2013, p. 98).

As pointed out in the EC Communication concerning EESS, the EU imports 53% of its energy. Energy dependency relates to crude oil (almost 90%), natural gas (66%) and, to a lesser extent, to solid fuels (42%)[31]. The most urgent issue as far as the security of energy supplies in the EU is its strong dependence on a single external supplier. This is particularly noticeable when it comes to gas and electricity, albeit the matter of gas supply seems to be the subject of far more debate. According to literature, European energy security policies have recently focused on ensuring natural gas supplies for two reasons. First, the security of gas supply is more challenging than other energy sources, such as oil or coal. Second, Russia is the single or dominant supplier of natural gas to a number of EU Member States (Schaffer, 2015, p. 182). According to the EC, six Member States were in 2013 dependent on Russia as the single supplier of their entire gas imports. At the same time, energy supplies from Russia accounted for 39% of the total EU natural gas imports and 27% of the EU's total gas consumption. With regard to electricity, three Member States (Lithuania, Latvia and Estonia) were dependent on one external operator for the functioning and balancing of their electricity

[28] See e.g. C – 398/98 *Commission v. Greece*, ECLI:EU:C:2001:565.

[29] Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No. 1229/2003/EC.

[30] http://europa.eu/rapid/press-release_IP-07-691_en.htm

[31] Communication from the Commission to the European Parliament and the Council, European Energy Strategy Security, Brussels, 28.5.2014, COM (2014) 330.

network[32]. Especially here, activities related to the strengthening of supply security should be accompanied by the protection of critical infrastructure such as gas and electricity transmission systems[33]. The protection of energy infrastructure should be regarded as a component of broader supply security policy (Hoyos Pérez, 2012, p. 75).

IV. Energy security in CEE countries

1. Introduction

It will not be an exaggeration to claim that energy transitions of CEE countries took the strongest form after joining the EU. Since then, new Member States have started to implement rules that not only cover the restructuring (or rebuilding) process of their energy sectors, but also introduced rules on competitiveness, sustainability and (an issue which was of no relevance during the socialist era) the security of energy supplies.

According to literature, a number of world events raised the issue of energy security to become one of the most significant current problems to be faced by EU countries (Kannelakis, Martinopoulos, Zachariadis, 2013). These events included: the increase of oil prices in 2004, disturbances of gas supplies from Russia in 2006 and the electricity blackout in North-Western Europe. These disturbances were acute for both 'old' and 'new' Member States, yet the scope of the problems was far greater for the newcomers. It is rather obvious that the EU enlargements of 2004 and 2007 influenced Europe's level of dependency on energy imports and increased supply disruptions. They also highlighted the risks associated with high concentration of supplies and transit routes (Maltby, 2013).

It is worth noting that not every state needs the same level of energy security. At the *macro* level, energy security treated as a common goal and part of the energy policy of the EU should of course be fulfilled by each Member State. At the *micro* level however, some CEE countries must be more than others focused on their own security of supply in order to provide energy in a stable and uninterrupted manner. CEE countries have at least one common goal – to increase their independence through the diversification of energy

[32] Ibidem.

[33] Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection (OJ L 345, 23.12.2008, p. 75).

suppliers. It is essential to remember that diversification must run parallel to other activities such as modernisation and infrastructure development by, for example, building gas storage facilities, LNG terminals, pipelines, energy grids and networks or interconnectors with neighbouring countries. As noted in the Communication concerning EESS, the issue of energy security of supply concerns every EU Member State, albeit the scope of the problem can differ. In this context, the Communication has indicated that the Baltic States and the Eastern European region are the most vulnerable to potential energy supply disturbances[34]. The key (and critical) issue here is the persistent, strong dependence on a single supplier. This remark relates mostly to Russia, which remains the only gas supplier for six EU Member States, whereby three of them have natural gas accounting for more than a quarter of their total energy supplies[35].

Selected CEE countries (all of which are EU Members) were scrutinized in order to present the conditions and initiatives leading to the strengthening of their security of energy supply. Two types of countries were chosen for this research project: 1) neighbours of Poland and 2) other CEE countries with strong (or relative strong) dependency on Russian fuels that undertake initiatives meant to strengthen their security of supply.

First to be presented are Baltic States since Lithuania, Latvia and Estonia are very often given as examples of countries most exposed to potential security of supply problems. Poland is presented next as the central and biggest country of the CEE region involved in a number of energy projects. Several joint initiatives in the Baltic region are subsequently described. The following section covers Poland's southern neighbouring states: the Czech Republic and Slovakia. Presented here is also a number of initiatives carried out by these countries jointly with Poland.

The second group of countries described below includes, first, Bulgaria and Romania. Their analysis emphasises cooperative initiatives meant to create new infrastructures and diversify their energy supply sources. The section closes with an assessment of Hungary, which is an example of a CCE country with an above EU average import dependency on all types of fossil fuels. Indicated here are activities undertaken by Hungary in order to change its current situation.

The analysis presented below is based on data publicly available in the EU.

34 Communication from the Commission to the European Parliament and the Council, European Energy Security Strategy, Brussels, 28.4.2014, COM (2014) 330.

35 Ibidem.

2. The Baltic States

The Baltic States – Lithuania, Latvia and Estonia – were for many years considered to be the most exposed area to energy supply problems. Most of the dangers related to geo-political disturbances resulting from their strong dependency on gas delivered from one supplier – Russia. These resulted not only in the Baltic States taking individual actions to counteract these threats, but particularly in joint regional initiatives becoming one of the crucial elements of the overall EU Energy Security Strategy that concerns the security of energy supply.

As pointed out in the EC Staff Working Document concerning Lithuania[36], its import dependency on fuels was higher than that for the EU as a whole. The construction project of a movable LNG terminal was identified as one of the crucial steps to overcome this problem. It was this very initiative that ultimately enabled Lithuania to start importing LNG starting from 2014 and it was primarily in this way that the country gradually managed to increase the diversification of its gas suppliers. Still, while its gas dependency started to decline, Lithuania's dependency for solid fuels increased. Supply concentration of other fuel sources remains very high also, which makes the country vulnerable to external shocks[37].

Lithuania is also considered highly dependent on electricity imports (65%), where the vast majority (44%) comes, one again, from the same source – Russia. However, considerable work has taken place in this field as well. Two interconnectors – one with Sweden (NordBalt) and one with Poland (LitPol Link[38]) were commissioned in December 2015. As a result, Lithuania's import dependency is still considerable, but its dependency on a single energy provider (as it was in 2013) is no longer a problem[39]. Lithuania is also still contemplating the construction of a regional nuclear power plant, together with other regional partners, which, if implemented, would further reduce its dependency on electricity imports[40].

[36] Commission Staff Working Document. Country Factsheet Lithuania. COM(2015) 231. Towards an Energy Union – Lithuania.

[37] Ibidem.

[38] As pointed out on the website of the project: LitPol Link will contribute to the creation of a common European energy market by integrating the electricity grids of the Baltic States (Lithuania, Latvia and Estonia) and other EU markets, including the Polish power system, and will improve energy supplies for the industry and final consumers. For more detail, see: http://www.litpol-link.com.

[39] Commission Staff Working Document Country Report Lithuania 2016, Brussels, 26.2.2016 SWD(2016) 83, available at: http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_lithuania_en.pdf.

[40] Ibidem.

In Latvia's case, import dependency is particularly significant when it comes to petroleum and natural gas. Importantly, the latter is once again entirely imported from one supplier – Russia[41], albeit some slight changes have occurred since the launch of the LNG terminal in Lithuania. According to EC documents, greater independence and diversification are expected to arise from the construction of a Baltic connector and other future regional LNG projects. Moreover, the modernisation and enhancement of the Inčukalns Underground Gas Storage facility[42] (the only functioning gas-storage facility in the Baltic region)[43] is paramount to the efficient operation of not only the Latvian, but also the joint East-Baltic regional gas market.

Latvia remains exposed to electricity supply risks due to its dependence on external suppliers. The Baltic States are synchronised in a common grid with Russia and Belarus and rely on external electricity suppliers through the IPS/UPS system. To make matters worse, the connection capacity between Estonia and Latvia is insufficient for the smooth operation of the electricity market of the Baltic States. If large generating units were to fail in Latvia and Lithuania, the continuity of supply for the region would be endangered[44].

Among the Baltic States, Estonia is the only country where import dependency is lower than the EU average. The dependency for solid fuels and petroleum products has decreased primarily due to domestic oil shale production and biomass use.[45] Although Estonia's natural gas market remains largely dependent on Russian supplies, but the country has been diversifying its imports since 2015. Estonia has natural gas connections with Russia and Latvia. Estonia's gas supply security improved thanks to critical projects implemented in other Baltic countries – Latvian underground gas storage facility in Inčukalns[46] ensuring the stability of regional natural gas supply and the Lithuanian LNG terminal. Although, the diversification level and energy security remains moderate in Estonia, the first gas deals with Lithuania have been a successful test for the liberalisation of Estonian's gas market. Further progress in this area can be achieved through the construction of the first gas interconnector with Finland (the Baltic connector) and a Poland-Lithuania gas interconnector (GIPL)[47].

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[41] Commission Staff Working Document. Country Factsheet Latvia. COM(2015) 230. Towards an Energy Union – Latvia.

[42] Commission Staff Working Document Country Report Latvia 2016, http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_latvia_en.pdf.

[43] See more on: http://www.lg.lv/?id=194&lang=eng.

[44] http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_latvia_en.pdf.

[45] Commission Staff Working Document. Country Factsheet Estonia. COM(2015) 222. Towards an Energy Union – Estonia.

[46] See more: http://www.lg.lv/?id=194&lang=eng.

[47] Commission Staff Working Document Country Report Lithuania 2016. http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_estonia_en.pdf.

Substantial improvements have been noted in the functioning of Estonia's electricity market since the full liberalisation of its retail segment at the beginning of 2013 and the launch of the electricity line with Finland in 2014 (Estlink 2). As in the case of natural gas supply, crucial projects conducted in other Member States have affected the development of electricity networks in Estonia. These boosts came, among others, from the connection of the Lithuanian electricity network with Sweden and Poland[48]. It has been also indicated that the integration of the Baltic electricity market with the rest of the EU will reduce demand for power transmission through Estonia and Latvia and will largely remove congestion risks on the Estonian-Latvian border. These risks will be eliminated with the completion of the third electricity interconnection project between Estonia and Latvia, which is advancing on schedule[49].

3. Poland

According to EC documents, Poland has overall low import dependency (even though it is increasing) mostly due to existing national resources of solid fuels. Import dependency is assessed at a high level for crude oil; it is also above EU average with respect to natural gas. The vast majority of these come from Russia – about 95% (crude oil) and 64% (natural gas)[50].

In the context of gas imports, great importance has to be attributed to Poland's first LNG terminal. The aim of this project was to increase gas supply security by diversifying suppliers, thus reducing Poland's dependency on Russian gas (currently 69% of domestic gas imports). The project was to help secure approximately 36% of the current demand for gas in Poland[51]. The LNG terminal in Świnoujście was expected to be operational by the end of 2014 but it was unfortunately delayed by two years. In the first stage of its operation, the LNG terminal will have the re-gasification capacity of 5 bn m^3 of natural gas annually. In its next stages, depending on the increase in the demand for gas, it will be possible to increase its dispatch capacity to up to 7.5 bn m^3.[52] First delivery of gas took place in June 2016.

[48] Commission Staff Working Document Country Report Estonia 2016. http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_estonia_en.pdf.

[49] Ibidem.

[50] Commission Staff Working Document. Country Factsheet Poland. COM(2015) 234. Towards an Energy Union – Poland.

[51] http://ec.europa.eu/energy/eepr/projects/files/gas-interconnections-and-reverse-flow/poland-swinoujscie_en.pdf.

[52] More on LNG terminal in Świnoujście see: http://en.polskielng.pl/lng/lng-terminal-in-poland/.

Since 1 April 2014, Poland has also implemented physical reverse flows on the Yamal pipeline. This allows Poland to cover almost half of its consumption through imports from Germany and the Czech Republic. This is without a doubt an important step in the diversification of its supply routes. On its basis, it will be able to replace 72% of Russian imports by internal flows from the EU[53].

Unfortunately, the development of energy interconnectors is slow in Poland, a fact which has hampered the security of its gas and electricity supplies and the integration of the energy markets in the region. The EC noted that Poland has completed a number of works co-financed by the European Regional Development Fund on the electricity interconnector with Lithuania ('LitPol Link'), which helped to develop trade between their energy markets[54]. By contrast, some of the initiatives concerning interconnectors with Germany and Slovakia have not progressed. As a result, Poland is one of the least connected EU Member States which exposes its electricity system to risks, as evidenced by the unexpected supply shortages in August 2015. Other than Sweden, Poland's power exchange is not linked by market coupling to neighbouring countries[55].

Three projects, out of 33 connected with supply security on the Project of Common Interest list, are regarded by European Commission (EC) as the most vital for Poland: a) the Poland-Czech Republic gas interconnector 'Stork I', which will allow Poland to increase its import capacities from the Western European gas market or ship to its southern neighbours; b) the Poland-Slovakia cross-border gas pipeline that will connect their transmission systems; c) the 'GIPL', which will enable Poland to overcome gas isolation of the Baltic States[56].

4. Common initiatives in the Baltic Region

Apart from internal activities undertaken by the Baltic States themselves, it is worth noting that there are some important projects carried out at the regional level also in cooperation with other Member States: Poland, Finland and Sweden. The Baltic Energy Market Interconnection Plan (hereafter, BEMIP) of 2009 plays a significant part in that regional cooperation. In the first half of 2015, the regional cooperation framework in the region was

[53] https://ec.europa.eu/energy/sites/ener/files/documents/20140528_energy_security_study.pdf.

[54] Commission Staff Working Document Country Report Poland 2016. http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_poland_en.pdf.

[55] Ibidem.

[56] Ibidem.

reformed by bringing together two initiatives: BEMIP and the EU Strategy for Baltic Sea Region Policy Area Energy (hereafter, EUSBSR PA Energy). Their goal is to improve macro-regional cooperation. The joint BEMIP/EUSBSR PA Energy Action Plan foresees regional cooperation in key energy policy areas such as electricity and gas markets and security of supply[57].

The physical isolation of the Baltic States from the European gas network is expected to come to an end in 2019. The construction of a new bi-directional gas interconnector between Poland and Lithuania (GIPL) will be the first gas interconnector between the eastern Baltic region and the continental European gas network. As noted in EC documents, if GIPL the project mentioned in the EESS manages to be completed as planned by the end of 2019, it will further strengthen energy supply security in the region[58].

A significant role in the diversification of gas suppliers can be attributed to the realisation of the aforementioned Lithuanian project concerning LNG vessel in Klaipeda. According to estimations, the annual capacity of the terminal is sufficient to cover 90% of the annual gas demand of the three Baltic States. In the first half of 2015, approximately 25% of Estonia's gas demands was covered by liquid natural gas from Klaipeda[59].

The second group of tasks realised as common initiatives concerns electricity. In 2014, interconnection capacity for electricity was estimated at 4% and yet when Estlink2 started operating – the second-high voltage direct current interconnection between Finland and Estonia[60] – this capacity increased to 10%. The Estlink1 and Estlink2 connections between Estonia and Finland, the LitPol Link connection between Lithuania and Poland, and the Nordbalt connection between Sweden and Lithuania, have jointly raised the interconnectivity of the Baltic States with the EU electricity market to approximately 25%[61]. Also, in the first quarter of 2015, the three Baltic States agreed on a common strategic goal – their de-synchronisation from the Russian/ Belorussian electricity grid (that is, IPS/UPS) and the synchronisation of their power systems with the continental European network by 2025[62].

[57] Towards an Energy Union – Latvia.

[58] Ibidem.

[59] Commission Staff Working Document Country Report Lithuania 2016. http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_lithuania_en.pdf

[60] For more details, see: http://estlink2.elering.ee/home/

[61] https://ec.europa.eu/energy/en/topics/infrastructure/baltic-energy-market-interconnection-plan and http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_latvia_en.pdf.

[62] Commission Staff Working Document Country Report Lithuania 2016.

5. The Czech Republic and Slovakia

The Commission assessed that the Czech Republic has relatively low import dependency for fossil fuels as a whole. The situation looks different with regard to gas and oil (and petroleum products). In 2013, 99.9% of its gas import came from Russia (however *via* other EU countries)[63]. The Czech Republic is taking advantage of EU programmes to boost investment in energy-efficient infrastructures[64]. The increasing share of renewables in its energy-mix has become the basis for some infrastructure investment projects. In addition, five PCIs are underway in the national electricity sector meant to increase the capacity of the Czech Republic. Their completion will significantly contribute to the strengthening of energy supply security between the Czech Republic and Slovakia[65].

2011 and 2012 saw the completion of the interconnector projects in Cieszyn between Poland and the Czech Republic and the establishment of reverse flow connections in Hungary and the Czech Republic which enable bi-directional transmission between West and East[66].

The import dependency of Slovakia is above the EU average for fossil fuels, gas and petroleum. As in the cases of other CEE countries, Slovakia imports almost all of its gas from Russia[67]. To upgrade Slovakia's energy infrastructure, plans are underway to create further electricity interconnections with Hungary, a gas interconnector with Poland and the Eastring gas pipeline to Romania and Bulgaria[68]. Slovakia is also a member of many regional initiatives that have been established under the TEN-E Regulation (such as the North-South electricity interconnections in Central Eastern and South Eastern Europe) as well as a member of the High Level Group on Central East South Europe Connectivity (CESEC). The objective of the latter is to establish a regional priority infrastructure roadmap and to advance its implementation in order to develop missing infrastructure and improve gas supply security[69].

The Czech Republic and Slovakia together with Poland and Hungary are also involved in regional cooperation within the Visegrad Group, which is

[63] Commission Staff Working Document. Country Factsheet Czech Republic. COM(2015) 222. Towards an Energy Union – Czech Republic.

[64] Commission Staff Working Document Country Report the Czech Republic 2016. http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_czech_en.pdf.

[65] Towards an Energy Union – Czech Republic.

[66] https://ec.europa.eu/energy/sites/ener/files/documents/20140528_energy_security_study.pdf.

[67] Commission Staff Working Document. Country Factsheet Slovakia. COM(2015) 237. Towards an Energy Union – Slovakia.

[68] Commission Staff Working Document Country Report Slovakia 2016. http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_slovakia_en.pdf.

[69] Towards an Energy Union – Slovakia.

present in the field of energy policy including, among others, gas market integration.

6. Bulgaria and Romania

According to EC documents, Bulgaria remains the most energy and carbon intensive economy in the EU. Lack of reforms in the past exacerbated the problems of its energy sector – its main shortcomings, including gas import dependency on a single supplier, namely Russia, were highlighted by earlier country reports[70]. Moreover, by relying on a single supplier and on a single route for its gas imports, Bulgaria has found itself with limited alternatives, be it LNG or gas storage. This makes the country particularly vulnerable to gas disruptions[71]. The EC indicated that the Bulgarian Government has taken steps to increase the resilience of its natural gas system. In 2015, Bulgaria started works on the expansion of an underground gas storage facility, refurbished several compressor stations and expanded its internal high pressure grid. A final investment decision was signed for an Interconnector with Greece[72]. With regard to gas supply, Bulgaria has also set out a political goal to develop a regional gas hub. However, a number of essential prerequisites has to be fulfilled before this objective can be achieved. They include, in particular: 1) access to diversified gas sources; 2) development of infrastructure connecting Bulgaria to its neighbouring countries and/or gas sources, 3) a stable regulatory framework; and 4) a well-developed trading environment[73].

With reference to electricity, Bulgaria's interconnection capacity was at the level of 11% in 2014; the implementation of a number of PCIs is planned to increase this level to 15% by 2030[74].

Unlike Bulgaria, Romania has a rather low import dependency, particularly due to its gas and coal reserves. Gas imports are at a low level (albeit it comes mostly from Russia) as a result of a relatively high internal gas production[75]. Romania's interconnection capacity was at a level of 7% in 2014 but, similarly

[70] Commission Staff Working Document Country Report Bulgaria 2016. http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_bulgaria_en.pdf.

[71] Commission Staff Working Document. Country Factsheet Bulgaria. COM(2015) 572. Towards an Energy Union – Bulgaria.

[72] http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_bulgaria_en.pdf.

[73] Ibidem.

[74] Towards an Energy Union – Bulgaria.

[75] Commission Staff Working Document. Country Factsheet Romania. COM(2015) 572. Towards an Energy Union – Romania.

to Bulgarian, the forecast for 2030 is set for 15%[76]. However, cross-border energy interconnections still require substantial investments.

Several Romanian energy infrastructure projects with significant cross-border impact are included in the 2015 PCIs list. Their aim is to promote interconnections in bi-directional systems between neighbouring Member States, as well as to diversify energy sources and supply routes. Projects included in the PCIs list include the reinforcement of the electricity interconnection between Bulgaria and Romania and the capacity increase on the Bulgaria-Romania-Hungary-Austria bi-directional gas transmission corridor ('ROHUAT/BRUA')[77].

7. Hungary

According to EC documents, Hungary's import dependency concerning all fossil fuels is higher than the EU average. Import dependency on gas originating from Russia is lower than in 2005 but remains at a high level[78]. However, some initiatives such as the inauguration of a new gas interconnector between Hungary and Slovakia have helped improve the security of gas supplies in Hungary as well as in the CCE region overall[79]. Several key initiatives have been identified as in urgent need of implementation including the reverse flow from Romania to Hungary and the reverse flow from Croatia to Hungary. The latter will enable the connection of Hungary to the liquefied natural gas (LNG) terminal in Rijeka and other western gas sources[80].

With reference to electricity, Hungarian interconnection capacity was at the level of 29% in 2014. Additional interconnectors between Hungary and Slovakia will make it possible to increase electricity imports in the mid-term[81].

The table below presents selected major security of supply infrastructure projects in CEE countries. These can reflect the scope of the activities included by the EU in the EESS.

[76] Ibidem.

[77] Commission Staff Working Document Country Report Romania 2016. http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_romania_en.pdf.

[78] Commission Staff Working Document. Country Factsheet Hungary. COM(2015) 227. Towards an Energy Union – Hungary.

[79] Commission Staff Working Document Country Report Hungary 2016. http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_hungary_en.pdf.

[80] Towards an Energy Union – Hungary.

[81] Ibidem.

Table 1. Selected major security of supply infrastructure projects in CEE countries

				Status of key security of supply infrastructure projects	
	Sector	**Term of project**	**Name of project**	**Description**	**Estimated time of completion**
1.	**natural gas projects**	**short – term**	Klaipeda – Kiemena pipeline upgrade	Capacity enhancement of the connection from Klaipeda to the Lithuania-Latvia interconnector	2017
2.			Greece – Bulgaria interconnector	New interconnector to support diversification and delivery of gas in Bulgaria	2016 (2 years delay)
3.			Bulgaria reverse flow	Increase of storage capacity in Chiren	2017
4.			Hungary – Romania reverse flow	Reverse flow enabling gas flows from Romania to Hungary	2016
5.			Bulgaria – Serbia interconnector	New interconnector supporting security of supply in Bulgaria and Serbia	2016
6.		**medium – term**	Baltic LNG terminal	New LNG terminal with location to be decided	2017
7.			Poland – Lithuania interconnector	New bi-directional pipeline (GIPL) ending isolation of Baltic States	2019
8.			Finland – Estonia interconnector	New bi-directional offshore pipeline ("Baltic connector")	2019
9.			Latvia –Lithuania interconnector	Upgrade of existing interconnector, including compressor station	2020
10.			Poland – Czech Republic interconnector	New bi-directional pipeline	2019
11.			Poland – Slovakia interconnector	New bi-directional pipeline	2019
12.			Poland-3 internal pipelines and compressor station	Internal reinforcements needed to link input points on the Baltic Coast to the PL – SK and PL – CZ interconnectors	2016–2018
14.			Bulgaria-internal system	Rehabilitation and expansion of transport system needed for regional integration	2017 (tbc)
15.			Romania – internal system and reverse flow to the Ukraine	Integration of Romanian transit and transmission system & reverse flow to Ukraine	Tbc

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Table 1 cont.

				Status of key security of supply infrastructure projects	
	Sector	**Term of project**	**Name of project**	**Description**	**Estimated time of completion**
16.	**electricity projects**	**short – term**	Lithuania-Poland interconnection	New interconnection and back-to-back converter stations; a subsequent stage planned for 2020; related reinforcements needed in Poland	2015 (first stage)
17.		**medium – term**	Internal lines in Latvia and Sweden	Increasing capacity on the Latvia-Sweden interconnection	2019
18.			Estonia-Latvia interconnection	Interconnection and related reinforcements in Estonia	2020
19.			Synchronisation of Estonia, Latvia and Lithuania with Continental European Networks	Synchronisation of the Baltic states	2020 (tbc)

Source: Communication from the Commission to the European Parliament and the Council European Energy Security Strategy, available at: www.eur-lex.europa.eu.

V. Conclusions and remarks

Energy security is a pressing topic in current EU policy considerations. Among all its various aspects, security of supplies appears to be the most vital. In particular, the EU supports initiatives that aim to promote policies that encourage diversification (both of energy types and supply sources), improve the functioning of energy markets and facilitate their cross-border integration. Regional cooperation on infrastructure developments is not only needed to optimise key regional infrastructure. Importantly, it also allows the participants to identify potential and future problems. There can be no doubt, the process of strengthening regional cooperation between CEE countries must continue. In fact, it would be desirable for CEE countries to speak with one voice not only within the EU, but also in external settings.

The analysis of CEE countries shows that not all initiatives have been completed yet. Some of them, such as the LNG terminal in Świnoujście or the gas interconnector between Bulgaria and Greece, have been subject to substantial delays. This is certainly not beneficial to the energy security of the entire region and creates sort of "gaps" in the common (that is, EU) perception of this matter. Reducing such shortcomings would not only contribute to improving regional planning, but also strengthen CEE countries as reliable partners in creating and building the EU's Energy Policy Strategy and the Energy Union. The countries of the region still face a common challenge – the diversification of their gas supply sources, a problem which is inherently connected with one dominant supplier, namely Russia. It is fair to say that the way to achieve supply independence is long. It is thus crucial for CCE countries to further improve their joint regional policy as a response to changing energy security priorities.

In this context it seems that the Baltic States have been particularly apt at learning their lessons seeing that they have been particularly active when it comes to taking actions directed at improving the security of their energy supplies. While their success is at least in part attributable to the effective implementation of EU energy legislation, it is partly, if not mostly even, the result of a strong sentiment based on a common past whereby Russia is treated more as a necessary evil, than a voluntary business partner. Incidentally, similar views have not, however, improved the situation in the Ukraine.

It must also be kept in mind that a well-functioning and interconnected gas market should provide the correct incentives for further investments and signal consumers to use resources in an efficient and sustainable manner. Interconnectors are still needed to further develop the internal electricity market. These remarks are in particular (but not only) addressed to Bulgaria

which must still come a long way in order to achieve the EU energy-efficiency levels.

Assessing whether CEE countries made progress, or in fact have regressed in the process of building their energy independence, it must be concluded that some significant advancements have been made towards energy security in this region. This is, however, only the first step in the realisation of the common initiative called the Energy Union.

References

Bogdanowicz, P. (2012). *Interes publiczny w prawie energetycznym Unii Europejskiej*. Warszawa: C.H. Beck.

Cameron, P.D. (2007). *Competition in Energy Markets. Law and Regulation in the European Union*. Second Edition. Oxford: Oxford University Press.

Cherp, A., Jewell, J. (2014). The concept of energy security: Beyond the four As. *Energy Policy 75*, 415 – 421, http://dx.doi.org/10.1016/j.enpol.2014.09.005.

Ciborski, J. (2006). Bezpieczeństwo energetyczne (p. 127–146). In: K. Kuciński (ed.), *Energia w czasach kryzysu*. Warszawa: Difin, p. 127–146.

Glachant, J.-M., Ahner, N. (2012). Is energy security the objective of the EU energy policy? (p. 5–22). In: J.-A. Vinois (ed.), *EU Energy Law. Volume VI. The Security of Energy Supply in the European Union*. Deventer – Leuven: Claeys & Casteels Law Publishers.

Hoyos Pérez, J.A. (2012). Critical energy infrastructure protection in the EU (p. 75–92). In: J.-A. Vinois (ed.), *EU Energy Law. Volume VI. The Security of Energy Supply in the European Union*. Deventer – Leuven: Claeys & Casteels Law Publishers.

Johnston, A., Block, G. (2012). *EU Energy Law*. Oxford University Press.

Jones, Ch., Gräper, F., Schoser, Ch. (2010). Security of supply (p. 535–563). In: Ch. Jones (eds.), *EU Energy Law, Volume I, The Internal Energy Market. The Third Liberalisation Package*. Luven: Claeys & Casteels.

Jonsson, D.K., Johansson, B., Månsson, A., Nilsson, L.J., Nilsson, M., Sonnsjö, H. (2015). Energy security matters in the EU Energy Roadmap. *Energy Strategy Reviews 6,* 48–56, http://dx.doi.org/10.1016/j.esr.2015.03.002.

Kannelakis, M., Martinopoulos, G., Zachariadis, T. (2013). European energy policy – A review. *Energy Policy 62*, 1020–1030, http://dx.doi.org/10.1016/j.enpol.2013.08.008.

Kruyt, B., van Vuuren, D.P., de Vries, H.J.M., Groenenberg, H. (2009). Indicators for energy security. *Energy Policy, 37*, 2166–2181, http://dx.doi.org/10.1016/j.enpol.2009.02.006.

Maltby, T. (2013). European Union energy policy integration: A case of European Commission policy entrepreneurship and increasing supranationalism. *Energy Policy 55*, 435–444, http://dx.doi.org/10.1016/j.enpol.2012.12.031.

Nowacki, M. (2010). *Prawne aspekty bezpieczeństwa energetycznego w UE*. Warszawa: Wolters Kluwer.

Nowak, B., Grzejszczak, P. (2011). Poland's Energy Security in the Context of the EU's Common Energy Policy. The Case of the Gas Sector. *YARS 4*(4), 41–56.

Nowak, B. (2012). *Gas market liberalisation and energy security. Legal and institutional aspects*. Warszawa: Wolters Kluwer.

Pach -Gurgul, A. (2012). *Jednolity rynek energii elektrycznej w Unii Europejskiej w kontekście bezpieczeństwa energetycznego Polski*. Warszawa: Difin.

Rewizorski, M., Rosicki, R., Ostant, W. (2013). *Wybrane aspekty bezpieczeństwa energetycznego Unii Europejskiej.* Warszawa: Difin.

Schaffer, B. (2015). Europe's natural gas security of supply: policy tools for single supplied states. *Energy Law Journal, 36*, 179–201.

Herranz-Surrallés, A. and Natorski, M. (2012). The European energy policy towards eastern neighbours: rebalancing priorities or changing paradigms? (p. 132–154). In: F. Morata, I.S. Sandoval (eds.), *European Energy Policy: An Environmental Approach*. Cheltenham: Edward Elgar Publishing.

Talus, K. (2013). *EU Energy Law and Policy: A Critical Account*. Oxford: Oxford University Press, http://dx.doi.org/10.1093/acprof:oso/9780199686391.001.0001.

Winzer, Ch. (2011). Conceptualizing energy security. EPRG Working Paper 1123, Cambridge Working Paper in Economics 1151. Retrieved from: http://www.econ.cam.ac.uk/dae/repec/cam/pdf/cwpe1151.pdf.

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Design of Regulatory Contracts – Example of the Urban Transport Industry

by

Joanna Piechucka*

CONTENTS**

Abstract

The present article discusses economic issues related to the design of optimal regulatory contracts on the example of the urban public transport industry. It highlights the importance of the design of efficient regulatory contracts in the context of changes facing the urban transportation industry in the European Union. Furthermore, it provides an overview of the main issues put forward in economic literature related to the design of regulatory contracts. It discusses several problems relevant in this context such as informational asymmetries, transaction costs, and regulatory capture. It also comments on a selection of views presented in economic literature dealing with these issues.

Finally, the article presents the regulatory framework, contractual practices and characteristics of the French urban public transport industry. France is well known

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for its long standing tradition of contracting between the State and the private sector in transportation. The analysis of the French example may help to prove useful insights in this regard.

Résumé

Cet article s'intéresse à la question de la conception de contrats réglementaires optimaux d'un point de vue économique dans le cadre du transport public urbain. Il met en évidence le fait qu'il est important de concevoir des contrats réglementaires efficaces dans le contexte des changements qui ont lieu actuellement dans le secteur du transport urbain dans l'Union Européenne.
En outre, l'article fourni un aperçu des principales questions mises en avant dans la littérature économique liée à la conception des contrats réglementaires. Il discute des problèmes qui peuvent survenir dans ce contexte, telles que les asymétries d'information, les coûts de transaction, et la capture réglementaire. Il présente et critique également des arguments avancés dans la littérature économique qui traite ces questions.
Enfin, l'article présente le cadre réglementaire, les pratiques contractuelles et les caractéristiques de l'industrie du transport public urbain en France. La France est bien connue pour sa tradition de relations contractuelles entre l'Etat et le secteur privé dans le secteur du transport. L'exemple du transport public urbain en France peut fournir des renseignements utiles à cet égard.

Key words: contracts; informational asymmetries; regulatory capture; transaction costs; urban public transport.

JEL: L14, L51, L92

I. Introduction

The goal of this article is to introduce the main economic problems that arise in the design of optimal regulatory contracts, and to highlight solutions that have been proposed by economic literature in order to overcome them. The example of the urban transport industry is used to illustrate the analysis.

In the last three decades, the organization and regulation of urban public transport in Europe has undergone considerable changes with contracting becoming a tool increasingly used by public authorities. In this context, the design of efficient regulatory contracts is essential for the provision of an economically efficient, high-quality service.

