Office of Competition and Consumer Protection

DIMENSIONS OF COMPETITION LAW AND POLICY

Warsaw 2014

The Project co-financed by the Polish development cooperation programme of the Ministry of Foreign Affairs of the Republic of Poland

Office of Competition and Consumer Protection

DIMENSIONS OF COMPETITION LAW AND POLICY

Polish aid

Warsaw 2014

CONTENTS

FOREWORD

It is my great pleasure to present a collection of essays on competition law and policy published by the Office of Competition and Consumer Protection (UOKiK) within the Polish aid programme.

Since 2008, it has been a privilege for Poland to support Georgia in its efforts to develop its regulatory framework. To that end, a number of cooperation activities supporting democratic mechanisms and aiming at stimulating growth have been implemented. One of them involves reinforcing the public system, specifically strengthening independent public institutions. As part of this initiative the Polish Competition Authority supported the Georgia Competition Agency (GCA) in setting up its institutional framework and modifying competition law and policy. Throughout 2014 representatives of UOKiK conducted training sessions for GCA officials and shared Poland's experiences and best practice in competition enforcement. The following collection of essays, authored by distinguished antitrust experts, summarises the project and provides enforcement suggestions for the GCA.

In the pages that follow, readers will find articles by renowned competition figures. President Andreas Mundt underlines the great importance of international cooperation in the field of competition enforcement and offers his comments on how newly established competition authorities may benefit from participation in international fora, such as the International Competition Network (ICN). In his contribution Director Carles Esteva Mosso and Mr. Dag Johansson take stock of developments in EU competition policy during the last five years, while Professor Tadeusz Skoczny offers an overview of recent competition developments in Poland. Professor Ketevan Lapachi and President Giorgi Barabadze take readers on a tour of past and recent reforms of Georgian competition law and policy. Finally, the know-how presented over the course of the training sessions has been consolidated in dedicated articles authored by the UOKiK's experts.

I would like to take this opportunity to express my gratitude to all the authors for devoting their time and energy to submit essays for this publication and for joining UOKiK in supporting the Georgia Competition Agency.

We know from our own experience that setting up an independent, well-functioning competition authority is hard work. However, international cooperation and the exchange of expertise and practical experience can bring about successful results. Learning from one another and maintaining direct personal "pick-up the phone" relationships is a fundamental component and pillar in the activities of all competition authorities.

While recently amending Poland's Act on competition and consumer protection[1], UOKiK has itself benefitted from the know-how of its international counterparts including the US Department of Justice and our ECN peers. The law does not consist of principles and rules that last forever or are set in stone, but must be regularly reviewed and adapted to the rapidly evolving economic environment and reflect the concerns and dilemmas voiced by market players. Indeed, the abovementioned reform of our competition system addressed dynamic fluctuations on the Polish market and responded to existing legal uncertainty. The amendment boosts our cartel fighting powers and streamlines merger approval procedures.

Apart from legal changes discussed above, in 2014 we introduced a number of measures that will help us to act even more effectively and deliver fair, evidence-based and impartial decisions.

For example, we boosted the role of economic analysis in all decisions and investigations. We communicated very clearly to stakeholders that we are open to dialogue and we are happy to be challenged in terms of evidence or sector-specific knowledge. We enhanced the role of internal evaluation and challenging prior to issuing decisions. We also appointed an advisory council comprising leading competition law academics and economists. And finally, we have engaged in building a competition network, comprising regulators and law enforcement agencies, to share information and analysis in the hope we will be faster in spotting collusion and consumer abuse.

These changes are only testament to the fact that every national competition authority constantly strives to improve and develop institutional knowledge. We hope that this publication will become useful as the Georgia Competition Agency moves forwards in its goal of protecting and promoting competition.

Adam Jasser

President of the Office of Competition and Consumer Protection

[1] The reform will enter into force at the beginning of 2015.

Giorgi Barabadze

COMPETITION POLICY IN GEORGIA

A country's competition law harmonised with the relevant executive institution is an integral part of democracy and a market economy. Accordingly, on the basis of amendments and additions to the Law of "Free Trade and Competition" of Georgia, on March 21, 2014 by Government Resolution, N288 April 14, 2014, the Georgian Competition Agency was established. Its main objectives are to implement the country's Competition Policy, create and maintain favourable conditions for the development of competition, and prohibit, detect and suppress all forms of anti-competitive agreements and actions.

In accordance with the framework of the Law and the relevant regulations, the Competition Agency has been established as a Legal Entity of Public Law (LEPL), which does not have controlling authority and is accountable only to the Prime Minister.

At the same time, merely adopting the law does not ensure the protection and development of competition on the markets, without highly qualified staff and relevant legal acts. Furthermore, it is established by the Law on Competition (Article 34 (8)) that the competences of the Agency requiring adoption of the legal acts also specified by this Law shall be fully effective immediately upon adoption of the relevant legislative acts. Consequently, the favoured objective of the Competition Agency from the first day of its establishment was the elaboration of the by-laws prescribed by the Law. For this purpose, the Agency has been cooperating with the Sector Economy and Economic Policy Committee of the Georgian Parliament and the concerned ministries, as well as international organisations and local experts. These include experts from the German International Cooperation Agency (GIZ), the Polish Office of Competition and Consumer Protection (UOKiK), the European Union and the World Bank. The contributions of the following Georgian experts in the process of drafting secondary legislative acts are of particular note: Ms. Ketevan Lapachi, Ms. Natia Kutivadze, Ms. Nona Gelashvili, Ms. Mariam Avalishvili - De Bour, Mrs. Tamar Chikhladze, Mr. Temur Khomeriki, Mr. Solomon Menabdishvili, Mr. Ivane Imnaishvili, Mr. Beka Dochviri and Mr. Slava Fetelava.

The following by-laws were prepared and adopted by the Government Resolution within the timeframe determined by the Law (01.09.2014): "Exemptions from Prohibition on Agreements Restricting Competition" (526) and "Small Amounts of Individual State Aid and a General Procedure for Granting State Aid" (529). The following by-laws were adopted by Order of the Chairman of the Competition Agency (30.09.2014): “The forms of applications and complaints, rules for their submission and procedures and deadlines related to the admissibility of the application and complaint” (30/09-1); “Procedure on submission and consideration of notification about concentration” (30/09-3); The Procedure for Applying the Leniency Programme and Benefiting from Exemption from Liability (Leniency Program) (30/09-2); “Methodological guidelines of market analysis” (30/09-3) and “The rule and procedures of investigation” (30/09-5). The 2014 - 2017 Action Plan of the Competition Authority, prepared by Order of the Chairman (16/07-1 of July 16, 2014), establishes free trade and fair competition principles in the country, improves enforcement mechanisms of the competences of the Agency specified by the Law and facilitates the process of fulfilling the commitments of the European Union and the World Bank. This plan describes in detail the measures which should facilitate the protection and development of free trade and competition.

After the adoption of the by-laws the Competition Agency was given the opportunity to fully embrace the practical implementation of the competition policy. Accordingly, the Agency launched an investigation of anti-competitive actions on the commodity markets on its own initiative and in accordance with applications and complaints.

At the same time, the enforcement of competition law requires proper and highly qualified, responsible personnel. Thus, especially in the light of the signing of the Association Agreement with the EU, the Agency was to select personnel prepared to rise to the challenge of creating a healthy competitive environment in the country. From its first day of operation the Competition Agency began the process of selecting qualified staff.

However, even if a selected staff member meets the Agency’s high standards, he/she must have and constantly update his or her practical experience in the competition law of the EU and other advanced countries. For this purpose, the Competition Agency is actively cooperating with the RCC OECD-GVH Regional Center for Competition in Budapest (Hungary), within which it regularly conducts workshops on competition policy issues, where the Competition Agency is actively involved. Furthermore, an agreement has been reached with the RCC OECD-GVH Regional Center for Competition in Budapest (Hungary) and an international seminar entitled “Direct and Indirect/Relevant Evidence in Cartel Cases” will be held in Tbilisi in 2015. Representatives from more than 20 countries will participate.

I would also like to highlight the invaluable assistance the German International Cooperation Agency (GIZ) and the government of Poland have provided. In particular, with the assistance of the GIZ, two employees of Georgian

Competition Agency trained at the Bundeskartellamt for two weeks. A study visit to the Lithuanian Competition authority and the Bundeskartellamt were also organized by the GIZ. We are grateful to the Polish government and experts from the UOKiK who provided highly skilled training on Economic and Competition issues. Since July of this year, seven seminars have been offered in Tbilisi and one in Warsaw.

Joining international professional organisations bolsters the international authority of the Competition Agency and improves the professional abilities of employees. The Georgian Competition Agency is a member of the Sofia Competition Forum and the International Competition Network (ICN).

Participation in different kinds of seminars, conferences and international forums , as well as organising study-tours in countries known for their best practices will help bring Georgia additional knowledge and experience, thereby improving employee qualifications. This should eventually promote fair competition principles in the country, improve the business environment and attract investment.

Wojciech Dorabialski

ASSESSING THE LEVEL OF MARKET CONCENTRATION

Abstract: This article discusses the problems related to calculating market shares for antitrust purposes. I explain the basic market concentration indexes, how they can be used and why they should be used. I also describe various methods used for delimiting relevant markets and explain what the appropriate data are and where an antitrust case handler can look for them.

1. Measures of concentration

Market concentration (market structure) is simply a set of market shares of all firms operating in a particular market. If there are *N* firms in a market, then the market concentration can be completely described by an ordered set (s_1, s_2,…, s_N), which are the market shares of all *N* firms, ordered from largest to smallest. The shares are calculated as:

$$S_i = \frac{V_i}{V_1 + V_2 + \cdots + V_N}$$

where V_i is the value of sales of firm *i*.

The number of firms varies from one industry to another and is sometimes quite large. Moreover, it is not stable over time. Looking at the full list of market shares is therefore not the most convenient approach to analysing the changes in market concentration or to comparative studies. It is much more practical to use a concentration index.

There are many different concentration indexes available, but only two are used commonly in antitrust enforcement. The first group is k-firm Concentration Ratios, calculated as follows:

$$C(k) = \sum_{i=1}^{k} S_i$$

Because we have ordered the firms from largest to smallest, the ratio is the sum of market shares of *k* largest firms. For example, *C*(4) is the sum of shares of the 4 largest firms.

The Herfindahl-Hirschman Index (HHI) is slightly more complicated:

$$HHI = \sum_{i=1}^{N} s_i^2$$

HHI is therefore the sum of the squares of the market shares of all *N* firms. The index takes values between 0 (the value for an atomistic market structure, with very many miniscule firms) and 10'000 (a monopoly). When the firms are symmetric, (all firms in the market have identical market share), then the formula simplifies to

$$HHI = N\left(\frac{100}{N}\right)^2 = \frac{10000}{N} \quad ,$$

which means that the index is inversely proportional to the number of firms. However, if the firms' shares are asymmetric, the index puts more weight on the share of the largest firm. For example, if there are 2 identical firms, with 50% market share each, HHI takes the value of 5000. If we shift 5% market share from firm 2 to firm 1, then we will end up with the following market shares: 55%, 45%. Such reallocation would shift HHI up by 50 points. However, if initially the market is already asymmetric, and the two firms have market shares of 60% and 40%, then shifting a 5% share between the two (which changes the market structure to 65%, 35%) would push HHI up by 250 points.

2. Why measure market concentration?

The simple answer is: because the letter of the law and legal practice tell us to do so. Almost all areas of antitrust use rules based on market shares. When dealing with non-hardcore anticompetitive agreements (such as collective boycotts or discrimination agreements), market shares are used to verify the applicability of *de minimis* exemptions. The rule used by the European Commission[2] is that:

- if the **aggregate market share** held by the parties to the agreement **does not exceed 10 %** on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are **actual or potential competitors;**

2 *"Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)", Official Journal C 368, 22/12/2001 P. 0013 - 0015*

- if the **market share held by each** of the parties to the agreement **does not exceed 15 %** on any of the relevant markets affected by the agreement, where the agreement is made **between undertakings which are not actual or potential competitors.**

"Block exemptions" for non-horizontal agreements also require market share to be verified[3]: "to verify the applicability of block exemption for non-horizontal agreements- the exemption [...] shall apply on condition that the **market share held by the supplier does not exceed 30 %** of the relevant market on which it sells the contract goods or services and **the market share held by the buyer does not exceed 30 %** of the relevant market on which it purchases the contract goods or services"

Similar provisions apply in EU member states and in other jurisdictions. For the purpose of unilateral-conduct cases, i.e. in proceedings against undertakings that allegedly abuse their dominant position in the market (or significant market power), a market share threshold may apply. The threshold may take the form of a rebuttable or non-rebuttable presumption of dominance, or a "safe haven" – a presumption of non-dominance[4], the level of which varies between jurisdictions. For example, according to Poland's Competition Act, dominance is presumed when the market share exceeds 40%. In EC practice, a 40% share is a rebuttable "safe haven" in assessing dominance.

Probably the most important field in which concentration measures are applied is merger control. Tests based on concentration thresholds or indexes are a popular screening method. They enable a relatively speedy and accurate identification of potentially problematic cases. In Poland, the tests are based on the market shares of the undertakings involved in a merger. If the ex-post joint share of merger parties who are competing against each other is below 20%, then it is presumed that the transaction generates no appreciable horizontal anticompetitive effect. The European Commission adopted more nuanced rules in their horizontal merger guidelines[5]. "Competition concerns" are unlikely to arise if the post-merger HHI is below 1000. The same conclusion applies if the post-merger market is moderately concentrated (1500 < HHI < 2500) **and the increase in** HHI is smaller than 250. According to the Commission, even if a horizontal merger leads to a highly concentrated market (HHI > 2000) it is unlikely to be problematic as

[3] Commission Regulation No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

[4] *Recommended Practices for Dominance/Substantial Market Power Analysis*, ICN, 2008

[5] *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, Official Journal C 31 of 05.02.2004.

long as the change in HHI is below 150[6]. Rules such as these are made public not only for transparency purposes, but mostly in order to allow the potential merging parties to conduct quick self-assessment of planned transactions.

Market concentration measures are also used for other purposes. One is to calculate administrative fines, in lieu of the estimation of actual gain or consumer damage. In Poland, for example, an undertaking's market share is used to weigh the impact of anticompetitive practice in one of the steps of fine calculation. Another application is as a cartel detection tool, an example of which is the Dutch Competition Authority's Competition Index[7].

3. The theory behind the use of market concentration

These practical applications of market concentration measures all point to the same conclusion – increasing market concentration above a certain level/threshold increases the risk of harm due to anticompetitive practices. Is this assertion about the relationship between concentration and antitrust risks actually grounded in economic theory? Is it supported by empirical findings?

A background in Economics is not required to understand that a completely concentrated market with a monopoly (or a monopsony on the buying side) will not benefit consumers. Where there is an absence of competition, there are virtually no constraints on price - the only limit is the buyers' willingness to pay, which is also known, in Economics parlance, as demand elasticity. On the other hand, when there are very many small firms in the market, competition brings prices down to a socially optimal level (perfect competition). Along the way from monopoly to perfect competition we pass through various oligopolies. Intuition tells us that the more competitors there are — and therefore the lower the market concentration — the better the outcomes for consumers. Economic theory confirms this. Game theory models of collusion show that collusion between firms is more likely if there are fewer of them. The popular oligopoly models (Cournot, Bertrand) show that margins fall and consumer welfare increases with the rise in the number of oligopolists. It can even be shown that in a Cournot model of a homogenous goods oligopoly with differentiated unit costs, the following relationship holds:

$$avergage\ margin = -\frac{1}{\varepsilon} \cdot HHI$$

where ε is demand elasticity.

[6] The US antitrust authorities stated a slightly different set of presumptions in their own Merger Guidelines (see: Horizontal *Merger Guidelines*, US Department of Justice and the Federal Trade Commission, August 19, 2010).

[7] See: Lilian Petit, *The Economic Detection Instrument of the Netherlands Competition Authority: The Competition Index*, NMa Workin Paper No. 6, January 6, 2012.

This means, in essence, that the price consumers pay falls and industry margins decrease as market concentration (measured by the Herfindahl-Hirschman Index) decreases.

It would therefore seem that our practice of using market share in antitrust enforcement is well grounded in economic theory. However, there are two caveats. The first is that even though economic theory supports the positive relationship between price (or industry margins) and concentration, it does not suggest any clear "concentration threshold". Theory only tells us that as concentration increases, so do antitrust concerns. The second problem is that the above price-concentration relationship is actually quite difficult to observe in reality. A meta-analysis by Schmalensee[8] revealed that empirical (econometric) studies hardly ever identify a clear relationship between firms' profitability measures and market concentration.

There are many possible explanations for this phenomenon, but one of them is particularly insightful. The theoretical models that show the link between price and concentration are short-run equilibrium models. This means that they take the industry structure as given. Cross-sectional studies such as those analysed by Schmalensee are better for identifying long-run relationships. In long-run equilibrium, market structure can be adjusted through growth, entry, exit and mergers. It can be shown that a reverse causal relationship emerges in such circumstances: stiffer competition, and the lower margins that go with it, means that fewer firms can survive. Perhaps somewhat paradoxically, this implies that in long-run equilibrium, higher concentration is a result of more intense competition[9].

So where, after all, is the truth? Can we infer the level of competition from concentration? First, we should keep in mind that antitrust analysis focuses on mid- to short-term effects. The situations we deal with as antitrust enforcers are inherently short-run equilibrium situations. They are transitory phenomena. This does not only apply to mergers. Unilateral or concerted practices aimed at excluding rivals in fact **prevent** the market from reaching a natural, long-run equilibrium. We should, however, mind that current market structure is only one of many competitive forces that work in a given market. Buyer power, threat of entry, regulation may sometimes have a much stronger influence on market outcomes than the number of firms and their market share. The implications of the long-run analysis should also be taken account - perhaps not at the case-handling level, but certainly at the policy level. For example, when setting concentration thresholds, a competition

---

8 Richard Schmalensee, *Inter-industry studies of structure and performance*, in Handbook of Industrial Organization (edited by Richard Schmalensee and R. Willig), vol 2, 1898, pp. 951-1009.

9 John Sutton, *Sunk Costs and Market Structure: Price Competition, Advertising, and the Evolution of Concentration*, MIT Press, 1991.

authority should remember that the larger and more open the economy is, the lower the natural, long-run concentration levels are.

4. Relevant markets – basic concepts

It is not possible to calculate market shares, unless we know what firms or which sales should be included in the calculations. In antitrust matters, we make these determinations by defining a relevant market. As stated in a document published by the International Competition Network "Market shares are useful in the analysis of market power only when they are based on properly defined product and geographic markets[10]."

A correct relevant market definition has at least 2 dimensions: a product dimension (a relevant product market) and a geographic dimension (a relevant geographic market). **A relevant product market** is usually defined as all those products and/or services which are regarded as interchangeable or substitutable by the consumer, due to the products' characteristics, their prices and their intended use. **A relevant geographic market** comprises the area in which the undertakings concerned (the undertakings that supply the products included in the relevant market) are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas. The conditions of competition in the neighbouring areas must therefore be significantly different then in the area defined as the relevant geographic market.

Although formally included in the product market definition, **the level of distribution** can be viewed as an additional, stand-alone aspect of a relevant market definition. The level at which the products/services are distributed affects both the product aspect, as well as the geographic scope of the market. Luckily, the level of distribution is relatively easy to determine, as there is only a handful of clear options, starting from the top: production (or out-of-factory sales), pre-wholesale, wholesale and retail.

In theory, defining the relevant markets should constitute the first stage of the assessment process. In practice, at an early stage only some hypotheses about the scope of the markets or some market variants exist. Any information gathered during the antitrust proceeding can influence the final shape of the market definition. That is why the final definition is usually established somewhere close to the end of the proceeding, especially in merger cases.

---

10 *Recommended Practices for Dominance/Substantial Market Power Analysis*, ICN, 2008

The “gold standard” in defining a relevant market is the **SSNIP test**. The acronym stands for a Small but Significant Non-transitory Increase in Price. Conducting an SSNIP test requires an answer to the question: would it be profitable for **all firms** if they jointly raised prices of all products/services included in the relevant market by 5-10%? If the answer is “Yes”, then the market is not defined too narrowly (though perhaps too widely). If the answer is “No”, then the market is defined too narrowly (some substitute products that should be included have been left out). The SSNIP is called the “hypothetical monopolist” test, because we ask whether it would be „significantly profitable” to monopolise the market – if yes, then this market is potentially a relevant market (though we still should check whether more narrowly defined markets fail the test). It is important to remember that the “small but significant” change in price used in the test is also “non-transitory”, i.e. consumers understand that it is not a temporary spike. A little later I will discuss how this test can be applied quantitatively. For now, however, it is important to remember that SSNIP can be, and often is, used indirectly, as a thought framework rather than as a formal quantitative test.

As relevant markets are all about product substitutability, it is worth recalling that economists distinguish two types of substitutability:

- Demand substitutability – which tells us whether buyers/customers are willing to switch to another product if the price increases;
- Supply substitutability – which informs us about potential competitors-firms that are currently not in the market, but which could be enticed by a price increase to join it (they must be able to enter the market quickly and at very little cost).

While demand substitutability is the basic criterion, supply substitutability should not be overlooked and can play an important role in some market definitions.

5. Defining relevant markets – qualitative criteria

The next two sections present various market definition criteria and tools, starting with qualitative criteria. These may look rather arbitrary at a first glance, but practically all of the qualitative criteria for defining relevant markets discussed here can be fit into the general “hypothetical monopolist” framework. We are simply making a statement that, in our opinion, a given market definition passes the SSNIP test, while other, narrower markets do not. The arguments presented here should support this statement. They can and should be combined and modified, and all of them have been used in past antitrust decisions, a great source of well-structured relevant market definition argumentation. Consulting past decisions should constitute one of the first steps in a market definition analysis.

Below I list the arguments used in the definition of a **product market** ordered (admittedly quite subjectively) from most to least useful. Examples of citations from UOKiK decisions are provided with decision numbers for future reference.

- Physical characteristics and the purpose of the products. Examples: coal production "most coal users and all large coal users cannot substitute coal with another product of different physical characteristics" - DKK 28/07; salty snacks "individual types of snacks have different physical characteristics, but the same purpose" - DKK 124/06;
- Significant difference in price between products which appear to have similar physical characteristics and/or purposes. Example: "medical services financed by public funds are not in the same market as medical services financed by private funds, even though the procedures are essentially the same, the prices for the buyers are significantly different, and serve patients with different needs and financial status" – DKK 60/08;
- Differences in regulations. Example: "collecting household waste is different from collecting hazardous waste - collecting hazardous waste more strictly regulated, a different license is needed" - DKK 94/11;
- Dissimilarity of buyers and buyer behavior. Examples: "displaying movies in multi-screen cinemas is not in the same market as displaying movies in single-screen cinemas, as the two types of cinemas serve a different type of moviegoers, who choose their firm carefully and are not interested in additional services (food and drinks)" - DKK 49/08;
- Cost of switching. Example: "the market for industrial paper bags is different from the markets for other types of industrial bags; for some buyers, paper bags could be substituted with other bags, but this required significant investment in packaging lines and did not constitute an attractive option" - DKK 131/10;
- Similar production process, infrastructure or inputs used. Example: "similar process and similar inputs used for the production of paints and varnishes, hence the two types of coatings constitute a single relevant market"- DKK 82/11;
- Time availability. "Showing films at home (Pay TV or DVD) is not a substitute to movie-going since newly released movies are available at cinemas much sooner" - DKK 49/08

Below follows a list of arguments used in the definition of a **geographic market:**

- Specific properties of the product - some products may lose value in transport. Example: "ready-mix concrete can be transported only about 50 km from concrete manufacturing plant" - DOK 71/07;
- Regulatory barriers. Example: processing scrap batteries - household waste collection - "communal regulations restrict the scope of the market to the area of a single municipality, even though it would be profitable to transport the waste over bigger distances" - DKK 94/11;
- Technical and infrastructural barriers. Example: Production and distribution of network heat – "the area covered by a given network constitutes a separate market" - RKT 69/07;
- Linguistic barriers are important for services and inexpensive consumer goods, where advertising costs and re-labelling constitutes a barrier to entry;
- Area consumers travel from. Example: the market for showing movies in multi-screen cinemas. In this case the traditional travel-time analysis was supplemented with data on cinemagoers' behavior; the city of Warsaw was delimited as a single market, while the Gdansk tri-city area was divided into two geographical markets - DKK 49/08;
- Specific consumer preferences. Example: gelatine desserts and jams – "Polish national market is unique, as consumers prefer basic products used for preparing jelly at home, while in most other countries consumers prefer processed, ready-to eat desserts" - DKK 68/09;
- Organisation of business activity. Example: wholesale pharmaceuticals – "all market participants concentrated their logistics networks and loyalty schemes on the national territory" - DKK 54/08;
- Uniformity of market parameters. Example: outdoor advertising – "even though the advertising posts have a very local reach, all major players had a national coverage and offered uniform prices and contract terms throughout Poland" – national scope of the market - DKK 106/10;

6. Defining relevant markets – quantitative criteria

I will start my discussion of the use of quantitative criteria in defining a market with techniques used to delimit geographical markets as this aspect of the definition lends itself so often to quantitative analysis. This is because in defining a geographic market, we are testing the substitutability between products offered at different locations. Obviously, transportation costs (in terms of both time and money) are the key factor in such an analysis, and are relatively easy to measure. For example, in the case of industrial paper bags, UOKiK determined that it was not profitable to transport the product farther than 1000 km. As a result, two geographic market variants were considered: a 1000-km radius from the plant and, a 1500-km radius (see decision DKK 131/10). In the retail market for FMCG (fast-moving consumer goods) sold via modern-format stores (hypermarkets, supermarkets, discounters), UOKiK assumes that the relevant geographic market is an area with a chrono-radius of a 20-minute drive by car from the point-of-sale.

How exactly do we arrive at the relevant “radius”? Remember, the SSNIP is always the correct analytical framework. We therefore usually ask the following question: if the price of the product increased by 5-10% at a given point-of-sale, how far (how long) would a rational buyer be willing to travel to obtain a substitute product. All we have to do is calculate the distance at which the cost surpasses the mark of 5-10% of the value of the product being transported. The distance calculated this way is the minimal reach of the relevant market, though the exact boundaries may depend on the exact distribution of buyers and their preferences. An example of such an SSNIP-like test for the scope of a geographic market can be found in UOKiK decision RWR 4/08:

“The nearest gas station not included in the relevant market is located 18 km away from Twardogora. An average passenger car would consume 2-3 liters of gasoline when travelling to that location and back. A typical gas tank of a car holds about 40 liters of gasoline, hence the costs of transporting the gasoline amount to at least 5% of the cost of purchase. [...] We can conclude that if the gas stations in Twardogóra collectively increased their prices by 5%, it would not result in a significant outflow of customers. We should therefore conclude that the market has not been defined too narrowly.”

Another empirical method used to delimit a geographic market is the Elzinga-Hogarty test. This test has more limited application, as it is based on actual shipment data between countries or regions and can only be used to test whether another region exerts competitive pressure on the tested region. First, we need two statistics:

- LIFO = (Production – Exports)/Consumption
- LOFI = (Production – Exports)/Production

If LIFO < 0.9 (little in from outside) **and** LOFI < 0.9[11] (little out from inside), then the country fails the test, and does not constitute a separate geographical

[11] Different test thresholds may be appropriate for different countries/product markets.

market. In other words, if we observe that a relatively large share of goods consumed come from imports and a relatively large share of home production is exported, then we cannot claim that the relevant market has national scope.

Let us now return to defining the product market. The best approach would be to apply SSNIP directly, empirically. Notice that a market definition passes the SSNIP test if:

$$(p - c + \Delta p)(q - \Delta q) > (p - c)q$$

In order to conduct the test we need the following ingredients: a price-cost margin (*p-c*), current quantity sold (*q*) and demand elasticity (i.e. the relationship between Δp and Δq). Δp is known – it's the SSNIP (i.e. 5% or 10%). Price-cost margins are relatively easy to estimate, the quantity is known, but the value of elasticity is rarely available, and must be estimated econometrically, using historical data, derived from buyer questionnaires or the effects of natural experiments[12].

Another popular quantitative technique is **correlation analysis**. Since the prices of substitute goods react in the same way to shifts in various parameters, their prices should be highly correlated. Low correlation between a price series, on the other hand, is a strong indicator of a lack of (or "insufficient") substitution between products. Two kinds of problems are encountered in correlation analysis. The first is finding the right benchmark. Correlations of 0.9 or higher obviously support the hypothesis that the products are in the same relevant market, but what if the correlation is positive, but much lower?

In its first Ryanair/Aer Lingus (Case No COMP/M.4439), the European Commission faced the problem of determining whether flights between Dublin and airports in relatively close proximity to each other (e.g. Frankfurt Main and Frankfurt Hahn) constitute the same relevant (geographic) market. A correlation benchmark was set at 0.69, which was the (average) price correlation for Ryanair and Aer Lingus flights between identical destinations. If the price correlation for flights between Dublin and different (but close) airports exceeded this benchmark, the Commission concluded that all these

12 Note that for the test to work properly, the actual price must be at the "correct" level. If the relevant market is already monopolised, then the prices are likely to be elevated to the point where any further increase would be unprofitable, which falsely suggests that the market should be defined more broadly (this is called the *cellophane fallacy*). If the price is below normal competitive levels (due to a price war or regulation), the test would falsely suggest that the market should not be defined more broadly (*reverse cellophane fallacy*).

routes constitute a single relevant market[13]. The second group of problems is related to the measurement of correlation, for which solutions are usually available. They include the risk of finding a spurious correlation (e.g. when a common resource is used in the production of both goods), a lag in response to changes in the price of a substitute good, or the non-stationarity and seasonality of the price series.

7. What data should be sought, and where?

Once the relevant markets have been established, we can proceed to calculating market shares. Here the identities of the suppliers of all products included in the relevant market must be known. Ideally, the data used to calculate market shares should come directly from the sellers. However, due to various restrictions (e.g. some of them may not fall under our jurisdiction), this is not always possible. In any case, various data sources should be consulted if possible. The suppliers may be parties to the proceedings or their competitors, who may want to distort the data, and therefore the numbers they furnish must somehow be verified. These other sources include buyers, trade associations, internal industry reports (produced by sellers and/or buyers), independent industry reports, pubic statistics, business intelligence services[14]. The more sources we use, the better our estimates of actual sales will be.

Although the formula for calculating market shares uses volumes of sales, different metrics may also be appropriate. For example, if the product is a homogenous good, the prices at which different suppliers sell their products will be very similar. In such case, quantities (volumes) of sales can be used, if the data for quantities are more reliable or verifiable. In some market settings, production capacities are equally important as actual sales, and can be used to calculate market share.