Urban transportation plays an important role in Europe's economic activity. 74% of EU's population currently lives in urban areas (EC, 2015);

approximately 57 billion passenger trips were made via local public transport in the EU in 2012 (UITP, 2014). However, urban public transport has migrated from being a profitable industry, with a high modal share, to a loss-making one with, in most cases, a minority modal share. To address these issues, reduce operating costs as well as to improve performance and service quality, the sector experienced a move away from public ownership and operation to its privatization.

Designing efficient regulatory contracts between public authorities and transport operators may seem problematic. First, the former may not be in a perfect position to observe the productive capacity and decisions made by latter. These informational constraints may limit the efficiency of industrial control exercised by transport authorities over transport operators, and in turn make it possible for the operators to receive informational rents. Second, if the task delegated to the transport operators is complex, contracts may be costly to design, enforce, and re-negotiate. Future contingencies may be difficult to predict and unforeseen costs may appear. Finally, regulatory decisions[1] may be dependent on the pressure of local interest groups, which may be willing to influence them for the benefit of their private interest. These issues are of key interest to economists.

Section II of this paper provides an overview of the main problems put forward in economic literature in the design of regulatory contracts[2]. These include informational asymmetries, transaction costs and regulatory capture. It also presents an overview of different solutions proposed in this regard by economic literature. Section III focuses on the example of the regulatory framework, contractual practices and characteristics of the French urban public transport industry. The French case provides useful insights regarding the design of efficient regulatory mechanisms. Overall conclusions can be found in section IV.

II. Economic issues in the design of regulatory contracts

The delegation of a task by a public authority to the private sector may be associated with problems related to the presence of informational asymmetries between the public authority and the firm to which a task is

[1] Regulatory decisions are understood as decisions made by the relevant (possibly local) transport authority when delegating the operations of a service to a transport operator.

[2] Throughout the text, the term regulatory contract will refer to a contract binding the relationship between the relevant public authority responsible for providing a given service and a private operator to whom the contract is delegated to.

being delegated to. Informational asymmetries further give rise to other difficulties such as transaction costs or regulatory capture. The purpose of this section is to introduce these terms and explain their role in the design of optimal regulatory mechanisms. It also provides an overview of solutions put forward by theoretical and empirical literature on this subject. This discussion is general in its nature and refers to a task that a public authority (hereafter, principal) delegates to a private company (hereafter, agent)[3].

1. Informational asymmetries

The agent may have more complete information about the task to be performed than the principal itself. The informational constraints the principal faces may affect the contracting process between them. Two types of informational asymmetries are discussed in economic literature: adverse selection and moral hazard[4], both of which can be problematic in optimal contract design.

As defined by (Laffont and Martimort, 2002) 'agents to whom the task has been delegated to by a principal may chose *actions* that affect value or trade or, more generally, the agent's performance'. By delegating the task, the principal loses control of these actions. In particular, moral hazard occurs as the agent can take actions which are unobserved either by the principal who offers a contract or the court of law that enforces it. They cannot be contracted upon, as their value cannot be verified. The action may concern the effort that the agent puts forward when providing the service. Effort may positively impact the agent's production level but, at the same time, it may provide a disutility to him. Effort can be understood as the intensity of work put into performing a task, such as engaging in cost-reducing activities. On the other hand, examples of negative effort may include purchasing materials at high prices, allocating excessive perks to management, putting private career opportunities over efficiency, etc. Moral hazard significantly limits the extent of control exercised by the principal.

Adverse selection occurs when the operator has private information. The informational advantage may concern, for instance, its technological capabilities. The existence of adverse selection allows the agent to extract an informational rent when contracting with the regulator. To illustrate this, while the operator knows its cost of producing a given level of output (for a given level of cost-reducing effort), this data is not known to the regulator. In other words, the regulator does not know whether the operator bears high

[3] This terminology refers to the terminology used in incentive economics.

[4] For a more general introduction to these terms see (Laffont & Martimort, 2002).

or low costs for performing the task. At the same time, the regulator must ensure that the firm is willing to perform the task, even if it faces high costs. A firm with low costs will thus enjoy a rent, as in the presence of asymmetric information the regulator does not know what costs the transport operator actually faces.

Of course, regulators may engage in collecting and exploiting data in order to limit the informational constraints they face. Operators may also be subject to audits, which allow the regulator to verify a given operator's actual costs. However, audit systems make it possible to only verify whether costs are correctly reported, that is, according to standard audit procedures. They do not resolve the problems of adverse selection and moral hazard.

The new theory of regulation considers informational asymmetries to be central in the contractual relationship between governments and firms. It adopts a normative approach to deal with these issues by assuming that regulatory contracts are optimally designed by regulators, who maximize social welfare through sophisticated mechanisms.

In line with this approach, (Laffont and Tirole, 1986) derive optimal regulatory mechanisms when informational asymmetries concerning production costs are the main concern in contracting. In their framework, the principal does not observe either productive capabilities of the operator or its cost-reducing efforts. The principal maximizes social welfare and must ensure that the agent is willing to perform the task.

They show that under informational asymmetries, the trade-off the principal faces is to make the agent reveal its productive capabilities as well as to provide the agent with incentives for cut costs. The two extreme cases are a fixed-price and cost-plus contracts. Under a fixed-price contract, the agent is paid a fixed sum for performing a task delegated by the principal, regardless of the production costs actually incurred. This type of contract provides incentives for cost cutting. Under a cost-plus contract, the production costs incurred by the agent are fully reimbursed. The agent then reveals the costs he actually faces.

Under moral hazard, the principal cannot fully reimburse all costs covered by the operator. In such a situation, the agent would not have any incentives to engage in any cost-cutting efforts, and would always manage to increase its expenditures. However, under adverse selection, the principal is not willing to implement a fixed-price contract. Under such a contract, the agent would have the incentive to understate its productive efficiency.

The resulting optimal regulatory mechanism under informational asymmetries is an incentive contract, where the principal partially shares costs with the agent. The contract is composed of two parts: a fixed-sum and a partial cost reimbursement. The optimal contract can be implemented by

asking the agent to announce its costs for performing the task. The transfer will then depend on the announced costs and the actual realized costs. The higher the announced costs, the lower the fixed-sum, and thus the lower the fraction of cost overruns or underruns that will be shared with the principal.

The optimal scheme is thus to propose a menu of linear contracts. Different types of firms will then self-select the contract, depending on their type (how efficient they are). By self-selecting a contract, they reveal their "type". This is the so-called second-best solution attainable under informational asymmetries.

The model derived by (Laffont and Tirole, 1986) provides a normative approach to how optimal regulatory contracts should be designed. However, introducing a menu of linear contracts may be difficult in practice, as calculating an optimal menu may be complex. As a result, incentive contracts have not been widely used in practice.

Literature has proposed other solutions that allow theory to coincide more easily with reality. (Rogerson, 2003) shows that, at least in some cases[5], a menu of only two contracts that an agent can chose from allows to capture more than 75% of the gains achievable under a complex menu of linear contracts. These two contracts are a fixed-price and a cost-plus contract. Intuitively, the above can be explained in the following manner from an economic standpoint. By offering a cost-plus contract, the principal ensures that even an agent with low efficiency will be willing to perform the task. However, this type of contract does not provide any cost-cutting incentives for the agent. The principal then decides on the price which it will set when offering a fixed-price contract, which will provide cost-cutting incentives for agents that are more efficient. The principal faces the following trade-off when deciding on the price. A lower price allows the principal to pay less when the contract is accepted by the agent. However, the probability that the agent chooses a fixed-price contract, instead of a cost-plus contract, is then also lower.

(Chu and Sappington, 2007) extend this model further to more general circumstances[6]. In particular, they show that when informational asymmetries on the cost efficiency of the agent are particularly pronounced, then the menu of two contracts proposed by (Rogerson, 2003) does not perform so well. They suggest a solution where the principal offers the agent a choice between a linear cost-sharing contract and a cost-plus contract. Under the linear cost-sharing contract, the principal chooses the fixed-rate and the

[5] The model considers an agent with a quadratic utility function and production costs that are a realization of a uniformly distributed random variable. A more technical discussion of the model is provided in the article itself.

[6] The technical details of the model are provided in the article.

reimbursement-rate so as to minimize its expected procurement costs. This solution makes it possible to capture at least 73% of the gains obtained when proposing a menu of linear contracts. In the setting analyzed by (Rogerson, 2003), it captures 90% of these gains.

The presence of informational asymmetries may lead to further problems such as transaction costs or regulatory capture. These are discussed in the next subsections.

2. Transaction costs

Transaction costs have their origins in contractual theories commenced by (Coase, 1937) and (Williamson, 1975). Transaction costs arise from the costs of seeking out buyers and sellers and arranging, policing and enforcing agreements or contracts in a world of imperfect information (Cowen and Parker, 1997).

Given that contracting takes place under asymmetric information, delegating a task to a firm (rather than public authorities providing it by themselves) may result in transaction costs. These reflect the difficulty in designing fully contingent contracts. In particular, when the task to be performed by the transport operator is complex, regulatory contracts may be costly to design, enforce, and re-negotiate.

It might be particularly difficult for the principal to clearly specify the task to be performed by the agent since the principal may lack the necessary technical expertise. Relevant information may be difficult to obtain. Designing the task may appear to be costly, especially when the delegated task is complex. In addition, there may be uncertainty as to the future economic situation at hand.

Contract enforcement requires the monitoring of the task performed by the agent. This, however, proves to be problematic for the principal. Necessary data collection may require costly studies. The principal may thus content itself with the data provided by the operator and may decide not to involve itself in extensive data collection or careful monitoring. In the absence of reliable and complete data on the service provided, the enforcement of the regulatory contract will not be carried out efficiently.

As future contingencies may be difficult to predict at the moment of designing the contract, the regulatory contract is likely to be incomplete. As stated by (Williamson, 2002), 'all complex contracts are unavoidably incomplete. For this reason, parties will be confronted with the need to adapt to unanticipated disturbances that arise by reason of gaps, errors and omissions in the original contract.' An agent may engage in opportunistic behavior *ex ante* in order to

win the contract, by anticipating that it will be able to re-negotiate *ex post* terms not covered by the contract (Prager, 1990). The principal may thus face unforeseen costs related to the re-negotiation of the contract.

(Bajari and Tadelis, 2001) consider *ex post* changes related to contract re-negotiations. They suggest the main problem the principal faces when delegating a task to an agent are in fact *ex post* re-negotiations. In line with this view, they develop a model that incorporates moral hazard and transaction costs related to contractual design and re-negotiations. Restricting their analysis to two types of contracts (fixed-price and cost-plus), they shed light on when each type of contract should be used.

In their model, the principal wants to delegate a task to an agent that can induce cost-cutting efforts when performing the task. The principal provides the agent with a design of the task the agent is to perform – the more complete the design, the lower the probability of re-negotiating changes in the contract *ex post*. However, providing a more complete design is also associated with higher costs *ex ante* for the principal.

Inspired by the construction industry, they show that most of the contracts observed in reality are simple variants of fixed-price and cost-plus contracts. Fixed-price contracts provide incentives for cost-cutting. However, if the design of such contracts remains incomplete, their contract re-negotiation costs are high. Cost-plus contracts, on the other hand, lack cost-cutting incentives but are better for *ex post* adaptations. The resulting basic trade-off lies between providing *ex ante* incentives for cost-cutting and avoiding *ex pos*t transaction costs related to re-negotiations.

This model makes it possible to draw certain conclusions regarding when best to use each type of contract. Complex tasks (more costly to design) will be accompanied by a high probability of *ex post* adaptations. These will be delegated using cost-plus contracts. On the other hand, simpler tasks (less costly to design) will be accompanied by a small probability of *ex post* adaptations. These are best administered using fixed-price contracts which provide cost-reducing incentives.

At this point, it seems interesting to discuss the related choice of the award mechanism. (Bajari, McMillan and Tadelis, 2009) notably argue that contract choice may be interrelated with the choice of the award mechanism.

By providing an empirical analysis of the US construction sector, they study the determinants of choosing between 'competitive bidding' and 'negotiations'. In their analysis, they consider the interplay of contracts and award mechanisms as well as the transaction characteristics that determine them. In particular, they suggest that the choice of contract type may influence the choice of the award mechanism. Since the price is the most important factor for fixed-price contracts, it is easy to award them by way of competitive bidding. On the

other hand, under a cost-plus contract, costs will not be reflected by bids in a meaningful way. In this context, they refer to management literature that shows that fixed-price contracts are awarded mainly through auctions and cost-plus contract via negotiations. Negotiations are therefore an award mechanism better suited to complex services, while competitive tendering is recommended for services that are simpler to describe.

They find a positive correlation between negotiations and a measure of complexity of the project. They suggest that *ex ante* projects may be incomplete and that *ex post* changes may be needed. In this context, the use of competitive bidding may come at a cost of losing valuable information at the moment of contracting and, if fixed-price contracts are used, *ex post* changes may be insufficient. The use of auctions (often requiring fixed-price contracts) may be inefficient when information *ex ante* is valuable and when *ex post* changes are anticipated.

The next section discusses another relevant issue in the design of regulatory contracts, that is, regulatory capture.

3. Regulatory capture

Regulatory capture refers to a situation where regulatory decisions are made in favor of specific interest groups. This issue is closely related to the private-interest theory of regulation (Stigler, 1971; Peltzman, 1976; Becker, 1983).

Regulatory decisions are not necessarily made by benevolent authorities. On the contrary, they may be dependent on the pressure of local interest groups, which may be willing to influence regulatory decisions for the benefit of their private interests.

Firms may impact regulatory choices by providing regulators with incentives. These incentives will be the instrument of influence and source of regulatory capture. Incentives may include bribes or payments for political purposes (for instance, to finance a political campaign). They may also consist of a promise of future employment. Regulators may wish to find jobs in the future in the industry which they are currently responsible for (the "revolving door" phenomenon).

How is regulatory capture problematic in the design of regulatory contracts? Firms may be willing to impact the choice of regulatory contracts in their favour by providing incentives to the regulator. Public authorities may be willing to stay in power, and may therefore choose regulatory contracts favouring specific interest groups. Governments may be, for instance, interested in re-election and may thus be willing to undertake actions to maximize political support in favour of votes or campaign contributions in the next election.

The next section presents the organizational and contractual practices in the French urban transport industry. It highlights the importance and extent of the abovementioned issues in the contracting process in this industry. France is well-known for a long tradition of contracting between the State and the private sector in transportation. The example of the French urban public transport industry may help to provide some useful insights as to the design of efficient regulatory mechanisms.

III. French urban public transport industry

1. Legal and organizational background

The legal framework of urban public transport in France, outside the Ile-de-France region[7], dates back to the Transport Law of 1982[8]. This Law provided a guideline for public passenger transport in the urban transport areas and established the concept of economic and social efficiency by providing the right to low-cost public transport. The institutional organization of public transport was then clarified by separating the functions of the organizer and the operator of the relevant service. It made local public authorities responsible for organizing urban public transport by defining, financing and organizing regular public passenger transport in urban transport areas. Local public authorities were left with the choice whether to organize and provide such services by themselves, or to delegate the relevant responsibilities to a completely private, or to a public-private operator. No national regulator of the sector exists. Local authorities are considered 'regulators' in their urban transport areas.

Until 1993, local authorities were not obliged to choose a transport operator by way of a competitive tendering process. The Sapin Law[9] made competitive bidding compulsory for the award of a contract for the provision of a public service. The aim of the law was to prevent collusion and corruption as well as to enhance competition between industry operators. The introduction of

[7] The regulation of transport in the Ile-de-France region differs from the rest of the country. In this particular region, transport is organized by STIF (franc. Syndicat des Transports d'Ile-de-France) half of which is formed by State representatives, the other half being formed of the Local Authority, the Ile de-France région, departments and city of Paris representatives. The association is presided over by a State representative who has the casting vote. This article focuses on the regulation of the industry in France outside the Ile-de-France region.

[8] Loi n° 82-1153 du 30 décembre 1982 d'orientation des transports intérieurs.

[9] Loi n° 93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publique.

this Law made it mandatory for local authorities to open a tender procedure before awarding a public contract. It did not, however, forbid the use of negotiations in the procedure. As a result, operators can be selected in a two-step procedure – a pre-selection step (with the use of competitive bidding) and a negotiation phase (allowing for subjective selection criteria). The French model of regulation, combining competitive tendering with a phase of negotiations, allows for the use of subjective selection criteria, which play an important role in regulatory relations between local authorities and transport operators in France.

The figure below presents the urban transport networks in France in 2013. It presents the difference between those regulated through delegated management and those managed directly by public authorities. 90% of urban transport networks in France are currently operated through delegated management (GART, 2015). In the case of delegated management, the operation of the service is entrusted to an operator chosen by the relevant local authority. This relationship is regulated by an agreement. In this agreement, the local authority specifies the characteristics of the service to be provided, the operator's duties to the passengers, the terms and conditions of the financing of the operator, payment and fares, as well as the choice of the regulatory contract type. The average duration of the contract is approximately 8 year (GART, 2015). The key feature of the French model is the attribution of the contract to only one operator at a time who will carry out the responsibility of providing the relevant service in the whole urban transport area.

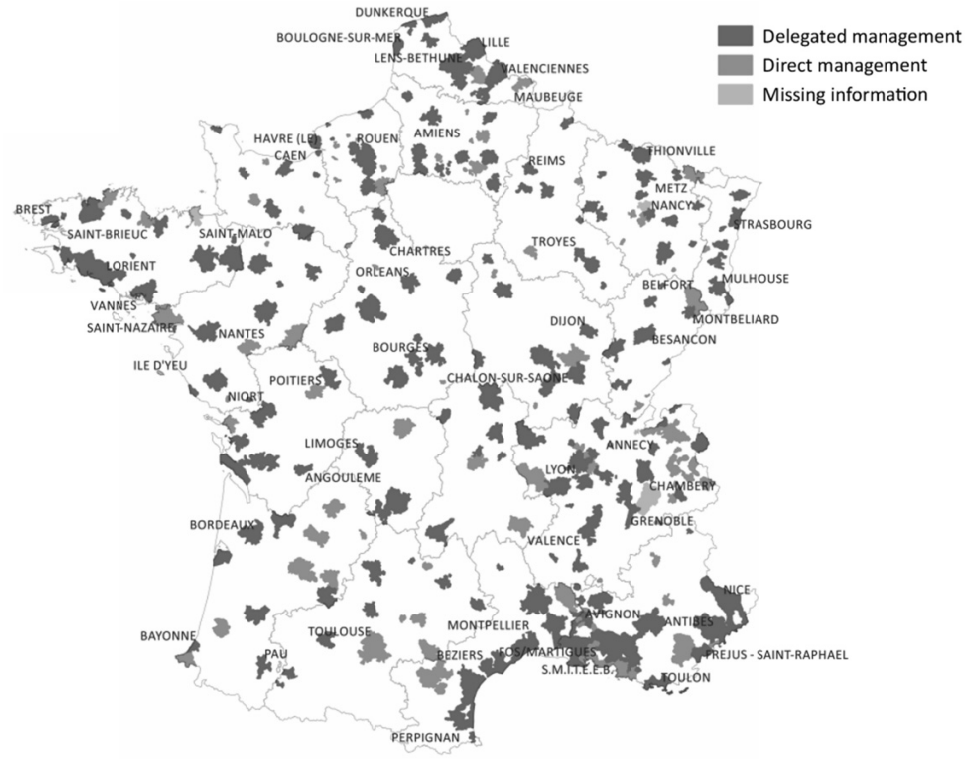
Furthermore, most transport operators belong to a major transport group. Before 2011, nearly 70% of the operators were subsidiaries of three major groups, two of which were private while the third was semi-public (respectively Keolis, Veolia Transport and Transdev). In March 2011, the 2nd and 3rd of those groups merged[10]. As stated by the French Court of Auditors (Cour des Comptes, 2015), the urban transport sector in France presents now the characteristics of an oligopolistic market.

In practice, the two main contract types binding local authorities and transport operators in France are effectively either fixed-price and cost-plus contracts. In networks regulated under a fixed-price contract, operators receive subsidies according to their expected operating deficits. Therefore, any cost changes affect their profits. On the other hand, in networks regulated by cost-plus contracts, the organizing authority collects commercial receipts and fully reimburses the operator's operating costs, increased by a pre-defined additional amount. Under this scheme, the authority provides the operator with subsidies to cover its actual deficits. Cost changes do not, therefore,

[10] Autorité de la concurrence, Décision n° 10-DCC-198 du 30 décembre 2010 relative à la création d'une entreprise commune par Veolia Environnement et la CDC.

affect the profit of the operator. In recent years, the industry has seen a move towards high-powered incentive schemes. As a result, the proportion of networks regulated under a cost-plus contract has decreased substantially from 100% in the 1970s, 60% in the 1980s, 25% in the 1990s (Yvrande-Billon, 2006) to only 7% in 2013 (GART, 2015).

Figure 1. Urban public transport networks (outside the Ile-de-France region) in France in 2013



Source: Own analysis on the basis of the TCU database of CEREMA, GART and UTP.

The French urban transport industry is highly subsidized and is currently facing strong financial constraints. Commercial receipts cover approximately 29% of the operating costs of the transport operators (GART, 2015). The remaining operating costs are covered by subsidies from the State, local authorities and a special local tax paid by local firms[11]. Designing good

[11] This transport tax consists of a local contribution of employers that makes it possible to provide additional funding for urban public transport. It is imposed on employers of both the

regulatory contracts plays thus an important role in the financial health of the industry.

The next section discusses to what an extent problems presented in economic literature related to the design of regulatory contracts are relevant to this industry.

2. Economic issues in the industry

Transport operators may have private information about their technological capabilities and may undertake cost-cutting efforts (data not observable to the relevant local authority). Such informational asymmetries may affect the economic efficiency of providing the service. Indeed, informational asymmetries are a problem for the French urban transportation industry. Their presence and extent are highlighted in sector- and academic studies dealing with this industry.

Most of the operators belong to major groups that have experiences accumulated from operating both in France and internationally as well as from internal research and development activities. As a result, they have greater experience and better information than the local authorities about the costs of providing the service is question, as well as its quality. Local authorities responsible for organizing urban public transport, on the other hand, are known for being lax in assessing operating costs (see (Gagnepain & Ivaldi, forthcoming)). Technical and financial data provided to local authorities is often not sufficiently representative of the realities of the relevant services, a problem compounded by the very limited technical expertise of their employees (Cour des Comptes, 2005). This gives rise to adverse selection.

As in most transport networks, local authorities are the ones to set the pricing policy and to finance the infrastructure. Operators can be involved in cost-cutting activities when providing the service. In particular, they may try to cut costs depending on the regulatory schemes put in place. Given the complexity and limited data on the service, it becomes difficult for local authorities to assess the cost-cutting activities undertaken by the chosen operator. Indeed, the organizing authorities in France have limited financial resources and few specialized staff members able to perform high quality audits or surveys. The insufficiency of the reports provided by operators to the organizing authority, and the complexity of the task of operating the service, make the evaluation process even more difficult. This gives rise to the moral hazard problem.

public and the private sector that employ more than 9 full-time employees within an urban transport area of a population of more than 10,000. It is collected by each urban transport area.

Contract enforcement seems to be particularly problematic in the industry. Information provided by operators to their local authorities is often incomplete, erroneous or non-explicit (Cour des Comptes, 2015). This makes it difficult for a given authority to analyze the effectiveness and efficiency of the management of the service. Existing national regulation does not impose any conditions on transport operators on the supply of data to the relevant local authorities that would be relevant for evaluating the quality of the service they provide (Cour des Comptes, 2005). Authorities rarely engage themselves in monitoring and data collection necessary to evaluate performance and service quality. In many networks, penalties defined in the regulatory contract are not actually imposed (Cour des Comptes, 2015)[12].

Moreover, as local authorities often face difficulties in precisely defining the service, contracts are likely to be incomplete. This is particularly relevant in undersized networks organized by small local authorities with limited or no specialized staff. Contracts here are thus re-negotiated throughout their duration.

Finally, the different actors taking part in providing the service (the local authority itself, the transport operators, the groups the operators are affiliated with) may prefer a certain type of contract and may thus be willing to impact the regulatory decision. This is a relevant issue to consider in the French transportation industry, a fact highlighted in academic literature on this industry discussed below.

Local authorities responsible for organizing urban public transport in France are ultimately made up of politicians representing municipal councils elected for a six-year period. These may be interested in re-election and may thus be willing to take actions to maximize their political support to gain votes or future campaign contributions. Politicians leaving the government may look for high-level jobs in the industry for which they were previously responsible for. Leaving rents in the form of higher wages or excessive profits to regulated firms puts the 'regulator' in good standing with the business and the social elites that own or control the transport firms.

Moreover, most transport operators belong to major transport groups. These groups may have important bargaining power when facing local authorities.

[12] Since at least 2008, the local authority of the Rouen-Elbeuf-Austerberthe network has not managed to impose any of the penalties foreseen in the delegation contract. Moreover, in the Caen network, penalties resulting from the non-achievement of objectives related to the quality of the service to be provided are rarely imposed and the incentive mechanisms provided in the delegation contract have limited impact. To give another example, applying penalties introduced in the delegation contract of the Clermont-Ferrand agglomeration require the fulfillment of several conditions, which make their execution difficult in practice. In the Toulon network, the incentive schemes allow, paradoxically, for the operator to increase its remuneration even in the case of a negative evolution of operating results.

In particular, they may want to aggressively maximize profits and thus might prefer fixed-price contracts. On the other hand, local authorities may also be willing to leave rents to the transport operator's employees and thus may opt for a cost-plus contract. As stated by the French Court of Auditors (Cour des Comptes, 2015), local authorities have little margin for negotiation and their relationship with operators belonging to major transport groups is often unbalanced. It is necessary to consider regulatory capture when studying the efficiency of the design of regulatory contracts.

Not surprisingly, the specifics of the French urban transportation industry drew the attention of economists. These studies provide empirical evidence of the relevance and extent of the aforementioned issues in the context of the French urban transport industry. They also provide explanations of why some of the solutions introduced to overcome these problems did not bring the expected results.

(Gagnepain and Ivaldi, forthcoming) provide empirical evidence for the importance of accounting for asymmetric information and political considerations when studying the effects and causes of regulation in the French urban transportation industry.

In their analysis, they consider the specificities of this industry segment as to the choice between a fixed-price and cost-plus contract. They assume that the regulator faces informational asymmetries and that it does not have means allowing it to make the agent reveal its real productive efficiency. Moreover, the regulator is considered to be motivated by political considerations in its choices. They adopt a positive approach to study the rationale that drives regulatory contract choices and the impact of these choices on total welfare.

Accounting for asymmetric information and political capture, they shed light on which contract type (fixed-price or cost-plus) performs better. In the framework considered, this question is not straightforward. On the one hand, fixed-price contracts provide the transport operator with cost-cutting incentives. However, subsidies paid to that operator may be excessive, as the regulator does not know the operator's productive efficiency. The regulator may thus leave an informational rent to the transport operator. The possible excessive subsidies may outweigh the positive impact on welfare of cost cuts achieved by the operator under a fixed-price contract.

Their results suggest that choosing a cost-plus contract entails higher costs for society than fixed-price contracts, the difference amounting to 3 million EUR. Yet this difference is lower when interest groups are accounted for in the welfare gap computation. In particular, higher operating costs (observed under a cost-plus regime) make it possible for the regulator to make transfers to the operator's employees. As the latter is a subgroup of the society, these transfers have a positive impact on total welfare. This in turn limits (but does

not eliminate) the advantages to society of fixed-price contracts as opposed to cost-plus contracts. In particular, the total welfare gap between the two contract types diminishes to 1 million EUR when accounting for interest groups.

They also provide empirical evidence of regulatory contract choices being motivated by political agendas, including political objectives of local authorities, the role played by trade unions and the pressure of corporations that own (fully or partially) local transport operators. In particular, they show that a change of government from left- to right-wing entails an increase in the probability of choosing a fixed-price contract from 47% to 84%. This probability increases from 48% to 60% if the operator has a public-private instead of private ownership structure.

(Yvrande-Billon, 2006) studies the industry from the perspective of transaction cost economics. She explains why the introduction of a competitive bidding procedure[13] did not translate into more competition and increased efficiency. She refers to theory claiming that problems associated with competitive bidding result from contractual disabilities between the contractual parties. She highlights in particular, among other things, problems related to contract specifications, contract enforcement and *ex post* contract changes. In light of these issues, she provides suggestions on how the current regulatory framework of the French urban transportation industry could be improved.

She stresses the importance of providing a good service specification in the competitive bidding process. When the service to be provided is complex, an incomplete design of the contract may lead to choosing the bidder who is most aware of the shortcomings of the contract, which he may exploit in the future. She provides evidence on the relevance of this problem in the French urban transportation industry. Local authorities lack the necessary technical expertise to provide a good service specification. This is shown to be particularly true in smaller local authorities (small networks) without an employee responsible for the regulation of the sector.

Accounting for problems related to the authorities' limited accessibility to relevant data, she highlights that contract enforcement is not efficiently carried out in the industry. She suggests that, in this context, writing more complex (and also more costly) contracts with various performance clauses does not lead to adequate results. As local authorities do not have the necessary data to assess performance and service quality, operators are not incited to improve performance, even under high-powered incentive contracts. She further points out that, facing limited technical expertise, local authorities often limit

[13] As mentioned before, the Sapin Law of 1993 made competitive bidding a mandatory award mechanism for choosing the transport operator to which the operation of the relevant transport network will be delegated to.

themselves to the data supplied to them by the relevant transport operators, without collecting the necessary financial data or conducting investigations by and for themselves. In this setting, contract enforcement is not efficient because operators are not supervised well enough. Performance clauses and various sanctions provided in delegation contracts will not prove to be beneficial as long as the data collected by the local authorities is not complete and reliable.

(Yvrande-Billon, 2006) highlights also the extent of *ex post* contract changes in the industry. She explains that significant amendments to contracts may be the result of opportunistic behavior of transport operators. In particular, transport operators may engage in *ex post* opportunistic behavior by re-negotiating promises made *ex ante* in order to win the contract for the operation of the services in a given network. She refers to sector studies that point out that the terms of contracts are frequently re-negotiated. As operators are better informed than local authorities, and the latter lack necessary expertise to evaluate the performance of the service to be provided, re-negotiations are more likely to turn out to be for the benefit of transport operators.

These findings are followed by suggestions how the current situation in the industry can be improved. She highlights, for instance, the potential benefits of creating a national regulatory agency that would standardize performance indicators and use benchmarking to compare performance of transport operators.

In view of the economic problems encountered in the industry, some solutions have been introduced to address them. They are mean to reduce informational asymmetries between local authorities and transport operators, enhance effective competition in the industry or introduce performance indicators in the relevant contracts.

IV. Final remarks

The goal of this article was to introduce the reader to the main economic problems that arise in the design of optimal regulatory contracts, and to highlight solutions that have been proposed by economic literature to overcome them.

The example of the French urban transport industry shows that issues discussed in economic literature seem to be indeed problematic in practice. Informational asymmetries manifest themselves in the difficulty experienced by public authorities of assessing the productive efficiency and cost-cutting efforts of transport operators. These informational asymmetries may make

monitoring of the relevant tasks further difficult and may result in costly *ex post* contract changes. Finally, public authorities are not necessarily interested in maximizing total welfare. They may be motivated by political considerations. These problems affect the design of regulatory contracts. Sharing the French experience may be helpful for other countries in identifying possible complications that may arise in contracting and providing adequate solutions.

The role of economists in this regard is to consider these problems and provide solutions that could be introduced in practice. Some such answers have been proposed in literature. However, there is still a need for more studies that would provide solutions that could be introduced in practice.

References

Bajari, P., Tadelis, S. (2001). Incentives versus Transaction Costs: A Theory of Procurement Contracts. *The RAND Journal of Economics, 32*(3), 387–407, http://dx.doi.org/10.2307/2696361.

Bajari, P., McMillan, R., and Tadelis, S. (2009). Auctions versus Negotiations in Procurement: An Empirical Analysis. *Journal of Law, Economics, & Organization, 25*(2), 372–399, http://dx.doi.org/10.1093/jleo/ewn002.

Becker, G. S. (1983). A Theory of Competition Among Pressure Groups for Political Influence. *The Quarterly Journal of Economics, 98*(3), 371–400, http://dx.doi.org/10.2307/1886017.

Chu, L.Y., Sappington, D.E. (2007). Simple Cost-Sharing Contracts. *The American Economic Review, 97*(1), 419–428, http://dx.doi.org/10.1257/aer.97.1.419.

Coase, R.H. (1937). The Nature of the Firm. *Economica, 4*(16), 386–405, http://dx.doi.org/10.1111/j.1468-0335.1937.tb00002.x.

Cour des Comptes. (2005). *Les transports public urbains.* Paris.

Cour des Comptes. (2015). *Rapport public annuel 2015.* Paris.

Cowen, T., Parker, D. (1997). *Markets in the Firm: A Market-Process Approach to Management, Hobart Paper No. 134.* Institute of Economics Affairs.

Dider van de Velde, A.B.-C.-H. (2008). *Contracting in Urban Public Transport.* Study submitted to EC-DG TREN by inno-V, KCW, RebelGroup, NEA, Tøi, SDG, TIS., Amsterdam.

EC. (2015). *EU transport in figures – statistical pocketbook 2015.*

Gagnepain, P., Ivaldi, M. (forthcoming). Economic efficiency and political capture in public service contracts. *Journal of Industrial Economics* .

GART. (2013). *L'année 2012 des transports urbains.* Paris.

Laffont, J.-J., Martimort, D. (2002). *The theory of Incentives: The Principal-Agent Model.* Princeton University Press.

Laffont, J.-J., Tirole, J. (1993). *A Theory of Incentives in Procurement and Regulation.* MIT Press.

Laffont, J.-J., Tirole, J. (1986). Using Cost Observation to Regulate Firms. *Journal of Political Economy, 94*(3), 614–641, http://dx.doi.org/10.1086/261392.