In accordance with the concept of the **single economic unit**, all companies belonging to the same capital group should be treated as one firm, hence we calculate a common market share for such entities by summing up the sales of each legal entity. Double-counting must be avoided, so the value of transactions between companies belonging to the same single economic unit should be disregarded; only sales to outsiders should be taken into account.

13 For example, the correlation for flights to Rome Fiumicino and Rome Ciampino was 0.89, so the routes were considered to be in the same market, whereas for Frankfurt Main and Frankfurt Hahn it equaled 0.53, which rendered the evidence inconclusive.

14 For a list of data sources used by competition agencies in merger cases, see: *ICN report on investigative techniques in merger cases*, 2003, International Competition Network

Note that for most applications, the data on market share become much more informative if they are available for a longer time – a minimum of 3 years prior to the date of collection is a good aim. The appropriate numbers are annual data, since these are easiest to verify, and data that refer to shorter time spans may prove too volatile. A time span longer than annual may even be appropriate for markets where large orders arrive infrequently or where long-term contracts predominate.

Conclusion

The person tasked with assessing the level of market concentration faces two main obstacles. The first is defining the relevant market, which means determining which firms and which products should be included in the calculation. The second one is collecting and verifying the data. These obstacles are serious, but not insurmountable – hundreds of antitrust officials and counsels manage to deal with them successfully on a daily basis. The analysis based on measuring concentration in relevant markets remains the simplest, most popular and (arguably) most robust method of assessing competitive constraints.

Marta Gutkowska

STATE AID PROCEDURES IN POLAND

1. State aid procedures in Poland before accession to the European Union

The rules governing State aid had to be applied in Poland long before the country's accession to the European Union (further: EU). The first obligation to monitor the aid was introduced as early as in 1992 by the Europe Agreement, which established an association between the European Communities and Poland[15]. According to Article 63 of the Agreement, any aid that distorted or threatened to distort competition by favoring certain undertakings or production of certain goods, in so far as it affected trade between the Community and Poland, was incompatible with the Agreement.

The Association Council was supposed to adopt the rules required to implement this article within 3 years of the entry into force of the Agreement; however, they were adopted only in May 2001[16]. Until this time in Polish law there was no uniform act regulating the granting and monitoring of State aid.

The rules of implementation imposed on the Polish Government an obligation to establish an independent monitoring authority, which was to establish rules governing the effective supervision of State aid granted in Poland. The authority was also obliged to set up a register of aid and to report annually to the Commission of the European Communities. Aid granted in Poland was assessed in the light of article 87 of the *Treaty establishing the European Community*[17], and as if Poland was one of the least developed EU regions. The rules didn't apply to *de minimis* aid, which was treated as having only a negligible effect on competition and Poland-EU trade.

According to the implementation rules, if an aid measure affected the interests of one of the parties, namely Poland or the European Community,

15 *Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part (Journal of laws 1994*, No 11, item 38).

16 Decision No 3/2001 (2001/615/EC) of the EU-Poland Association Council of 23 May 2001 adopting the implementing rules for the application of the provisions on State aid referred to in Article 63(1)(iii) and (2) pursuant to Article 63(3) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, and in Article 8(1)(iii) and (2) of Protocol 2 on European Coal and Steel Community (ECSC) products to that Agreement (O.J. L 215 , 09/08/2001).

17 Today's article 107 of the *Treaty on the functioning of the European Union* (O.J. C 326, 26.10.2012).

the other party could request information and set up consultations with the aim of finding a mutually acceptable solution.

The Commission of the European Communities committed itself to informing the Polish authority about new laws and providing it with documentation, training, study tours and technical assistance. It was also possible to jointly evaluate problems concerning implementation of the law. Cases in which larger amounts of State aid were involved (over 3 mln EUR) could be submitted to the Association Sub-Committee, which issued a decision or recommendation.

The implementation rules obliged Poland to set up a new law that would regulate the granting and monitoring of State aid. On January 1, 2001, the *Act on conditions for admissibility and supervising State aid to entrepreneurs of June 30, 2000*[18] came into force (further: the Act).

In compliance with the Act, the President of the Office of Competition and Consumer Protection (further: UOKiK) became the State aid monitoring authority in Poland. Accountable only to the Prime Minister, the President is independent from granting bodies and the government.

The Act laid down procedural as well as some substantive rules governing the granting of regional, sectoral and horizontal aid. Important elements of the Act include:

- its scope (excluded sectors and aid amounts to which it applied[19]),
- important definitions,
- general conditions for granting State aid,
- general obligations of aid grantors and beneficiaries,
- compulsory elements of an aid scheme,
- general types of admissible aid,
- conditions of granting regional, sectoral and horizontal aid.
- duties of the UOKiK:
  - *ex ante* and *ex post control* of the aid granted in Poland,
  - procedures concerning incompatible or misused aid.

Important definitions include:

- an undertaking,

[18] Journal of Laws 2000, No 60, item 704.

[19] The act applied at first only to aid above 1 000 000 EUR granted to an undertaking for a period of 3 years but this amount was later decreased to 100 000 EUR.

- small and medium-size undertakings,
- public undertaking,
- aid-granting body,
- date of granting,
- export aid,
- amount of aid,
- public resources,
- regional, sectoral and horizontal aid.

Examples of different forms of aid were also listed in the Act.

The Act contained general rules for granting aid, including the cumulation or Daggendorf rule, according to which no aid can be granted to a beneficiary subject to the recovery obligation[20].

The *ex ante* control of the President of the UOKiK was based on issuing opinions on aid schemes and individual aid projects above a certain amount[21]. No aid could be granted before his or her opinion was issued. The opinions were given within 30 or 60 days[22] and assessed the schemes' and projects' compliance with the Act and the international agreements Poland maintains. When necessary, the President of the UOKiK could ask competitors for information concerning a particular case. The opinions were published on the UOKiK's website. *Ex officio* opinions were also possible.

In order to enable granting bodies *ex ante* control of the aid they were about to grant, undertakings applying for aid were obliged to provide information on any aid received within the previous 3 years.

As far as *ex post* control is concerned, the Act called for both the granting bodies and beneficiaries of aid to report. Failure to do so could result in a fine levied by the President of the UOKiK. The President kept a record of aid granted in Poland and on this basis prepared annual reports for the government and the Commission of the European Communities.

The Act also defined procedures concerning incompatible or misused aid. Where an aid scheme was incompatible with the Act, the Constitution or international agreements, the President of the UOKiK could request the Prime Minister bring the matter before the Constitutional Court, which could annul the scheme and order the aid be returned. In the case of an administrative

20 Judgment of the Court of 9 March 1994 in case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* (ECR 1994 I-00833).

21 See footnote no. 5.

22 30 days in the case of normative acts and 60 days for export credit insurance guarantees.

decision based on such an incompatible law, the aid grantor was required to annul its decision following the Court's ruling. If the grantor failed to do so, the President of the UOKiK could submit a complaint to the Supreme Administrative Court. In case of aid granted on the basis of a civil law, after judgment of the Constitutional Court the aid grantor was required to ask a district court to annul the decision. In cases of misused aid, it was the aid grantor who was obliged to order the recovery. In all cases national executive proceedings were applied to the recovery process.

The Act was the basis for several implementation regulations on:

- methods of calculating aid granted in different forms,
- specific conditions for granting regional, horizontal and sectoral aid,
- methods and scope of reporting and entities obliged to report,
- regions in which aid could be granted,
- maximum aid intensities,
- how information about aid schemes was published,
- sectors in which sectoral aid could be granted,
- information to be submitted to the President of the UOKiK together with the application for an opinion on a State aid project.

2. State aid monitoring in Poland after accession to the EU

The UOKiK President's role in State aid monitoring was far larger prior to Poland's accession to the EU than it is now. State aid monitoring in the EU is an exclusive competence of the European Commission (further: Commission), so the UOKiK's post-accession role was limited considerably. At the same time, it took on new duties in cooperating with the Commission and the European Courts.

Since accession, State aid monitoring in Poland has been regulated by the *Act of 30 April 2004 on procedural issues concerning State aid*[23]. The Act provides only for procedural rules because the substantive law of the European Union has to be applied directly without implementation to the national law.

The monitoring of State aid is distributed between the President of the UOKiK and the Minister of agriculture, who is responsible for the monitoring of aid

[23] Journal of laws 2007, No 59, item 404.

in the agricultural and fisheries sector. The obligations of the Minister of agriculture are analogous to those of the President of the UOKiK.

2.1 Support for grantors in ensuring compliance with the rules on EU State aid

An important role of the President of the UOKiK is to assist State aid grantors in ensuring that State aid granted in Poland is compatible with European law. However, the ultimate responsibility to ensure this compliance lies with the granting bodies. They are also obliged to recover any aid granted in contravention of the *Treaty on the functioning of the European Union* (further: TFEU).

The main responsibility of the President of the UOKiK is to issue opinions on projects of aid schemes and individual aid. According to article 12(4) of the *Act on procedural issues concerning State aid* such opinions include:

- assessment of whether or not the project involves State aid,
- assessment of the aid's compatibility with the internal market,
- suggested amendments ensuring the compatibility of the aid granted,
- information on notification requirements.

Opinions are issued at the request of:

- public authorities developing the aid scheme (in cases of aid schemes);
- granting bodies (in cases of individual aid),
- undertakings applying for aid (in cases of individual aid for restructuring).

Article 14 of the *Act on procedural issues concerning State aid* states that opinions on aid schemes are to be issued within 21 days and on individual aid within 60 days of the receipt of the project together with information required for an opinion to be issued. The scope of the information is defined in a separate regulation and contains *inter alia*: information on the aid-granting bodies and beneficiaries, a detailed description of the rules governing the granting of the aid, the number of beneficiaries, the region in which the aid is to be granted, the expected scheme/project budget. In the case of a project of individual aid for restructuring apart from those above, a restructuring plan and the opinion of a granting body are required.

Opinions define whether or not an aid project constitutes State aid and rule whether or not it is subject to the notification requirement. They also identify possible problems concerning its compatibility with the rules on State aid. The role of the President is therefore *inter alia* to “filter” the issues sent to the Commission, namely to prevent the granting bodies from notifying the cases which are not subject to this obligation and to make them correct evident mistakes. However, post-EU accession, the opinions of the President are no longer binding; the compatibility of State aid with the European rules is decided solely by the Commission.

When aid exempted from the notification requirement is concerned, block exempted aid schemes are subject to the opinion of the UOKiK; however, individual aid projects may be subject to the opinion and notified only on request. After entry into force of a measure granted in compliance with the block exemption regulation (further GBER)[24], the aid grantors submit to the UOKiK a summary information sheet, which is then sent to the Commission via SANI system. The Commission gives the measure a number, which is thereafter required for reporting.

Projects of *de minimis* aid schemes are subject to the screening of the President of the UOKiK, who may within 14 days present his or her reservations concerning the transparency of the rules. Projects of *de minimis* individual aid cases are not subject to the screening. However, for both schemes and individual aid, the legal basis of the measure must refer to a concrete *de minimis* regulation and the granting authority must assess, on the basis of the *de minimis* certificates and other information presented by the undertaking applying for aid, whether the party applying is eligible for aid. The granting body must also issue a *de minimis* certificate stating the amount of aid in gross grant equivalent and submit a report on the aid to the UOKiK.

The President is also responsible for recording some of the local laws. This concerns acts based on and in accordance with national regulation of which the Commission was notified and which it accepted or which was based on GBER. Where such a local law exists, neither notification, nor the opinion of the President of the UOKiK, nor a summary information sheet is required. A local law of this type should be sent to the UOKiK immediately upon entering into force. It is then recorded and published on the UOKiK’s website.

The UOKiK participates in the regular governmental legislative process. The President examines draft legislation, presents comments and suggests amendments aimed at ensuring that law created in Poland is compatible with the rules governing State aid.

24 *Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in the application of Articles 107 and 108 of the Treaty* (O.J. L 187 of 26.6.2014).

2.2 Cooperation with the European Commission and the European Courts

Article 108(3) of the TFEU sets a general notification requirement and a *standstill clause*, which means that no aid can be granted until the Commission approves.

In Poland the President of the UOKiK and the Minister of agriculture notify the Commission of aid schemes and individual aid projects. The notification is prepared based on information from aid grantors and beneficiaries and transmitted via SANI, an interactive system for submitting notification of State aid cases. Notification of aid schemes requires the approval of the Council of Ministers, though local acts do not.

In cases in which the President has released a negative opinion, aid schemes and individual aid projects may still be notified on request. For aid schemes, this requires the approval of the Council of Ministers. In case of individual aid, bodies requesting an opinion may ask for notification within 14 days. Individual aid for restructuring is dependent on the granting bodies, which may change their opinion.

The procedures concerning notification remain in force also for amendments of aid schemes or individual aid projects. Any changes other than modifications of a purely formal or administrative nature, which cannot affect the evaluation of the compatibility of the aid measure with the common market[25], are considered new aid[26] and must be notified.

The President of the UOKiK intermediates between the Commission and the Polish government, aid grantors and aid beneficiaries. The President acts through the Permanent Representation of the Republic of Poland to the EU in Brussels. The UOKiK prepares answers to the Commission's queries based on information from aid grantors and beneficiaries and transfers the Commission's decisions to the entity that has requested notification.

Article 108 (2) of the TFEU sets general rules concerning aid that is incompatible with the internal market or is misused. The President of the UOKiK transfers the Commission's decisions to the entities requesting notification and acts as a prosecutor in civil and administrative proceedings or in proceedings before administrative courts. However, the responsibility of recovering the

---

25 According to Article 4 of *Commission Regulation No 794/2004 of 21 April 2004 implementing Council Regulation No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004)*, an increase in the original budget of an existing aid scheme by up to 20 % is not an alteration to existing aid.

26 In the meaning of Article 1 (c) of the *Council Regulation No 659/199 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union* (OJ L 83, 27.3.1999).

aid lays exclusively with the granting bodies, which must, depending on the situation, order the recovery, change their decision or ask a court to annul an agreement or order the recovery from the aid beneficiary. The recovery is conducted according to national executive proceedings. The aid recipient may not receive any other aid before the recovery process is completed.

Another of the UOKiK's responsibilities is to represent Poland before the European Courts. After approval of the Council of Ministers the President refers matters related to State aid to the European Courts and participates in the proceedings when Poland is one of the parties. Following approval of the Council of Ministers, the UOKiK also brings appeals against the Commission's decisions on behalf either of local authorities or Poland.

The President of the UOKiK publishes information online on State aid cases that concern Poland. This information may include decisions of the Commission concerning State aid granted in Poland, appeals against these decisions, matters referred to the European Courts and judgments of the Courts.

According to Article 42 of the *Act on procedural issues concerning State aid,* the President may participate in audits conducted by the Commission. Officials of the UOKiK may be present during the audit and may put forward remarks regarding the audit and the choice of experts. During the audits, they may request the assistance of authorised government administration officials or officers of the police if the beneficiary obstructs the audit.

The President of the UOKiK may also impose penalties on beneficiaries, granting bodies or public authorities if an audit is obstructed or if information requested by the UOKiK is not submitted or is required to obtain an answer to the Commission's questions. Penalties may be up to 10 000 EUR and may be appealed in the UOKiK Court.

Finally, the President of the UOKiK participates in the public consultations on drafts of the Commission's regulations, as well as "soft laws" like: guidelines, frameworks, communications or notices. The President of the UOKiK prepares the position of the Polish state in cooperation with other ministries, institutions and other interested parties. Furthermore, the UOKiK officials take part in the multilateral meetings with the representatives of the Commission and other member states. However, the Commission can reject the remarks of member states, because European State aid law falls within its exclusive competence.

2.3 Ex post monitoring

An important duty of the President of the UOKiK is the *ex post* monitoring of aid granted in Poland. Aid granting bodies are obliged to report to the President on State aid and *de minimis* aid via an electronic system of planning, registration and monitoring of State aid (SHRIMP). The reports should be introduced to the system within 7 days of the day the aid was granted (not actually paid). Data should also be corrected within 7 days of the receipt of the information about a change to the amount of aid or a mistake in the report. Granting bodies supervised by other authorities submit the reports through the supervising bodies.

If a grantor does not grant aid in a given year, a declaration of no aid must be submitted. Each grantor has a login and password to log in to the system. Before the system was created granting bodies would send the reports to the UOKiK in the form of excel files. There are now about 4500 grantors registered in the system and reporting. The reports include information on: the legal basis of the aid, date of granting, the number of the aid scheme or individual aid, name, legal form, size, sector of activity and tax identity number of the undertaking, identity number of the municipality, amount of aid in nominal value and in gross grant equivalent, the form, objective and source of the aid.

Every year several hundred thousand aid cases are registered in SHRIMP (about 900 000 in 2013). Aid is granted to thousands of beneficiaries (about 300 000 in 2013). The total amount of State aid granted in Poland in 2013 was 5 103,6 EUR (1,31% GDP), while a total of 1 463,5 mln EUR (0,38% GDP) was granted in *de minimis* aid.

On the basis of the reports collected from granting bodies, the UOKiK prepares its reports for the Commission and for the Council of Ministers and Parliament. Such reports indicate the amounts, objectives and forms of aid granted in Poland and an assessment of the effects of the aid on competition.

According to Article 21 of the *Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty*[27], member states shall submit to the Commission annual reports on all aid granted except for *de minimis* aid. Such a report includes information on amounts, objectives and forms of aid and is submitted to the Commission via an electronic system called SARI. On the basis of the reports the Commission publishes a State aid Scoreboard containing a synthesis of the information on State aid granted in the EU.

2.4 Dissemination of knowledge

Another important function the President of the UOKiK has is to disseminate knowledge on the rules of State aid. UOKiK officials prepare interpretations

[27] OJ L 83, 27.3.1999.

of the EU law for public authorities, granting bodies, aid beneficiaries and any other legal or natural persons applying for it. The UOKiK website, http://www.uokik.gov.pl/, is an important source of information. The site contains EU law on State aid, Polish law on procedural issues concerning State aid, implementing acts and forms to be completed by undertakings applying for aid or the granting bodies, a record of the Commission's decisions concerning State aid granted in Poland, a record of aid schemes and individual aid projects exempted from the notification requirement, a record of some of the local laws, reports on State aid granted in Poland, interpretations of the UOKiK, and a user manual for the SHRIMP system.

Bibliography:

Kawecka-Wyrzykowska E., Synowiec E., *Układ Europejski i ocena jego funkcjonowania*, w: *Unia Europejska. Przygotowania Polski do Członkowska*, red. E. Kawecka-Wyrzykowska, E. Synowiec, Instytut Koniunktur i Cen Handlu Zagranicznego, Warszawa 2001

Ambroziak A., Kaliszuk E., *Warunki udzielania pomocy publicznej w Polsce po akcesji do UE, w: Unia Europejska. Przygotowania Polski do członkostwa*, red. E. Kawecka-Wyrzykowska, E. Synowiec, Instytut Koniunktur i Cen Handlu Zagranicznego, Warszawa 2004

Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1999 r. (http://www.uokik.gov.pl/sprawozdania_z_dzialalnosci_urzedu.php)

Paweł Kułak

COOPERATION BETWEEN THE COMPETITION PROTECTION AUTHORITIES AND SECTOR REGULATORS

Introduction

This article describes the relations between competition protection law and sector-specific regulation. It also presents the cooperation between the Office of Competition and Consumer Protection and the national authorities in charge of regulating the telecommunications, energy and railway sectors. Competition protection laws are in place in Poland just as in other EU Member States. The Act on Competition and Consumer Protection dated 16 February 2007[28] lays down the terms and conditions based on which competition is to be developed and protected, and sets out the principles of actions to be undertaken, for the benefit of the public, in order to protect the interests of undertakings and consumers (Art. 1(1)). The Act applies, to the same extent, to all relevant markets (regardless of their specific nature), irrespective of the sector in which the undertakings whose practices (behaviors) may be investigated by the President of the UOKiK operate.

At the same time, sector-related regulations do apply to some markets. These have been tailored to specific branches and their specific problems. Whenever it is used in the present article, the term "sector regulation" shall be understood as laws targeted at undertakings operating in such sectors as telecommunications, postal services, energy, and rail and air transport. The need for sector regulation stems from a number of factors. First, these sectors has functioned under natural monopoly conditions[29], their operation is closely linked to indispensable network infrastructure (known as *essential facilities*), and last but not least these sectors are characterised by market failures. The sector regulation that is applied currently is often referred to as *regulation for competition or procompetitive regulation*, as it aims to achieve a state of competition on the markets the infrastructural sectors (network sectors) are made up of. These markets are usually characterised by the presence of long-established monopolists or dominant companies

28 (Journal of Acts No. 50, item 331, as amended)

29 Maher M. Dabbah "*The relationship between competition authorities and sector regulators*" Cambridge Law Journal, Volume 70 / Issue 01 / March 2011, pp. 113-143.

(so called ‘incumbents’) who may, especially with the relevant network at their disposal, block the market entry of new undertakings[30].

The essence of sector regulation has been aptly defined by the Supreme Court’s ruling[31] of 19 October 2006, III SK 15/06, which stated that *“Telecommunications law is an instrument by means of which the state authorities may create relevant conditions enabling equal and effective market competition. In other words, the Telecommunications Law is to create competition. The aim of the Act on Competition and Consumer Protection, in turn, is to protect competition from distortions resulting from the behavior of enterprises operating on the market. This means that the provisions of the Telecommunications Law, as well as of the Act on Competition and Consumer Protection, and, hence, the relevant authorities in charge of their enforcement, deal with competition on telecommunications markets from a different perspective. (...) The regulator’s activities may not have anything in common with the market reality, as they are often undertaken prior to a given undertaking actually commencing their market activity in the capacity of an operator”.*

Though related to the telecommunications sector, these comments aptly reflect the essence of sector-specific regulation regardless of the actual sector involved.

Competition law and sector-specific regulation

The doctrine indicates that both competition law and sector-specific regulation share the same objective. That is, they both aim to secure the welfare of and to protect the consumer. It needs to be stressed that both competition law and sector-specific regulation, are instruments the state uses to regulate the economy. As such, they, enable the relevant authorities to intervene if the following market-related problems caused by undertakings operating in the network sectors are encountered: the refusal to grant access to the network, margin squeezes, excessively high or predatory prices, or the vertical integration of companies[32].

But at the same time certain fundamental differences between the two sets of rules being analysed must not be overlooked: it is assumed that

---

30 Mirosław Raczyński “*Regulacja a polityka ochrony konkurencji w telekomunikacji*”, rozdział 29 w: “*Polityka gospodarcza państwa*”, praca zbiorowa pod red. Danuty Kopycińskiej, published by: Print Group Daniel Krzanowski, 2007.

31 *Telecommunications Law* of 16 July 2004 (i.e. Journal of Acts of 2014, item 243, as amended, hereinafter: Telecommunications Law).

32 Marek Szydło “*Prawo konkurencji a regulacja sektorowa*”, published by: Wolters Kluwer Polska, 2010.

the competition law operates *ex post* and aims to protect competition by preventing those behaviours that restrict competition. Hence, interventions are related to behavioural issues, such as the establishment of cartels or the abuse of a dominant position. Sector regulation, in turn, is applied *ex ante*, and focuses on establishing a market structure that fosters competition (in other words, on providing conditions that enhance competition). Hence, in principle, sector regulation is applied to structural problems (establishing and monitoring standards, safety issues, and price controls)[33].

This is why, as indicated above, the network sectors are governed both by competition laws and sector-specific regulations, which are passed in EU Member States, at the national level (legal acts and secondary legislation of a given state) and an EU level (primary and secondary EU legislation). Moreover, both sets of norms discussed in the present paper may be applied in parallel, meaning that anti-monopoly authorities and regulatory bodies may take action, pursuant to the regulations that are relevant to them, with regard to the same behaviours perpetrated by specific undertakings. The literature pinpoints certain deficiencies of the system in which the competition law and sector-specific regulations are applied in parallel. These include: duplication of actions undertaken by administrative organs in the same case, with the resulting extended proceedings and delays in issuing decisions; increasing unnecessary costs borne both by the authorities and the undertakings concerned; the potential for contradictory decisions to be issued by the anti-monopoly authority and the sector regulator[34].

The Anti-monopoly authority and regulatory bodies

The introduction of sector-specific regulation in such areas as telecommunications, energy or rail transport has resulted in the establishment of specialised administration authorities tasked with applying the regulatory laws, i.e. sector regulators, and has created the issue of relations between these regulators and anti-monopoly authorities. The subject literature provides examples of numerous models based on which the relations and delegation of competence between the anti-monopoly offices and sector regulators are shaped. These models are selected depending on the institutional culture of a given country, and their choice is driven by political decisions as well.

The two models that are most frequently analysed in the literature (and, it seems, are most common in practice) are: the exclusivity model, in which

33 Mirosław Raczyński, *ibidem*.
34 Maher M. Dabbah, *ibidem*.

competition law is applied by the anti-monopoly authority only, and the concurrency model, in which the decision-making responsibilities in the field of competition enforcement are shared[35]. The advantages of using the former model include greater independence the anti-monopoly authorities enjoy compared to sector regulators, consistency in applying the competition laws regardless of the sector in question, and fewer costs thanks to a lack of duplicate actions taken by various authorities with regard to the same issue. The disadvantages include a lack of technical knowledge the authority may possess on how a specific sector operates, the risk of the anti-monopoly authority becoming involved in complicated regulatory cases that are only loosely linked with competition-related issues, and the longer duration of proceedings conducted by anti-monopoly authorities, compared to those performed by sector regulators[36].

The concurrency model is an alternative to this solution. Here the competence (authority) to apply competition law is shared both by the anti-monopoly authority and sector regulators, who have powers to apply antitrust regulations in the sectors. The advantage of the concurrency model consists in the anti-monopoly authority's ability to promote the use, by the sector regulators, of analytical methods typical of competition laws. The drawbacks include the rights of the anti-monopoly authority and the sector regulators overlapping, and the resulting potential duplication of actions undertaken by these bodies in the same case. Each of these authorities may also approach competition-related issues in a slightly different manner.

The classic and standard example of the concurrency model is the solution that has been adopted in Great Britain, where the right to apply the provisions of national competition law, as well as the provisions of Article 101 and 102 of the Treaty on the Functioning of the European Union, is shared by the anti-monopoly authority (*Competition and Markets Authority)* and six sector regulators[37]. These bodies comprise the UK Competition Network, within which they exchange information. The Network is led by the anti-monopoly authority. One of the primary assumptions on which the operation of the Network is based is the principle of the prevalence of competition law: prior to applying regulatory instruments that have been assigned to them by the sector-specific legal acts, the sector regulators are obliged to consider

35 Rafał Stankiewicz "Między ochroną konkurencji a regulacją sektorową. Ustrojowe granice rozdzielenia obszarów ingerencji państwa w gospodarce", Ekonomia i Prawo quarterly, Volume VIII, issue 1/2012.

36 Maher M. Dabbah, *ibidem*.

37 The Office of Communications, The Gas and Electricity Markets Authority, the Civil Aviation Authority, the Water Services Regulation Authority, the Office of Rail Regulation and the Northern Ireland Authority for Utility Regulation

whether the application of the competition law would not be more advisable in each specific case[38].

There is also a trend in the EU to combine, within the structure of a single office, the powers of the anti-monopoly authority and of the sector regulator. Institutional changes were introduced in the Netherlands and Spain in 2013 that merged the separate competition protection and regulatory offices into a single authority that acts, concurrently, as an anti-monopoly authority and a sector regulator in charge of the telecommunications, postal services, energy and transportation markets.

Cooperation between the UOKiK and regulatory offices

In the model Poland uses, competition law is applied exclusively by the anti-monopoly authority. The President of the UOKiK is the only authority with the right to apply national competition-related regulations, as well as provisions of Article 101 and 102 of the Treaty. Regulatory offices apply only the relevant provisions of the sector-specific legal acts and regulations.

Cooperation between the UOKiK and the Office of Electronic Communications (UKE)

The President of the UKE is the regulatory authority that oversees the telecommunications industry and the postal service market. His duties include cooperating with the President of the UOKiK in matters related to the observance of the rights of entities using postal and telecommunication services, and preventing competition-restricting practices and anti-competitive concentrations of postal operators, telecommunications undertakings and associations thereof (Art. 190(1) and Art. 192(1)(14) of the Telecommunications Law).

The anti-monopoly authority participates in regulatory decisions issued by the President of the UKE, reserving frequencies by means of public tenders and competitions, as well as switching the entities for which frequencies have been reserved.

Pursuant to Article 23(1)(1) of the Telecommunications Law, should it be determined that no telecommunications undertaking is present on the relevant market that would enjoy a significant market position (or telecommunications undertakings enjoying a significant collective

38 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262996/UKCN_Statement_of_Intent_FINAL.pdf

position), the President of the UKE issues a resolution in which the relevant market is defined, and states that effective competition takes place on that relevant market if no telecommunications undertaking with a significant market position (or telecommunications undertakings enjoying a significant collective position) was/were present on that same relevant market. If, however, a telecommunications undertaking was present on the relevant market and enjoyed a significant market position, or telecommunications undertakings who enjoyed a significant collective position, who have lost such a position, the President of the UKE issues a resolution in which the relevant market is defined, states that effective competition takes place on that relevant market and waives the regulatory obligations applied (Article 23(1)(2) of the Telecommunications Law).

If, in turn, it is determined that a telecommunications undertaking is present on the relevant market and enjoys a significant market position, or telecommunications undertakings enjoy a significant collective position, the President of the UKE issues a resolution in which the relevant market is defined and the telecommunications undertaking with a significant market position, or telecommunications undertakings with a significant collective position are identified, and:

a) imposes regulatory obligations, with the adequacy and proportionality of a given obligation to the market problems taken into consideration, or

b) maintains the regulatory obligations applied, if the telecommunications undertaking or undertakings have not lost their significant position, or

c) amends or waives the regulatory obligations applied, if the telecommunications undertaking or undertakings have not lost their significant position, but the conditions of the relevant market justify the amendment or the waiver of such obligations (Article 24 of the Telecommunications Law).

All of the regulatory decisions of the President of the UKE are issued upon that office's obtainment of an opinion from the President of the UOKiK and are written the form of a resolution.

Pursuant to Article 116 of the Telecommunications Law, if no sufficient frequency resources are available, the entity for whom the frequency is to be reserved will be selected by means of a contest, tender or auction held by the President of the UKE. The bids submitted in the tender and in the contest are assessed based on, among other criteria, the criterion of competition, and it is with regard to the fulfillment of that criterion that the President of the UKE is obliged to seek the opinion of the President of the UOKiK.

If an application of the relevant entity for whom a given frequency has been reserved is filed, the President of the UKE changes the entity for whom the frequency has been reserved, and the decision of the regulatory authority is issued upon the opinion of the President of the UOKiK on maintaining the competition conditions (Art. 122(1) and (5) of the Telecommunications Law).