Peltzman, S. (1976). Toward a more general theory of regulation. *Journal of Law and Economics, 19*(2), 211–240, http://dx.doi.org/10.1086/466865.

Prager, R.A. (1990). Firms Behavior in Franchise Monopoly Markets. *The RAND Journal of Economics, 21*(2), 211–225, http://dx.doi.org/10.2307/2555419.

Rogerson, W.P. (2003). Simple Menus of Contracts in Cost-Based Procurement and Regulation. *The American Economic Review, 93*(3), 919–926, http://dx.doi.org/10.1257/000282803322157160.

Stigler, G.J. (1971). The Theory of Economic Regulation. *The Bell Journal of Economics and Management Science, 2*(1), 3–21, http://dx.doi.org/10.2307/3003160.

Tirole, J. (1986). Hierarchies and Bureaucracies: On the Role of Collusion in Organizations. *Journal of Law, Economics, & Organization, 2*(2), 181–214.

UITP. (2014). *Statistical Brief – local public transport trends in the European Union.*

Williamson, O.E. (1975). *Markets and Hierarchies: Analysis and Antitrust Implications.* The Free Press.

Williamson, O.E. (2002). The Theory of the Firm as Governance Structure: From Choice to Contract. *Journal of Economic Perspectives, 16*(3), 171–195, http://dx.doi.org/10.1257/089533002760278776.

Yvrande-Billon, A. (2006). The Attribution Process of Delegation Contracts in the French Urban Public Transport Sector: Why Competitive Tendering is a Myth. *Annals of Public and Cooperative Economics, 77*(4), 453–478, http://dx.doi.org/10.1111/j.1467-8292.2006.00315.x.

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What Are the Directions in the Enforcement of Polish Competition Law – Review of a Series of New Polish Soft Law Guidelines

by

Anna Laszczyk*

CONTENTS**

Abstract

A recent amendment to the Act of Competition and Consumer Protection of 2007, which entered into force in January 2015, brought with it a number of changes to the Polish competition law system introducing, among other things, several new legal institutions. This development created the need to issue new soft law guidelines in order to give some clarity as to their application. At the same time, certain pre-existing soft law guidelines of the Polish Competition Authority – the President of the UOKiK – needed updating in order to make them applicable to the new legal conditions. The aforementioned legislative changes were accompanied

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by an official UOKiK policy statement of openness and transparency. Given this objective, the UOKiK President provided a set of best practices for the Authority, in particular as regards its relations with undertakings. The aim of this paper is to critically review the newly adopted guidelines as well as modifications made to pre-existing soft laws. It emerges from this analysis that although the issuance of any sort of guidelines should be welcomed in general, since it improves legal certainty as to the Authority's future conduct in individual cases, a number of problems remains which have not been sufficiently or in fact properly addressed.

Resumé

Une réforme récente de la Loi sur la concurrence et la protection des consommateurs de 2007, qui est entrée en vigueur en janvier 2015, a introduit un certain nombre de changements dans le système polonais du droit de la concurrence, y compris des nouvelles institutions juridiques. Ce développement a créé un besoin de publier les lignes directrices afin de donner une certaine clarté concernant l'application des institutions juridiques qui ont été introduites. En même temps, certaines lignes directrices déjà publiés par l'autorité polonaise de la concurrence – le Président de l'UOKiK – devrait être mises à jour afin de les rendre applicables aux nouvelles conditions juridiques. Les changements législatifs mentionnés cidessus ont été accompagnés par la déclaration officielle de la part de UOKiK portant sur la politique d'ouverture et de transparence. Compte tenu de cet objectif, le Président d'UOKiK a fourni un code de bonnes pratiques pour l'Autorité de la concurrence, notamment en ce qui concerne ses relations avec les entreprises. Le but de cet article est d'examiner de manière critique les nouvelles lignes directrices adoptées par le Président d'UOKiK, ainsi que d'examiner des modifications apportées aux lignes directrices pré-existantes. Il ressort de cette analyse que, même si la publication de toute sorte de lignes directrices doit être appréciée, car elle améliore la sécurité juridique concernant la conduite future de l'Autorité de la concurrence dans des cas individuels, il reste toujours un certain nombre de problèmes qui n'étaient pas suffisamment ou correctement pris en compte.

Key words: soft law; guidelines; statement of objections; settlement; commitments.

JEL: K20

I. Introduction

2015 brought significant changes to Polish competition law. The key development took place via a substantial amendment (hereafter, Amendment)[1] introduced to the Polish Act of Competition and Consumer Protection of

[1] Act of 10 June 2014 amending the Act on Competition and Consumer Protection and the Civil Procedure Code (Journal of Laws 2014, item 945).

2007 (hereafter, Competition Act)[2]. Among other things, the Amendment introduced two-phase merger control proceedings and novel procedures such as leniency plus and a settlement. These changes brought about the need to update pre-existing soft law guidelines applied by the President of the Polish Office of the Competition and Consumer Protection (hereafter, UOKiK or Authority). At the same time, the Amendment created the need to design and adopt a series of completely new soft law guidelines.

2015 was also noteworthy because of the policy of greater openness and transparency implemented by the UOKiK President. The Authority kept publicly emphasising that the relationship between the UOKiK and undertakings should be that of partnership that base their relations on mutual trust and respect. This new policy resulted in a number of soft law guidelines adopted in order to make the activities of UOKiK more transparent and predictable for undertakings.

The main aim of this paper is to critically review soft law guidelines adopted in this context and to assess, on this basis, the expected main directions of Polish competition law enforcement by the UOKiK. The analysis focuses on newly adopted soft law guidelines, but a short overview of changes made to pre-existing guidelines, that is those applied already before the Amendment entered into force, is also provided.

II. Newly adopted soft law guidelines

1. Guidelines on contacting entrepreneurs with regard to the jurisdictional competence of the President of UOKiK[3]

Shortly after the Amendment entered into force, the UOKiK published its Guidelines on contacting entrepreneurs with regard to the jurisdictional competence of the President of UOKiK (hereafter, Contact Guidelines). The Contact Guidelines are meant to fulfil the main principles of the Authority's declared policy, that is – openness and transparency. Under the new framework, the UOKiK intends to implement, as fully as possible, the following key principles of administrative procedure: deepening trust in public administration; active participation of undertakings in the proceedings as well as; accelerating and simplifying the proceedings. Hence, the UOKiK

[2] Act of 16 February 2007 on Competition and Consumer Protection (Journal of Laws 2007, No 50, item 331).consolidated text

[3] Guidelines available at: https://uokik.gov.pl/download.php?plik=16154.

emphasises that whenever it is reasonable, and does not encounter any legal or factual obstacles, an undertaking or an individual should have the right to be heard and to present his/her views concerning a case during an informal meeting with UOKiK representatives. An undertaking should also be given easy access to information and guidance of the Authority as to the legality of its market behaviour.

The Contact Guidelines describe various means of communication with the Authority (e-mail, phone calls, meeting). E-mails or phone calls may be used for seeking organisational, technical or rudimentary legal information. They would be particularly appropriate for: (i) seeking to clarify questions included in information requests sent by the UOKiK, (ii) obtaining basic information on documents included in a case file and on the status of the proceedings and their expected termination date, (iii) obtaining explanations with regard to provisions of the Competition Act concerning merger control. However, no information on the findings of the UOKiK made on the basis of evidence it collected would be passed on to undertakings.

The Contact Guidelines considers meetings (including informal hearings) as an efficient way for undertakings to pass on market information to the Authority in order to explain potentially complicated market interplays. When deciding whether conducting a meeting would be a reasonable option, the UOKiK analyses whether it would increase procedural efficiency. A meeting may serve: (i) to obtain information or get an early assessment of a leniency application (being considered by an undertaking, or which has already been submitted), (ii) to discuss potential competition concerns with regard to mergers, (iii) an undertaking to present its views on issues raised in ongoing proceedings. Minutes taken from such meetings are later included in the case file. Accordingly, any material used by an undertaking during a meeting can be included as well.

This new policy of the UOKiK should be assessed positively. Until now, the Authority was often criticised for its rather formalistic approach in this regard, which prevented undertakings from gaining a better understanding of on-going proceedings. In practice it was not unheard of the past for companies to only discover what exactly they were accused of (or objections to its planned concentration in merger control proceedings) when the antitrust decision was actually issued. The Contact Guidelines, which include practical examples, encourage undertakings to pro-actively seek contact with the UOKiK during antirust proceedings and, at the same time, give them a reasonable expectation to receive data which they request. It remains to be seen whether and how the new policy will be implemented in practice since it not only requires openness on the side of the Authority, but also confidence on the side of the undertakings that contacting the UOKiK would not prove detrimental to their position.

2. Guidelines on publishing the results of market inquiries[4]

Another step in increasing administrative transparency is the UOKiK's declaration to publish the results of its market inquiries. When deciding on the form and scope of the publication of information on the results of a market inquiry, the Authority takes into account the educational value for consumers of a given inquiry, the scope of business secrets of undertakings questioned in the inquiry, and the scope of the information which needs to remain confidential, owing to the efficiency of ongoing proceedings. The Authority may publish the whole text of such a market report, its summary[5] or only a press release. Alternatively, it can put the relevant data into a table or a presentation.

As with regard to the Contact Guidelines, introducing clear rules on publishing information on market inquiries is a positive step towards creating greater clarity as to the internal activities of the UOKiK.

3. Guidelines on statements of objections

The need to provide undertakings with detailed information on what charges are being raised against them by the UOKiK, which would include factual and legal reasons for instigating the proceedings, had been recognised long before the Amendment took shape. (Bernatt 2011, Bernatt 2012a, Bernatt 2012b). The UOKiK's earlier enforcement practice was far from satisfactory since situations occurred where a resolution of the opening of proceedings (hereafter, Resolution on the Institution of Proceedings) merely mirrored the wording of applicable legal proceedings[6].

During the public consultations of the Amendment, the introduction of a mechanism analogous to EU statement of objections (hereafter, SO) was demanded by several stakeholders. It was argued that the scope of the Resolution on the Institution of Proceedings should be precisely determined in order to safeguard the procedural rights of the undertakings concerned. It was proposed that the said objectives could be achieved either through the imposition of a new duty upon the UOKiK to provide the undertakings concerned with information on the objections in the course of the proceedings, or through the determination of obligatory elements of the Resolution on

[4] Guidelines available at: https://uokik.gov.pl/download.php?plik=16154.

[5] As it was recently done with a summary of the report on retail sales of pharmaceuticals by pharmacies which was published by the UOKiK in 2015.

[6] Decision of the UOKiK President of 8 December 2009, DOK-7/2009.

the Institution of Proceedings. The UOKiK rejected this proposal with the justification that it would require a substantial change of Polish antitrust procedure while Competition Policy for 2011-2013 did not point to the need to make such change. However, the Authority did not seem to dismiss the proposal in its entirety since it suggested that the introduction of a SO should be considered after the Amendment enters into force.

The position adopted by the UOKiK was criticised by both academics as well as legal practitioners. The need to provide undertakings with complete information on the charges facing them in the Resolution on the Institution of Proceedings is grounded in the general principle of administrative proceedings to give information to the parties, as well as in the provisions of the European Convention of Human Rights[7] (Bernatt, Turno 2015). It was underlined that the absence of a SO significantly limits the right of defence of undertakings, since information on how the Authority assessed evidence, and how a given market behaviour was judged from an antitrust perspective, is usually only provided once the decision is actually issued (Gago and Rosiak 2013). Admittedly, at the final stage of the proceedings, before the decision is issued, an undertaking is granted the right to access the file, but in practice, at that late a stage of the proceedings, the case tends to be already decided.

Bearing in mind the above concerns, the step taken by the UOKiK to establish best practices of providing undertakings with a SO in its antitrust proceedings, as well as in proceedings on infringements of collective consumer interests, shall be assessed positively. The Authority committed itself to issue SO in Guidelines on providing investigated undertakings with 'a detailed justification of charges' (hereafter, SO Guidelines).

The introductory part of the SO Guidelines explains that the need to respect the principles of procedural fairness in the course of antitrust proceedings is the reason to introduce SO. Further on, the SO Guidelines also reveal that the introduction of SO responds to the proposals of competition law academics and practitioners.

The SO Guidelines envisage that a SO will be sent only if the UOKiK intends to issue a decision finding a practice which infringes competition/collective consumer interests, or imposing a fine for contradicting the provisions of the Competition Act. It follows from the above that a SO will not be issued if the UOKiK accepts commitments and issues a commitments decision, or if its proceedings are discontinued.

The Authority sends a SO once it collects all evidence because it is only at that time that the UOKiK can prepare a document containing an exhaustive

[7] Also courts underline that standards derived from ECHR need to be respected – see judgment of SOKiK of 7 April 2004, XVII Ama 24/03, judgment of the Court of Appeals in Warsaw of 4 July 2012, VI Aca 202/12.

legal and factual explanation of the charges raised against the investigated undertaking. In the SO, the UOKiK presents all relevant facts and evidence of the case (along with references to the case file) on which it will base its decision as well as the legal assessment of the established facts. The Authority also informs the undertaking whether it intends to impose a fine and lists applicable mitigating and aggravating factors – albeit it does not state what the exact amount of the fine will be. If applicable, a SO may also contain remedies, measures aimed at redressing lasting effects of the infringement (in case of an infringement of collective consumer interests) and information on an order of immediate enforceability.

A procedural party has fourteen days for commenting on the content of the SO. If new circumstances or evidence appear after a SO is issued, the UOKiK sends an undertaking an amended SO.

The introduction of a SO shall be assessed positively as it provides undertakings with greater clarity in the course of antitrust proceedings. However, it should also be noted that a SO is not a decision or a resolution – it is merely a letter of a preparatory character, issued before an administrative decision is rendered. Bearing in mind the character of a SO, and the fact that the SO Guidelines (like any other guidelines) are not binding, one may consider whether an undertaking is entitled to take any legal steps if the UOKiK either does not issue the SO or does not comply with its best practice established in the SO Guidelines. It seems that any claims in this context could be based directly on the provisions of the Competition Act in relation to the provisions of the Code of Administrative Procedure, and provisions of ECHR only. It would thus be reasonable for the current mechanism to have an only temporary character – to be used to observe how well it works in practice so as to improve its potential deficiencies. In the long term however, a specific obligation to issue SO should be introduced directly into the Competition Act.

4. Guidelines on Settlements[8]

The Amendment introduced a new mechanism into the Competition Act – a settlement procedure – which can be used if the Authority considers that a settlement would contribute to the acceleration of the proceedings. The settlement procedure can be applied by the UOKiK *ex officio* or upon a request of a procedural party. Undertakings and individuals are able to benefit from settlements and receive a fine reduction of 10% in comparison to the fine which they would have received without a settlement.

[8] Guidelines are available at: https://uokik.gov.pl/download.php?plik=16154.

The Competition Act states that if a procedural party agrees to join the settlement procedure, the UOKiK informs it about its initial findings, the envisaged content of its decision, including the amount of the fine to be imposed as well as about the consequences of appealing against a settlement decision. The final statement encompasses an undertaking's declaration of a voluntary submission to the fine and the confirmation of: (i) the amount of fine accepted by that undertaking, (ii) being informed about the charges, (iii) being entitled to express its views on the case, (iv) being informed about the consequences of an appeal.

Both the procedural party concerned and the UOKiK are entitled to withdraw from an already opened settlement procedure but the Authority may do so only if it considers that a settlement would not contribute to accelerating the proceedings. Once a settlements procedure is discontinued, any information or evidence acquired by the UOKiK cannot be used in the proceedings in question or in any other proceedings.

The Settlements Guidelines clarify how a settlement is reached – they leave no doubts that accelerating proceedings is the sole condition taken into account by UOKiK when deciding if a settlement procedure is to be pursued. Given that the Authority is obliged to collect and analyse all evidence, unlike the EU and many national settlement procedures, Polish rules do not pursue the objective of simplifying the proceedings, as this would require the undertaking concerned to resign from its right to access the file or right to an oral hearing (Krajewska and Piszcz 2014). Accelerating proceedings is understood as terminating them without the necessity to defend a potential decision before the court as a result of an undertaking's appeal.

When considering whether a settlement would realise said objective in a given case, the UOKiK takes into account the probability to decide on a case within a reasonable timeframe, the nature of the infringement, the number of procedural parties, the scope of the factual circumstances of the case and the legal judgements questioned by the procedural parties. Refusal to commence a settlement procedure proposed by a party does not exclude initiating it by the UOKiK *ex officio*. The decision whether to approach a party with a settlement offer is made by the Authority once sufficient evidence to issue a decision is collected.

The Settlement Guidelines explicitly state that hybrid settlements are not excluded, although the objective of the discussed procedure is fully realised only if all procedural parties participate. A settlements procedure may be applied in proceedings based on leniency. In such cases, if a party does not benefit from full immunity, the amount of a fine already lowered as a result of a leniency application, is further lowered by the 10% associated with settlements.

The Settlement Guidelines provide a detailed and practical description of the process of reaching a settlement. If the discussed procedure is initiated by the Authority, the latter sends a letter to all procedural parties and gives them 14 days to declare whether they are willing to join the procedure. If an undertaking submits a settlement request, the UOKiK responds within 14 days as to whether it accepts or rejects the offer. Reasons do not have to be given – be it by the undertaking requesting a settlement or by the Authority informing the parties that it wished to commence or refusing to commence a settlement procedure. A refusal to commence a settlement procedure cannot be appealed.

Once the procedure starts, the Authority informs undertakings about its initial findings in the proceedings. The scope of the information provided corresponds in principle to the information provided in a SO[9], except for the fact that in the settlement procedure a party is also informed of the reasons and amount of the envisaged fine. A given undertaking does not receive information about findings concerning other procedural parties. One may consider here whether the Settlement Guidelines are not, in fact, inconsistent. They state, in one place, that to propose a settlement the UOKiK needs to have evidences sufficient to issue a decision. Yet in another place, they state that when offering a settlement the Authority shall present its 'initial findings'. However, one may interpret the use of the phrase 'initial findings' as meant to facilitate an exchange of views between the UOKiK and the undertakings concerned. In other words, 'initial findings' may suggest that the Authority is willing to discuss the case in order to reach a common understanding.

Once the said information is received, a party has 14 days to express its views. If it objects to the findings of the Authority, it should comment on the challenged circumstances and provide relevant evidence. It should also provide its own assessment of the circumstances influencing the amount of the fine, if these are also questioned. The UOKiK may modify its findings on the basis of the information received from such party, or it may reject its objections. An undertaking has another 14 days to present its position. After that the Authority provides its findings one more time and asks the party to submit its final position.

The Settlement Guidelines envisage an intensive exchange of views between the Authority and the undertakings concerned as to the evidence, the factual circumstances of the case, and their assessment. This is in line with a recent, and at the same time first, EU judgment on hybrid settlements where the General Court, elaborating on the essence of the settlement procedure, stated

[9] In its recent judgement, the Court calls such case overview an advanced statement of objections – see T-456/10 *Timab Industries and CieFinanciere et de Participations Roullier (CFPR)*, ECLI:EU:T:2015:296, para. 73.

that: 'the Commission does not negotiate the question of the existence of an infringement of EU law or the appropriate penalty. However, that notice should not be an obstacle to discussions. The settlement procedure requires, by its very nature, an exchange of views between the parties. Accordingly, it is an inherent part of such a procedure that both the undertakings and the Commission should try to reach a common understanding of the situation'[10]. However one should agree that while reaching a common understanding of the situation, the UOKiK and the parties should as quickly as possible identify what the most controversial issues of the case are. By so doing, they can then tackle them within a reasonable amount of time rather than circumvent the objectives of the procedure (Krajewska and Piszcz, 2014)

Both the UOKiK and the undertakings are entitled to withdraw from the procedure at any time. Still, once the Authority receives the final statement from an undertaking it may do so only in specific situations justified by exceptional circumstances. Regrettably, the Settlements Guidelines do not give examples of such special cases.

Although in general a settlement procedure takes place in writing, the Settlements Guidelines mention a possibility of an undertaking meeting the UOKiK. In fact, such a meeting may also be initiated by the Authority itself. This is in line with the aforementioned openness and transparency policy pursued by the UOKiK. Such a possibility should be assessed positively because it may, at least partially, respond to the objections voiced towards the design on the Polish settlement procedure which, being merely written in nature, may weaken its main objective, namely accelerating antitrust proceedings (Krajewska, 2012)

The Settlements Guidelines also describe rules of using and giving access to documents and information submitted by procedural parties in the course of the settlement procedure. If the procedure is discontinued, none of the documents or information may be used in the proceedings in question, or in fact in any other proceedings. During the settlement procedure, access to documents and information may be given to other procedural parties only upon consent of the undertaking concerned. Such documents and data will never be accessed by 3rd parties pursuant to the rules on access to public information.

The Settlement Guidelines provide desirable clarity as regards the operation of a new legal procedure. As it will be implemented in practice, it would be useful to update the guidelines with case law examples. In particular, further clarification is needed on the circumstances which allow the UOKiK to withdraw from a settlement procedure once an undertaking submits its final statement.

[10] T-456/10 *Timab Industries and CieFinanciere et de Participations Roullier (CFPR)*, para. 117.

V. Updated soft law guidelines

Significant changes introduced in January 2015 to the Competition Act of 2007 made it necessary to also make relevant modifications to pre-existing soft law guidelines. Said modifications are briefly summarised below

1. Jurisdictional guidelines concerning concentration control[11]

The vast majority of the changes made to the Jurisdictional Guidelines adapt them to the new provisions of the Competition Act regarding, for instance, new exemptions from the duty to notify a concentration. They are also helpful in navigating the new notification form which was subject to several major modifications.

One of the most important novel clarifications concerns the creation of joint ventures. The Jurisdictional Guidelines draw a distinction between the 'creation of a joint venture' and the 'acquisition of control' in a situation when the target is an already existing and operating company belonging to the seller's capital group. If plans are for the target to substantially change or expand its business activities after the transaction, then the operation should be seen as a creation of a joint venture[12]. By contrast, if the scope of the target's activities is not to be significantly altered as a result of the transaction, then the operation should be qualified as an acquisition of control. Said distinction is of key importance for assessing the applicability of the exemption from the notification duty. A EUR 10 million threshold is applicable to the target only with regard to the acquisition of control. By contrast, when a joint venture is created, the turnovers of the parent companies need to be taken into account. The benefit of an exemption is thus far less likely in the latter case.

The Jurisdictional Guidelines also clarify what kind of actions can be taken by financial institutions in preparation for the sale of shares acquired on a temporary basis. Such temporary acquisitions benefit from a notification duty exemption, but there was uncertainty as to what actions a financial institution may take during the transitional period. The Guidelines now state that even exercising voting rights, if undertaken for the purpose of eliminating any obstacles as to the sale of shares, would not remove the benefit of such an exemption.

[11] Guidelines are available at: https://uokik.gov.pl/download.php?plik=16154.

[12] Also a significant change of the JV's activities shall be notified.

2. Guidelines on Commitments Decisions[13]

Pursuant to the Competition Act the UOKiK President is authorised to issue a commitments decision when, on the basis of information coming from a complaint or evidence collected during explanatory proceedings, the Authority finds out that an infringement of competition law or collective consumers interests is plausible. In such cases, the UOKiK President accepts from the investigate undertakings commitments to undertake, or to discontinue given actions. The accepted commitments should result in the withdrawal from the potentially illegal practice and redress its negative market effects. When issuing a commitments decision, the UOKiK President does not impose a fine.

The Amendment enabled the UOKiK President to accept commitments even if a given practice, potentially incompatible with the provisions of the Competition Act, has already been discontinued.

The updated Guidelines on commitments decisions (Commitments Guidelines) take into account the aforementioned legislative changes and recent case law developments. They recognise commitments decision as a way of terminating proceedings by means of negotiations between the Authority and the undertakings concerned, which is clearly a sign of the new enforcement policy pursued by the UOKiK.

A commitments decision may be issued upon an undertaking's request when it offers commitments to change its market behaviour. Like in the previous version of the Commitments Guidelines, an undertaking is expected to offer commitments as soon as possible, preferably in response to the Resolution on the Institution of Proceedings. Commitments should be clear and precise enabling the UOKiK to verify their fulfilment. Yet when offering commitments, an undertaking should not only modify the questioned market behaviour, but also offer measures aimed at redressing its negative market effects. However, such a requirement is somewhat questionable. On the one hand, it should be assessed positively as it enables undertakings which already ceased a potentially illegal practice to benefit from a commitments decision. On the other hand, a redress duty may imply that a given practice is actually a breach of the Competition Act. Such contention would be incompatible with the assumption that in a commitments procedure the UOKiK does not prove, but only makes plausible the existence of an infringement. This is further confirmed by the fact that a commitments decision cannot be used before civil courts in private enforcement proceedings. The view should be supported that when offering commitments an undertaking is not obliged, and should not be expected, to acknowledge that its market behaviour may contradict the provisions of the Competition Act (Piszcz, 2012). In principle, a commitments decision should

[13] Guidelines are available at: https://uokik.gov.pl/download.php?plik=16154.

be regarded as a win-win solution – an undertaking is not found liable for an infringement but offers commitments which remedy plausible, but not proven concerns of the Authority.

The Commitments Guidelines give examples of possible redress mechanisms such as modifying the potentially anti-competitive or abusive practices, lowering prices, returning unduly collected fees, providing information required by relevant laws. Recent UOKiK decisions, where the Authority emphasised that redress is expected in particular in cases related to consumer protection, prove that commitments aimed at eliminating negative effects of the contested practice will be preferable. The Commitments Guidelines clarify that the recipient of a commitments decision cannot only commit to change its future behaviour; it is also expected to identify the negative effects of the contested practice in the past and undertake actions aimed at mitigating and/or eliminating them.

When deciding on whether to accept commitments, the Authority will analyse whether a commitments decision would contribute to fulfilling two major aims underlying this procedure – accelerating proceedings and efficiency. The former is related to a quicker termination of proceedings thanks to liberating the UOKiK from the duty to collect all evidence and minimising the risk of judicial challenge. When analysing the efficiency criterion, the Authority will consider whether commitments would effectively redress the negatives consequences of a given practice on the market.

In principle commitments decision will not be issued in cases concerning hard-core restrictions owing to their largely negative effects on the market and unjustifiable benefits achieved by those engaging in such practices. In the view of the Authority, legal institutions such as leniency or leniency plus are better suited to be used with regard to hard-core restrictions. This limitation may raise concerns since the Competition Act does not restrict the use of commitments decision to selected infringements only. Neither do key criterions of applying a commitments decision justify said limitation. In principle, a presumption of quick and efficient proceedings may be equally applicable to hard-core restrictions. One may consider that *de facto* excluding the most serious of all antitrust infringements from the use of commitments decisions is meant to not hamper private enforcement. If, for instance, cartel members could avoid their antitrust liability by means of a commitments decision, potential private enforcement plaintiffs would be seriously impeded when seeking redress.

A novel measure applied in the Commitment Guidelines is the UOKiK's ability to market test commitments. However, such test has been used in practice already in the earlier *PGNIG* case. Although the application of market-oriented measures should be welcomed, as it contributes to the achievement of efficiency objectives, one should be cautious here since excessively lengthy

market tests may be counter-productive when it comes to the objective of accelerating antitrust proceedings. It would be desirable for the Guidelines to state in which circumstances would it be reasonable for the UOKiK to market-test commitments.

The Commitment Guidelines oblige the UOKiK to inform the undertaking concerned that the Authority has rejected its commitment offer before it issues its final decision. The Guidelines envisage that such rejection may incentivise an undertaking to cease the contested practice or to undertake redress measures. The UOKiK will then take into account such behaviour when setting the fines. It seems that the Guidelines are slightly overoptimistic in this regard, if not even irrational. From an undertaking's point of view, a rejection of its commitments offer implies that it would need to defend its position before the courts. In such a situation, ceasing the practice or providing redress would weaken its arguments.

The guidelines describe obligatory elements of a commitments decision: a statement of facts making an infringement plausible, the exact wording of the commitments, a duty to fulfil them and reporting obligations.

The Commitment Guidelines clarify also the conditions when an undertaking can expect to avoid a fine if it changes its behaviour and offers redress. The willingness of the UOKiK to talk with the undertaking about the scope of the commitments, even via informal meetings, and to apply market-oriented elements should be welcomed. However, the expectation to redress negative consequences of a given market practice would likely be very burdensome for some undertakings.

3. Guidelines on the amount of fines imposed for competition restricting practices[14]

The Guidelines on the amount of fines imposed for competition restricting practices (hereafter, Fining Guidelines) have not been subject to major modifications. The most significant changes in this context pertain to amendments made to the Competition Act.

The updated Fining Guidelines retain the previous classification of infringements as: very serious, serious and other. What they do change is the qualification of so-called 'hub & spoke arrangements' as very serious infringements.

With regards to aggravating and mitigating factors, the Fining Guidelines explain now that the list of mitigating factors is open. Undertakings are

[14] Guidelines are available at: https://uokik.gov.pl/download.php?plik=16154.

therefore free to assert any circumstances which, in their view, may contribute to the lowering of their fine. The list of aggravating factors is on the other hand enumerative and so the Authority cannot invoke any other circumstances than those explicitly listed in the Fining Guidelines.

Furthermore, the list of mitigating factors was extended; it focuses on actions taken by an undertaking on its own initiative including, for instance, measures aimed at withdrawing from an infringement or redressing its effects. Co-operation with the Authority will be perceived as a mitigating factor only if it goes further than a simply fulfilment of an undertaking's obligation to provide information in response to an information request issued by the UOKiK.

As regards aggravating factors, the Fining Guidelines clarify now that the fact of committing an antitrust infringement in the past will influence the amount of the fine imposed for a new infringement in a proportionate manner to the level of similarity of the two breaches – the more similar the infringements, the bigger the increase in the fine will be.

The Fining Guidelines provide also some clarification with regard to the rules on the imposition of fines on undertakings achieving small turnovers as well as fines imposed on managers. As regards undertakings with small turnovers, the maximum fine which may be imposed by UOKiK is EUR 10,000. When calculating fines, the Authority will generally follow its normal fining guidelines but, under certain circumstances, the fine may be altered to the maximum amount. This applies to situations when the turnover does not reflect the real economic potential of the undertaking, or the fine calculated pursuant to general fining principles would not serve its aim.

With regard to fines imposed on managers, the basis for calculating it is related to their income earned while working for the undertaking which committed the antitrust violation. The Guidelines contain a catalogue of mitigating and aggravating factors influencing the amount of fines imposed on managers, which is similar to those applicable to undertakings.

III. Conclusions

The number of guidelines adopted and modified after the major Amendment entered into force in January 2015 proves that the UOKiK reacted relatively swiftly to the new legal environment. This trend should be welcomed in general as it enables undertakings to better predict and prepare for the actions likely to be taken by the Authority in the course of its proceedings. The Contact Guidelines and the Market Inquiry Guidelines point to competition advocacy as a policy objective pursued by the UOKiK. It remains to be seen

whether the new President UOKiK (appointed on 12 May 2016) will chose to follow this policy direction. The issuance of the SO Guidelines confirms that the principles of procedural fairness are to be recognised and respected by the Authority. However, procedural rights of undertakings would only be fully guaranteed if the duty to issue a SO was to be directly introduced into the Competition Act. The Commitments Guidelines and the Settlement Guidelines encourage undertakings to exchange views with the UOKiK as well as to submit their comments on the Authority's findings. They place the UOKiK and the undertakings in the position of negotiating partners as to the outcome of the proceedings. Here, once again, it remains to be seen whether such approach will be implemented in the future.

There is no doubt that the recent Amendment together with all the new soft law developments has equipped the UOKiK with a number of tools to be used in its competition law enforcement. Once they have been applied in practice, it would be useful for the Authority to supplement its guidelines with case law examples.

References

Bernatt, M. (2011). *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*. Warszawa: Wydawnictwo Naukowe Wydziału Zarządzania UW.

Bernatt, M. (2012a). Ustawa o ochronie konkurencji I konsumentów – potrzeba nowelizacji. Perspektywa sprawiedliwości proceduralnej. *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, *1*(1), 85–96.

Bernatt, M. (2012b). Can the Right to Be Heard Respected without Access to Information about the Proceedings? Deficiencies of National Competition Procedure. *YARS 5*(6), 91–110.

Bernatt, M. and Turno, B. (2015). O potrzebie doskonalenia rozwiązań procesowych w znowelizowanej z dniem 18 stycznia 2015 r. ustawie o ochronie konkurencji i konsumentów. *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, *2*(4), 75–92.

Gago, R. and Rosiak, P.K. (2013). Uwagi dotyczące zakresu postanowienia o wszczęciu postępowania w świetle wymogu zapewnienia realizacji prawa do obrony oraz w związku z zakresem unijnego postanowienia o przedstawieniu zarzutów (Statement of objections), *internetowy Kwartalnik Antymonopolowy i Regulacyjny, 7*(2), 45–50.

Krajewska, E., (2012). Settlement w świetle doświadczeń europejskich – w poszukiwaniu najlepszych rozwiązań. *internetowy Kwartalnik Antymonopolowy i Regulacyjny, 4*(1), 57–76.

Krajewska, E., Piszcz, A. (2014). Komentarz do art. 89a. In: Skoczny, T. (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz,* p. 1099–1013, Warszawa: C.H. Beck.

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2015 Amendments to the Aviation Law Act

by

Anna Konert* and Piotr Kasprzyk**

CONTENTS***

Key words: air traffic flow management; aviation law; civil transport; military airports.

JEL: L93

I. Introduction

In 2015, the Polish Parliament passed two amendments to the Act of 3 July 2002 – Aviation Law[1]. The first of the Amendments adjusted Polish law to EU rules on air traffic flow management. The second made it possible to use military airports to perform civil aviation operations, especially flights conducted for the Polish Armed Forces. 2015 saw also the start of legislative works on a more comprehensive amendment of the Aviation Law Act. The latter are to adapt national laws to rapidly changing EU legislation, in particular in the field of aviation safety.