The President of the UOKiK is also required to provide his opinion when the President of the UKE issues a decision based on which the terms and conditions applying to the manner in which the frequency that has been leased to or handed over for use by an authorised entity are changed, or based on which the use of a given frequency by such an undertaking is banned (Article $122^1(5)$ of the Telecommunications Law). At such times, the opinion of the President of the UOKiK is concerned with the potential distortions of competition, especially those caused by overconcentration of frequencies in the hands of a given undertaking or capital group.

Opinions of the President of the UOKiK, issued in relation to all of the aforementioned decisions of the President of the UKE, are presented in the form of a non-appealable resolution.

Another aspect of cooperation between the President of the UOKiK and the telecommunications sector regulator is the exchange of information in the course of anti-trust proceedings. While holding such proceedings, the President of the UOKiK has applied, on numerous occasions, to the President of the UKE to provide information or explain technical issues.

Such cooperation is based on Article 72 of the Act on Competition and Consumer Protection, pursuant to which public administration bodies are obliged to make available to the President of UOKiK documents in their possession, as well as information that is crucial for the proceedings held by the President of the Office.

The President of the UOKiK also relies upon this regulation to obtain information from other regulators.

Cooperation between the UOKiK and the Energy Regulatory Office (URE)

Pursuant to Article 21 of the Energy Law[39], it is the President of the Energy Regulatory Office (President of URE) who serves as the central government authority in charge of regulating the energy market and of promoting

[39] dated 10 April 1997, Journal of Acts of 2012, item 1059, as amended, hereinafter: the Energy Law.

competition. When cooperating with this regulator, the President of the UOKiK has turned, in the course of proceedings related to the energy sector, on numerous occasions, to the President of the URE to submit information explaining technical issues or presenting opinions on issues of crucial importance for the case in question. In this context, several cases that concluded with decisions issued by the President of the UOKiK are worth considering.

In April 2013 the President of the UOKiK initiated anti-monopoly proceedings against PGNiG S.A., a Polish natural gas company with a dominant position in both wholesale and retail gas sales.

It was presumptively proven in the course of the proceedings that PGNiG S.A. was abusing its dominant position by including, in agreements with its trade partners, provisions that limited their ability to reduce the quantities of fuel they ordered, restricted their ability to resell fuel purchased from PGNiG S.A., or determined the maximum amounts of fuel that could be resold. During the course of the proceedings, the company produced a proposal of obligations that could be assumed in order to prevent violations of competition.

In response, the President of the UOKiK decided to perform a market test. An announcement was published on the website of the Office of Competition and Consumer Protection in July 2013 containing the accusations that PGNiG was faced with in the course of the anti-monopoly proceedings, as well as the obligations assumed by that company. The public was also informed that all entities interested were welcome to furnish, within the specified deadline, their own opinions concerning the solutions proposed to PGNiG, including the scope and the implementation deadline thereof, as suggested by PGNiG. The market test aimed at acquiring the views of the participants as to the extent to which the solution put forward by PGNiG were adequate and sufficient to eliminate the practices questioned by the President of the UOKiK in its resolution on commencing anti-monopoly proceedings. One of the 14 opinions received by the President of the UOKiK and considered by the anti-monopoly authority in issuing its final decision came from the President of the URE. Decision DOK-8/2013, imposing upon PGNiG the duty to meet certain obligations, was issued on 31 December 2014.

The cooperation between the anti-monopoly authority and the regulator in charge of the energy sector could also be observed in the anti-monopoly proceedings that concluded with the issuance of decision DOK-2/2012, dated 5 July 2012. The case concerned PGNiG S.A.'s refusal to sell natural gas to the company NowyGaz, which intended to make wholesale purchases from the dominant entity and to supply gas to end-users connected to the distribution network. NowyGaz filed a complaint with both the sector regulator and the UOKiK. The President of the URE was not authorised, however, to question

PGNiG S.A.'s practices based on the provisions of the Energy Law, which was explained in a letter to the President of the UOKiK, and suggested that the case should be examined for potential violation of the Act on Competition and Consumer Protection.

In the course of the subsequent anti-monopoly proceedings, the President of the UOKiK twice requested the President of URE furnish market data. It also solicited the regulator's opinion on PGNiG S.A.'s explanations containing objective justification for its refusal to sell gas. The regulator's opinion was invaluable, as the undertaking had justified its refusal to sell gas with technical reasons, difficulties in conducting financial settlements related to the gas sold, and the lack of relevant regulations (approved by the President of the URE). In letters submitted to the anti-monopoly authority, the President of the URE failed to share the arguments the Company had given. By means of decision DOK-2/2012, the President of the UOKiK ruled that the refusal to sell natural gas to NowyGaz constituted abuse of a dominant position and imposed upon PGNiG a penalty of PLN 60 million.

The UOKiK and URE share the responsibility of writing, in cooperation with the Minister of the State Treasury, an annual report on the abuse of a dominant position by energy sector companies and on behaviours that contradict the principles of competition on the electricity market. The report is submitted to the European Commission (the obligation to submit the report stems from Article 15c(1) of the Energy Law). Another obligation provided for in the Energy Law that leads the two authorities to cooperate is their shared efforts in compiling a guide to energy consumer's rights. This guide is supplied by natural gas and electricity providers to each customer, and published in the Public Information Bulletin of the Energy Regulatory Office (Article 5(6e) and (6f) of the Energy Law).

Other cooperation efforts in 2014 between the two offices included workshops. UOKiK staff trained URE employees on competition laws, while the URE workforce trained UOKiK personnel on sector-specific regulation.

Cooperation between the UOKiK and the Office of Rail Transport

The President of the Office of Rail Transport (UTK) is another of the sector regulators that the President of the UOKiK cooperates with. The President of the UTK oversees the regulation and licensing of rail transport (*vide* Article 15 of the Rail Transport Act[40]). As is the case with other regulatory offices,

[40] Rail Transport Act of 28 March 2003, Journal of Acts of 2013, item 1594, as amended.

the President of the UOKiK cooperates with the President of the UTK by requesting, among other things, the provision of market data or by explaining technical matters that are important in making decisions in the course of anti-monopoly or investigation procedures.

A relevant decision was DOK-3/2009, which ruled that that PKP Cargo S.A. was abusing its dominant position and imposing, upon the forwarder, a monetary penalty of PLN 60 million. The anti-monopoly authority twice during the proceedings requested the President of the UTK submit information (market data), enabling the authority to determine that PKP Cargo S.A. had a dominant position in its market.

The regulatory authorities are Offices that that monitor a given sector on a continuous and permanent basis, gather detailed statistical information and have at their disposal the technical knowledge specific to the sector in question. As the above example illustrates, these authorities remain an important source of sector-specific information, market data and technical explanations for the President of the UOKiK.

‘Sector-specific regulators play a crucial role in preparing and implementing the government’s competition policy’. One of the priorities of the *Competition Policy for 2011-2013* was to foster competition in the regulated sectors—telecommunications, energy, rail and air transport, and postal services. The cooperation between competition authority and sector regulators has helped to achieve goals listed in the abovementioned document.

Summary

The development of competition in the regulated sectors is possible thanks to the effective performance of the duties of both the competition protection authority and the sector regulators. The activities undertaken by both types of authorities should be of a complementary character. These bodies should cooperate in situations laid out in the relevant legal acts, with the ultimate objective of their activity being the welfare and protection of consumers. Hence, a precise definition of the scope of competence and tasks of the regulatory bodies and the competition protection authority is of key importance for the establishment of an efficiently operating regulatory mechanism (order) in the sectors of the economy described above. A clearly defined relationship between the authorities, provided for in the relevant legislation, makes it possible, first, to avoid competence-based disputes, and, second, to define the circumstances and the form of potential cooperation. This is of particular importance for those markets in which the liberalisation process has not yet been completed.

Ketevan Lapachi

A CRITICAL ANALYSIS OF COMPETITION POLICY REFORMS IN GEORGIA OVER THE LAST 20 YEARS

1. Beginnings

In Georgia, state antimonopoly regulation was started in the first stage of political-economic independence together with the de-monopolisation of the national economy, privatisation of state property and liberalisation of economic activity. In the fall of 1993, the country's long-term economic reform programme was worked out. Among the aims of this reform was to create the legal and institutional bases for antimonopoly regulation in order to protect consumers and entrepreneurs, to restrict and prohibit monopolistic activity and promote competition.

In February of 1992, a new section, the Anti-monopoly Department was created within the Ministry of Economy. Its' main tasks were to restrict monopolistic activity, promote competition, support entrepreneurs and protect consumer rights. By Decree 60 (1995) of the President of Georgia *"On Consumer Protection from Unfair Advertising"* the Anti-monopoly Department was empowered to monitor advertising activity as well. From 1992-1996 Department of Antimonopoly Regulation activity had been essentially based on the State Council Decree *"On the restriction of monopoly activity and the development of competition"*(1992), though the antimonopoly requirements were also established by other normative acts, including the law *"On the Basic Principles of the Activity of Entrepreneurs"* and Decree of the Cabinet of Ministries of Georgia 323 (1992) *"On Measures for the De-monopolization of the National Economy"*, among others.

In 1995, the law *"On the Protection of Consumer Rights"*, and in 1996 the law *"On Monopolistic Activity and Competition"* were adopted by the Georgian Parliament, and the State Antimonopoly Service of Georgia (later SASG) was created. Presidential Decree 137 (14 March 1997) defined the tasks, functions and responsibilities of the SASG. In addition to the above laws, during the years 1995-2000 the Law on Advertising (1998) and up to 40 normative acts were adopted on the basis of that law. To increase the SASG's competences, appropriate amendments were made to the Administration Code, Criminal Code, the Georgian Law on Normative Acts and other legal acts.

2. The State Antimonopoly Service of Georgia (SASG,1997-2005)

From 1997 to 2005, the SASG was the government regulatory body responsible for enforcing antimonopoly law and laws on consumer protection and advertising. The SASG directed in its activity by the laws *"On Monopolistic Activity and Competition"*, *"On the Protection of Consumers' Rights"*, and *"On Advertising"*, resolutions of the Parliament, Presidential decrees and orders, and normative acts adopted in accordance with the above laws. The principal tasks of the SASG were to implement antimonopoly policy, create and protect conditions favourable for the development of competition in Georgia, and ensure the laws were being observed through monitoring, fight monopoly activity, and oversee consumer rights protection and advertising activity[41].

The decisions, resolution, instructions, and regulations, as well as other normative acts adopted by the SASG within its areas of competence were binding for ministries and departments of the government of Georgia, regional and local government bodies, enterprises and organisations regardless of their forms of ownership or organisational and legal status, as well as for individual entrepreneurs.

The main source for financing was the central budget of Georgia, as well as special resources and grants.

There were 65 staff in the central office and 85 in regional offices—150 in total spread across seven departments: the department of antimonopoly regulation, the department of market analysis, the department of consumer's rights protection, the department of regulation of advertising activity, the department of international relations and coordination of regional offices, the legal Department, and the department of administrative and economic activities.

From 1997 to 2000, the SASG considered roughly 800 violations of antimonopoly, consumers right protection and advertising laws. Hundreds of violations of the Law "*On Monopolistic Activity and Competition*" were revealed, an significant number of which were ceased according to directions of the SASG. More than 400 cases were passed to courts[42]. Typical violations of antimonopoly legislation included

---

41 Features of the newly established antimonopoly service were broadly described by W. Kovacic and Ben Slay, in "Perilous Beginnings: The Establishment of Antimonopoly and Consumer Protection Programs in the Republic of Georgia," *Antitrust Bulletin* (1998), 15-43.

42 Collected articles for antimonopoly services of Georgia, 1999, Tbilisi

a) monopoly activity,

b) the adoption of anti-competitive decisions by the government,

c) anti-competitive agreements among undertakings,

d) unfair competition,

e) and others[43].

The analysis showed that the ,,state bureaucratic monopoly", which saw competition restricted by the activities (directly or indirectly) of government bodies and officials, was a particularly urgent problem, the acuteness of which was directly attributable to the high level of corruption, the atmosphere of impunity and common problems in managing the government. Of course, the SASG had its own drawbacks and specific as well as general problems that were not its fault. These included an inability to forestall anti-competitive behaviour by other state and administrative institutions, due to its weak status and ambition, inefficient executive mechanisms, a lack of financial support and skilled staff, serious opposition of both a hidden and vocal type, and pressure from anticompetitive forces (from firms already established on the market and some government officials as well) among many others.

In spite of the important negative influence of these enforcement problems, a number of positive results were achieved from 1997 to 2000: the basic institutional framework for antimonopoly legislation was developed and measures were taken to improve it according to international recommendations. Capacity building and the development of the competition infrastructure were actively supported by the WB, UNCTAD, USAID, and EU. The increasing number of letters and complaints coming from entrepreneurs and consumers alike served to demonstrate the growing awareness of and confidence in the SASG.

From 2000, the SASG became a place of permanent reorganisation and staff changes, which of course reduced its institutional capabilities and effective employment of human resources, and, accordingly, its image and the efficiency of its service. The situation changed dramatically after the "*Rose Revolution*" (November, 2003). In June of 2005 *the law "On Monopolistic Activity and Competition"* (1996) was abolished in the name of liberalisation. At the same time, a new law "*On Free trade and Competition*" was adopted, and the SASG was replaced by the Free Trade and Competition Agency with a much reduced scope of responsibilities.

[43] See "Anti-monopoly Regulation in a Transition Country: The Example of Georgia", "*European Competition Law Review*", Volume 22, Issue 9 (September 2001, London, "Sweet & Maxwell"), pp. 374 –382

3. Georgia's international obligations in the field of competition and the competition policy framework for the period 2005-2012

Georgia is moving towards EU integration, is a member of the WTO, and either observes or enjoys full member status in many bilateral, regional or multilateral agreements and international organisations. Consequently, the GoG has certain obligations in the light of the regulation of its domestic legal framework for trade and competition with due consideration of international principles and best practices and, first and foremost, the rules and principles of the EU, WTO, UNCTAD, OECD. Observance of these commitments obliges the country to adopt, improve and efficiently enforce the relevant legal acts; to base legislation on the principles of suppression and efficient regulation of practices restricting competition[44]; to improve competition policy and, respectively, care for the provision of such elements as the existence of clear and predictable rules of competition, efficient state supervision over their observance and reliable and transparent enforcement practice.

Competition policy has been a part of the EU-Georgian relationship since its inception. *The Partnership and Cooperation Agreement (PCA)* agreed between Georgia and the European Union in 1996 outlined key issues and undertakings (Article 44) which should be accorded particular attention in the course of harmonising domestic competition law with that of the EU, amongst them: agreements and associations between undertakings and concerted practices which may have the effect of preventing, restricting or distorting competition; abuse by undertakings of a dominant position in the market; state aid that distorts competition; state monopolies of a commercial character; public undertakings and undertakings with special or exclusive rights; the review and supervision of the application of competition laws and means of ensuring compliance with them[45].

Instead of implementing needed improvements, what was happened in Georgia in 2003-2005 was exactly the reverse. Since the "Rose Revolution" (November, 2003) Georgia's competition legislative and institutional framework underwent substantial reform while the rationale of harmonisation with the EU pursuant to Art. 43 and 44 of PCA has been neglected.

In February 2004, a new law *"Concerning the Structure, Proxy and Activity Rules of the Georgian Government"* was adopted by the Parliament of Georgia.