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[1] Consolidated text: Journal of Laws 2013 No. 1393 as amended.

II. Air traffic flow management

Commission Regulation (EU) No. 255/2010 of 25 March 2010 laying down common rules on air traffic flow management[2] (hereafter, Regulation 255/2010) introduced a number of measures regarding Air Traffic Flow Management (hereafter, ATFM). They were meant to optimize available airspace capacity and enhance ATFM processes. Regulation 255/2010 was based on one of the four basic Regulations[3] establishing the framework of the so-called Single European Sky package. According to Regulation 255/2010, ATFM measures should be based on principles laid down by the International Civil Aviation Organization. Moreover, all parties to the ATFM system should adhere to rules that ensure that air traffic control capacity is used safely and to the maximum extent possible.

The ATFM measures should prevent excessive air traffic demand, compared with declared Air Traffic Control (hereafter, ATC) capacity of sectors and airports. They should use the capacity of the European Air Traffic Management Network (hereafter, EATMN) to the maximum extent possible, in order to optimize the efficiency of the EATMN. They are meant to minimize adverse effects on operators, optimize the EATMN capacity made available through the development and application of capacity enhancing measures by ATS units, as well as support the management of critical events. Furthermore, according to Regulation 255/2010, operators (air carriers and other air users) need to respect the allocated airport slots and filed flight plans[4].

Article 15 of Regulation 255/2010 imposed an obligation upon EU Member States to create the framework for the imposition of penalties for infringements of the provisions of this Regulation as well as a duty to take all measures necessary to ensure that the penalties are in fact implemented. The penalties provided for must be effective, proportionate and dissuasive. The introduction of penalties is to transpose the requirements of Regulation 255/2010 as the defined practices reduce the effectiveness of air traffic management. In particular, problems exist with relation to the use of multiple flight plans and violations of allocated airport slots.

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[2] OJ 2010 L 80/10.

[3] Regulation (EC) No. 551/2004 of the European Parliament and of the Council of 10 March 2004 on the organization and use of the airspace in the Single European Sky (OJ L 96/20).

[4] See Article 7 ('Each intended flight shall be covered by a single flight plan. The filed flight plan shall correctly reflect the intended flight profile. All relevant ATFM measures and changes thereto shall be incorporated into the planned flight operation and communicated to the pilot.')

Poland was under the obligation to implement Regulation 255/2010 by 2011 yet it has failed to do so. In September 2014, the European Commission called upon Poland to adopt the necessary legislation establishing penalties for infringements of Regulation 255/2010, threatening Poland with a referral to the Court of Justice. These steps are in line with the Commission's power to take legal action against a Member State that is not respecting its obligations under EU law[5]. After receiving a 'Reasoned Opinion' from the Commission, the Polish government developed a draft of the necessary amendments to its Aviation Law[6]. These legislative works resulted in the enactment of the Law of 5 August 2015 Amending the Act – Aviation Law[7].

The essence of the amendment is to clarify some EU law solutions on ATFM at the national level and to introduce so-called 'administrative penalties' into the Aviation Law Act (Section XIA of the Act) as sanctions for breaches of the requirements of Regulation 255/2010.

A breach of Regulation 255/2010 (Article 209c) has been specifically named in the Annex to the Aviation Law Act and associated with financial penalties. These penalties may be imposed by the President of Civil Aviation Authority (hereafter, CAA) in relation to those entities that infringe certain of their responsibilities associated with ATFM, namely: the Air Traffic Service (hereafter, ATS), acting as ATM bodies[8], slot coordinators and airport managing bodies.

The Amendment introduced a catalog of administrative penalties that can be imposed by a decision of the President of the CAA as a result of a finding that a breach had occurred of the obligations imposed by Regulation 255/2010 as far as, among others, compliance with: flight plans, the allocation of time slots, or procedures for handling critical events.

However, it was not explained in the course of the legislative works why some of the fines are set in the range 'from …to' while others have a directly specified amount. The Amendment introduced the general principle whereby penalties referred to in the Aviation Law Act cannot be included in the costs related to the tasks financed from coordination fees, airport fees and navigation fees. Otherwise, the fined entity could get compensation for the fine by increasing costs, which are the basis for determining the fees charged.

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[5] http://ec.europa.eu/polska/news/140925_przestrzen_pl.htm

[6] Form 3663, draft was sent to the Parliament in July 2015.

[7] Journal of Laws 2015, item 1586.

[8] In Poland, this is the Polish Air Navigation Services Agency, managing the flow of air traffic on the basis of Article 3 of the Act of 8 December 2006 on the Polish Air Navigation Services Agency (Journal of Laws 2006 No. 249, item 1829 as amended.).

III. Using military airports for civil air transport

The second Amendment Act to the Aviation Law passed in 2015 is the result of an earlier document stating the assumptions behind the Daft Act prepared by the Ministry of Defence, which pointed out the growing demand of the Armed Forces for civil air transport.

The Draft explained that Polish aviation law applicable at that time separates civil aviation from military aviation solely on the basis of which registry has a given aircraft been listed in – the civil or the military registry. At the same time, the law stipulated that civil aircrafts could, in principle, operate only from civil airports. Consequently, it was not possible to operate civil aircraft flights from, or to military airport even if the aircraft was chartered by the military to transport soldiers or military equipment. Soldiers and military equipment stored at military airports were thus transported to civil airports, where the civilian aircraft chartered by the military was boarded and loaded. This situation generated additional costs and complicated procedures for both civil airports and for the military.

The aim of this Amendment was thus to introduce laws that would make it possible for civil aircraft to perform air operations from Polish military airports, maintaining at the same time the necessary safety level. The Draft assumed also that the change should provide a level of operational safety equal to that ensured in the performance of flight operations by civil aircrafts at civilian airports.

In order to achieve this goal, the following solutions were introduced into the Polish Aviation Law Act:

1) the main condition for using military airport is the prior publication of technical and operational airport data in the Aeronautical Information Publication (hereafter, AIP Poland),
2) take-offs and landings are permitted for civilian helicopters and propeller-driven airplanes with a maximum take-off weight not exceeding 5700 kg or with a passenger seating configuration of less than 10, regardless of the nature of the operation,
3) take-offs and landings are permitted for civilian aircraft in order to carry out tasks fulfilling the needs of the Polish Armed Forces in relation to the transport of cargo,
4) take-offs and landings are permitted for civilian aircraft in order to carry out tasks fulfilling the needs of the Polish Armed Forces in relation to the transport of soldiers, officers of military intelligence and counterintelligence, Government Protection Bureau and army personnel. This rule is conditional upon the military airport in question meeting

the technical and operational requirements of civilian airports for public use with so-called 'limited certification'. These are airports open for air traffic, which are not subject to the requirements of EU legislation in this area[9].

Military air traffic control services will be provided in all of the above types of operations. This service should be provided in accordance with the requirements of EU legislation on air navigation services.

Interestingly, a special legal solution was introduced regarding civil liability for damages caused by the movement of civil aircrafts performing take-offs and landings in order to transport soldiers, officers of military intelligence and counterintelligence, Government Protection Bureau and army personnel.

General rules for civil liability to third parties for damages caused by aircrafts are as follows. Article 206(1) of the Aviation Law Act foresee that civil liability for damages caused by the movement of an aircraft is subject to the provisions of the Civil Code on traffic accidents caused by motor-vehicles. Nevertheless, no right to compensation arises if the damage results from the mere fact of the passage of an aircraft through the airspace in conformity with existing air traffic regulations (Article 206(2)). Moreover, the Aviation Law Act provides some additions to the provisions of the Civil Code. It is established in Article 207(1) that liability for compensation covered by Article 206 shall relate to the operator of the aircraft. The definition of the term 'operator' covers the person who was making use of the aircraft at the time when the damage occurred. However, if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, than that person shall be seen as the operator (Article 207(2)(3)). A person shall be considered to be making use of an aircraft when using it personally, or when the aircraft is used by his employees or agents in the course of their employment, whether or not within the scope of their authority (Article 207(4)). The registered owner of the aircraft shall be presumed to be the operator and shall be liable as such unless, in proceedings for the determination of his liability, he proves that some other person was the operator of the aircraft in question (Article 207(5)). If a person makes use of an aircraft without the consent of the person entitled to its navigational control, the latter, unless he proves that he has exercised due care to prevent such use, shall be jointly and severally liable with the unlawful user for the damage sustained (Article 207(6)). If any other person causes damage by his/her fault, the latter shall be jointly and severally liable with the persons specified in the Article 207 (Article 207(7)) (Konert, 2016; Konert, 2014a; Konert, 2014b).

[9] See Article 59a(6) of the Aviation Law Act.

In addition to these rules, the new Amendment places special liability on the Polish State for accidents of civil aircrafts operating from, or to military airport when caring out tasks fulfilling the needs of the Polish Armed Forces in the transport of soldiers, officers of military intelligence and counterintelligence, Government Protection Bureau and army personnel. This creates additional joint and several liability of the State Treasury, represented by the organizational unit or the organizational union of the Armed Forces using the military airport (Article 207(8)) (Konert, 2016).

Since the legislature did not specify any special principles of liability here, it is accepted that the liability of the Treasury in such cases is absolute (objective liability). The only condition for such liability is to establish that the damage caused by the movement of the aircraft corresponds to one of the abovementioned entities referred to in Article 207(1)-(6), which corresponds to objective liability (risk-based liability), or other entity that is liable for fault.

Such a solution raises many questions and doubts. It is unknown how far the liability of the Treasury can reach – managing military airport – for damages resulting from an accident that occurred in connection with 'civilian flights' performed for the Armed Forces.

In particular, this applies to situations without a connection between the accident and an act or omission on the side of the airport managing body. For example, a problem would arise if an accident occurs even before pre-contact with the military air traffic control service, when the crew of the civil aircraft performing a flight for the Polish Armed Forces remain far from the military airport, in airspace where air navigation services are provided by civil institutions.

IV. Forthcoming amendment of the Aviation Law Act

In 2015, the government started also a legislative process directed at a comprehensive amendment of the Aviation Law Act. The project involves adapting the Act to new or revised EU legislation. It also addresses passenger rights protection issues, air navigation, aviation personnel, aviation technology, aviation business and air transport, air operations, airports and civil aviation security. As part of the intergovernmental agreement, the Legislative Council made its comments[10].

The legislative process continued recently when the current version of the Draft Amendment was sent for final approval of the government. It can

[10] http://radalegislacyjna.gov.pl/dokumenty/opinia-z-3-lipca-2015-r-o-projekcie-ustawy-o-zmianie-ustawy-prawo-lotnicze-oraz-niektorych.

thus be assumed that this Draft should find itself on this year's parliamentary agenda. Importantly, the project has to adjust the provisions of the Act to new or revised EU legislation. Looking even only at aviation safety, at least a dozen acts of EU law have been issued since the last comprehensive amendment of the Polish Aviation Law. Furthermore, the goal of the forthcoming amendment is also to redesign those existing parts of the Aviation Law Act, which had proven to cause practical problems. For example, it has been proposed to limit administrative procedures for civil claims for canceled or delayed flights, or to create the institution of an Ombudsman for passengers in order to conduct mediation proceedings.

References

Konert, A. (2016). Komentarz do art. 207. In: M. Żylicz (red). *Komentarz do ustawy Prawo lotnicze*. Warszawa: Wolters Kluwer.

Konert, A. (2014a). *New progress and challenges in the air law – air crash victims families protection,* Warszawa: Wydawnictwo Uczelni Łazarskiego 2014.

Konert, A. (2014b). *Odpowiedzialność za szkodę na ziemi wyrządzoną ruchem statku powietrznego*. Warszawa: Wolters Kluwer.

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The First Cartel Discovered on the Georgian Market.
Case Comment to the Decision of 14 July 2015 on the Car Fuel Commodity Market (Order No 81 of the Chairman of the Georgian Competition Agency)

by

Zurab Gvelesiani*

CONTENTS**

Key words: hardcore cartel; indirect evidence; pricing policy.

JEL: K21

'Before the Rose Revolution[1], dozens of companies operated in the retail fuel market. We could buy decent gas, bad gas and black market gas. After the Rose Revolution, the government effectively eliminated the black market retailers as

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[1] The term 'Rose Revolution' is a name given by the media to the events that took place in Georgia in November 2003. Massive anti-governmental demonstrations forced the late president Eduard Shevardnadze to resign, bringing Mikheil Saakashvili and his United National

> *new companies emerged and began to consolidate their presence. One by one, independent gas stations were swallowed up by bigger fish. Now, only 5 suppliers operate on the Georgian market. [...] If one liter of gasoline is 2.50 GEL at Gulf[2], you can bet it will pretty much be the same price at Wissol, Lukoil, Rompetrol and Socar.'*
>
> (Rimple, 2012)

I. Background

An oligopoly and a presumed cartel on the fuel market used to be a widely discussed issue and topic of endless speculations in Georgia for years. It was an issue frequently covered by the media, discussed by politicians, studied and analysed by the NGO sector, examined by various experts and commented on by academics. In the absence of competition rules, the fuel market was often used as proof of the unhealthy development of the Georgian economy, in order to demonstrate the need for state intervention (Rimple, 2012; Transparency International Georgia, 2012). It thus came as no surprise that when Georgian Competition Law (hereafter, GCL)[3] was adopted, and the Georgian Competition Agency (hereafter, GCA or Agency) started functioning, the first segment of the economy which the Agency choose to investigate on its own initiative was no other but the fuel commodity market. It was a strategically well chosen subject, which would attract the attention of the public as well as of businesses. It would popularize the new legal field as well as make an example and establish new standards for fair business practices in Georgia.

However, as well chosen as the fuel market might have been, it was equally challenging to achieve the abovementioned objectives successfully. First of all, the expectations toward the newly created Agency were generally high. Moreover, the GCA had to face the challenges of establishing completely new standards of competition law proceedings. Additionally, not only would the Agency have to analyse the long evolution and operations of the specific and complex fuel market, without having any relevant experience to fall back upon, it would have to do so in a period of time marked by a global change in oil prices. Indeed, after a set of geopolitical developments, previously stable oil

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Movement into power. For more information see: (BBC News, 2005); (Kandelaki, 2006); (United States Institute of Peace, 2016); (Coppieters and Legvold, 2005); (Lincoln, 2013).

[2] It needs to be clarified that the competition Agency decision does not directly mention Gulf, but instead it refers to Sun Petroleum Georgia LLC, the company that developed the network of Gulf filling stations and which presents the brand in Georgia. For more information about the company, see: http://gulf.ge/en/gulf-georgia/about-company (23 April 2016)

[3] Law of Georgia of 8 May 2012 No. 6148-Is on Competition.

prices started to fall sharply in July 2014 (The Economist, 2014; Krauss, 2016), and yet this trend was not reflected in Georgia to a similar degree (Association of Young Financiers and Businessmen, 2015; Business Week Caucasus, 2014). Importantly, the GCA was set up to be accountable to the Prime Minister of Georgia[4] and it was he who gave the Agency 10 days, in mid-December 2014, to analyze and prepare a detailed report on the state of the national fuel market. The purpose of that report was to identify the reasons for the inadequate fall in fuel prices in Georgia in light of the global price decrease in crude oil[5]. The Agency's preliminary report was presented to the Prime Minister, after which he stated that the public had 'every reason to be dissatisfied' by the performance of the companies on the fuel market (Kirtzkhalia, 2015).

II. Facts and figures

On 12 November 2014, the GCA started an investigation of the national fuel commodity market. According to the GCL, after opening an investigation the Agency should take a decision within a period of 3 months, although the investigation may be extended to up to 10 months, depending on the significance and complexity of the case[6]. The GCA was unable to deliver a decision within the original 3 months and twice extended the investigation period[7]. Ultimately, it took 8 months and 2 days before the investigation was concluded and the decision rendered. In order to better demonstrate the scales of the investigation, it is useful to provide some basic statistical data and figures. The Agency studied the developments on the fuel market between 2004 and 2015 (with particular emphasis on the period between 2008 and 2014) that resulted in 1200 pages long decision. Aside from communicating with hundreds of undertakings[8] operating on the fuel market (as well as

[4] Article 16 (3) GCL.

[5] For more information, see: http://gov.ge/index.php?lang_id=ENG&sec_id=387&info_id=46123 (23 April 2015).

[6] Article 25 (1)(2) of GCL.

[7] On 12 February 2015, with order N20, the Chairman of the Agency extended the investigation until 31 May 2015. On 29 May 2015, the order N20 was amended and the investigation period was extended until 31 July 2015. For more information, see: Order N81 (14 July 2015) of the Chairman of the Competition Agency, p. 3.

[8] It is necessary to allay the confusion regarding the terms in the GCL. The Georgian text of the Law uses the term 'economic agent' (Art. 3(a)) meaning: an undertaking. However, it is not clear how it should be translated into English. An unofficial translation of the Law published on the GCA website uses the term 'economic agent'. The same term has been used in practice by the Agency when making English language announcements, reports or case reviews. However,

on neighbouring markets) currently or in past years, arranging individual meetings with them and requesting that they provide data and explanatory statements, the GCA also repeatedly asked for information from 15 different state institutions and 15 banks operating in Georgia. Additionally, it requested access to studies and held consultation meetings with a number of NGOs, state officials and public bodies, with experts and academics. Moreover, the GCA requested data from the Armenian Competition Authority[9] as well as consulted representatives of German and Italian Competition Authorities.

The GCA finally issued its decision on 14 July 2015 finding that a cartel has been operating on the Georgina fuel market. In total, the Agency fined 30 undertakings although it identified the 'Big Five' as the core of the cartel. In fact, the cartel included all of the five large-scale undertakings operating on the Georgian fuel market: SOCAR Georgia petroleum LLC[10] (hereafter, SOCAR), Sun Petroleum Georgia LLC (hereafter, Sun petroleum), Rompetrol Georgia LLC[11] (hereafter, Rompetrol), JSC Wissol Petroleum Georgia (hereafter, WISSOL) and LUKOIL-Georgia LLC (hereafter, LUKOIL). The Agency identified also 3 other undertakings that did not operate on the retail market but were active on the wholesale level, which were in close vertical relations with various members of the 'Big Five'. These included: L Oil LLC (closely linked with LUKOIL), Binuli 1 LLC (closely linked with Rompetrol) and ITI LLC (closely linked with SOKAR). Additionally, the decision was addressed to 21 limited liability companies and one sole proprietor, which had franchising/license agreements with either LUKOIL or Rompetrol.

The total sum of the fines imposed upon the infringers totalled 54 702 729 GEL (21 935 491 EUR)[12], an unprecedented amount for Georgia. Out of this amount, 51 661 228 GEL (20 715 866 EUR) went to the members of the 'Big Five'[13],

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the translation of the Law published on matsne.gov.ge translates the term as 'undertaking'. Matsne.gov.ge is the Legislative Herald of Georgia, meaning that the normative acts acquire legal effect only after being published therein. It also offers official translations of national legislation. While it is presumable the translation made by matsne.gov.ge is correct, the GCA needs to adjust its own and use the same terminology to avoid confusion.

[9] The State Commission for the Protection of Economic Competition of the Republic of Armenia.

[10] SOCAR Georgia Petroleum is a daughter company of State Oil Company of the Azerbaijan Republic – SOCAR

[11] Rompetrol Georgia is part of KMG International N.V. (the former The Rompetrol Group N.V.)

[12] For the official exchange rates of GEL against other currencies on the day of the GCA decision, see: https://www.nbg.gov.ge/index.php?m=582&lng=eng

[13] The amounts of the individual fines are: SOCAR – 14 381 385 GEL (5 823 366 EUR), Sun Petroleum – 11 267 384 GEL (4 562 432 EUR), Rompetrol – 10 845 806 GEL (4 391 725 EUR), Wissol – 10 426 393 GEL (4 221 895 EUR), LUKOIL – 4 740 260 GEL (1 919 444 EUR).

3 037 101 GEL (1 217 860 EUR) was imposed on the three aforementioned wholesale distributors[14] closely linked with the 'Big Five'. Each of the remaining 22 undertakings was fined with a symbolic 200 GEL (80 EUR).

None of the members of the 'Big Five' settled with the GCA or admitted committing an infringement. Moreover, each of them has individually appealed the decision (BPI, 2015; Civil Georgia, 2015; Georgian Journal, 2015). So far, the Tbilisi City Court has only ruled on the SOCAR's appeal upholding the original decision of the GCA (Georgian Business Consulting, 2016a). The Agency hopes this ruling will become a precedent for the remaining appeal cases. However, SOCAR remains defiant and plans to take the case before the appellate court (Georgian Business Consulting, 2016b).

III. Legal barriers identified by the Competition Agency

Issuing its first significant decision after conducting a long and complex investigation, the GCA identified in the decision several problems in Georgia's existing legislation. According to the Agency, these shortcomings decrease the effectiveness of the GCA's performance and make it particularly hard for the Agency to gain access to any direct evidence of a competition law infringement. According to the GCA, the current law irrationally limits its authority, and due to poor legal provisions, the Agency faces serious challenges in its investigative process[15]. The GCA indicated that the law allows conducting on-site inspections of undertakings on the basis of an *a priori* judicial consent[16]. According to the GCA's interpretation of the Administrative Procedural Code, and of the law on the Control of Entrepreneurial Activity, the Agency is unable to conduct dawn-raids in a surprise manner because when it applies to a court for such consent, the court is legally required to inform the targeted undertaking of that fact before taking a decision in the matter. As such, this allows the alleged infringer to destroy potential evidences. The GCA stressed therefore the need for the law to include special provisions allowing it to conduct on-site investigation without a prior court approval.

The Agency is currently entitled to invite interested parties to hear their explanations[17] and yet the law does not provide for any measures to be taken

[14] The amounts of the individual fines are: L Oil – 1 209 890 GEL (489 913 EUR), ITI – 1 172 766 GEL (474 880 EUR), Binuli 1 – 654 445 GEL (265 000 EUR).

[15] For a detailed analysis see: Order N81 (14/07/2015) of the Chairman of the Competition Agency, Part V. Review of the Problems in the Competition Legislation, p. 71–75.

[16] See: Article 18 (1(e)), Article 25(8) GCL.

[17] Article18 (1(d)), Article 25(6) GCL.

in case the invited party fails to appear. Moreover, the GCA lacks the power to force a requested entity to appear which ultimately makes the participation of the latter in the investigative process rather voluntary.

According to Article 25(7) GCL, the Agency may carry out an on-site inspection of an undertaking against whom an application and/or complaint is submitted. However, the GCA can also open an investigation on its own initiative[18], this Article should allow the Agency to perform on-site inspections for any type of case, no matter whether it is based on an application and/or complaint or not.

Moreover, the Agency mentioned its limited access to data collected by the National Statistics Office (Geostat), which can often be vital and extremely relevant for competition law investigations. While the GCA is entitled to request information from any state authority, the procedure should follow the rules laid down by the legislation of Georgia[19]. The Law on Official Statistics declares that data collected for the purpose of creating official statistics is confidential where it might reveal the identity of its source or enable such identification to be established[20]. Although legal exceptions regarding limited access to confidential information exist in Georgian legislation, none of them apply to the GCA, making the data gathered by Geostat inaccessible to the Agency.

Finally, the Agency indicated that its authority is rather limited in case of on-site investigation. It can access the place where the activities of the undertaking are conducted, and examine all the documents related to professional activities, including financial/economic documents, irrespective of their confidentiality. However, according to the GCA, it is not allowed to check private correspondence, work email, tap or take recordings of phone call, conduct searches within the properties of a case-related person, or anywhere else where evidence can possibly be kept. To prove the validity of its point, the Agency brought forward examples of Spanish, German, Italian, Israeli, Swedish and Polish legal models, all of which provide their competition authorities with much broader investigative powers.

Inserting a review of the various shortcomings of existing legislation into the well publicized fuel-cartel decision served as an advocacy means for the GCA meant to argue for the extension of its current competences. However, placing such review before the actual assessment of the case served the additional purpose of justifying the lack of direct evidences supporting the arguments

[18] Article 18 (1(a)) GCL.
[19] Article 18 (2(a)) GCL.
[20] Article 28 (1)(2) GCL.

of the Agency[21]. The GCA believed that it had direct evidence against two members of the 'Big Five', as well as plenty of indirect evidence, to prove the existence of the overall cartel.

IV. Key findings and arguments of the decision

1. Timeline of the developments on the fuel market

The GCA started the investigation by determining the relevant market. It considered that despite the differences in their features, petrol and diesel are interchangeable goods from the perspective of consumers and suppliers. Moreover, there are separate markets for car fuel and for aviation fuel. Eventually the market was defined as the car fuel commodity market, containing undertakings dealing with petrol and diesel. It is important that Georgia is not a refinery country, nor does it have any fuel production, and so its retail market is fully depended on imports. That is why the Agency paid particular attention to the concentration ratio of the import structure and presented yearly statistics on the number of importing undertakings along with the Herfindahl-Hirschman Index (hereafter, HHI) of concentration.

In 2004, 178 undertakings imported fuel and the concentration ratio was at a low HHI of 279.2. In 2005, 19 undertakings left the market; 159 remained with a HHI set at 572.46. By 2006, the number of importers fell to 142 with a HHI of 534.6. In 2007, there were 113 undertakings left on the market, however 15 of them controlled 90% of the import. Eventually, the concentration ratio went from low to moderate and reached a HHI of 1461.13. By 2008, as many as 82 undertakings left the Georgian market and only 31 remained. At that point in time, the import market moved to a high concentration level and reached a HHI of 2799.46.

Importantly, along with the decreasing number of importers, the actual import size has been steadily increasing over the years. Moreover, in 2004 fuel was imported into Georgia from a number of countries, by various wholesalers and retailers, none of which had exclusivity (except Eko Georgia LLC which was the only importer from Greece). By 2008, a small group of undertakings started to dominate imports while the activities of others significantly decreased. There are two traditional routes of importing fuel into

[21] A similar style of 'excuses' can be found in several other places in the decision, where it is stressed that the Agency is very new, it is only now creating its own databases and this is the first time it has to deal with and analyse such a vast amount of information.

Georgia: 1) from the east – from/through Azerbaijan and 2) from the west – through the Black Sea. By 2008, after SOCAR and Rompetrol increased their activities, import barriers appeared. In fact, importers started increasing their presence on the retail level acquiring or leasing existing petrol stations. By 2009, 25 undertaking imported fuel into Georgia (HHI of 2445.4). As SOCAR started to dominate imports from Azerbaijan, other undertakings were only rarely and selectively given the opportunity to import from that region. In the second half of 2009, the process of establishing artificial barriers intensified and the most active cartel-forming phase commenced.

After a slight decrease in the size of imports in 2009, they grew once again in 2010 – but conducted solely via 12 undertakings (HHI of 2757.72). Since 2008, imports have been dominated by SOCAR, which imported nearly half of all fuel consumed in Georgia. Between 2009-2011, a massive market exodus took place that included companies which had until then been well-established on the Georgian market such as: Senta Petroleum LLC, Eko Georgia LLC, Magnati 2006 LLC, Intercompany LLC, Luck Bunker LLC and others. Explanatory statements provided by these companies demonstrated the difficulties which they had been facing in that period of time. They claimed that after SOCAR gained control over imports from Azerbaijan, other undertakings had lost the possibility not only to import from that region, but also to transit goods through Azerbaijan – albeit rejection reasons varied. Undertakings were also frequently unable to import from the western direction for example due to unreasonable refusals to use a port's docking facilities (e.g. for technical reasons). Furthermore, after the market entry of Rompetrol, imports from Romania became inaccessible. Undertakings unable to import by themselves, which wanted to purchase goods from members of the 'Big Five', were frequently rejected due to (claimed) lack of resources. Alternatively, they were offered the requested goods, but at an inflated price (set at a nearly retail level). Some undertakings claimed that certain state authorities assisted selected companies by imposing sanctions upon others, in order to make them exit the market. However, the GCA stressed that apart from the abovementioned explanatory statements, no other evidence exists proving the participation of state institutions in the process of establishing artificial import barriers[22].

[22] For demonstrational purposes, the decision discussed the case of the Dedoplistskaro municipality where 8 undertakings had operated 12 petrol stations, until they were all obliged to stop their activities in 2010–2011. They disclosed in their explanatory statements that they had faced serious problems with the wholesale purchase of fuel. This happened in the harvest period, which in this agricultural region is the best business period. Unable to purchase fuel, they all gradually stopped operating. Some on the petrol stations were sold or leased to members of the 'Big Five', the rest were shut down. The Agency considered the case is evidence of the

In 2011, 10 undertakings imported fuel into Georgia – 8 principal importers, out of which 1 undertaking left the market while another was dependent on Sun Petroleum. Hence, there were actually 6 importers and the concentration ratio reached a high level of HHI 3106.83. By 2012, 8 agents import the goods in question with a HHI of 2917.46. Overall, between 2010 and 2012, members of the 'Big Five' were the predominant operators on the Georgian fuel market with a number of other undertakings closely related to them. All other competitors were eliminated – 662 petrol stations stopped operating.

Sun Petroleum entered the market in 2011 and leased, within a short period of time, 91 petrol stations from undertakings exiting the Georgian market; it soon became one of the largest actors on the national market with the highest number of petrol stations. Meanwhile, the four companies already dominating the national market, known to act aggressively against other competitors, have shown no particular reaction to the expansion of Sun Petroleum and did not actively compete with it.

2. Sun Petroleum's lease agreements

Sun Petroleum gained control over dozens of petrol stations by leasing them. During its investigation, the GCA analysed these contracts and discovered that their absolute majority is extremely one-sided and tailor-made to suit the interests of Sun Petroleum. The lessors are paid very low rent when compared to market prices. Duties typically imposed on lessees are instead placed on lessors, for example the latter are obliged to bear the expenses of renovating and "rebranding" the petrol stations. Lessors' rights to visit their property are limited and depend on the consent of Sun Petroleum. The latter is allowed to sublet the petrol stations without the consent of the owners. While the lessee can easily withdraw from the contracts, lessors are virtually unable to terminate them. Overall, the content of these contracts raised suspicions that dozens of undertakings decided to exit the Georgian market at the same time and entered into extremely unfavourable contractual relationships with a recently established company, agreeing on low rent rates, without a withdrawal mechanism. The negative impact of these contracts continues until today since the majority of the lessors remain their 'prisoners'. In the absence of these contracts, they could re-enter the market and generate

coordinated behaviour of the cartel members. Moreover, the GCA assumed that the dominant undertakings needed to enter Dedoplistskaro, as well as other provincial regions, in order to be present all around the country, a fact that would allow them to participate in consolifated tenders for providing fuel to state institutions.

far higher profits comparing to the minimal lease rates which they currently get on the basis of the unfavourable lease agreements.

3. Franchising / License Agreements of Rompetrol and LUKOIL

A high number of the petrol stations operating under the brands of LUKOIL and Rompetrol are independent undertakings, which are under license/franchising agreements with the two aforementioned large companies. In the case of Rompetrol, its contracts explicitly fix prices – by contrast, LUKOIL agreements are only oral, and yet still complied with in practice, a fact confirmed by explanatory statements and by a comparative price analysis. While Article 613 of the Civil Code of Georgia allows franchisors and franchisees to be in 'loyal competition' with each other, it is illegal to directly fix prices. The GCA referred to the decisions of German and Polish competition authorities to claim that fixing prices for franchising/license agreements is a competition law infringement. Moreover, according to EU practice, only non-binding recommendations can be tolerated.

4. Pricing policy

The GCA identified parallel pricing practices on the fuel market. Fuel prices were always analogous among the 'Big Five'. Moreover, the Agency concluded that the prices were fixed and not determined by economic factors, a realisation proven by the fact that prices were identical in the whole territory of the country. For example, 1 litter of petrol costs the same in one border town (despite no extra transportation costs) and in a town hundreds of kilometres away on the opposite border of the country. Moreover, at the latter border, other companies import the goods for a cheaper price and yet they fail to use this advantage to cut prices in order to compete. The GCA stressed that LUKOIL was particularly hesitant to compete and utilise its cost advantage (considerably lower operational expenses), which was again seen as indicative of coordinated behaviour among the companies. The artificiality of retail prices was demonstrated by the fact that, in December 2014, when Rompetrol and Lukoil simultaneously submitted offers to a state consolidated tender to sell 'Premium' fuel, both their offers were 1.57 GEL, despite the fact that retail prices were at that time set between 2.06–2.08 GEL. The fact that the 'Big Five' exploited and coordinated their dominance in order to maximize their profit is evident in the fact that in 2012 fuel consumption increased in Georgia by 10% comparing to 2008 and yet the income of the companies increased by

205%. Eventually, excessive profits and coordination among cartel members allowed them to make some economically irrational investments, which they made based on expectations of guaranteed high profits.

5. The current situation

The GCA came to the conclusion that artificial import barriers were eliminated and positive structural changes started on the Georgian fuel market in 2013[23]. By that time, 25 agents were already importing the goods in question resulting in a HHI of 1790.04. The number of importers decreased again in 2014 to 19 (HHI 1938.42). Still, as imports became accessible once again, more undertakings started to return or enter the market. By February 2015, Georgia had 963 petrol stations in operation – 538 belonged to the 'Big Five', the remaining 425 were 'non-branded'. Despite these positive developments, change is slow and it is clear that the negative impact of the developments of 2008-2012 will continue. For example, by 2014, the 'Big Five' controlled 93% of the total import of fuel. An additional challenge lies in the fact that some of the companies that recently returned or newly entered the Georgian market do not necessarily compete with the 'Big Five' on the retail level. Rather than offering cheaper fuel prices, some actually prefer to take advantage of the highly concentrated market structure and strategise to keep their own high profit margins by setting similar rates on fuel to those of the 'Big Five'.

V. Comment

The discussed case can be called a landmark decision for Georgia simply because it is the first time that the GCA has found a breach of competition law and imposed sanctions upon the infringing undertakings after Georgia adopted its Competition Law in 2012. Moreover, it is obviously its first hard-core infringement case, especially significant as it involves widely consumed goods and a market of vital importance for the national economy.

With regard to the quality of the decision, the Agency has conducted a complex investigation, collected and analysed sizable data and, within the limitations established by the law, still managed to prove the existence of a cartel. However, and unsurprisingly, the decision has some shortcomings.

[23] It is assumed that the breakthrough happened due to political changes in the government of Georgia

As repeatedly stressed in the decision itself, this was the first large scale investigation conducted by the GCA and so it has proven to be a learning experience for its staff. This is noticeable in the technical mistakes or typos that can be found in the text of the decision, which are obviously not the principal indicators that should be used to evaluate it. Yet it can be argued that in certain areas the arguments of the Agency are not sufficiently well supported. For example, the decision delineated the relevant market simply by indicating that from the consumers' and suppliers' perspective diesel and petrol are interchangeable. Such justification is rather simplistic and is against the modern approach employed in EU, which avoids putting much emphasis over subjective opinion of any group, when determining the market (Albors-Llorens and Jones, 2016)[24].

Overall, the weakest point of the decision its lack of direct evidence. The GCA stressed that direct evidences against two members of the cartel: LUKOIL and Rompetrol is present. However, these pieces of evidence reveal the existence of price fixing practices of these two companies with their licensees/franchisees – they do not prove the existence of a cartel of the five market leaders.

Furthermore, the Agency indentified in the review of the shortcomings of existing legislation that it lacks the power to access direct evidence, as it cannot conduct surprise on-site inspections because it always needs to get *a priori* court consent. When conducting on-site inspections, the GCA should, however, follow the rules of the existing Law on the Control of Entrepreneurial Activity and of the Administrative Procedural Code. The GCA complained that neither of these legal acts contains any special provisions concerning the Agency. Yet although it is true that they do not speak specifically of the activities of the GCA, their general rules should be used in this case as they do actually provide for the possibility of starting an inspection without prior approval from a judge[25]. It is unclear why the GCA refused to use the existing mechanism in order to inspect the undertakings in question. Ultimately, it has

[24] For example, EU Commission and the European Court of Justice have been widely criticized for the famous case of *United Brands,* after they identified the relevant market based on the viewpoint of the certain groups of the final consumers, who considered bananas as the special and not interchangeable with other fruits.

[25] The Administrative Procedural Code (Article 21^2 (1)(2) defines that the controlling body should submit a request to the judge before commencing an inspection of an entrepreneur. However, in case of immediate and direct threat to the evidence, the authority is entitled to suspend the operation of that enterprise and immediately submit a request to a judge. If the operation of an enterprise cannot be suspended, or the suspension significantly damages the enterprise, the authority can commence an inspection and submit an appropriate request to a judge within 24 hours.

potentially missed out on its only opportunity to access direct evidences that would have made its decision far better supported and proven.

The decision did not estimate the total amount of the damage caused by the existence of the cartel over the years of its functioning. Importantly however, the decision did calculate how much the price per unit had to be and how much the cartel members actually charged on the retail market. If the judiciary ends up upholding the decision of the GCA, any undertaking or individual who suffered damages as a result of this cartel will be able to rely on these numbers to seek damages. Encouraging the development of private enforcement of competition law in Georgia could thus turn out to be a very positive outcome of this investigation.

With regard to the amount of the fines imposed by the Agency, it is hard to evaluate the rationality of the penalty while the actual size of the damage caused by the cartel is unknown. However, the imposed fines are hardly proportional considering the gravity and length of the infringement as well as the number of undertakings and consumers affected. Unlike EU law which has a 10% turnover cap, Georgian competition law sets the ceiling for competition fines at 5% of annual turnover. Notwithstanding the above, the GCA has not imposed the maximum amount of fines possible. Whether the fines will prove enough to serve as deterrence, especially since the companies remain fully confident that they had not infringed any laws, is disputable. However, it is commendable that the Agency fined the licensees/franchisees of the main infringers with a symbolic amount only. It was obvious that for them, the participation in the price-fixing practices was not a matter of choice or something they could negotiate.

In fact, the Agency has annulled the offending clauses of the licence / franchise agreements and so the licensees/franchisees are now legally free to determine their own retail prices. Considering the annulment of the price fixing clauses, it is unclear why the Agency did not take similar actions regarding the lease agreements of Sun Petroleum, repeatedly mentioned in the decision as unfavourable to the lessors and a hindrance to their return to the Georgian market. Why has the Agency failed to intervene against this member of the 'Big Five' that continues to maintain very effective market barriers keeping potential competitors from returning to the market?

Despite the abovementioned problems, is a very positive development for the Georgian competition law sphere that the GCA started to function actively, investigated one of the most problematic markets in the country and ultimately detected and fined an operating cartel. It is essential for the Agency to learn from this experience and to extend its activities to other problematic markets.

References

Association of Young Financiers and Businessmen. (16 January 2015). Gas prices on Georgian market are inadequate to that of international market. Retrieved from: http://afba.ge/en/news/index/116.

BBC News (10 May 2005). How the Rose Revolution happened. Retrieved from: http://news.bbc.co.uk/2/hi/4532539.stm.

BPI. (6 August 2015). Oil Companies to Sue the Competition Agency's Conclusion. http://bpi.ge/index.php/oil-companies-to-sue-the-competition-agencys-conclusion/?lang=en.

Business Week Caucasus. (22 December 2014). Global price on fuel declines considerably by 48%, while Georgian prices decrease by 13%. Retrieved from: http://cbw.ge/business/global-price-on-fuel-declines-considerably-by-48-while-georgian-prices-decrease-by-13/.

Civil Georgia. (17 July 2015). SOCAR, Sun Petroleum Dispute Multi-Million Fines Imposed by Competition Agency. Retrieved from: http://www.civil.ge/eng/article.php?id=28445.

Coppieters, B. and Legvold, R. (2005). *Statehood and security: Georgia after the Rose Revolution.* Cambridge: American Academy of Arts and Sciences.

Georgian Business Consulting. (11 April 2016a). The court left a fine of 14 million, imposed on "SOCAR", under the force http://gbc.ge/index.php?m=tst.

Georgian Business Consulting. (12 April 2016b). SOCAR plans to continue fight against Competition Agency. http://gbc.ge/index.php?m=tst.

Georgian Journal. (24 July 2015). The Cartel-ificent Five – Determining real owners of the 'Big Five' is harder than catching a black cat in a dark room. http://www.georgianjournal.ge/business/31083-the-cartel-ificent-five-determining-real-owners-of-the-big-five-is-harder-than-catching-a-black-cat-in-a-dark-room.html?fb_comment_id=848330121911129_848386001905541#f954840d723b3.

Jones, A. and Albors-Llorens, A. (2016). The Images of the Consumer in EU Competition Law. In: Leczykiewicz, D. and Weatherill, D. *The Image(s) of the 'Consumer' in EU Law*. Hart Publishing.

Kandelaki, G. (2006). Georgia's Rose Revolution, Participant's Perspective. United States Institute of Peace, Special Report. Retrieved from: http://www.usip.org/sites/default/files/sr167.pdf.

Kirtzkhalia, N. (30 January 2015). Georgian PM accuses oil companies of violating competition law. Trend News Agency, retrieved from: http://en.trend.az/scaucasus/georgia/2358571.html.

Krauss, C. (18 April 2016). Oil Prices: What's Behind the Drop? Simple Economics. NY Times. Retrieved from: http://www.nytimes.com/interactive/2016/business/energy-environment/oil-prices.html?_r=0.

Lincoln, M. (2013). *Uncertain Democracy: U.S. Foreign Policy and Georgia's Rose Revolution*. Philadelphia, University of Pennsylvania Press.

Rimple, P. (2012). Who Owned Georgia 2003-2012. Tbilisi: Transparency International Georgia. Retrieved from: http://www.transparency.ge/sites/default/files/post_attachments/Who%20Owned%20Georgia%20Eng.pdf.

The Economist. (8 December 2014). Why the oil price is falling. Retrieved from: http://www.economist.com/blogs/economist-explains/2014/12/economist-explains-4.

Transparency International Georgia. (2012) Competition Policy in Georgia. Tbilisi.

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Gas Insulated Switchgear Cartel in the Slovak Republic

by

Silvia Sramelova*

CONTENTS**

Key words: cartel; parallel competences; parental liability; *reformatio in peius*; Slovak competition authority.

JEL: K21

I. Introduction

The case of the *Gas insulated switchgear* (hereafter, *GIS*) cartel is well known to competition experts all over Europe. The cartel lasted for more than twenty years and affected competition on relevant markets in several countries. Following leniency applications submitted by one of its participants, the case was brought before several competition authorities in the European Union, including the European Commission and the Antimonopoly Office of the Slovak Republic (hereafter, AMO).

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In 2009, the AMO took a cartel decision covering the biggest producers of GIS, including several Japanese and European undertakings[1]. According to the decision, 20 GIS producers infringed the Slovak Act on the Protection of Competition[2]. The cartel consisted of various forms of infringements such as: price fixing, stabilization of market shares on the basis of pre-agreed quotas, bid rigging etc. Japanese and European companies participated in cartel activities on a worldwide level. On the basis of the cartel agreements, Japanese and European GIS producers agreed that Japanese companies will not enter the European market and vice versa. Moreover, European GIS producers concluded anti-competitive agreements with each other, which were applied directly in Europe, including Slovakia. The AMO identified several public tenders in the Slovak Republic directly affected by this cartel. The AMO[3] imposed a fine totaling 8 628 390 EUR.

The AMO initiated the proceedings on the basis of a leniency application submitted by the members of the economic group ABB[4]. The leniency applicant provided the AMO with all relevant documents and information necessary to prove the infringement.

From the Slovak perspective, the case was interesting for several reasons.

1) It was the first case where the AMO referred to the principles of the parental liability concept according the case law of the European Commission and the jurisprudence of the Court of Justice of the European Union (hereafter, CJEU).
2) The case was dealt with in parallel by various competition authorities within the European Union – a fact that brought up *ne bis in idem* issues and questions concerning the application of Regulation 1/2003. This lead to a preliminary proceeding before the CJEU.
3) In this case, the Council of the AMO (the 2nd instance body within the structure of the AMO) increased the fine imposed within the 1st instance proceedings. Thus, the AMO responded to objections about the breach of the *reformatio in peius* principle. The issue was finally resolved by the Slovak Constitutional Court.

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[1] Decisions No 2007/KH/1/1/109 of 28 December 2007 and 2009/KH/R/2/035 of 14 August 2009. The AMO decides on cases on the basis of a two instance system. The executive department of the AMO decides on the case in the 1st instance. This decision may then be reviewed by the Council of the AMO. After the 2nd instance decision is taken, the case may be brought before the court. The text below uses the term 'the decision' in this context. The distinction is made only where it is necessary.

[2] Act No 136/2001 Coll. On Protection of Competition

[3] The text below uses the term 'AMO' to refer both to the Council of the AMO and the 1st instance body. The distinction is made only where it is necessary.

[4] ABB Management Services Ltd, ABB Switzerland Ltd, ABB Ltd.

The case was reviewed by Slovak courts in separate judicial proceedings (i.e. separate proceedings on the basis of separate actions submitted before the courts). Whereas the Regional Court in Bratislava annulled the decision of the AMO, the Supreme Court amended these judgments and dismissed the actions[5].

II. Parental liability

According to the evidence submitted by the leniency applicant, the members of the cartel[6] belonged to several economic entities. The evidence indicated that within their economic groups, both parents and their subsidiaries participated in the cartel. Moreover, during the course of the cartel, some of its members ceased to exist, or transferred their economic activities to other companies.

The Slovak Act on the Protection of Competition does not explicitly foresee the application of the parental liability concept. The decisions of the AMO are always addressed to persons with legal standing. The Act on the Protection of Competition does not contain any specific legal provisions on the liability of an 'economic entity', nor provisions concerning several and joint liability for fines. Nevertheless, 'economic reality' makes it impossible for the AMO to see legal persons completely separately from the economic group to which they belong[7].

The GIS cartel was the first case for the AMO to explicitly refer to the parental liability concept as it is applied in the European Union (in particular to the 100% presumption), even though Article 101 TFEU was not applied in this case but rather, only its Slovak equivalent.

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[5] Though the case was reviewed in separate judicial proceedings, the conclusions/findings in of the courts were similar. The text below refers to a specific judgement only where it is necessary.

Some of the proceedings are still open before the Supreme Court. However, most of the proceedings have already been closed (7Sžhpu1/2013, 8Sžhpu/4/2013, 3Sžhpu/1/2013, 8Sžhpu 1,2,3/2013, 2Sžhpu/1/2013, 5 Sžhpu/1/2014. On 28 April 2016, the Supreme Court delivered the judgement as regards the complainant Siemens Aktiongesellschaft Österreich (5 Sžhpu/1/2014). In this case, the Supreme Court annulled the decision of the AMO to the extent related to the complainant. The decision of the AMO was annulled mostly for the 'insufficient reasoning of the imposed fine'.

[6] I.e. legal persons.

[7] This could be seen e.g. in the Decree of the Antimonopoly Office of the Slovak Republic of 19 June 2014 172/2014 Coll. laying down details of leniency programme, according to which a leniency application may not be submitted by more than one undertaking at the same time, unless they belong to the same economic group.

It is clear from the text of the decision that the AMO (taking into account the differences between the Slovak legal system and that of the EU) endeavored to find evidence of each parent company's and its subsidiary's direct participation in the infringement. However, the AMO was unable to identify the exact form of each company's participation in the cartel – the evidence submitted by the leniency applicant mostly showed the participation in the cartel of economic entities as such (rather than specifically the participation of individual members of such economic entities).

The AMO stressed in its decision that imposing a fine only upon a parent company, despite the fact that both parent and its subsidiaries infringed competition rules, could make the fine not proportionate to the profit gained by the infringement. Thus, the sanction would not have a sufficient deterrent effect. The AMO underlined the importance of imposing a fine that is proportionate to the strength and importance of the economic entity at stake.

The Slovak Act on the Protection of Competition does not permit the imposition of a single fine for which both the parent and its subsidiary would be liable. Fines must be therefore calculated separately for each legally entity.

In the calculation of the final amount of the fine[8], the AMO took into account the fact that participants are part of the same economic entity. Similarly to the decision of the European Commission, for the purpose of the calculation of fines, the AMO first divided the participants according to their relation to the economic entities, and then took into account the economic strength of each economic entity.

The Regional Court in Bratislava agreed with the AMO, in so far as the AMO decided that an infringement of the Act on the Protection of Competition took place and that the infringement affected the territory of the Slovak Republic. The Court also agreed that the economic entities identified in the decision infringed competition rules.

However, according to the Regional Court in Bratislava, the AMO failed to clarify to what an extent each of the cartel members (i.e. each legal person) contributed to the functioning of the cartel. The Court stressed the principle of 'individual and personal liability' for the infringement. It thus came to the conclusion that it is necessary to take into account the role of each cartel member in the infringement. Not doing so would result in a situation where those that participate in a cartel as part of a larger economic group would be in a worse position than those who partake on their own. According to

[8] The AMO did not use its Guidelines on the procedure for setting the fines in cases of abuse of dominant position and agreements restricting competition from 2008 (since the Guidelines entered into force after the adoption of the 1st instance decision) http://www.antimon.gov.sk/data/files/16_metodicky-pokyn_pokuty.pdf

the Regional Court in Bratislava, it is necessary to prevent an undesirable accumulation of fines.

By contrast, the Slovak Supreme Court came to the conclusion that the AMO had sufficiently identified the role of each cartel participants in its infringement decision and had given sufficient reasons for the fine which it had imposed. However, the Supreme Court did not explicitly refer to the parental liability concept, nor clarified the possibility of applying this concept in Slovak competition proceedings.

III. Parallel competences – the European Commission and the AMO

Since the case was brought before several competition authorities across the European Union, the AMO had to deal with the interpretation of the provisions of Regulation 1/2003[9] on the division of competences between the European Commission and National Competition Authorities (hereafter, NCAs).

The AMO issued its own decision after the adoption of the decision by the European Commission. The latter set the date of the cessation of the cartel to 11 May 2004 (11 days after the accession of the Slovak Republic to the EU). Unlike the Commission, the AMO set the date of the cessation of the cartel to 30 April 2004 – a decision reasoned by doubts about the competences of the AMO to assess the infringement after this date (this question was ultimately left open in the decision)[10].

Importantly, according to the AMO, the decision of the European Commission did not cover the territory of the Slovak Republic.

The applicants primarily argued that the proceedings brought at the national level infringed the *ne bis in idem* principle, prohibiting the undesirable accumulation of penalties. According to their claim, the AMO had determined the duration of the cartel in an erroneous manner, since it had set the cessation of the cartel to a date prior to the accession of the Slovak Republic to the European Union. According to those applicants, it follows from Article 11(6) of Regulation 1/2003[11] that the AMO did not have the power to start proceedings

[9] 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.

[10] See para. 135 of the 2nd instance decision of the AMO

[11] '6. The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority'.

at the national level since the European Commission had already initiated proceedings at the EU level in the same case.

Incidentally, the same cartel had at that time already become the subject of an investigation by the NCA of the Czech Republic (the Office for the Protection of Competition) and so the problem of parallel competences arose first in the Czech proceedings. The reviewing court, the Regional Court in Brno, used the preliminary ruling procedure to ask the CJEU to provide guidance on the question of parallel competences of NCAs to assess a case already investigated by the Commission.[12] In view of these developments, Slovak courts suspended their proceedings awaiting the ruling of the CJEU.

The CJEU stressed in its judgment[13] that the provisions of Article 81 EC (now 101 TFEU) and Article 3(1) of Regulation 1/2003 are applicable to the possible anti-competitive effects of the cartel at issue in the main proceedings on the Czech territory only in so far as it is necessary to impose penalties for those effects inasmuch as they were produced during the period which began on 1 May 2004.

The court further added that applicants in the main proceedings do not advocate the application of a more lenient penalty for the period before 1 May 2004, but are in reality seeking to obtain a situation in which the Czech NCA takes no final decision as regards the effects of the cartel in question on the Czech territory. Those companies want the principle of the retroactive application of the more lenient penalty to be ultimately interpreted as meaning that the NCA does not have the power to penalize that cartel for the period before 1 May 2004, and that the anti-competitive effects produced by the latter during that period are considered as covered by the decision of the European Commission.

The CJEU came to the conclusion that the decision of the Commission does not cover any anti-competitive effects of the cartel in the territory of the Czech Republic in the period prior to 1 May 2004. According to the Court, the *ne bis in idem* principle does not preclude penalties which the NCA of the Member State concerned imposes on cartel participants on account of the anti-competitive effects to which the cartel gave rise in the territory of that Member State before its EU accession, where the fines imposed on the same cartel members by a Commission decision (taken before the decision of that NCA was adopted) were not designed to penalize the said effects.

Slovak courts took into account the abovementioned conclusions and referred to the judgment of the CJEU. Thus they did not provide a further analysis in this respect.

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[12] The Slovak government submitted its observations to the CJEU in the proceedings as well.

[13] C-17/10 *Toshiba Corporation v. the Office on Protection of Competition* (*Czech Republic*), ECLI: EU: C:2012:72.

IV. Reformatio in peius

Reformatio in peius is a common legal principle applied in criminal law in the Slovak Republic. The principle stems from the Roman law rule: *'Reformatio in peius iudici appellato non licet'* which essentially means that nobody should be placed in a worse position as a result of filing an appeal. The principle is a key part of the right of defence and works as a guarantee that everybody could use his/her right of defence without concern that his/her position will worsen as a result (Ivor, 2010, p. 704-705)[14].

The application of this principle is part of a long-lasting discussion on the application of criminal law principles to administrative offences[15].

Neither the Administrative Procedural Code[16], nor the Act on the Protection of Competition, have specific provisions on *'reformatio in peius'* in administrative (or competition) proceedings.

The AMO is a body that both investigates and decides on a competition law infringement. As mentioned, the AMO decides in two instances. The 2nd instance body (the Council of the AMO) decides on the basis of an appeal. However, once the 1st instance decision is appealed, the Council of the AMO does not limit its review to the grounds of the appeal only but actually reviews the decision as a whole. After the procedure, the undertaking can bring the case before the court. The court reviews the legality of the decision of the AMO within the terms of the claim.

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[14] This principle is applied in criminal proceedings in an appeal procedure, together with the principle *beneficium cohaesionis* (according to this principle, the decision appealed by one of the accused could be changed in favour of the others even though they did not submit the appeal). The *reformatio in peius* principle is applied in the 2nd instance proceedings as well as in the subsequent 1st instance proceedings if the 1st instance decision is annulled).

[15] Competition law infringements belong to the group of the so called 'other administrative offences'. These include offences committed by natural and legal persons in various branches of the law such as: offences in the area of environmental law, offences in construction law, etc. Unlike minor offences, 'other administrative offences' are regulated by a number of different laws. When it comes to substantive legal rules, they lack *lex generalis*. Both the substantive aspects of 'other administrative offences' and their procedural particularities are regulated by *lex specialis*. As regards procedural issues, the function of *lex generalis* is fulfilled by the Administrative Procedural Code. Albeit the Administrative Procedural Code regulates the procedural aspect of the assessment of 'other administrative offences', it does not cover general questions such as: the basic principles for the imposition of fines, the application of exculpatory circumstances, etc. This *altum silentium* may be replaced by the application of analogy with a branch of law that possess the relevant legal rules e.g. by the application of criminal law principles. Analogy with criminal law is however quite disputable. See also (Sramelova and Blazo, 2015).

[16] The Administrative Procedural Code no 71/1967 Coll.

By contrast, in criminal proceedings, the crime is investigated by the police. The court decides both on the crime and on the punishment. The judgment can be appealed by either the state attorney or the by the accused. The *reformatio in peius* principle is applied only if the judgment is appealed by the accused.

In the case at hand, the Council of the AMO decided to increase the fine imposed in the 1st instance with respect to one of the cartel members, SIEMENS AG. The Council of the AMO believed that it was necessary to take into account the special role which SIEMENS AG had played in the cartel – according to evidence, SIEMENS AG acted as the coordinator of the cartel and significantly facilitated its functioning. This has lead the Council of the AMO to decide to increase the fine originally imposed on SIEMENS AG in the 1st instance decision by an additional 40%.

While reviewing the case, the Regional Court[17] referred to the European Convention on Human Rights and fundamental freedoms (hereafter, ECHR). In its view, forasmuch as the court reviews the decision where the fine was imposed, it is necessary to apply Article 6 ECHR. The Regional Court referred also to the Council of Europe's Recommendation No (91) 1 of the Committee of Ministers to Member States on Administrative sanctions (hereafter, Recommendation)[18]. The Recommendation lays down the basic principles which should be followed in administrative procedures – most of them derive from criminal proceedings.

The Regional Court stressed that it was necessary to apply criminal law principles to the proceedings at hand. Hence, it was necessary to go with the more favorable treatment when it comes to the accused company.

By contrast, the Supreme Court[19] did not share the view of the Regional Court with regard to the application of the *reformatio in peius* principle. In its judgment, the Supreme Court provided a detailed analysis of its own jurisprudence as well as that of the judicature of the Czech Republic, the ECtHR and of the CJEU.

First, the Supreme Court dealt with the application of criminal law principles to administrative proceedings. In its previous rulings, the Slovak Supreme Court stated that administrative sanctions must be subject to the same regime as those imposed in criminal proceedings[20]. In this judgement,

[17] Judgement of the Regional Court in Bratislava of 28 May 2013 in case 3S228/2009.

[18] Recommendation was adopted on administrative sanctions on 13 February 1991 by the Committee of Ministers to Member States.

[19] Judgement of the Supreme Court of the Slovak Republic of 9 June 2015 3Sžhpu1/2003.

[20] E.g. Judgement of the Supreme Court of 24 November 2011 in case no 8 Sž 18/2011, 8 Sž 22/2011, 8 Sž 23/2011 a 8 Sž 24/2011 of 24 November 2011.

the Supreme Court referred to the Engel criteria[21], which must be analysed to uncover whether the sanctions are of a criminal nature. It further referred to the jurisprudence of the ECtHR according to which the ECHR makes a distinction between 'hard core criminal law' and 'other offences' (including competition law infringements), where 'criminal' guarantees will not necessarily apply with their full stringency[22].

In the case at hand, the Supreme Court said that the substantive part of criminal law guarantees applies also to administrative proceedings, where administrative sanctions are imposed. However, the Supreme Court also stressed that it is not possible to conclude from the Recommendation that all rights immanent to criminal law procedures are applicable to administrative proceedings as well.

The Supreme Court emphasized the particularities of administrative proceedings in comparison to criminal procedures, especially the right of the administrative body to review the 1st instance decision as a whole, and the obligation of the 2nd instance administrative body to annul or amend every decision which is in breach of the law. Moreover, it pointed out that in a criminal procedure, the public interest is represented by the state attorney, which could acquire the imposition of stricter punishment following his/her own appeal.

The Supreme Court referred also to the rulings of the Constitutional Court of the Czech Republic, which had concluded that it is not possible to derive from the Constitution that the principle is applied also in the area of administrative sanctions. It also pointed towards the judgments of the CJEU[23] where the latter increased the fines imposed by the European Commission.

The Supreme Court concluded that it is not always possible to exclude the application of the *reformatio in peius* principle to administrative proceedings, but it is necessary to take into account the circumstances of each case. Accordingly, it is necessary to take into account not only the rights of the accused company, but also the public interest. Cartel agreements are meant to benefit its members only. At the same time, they harm consumers and competition.

The applicant subsequently submitted a complaint to the Constitutional Court of the Slovak Republic. In the complaint, the applicant argued, *inter alia*,

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[21] As specified in the judgement of the ECHR of 23 November 1976 in case of *Engel and others v. Netherlands* (application no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72): the nature of the offence and the degree of stigma attached to it, the severity of the possible penalty, and the classification of the offence under domestic law

[22] See e.g. the Judgement of the ECHR of 23 November 2006 in case of *Jussila v. Finland.*

[23] Judgement of the Court of the First Instance in Joined Cases T-101/05 and T-111/05 *BASF AG, UCB SA*, ECLI:EU:T:2007:380.

that the AMO in the 2nd instance proceedings imposed its financial penalty in an erroneous manner in that it increased the fine imposed in the 1st instance decision. According to the applicant, the AMO breached that company's right to a fair trial.

The Constitutional Court reviewed the decision of the Supreme Court and came to the conclusion that no breach of the rights of SIEMENS AG had taken place[24].

The Constitutional Court analyzed the application of criminal proceedings to competition proceedings in greater detail. According to the Court, in such cases it is necessary to search for the intersection between criminal and administrative law. The relation between criminal and administrative law is twofold.

First, a type of administrative proceedings exists which may be seen as a continuation of criminal proceedings. These types of proceedings are of a quasi-criminal nature and are so close to criminal proceedings that procedural rights immanent to criminal proceedings apply naturally to such administrative proceedings also. This group includes, for example, proceedings on minor offences of natural persons[25].

When it comes to the second type of administrative proceedings, it is necessary to search for those procedural rights immanent to criminal proceedings, which should be applied therein.

However, there is no reason to interpret the legal order so as to see all sanctions imposed in administrative proceedings as being criminal in nature.

The Constitutional Court stated that the mere fact that the law allows for the imposition of a fine, which could amount to millions of EUR, could not automatically mean that the fine is not proportionate, since high fines are natural to competition law. Moreover, fines are usually imposed on undertakings of significant economic strength and importance.

The Constitutional Court referred to the Engel Criteria. According to the second Engel Criterion, it is important to distinguish between the preventive-repressive and the reparative purpose of the fine.

The Constitutional Court stated that in cartel cases, the function of the fine lies in the 'reparation of the effects of the infringement'. Therefore, fines do not fulfill a primarily preventive or repressive function. As a result, the fine imposed by the AMO was not of a quasi-criminal nature.

The Constitutional Court further stressed the distinctions between criminal and administrative proceedings. The purpose of the application of the *reformatio in peius* principle is to establish a balance between the infringement

[24] Decision of the Constitutional Court of 13 January 2016, I. US 505/2015-55/.

[25] See e.g. judgement of the ECtHR of 2 September 1998 in case of *Lauko v. Slovakia* (4/1998/907/1119).

and the sanction imposed for that infringement. Establishing such balance is more complex in criminal proceedings. While an appeal brought by the state attorney may lead to stricter sanctions in criminal proceedings, this is not possible in administrative proceedings. In the latter, there is no adverse party (similar to the state attorney) that would protect the public interest. An interpretation whereby *reformatio in peius* in an appeal procedure is not allowed would thus be in conflict with the purpose of the appeal procedure in administrative proceedings.

V. Conclusions

As seen from the above, the *GIS* cartel generated several interesting issues.

When it comes to the parental liability concept, Slovak courts did not clearly state to what an extent it is applicable to Slovak competition law proceedings. Neither did they further examine the conditions of its application in the national legal order. This question remains therefore, for the most part, unresolved.

The conclusions reached by the domestic judiciary with respect to the parallel competences of the European Commission and NCAs were limited to one particular situation only – infringements that took place before and after the accession of a Member State to the European Union. However, other questions remain unanswered in relation to 'possible' conflicts between the competences of the Commission and NCAs according to Regulation 1/2003.

On the other hand, the conclusions of the Slovak Constitutional Court as regards the *reformatio in peius* principle are appreciable, since it expressed its position more clearly towards the application of criminal law principles to competition law proceedings. These conclusions should be welcomed since the nature of competition proceedings does not allow for the application of all criminal law principles to these types of proceedings.

References

Ivor, J. et al. (2010). *Criminal Procedural Law. Second Edition*. Bratislava: Iura Edition.

Sramelova, S. and Blazo, O. (2015). The First Bid Rigging Case in Slovakia After Years of Judicial Disputes, *YARS, 8* (11), 249–260, http://dx.doi.org/10.2139/ssrn.2741673.

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Anti-Competitive Agreements according to Kosovo's Law on the Protection of Competition – Case Study of the Insurance Market

by

Orhan M. Çeku* and Mentor Q. Shaqiri**

CONTENTS***

Abstract

Competition law is an area which links the economy with the law and is very important for the functioning of a free market economy. Anti-competitive agreements, along with the abuse of dominance and concentrations of undertakings, are the subject matter of the Law on the Protection of Competition (LPC) of the Republic of Kosovo. Anti-competitive agreements can be horizontal or vertical in nature.
The following paper deals with agreements and other multilateral practices prohibited under Kosovo's Law on the Protection of Competition. The LPC explicitly states also specific circumstances where the prohibition does not apply – these are covered by the so called 'exceptions and allowances' section of the LPC.

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In this respect, the LPC has incorporated the entirety of the principles covered by Article 101 TFEU.
The insurance market of the Republic of Kosovo was analyzed in the context of this case study, which has all the features of an oligopoly including: a limited number of participating firms, product standardization, interdependence in controlling prices and, difficulty of new market entry. From this perspective, the insurance market is highly problematic as far as violations of the provisions of the law dealing with anti-competitive agreements are concerned. The analysis is conducted based on the enforcement measures undertaken by the Kosovo Competition Authority and reviewed by the judiciary of the Republic of Kosovo.
Taking into consideration that Kosovo is a young country facing special transitional challenges and aiming to become a member of the European Union, much needed reforms are to take place still. The aim of this analysis is thus to contribute to further development of competition law in Kosovo through the analysis of current market situation, domestic legislation and its compliance with EU rules.

Resumé

L'article suivant concerne des accords et des pratiques interdites par la loi sur la protection de la concurrence du Kosovo. La loi mentionnée ci-dessus prévoit également circonstances atténuantes exceptionnelles pour l'application des dispositions concernant les accords anticoncurrentiels. À cet égard, la loi sur la protection de la concurrence a incorporé les principes de l'article 101 du Traité sur le fonctionnement de l'Union européenne.
Dans ce contexte, l'article analyse le marché de l'assurance dans la République du Kosovo, qui possède toutes les caractéristiques d'oligopole, y compris le nombre limité d'entreprises, la normalisation des produits, l'interdépendance dans le contrôle des prix et les difficultés de nouvelles entreprises qui entrent le marché. Dans cette perspective, le marché de l'assurance est très problématique en termes de violation des dispositions concernant les accords anticoncurrentiels. L'analyse est effectuée à la base de sanctions introduits par l'Autorité de la concurrence de Kosovo, ainsi que par la Cour de la République du Kosovo.
En prenant en compte que le Kosovo est un pays jeune, avec des défis pour la transition, qui a pour son objectif de devenir un membre de l'Union européenne, certains réformes doivent être mises en oeuvre. En effet, le but de l'article est de donner la contribution pour les développements de la loi de la concurrence au Kosovo, par l'analyse de la situation actuelle du marché, de la législation nationale et de sa cohérence avec des règles du droit de l'Union européenne.

Key words: anti-competitive agreements; competition law; insurance; Kosovo; oligopoly.

JEL: K21

I. Introduction

Kosovo's state building and development process is based on the principles of parliamentary democracy and free market economy. As a ex-communist country, the Republic of Kosovo is a State in transition, which has been through fundamental changes concerning the improvement of its legal infrastructure and its economic base. Situated in South-Eastern Europe, a region impacted by ethnic conflicts, a fragile economy and internal political problems, Kosovo is successfully facing its democratic changes.

Although a small country, its economic potential should not be underestimated. It is well worth mentioning here the report of the World Bank entitled 'Doing Business 2015'[1] which puts Kosovo on the 75th position in the world when it comes to the ease of doing business – in comparison to the 2014 report, Kosovo has thus improved by six points. In fact, also according to the World Bank, starting up a business in Kosovo has been upgraded last year alone by as much as 58 points, placing the country at the 42nd position in the world in 2015. On the other hand, Kosovo has dropped in the ratings with respect to its electricity production and is presently in position 112th (105th in 2014).[2] These changes are the outcome of legislative improvements and continuing building of democratic and functional institutions in Kosovo.