44 The United Nations' Set Of Principles And Rules on Competition (the Set Of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices), Geneva, 2000.

45 Partnership and Cooperation Agreement Between Georgia and The European Community and Their Member States, 1996

This law required the state apparatus to be restructured in order to simplify it and make it cost effective. Two major changes were also made at the SASG. First, the appointment criteria were changed: while it had to this point been done by Presidential appointment, the head of the authority was now to be nominated by the Minister for Economic Development and appointed by the Prime Minister. Second, the staff was whittled down, from 150 to 19. However the functions, powers and responsibilities were not changed.

Later, in June 2005, a new competition law *"On Free Trade and Competition"* was adopted while *the Law "On Monopolistic Activity and Competition"* of 1996 was repealed. The SASG was shut down and replaced by the Free Trade Agency under the Ministry of Economic Development, with a much reduced scope of responsibilities. At that point, the number of staff was reduced to just 12.[46] (later, the number of full-time staff was reduced to 5).The newly adopted competition law derogated all previous laws, regulations and decrees adopted over more than one decade with extensive international support. Experts were of the opinion that the changes that had been made in competition law since 2004 in Georgia were a step backwards in the country's competition policy developments[47].

"While the title of the law includes the word "competition", the articles relate mostly to two sub-areas of competition law in a wider sense (State aid and, to a certain extent, concessions)"[48]. Unlike similar laws (e.g. the laws of the WTO, OECD and EU member countries), this law of 2005 did not apply to such manifestations of business restricting practices as anticompetitive agreements, monopolistic activity, or the concentration of market power (mergers and acquisitions).

The new Agency for Free Trade and Competition was granted the authority to issue recommendations. However, the governmental and local authorities setting up the state aid scheme were entitled to choose whether or not to comply with them. Furthermore, the Agency was given very limited investigative power. For the time being, it could be concluded that the Agency exists only nominally as a structural unit of the Ministry of Economic Development with a staff of only 5 persons. Due to deteriorated institutional capacities this authority was practically inactive.

Between the reform of 2005 and 2010 no legislative or administrative initiatives were implemented, except for the introduction of rather strict

---

46 Georgia, by Ketevan Lapachi, in Almanach "*Competition Regimes in the World - A Civil Society Report*", India, 2006, CUTS International – INSCOS, p.378

47 Lapachi, K. Let me disagree with you, Georgian Newspaper "*Sakartvelos Resbublika*", August 19, 2004.

48 Juan Ramon Ituria Gagoitia Comments to the law of Georgia On Free Trade and Competition, available at www.geplac.org

provisions to the laws of sectorial regulation aimed at restricting the rights of the Competition Agency and fragmentation of the competition policy according to sectorial principle (without any kind of efficient coordination mechanisms for ensuring the cooperation between and joint activities of sectorial regulators and the Competition Agency)[49].

As a result, rather than a logical development for these two key regimes of economic regulation, competition policy was fragmented according to sectorial principle. Analysis of the legal and institutional framework in force until 2012 demonstrates that Georgia's competition policy was not compatible with the reform policy chosen by the country and its aspiration for integration into European institutions. Experts were of the opinion that, during the 2005 - 2012 period, Georgia's competition law and administrative body were ineffective and there was no political will to do anything about it. "The ambiguity of the law leads to significant confusion for the public and the private sectors alike. Too many open questions remain after the adoption of the present law. **Most importantly, the creation of a competition law-free country,** as has been suggested, cannot be seriously considered in a globalised world, notably when referred to a transition economy where many non-market economy structures still subsist (and have been or are being privatized)[50]".

The topicality of the problem is evidenced both by Georgian and foreign practice of law enforcement in the field of antimonopoly regulation and the situation on the commodities market of Georgia. Against the background of the pace and scope of liberalisation of the regulatory regime and inadequate efficiency of sectorial regulation this problem was particularly pressing in "socially sensitive fields" including transport, communications, water and energy supply. Examples of monopoly bottlenecks can be found in research papers by the Transparency International[51] and others[52]. Experts were of the opinion that "there is an urgent need to recreate a regulatory system that would help sustain economic growth and extend the benefits to a larger part of Georgian society. Putting a regulatory system in place will certainty involve recreating some of the government agencies responsible for essential business regulatory functions. These would include the antitrust and consumer

49 Lapachi,K., Georgia, in ,,Competition Regimes in the World – A Civil Society Report, edited by Predeep Mehta, India, 2006, CUTS International – INSCOS, p.378

50 Juan Ramon Ituria Gagoitia Comments to the law of Georgia On Free Trade and Competition, available at www.geplac.org

51 Competition in Georgia, retrieved from: http://transparency.ge/sites/default/files/Competition%20in%20Georgia.pdf

52 Clear examples of monopolisation in Georgian markets (telecommunications, advertisement, oil imports and distribution, pharmaceuticals, to name a few) during 2003-2012 are described by Paul Rimple in his book "who owned Georgia". Available on: http://transparency.ge/sites/default/files/post_attachments/Who%20Owned%20Georgia%20English.pdf

protection agencies that were abolished during the deregulation process"[53]. Commenting on the Georgian Law in *"On Free trade and competition"* in 2005 Juan Ramon Ituria Gagoitia, an expert, wrote: "the worst provision in this law is certainly its article 16, which derogates a number of laws, decrees and orders in the field of competition law that were painstakingly adopted over more than 10 years with the financial support of international donor organizations and with the intellectual input of many prestigious foreign experts. Dumping good laws should always be dismissed, unless they are replaced by excellent laws. Regrettably, the Georgian authorities have rejected such an approach in the present instance. By derogating most of its competition laws, Georgia breaches its international obligations, not only under the Partnership and Cooperation Agreement, but those accepted in its commitments when it became a member of the WTO"[54].

Preparation for the negotiations on DCFTA with the EU was considered an essential element of the agenda of the EU-Georgia relations. EC assessment of Georgia's preparedness for a DCFTA with the EU (2009) outlined the four priority areas (competition policy, taxation, customs and IPP)[55] where further improvements were required. Among the priority measures were: preparation of a comprehensive strategy in line with EU standards, adoption of a general competition law and the initiation of its implementation through capacity building.

Accordingly, since 2009, some important steps have been taken by the Georgian Government (GoG), namely:

- In February 2010, the independent legal entity competition agency was set up (though, its functions, powers and responsibilities were not changed until 2012);
- The Comprehensive Strategy in the field of Competition was adopted by the Georgian Government in December 2010, and an appropriate action plan was elaborated[56];
- In September 2011, a draft competition law was submitted to the Georgian parliament. After lengthy consideration, in May of 2012 a new competition law "On Free Trade and Competition was adopted by the Georgian Parliament (it was published on May 25, 2012 and entered into force 60 days after publication) and basic definitions needed for competition policy were restored;

53 Eric Livny, Sandro Shelegia, From over-regulation to under-regulation in the Georgian Economy, ISET-TSU 2008

54 uan Ramon Ituria Gagoitia Comments to the law of Georgia On Free Trade and Competition, available at www.geplac.org

55 http://ec.europa.eu/world/enp/mid_term_review/initial_concept_note_georgia__en.pdf

56 The Comprehensive Strategy in Competition Policy http://www.geplac.ge/newfiles/Comprehensive%20Strategy%20in%20Competition%20Policy.pdf

- An independent legal entity of public law, the Competition and State Procurement Agency, was established by resolution 497 of December 27, 2011 by the president of Georgia[57]. The Agency was authorised to ensure the fulfillment of the provisions of this law and the law on state procurement.

It should be noted that the original law of 2012, unlike the law of 2005, which concerned only anti-competitive actions by the government, applied to all entities, both public and private, and contains all structural elements of standard competition laws: anticompetitive agreements, abuse of a dominant position, concentrations and state aid. At the same time, this institutional framework lacked effective enforcement power and it didn't ensure the effective supervision of competition on the market (the Competition and State Procurement Agency never actually investigated or initiated any cases). Experts[58] have pointed out that the main deficiencies of the law include

a) a limited scope of application (the law was not general in its application and contradicted best international practice as well as GoG competition strategy)[59];

b) numerous unclear formulations and exemptions and the ability to establish more additional exemptions by means of government decision;

c) remarkably high thresholds for implementation of *de-minimis* rules[60];

d) unusual understanding of task prioritisation and how the government can be empowered to establish priorities for the Agency's activities[61];

57 Decree #497 of GoG, December 27, 2011

58 Critical comments were provided by the TI-Georgia, GILA, GDRI and other think tanks and some independent experts

59 According to the original version of the law of 2012 (Article 1, paragraph 4) the law did not apply to: a) Intellectual property rights; b) Interactions envisaged by the "Law of Georgia on the Securities Market"; c) The activities of undertakings in a free economic zone; d) Objects of importance for national security; e) Labour relations; f) Markets the total turnover of which does not exceed 0,25% of GDP; g) Goods and services necessary for defense and public safety.

60 The law's (Article 8) original wording defines agreements of minor importance and stipulates that prohibition of the agreements shall not apply "a) to horizontal agreements, if aggregate market share of the parties does not exceed 25 %; b) to vertical agreements, if the share of the relevant market of each party does not exceed 40 % for each party; c) if an agreement contains both characteristics, and the aggregate share of parties does not exceed 40% ". Though *de minimis* rules are customary for competition laws, thresholds established by the law of 2012 in Georgia were unusually high and contradicted international standards where the same benchmarks are established at 5-15%. Experts argued that the great majority of anticompetitive agreements would end in exemptions.

61 According to original law of 2012, Article 19 (Priorities of the Agency's activity): "the Government of Georgia periodically approves the priorities of the Agency's activities. 2. The Agency shall consider submitted complaints and/or applications with respect to priorities approved by the Government of Georgia" (the article was abolished in 2014). In addition, the law of 2012 stipulated (Article 24. "Grounds for refusal to launch an investigation", paragraph 2/"d") the following: "2.the Agency is entitled to refuse to launch an investigation based on submitted complaints or/and application if: d) the complaints and/or application do not correspond to the priorities of the activities of the agency envisaged by article 19."

e) insufficient, to act as deterrence, fines (up to 10 % of profits or up 2% of turnover during the last financial year);

f) exhaustive list of what is considered as abuse of dominant position (ADP);

g) fee (to be determined by GoG) for service[62];

h) placing too much power in hands of government vis-à-vis the agency;

i) and others. As soon as the draft law became available to the public, the above deficiencies became the subject of controversy and came in for strong criticism from both Georgian and international experts. Critical comments and suggestions on the draft provisions came from the GDRI[63], CEPR[64], TI Georgia[65] and others. Nonetheless, policymakers opted to not make any changes.

In spite of it all, compared with the law of 2005, the competition law of 2012 was considered a major step towards restoring basic competition rules in Georgian Law. At the same time, it was clear that the competition policy framework (2012) required a comprehensive reform in order to ensure effective state oversight of the competitive environment, free and fair competition as well as to increase the compatibility of the Georgian and the EU markets.

Since the election of 2012, the new Georgian government has decided to reform competition policy yet again, this time in order to meet the EU - Georgia Association Agreement requirements to maintain comprehensive competition law and an authority responsible and appropriately equipped to effectively enforce the competition law.

4. Current Competition Law and Institution

In March 2014 the Parliament of Georgia adopted a competition policy reform package, developed to improve the institutional framework for competition. The revised law *"On Competition"*[66] lays down the principles protecting free and fair competition from unlawful restrictions. The law defines the

62 According to the original law of 2012, paragraph 8 of article 23 " the compliant or applicant shall cover the cost (referred as fee) of the service of the Agency while submitting the application"

63 Lapachi K., Comments to the draft law on free trade and competition, Available www.gdri.org

64 Khaduri Nodari, Changes to Anti-Monopoly Regulation in 2010-2011, *Competition Policy and Practice of Market regulation*, pp.19-26, Center for Economic Problems Research, Tbilisi 2012

65 Kutubidze Natia, Comments and suggestions regarding Georgian Government's legislative initiative: Draft law On Free Trade and Competition". Retrieved from http://transparency.ge/en/post/general

66 The law was renamed in March 2014

anticompetitive actions and legal basis for their prevention and elimination and defines the competences of the Georgian Competition Agency.

The law consists of the following chapters: General provisions; Distortion of Competition and Concentration between Economic Agents; Unfair competition; State aid; Agency; Enforcement; Cooperation with sectoral regulators; Sanctions; Transitional and concluding provisions;

The law (Article 1) defines anticompetitive actions and the legal basis for their prevention and elimination, and defines the competences of enforcement body. The laws covers anticompetitive actions (by economic agents and by government) that take place in Georgia and abroad and unlawfully distort the competition and free trade on the goods and services markets of Georgia; the law does not cover: a)labour relations; b) Intellectual property rights, with the exception of cases where such rights are used to limit and eliminate competition; c) relations specified by Georgian Law on the Securities Market, with the exception of cases where such relations impact competition at the goods market of the country and/or limits it or may substantially limit it.

Acts, actions and practices relative to the implementation of state antimonopoly oversight are defined in chapter II: “Distortion of Competition and Concentration between Economic Agents” (Articles 5-11[2].

Georgia monitors and regulates the abuse of a dominant position along the same lines as it is done elsewhere. In accordance with international principles, the country’s competition law does not consider the monopolistic position of economic agents illegal — only the abuse of a monopolistic position is prohibited by law (Articles 5, 6). The law provides the list of criteria (including market share) for determining a dominant position, as well as for assessing joint dominance where there are several economic agents on the market and the list of actions considered to be ADP.

The law (Article 7, paragraph 1) defines restrictive agreements, decisions and concerted practices and prohibits all agreements, decisions or collusive actions of economic agents intended for or resulting in the limitation, prevention and/or restriction of competition in the relevant market. Those actions include:

a) Directly or indirectly fixing purchase or sell prices or any other trade conditions;
b) Limiting production, markets, technological development or investments;
c) Share markets or sources of supply by consumers, territorial or other characteristics;

d) Applying different/discriminating terms and conditions on identical transactions for certain trade partners, thus putting them at a competitive disadvantage;

e) Imposing on a party of a deal, as conditions for the deal, additional obligations not related to the subject of the deal, be they material or commercial;

f) Gaining material benefits or advantages, setting pre-agreed conditions for tender proposals for agreed economic agents participating in the state procurement and thus substantially jeopardizing the lawful interests of the procuring organisation.

According to the same article (paragraph 2) the prohibited agreements defined in Article 7/1 shall be null and void unless exclusions specified in this Law are not applicable to them.

Article 8 (Agreements insignificantly limiting competition) concerns agreements of minor importance not subject to regulation. New thresholds *(de minimis thresholds*) established by the law are in line with EU practice. In spite of their original version, *de minimis* exemptions are not to be applied to cartel agreements. Further exemptions (subject to the rule of reason) are also envisaged by the law (Article 9).

One chapter is devoted to unfair competition. It defines the things undertakings may do that are in breach of the norms of business ethics and infringe the interests of competitors and consumers (Article 11[3]).

The current law, as well as all previous laws on competition (of 2005,1996) and the State Counsel's Decree of 1992 include special provisions on the inadmissibility of distorting competition by the state and local authorities.

The law defines the term concentration (Article 11) and in spite of original wording of the law of 2012 sets pre-merger notification requirements (Article 11[1] obliges economic agents to notify the Competition Agency about the concentration in which they are participating when transactions meet special thresholds established by law. In addition, the agency is authorised to require from economic agents, who as a result of concentration acquire a dominant position, to periodically submit information about transactions that may have a significant influence in terms of distorting competition on the relevant market. Further, the law regulates cases when an economic agent is obliged to notify, as well as those in which it is excused from doing so (Article 11[2]. Exemption from the Obligation of Notification on Concentration).