Among them, concrete steps have been taken to build a legal and institutional infrastructure in the field of competition law, which should be perceived as a necessary instrument to increase general welfare, by ensuring higher possibility of profit for enterprises and better service quality for consumers.

The Law on the Protection of Competition No. 03/L-229[3] (hereafter, LPC), was approved on 7 October 2010. It was subsequently amended and supplemented by Law No. 04/L-226 for Amending and Supplementing the Law No. 03/L-229 on the Protection of Competition[4], approved on 13 February 2014 (hereafter, LPC Amendment). Importantly, Kosovo's legislation explicitly determines the necessity to implement the legal instruments of the European Union in its domestic competition law. Therefore, according to LPC, 'Implementation of this Law should be in conformity with European Union on competition'[5].

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[1] http://www.doingbusiness.org/data/exploreeconomies/kosovo/.

[2] Ibidem.

[3] Official Gazette of The Republic of Kosovo, Prishtinë: Year V, No. 88, 25 November 2010.

[4] Official Gazette of The Republic of Kosovo, No. 17, 10 March 2014 .

[5] Article 66 of Law on Protection of Competition of Kosovo (Law No. 03/L-229). Official translation of the LPC can be found at https://ak.rks-gov.net/repository/docs/2010-229-eng.pdf.

This paper will focus on one segment of Kosovo's competition law, that is, the prohibition of anti-competition agreements. The discussion correlated this material aspect of competition law with a case study of Kosovo's insurance market, which is well known to suffer from agreements that violate the provisions of its competition law. EU law was taken into consideration in the following discussion where ever Kosovo's legislation has already been approximated to EU legislation at least to a certain extent.

II. Anti- Competitive Agreements According to Kosovo Legislation

1. Prohibition of anti-competitive agreements

In a competitive market, companies have a tendency to increase their profits by competing independently from each another, a fact that brings about an increase in productivity. However, in order to limit competition companies interact with each other and coordinate their activities by entering into secret agreements meant to fix prices and other trading conditions. This is in turn reflected in a reduction of productivity and higher prices for consumers (Vickers, 2003, p. 74).

Pursuant to the LPC Amendment, the definition of an 'agreement' refers to – agreements of any kind concluded between enterprises, with or without binding force, decisions or recommendations of groups of enterprises, as well as coordinated practices between enterprises that operate at the same level, or at different levels of the market. According to the legal definition, an agreement can be written, non-written, or unspoken (so called gentleman's agreement) provided it violates legal provisions on the protection of competition[6].

First instance investigations of cases related to competition harm resulting from prohibited agreements are conducted via an administrative procedure led by the Kosovo Competition Authority, which reaches a decision after reviewing the respective case. 'In order to rule if competition was restricted, one should analyze the effect of the agreement on the parameters of market competition such as the price, quantity of production, quality of productions, variety of productions and market innovations. Price and quantity of production are the most important parameters of market competition, every limitation in the freedom to set them independently by enterprises is harmful for competition' (Kabashi and Asllani, 2012, p. 90–91[7]).

[6] Article 2(1.1.) of Law on amending and supplementing Law No. 03/L-229 on Protection of Competition.

[7] Translation by the Authors of this paper.

Kosovo's LPC clearly states when an agreement between business entities is considered to be illegal. The LPC provides that 'All agreements between two or more independent enterprises are prohibited, decisions made by business associations and concerted practices that aim or may significantly influence on disturbance of market competition in relevant market, and in particular the ones that:

1. directly or indirectly impose purchase or sale price or any other condition in trade;
2. limit or control production, market, technological development and investments;
3. share markets or supply sources;
4. implement unequal conditions for similar transactions with other enterprises, consequently placing them in an unfavorable competitive position;
5. apply conditions for agreements on contracts to rely on other contracting subjects, through other supplementing conditions that do not have any natural or common trade practice connection to the object of such contract'[8].

Aside from cases where formal signed agreements between companies exist, according to the LPC, there are also informal concerted practices which affect market competition. A 'concerted practice' is, according to the LPC 'an activity concerning an informal cooperation between two or more enterprises and which is not based on a formal decision or agreement'[9].

When analyzing the provisions of the LPC on anti-competition agreements, it is noticeable that it is almost in full compliance with Article 101 TFEU (former Article 81 TEC). This shows that Kosovo has made great progress in aligning its legislation to that of the EU – a fundamental criterion for its EU accession process.

In order for an anti-competitive practice to violate Article 101 TFEU, 'it requires that the agreement, decision or concerted practice targets, or results in the prevention, limitation, distortion of internal market competition' (Zajmi, 2012, p. 31[10]).

The fact whether a cumulative fulfillment of these requirements is needed, or if the existence of one of them is sufficient to ascertain a violation remains a matter of discussion. The truth is that the existence of one the items provided in Article 101 TFEU is sufficient to ascertain a violation of this provisions. 'First the objective of the agreement should be analyzed, if the objective of the agreement is not to restrict competition; in order for an agreement to be

[8] Article 4 of Law on Protection of Competition, Law No. 03/L-229.

[9] Article 3(1(2) of Law on Protection of Competition, Law No. 03/L-229.

[10] Translation by the Authors of this paper.

covered by Article 101 TFEU, it should aim or cause obstruction, limitation or distortion of the common market competition' (Kabashi and Asllani, 2012, p. 87[11]).

TFEU prohibits concerted practices by enterprises which aim to limit competition in the internal market. 'There are two factors to consider in conceiving this term: On the one side companies can be avert. They could have been plotting, but also have been shrewd enough to destroy all written evidence. The 'agreement' might have never been put on paper at all, being based on a verbal consensus and exchanges only. Nevertheless, a conspiracy and a secret agreement could be real, and the creation of a term such as concerted practices should be sufficiently flexible as to cover this fact of business life. On the other hand, a broad interpretation of the term could be considered as parallel price adjustment, which is a natural and reasonable response of companies active in the same market. In normal and competitive markets, it is unlikely that companies set the same price level without having made some sort of a secret agreement due to differences in their cost structures and other similar matters' (Zajmi, 2012, p. 21[12]).

2. Exemptions

[I expect they are meant to be BLOCK EXEMPTIONS but because the official translation of the LPC is not aligned with the TFEU, especially with reference to the use of the term 'allowance' but also 'exemptions', this fragment needs to be revised by the Authors in order to explain differences in terminology with EU law so that readers can understand which Kosovo instruments are meant to fulfill which EU functions especially with reference to: **individual exemptions vs. group exemptions** vs. **ancillary restraints**]

Although some agreements are contrary to competition law, there are also situations when these agreements are exempt from these general rules. It was emphasized above that in order to ascertain that a practice has been anti-competition, the agreement, decision or concerted practice should aim or result in the prevention, restriction, or distortion of market competition. 'When the analysis of these clauses does not reveal that the impact on competition is significantly detrimental, the consequences then should be considered and in order for it to fall under the prohibitions it is necessary to ascertain the presence of factors proving that competition in fact has been obstructed or restricted, distorted to a considerable extent' (Zajmi, 2012, p. 37). Therefore, the LPC provides exemptions because in cases foreseen by the LPC (the goal

[11] Translation by the Authors of this paper.
[12] Translation by the Authors of this paper.

of which is not a serious violation of competition or the impact of the violation does not significantly impair market competition) sometimes a harmful effect is indispensible to achieve positive market objectives or public interest goals.

The LPC contains an entire group of' 'exemptions and allowances' including: Exemption on horizontal agreements, Exemption on vertical agreements, and Exemption for license agreements, Small value agreement.

This section of the LPC speaks first of an 'Exemption on horizontal agreements':

'1. Horizontal agreements, especially agreements the objective of which is rationalization or specialization of economic activity, researching and developing products or processes, joint purchase or sale of products from one single source, may be exempt from prohibition set forth in Article 4, of this law, due to economic efficiency.
2. The agreement is justified by economic efficiency if the following conditions are fulfilled:
   2.1. reduction of production or distribution costs, improvement of efficiency, improvement of products or production processes, encouragement of research for development and dissemination of technical or professional knowledge, rational exploitation of resources or encouragement of the development of small and medium enterprises;
   2.2. more direct participation of consumers or users in these advantages.
   2.3. not significantly limit competition'[13].

In order to consolidate the provisions of the LPC, it is also necessary to refer to the jurisprudence of the Court of Justice of European Union (hereafter, CJEU) in particular to the *REMIA* case where the Court of Justice had to rule whether a competition clause was conflicting Article 101(1) TFEU, which is part of enterprise sales contract[14]. CJEU ruled that such a clause was necessary for the sale of the enterprise. The competition clause was classified as exemption agreement and was not in violation of Article 101(1) TFEU (Papajorgji, 2013, p. 47).

The LPC contains also an 'Exemption on Vertical Agreements':

'1. Vertical agreements may be exempted from prohibited agreements set forth in Article 4 of this law due to economic efficiency, especially agreements the objective of which is:
   1.1. to limit direct contact sales within an exclusive territory or against a group of exclusive clients, reserved for the supplier itself or another distributor authorized by the supplier, if such an agreement does not restrict sales of the distributor's clients;

[13] Article 5 of Law on the Protection of Competition of Kosovo, Law No. 03/L-229.

[14] 42/84 *Remia and others v. Commission*, ECLI:EU:C:1985:327.

1.2. to limit sales to end users by the distributor that is engaged in whole trade level activities;
1.3. to limit sales to unauthorized distributors from members of a single distribution system, in which supplying enterprises, directly or indirectly, sell contracted products to distributors selected based on specified criteria;
1.4. to limit the distributors' right to sell component parts to clients, who use the same for production of products similar to that of the supplier.

2. Provisions set forth in paragraph 2 of Article 5 of this law also apply to paragraph 1 of this Article'[15].

The LPC contains an 'Exemption of License Agreements':

1. License agreement and the agreement for selling the industrial property rights may be exempt from prohibited agreement specified in Article 4 of this law, if:
   1.1. freedom of trade of the merchant, licensed entity or other undertakings is not restricted unjustly, and;
   1.2. market competition is not significantly limited.
2. Limitations pursuant to article 4 of this law are not valid for the buyer, for the time period in which these limitations do not exceed the period of purchased right or the right that makes the object of the license, especially when:
   2.1. they are justified by the interests of the seller or the licensor requesting better technical use of the object of the protected right;
   2.2. they set an obligation to exchange experience or to issue nonexclusive invention licenses, improvement or implementation of the latter, on the condition that these obligations are the same for the seller and the licensor;
   2.3. their object is indisputability of the protected right;
   2.4. they contribute to minimal use of the protected right which is object of license or payment of a minimal tariff;
   2.5. they label licensed products, not excluding producer's reference[16].

Part of the exemptions and allowances section of the LPC is also the provision on 'Small Value Agreements' (in EU law terminology: *de minimis* agreements) which states that '[a] small value agreement is considered an agreement where their joint participation in the market is not significant and does not disturb competition. Criteria and conditions on defining the

[15] Article 6 of Law on Protection of Competition of Kosovo, Law No. 03/L-229.
[16] Article 7 of Law on Protection of Competition of Kosovo, Law No. 03/L-229.

Agreements of small value shall be regulated through bylaws issued by the Government, based to the Authority proposals'[17].

III. Insurance Market

1. Legislation, licensing and supervision of insurance companies

The insurance industry – that is, the organization and functioning of insurance companies in accordance with requirements and modern trends of economic development on the national and international level – began in Kosovo in 1999.

In 2001, United Nations Interim Administration Mission in Kosovo (hereafter, UNMIK) promulgated Regulation No. 2001/25 on the Licensing, Supervision and Regulation of Insurance Companies and Insurance Intermediaries (hereafter, Insurance Regulation), which was meant to establish a domestic legal regime in Kosovo's insurance field. Based on the Insurance Regulation, all insurance companies which now operate in the national insurance sector are licensed and function under this legislative act. Insurance companies active on the Kosovo market, offering compulsory motor liability insurance services as well as offering non-compulsory insurance types, are bound by the Insurance Regulation and by a set of bylaws issued by the Central Bank of the Republic of Kosovo (hereafter, CBK) (Zajmi, 2012, p. 3).

The Insurance Regulation describes in detail the nature of insurance, including monitoring insurance, sets forth obligations of the authority (the CBK) in issuing bylaws such as regulations, orders, directives and other decisions foreseen by the Insurance Regulation, which served as the basis for all actions undertaken for the purpose of advancing and development of insurance in general (Ahmetaj, 2012, p. 4).

The main objective of the Insurance Regulation is to define the powers and authority of the insurance supervisory body – the CBK. These powers relate to, first, the licensing of insurance companies and insurance intermediaries (meant to protect insurance policy-holders) and second, the exclusive responsibilities and obligations of the CBK to draft and approve regulations, directives, guidelines and criteria associated with the business of insurance companies.[18]The Insurance Regulation grants therefore the CBK extended

[17] Article 8 of Law on Protection of Competition of Kosovo, Law No. 03/L-229.

[18] UNMIK/REG/2001/25, 5 October 2001 on licensing, supervising and regulating Insurance Companies and Insurance Intermediaries. This regulation is still in force and is the main legal

powers on licensing, supervision and regulation of insurance companies and the insurance market in Kosovo.

According to the Insurance Regulation, in order for an insurance company to engage in the insurance business it must be licensed by the CBK through a procedure set forth by the Insurance Regulation. The CBK shall grant a license to an insurance company only if it is satisfied that the following minimum requirements are met:

(a) The insurance company shall be a corporation formed under the applicable law in Kosovo, or a branch of a corporation formed under the laws of another jurisdiction;
(b) The minimum required capital has been paid-in;
(c) The business plan of the insurance company is based on a sound analysis under reasonable assumptions;
(d) The insurance company undertakes to comply with all provisions of the present regulation; and
(e) The qualifications, experience, and integrity of the insurance company administrators, principal shareholders and those who propose to have or have significant interests are appropriate for the insurance company's business plan and financial activities.[19]

The CBK may prescribe rules setting out additional requirements consistent with the Insurance Regulation.

(a) Within three (3) months from the date of its receipt of a completed application for an insurance company license, the CBK shall preliminarily approve or deny it and notify the applicant of its decision in writing; notifications of a denied license shall state the grounds on which the license was denied.
(b) In the case of preliminary approval of an application for an insurance company license, the CBK shall enumerate the conditions for the insurance company to receive the license to commence its operations.
(c) If an insurance company fails within one (1) year to comply with the conditions to receive the license to commence operations, the preliminary approval of the application shall expire.
(d) When a corporation has been formed in Kosovo with the intention of applying for an insurance company license, all founding corporate documentation, including the founder's agreement, charter, by-laws, and any shareholders' agreement, or equivalent documentation, as well

act in the insurances sector in Kosovo. The Kosovo Government has proceeded to the Kosovo Assembly to pass the Law on Insurance, but the new law has not been approved yet by the legislator.

[19] Article 12(1) of UNMIK/Regulation/2001/25.

as any additional information required by CBK rules, shall be submitted to the CBK.

(e) The charter establishing the insurance company shall contain information regarding the corporate name and address, the amount of charter capital, classes of shares, numbers and nominal values of each class of shares, and the voting rights accompanying those shares.

(f) In addition to any grounds set forth in a CBK rule, the CBK may refuse to issue a license to an insurance company where it determines that the best interests of policyholders will not be well served by approving the application.

(g) An insurance company license shall be granted for an indefinite period of time and shall not be transferable.

(h) Decisions on the licensing of insurance companies shall be taken by the CBK independently. The CBK shall be guided by the desire to ensure a sound and stable insurance market in which fair competition and consumer choice is enhanced[20].

In order to improve the functionality of the Kosovo insurance market, the CBK approved in 2014, in accordance with its competences, a separate Regulation on the Licensing of foreign insurance companies and branches of foreign insurance companies.

The Licensing Regulation determines the criteria, requirements, procedures and license application terms for foreign insurance companies or branches of a foreign insurance companies referred to as an *insurance company*, except for cases when an insurance company, established as a subsidiary or branch of a foreign insurance company, is specifically addressed. The Licensing Regulation is applicable to all entities applying to the CBK for a license to operate in the insurance market in the Republic of Kosovo[21]. According to the Licensing Regulation, in order to obtain a license, a company offering life and non-life insurance policies needs to have a charter capital of 3,000,000 EUR. 'Charter capital of any insurance company licensed to operate in the insurance market in the Republic Kosovo cannot be less than three million Euros (€3.000.000). For this reason the insurance company applying for the license to operate in Kosovo, after receiving final license, shall deposit charter capital at CBK as foreseen in this Articles'[22].

On 23 June, the Kosovo Assembly passed the Law on Compulsory Motor Liability Insurance No. 04/L-018, which regulates compulsory motor liability insurance (hereafter, TPL).

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[20] Article 12(2)-(9) of UNMIK/Regulation/2001/25.

[21] Article 1 of CBK regulation of 30 October 2014 on licensing of the insurance companies and branches of foreign insurance companies.

[22] Article 10 of CBK regulation.

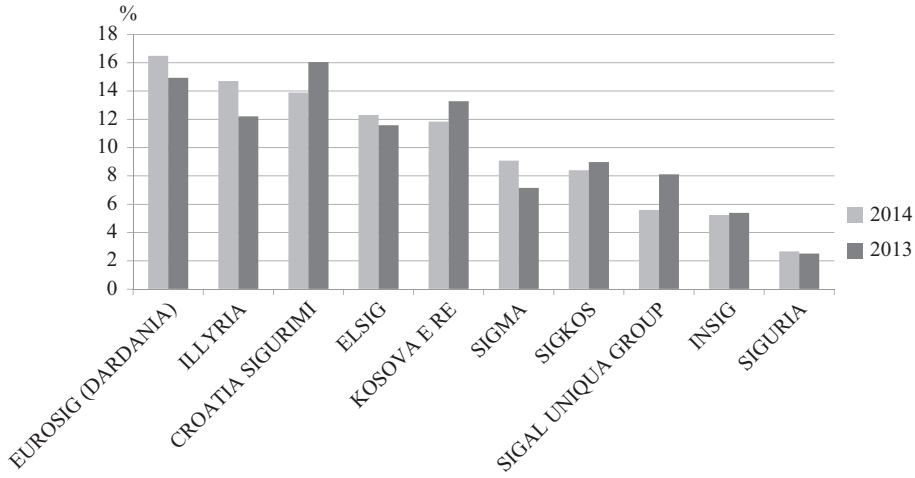
The TPL determines that the owner of a vehicle must contract a motor vehicle insurance covering the liability for damages caused to third parties, regardless whether the damage is material or non-material, prior to using the vehicle and irrespectively of their actual users. A compulsory insurance policy (a contract covering liability to third parties, valid all over the territory of the Republic of Kosovo) can be contracted only by insurers licensed by the CBK through the payment of the assigned Premium (Mazreku, 2012, p. 5).

Until 2015, 10 insurance companies operated in Kosovo. Two additional ones were licensed in 2015 bringing the current total to 12 insurance companies operating in a market of 1,804,944 inhabitants[23].

This small number of companies indicates that there are barriers for new companies to enter the market. One of those lies in the aforementioned high amount of the charter capital needed to enter the Kosovo insurance market which is currently set at 3 million EUR[24]. Aside from the need of a large charter capital, there are indications that existing insurance companies have concluded secret agreements to make new market entry impossible.

Looking at the general insurance market shows that the five biggest companies control 70% of the market, shared almost proportionally between them. The rest of the market is covered by five other companies[25].

Table 1. Insurance market in Kosovo in 2013–2014



[23] https://ask.rks-gov.net/: official web site of Kosovo Agency of Statistics.

[24] Article 10(1) of CBK regulation.

[25] In the calculation, the methodology was used by which an overview of the gross premium income was extracted for all companies and compared with each other.

Kosovo's insurance market is dominated by compulsory motor vehicle liability – TPL. Analyzing this market, 'one would notice that compulsory motor vehicle liability constituted 70.1% of the portfolio in 2012, and around 70% in 2011, while other non-TPL insurances constituted 27% with only 1.77% of life insurances' (Kryeziu, 2013, p. 7). Unfortunately, no changes are expected in this regard in upcoming years either.

It is fair to say that the above situation is related to the economic situation in Kosovo and the fact that potential clients lack sufficient information on the benefits and costs of other types of insurances. Insurance companies, each of them individually, should thus do more to increase the awareness of both private citizens and businesses of the purposes of insurance and of the different types of insurances which they have on offer. Information and awareness campaigns should be more consumer-oriented since they are even less informed about the insurance market than businesses[26]. As a result Kosovo's citizens tend to only use compulsory policies with very few voluntary insurances. For this reason, it is recommended that 'Promoting activities of insurance companies should be focused on increasing individuals' and businesses' knowledge of the different types of insurances, other than TPL, since other types of insurances as rarely purchased despite the fact that their prices are not unaffordable'[27].

2. Harm to competition by insurance companies

As to the perception of the public, researchers and clients, insurance companies have continuously violated the provisions of the LPC. This perception was confirmed by the Kosovo Competition Authority – the body competent to review and decide according to an administrative procedure, on the applicability of competition law in Kosovo.

In the Decision No. 5/1 dated 27 December 2010, the Kosovo Competition Authority fined ten insurance companies for their involvement in an agreement signed in 2009 that fixed prices of insurance policies.

The Kosovo Competition Authority conducted a thorough investigation of the national insurance market focusing on the domestic market for compulsory TPL insurance. After the investigation, the Competition Commission reached the decision on the agreement of insurance companies to fix prices for the sale of insurance policies for motor vehicle insurance policies covering liability for damages caused to third parties. The object of the agreement was fixing prices for the sale of insurance policies for motor vehicle insurance policies covering

[26] Buletini i Sigurimeve, Shoqata e Sigurimeve të Kosovës, Nr. 6, dhjetor, 2013, p. 8.
[27] Ibidem, p. 8.

liability for damages caused to third parties (TPL). Parties in the investigation were 10 insurance companies operating in the Kosovo market.

The Competition Commission, after a two months investigations and the completion of its documentation, collection of facts and meetings, has noticed that there is a justified suspicion of cooperative practices among insurance companies in the form of price fixing of motor vehicle insurance policies. During these investigations, the Competition Commission has found a copy of a written agreement by the Insurance Companies dated 3 July 2009 signed in Gjakova to disallow price discounts on the insurance market.

The Competition Commission has verified that an agreement existed between insurance companies which fixed prices of insurance policies making it impossible for consumers to choose the most favorable offer consequently causing a competition limitation and market distortion, which is in contradiction with Article 3 LPC.

The Commission has proved that all ten insurance companies have signed this agreement and has imposed a fine in the amount of 100,000 (one hundred thousand) Euros on each of them – 1,000,000 Euros (one million) in total.[28]

The insurance companies did not agree with the decision of the Kosovo Competition Authority. They have initiated an administrative dispute before the Basic Court of Prishtina, which has jurisdiction to review the case. On 17 January 2014, the first instance court rejected the appeal of the insurance companies and reinforced the sanctions imposed by the Kosovo Competition Authority. The companies rejected the first instance ruling and filed an appeal before the Appeal Court. After reviewing the appeal of the "Siguria" insurance company, the Appeal Court annulled the judgment of the Prishtina Basic Court of 17 January 2014 and referred the case back for a retrial (decision no. 108/2014[29]).

In its reasoning, the Court of Appeal emphasized, among other things, that the first instance ruling was defective and could not be re-examined. The Court of Appeal stated that there has been no reason for the decisive facts to be analyzed and compared in order to verify the contested facts, and that the decision of the Kosovo Competition Authority was unlawful and did not provide evidence for the potential unlawfulness of the actions of the "Siguria" company. The Appeals Court also stated that the contract on the basis of which the company was sanctioned was non-existent, that the company

[28] Short summary of the case in which the Authority imposed sanctions for the violation of the Law, was taken from https://ak.rks-gov.net (official web site of Kosovo Competitive Authority).

[29] Up to the time of writing, the court's final decision has not yet been reached. This proves that judicial procedures take too long in Kosovo due to an overall inefficiency of the judicial system in general.

had not been informed about this contract and that it had not been signed by authorized persons, the it did not have a name nor a stamp and that it is possible that it had been brought into the proceedings with the intention of damaging the insurance companies, etc. Subsequently, the Appeal Court decided to approve the appeal and annulled the first instance ruling, sending the case back for retrial.[30]

When considering the arguments presented in the reasoning of the Court of Appeal, it is evident that the national judiciary does not have the needed experience to review competition law cases as this is a very new legal area for Kosovo. The Court of Appeal did not reflect on the fact that according to the LPC, a legal infringement can take place even without a written contract and that the LPC provides the possibility of imposing antitrust sanctions on enterprises when there is a distortion of competition in practice and there is grounded suspicion that the enterprises have merely a verbal agreement to fix prices.

IV. Conclusions

In general, Kosovo's legislation on competition protection is in accordance with international standards and is approximated to EU law. In this regard, the Law on the Protection of Competition and the Law Amending and Supplementing the Law on the Protection of Competition have incorporated the legal solutions of the TFEU. This paper is based on the basic principles of the law of competition namely 'prohibited agreements'. The LPC states when agreements between different companies are prohibited, be that on the horizontal or vertical level. The LPC also prescribes which cases are legally exempt from that prohibition (exemptions) including cases that do not significantly infringe competition and are indispensable for the functioning of the market as well as agreements between parent companies and branch company and license agreements.

By analyzing the insurance market as an exemplary case study, the conclusion emerges that the Kosovo Competition Authority, as the competent institution for competition policy and enforcement in the country, has found that 10 insurance companies have infringed the LPC. They were operating in breach of the LPC and were consequently subject to a fine imposed by the Kosovo Competition Authority for a prohibited price fixing agreement concerning

[30] Summary of the reasoning of the Court of Appeal in relation to the appeal filed against the ruling of the Basic Court in Prishtina in confirming the decision of the Kosovo Competition Authority which sanctioned the insurance companies, decision A no.108/2014.

their TPL insurance policies. Although the decision of the Authority was approved by the Basic Court in Prishtina (first instance court), its ruling was later overturned by the Appeal Court (second instance court). The case is currently under re-examination and a final verdict has not yet been reached.

Insurance companies should be cautioned not to undertake actions by which they violate the LPC to the detriment of consumers. The approval of the Code of Ethics in the Insurance Market should be seen as a very positive step in this context, which obligates insurance companies to respect competition law and regulations.

It is noticeable that Kosovo's judiciary is not experienced enough yet in ruling on competition law cases and that special expertise and assistance from the European Union is needed. Kosovo has officially signed the Stabilization and Association Agreement with the EU in October 2015. Aside from its other benefits, Kosovo should also incorporate the practice of the CJEU.

References

Ahmetaj, S. (2012). Fushëveprimi i Rregullores 2001/25 në lëmin e sigurimeve. *Insurance Bulletin, Kosovo Insurance Association*, 2.

Kabashi, S. and Gani, A. (2012). *Konkurrenca dhe e drejta e konkurrencës*. Prishtina: College Biznesi.

Kryeziu, N. (2013). Industria e sigurimeve në Kosovë sfidat dhe mundësit. *Insurance Bulletin*, *Kosovo Insurance Association*, 5.

Mazreku, S. (2012). Ligji mbi Sigurimin e Detyruar nga Autopërgjegjesia. *Insurance Bulletin*, *Kosovo Insurance Association*, 2.

Papajorgji, E., *E Drejta Ndërkombëtare dhe Shqiptare e Konkurrencës*, Tirana: International Institute for Private, Commercial and Competition Law.

Vickers, J. (2003). Competition is everything. *The Economist*, 6-12 December.

Zajmi, F. (2012). Sigurimet në Kosovë, *Insurance Bulletin*, *Kosovo Insurance Association*, 2.

Zajmi, I. (2012), *E Drejta Europiane e Konkurrencës.* Tirana.

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Łukasz Grzejdziak, *Regulacja finansowania usług publicznych w Europie* [*Regulation of Financing Public Services in Europe*], Wolters Kluwer Business, Warsaw 2015, 563 p.

The reviewed book, *Regulation of Public Services Financing in Europe* by Łukasz Grzejdziak, explores the legal approach to the admissibility of state aid granted to undertakings entrusted with the provision of services of general economic interest (hereafter, SGEI). The publication analyses also the broad concept of public services. The author does not limit himself to the mere assessment of the legal orders in chosen EU Member States – issues covered in the reviewed book focus primarily on the output of *acquis communautaire* (*unionaire*) with reference to a number of cases dealt with by EU courts and the decisional practice of the European Commission. The choice of the subject matter merits particular approval in light of its topicality, its significance for the economies of individual EU Member States as well as its legal complexity (multiple aspects are considered). Spanning over 500 pages, the book is extensive and the various issues presented therein have been given equal attention.

The topic of the book focuses, on the one hand, on the provision of public services, the rendition of which is an obligation governed by both EU law and national legislation of individual EU Member States. From the point of view of economic viability, the perfect solution would be to regulate SGEI by way of ensuring free-market conditions for their provision. However, this is often not possible and so special instruments exist to support entrepreneurs who render SGEI. Hence, on the other hand, rules on competition and the admissibility of state aid apply to the financing of SGEI by enterprises. For this reason, the freedom of Member States to establish their own rules on the provision of SGEI is limited. In the framework of pursued socio-economic policy, a Member State regulates its market – imposing obligations to render SGEI, establishing the rules for their provision and ensuring their financing. The latter should, however, comply with competition and state aid rules. Combining these two planes is particularly interesting with regard to the research perspective used, and this approach lends great potential to the chosen topic. [unclear, pls revise of delete]

The book structure is well thought-out. The Author has availed himself of relevant current literature. He has succeeded in covering all of the issues that fall within the scope of the chosen topic – the application of competition rules to the financing of SGEI with state funds. The book has 10 chapters which may be divided into two broader thematic areas. Each chapter offers a summary, as well as the Author's assessments and conclusions regarding the specific matter covered therein. The first

thematic area extends over chapters 1 to 3, which focus on the notions of state aid and public services. The first theme constitutes an introduction to more specific aspects of competition law covered in the later sections of the book. The purpose of the first part is thus to explain key legal concepts related to state aid and the provision of public services. It explores the fundamentals of state aid, its admissibility and its supervision by the European Commission. The second thematic area (chapters 4 to 10) concerns the regulation of SGEI in light of EU law, including the application of Article 106(2) TFEU in its scope related to rules on competition. This thematic area offers a historical analysis of how the doctrine on the financing of SGEI has been shaped over time. The book examines here the development of the jurisprudence of the Court of Justice of the EU as regards the assessment (from the point of view of state aid and SGEI financing) of the application of Treaty provisions by the European Commission. It also scrutinizes Commission decisions and, ultimately, the rules it adopted on the financing of SGEI and the granting of state aid in the form of SGEI compensation. With respect to the historical assessment method used by the Author, I am of the opinion that it has great cognitive value, as it enhances the understanding of the adopted rules and methods of interpreting the Treaty. Binding rules on the financing of SGEI are discussed towards the end of this thematic area. The last chapter offers a summary of how the interpretation of EU rules pertaining to the application of competition rules to SGEI financing came to be. It also provides a recap of the relevant provisions currently in force.

The choice of the applied research methods (dogmatic, comparative and historical) is commendable. The conclusion that such an approach (historical) is both correct and sound stems from two facts. First, it makes it possible for readers to trace back the development process of current institutions from a dynamic perspective. Second, it is a *sine qua non* condition for the understanding and proper interpretation of the law presently in force. Without historical knowledge on the origins of the interpretation of Article 106(2) and Article 107 TFEU, it is impossible to grasp the current legal and interpretative framework. This is particularly evident as regards the approach to the problem of whether providing compensation for SGEI constitutes state aid. This interpretation has undergone major changes – starting from the inference that compensation is a cost refinanced by the State, and as such does not constitute state aid, to the determination that it actually does. Ultimately, following the Altmark judgement, a set of criteria was established that must be satisfied in order to enable the provision of compensation for SGEI. Along with these criteria, a regulatory package was adopted specifying in which cases such financing would be subject to the state aid notification duty. At the same time, granting support based on the Altmark criteria raises doubts and criticisms. This is so especially with reference to Altmark's 4th condition referring to the fact that 'non-tender' financing of compensation must not exceed the average costs of a well-run undertaking that is adequately equipped to provide the public service.

Specific issues on the financing of SGEI, although explored in detail in numerous articles and parts of larger publications on state aid, have not yet been comprehensively covered by literature. The reviewed book certainly fulfils this demand. Public services

have a very broad scope; this work is thus likely to be of interest to a wide range of readers. It covers, among others, granting aid for the provision of network services (postal, energy, telecommunication sectors, etc.), banking services, media services, and others.

Considering the above, I conclude that the monograph by doctor Łukasz Grzejdziak entitled *Regulation of Public Services Financing in Europe* covers significant issues, thus far only partially identified by literature of this subject, that concern the financing of SGEI from public funds. Due to its innovative nature and historical approach, as well as the clear communication of this complex subject matter, I highly recommend this publication.

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Marta Michałek, *Right to Defence in EU Competition Law: The Case of Inspections*, University of Warsaw Faculty of Management Press, Warsaw 2015, 431 p.

Marta Michałek, the Author of the book *Right to Defence in EU Competition Law: The Case of Inspections*, provides an interesting depiction of the interdependence of fundamental rights and competition law. She thoroughly analyses the jurisprudence of the European Court of Human Rights (hereafter, ECtHR) and the Court of Justice of the European Union (hereafter, CJEU). The analysis is supported by national examples from EU Member States as well as Switzerland. The Author focuses on issues stemming from the European Commission's (hereafter, EC) powers of inspection in EU competition law, and examines the positions of undertakings in the light of such an event. Considering its formal aspects, the book contains an introduction, followed by eleven chapters and conclusions, an impressive, noteworthy bibliography, as well as lists of relevant legislation and jurisprudence.