The law contains a chapter on state aid (articles 12-15) and defines:

a) the forms of state aid that shall be prohibited, shall be allowed and do not require the consent of Agency, and shall be permitted with the consent of Agency;

b) general rules governing aid granting procedures;

c) the forms of agreements on state aid and appealing state aid that has been granted.

The law defines, among other things, the authorised body that ensures competition law (article 4) and its competences, the main directions and principles of the body's activities, and criteria for appointing a chairman (articles 16-22).

The law establishes the enforcement procedures (articles 22-28) and forms of punishment for infringing competition legislation (articles 32-33). Namely: failure to submit information to the Agency shall result in a fine from one to three thousand GEL. For anticompetitive agreements and the abuse of a dominant position (stipulated be the articles 6 and 7), the undertaking shall incur a fine of up to 5 percent of its annual turnover for the last financial year. In case of non-elimination of legal basis of the violation of competition legislation or repeated violation, the Agency is authorised to impose a fine up to 10 percent of the undertaking's annual turnover for the last year. Pursuant to the Competition law, to determine the size of the fine, the following must be taken into account: damages the infringement caused, its duration and scope.

Another chapter is devoted to the forms of cooperation between the Agency and independent national regulators.

The cooperation program (leniency) is also discussed in Article 33^1 of the law, which provides for an economic agent's full or partial release from the sanctions established by the competition law if it cooperates with the Agency in the course of an investigation of an anti-competitive action.

According to transitional provisions, the charter of the agency was to be approved and the head of the agency was to have been appointed by April 15, 2014, and secondary legislative acts envisaged by the law were to have been adopted.

The charter and structure of the Competition Agency had been approved and the Prime Minister of Georgia had appointed the Chairman of the newly established Agency in April, 2014. The relevant secondary legislation (rules and procedures on submission and consideration of notifications about concentrations, market analysis guidelines, rules and procedure of investigation for investigation by the Agency and others) foreseen by the competition law had been enacted by October 1, 2014, the deadline.

The Competition Agency was empowered to effectively implement the Competition Law and exercise efficient state supervision over the institutional framework of competition in Georgia from October 1, 2014.

5. Concluding remarks

According to EU-Georgian Association Agreement[67], Georgia recognises the importance of free and undistorted competition; acknowledges that anti-competitive business practice and state interventions have the potential to distort the proper functioning of markets and undermine the benefits of trade liberalisation; maintains comprehensive competition law which addresses anti-competitive agreements, concerted practices and anti-competitive unilateral conduct of enterprises with dominant market power and control of concentrations.

An independent competition agency exists today, but its institutional capacity remains the principle barrier to the effective enforcement of competition law. Low funding and inadequate resources, a lack of skilled staff, poorly developed competition infrastructure, and a lack of established practices or precedents to build on are among the major problems the agency now faces. The World Bank, EU delegation, the Polish Government, GIZ, and SIDA are among the major contributors already involved in developing Georgia's competition policy and capacity building. To be more effective, international technical assistance must be tailored to local needs and guided by continuity and a long-term orientation.

Although Georgia's competition Law still needs improvements in some areas, the existing framework, as currently drafted, can serve as a solid basis to produce a credible competition policy, provided that there is strong political will and the Agency has sufficient resources.

67 EU-Georgia Association Agreement:
Retrieved from http://eeas.europa.eu/georgia/assoagreement/assoagreement-2013_en.htm

Carles Esteva Mosso and Dag Johansson

CURRENT TRENDS AND FUTURE PERSPECTIVES IN EU COMPETITION LAW

1. Challenges and achievements during the last five years

At the time of writing, the Juncker Commission has just taken office, and Joaquin Almunia was succeeded by Margerethe Vestager as Commissioner for competition policy. This is a good time to take stock of developments in EU competition policy during the last five years under Almunia's stewardship.

Fighting cartels continued to be a top enforcement priority during this period. DG Competition has faced up to new challenges brought by the increasing globalisation of markets, businesses and, regrettably, globalisation of cartels. In addition, we are currently detecting more cartels outside those industrial sectors that are traditionally prone for cartelisation. Our recent practice shows that cartels increasingly occur in markets with less homogeneous and more technologically advanced products.

One example of this tendency was the *DRAM* decision in the market for memory chips back in 2010. In 2014 the European Commission sanctioned a cartel among four producers of smart card chips.

Another industry that has kept DG Competition busy is finance. In the *Libor and Euribor* case of 2013, we sanctioned financial institutions that had colluded to manipulate benchmark rates. Several large banks and a broker accepted a settlement where € 1.7 billion fines we imposed on them. However, three banks – JPMorgan, Crédit Agricole and HSBC – and one broker – ICAP – did not agree to settle. Therefore, the Commission has initiated normal infringement proceedings against them, which were still ongoing at the time of writing.

It should not be forgotten that we still have many cartel cases in the more traditional sectors. The almost € 9 billion in fines we imposed since 2010 concerned a broad range of markets, including airfreight, detergents, steel abrasives and power cables. A particular sector may be highlighted, namely the automotive industry. We are investigating a number of cases where the same companies – car manufacturers – suffer the consequences of these world-wide cartels. The Commission has taken two decisions against car-parts producers – the *Wire Harnesses* case in 2013 and the *Bearings* case in 2014 – and there are more cases in the pipeline.

Beyond hard-core cartels, in our fight against other types of illegal collusions and abuses of dominant positions, we have been active in many sectors of great importance for the EU single market such as energy, telecoms, transport, payment services and other digital economy markets. A specific development over the last years is the increased interaction between competition enforcement and intellectual property rights (IPRs). So far, this issue has arisen in two areas; in the pharmaceutical sector and in the smartphone industry.

In the pharmaceutical sector illegal patent settlements have been made in so-called pay-for-delay deals. In most cases, a patent settlement is perfectly legitimate tool to solve patent disputes. However, such settlements may sometimes be used for anti-competitive purposes. To date, the Commission has imposed fines in three pay-for-delay cases. The 2013 *Lundbeck* decision sanctioned a series of patent settlements intended keep out of the market generic competition to Citalopram, a "blockbuster" antidepressant. In the *Johnson&Johnson/Novartis* case of 2013, payments were made under the pretence of a co-promotion agreement to avoid entry in the Netherlands of a potential competitor to Fentanyl, an analgesic. In 2014, the Commission fined *Servier* for excluding generic competition to Perindopril, a hypertension medication. Additional cases are still pending.

The so-called smartphone wars are other examples where IPRs have been used in an anti-competitive manner. Spurious court injunctions and standard-essential patents (SEPs) were used for exclusionary purposes. In 2014 the Commission adopted two decisions, one against *Samsung* and one against *Motorola*. These decisions established the principle that if the owner of a technology that is part of a standard for mobile devices has pledged to license it on fair, reasonable and no-discriminatory (FRAND) terms to other manufacturers, they cannot bring rivals to court if they are willing to obtain a license for the technology on such terms. These decisions are aimed to strike a balance. On the one hand, holders of SEPs are entitled to a fair remuneration. On the other hand, companies using the technology are entitled to do so without being threatened by spurious court injunctions. The decisions protect patent holders while defending the interests of firms that need the patented technologies to manufacture their products.

Moving on to merger control, this is another enforcement area where globalisation has had a profound impact on our investigative practices. Over the last decade, we have seen a significant increase of merger cases involving non-EU companies. Such transactions now represent almost 60% of all mergers notified to the Commission. This development makes interjurisdictional cooperation between competition authorities necessary and more frequent. The Commission cooperated with other authorities in approximately half of our past significant merger cases where we had to intervene. The Commission has longstanding cooperative relationships with the Federal Trade Commission and the Department of Justice of the United States, the Japan Fair Trade Commission, the Korea Fair Trade Commission and a number of other competition authorities.

The vast majority of proposed mergers do not raise any competition concerns. In some 5% of cases, the mergers are approved only after the merging firms have offered remedies that remove all competition concerns. Proposed mergers are prohibited very rarely. During the last five years, the Commission has blocked four mergers, most notably the *NYSE/Deutsche Börse* and *UPS/TNT* cases.

2. Current trends in EU competition enforcement

More and increasingly complex mergers

The number of mergers varies in a cyclical manner, depending on the overall state of the economy. In addition, we frequently observe smaller merger waves that are confined to single industries. Major acquisitions in competitive industries may set off consolidation waves. Often other market developments reinforce those trends. One example is the pharmaceutical industry, where market fragmentation and the increasing difficulty and cost of bringing new "blockbuster" drugs to market has triggered a large number of mergers. The last merger wave ended rather abruptly with the onset of the financial crisis in 2007.

In the EU there are signs that merger activity is picking up again. The number of proposed mergers notified to the Commission in 2014 will exceed the number of notifications in 2013.

Mergers are becoming increasingly complex, as many markets develop at an ever faster pace and as merging firms are becoming larger with activities on a global scale. The increased complexity inevitably has an impact on our investigations, in particular for major acquisitions which are potentially problematic for competition. Economic submissions and detailed analysis of internal documents play a more important role. The Commission has responded to these changes in various ways. An increased number of notification referrals from the Commission to the national competition authorities (NCAs) and streamlined treatment of straightforward cases have freed up resources so that we can concentrate more on complex cases. Moreover, we are hiring more and more highly qualified economists to strengthen our ability to carry out complex state-of-the-art economic analyses.

The globalisation of cartels and anti-cartel enforcement

As mentioned above, the globalisation of business is changing the way competition authorities deal with cartels. As markets globalise, so do cartels. To effectively detect, investigate and penalise companies engaging in worldwide cartel activities, competition law enforcers have to “globalise” as well. For competition authorities, going global means increased cooperation across jurisdictions. Sharing experience and best practices in international fora like the OECD Competition Committee and the International Competition Network (ICN) is a crucial element of such cooperation, but increasingly hands-on cooperation in ongoing investigations has become a pre-requisite for success.

The Commission and other major enforcers have responded to the globalisation of cartels by reinforcing their cooperation to such an extent that it has become part of daily enforcement practice.

A good example of joint anti-cartel activities in a globalised industry is the automotive sector, where we are looking into the behaviour of companies that supply parts to car manufacturers. In the 2013 *Wire harnesses* and the 2014 *Bearings* decisions, the Commission fined a large number of car-part suppliers for running cartels that inflated the prices of crucial inputs for car manufacturing. Our extensive investigations into these cartels were conducted in close cooperation with the US Department of Justice, the Japan Fair Trade Commission and the Korea Fair Trade Commission. Together with other competition agencies, we are currently investigating suspected cartels in other markets for car parts. In the period 2010 to 2013, the Commission adopted 19 cartel prohibition decisions, and in 13 of those cases (68%) we cooperated with competition authorities outside the EU.

Another discernable trend is the increased sophistication of cartelists. With globalising markets, products and services becoming more complex and the risk of detection by competition authorities getting higher, cartelists use increasingly sophisticated means to keep their illegal activities clandestine. Advanced information technology is used for contacts between the cartel members. To keep up with these developments, the Commission is dedicating substantial resources to developing and acquiring state-of-the-art forensic information technology (“FIT”) and training its staff in conducting unannounced inspections (“dawn raids”). Also in this respect, cooperating and sharing experience with other competition authorities will become increasingly important for success.

Increased interaction between competition enforcement and IPRs

The smartphone wars and the pay-for-delay agreements referred to above illustrate another trend in competition enforcement; the increased use and misuse of IPRs as competitive tools. Contrary to what is sometimes argued, there is no inherent contradiction between competition policy and patent protection. The two policy areas share several overarching objectives, such as increasing economic efficiency and stimulating and remunerating successful innovation. As stated above, in most cases it is perfectly legitimate for patent holders to settle patent disputes or pursue patent infringers before a court of law. However, an abusive use of IPRs must not be used to stifle, delay or even block legitimate competition.

The technical complexity of products in combination with shorter product cycles and faster market developments will increase the importance of patents and patent licencing in many markets. Companies involved in these markets are household names around the world and future patent-related conflicts or anti-competitive agreements between such firms will keep competition authorities busy in more than one continent. We therefore expect an increasing number of patent-related competition cases in the coming years.

It will be up to the Commission and other competition enforcement agencies to try to strike the right balance, i.e. penalising firms misusing patent rights while allowing firms to defend their legitimate rights. The Commission strives to do so by adopting a limited number of decisions establishing principles to be applied in similar cases. It is important to avoid that competition law is used to settle patent disputes.

3. Future challenges

The White Paper: Tweaking the EU merger rules

In the Commission’s view, the current merger rules that emerged from the 2004 reform have functioned well overall. There is near consensus among stakeholders that this is the case. As stated above, the vast majority of mergers do not give cause for concern from a competition point-of-view, and most of them may be deemed to be pro-competitive. Under the current system, such unproblematic mergers are dealt with very quickly, so that firms can proceed with their plans without losing too much valuable time.

Deals with no negative impact on competition qualify for a simplified notification procedure, which substantially reduces the notifying parties' administrative burden. In 2013 the Commission adopted the so-called Merger Simplification Package which further streamlined our merger control procedures and made them even more business-friendly. The Package widened the scope of the simplified merger review procedure, and reduced the information that needs to be provided, not only for simplified cases but for all merger cases. In addition, the so-called pre-notification procedure was made less burdensome.

However, there is always room for improvement and competition policy must evolve as the overall competition conditions change. Therefore, in 2014 the Commission issued a discussion paper – a so-called White Paper – which includes proposals that go further than the Merger Simplification Package. The changes made in 2013 were procedural, while the proposed changes we put forward in the White Paper would require amending the Merger Regulation itself. The White Paper is intended to launch the debate about two main proposals.

The first proposal would extend the Commission's power to review – when necessary – the acquisition of non-controlling minority shareholdings. Such rules already exist in several jurisdictions in the EU. Minority shareholdings – sometimes referred to as structural links – are rarely problematic. However, in certain cases minority shareholdings can be anticompetitive. For example, if a company acquires a major but non-controlling stake in a competing firm, the acquirer could obtain the right to be represented at the company board. This would give the holder of the minority stake insight in the strategic plans of its competitor, and albeit in minority of the board, may be able to influence the firm's strategic direction. In a concentrated market such board representation could serve as a conduit for collusion between the two competitors.

It should be emphasised that the Commission does not have any elaborate notification system in mind for this type of transactions. Only in exceptional cases, such as the example above, would the Commission investigate them and consider intervening.

The second proposal would streamline the system for referring merger cases from the NCAs in the EU to the Commission and vice versa. Although functioning rather well, we consider that they could be simplified further with the aim to save investigative resources and reduce firms' administrative burden.

In most cases it is clear which authority is better placed to assess a proposed merger. The turnover thresholds in the Merger Regulation are clear-cut, and the existing referral mechanisms enable us to allocate proposed mergers to the most appropriate authority. However, the Commission reviews hundreds of transactions each year and EU NCAs assess between two and three thousand. With such a case load, it is unavoidable that sometimes the allocation of a border-line case needs to be discussed. In such situations, the Commission and the NCAs concerned must agree on case allocation as quickly and efficiently as possible.

Therefore, we propose a fast-track system that companies can use to notify directly to the Commission mergers that are subject to control in several Member States. This could be done provided that no Member State with competence to assess the proposed merger objects. In addition, we propose a mechanism making sure that when one or more Member States wish to refer to the Commission a merger already notified to them, the Commission would look at the transaction for the whole of the EEA. The purpose of this proposal is to avoid parallel investigations, and most importantly, to avoid conflicting outcomes when more than one NCA is competent to review a proposed merger with cross-border effects. But please note that conflicting outcomes are extremely rare.