Chapter I is devoted to the elusive concept of the right to defence, which the Author unravels by researching its history, various applicable terminology, its nature, relevant case-law and doctrine. This study is completed by a presentation of a proper definition of the right to defence, which sees it as a complex fundamental legal principle that provides each natural or legal person, whose legal situation has been influence by an authority, with unilateral decision-making power with a justifiable entitlement to protect his legitimate interest by supporting or challenging the claim made by or against him. The Author distinguishes this right from several related notions such as the rule of law, procedural justice and the right to good administration. Chapter II presents the complex landscape characterising the protection of the right to defence in Europe with its multitude of legal regimes deriving from: universal international law (UN Universal Declaration of Human Rights, International Covenant on Civil and Political Rights), regional international law (European Convention on Human Rights) and EU law (Charter of Fundamental Rights). The Author describes subsequently the EC's powers of inspection granted to the Commission by Regulation 1/2003. These powers are means to safeguarding the effectiveness of the EC's investigations, leaving the inspected undertaking with little hope for success in invoking its right to defence. This standpoint is strengthen in Chapter III where the Author argues that procedural fines and periodic penalty payments (for any lesser obstructions during inspections) deprive the inspected undertaking of an effective, not illusory, right to oppose. This is so especially taking into consideration the stringent jurisprudence of the CJEU

on the burden of proof and the zero-tolerance policy regarding excuses given by undertakings.

The Author highlights in Chapter V the EC's practice known as 'fishing expeditions'. These are inspections conducted without a factual or legal basis, driven merely by an unsubstantiated suspicion of a potential infringement. The Author, relying on recent case law, stresses the illegality of this practice and emphasises that the ban thereof is a crucial safeguard of the right to defence of undertakings. Nevertheless, the Author notes that there is scope for improvement, strongly criticising in Chapter VI the EC's practices of seizing and copying the entirety of digital storage mediums, which gives inspectors insights into all documents of the inspected undertaking, regardless of their relevance to the case at hand or whether or not the documents were granted confidentiality under legal profession privilege (hereafter, LPP). This practice is hugely controversial regarding the jurisprudence of the ECHR as it is extremely intrusive and not in line with the principle of proportionality, hence a clear position of the CJEU in this regard is needed.

The five subsequent chapters discuss limitations of the EC's powers by, respectively, the right to privacy (Chapter VII), the principle of proportionality (Chapter VIII), the privilege against self-incrimination (Chapter IX), and, finally, the principle of effective judicial protection (Chapter X). It is noteworthy that the Author examines these issues with regard to both ECtHR and CJEU jurisprudence, noting discrepancies and aspects that need enhancements. The right to privacy, in the opinion of the Author, is fully observed in the EU legal order. This is so because of the EC's obligation to state its reasons and the right of the inspected undertakings to challenge the inspection decision by bringing an action for annulment in light of *Delta Pekarny* (ECtHR) and *Deutsche Bahn* (CJEU), which together sufficiently safeguard undertakings from an unjustified and disproportionate intervention. The Author stresses the importance of the principle of proportionality as a supreme guideline limiting the powers of inspections. Yet she notes also the ever surfacing tendency to shift the focus of the CJEU more towards ensuring the effectiveness of inspections and away from an in-depth examination of the proportionality of the use of intrusive investigative means. This line of argumentation is followed by the Author's criticism of the practice of not granting protection under LPP to documents produced by in-house lawyers, or found in their offices, which is considered contrary to the Strasbourg's approach. Nonetheless, the Author holds the view that with the legally binding status of the Charter of Fundamental Rights (hereafter, CFR) and the future accession to ECHR, guarantees for undertakings relating to LPP should be developed and extended. The penultimate chapter analyses the privilege against self-incrimination. It states that its very restricted nature raises serious doubts as to its conformity with the jurisprudence of the ECHR. Not acknowledging the right to absolute silence is considered particularly problematic. Chapter XI examines remedies and the right to judicial review granted to undertakings and rises questions on their power to ensure the observance of the right to defence. The Author concludes that judicial review of inspection decisions of the EC may, in general, be regarded as complete, albeit some improvements have to be introduced, for example due to the rare use of interim measures.

Marta Michałek's study constitutes a comprehensive and complementary analysis of the undefined and non-codified right to defence of undertakings in EU competition law proceedings as well as its efficiency. The Author thoroughly examined the jurisprudence of the ECtHR and CJEU, pointing to their differences and postulating *de lege ferenda* changes. The Author is of the firm opinion that the future development of the right to defence in competition law proceedings should follow into the footsteps of the Strasbourg's approach. However, one may ponder the correctness of this standpoint when taking into account the *Melloni doctrine* on the principle of the effectiveness of EU law. It might also be worth considering the role of the Charter of Fundamental Rights of the EU in more detail seeing that the CJEU emphasises that the Charter has to be applied over and above the EConHR to cases falling within the scope of EU law. Moreover, according to some researchers, the legal basis of the right to defence in EU competition law proceedings pending before the European Commission is to be found jointly in Articles 41 CFR and 48(2) CFR. [pls provide acronyms]

Those minor comments do not, however, compromise the excellence of the presented study, which is followed by a meticulous examination of abounding Polish, Franco- and Anglophone literature and relevant jurisprudence. In fact, this book is also to be recommended to practising lawyers interested in national and EU competition law since it is written in a comprehensive and clear manner. It is close to a manual on how to behave (or not to behave) in case of an inspection, listing important potential charges facilitating the use of the right to defence in practice.

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Ahtii Sarenpää and Karolina Sztobryn (eds), *Lawyers in the Media Society. The Legal Challenges of the Media Society*, Rovaniemi 2016, 231 p.

The book entitled *Lawyers in the media society. The Legal Challenges of the Media Society*[1] is a collection of scientific papers edited by Ahtii Sarenpää and Karolina Sztobryn. They are the result of the collaboration between the Institute for Law and Informatics, Faculty of Law, University of Lapland and the Faculty of Law and Administration, University of Lodz. The book contains a number of submissions from contributors representing different institutions and was published in 2016 in Rovaniemi.

The title of the book refers to the place played by the law in the world of the new media, information society and new technologies. The scope of the work is definitely broad, as it covers many issues, and is not restricted to a single legal branch. The choice of particular papers fits the main topic of the book. The world is changing very quickly, especially in the area of new technologies. This state of fact constitutes a big challenge for the law from many different perspectives. There is a need therefore for a discussion on the problems related to technical developments for the current legal order and the shape of future regulations. An important question emerges in this context about the role of lawyers in contemporary society.

The book has a logical and orderly structure. It is divided into 3 main parts entitled: *Challenges of the information society*, *Challenges of the network and digital society*, *Challenges of IP and data protection*. Each part contains 5 or 6 chapters. This division is based on merits and it reflects different scope of topics.

The first part of the book reflects a theoretical, sociological and philosophical approach and has a different character to the rest of the book. It touches upon problematic aspects of jurisprudence, legal logic and teaching. In the first chapter, entitled 'Legal Informatics Today – the View from the University of Lapland', Ahti Saarenpää (University of Lapland) deals with 'legal informatics' (especially, but not only from the perspective of Lapland University) as a discipline concerned with different technological and societal changes. According to the Author, this modern legal science is one of the most international fields of law. In the second chapter, entitled 'Knowledge, Information, and Individuals', Wolfgang Mincke (University

[1] A reviewed publication is available at: https://lauda.ulapland.fi/bitstream/handle/10024/62394/Lawyers%20in%20the%20Media%20Society_pdfA.pdf?sequence=2.

of Lapland) presents basic terms of the field of logic explaining concepts such as knowledge, information, meaning and understanding. In the third chapter, entitled 'Law: Linear texts or Visual Experiences? Challenger for teaching law in the network society', Ahti Saarenpää provides interesting remarks of the 'visuality' of the law. He poses an original question about how the law looks like? Its visual dimension is represented by signs – like copyright symbols or traffic signs. Professor Saarenpää suggests that the need for the use of such signs in information networks is going to grow. It is hard not to agree that these 'legal signs' are easier to understand by non-lawyers than legal texts. In the fourth chapter, entitled 'The modern lawyer and his role in the era of the information society and its services', Arkadiusz Bieliński (University of Bialystok) focuses on perspectives available to lawyers in the information society. In his opinion, the changing customer market is going to redefine this sector dramatically. Modern lawyers shall provide legal services with the use of information technology (e.g. Internet ODR – Online dispute resolution, e-mediation, e-negotiations) in order to adapt to the new reality. In the fifth chapter, entitled 'The new information society code of Finland', Rauno Korhonen (University of Lapland) presents the approach of Finish legislation in the field of communications. The recent *Information Society Code* has replaced eight former legal acts (e.g. those concerning domain names, protection of privacy, television and radio). The Author points out that one all-encompassing act can be less understandable for citizens who are obliged to be familiar with the law. The question arises whether this area is not overregulated. In the sixth chapter, entitled 'Legal conceptualism. General theory of law – a new method of statement of the law and a way of explaining applicability of the law', Jakub Rzymowski (University of Lodz) presents his thoughts on the conceptualism in the law. The Author's considerations are interesting but seem to miss the core issue.

The second part of the book focuses of networks and the digital society. It is not surprising that technical development has a very big impact on reality and creates challenges for national and international legal orders. In the first chapter, entitled 'Criminal evidence in the network society: new problems, new solutions?', Jugana Riekkinen (University of Lapland) identifies important issues concerning cybercrime and electronic evidence such as: trans-nationality of cybercrime, lack of physical evidence and obscurity of the crime scene, identifying and locating the suspect, obtaining data, preservation and storage of data, presentation, admissibility and evaluation of data. The Author notes that the structure of the global network, pace of technological development, high volumes of data, speed of network connections and anonymity are significant aspects to consider. In the second chapter, entitled 'Still high in the sky: facing legal challenges of cloud computing in the EU', Agata Jurkowska-Gomulka (University of Information Technology and Management in Rzeszow) raises regulatory problems faced by cloud computing. She analyses existing EU legal provisions, as well as those being developed by the European Commissions, and arrives at the conclusion that future regulation should be of a 'soft' character. The argumentation supporting this statement is very clear and convincing. In the third chapter, entitled 'Connected TV as the technological puzzle call for a reform of audiovisual media services directive', Katarzyna Klafkowska-Waśniowska (Adam

Mickiewicz University in Poznań*)* speaks of the legal problems pertaining to the Audiovisual Media Services Directive. The Author focuses on the meaning of the term 'audiovisual media services' as contained in the Directive and shows the legal consequences of a particular services falling outside its scope, as it is in the case of smart TV's. in the fourth chapter, entitled 'Intermediaries caught between a rock and a hard place – the case of website blocking and no general obligation to exercise control over the user-generated content', Daria Katarzyna Gęsicka (Nicolaus Copernicus Univerity in Toruń) focuses on the phenomenon of website blocking orders against intermediaries. She refers to the jurisprudence of Court of Justice of the EU and European Court of Human Rights. The issue touches upon the delicate subject matter of the clash between copyright protection, human rights and new technologies. In the fifth chapter, entitled 'Protection of minors and human dignity in the information society EU end US perspectives', Magdalena Konopacka (University of Gdańsk) analyses and compares judgments of European courts and those of the U.S. Supreme Court. The Author emphasizes threats for minors and for human dignity posed by the development of the information society. As noted in some cases, the most effective means of protection is self-regulation.

The third part of the book deals with the challenges of IP and data protection in the media society. It goes without saying that technological development results in countless problems and issues in this field. In the first chapter, entitled 'The clash between protection of personal data and protection of intellectual property rights in internet in the CJEU jurisprudence'*,* Krystyna Kowalik-Bańczyk (Polish Academy of Sciences*)* provides interesting observations on the jurisprudence of Court of Justice of the EU on personal data and IP protection. The Author seeks answers to the question if there is a hierarchy between the above. In the second chapter, entitled 'Wrong assumptions, wrong conclusions. Economics of intangible goods and its impact on interpretations of copyright law on the internet', Konrad Gliściński (Jagiellonian University) argues that the Copyright Directive is based on wrong assumptions and thus, *inter alia,* imposes non-legitimate limits on the right to private use. Some of the opinions of the Author seem to be very brave, and thus somewhat disputable, but he touches upon a very interesting issue which clearly deserves attention. In the third chapter, entitled 'What is done cannot be undone. The changing face of intellectual property law in the media society'*,* Karolina Sztobryn (University of Lodz) deals with the influence of the media society on intellectual property law. She stresses that media are the aggregates of intellectual property. The problem is that different categories of intangible goods differ significantly and so a question arises concerning the proper way and amount of protection. Computer programmes can be seen as one of the examples. Many problems in this field exist or are particularly visible in the media environment. In the fourth chapter, entitled 'New methods of processing personal data vs. professional secrecy of lawyers. Difficult Relation? Data protection perspective', Katarzyna Witkowska (University of Lodz) focuses on specific issue of confidentiality and data protection duties of professional lawyers in the digital environment (such as cloud computing). The Author analyses the guidelines issued by the Council of Bar and Law Societies of Europe and other similar associations (on the national

level). She expresses the hope that the level of awareness of lawyers in this field will grow. In the fifth chapter, entitled 'Open government data: legal, economical and semantic web aspects', Dino Girardi (University of Lapland) and Monica Palmirani (University of Bologna) present an overview on the Open Government Data (OGD) policy. They explain legal issues as well as economic aspects arising from the disclosure and exploitation of datasets made available by States. While OGD is a global phenomenon, its shape seems to be still evolving. Describing the current approach of EU Member States, the Authors note the existing lack of consistency or common strategy. In their opinion, OGD should be considered as a harmonized, integrated and interoperable ecosystem. In the last chapter of the book, entitled 'Abuses of dominant by ICT companies in the area of data protection', Aleksander Wiatrowski (University of Lapland) focuses on data protection in the context of existing companies such as Microsoft, Google, Facebook. The Author mainly analyses the meaning of the term 'dominant/dominance' – his observations and findings definitely deserves approval. Yet the Author leaves the reader with the impression that this topic has not been exhausted.

Certainly there is a need for a discussion on matters where the law is chasing reality. The Authors refer to most up-to-date legal issues of considerable meaning. The book as a whole constitutes a valuable source of information and opinions. For obvious reasons, the papers differ significantly as far as topic and styles are concerned. However, they are based on solid bibliographical research and are of high scientific level and accessibility – a fact that makes this book attractive not only to lawyers but also to specialists representing other professions dealing with the media society. I believe the book can be recommended as a very valuable source of knowledge.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Prof. Paul Nihoul: I think it is only a proxy. I personally like the definition which is given by the Court of Justice of the European Union to the notion of dominance and I think we can apply it also to the concept of market power. First, I need an obligatory partner, second, I have the capacity to behave independently, and third, I have the ability to fix the conditions on the market. It is a qualitative approach. In most cases a big market share would mean that there is no credible competition. For example,

there are several supermarkets in Belgium, so there is no dominance, there is not even market power and yet each of them has control over suppliers to the extent that they are actually threatening the existence of choice. Even though there is no huge market share, they are in the position to alter fundamental market mechanisms. Most of us are concerned with the application of competition law in our country, but we have to be aware of the fact that the firms that we represent now do not operate only in Poland, but also in Africa, Asia, America; and they apply different standards on those continents. There is a need for the same standard worldwide. What is it going to be? Chicago standard based on science, but not accepted by everybody?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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First National Consumer Conference Katowice (Poland), 9–10 May 2016

The National Consumer Conference took place on 9-10 May 2016 in Katowice. It was organized by the Department of Law of the University of Economics in Katowice in collaboration with CARS (Faculty of Management, University of Warsaw) and TAURON Sprzedaż. It was the first nation-wide meeting in Katowice which gathered a large group speakers and a large audience from the world of academia, practicing lawyers, economists, employees of the Polish Competition Authority (UOKiK) as well as representatives of the business world. The subject of the conference's deliberations, panel discussions as well as foyer conversations concerned latest legal developments related to consumer protection with particular emphasis on the electricity sector.

The opening ceremony included speeches by Professor Leszek Żabiński (Rector Economic University in Katowice), Professor Robert Tomanek (Rector-Elect Economic University in Katowice), Mr Adam Jasser (President of UOKiK), Grzegorz Lot (Vice-President of Tauron Sprzedaż) and, on behalf of Professor Tadeusz Skoczny, Dr. Jan Walulik. The fact was emphasized from the start that the Conference was a perfect way to exchange both knowledge and experience between the representatives of different worlds, which should allow them to discuss the current state of research from many different perspectives.

According to the organizers, presenting the questions in both economic and legal terms makes it possible to analyze them in an interdisciplinary fashion which would further the development of this legal area.

The programme of the first day of the Conference was extensive and included five panels dedicated to basic competition and consumer protection issues including: standard contracts, abusive clauses, the prohibition of violations of collective consumer interests and, latest solutions in the field of counteracting practices infringing collective consumer interests.

The Conference was divided into thematic sessions. The first session – *Abusive clauses* – moderated by Dr. Jan Walulik (CARS UW) concerned the problem of abusive clauses in consumer contracts. Anna Mloston-Olszewska (UOKiK, Łódź) spoke first of the advantages and disadvantages of the possibility of declaring as prohibited of clauses of standard contracts contrary to biding legal provisions in the context of recent legislative changes. Marcin Kolasiński (Law Firm Kieszkowska Rutkowska Kolasiński) gave the next speech entitled 'The choice of foreign law in online contract templates and consumer protection'. He discussed therein the question of assessing

provisions permitting the choice of foreign law contained in the rules of UEFA EURO 2012 online ticket sales. Recalling the statements contained in the judgment of the Supreme Court of 17 April 2014 (Ref. No. I CSK 555/13), he pointed out that in an era of dynamic growth such as online sales, legal solutions should meet the expectations of the services market and cannot constitute a barrier to international trade. Jacek Krzemiński (Faculty of Law and Administration, Mikołaj Kopernik University) spoke of 'The future of consumer arbitration – a record for the Polish court of arbitration as an illegal provision in contracts with consumers'. He noted that unlike the European trend, arbitrations are still uncommon in Poland. Nevertheless, defects in judicial proceedings make arbitration attractive for settling consumer disputes. Still, in some cases, an arbitration agreement may be considered to be an illegal contract provision, in particular where a trader enforces the consumer certain conditions for conducting arbitration, which reduces its viability or desirability.[unclear, pls revise of delete]

The second panel concerned control models of standard contracts; it was moderated by Dr. Aneta Wiewiórowska-Domagalska (University of Osnabrück). Christopher Lehmann (UOKiK, Bydgoszcz) spoke of eliminating prohibited provisions from executed continuous contracts in consumer trade. In his view, consumers' growing awareness of the institution of 'illegal contractual provisions' forced entrepreneurs to verify the use of standard contracts. Control of illegal resolutions relates to the need of facing the consequences of placing the prohibited provisions in currently binding contracts, among others, in mortgage agreements indexed to the Swiss franc, as well as life insurance contracts with an insurance capital fund. Dr. Antoni Bolecki (Law Firm Greenberg Traurig, affiliated with CARS) spoke next on the differences between incidental and abstract control, referring also to animatedly discussed issues related to the evaluation of the provisions contained in bank loan agreements in Swiss francs.

The second session of the conference was devoted to the issue of the ban on infringing collective consumer interests. The third panel, 'The essence of violations of collective consumer interests', was moderated by Dorota Karczewska (Vice-President of UOKiK). Michał Strzelecki delivered the first speech entitled 'Practices infringing collective consumer interests in the light of the complete harmonization of business practices resulting from Directive 2005/29/EC on Unfair Commercial Practices'. He presented therein some of the problems related to the implementation of Directive 2005/29/EC on the basis of the case law of the UOKiK President. During the next presentation entitled 'Violation of good practices and activities infringing the collective consumer interests', Aleksandra Kunkiel-Kryńska (Law Firm Wierzbowski Eversheds) presented the role of general clauses in the process of applying the law. She pointed out that the objection of business practices contradiction with good manners appears increasingly in the decisions made by the UOKiK President and asked about their scope in the context of Article 24(2) of the Polish Act on Competition and Consumer Protection (hereafter, Competition Act).

Professor Monika Namysłowska (University of Łódź) moderated the fourth panel entitled 'New solutions in preventing practices infringing collective consumer interests'. Małgorzata Ganczar (Faculty of Law and Administration, Catholic University of Lublin) stressed first the interpretative doubts related to the newly regulated practices

infringing collective consumer interests in Article 24(2(4)) of the Polish Competition Act (so-called 'Misselling'). Marta Burnecka-Szczepańska (UOKiK, Bydgoszcz) spoke next of the new powers conferred on the UOKiK President in cases of practices infringing collective consumer interests in the context of the institution of the 'mystery shopper'. She stressed the assumptions, rationale and objectives of its introduction in Poland. Jan Szczygieł (PhD candidate, University of Silesia) presented another new instrument available to the UOKiK President namely the possibility to present to the court (in matters of competition and consumer protection) an opinion, essential for a case, if presenting this opinion can be important from a point of view of public interest. The speaker stressed the legal nature, form and presentation of evidence pointing out that comprehensive assessment of this institution will be possible only after a considerable time.

The last panel, entitled 'Substantive and procedural consequences of the application of the prohibition of practices infringing collective consumer interests', was moderated by Professor Anna Piszcz (University of Bialystok). Łukasz Wroński (UOKiK) analyzed the effects of violations of the prohibition of practices infringing collective consumer interests and measures to remove them in the decisions of the UOKiK President. The subsequent presentation was entitled 'Modification of the terms of contracts concluded by energy and communication companies with consumers in light of the case law of the UOKiK President' and given by Piotr Suski (PhD candidate, Faculty of Law and Administration, Jagiellonian University, Law Firm Markiewicz Sroczyński). He gave therein a comprehensive presentation on the types of modifications to consumer contracts referring to the provisions of the Act - Energy Law, Telecommunications Law and the Civil Code. In the following presentation, Jan Ułański (PhD candidate, Faculty of Law and Administration, University of Lodz; Law Department UOKiK) and Agnieszka Szafran (Key Specialist, UOKiK, Bydgoszcz) spoke of the prejudicial nature of the decisions issued by the UOKiK President in disputes between individual consumers and traders.

The first session of the second day of the Conference dealt with economic aspects of consumer protection; it was moderated by Dr. Marzena Czarnecka. Professor Monika Namysłowska (University of Lodz, Faculty of Law and Administration) analyzed the role of economics in the forming of consumer law. In the summary of her discussion, she posed the question of how much a lawyer should know about economics, thus giving rise to a following discussion. Jarosław Sroczyński (Law Firm Markiewicz, Sroczyński, affiliated with CARS) gave the next speech entitled 'UOKiK – what do we have from it? An attempt of a research methodology of the so-called consumer increment'. First, the speaker stressed the growing interest in the issue of consumer increment, which is the value that the consumer 'saves' or 'receives' as a result of a decision of the UOKiK President. He then presented his own definition of consumer increment, paying attention to economic issues related to the method of calculating the economic benefit to the consumer, including analyzing the occurrence of similar cases abroad. In conclusion, he stressed that consumer increment is a new, interesting and unexplored research area suggesting that it would be worth organizing a conference dedicated to this issue alone. Jacek Marczak (UOKiK, Bydgoszcz) also

spoke of consumer increment. His speech, entitled 'Voluntary consumer increment on the example of commitments decisions', analyzed the issue of compensation for the public referring to the commitments decisions issued not only on the basis of Polish law by the UOKiK President, but also to certain decisions by US, German and Hungarian competition authorities. Maciej Trąbski (Law Firm Gessel, Koziorowski) spoke last on 'Commitments decisions of the UOKiK President in the case of advertising practices – the character of regulation and judicial practice'. The speaker commenced his presentation by discussing Article 28 of the Polish Competition Act. Then, based on the cited decisions of the UOKiK President, he discussed the question of the specificity of advertising practices, noting the inability to determine the effect of the practice. In conclusion, considering issues related to examining the merits of the entrepreneurs' commitments, he asked the rhetorical question if it pays for the UOKiK President to impose commitments on entrepreneurs.

The second session dealt with consumer rights' protection in the energy sector. The Vice-President of TAURON Sprzedaż, Grzegorz Lot, acted as the moderator. In anticipation of the speakers' presentations, he connected with the audience by initiating a discussion on end users' expectations towards energy companies. Justyna Matysiewicz (University of Economics in Katowice) delivered a speech entitled 'The model of consumers' expected value on the electricity market'. She signaled a range of changes on the Polish market, in particular these related to the liberalization processes and the integration of individual markets within the EU. She focused on consumers' perception of value offered to them by energy suppliers and its evaluation. The model of customers' value on the electricity market is based on three values: conditional, functional and cognitive. This knowledge can be used by energy companies to better adjust their actions and offers to the needs of consumers. Ryszard Stefański (STRATEG financial and marketing consulting) delivered the next speech entitled 'The economic conditions for connecting new customers to power grids and the economic interests of consumers'. Therein he highlighted that the effectiveness of investment projects in the expansion of the gas and electricity network is dependent on many factors. The main factors influencing the evaluation of the profitability of investments in the distribution network are: the amount of capital expenditures, the planned number of customers and volume of sales of services by individual tariff groups, the cost of network operations and service prices in the forecast period. He presented also a methodology for assessing network investment projects. Agnes Marie and Agnieszka Put (PhD candidates, University of Economics in Katowice) gave the next presentation entitled 'Virtualization of the behavior of the consumers of energy services'. They first spoke of the changes in consumer behavior in the market for energy services, paying attention to the progressive phenomenon of consumption virtualization (fulfilling needs through electronic means such as the Internet or TV). They then presented the results of their research carried out with the use of profiles in social media sites such as Facebook and Youtube of the following power companies: Tauron, PGE, Enea, Energa and RWE. Based on the analysis of the content published by consumers on such sites and their comments, the speakers made some classifications of consumers.

The last panel of the conference, entitled 'New Deal' in consumer protection in the energy sector', was moderated by Leszek Juchniewicz (affiliated with CARS). Ilona Szwedziak-Bork (PhD candidate, Faculty of Management, University of Warsaw) considered the question 'How much of a consumer is in the prosumer in the light of the law on renewable energy sources?' The speaker presented the relations between the concepts of the customer, the consumer and the prosumer in the power sector, noting that the provisions conferring powers to the prosumer are scattered in various acts including the Civil Code, the Act - Energy Law, the Law on Competition and Consumer Protection, the Act on Counteracting Unfair Market Practices, and the Law on Renewable Energy Sources. Andrzej Wlazły (Faculty of Law and Administration, Adam Mickiewicz University in Poznań) delivered a speech entitled 'Prosumer energy. Consumer behavior in the energy sector'. The presentation helped the audience to get closer to the sociological aspect of the prosumer movement. The speaker drew attention to the need to provide emerging media with information on subsequent amendments of the Law on Renewable Energy Sources on a stable regulatory framework for the development of prosumer energy in Poland. Marta Kajda (UOKiK specialist) gave the next speech entitled 'The right to change supplier and protection of consumer rights'. She discussed the procedure for changing the supplier with reference to statistical data showing that the number of customers switching electricity suppliers is steadily increasing on a yearly basis. She also highlighted however the negative phenomena that occur in the market due to supplier changes.

After the last speech, Marzena Czarnecka, *spiritus movens* of this conference, summed up the National Consumer Conference, thanked all of the speakers, sponsors and the audience. She stressed that the conference helped to analyze and explain the emerging concerns related to the recent legal changes in the area of competition and consumer protection. In conclusion, Marzena Czarnecka assured the audience that the organizers have decided to arrange the next edition of the Conference in Katowice for next year.

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The Energy Forum of Science and Economy Warsaw (Poland), 21–22 January 2016

The Energy Forum of Science and Economy took place on 21 and 22 January of 2015 in the registered office of the Łazarski University in Warsaw, thanks to the cooperation with Tauron Sprzedaż sp. z o.o.

The Forum constituted the first, of a foreseen cycle of meetings, meant to develop a common cooperation platform for the representatives of scientific institutions, power engineering enterprises, public administration bodies and practicing lawyers with experience in power engineering law. The Forum was organized by the following institutions: the Faculty of Law, Canon Law and Administration at the John Paul II Catholic University, the Faculty of Law and Administration at the Łazarski University, and the 'Mercatus et Civis' Foundation.

The subject matter of the meeting focused, first and foremost, on the principles of developing the common energy market within the European Union, which is constantly facing serious obstacles with respect to both politics and law.

As far as the political aspect is concerned, obstacles arise predominantly in developing unified objectives in terms of energy policy for all Member States. Considering the legal aspect, hindrances concern the need to specify transparent rules of conducting business operations within the internal energy market.

Further to the above, it appears logical that these issues arouse the interest not only of power engineering enterprises, which exist within a given political and legal reality, but also of scientific institutions within the domain of law, and in particular, public commercial law. The latter entities focus their activities not only on the analysis of the legal grounds for the operations in the energy sector, but also on their creative development, by means of assessing and formulating *de lege ferenda* conclusions.

Hence power engineering enterprises, as well as the law and related legal regulations in general, identify the very same objectives within the energy market. Unfortunately, so far the above has not necessarily been synonymous or concurrent with the objectives of the undertakings. The intention of the organizers of the conference had thus been to define a common platform for actions undertaken by power engineering enterprises, universities, and advanced educational institutions, which could cooperate by means of their organizational units to develop a new, better legal framework indispensable for efficient operations in the energy sector.

Among the issues that generated particular interest by the participants in the Forum were: competition within the common energy market, the policy of developing support

systems for renewable energy sources, imposing taxes upon economic operators in the power engineering industry, and legal aspects of using state-of-the-art technologies.

These issues, crucial for power engineering enterprises and often also for their lawyers, constitute a matter of concern for public administration also. They constituted the starting point for interesting discussions conducted during the Forum.

The Forum lasted for two days commencing with opening speeches delivered by representatives of the organizers: the Honorable Jerzy Stępień (Deputy Rector of the Łazarski University, retired President of the Polish Constitutional Tribunal), Professor Artur Kuś (Deputy Dean of the Faculty of Law and Administration, Łazarski University), Professor Marcin Trzebiatowski (John Paul II Catholic University of Lublin) who spoke on behalf of Professor Piotr Stanisz (Dean of the Faculty of Law, Canon Law and Administration, John Paul II Catholic University of Lublin) and Jarosław Król (President of the 'Mercatus et Civis' Foundation).

Professor Andrzej Stanisławek (Senator of the Senate of the Republic of Poland, President of the Senate Committee for National Economy and Innovation) spoke next, followed by Mr Marek Suski (MP, President of the Parliamentary Committee of Energy and State Treasure) who delivered a speech on behalf of the Sejm of the Republic of Poland. In his presentation, he stressed the need to increase the quality and cohesion of energy law and related regulations, in particular within the domain of rules governing renewable energy sources.

Andrzej J. Piortowski (Undersecretary of State in the Ministry of Energy) delivered a speech on behalf of the Council of Ministers of the Republic of Poland. He presented the government's key objectives in the energy sector and noted that the guidelines for the national power engineering policy should take into consideration the specificity of Poland's natural resources and the prerequisites of the energy 'mix' within the electricity generating area.

The first plenary session of the Forum, entitled: 'Common energy market. Legal Grounds', commenced with two introductory lectures. Professor Anna Walaszek-Pyzioł (Faculty of Law and Administration, Jagiellonian University) delivered the first speech on: 'Legal grounds for the common energy market', which mainly addressed issues related to target-oriented development of the joint competences of the European Commission and Member States. The speaker clearly indicated the possibility of shaping national power engineering policy in an independent and autonomous manner, as well as choosing the relevant regulatory methods, provided they do not contradict EU rules.

Professor Anna Haładyj (Faculty of Law, Canon Law and Administration, John Paul II Catholic University of Lublin) referred in her speech to the influence exerted upon Polish power engineering policy by the new climate agreement. In her opinion, the immediate consequence thereof is the need to change the structure of electricity output, including, above all, the increase in the proportion of renewable energy sources in the overall volume of the energy mix.

The following discussion panel moderated by Professor Bartłomiej Nowak (Koźmiński University) was devoted to the main issues of applying power engineering law within the context of building a common energy market. The panel gathered

a number of participants: Professor Anna Walaszek-Pyzioł (Faculty of Law and Administration, Jagiellonian University), Professor Marek Wierzbowski (Faculty of Law and Administration, University of Warsaw), Professor Anna Hładyj and Dr. Michał Domagała (Faculty of Law, Canon Law and Administration, John Paul II Catholic University of Lublin), Adam Janczak (EU Economic Department, Ministry of Foreign Affairs), Dr. Zdzisław Muras (Head of the Legal Department of Dispute Settlement, the Energy Regulatory Office).

The second session of the first day of the Forum, entitled: 'Competences in the Power Engineering Industry. Still a challenge or a reality in the energy market', was moderated by Dr. Małgorzata Ganczar (Faculty of Law, Canon Law and Administration, John Paul II Catholic University of Lublin). It commenced with a lecture by Professor Marcin Trzebiatowski (Faculty of Law, Canon Law and Administration, John Paul II Catholic University of Lublin) which focused on innovation constituting the background for competition among power engineering enterprises in Poland. The speaker noted that it is necessary to take into account the implementation of new technologies in the overall development plans of power engineering enterprises.

Ms Magdalena Vallebona (Institute of Political Studies, Polish Academy of Sciences) delivered the next speech entitled: 'Price as an element of the EU energy market and its regulation'. The presentation referred to the impact exerted by electricity prices upon the development trends of competition in the energy market. The speech also referred to the necessity to take social aspects into consideration when shaping prices.

Ms Marta Olszewska-Staniec (Faculty of Law and Administration, Cardinal Stefan Wyszyński University in Warsaw) delivered the subsequent speech entitled: 'Stranded cost compensation – the experience of Polish producers'. Ms Olszewska-Staniec discussed therein the influence of terminating long-term contracts upon competition in the electricity market, in particular with reference to prices for industrial customers.

The second part of the session was devoted to competition in the energy market. The discussion panel was moderated by Dr. Michał Domagała (Faculty of Law, Canon Law and Administration, John Paul II Catholic University of Lublin). The panel was attended by: Professor Marcin Trzebiatowski (Faculty of Law, Canon Law and Administration, John Paul II Catholic University of Lublin), Ms Magdalena Vallebona (Institute of Political Studies, Polish Academy of Sciences), Professor Mirosław Pawełczyk (President of the Management Board the Polish Foundation of Competition Law and Sector-Specific Regulation), Professor Zbigniew Jurczyk (WSB Wrocław, Head of the Wrocław Delegation of UOKiK), Dr. Marcin Marszałek (Law Firm of Counsellors at Law, Barristers and Advocates Dziedzic, Kowalski, Kornasiewicz and Partners).

A number of issues was under consideration during the panel including: the consequences of the establishment of the Ministry of Energy and the influence of this fact upon the development of the power engineering policy in Poland. Importantly, the discussion covered also the issue of the identification of those areas of the energy market where competition exists and those where it does not. Furthermore, panel participants considered the possibility of price deregulation for households, and the

impact such decision might have upon the possible changes for the aforementioned group of customers.

The second day of the Forum commenced with a session devoted to the legal position of the customer on the energy market. The introductory lectures were delivered by Professor Andrzej Gorgol and Dr. Małgorzata Balwicka-Sczyrba. Professor Andrzej Gorgol (Faculty of Law and Administration, University of Zielona Góra) focused on energy consumption constituting an indicator of preferential excise duty for customers. Dr. Małgorzata Balwicka-Sczyrba (Faculty of Law and Administration, University of Gdańsk) discussed clauses excluding, or limiting the liability of power engineering entrepreneurs in customer contracts.

The subsequent speech by Krzysztof Podgórski (President of the Association of Consumer Ombudsmen, Consumer Ombudsmen of the City of Tarnów) focused on the rights of consumers within the energy market. Professor Aleksander Lipiński (Faculty of Law and Administration, University of Silesia in Katowice) delivered the last speech of the introductory session entitled: 'Decision on strategic localization of the pipeline network'.

The following discussion panel was moderated by Dr. Michał Domagała. It was attended by, *inter alia*: Professor Andrzej Gorgol, Małgorzata Rothert (Faculty of Law and Administration, University of Silesia, Vice-President of the National Council of Consumer Ombudsmen, Consumer Ombudsmen of the City of Warsaw), Dr. Małgorzata Balwicka-Szczyrba (Faculty of Law and Administration, University of Gdańsk), Kamil Pluskwa-Dąbrowski (President of the Consumer Federation), Krzysztof Podgórski (President of the Association of Consumer Ombudsmen, Consumer Ombudsmen of the City of Tarnów), and Adam Pietras (Head of the Legal Office of PGE Dystrybucja S.A.)

The discussion focused primarily on the issue of advantages and risks for consumers connected with their operations on the liberalized energy market. Speakers noted, among others, the need to protect consumers against unfair practices of some electricity dealers, cases which are most frequently referred to Consumer Ombudsmen, and activities the latter undertake to improve consumers' legal security. Attention was also drawn to the need to construct the tax system properly in relation to the final level of energy prices.

The final, fourth session of the Energy Forum of Science and Economy was devoted to new technologies in power generation and support systems for the generation of electricity from renewable energy sources. Introductory reports were delivered by Professor Krzysztof Bandyda (Faculty of Mechanics, Power Engineering and Aviation, Warsaw University of Technology) who spoke on: 'Challenges for the Polish Power Engineering Industry as the result of the transformation of the power generation structure'. Dr. Piotr Lissoń (Faculty of Law and Administration, Adam Mickiewicz University in Poznań) delivered the subsequent speech entitled: 'Differentiation of mechanisms and instruments supporting the generation of electricity from renewable energy sources vs. the type of installation criterion. Considerations with reference to the provisions of the Act on renewable energy sources'. The following speech by Dr Mariusz Szyrski (Faculty of Law and Administration, Cardinal Stefan Wyszyński

University) was entitled: 'Renewable energy in Poland – issues regarding law and administration'. Two further reports were delivered by Ms Róża Szawłowska (Warsaw School of Economics) who referred to the principles of supporting off-shore wind energy according to Polish law and related regulations, and Ms Magdalena Brodawka (University of Warsaw) who spoke on: 'State aid for the generation of energy from renewable sources according to the rulings of the Court of Justice of the European Union'.

After the introductory lectures, the final discussion panel was moderated by Dr. Piotr Lissoń with the participation of: Professor Krzysztof Bandyda (Faculty of Mechanics, Power Engineering and Aviation, Warsaw University of Technology), Dr. Mariusz Szyrski (Faculty of Law and Administration, Cardinal Stefan Wyszyński University), Michał Kornasiewicz (Law Firm of Counsellors at Law, Barristers and Advocates Dziedzic Kowalski Kornasiewicz and Partners).

For the purpose of the round-up session, Professor Artur Kuś, speaking on behalf of the organizers, drew the attention of the audience to the fact that the objectives of the Forum had been reached. Hence it was decided that joint actions of universities, public administration, energy enterprises and energy law practitioners should primarily focus on the development of a more transparent framework for the purpose of consumer protection, and on creating a support system for renewable energy sources, taking into special consideration those aspects of such actions that are connected with taxation. Jarosław Król (President of the Management Board of 'Mercatus et Civis') also stressed their interrelation because the result of the above-mentioned actions would be a real increase in competition in the energy market, which would in turn bring about effects not only in economic terms, but also in the field of energy security.

Summing up, it should be noted that the Forum managed to gather the representatives of 15 research centers, central public administration offices, and several dozen power engineering enterprises and law firms.

The conference was organized in a partnership with: Tauron LLC, Center for Energy Market Information S.A., CIRE.PL, CH. Beck Publishing house, Novum.

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Changes in the Polish Postal Sector, Łódź (Poland), 9 December 2014

A first nation-wide research conference entitled 'Changes in the Polish Postal Sector' took place on 9 December 2014 at the Faculty of Law and Administration of the University of Łódź (WPIA UŁ). The conference was organized by the Student Group of Energy Law and Other Infrastructure Sectors of the University of Łódź (NKPEiISI). The conference was under the auspices of the President of the Office of Electronic Communications (UKE), the Centre for Antitrust and Regulatory Studies of the University of Warsaw (CARS), the National Council of Legal Advisers, the Łódź Scientific Association and the Nationwide Employers Association of Non-Public Postal Operators. Poczta Polska S.A acted as the strategic partner of the conference providing the organisers with substantial financial and organizational support. The Polish Foundation for Competition Law and Sector Regulation Ius Publicum and the law firm Modzelewska&Paśnik actively participated in the preparation of the conference.

The aim of this conference was to analyse changes taking place in the Polish postal sector. An attempt was made during the conference to answer the question on how to liberalize the postal services market. Subsequently, a number of issues were presented and discussed connected to the legal status of the Polish postal services market, financial and regulatory conditions of its liberalisation, non-regulatory interference of the State in this sector and ensuring access to universal postal services.

The opening speech was delivered by Professor Sławomir Cieślak (Vice-Dean of the WPiA UŁ, Prof. UŁ) who stressed the importance of postal law in legal transactions and expressed his satisfaction that a conference dedicated to issues of regulating the postal sector was organised in the edifice of WPIA UŁ. On behalf of the President of UKE, Magdalena Sławińska (chief of the Department of the Postal Market of UKE) expressed her thanks for the invitation to attend the conference and wished all participants a fruitful discussion. Professor Tadeusz Skoczny (Director of CARS) and Professor Kazimierz Strzyczkowski (WPIA UŁ) took the floor next. Professor Skoczny congratulated the organisers for the idea of arranging a conference on the regulation of the postal sector in Poland and wished a lot of success to the student organisation that organized it. He also spoke of the date of the post-conference publication and its guidelines. Professor Strzyczkowski stressed subsequently the substantial meaning of the regulation of infrastructural sectors, which is more and more distinct in our legal system as well as in economic practice. He also thanked both organisers and speakers for all the effort they put into preparing this event and expressed his satisfaction at

the active participation of the student body. In conclusion, he brought the attention of the participants to the conference programme as an example of multidimensional approach to the issue, which painted a big picture of the postal sector in Poland's legal order. Concluding the opening part of the conference, Marcin Kraśniewski (chairman of the Student Group of Energy Law and Other Infrastructural Sectors of the University of Łódź, organiser of the conference) thanked all speakers, chairpersons and partners of the conference for their involvement.

The conference consisted of four parts: Non-regulatory intervention of the State on the postal services market (chairperson: Prof. Kazimierz Strzyczkowski), Financial and regulatory conditions of liberalisation of the postal services market (chairperson: Prof. Tadeusz Skoczny), Ensuring access to universal postal services (chairperson: Prof. Agata Jurkowska- Gomułka, University of Information Technology and Management in Rzeszow), Legal status on the postal services market (chairperson: MA Jarosław Olesiak, University of Łódź).

The first session of the conference contained speeches by Professor Anna Fornalczyk (COMPER), Professor Aleksander Werner (Warsaw School of Economics), Associate Professor Agata Jurkowska- Gomułka, Dr. Anna Górczyńska (University of Łódź). Dr Anna Fornalczyk defined, among other things, the concept of 'public aid', pointed out economic prerequisites which justify obtaining public aid and then moved on to aims of its regulation in the postal sector such as ensuring access to universal postal services and development of competition. She also spoke of the forms of public aid in the postal sector. Prof Aleksander Werner defined the concept of 'services of general economic interest', analysed aspects of granting compensation for providing services of general economic interest, which should be allocated after fulfilment the Altmark criteria. Professor Agata Jurkowska-Gomułka searched for an answer to the question whether the provisions of postal law are well suited to the risks connected to the activities in this economic sector? Dr. Anna Górczyńska presented the postal service in the light of public procurement law.

The second panel gathered representatives of postal operators, the Office of Electronic Communications and law firms. Speakers discussed 'barriers to entry' existing on the postal services market, rules of access to rail infrastructure, charges for postal services and application of competition law in the postal sector. After that, a heated discussion commenced on changes in the postal sector and on insufficient legal consideration for technological progress set by the European Union.

Two graduate-student panels took place in the afternoon. Graduate students selected from the entire Polish territory presented their papers chosen from all applicants on the basis of abstracts sent to the Scientific Council. The latter consisted of academic employees from a number of Polish universities. The selected papers concerned issues such as: ensuring access to universal postal services and a subjective and objective range of Polish postal law.

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CARS Activity Report 2015

1. General information

The Centre for Antitrust and Regulatory Studies (CARS) continued its regular publishing, research and educational activities in the 9th (2015) year of its existence.

The granting of the fourth CARS Award remains among the most noteworthy events of 2015. Unlike in the past however, this year's award was granted in the regulatory, rather than antitrust field. The 2015 CARS Regulatory Award for outstanding academic monographs on legal and economic problems of sector specific regulation honoured Dr. Jan Walulik for his outstanding book entitled *Regulatory reform. The Air Transport Example* (Wyd. EuroPrawo, Warsaw, 2013). The award was once again very generously funded by PKO BP, one of Poland's largest banks.

Professor Tadeusz Skoczny, the founder and Director of CARS, has been selected by the General Assembly of ASCOLA (Academic Society of Competition Law) to become a member of the Board of ASCOLA on 22 May 2015 during the 10th Annual Conference of ASCOLA held in Tokyo, Japan. Professor Skoczny has been tasked to chair the ASCOLA Membership Committee responsible for the expansion of ASCOLA membership primarily in Eastern Europe, Asia and Africa.

CARS continued to engage in advisory activities. In 2015, they mostly took the form of academic expertises commissioned by external partners. In order to ensure the transparency of its activities as well as its continuing scientific independence, the condition for CARS accepting such commissioned work remains the publication off all its research results on the CARS website (www.cars.wz.uw.edu.pl/ekspertyzy). CARS prepared four separate academic expertises in 2015.

In November 2015, CARS signed two agreements with the Polish Competition Authority (UOKiK) concerning the realisation of research projects on the penalisation policy concerning anticompetitive practices and practices infringing collective consumer interests. The above projects are to be completed by June 2016.

The year 2015 proved very productive for the CARS Publishing Programme. Four new titles were added to the CARS Publishing Series 'Antitrust and Regulatory Monographs and Textbooks'. It continued to publish its well established English-language *Yearbook of Antitrust and Regulatory Studies* – two volumes of YARS were released in 2015 (YARS 2015, vol. 8(11) and 8(12)). At the same time, CARS published eight volumes of the Polish-language journal iKAR, *internetowy Kwartalinik Antymonopolowy i Regulacyjny*

(*internet Quarterly on Antitrust and Regulation*). In 2015, both of CARS's journals (YARS and iKAR) went through the ICI Journals Master List 2014 evaluation process receiving their respective ICVs (Index Copernicus Value). The *Yearbook of Antitrust and Regulatory Studies* received an ICV 2014 of 68.41, showing a growing trend since 2013. The *internetowy Kwartalnik Antymonopolowy i Regulacyjny* received an ICV of 48.94, also showing a growing trend since 2013. Both periodicals were also placed on List 'B' of the Polish Ministry of Science and Higher Education. Placing on this list for a number of years already, YARS received 10 points in 2015 (which represents a 100% increase since 2014). At the same time, iKAR received 5 points as a new entry.

In 2015, CARS was involved in the organisation of four conferences – one international and three domestic. Its 'guest lecture' programme has noticeably intensified in 2015 welcoming four outstanding guest lecturers from both Poland and abroad. These exceptional scientific events were complemented by two sessions of the CARS Open PhD Seminar.

CARS signed also in 2015 a cooperation agreement with the National Radio and Television Council.

2. Advisory activities (academic expertises)

2.1. Duty to supply medicine to wholesalers in the light of the provisions of competition law and sector-specific regulation

The expertise was prepared by Professor Tadeusz Skoczny (Department of European Economic Law, Faculty of Management, University of Warsaw) and Mr Marcin Kolasiński (PhD candidate, Department of European Economic Law, Faculty of Management, University of Warsaw). The work was commissioned by INFARMA, the Employers' Association of Innovative Pharmaceutical Companies. The project related to the, at that time, ongoing legislative works on amendments to Poland's Pharmaceutical Law. Since the CARS expertise was published on its website, a condition of accepting the commission in the first place, its results were available also outside the legislative process. The main aim of the expertise was to verify whether it is necessary to guarantee supplies to wholesalers of refunded medicine in order to ensure that patients' every day needs are fulfilled.

2.2. Notion of 'subsidiaries' and 'capital groups' in the light of the Competition and Consumers Protection Act, also taking into account Article 99(3) of Pharmaceutical Law of 6 September 2001

The expertise was prepared by Professor Tadeusz Skoczny (Department of European Economic Law, Faculty of Management, University of Warsaw). It was commissioned by the Regional Apothecary Council in Warsaw. The purpose of this project was to clarify – on the basis of the Competition and Consumer Protection

Act – the term 'subsidiaries' and 'capital group' as defined in Article 99(2) and (3) of Pharmaceutical Law. The latter are the basis for the issue of a permit to run a pharmacy issued by regional pharmaceutical inspectors.

2.3. The possibility and manner of eliminating from the legal order of contractual clauses deemed abusive by the Court of Competition and Consumer Protection

The expertise was prepared by Assistant Professor Monika Namysłowska (Institute of European Economic Law, Faculty of Law, University of Łodz) with the cooperation of Professor Tadeusz Skoczny (Department of European Economic Law, Faculty of Management, University of Warsaw). It was commissioned by the Association of Polish Banks. The purpose of the expertise was to specify the possibility, and potential manner, of eliminating from the legal order of contractual clauses that have been deemed abusive by the Court of Competition and Consumer Protection

2.4. The analysis of examples of anticompetitive concentrations of undertakings on two-sided markets

The expertise was prepared by a team including: Professor Tadeusz Skoczny (Department of European Economic Law, Faculty of Management, University of Warsaw), Dr. Jakub Górka (Chair of Financial Systems of Economy, Department of Banking and Money Markets, Faculty of Management, University of Warsaw) and Dariusz Aziewicz (PhD candidate, Department of European Economic Law, Faculty of Management, University of Warsaw). It was commissioned by the law firm Sołtysiński Kawęcki & Szlęzak in Warsaw. The purpose of this expertise was to analyse six analytical problems relating to pre-emptive control exercised by competition authorities over concentrations between undertakings acting on two-sided markets understood in the economic sense of the term.

3. Publications

3.1. Konrad Stolarski, *Abuse of dominant position on telecommunications markets in the law of the European Union*, Textbooks and Monographs (16), University of Warsaw Faculty of Management Press, Warsaw, 2015

The subject matter of this book concerns the functioning of the prohibition of the abuse of dominance on telecommunications markets in the law of the European Union. It presents an in-depth, comprehensive analysis of this institution meant to explain the problems that may be experienced during its functioning in practice. In principle, the law of the European Union serves as the reference point for this analysis. However, for comparative purposes, the author also considers how similar provisions function in the legal regimes of Poland and selected EU Member States. The main purpose

of this book is to analyze how the specific nature of the strictly regulated telecoms market effects the application of competition law institutions, primarily Article 102 TFEU. In this respect, the author studies issues such as the boundaries between regulatory and antitrust intervention, and the relations between Directives which are the basis for the activities of national and EU regulatory and antitrust authorities. The book also thoroughly analyses several notions particularly important from the antitrust perspective such as market definition, dominance, collective dominance and objective justification of abusive practices. It also presents an analysis of the most characteristic meeting point of regulatory and antitrust law, that is, the 'regulated conduct' defence in antitrust cases.

3.2. Rajmund Molski, *Legal and economic aspects of national champion policy*, Textbooks and Monographs (17), University of Warsaw Faculty of Management Press, Warsaw 2015

A State's policy of promoting national champions has sparked controversy, which has in turn provoked a lively debate on its rightfulness. By now, more questions have been asked than answers given in this debate. The key problem here comes down to the fact whether national champions should form spontaneously or rather, whether an active role in their formation and growth should be taken by the State and if so, what form should the public support take in such cases. Another issue which needs to be addressed here is the real dimension of the policy of promoting national champions pursued in practice by various States, as well as the question of its compliance with competition law and policy understood in a broad sense of the word. As much as these matters have gained particular importance during the time of intensified public intervention in the market economy following the economic crisis, their topicality cannot be reduced merely to this specific period of time. The objective of this monograph is to attempt to respond, at least in part, to these fundamental questions.

3.3. Marta Michałek, *Right to Defence in EU Competition Law; The Case of Inspections*, Textbooks and Monographs (18), University of Warsaw Faculty of Management Press, Warsaw 2015

This book constitutes a doctoral dissertation defended by the author at the University of Fribourg (Switzerland) in 2015. The book examines the question of the protection of undertakings' right to defence in the context of inspections carried out by the European Commission. The assessment of the level of protection granted to undertakings is based on the comparison of: (i) the current EU legal order and the approach adopted by the Court of Justice of the European Union with; (ii) the protection enshrined by the European Convention on Human Rights and the standards set out by the European Court of Human Rights in this matter. The analysis covers the following issues: characteristics of the right to defence; the most relevant international (in particular European) systems or legal acts providing for the

protection of the right to defence; the powers of inspection of the Commission; power to impose fines and periodic penalty payments and some related problems (fishing expeditions, subsequent electronic searches); as well as the most relevant rights and principles (being components of the right to defence) that constitute limitations of the Commission's powers of inspection that is: the principle of proportionality, legal professional privilege, privilege against self-incrimination, principle of effective judicial protection as well as right to privacy.

3.4. Piotr Semeniuk, *Concept of single economic unit in competition law*, Textbooks and Monographs (19), University of Warsaw Faculty of Management Press, Warsaw 2015

The book discusses the conditions of the application of the single economic unit doctrine in competition law. Polish and EU competition law constitute the main legal regimes subject to the analysis in this thesis. Since they both refer to the single economic unit doctrine in a very general manner only, the author also discusses additional legal regimes, mainly US law. Various justifications for the existence of the single economic unit doctrine in competition law are examined in the book. The doctrine is also confronted with the input from the economic sciences (in particular with the 'theory of the firm') and the views expressed towards this doctrine by scholars, courts and competition law enforcers.

The main objective of the thesis, apart from systematizing exiting the views of the judiciary and literature, is to prove that the single economic unit doctrine can take on different meanings and should be subject to a non-homogeneous analysis depending on the legal norms for the application of which it is used. The above should be the case even if the single economic unit doctrine is based on a homogenous ontological phenomenon (the phenomenon of a "firm" described by economic sciences). Each legal norm of the antitrust system is motivated by different aims and functions. Depending on those functions and aims, the single economic unit doctrine should be applied in a different manner. Referring to one, objectively understood, doctrine of a single economic unit can thus be a substantial simplification.

3.5. *Yearbook of Antitrust and Regulatory Studies* (YARS) (www.yars.wz.uw.edu.pl)

The first regular volume of YARS published in 2015 (2015, vol. 8(11)) contained academic papers from authors from Albania, Georgia, Kosovo, Lithuania and Poland.

The second volume of YARS published in 2015 (YARS 2015, vol. 8(12)) contained conference papers presented during the international conference entitled *Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective*. The Conference was organized jointly by CARS and the Faculty of Law of the University of Białystok, which took place in Supraśl on 2-4 July 2015. The authors of the papers contained in this volume derive from a wide range of countries including: Croatia, Georgia, Lithuania, Poland, Portugal, Serbia, Slovenia, Ukraine and Hungary.

3.6. *internetowy Kwartalnik Antymonopolowy i Regulacyjny* (www.ikar.wz.uw.edu.pl)

The year 2015 proved to be another expansion period for the *internet Quarterly on Antitrust and Regulation*. Eight separate volumes of iKAR were published that year – four of them had a general nature containing varied contributions on competition and consumer protection matters (volumes 2(4), 4(4), 5(4), 8(4)). The remaining four volumes were dedicated to specific regulated sectors: rail transport (No. 1(4)), energy (No. 3(4)), audiovisual media (No. 7(4)) and telecommunications (No. 8(4)).

4. Conferences

4.1. International Conference on Harmonization of Private Antitrust Enforcement: a Central and Eastern European Perspective

The Centre for Antitrust and Regulatory Studies (CARS, University of Warsaw) and the Faculty of Law of the University of Białystok (Department of Public Commercial Law) organised an international Conference entitled 'Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective' which was held in Supraśl (Poland) on the 2-4 July 2015. The Conference's main focus was on the implementation of the Damages Directive (Directive 2014/104/EU). The Conference gathered over 40 competition law researchers primarily from countries of the Central and Eastern European region, just over half of the participants came from Poland. The conference papers were subsequently published in the *Yearbook of Antitrust and Regulatory Studies* 2015, vol. 8(12).

4.2. Amended Act of the Competition and Consumers Protection Act – main changes and directions of further modernisations

This Conference took place on 19 January 2015 in Warsaw. Its purpose was to provide a critical summary of the key changes introduced into Poland's Competition and Consumer Protection Act of 2007 by way of the Amendment Act of 10 June 2014 and to discuss the general expectations related to its forthcoming entry into force. The Conference was also meant to provide a platform for initial reflections on future directions and proposals of further modernisations of the Competition and Consumer Protection Act. These would include issues intended to improve the effectiveness of competition protection in Poland, increase the level of its procedural fairness as well as its compatibility with EU and world standards.

4.3. The First Polish Congress on Competition Law

The First Polish Congress on Competition Law – **1. PKPK** – was without a doubt the main event of 2015 as far as competition law field in Poland is concerned. It

was initiated and organized by CARS – Tauron Sprzedaż acted as its official Patron.

The Congress was organized in the context of the 25th anniversary of Poland's transformation – which included the creation of the normative basis of its competition and consumer protection laws and the fight against unfair competition in a free market economy. The Congress was meant to summarise past achievements as well as to identify current and likely future challenges facing academics and practicing lawyers in the field of competition law and unfair competition law.

The Congress took place on 13-15 April 2015 in the Conference Centre of the Polish Competition Authority (UOKiK) in Warsaw. Immediately before the opening of the Congress, an official session took place commemorating the 25th anniversary of the introduction of competition law in Poland hosted by the UOKiK President Mr Adam Jasser.

The materials from the Congress were published in the volume: Competition law 25 years. First Polish Congress on Competition Law, Edited by T Skoczny, Wolters Kluwer, Warsaw, 2016, see also the dedicated Congress website http://www.1pkpk.wz.uw.edu.pl/

4.4. Economics of Competition Protection

A Conference took place on 13-14 October 2015 on the Economics of Competition Protection. It was organized by the Polish Competition Authority (UOKiK) and CARS; it was held in the Conference Centre of the Polish Competition Authority (UOKiK) in Warsaw.

An international seminar on vertical restraints was held during the first day of the Conference. The seminar was attended by the representatives of the European Commission, several national competition authorities of EU Member States, as well as numerous academics and practitioners. The relevant presentations are available on the UOKiK website.

Four panels were held during the second day of the Conference. They were devoted to: the use of economics in competition protection, the use of economic analyses and the conditions of using qualitative methods in the application of competition law as well as the economics of competition protection and regulation towards anti-competitive practices.

5. Guest lectures

5.1. Barry Sullivan, 'Use of Economic Analysis in US Administrative Law'

On 26 October 2015, Professor Barrym Sullivanem (Loyola University, Chicago) delivered a guest lecture entitled 'The Use of Economic Analysis in US Administrative Law'. The lecture was organized by the Centre for American Law Studies, Faculty of Law, University of Warsaw with the cooperation of CARS.

5.2. Rajmund Molski, 'Policy Dilemmas in Promoting National Champions'

On 13 November 2015, Professor Rajmund Molski gave a guest lecture entitled 'Policy Dilemmas in Promoting National Champions'. Professor Molski tackled, among others, some of the most controversial questions of current industrial policy namely: should companies with the status of a national champion come into existence on their own, or should an active role in their creation be played by States and if the latter was true, what sort of State help should they receive? What are the practical experiences with the policy of promoting national champions by different countries? Can such policy be in agreement with competition law?

5.3. Marek Martyniszyn, 'How high (and far) can you go? On fine-setting in cartel cases involving vertically-integrated undertakings and foreign sales'

On 30 November 2015, Dr. Marek Martyniszyn (Lecturer at Queen's University Belfast School of Law) gave a guest lecture entitled 'How high (and far) can you go? On fine-setting in cartel cases involving vertically-integrated undertakings and foreign sales'.

5.4. Paul Nihoul, 'Fairness, efficiency, choice. What standard for competition policy worldwide?'

On 17 December 2015, Professor Paul Nihoul (Catholic University Louvain, ASCOLA Chair) gave a guest lecture entitled 'Fairness, efficiency, choice. What standard for competition policy worldwide?' The lecture was organized by CARS with the support of the Polish Competition Authority (UOKiK) and the Competition Law Association and held the Conference Centre of the Polish Competition Authority (UOKiK) in Warsaw. In his speech, Professor Nihul noted that a growing number of academics look towards maximising consumer choice as a competition law standard, as opposed to the more typical consumer welfare or total welfare standard. According to the speaker, strong support for such an approach can be found in cases such as *Microsoft, Intel* or *France Telecom.* At the same time, he noted that standard economic criteria do not always give correct answers and thus it is necessary to look more closely at consumer preferences measured, for instance, by way of questionnaires.

6. Open PhD Seminar

6.1. Piotr Semeniuk, 'Responsibility of mother companies in Polish competition law and the concept of guilt of collective entities'

A meeting of the Open PhD Seminar took place on 24 March 2015. The presentation given by Piotr Semeniuk was commented by Associate Professor Agata Jurkowska-Gomułka and Associate Professor Anna Piszcz.

The subject matter of Mr Semeniuk's presentation (PhD candidate Faculty of Law Jagielonian University) was that of administrative responsibility of collective bodies in competition law as well as within those bodies. The speaker aimed to answer whether the President of UOKiK can impose fines on mother companies for the behaviours of daughter companies. The speaker also tried to clarify responsibility issues within collective bodies, that is, such legal bodies where a hierarchical decisional structure exists. He mentioned doubts surrounding the amendments of the Polish Competition and Consumer Protection Act concerning the introduction of administrative responsibility of 'managers'.

6.2. Jan Markiewicz, 'Slotting fees' – taking fees other than trade margin in order to have a product placed in the store as an unfair competition practice in the light of Article 15(1)(4) of the Act on Combating Unfair Competition. A traditional interpretation in the light of new jurisprudence'

A meeting of the Open PhD Seminar took place on 11 October 2015. Barrister Jan Markiewicz (Law Firm Wardyński & Wspólnicy, PhD candidate supervised by Professor Ewa Nowińska of the Faculty of Law Jagielonian University) made a presentation on the interpretation of Article 15(1)(4) of the Act on Combating Unfair Competition. According to the current interpretation, the charging of any fees other than a trade margin (that is, the charging of 'slotting-fees'), would be an act of unfair competition as it hinders market access. Since the entry into force of that provision, suppliers have been regularly using it in order to demand the return of what they generally call 'slotting-fees'. Such demands cover mainly payments made for services rendered (e.g. advertising or logistic) and amounts by which prices were cut. The speaker made also a critical analysis of cases where suppliers might have been using this provision unjustifiably and noted that while it cannot be said that the current judicial line has yet changed, he was of the opinion that the judiciary seems to have nevertheless become somewhat more critical towards the suppliers' aforementioned practices. Covered in the presentation was also the transferral of the disputes from judicial to arbitration venues.

7. Agreements: CARS – National Radio and Television Council (KRRiT)

Continuing the tradition of cooperation with public administration bodies responsible for competition protection and sector specific regulation, CARS has signed on 5 May 2015 a cooperation agreements with the National Radio and Television Council (www.cars.wz.uw.edu.pl/). The agreement envisages widespread cooperation between CARS and Polish bodies responsible for the regulation of the radio and television sector in the field of scientific research, publications, conferences and other events.

Ewelina D. Sage
CARS International Co-operator

Ministry of Science and Higher Education
Republic of Poland

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

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

Center for Competition Law and Consumer Protection, Tbilisi (Georgia)

The Center for Competition Law and Consumer Protection was founded in Georgia in June 2014 by Solomon Menabdishvili. The goals of the Center are enshrined in its by-law – its main aim is to promote and enhance free competition on the market. The Center has the following objectives:

1. Start a thorough information campaign on the Competition Law of Georgia in order to promote the new legislation;
2. Work on the development of the current Competition Law of Georgia in order to approximate it with EU rules and eradicate existing flaws;
3. Create a dedicated website for the Center, which would allow interested natural and legal persons to access detail information on the Competition Law of Georgia, its development over recent decades as well as related secondary legislation and guidelines. The website shall provide the definitions of key terms and provisions found in competition law and related soft-laws, interesting decisions of the European Commission and judgments of the Court of Justice of the EU;
4. Print and distribute leaflets and brochures on competition law;
5. Provide online, telephone and personal consultations on competition matters;
6. Represent economic agents before the Georgian Competition Agency and judiciary;
7. Host round table discussions and conferences on competition rules;
8. Help the Georgian Competition Agency implement best practice in Competition Law by providing up-to-date information on competition related issues;
9. Deliver public lectures to interested persons, including attorneys and judges;
10. Invite international experts to deliver guest-lectures in Georgia;
11. Cooperate with Georgian governmental and nongovernmental bodies, including the Business Ombudsman, in order to promote free competition in Georgia;
12. Help economic agents to enter, expand or leave the Georgian market etc.

The establishment of the Center was set out by the adoption of the new Competition Law of Georgia in 2012 as amended in March 2014. The amendment was introduced in order to approximate Georgian legislation with EU rules. This was one of the main requirements of the Association Agreement signed between the EU and Georgia in June 2014.

At the end of 2014, the Center wrote a brochure on novel issues in competition law, which was financed by the German Society for International Cooperation (GIZ).

The Center has hosted a number of public lectures on competition issues with leading European experts acting as guest lecturers. The topics covered include: Economic Analysis in Competition Law Enforcement; Cartels as a Criminal Offence; Private Enforcement through Damage Claims; Power to Carry Out Market Research; Merger Control, etc.

The founder of the Center, Solomon Menabdishvili, is a guest lecturer at Tbilisi State University teaching Competition Law and Consumer Law since 2011. He regularly conducts research in EU Member States and publishes noteworthy articles on current issues of Georgian competition rules as well as on EU competition rules intended for Georgian readers.

Since its creation, the Center has lodged key applications with the Competition Agency of Georgia. First, it asked the Agency to inspect a merger between supermarket chains which compete with each other directly. The merger had not been notified to the Agency. According to the Competition Law of Georgia, fines cannot be imposed on undertakings that fail to notify a planned merger. It is, however, feasible to annul the deal and break up the merger.

Another application submitted by the Centre concerned the pharmaceutical sector. Research has shown that there is a reasonable suspicion that local pharmaceutical companies enjoy territorial exclusivities granted to them by foreign suppliers.

The Center will adequately react to future infringements of competition rules in order to promote competition, which would in turn benefit consumers.

The Center is interested in cooperation with foreign organizations in order to achieve its goals.

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Ministry of Science and Higher Education
Republic of Poland

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ARTICLES

CENTRE FOR ANTITRUST AND REGULATORY STUDIES (CARS)

www.cars.wz.uw.edu.pl

The Centre for Antitrust and Regulatory Studies, CARS (in Polish: *Centrum Studiów Antymonopolowych i Regulacyjnych*), of the University of Warsaw Faculty of Management, established in 2007, became starting from 1 October 2014 an independent organizational unit of the Faculty of Management to engage in teaching and research activities in the field of economics and law of antitrust and sector-specific regulations.

CARS conducts cross and interdisciplinary academic research and development projects, provides consulting services as well as publishes books and periodicals, including the English language Yearbook of Antitrust and Regulatory Studies, YARS (www.yars.wz.uw.edu.pl) and the Polish language Antitrust and Regulation e-Quarterly, iKAR (in Polish: *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, www.ikar.wz.uw.edu.pl). Moreover, CARS organizes scientific conferences and workshops, offers Post-graduate studies (www.aris.wz.uw.edu.pl) and an Open PhD Seminar. CARS co-operates with scientific institutions in Poland and abroad as well as with the Polish competition authority and national regulators in the energy, telecommunications and railways sectors.