The Damages Directive on Antitrust Damages Actions: Making it work in practice

The Directive on Antitrust Damages Actions (the Damages Directive) was adopted by the European Council in November 2014. EU Member States now have two years to incorporate these rules into national legislation. As the first binding piece of EU legislation in this area, the Damages Directive may be characterised as a landmark piece of legislation.

Reaching this point took years of debate and negotiations. The right to full compensation for infringements of EU competition rules was recognised by the European Court of Justice in 2001. However, due to missing or inadequate national legislation, the victims of competition infringements found it extremely difficult to obtain compensation. In a 2005 Green Paper and a 2008 White Paper, the Commission proposed measures to overcome this problem. The ensuing debate among stakeholders was intense and negotiations between the Commission, the European Council and the European Parliament lasted for years.

The Damages Directive aims to strike the right balance between the public and private enforcement of EU antitrust rules. The Directive preserves the effectiveness of public enforcement – in particular of leniency and settlement programmes - while providing the victims of antitrust infringements with effective means of redress across the EU. To allow consumers and businesses to go to court and seek compensation, the Damages Directive includes binding rules for all antitrust damages claims, individual as well as collective ones. Certain breaches of competition law harm large numbers of citizens. In these cases, collective action is an appropriate compensation measure, making private enforcement more effective.

The Damages Directive eases the heavy burden currently placed on victims in terms of providing evidence to national courts in support of their claims. Evidence can be obtained more easily from the companies that possess it. However, certain restrictions apply, self-incriminating information released in the context of leniency programmes and settlement procedures will not be disclosed, and immunity recipients will be liable only to their own customers and not to those of their co-cartelists. Victims can use the findings of competition authorities in court. The Directive stipulates that final decisions taken by competition authorities constitute evidence of infringement.

The Damages Directive will harmonise national laws. Its rules will apply throughout the EU, making sure that victims can seek redress irrespective of where they reside. The challenge for the EU in the coming years will be to create a well-functioning, harmonised system for private enforcement across Europe. Public enforcement of competition rules is about sanctioning and deterrence, while private enforcement is primarily about compensation. Ideally, public and private enforcement should complement and reinforce each other. We are convinced that the combined effect will dissuade more companies from forming cartels or adopting other anti-competitive practices in the future.

Towards a single competition enforcement area in the EU

In 2003/2004 EU competition policy underwent the most far-reaching changes for over 40 years. Regulation 1/2003 decentralised the enforcement of articles 101 and 102 of the Treaty for the Functioning of the European Union (TFEU) to the NCAs and national courts. In antitrust the European Commission and national authorities apply the same rules as interpreted by the EU Court of Justice. Overall, the system has served us well.

After ten years, the time has come to take stock and think about further steps to take towards a genuine common enforcement area in the EU. The Commission presented its analysis in a Communication published in 2014. Multiple enforcers have resulted in a much wider and more effective application of the EU antitrust rules. Over the last ten years, the Commission and the NCAs have together adopted more than 800 antitrust decisions.

Cooperation between competition authorities has exceeded expectations and, overall enforcement is consistent across Europe. Cooperating with fellow competition enforcers has become standard practice in the EU while the European Competition Network fosters a common competition culture.

However, as markets evolve at a fast pace EU competition authorities face new challenges and are faced with novel issues that must be resolved. It is crucial that all enforcers send a coherent message so that firms can predict what is allowed and not allowed under EU competition rules.

Important divergences remain which impede the development of a common enforcement area in the EU. To fulfil this objective, all NCAs must be sufficiently independent and have adequate resources at their disposal. Moreover, they must have the powers to impose appropriate sanctions on firms that infringe the competition rules. In this respect, certain underlying problems remain across several jurisdictions.

Regulation 1/2003 does not include any provisions governing the independence of NCAs, the tools they can use or the sanctions they can impose. Not all NCAs have the same degree of independence and not all EU governments give them the administrative resources they need to carry out their tasks. Moreover, not all EU NCAs have the full set of enforcement powers required for effective investigations. Certain authorities cannot inspect non-business premises or search mobile telephones and computer tablets. There are NCAs that cannot issue enforceable requests for information.

It should be recognised that many Member States have made substantial efforts to reinforce their competition authorities, but more needs to be done. Currently, the EU lacks the legal means to ensure that all NCAs may enforce EU antitrust rules with the same effectiveness. This calls for further discussions with the Commission and among Member States.

4. Conclusions

Well-functioning competition regimes should protect competition on the merits, foster innovation, while keeping markets open and fair. We should carefully consider when to intervene, and equally importantly, when not to intervene in markets. To the extent possible, markets should be left on their own, and competition authorities should limit their interventions to situations where there are market dysfunctions or even market failures. Moreover, before taking action competition authorities must be convinced that they have a remedy that is likely to solve or alleviate the competition problem at hand, otherwise it is better to abstain from intervening.

However, we must never rest on our laurels. In this article, we have given a number of examples how the Commission in cooperation with EU NCAs have adapted and fine-tuned our regulatory frameworks and enforcement practices to keep up with market developments and the progressive integration of world economies. It would not be too presumptuous to say that one of the main strengths of competition policy in the EU is our ability to periodically question our rules and principles and propose ways to improve them. As our latest proposals show, this is a continuous process. To conserve our „competitive edge" as enforcers, we must to continue to adapt our rules and the way we use them.

Andreas Mundt

INSIDE ICN: AN AIDE FOR YOUNG COMPETITION AUTHORITIES[68]

Creating a new competition authority is a tremendous challenge for any head of agency, no matter in which part of the world. Depending on the already existing competition culture, it involves not only finding premises and qualified staff but also many hours spent on explaining the benefits of having and funding such an authority. Many stakeholders including inter alia the legislator, the general public and the media have to be brought on board to make the authority successful. This challenge may appear near to invincible, but it emerges to be advantageous for the society.

The management of young competition authorities will hopefully find solace in the fact that at a closer look these challenges and task are shared also with the leadership of mature competition authorities.

The International Competition Network (ICN) brings together young and mature competition authorities and has proven to be very successful in promoting an exchange of experience[69].

Structure of the ICN

The ICN is truly a unique organisation. Founded in October 2001 by high-ranking antitrust officials from fourteen jurisdictions, the ICN set out to meet the needs that had been identified in the preceding years.[70] At several international conferences the demand had emerged for the establishment of a network of competition authorities and international competition experts. Even though the ICN is a network of competition authorities with the aim of enhancing convergence and cooperation, it was realised from the start that also other groups had to be included to reach this goal. Therefore the ICN was opened to the participation of non-governmental advisors (NGAs), including representatives from business, consumer groups, academics, and the legal and economic professions, with the common aim of addressing practical

[68] The author was elected as the new Steering Group Chair of the International Competition Network (ICN) in September 2013. He is also the president of the German Competition Authority, the Bundeskartellamt.

[69] For current information on the International Competition Network see http://www.internationalcompetitionnetwork.org/

[70] International Competition Network, History, available at http://www.internationalcompetitionnetwork.org/about/history.aspx

antitrust enforcement and policy issues. Ultimately, the ICN promotes more efficient and effective antitrust enforcement worldwide to the benefit of consumers and economies.

The ICN is a specialized yet informal network of established and newer agencies. It is guided by a Steering Group that consists of representatives of antitrust agencies from developed and developing countries that are committed to going forward with the ICN's mission. The Steering Group is made up by elected members and ex officio members. The members are elected every two years. The ex officio members represent ICN members designated to host an ICN Annual Conference and shall join the Steering Group for a three-year term, beginning one year prior to the year of their hosted conference, and concluding at the Annual Conference following the year of their hosted conference. The Steering Group selects one of its members to act as chair. The Chair in turn may, after consultation with the Steering Group, nominate up to two Vice Chairs for Steering Group approval. Currently the position of Vice Chairs for enhanced member and NGA engagement and outreach is President Bruno Lasserre of the French Competition Authority. Vice Chair for implementation is Vinicius Marques de Carvalho, President of the Brazilian Competition Authority.

The ICN is a results-based, project-oriented organisation, which has grown from 16 competition agencies to over 130 competition agencies to date. The membership is open to all national or multinational competition agencies that are entrusted with the enforcement of competition law. At present the ICN has five enforcement working groups: Merger, Cartel, Unilateral Conduct, Agency Effectiveness and Advocacy[71].

The ICN in its working groups operates by consensus. ICN work takes place in flexible project-oriented and results-based working groups, with members and NGAs developing materials and conducting discussions, typically via teleconference, webinars or e-mail. Members and experts convene at an annual conference to discuss group projects and the implications for competition policy and enforcement. In addition, ICN working groups organize periodic workshops on specific enforcement and policy topics. ICN is not used as a forum to cooperate on specific cases, but it helps to build trust by working closely together. Very often ICN members commend that the workshops help to create a situation in which members feel at ease to pick up the phone and call an ICN counterpart in another jurisdiction to exchange experiences after returning from the workshop.

The ICN has produced a series of practical recommendations and other tools on best practices, investigative techniques and analytical frameworks, which

---

71 An overview of the working groups and their past and present work products is available at http://www.internationalcompetitionnetwork.org/working-groups/current.aspx

have significantly contributed to cooperation efforts among competition agencies. All members have the opportunity to get involved in the work process of the Working Groups, although at no stage there is an obligation to actively get engaged in the work.

The Steering Group and the Working Groups are supported by the ICN Secretariat. It is an unique feature of the ICN that there is no permanent secretariat. The ICN sees itself as a virtual network. However, it was realised that the Working Groups and Annual Conference hosts required logistical support by a secretariat. This task is kindly performed by the Canadian Competition Bureau.

Working Groups

The first Working Groups established within the ICN dealt with Mergers and Competition Policy Implementation. Within the first year of existence the Merger Working Group created the first Recommended Practices on Merger Notification and Review Procedures. In the following years, the ICN developed additional recommended practices in the area of notification and procedures (available also in Spanish and French) and new Recommended Practices in the area of substantive assessment of mergers.

Another early initiative of the ICN was the establishment of the Advocacy Working Group in 2001. The original mandate was to undertake projects with a view to recommending best practices and to provide information to members in support of their advocacy functions. This work took place from 2001 through 2003, when this working group was discontinued. In 2008, the Advocacy Working Group was reconvened and a revised work plan reflecting the needs of ICN members in sharing experience in competition advocacy and market studies was approved by the Steering Group.

In 2003 a working group for Antitrust Enforcement in Regulated Sectors was created. It later changed its focus and mainly dealt with the Telecommunication Services Sector, only to be discontinued in 2006. In particular, the working group sought to examine how technology is affecting competition in this sector and the challenges that technological innovation presents for competition authorities. In order to achieve its purpose, the working group produced a comprehensive report on antitrust enforcement issues in the telecommunications sector, including experience and examples from members, and a set of suggested best practices for the role of competition in the sector.

A year later, the ICN realised the need to discuss cartel procedures and created the Cartel Working Group. The Cartel Working Group is split into two subgroups dealing with the Legal Framework (Subgroup 1) and Enforcement Techniques (Subgroup 2). The focus of the Cartel Working Group is to examine policy-level issues of the institutional and investigative framework for the detection and punishment of hard core cartels on the one hand. On the other hand, the Cartel Working Group also aims to improve the effectiveness of anti-cartel enforcement by identifying and sharing specific investigative techniques and advancing the education and information sharing agenda of the Cartel Working Group. To name just one of the Cartel Working Group work products, the Anti-Cartel Enforcement Manual in its various chapters gives mature as well as young competition authorities a good overview of techniques employed at various stages of anti-cartel enforcement and identifies approaches that have proven effective and successful.

In 2006 the ICN established the ICN Unilateral Conduct Working Group. Its primary objectives are to examine the challenges involved in analyzing unilateral conduct of dominant firms and firms with substantial market power, to facilitate greater understanding of the issues involved in analyzing unilateral conduct, and to promote greater convergence and sound enforcement of laws governing unilateral conduct. Convergence is promoted especially by the three Recommended Practices on assessment of dominance/ substantial market power, on the application of unilateral conduct rules to state-created monopolies and for predatory pricing analysis pursuant to Unilateral conduct Laws. The first two Recommended Practices are already available in French and Spanish.

Recognizing that the manner in which a competition agency organizes its operations and conducts its investigations shapes the quality of its substantive work, the Agency Effectiveness Working Group was formed in 2009 when the Competition Policy Implementation Working Group's title and focus were changed. To date, the Agency Effectiveness Working Group accomplishments have focused on four primary initiatives: the ICN Competition Agency Practice Manual, the ICN Curriculum Project, the Investigative Process Project, and agency leadership roundtables.

This is naturally only a brief overview of the Working Groups and does not serve justice to the numerous unmentioned high quality work products of the ICN Working Groups.

Why join the ICN?

There are a number of reasons, why competition authorities should consider joining the ICN. About 130 jurisdictions worldwide have a competition law regime and a competition authority. This is extraordinary if one considers that about forty years ago roughly twenty jurisdictions had a competition law regime. The ICN in short nowadays represents the vast majority of the world's existing competition enforcers.

With this laudable proliferation however some challenges and questions have arisen. Predominantly the question for example how to achieve convergence and to coordinate in multijurisdictional cases as come up. This question is not only relevant for the ICN. Therefore in 2012 the OECD and the ICN joined their efforts and worked together closely to learn more about international enforcement cooperation. Both organisations surveyed their members and wrote drafts summarizing the outcome of the surveys[72]. It was realised that a lot can be learned from the national and international counterparts.

A competition authority that decides to join the ICN can benefit immensely from its membership. All ICN members and also non-members have unrestricted access to the ICN Work products via the ICN Website. Especially for young authorities this encyclopaedic knowledge is a valuable resource. Many of the existing ICN members represent jurisdictions whose economies could be considered as being in the process of development or transition. Such a set-up makes the ICN an excellent forum for the discussion of common challenges and the sharing of experience and expertise.

Some may regret that the ICN creates only soft-law. However this is exactly where the strength of the ICN lies. The ICN induces regulatory change through its various working groups. In the beginning of most projects, the purpose of each working group is easily described: identify a problem for study; study the issue; present findings; define common grounds and begin the process of harmonization. The ICN approach of seeking consensus positions allows for leeway based on the specific country situation of each agency. By using this approach the ICN has, despite its diversity in membership, managed to create an impressive and steadily growing body of accepted principles, best practices and recommended practices. Each ICN member voluntarily decides what level of participation is desired, how and to what extent domestic reforms of its competition regime might be desirable and in how far it will adhere to the ICN work products.

The ICN benefits immensely from the fact that it is an attractive organisation to which young agencies wish to participate. In joining they add a fresh set of eyes on the already existing work product. This means that after joining the work products can be further developed to reflect even more views on certain

72 The ICN report is available at
http://internationalcompetitionnetwork.org/uploads/library/doc908.pdf
The OECD report is available at
http://www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf

topics. Many ICN work product are updated to reflect the technical advancement and knowledge or the views of newly joined members. Also discussions with new ICN members very often inspire long standing ICN members to reflect on topics that were previously discussed under a new angle.

Vice versa, the new ICN members profit from the vast resource of work products the ICN has already produced. A young agency has therefore an easy reference to different topics and does not have to undergo the same difficulties as other agencies before. ICN members share their experiences in many different areas. A young completion agency can for example benefit from another member's experience in advocating the benefits of competition or of having a competition law regime to the legislator and the public. Even though such efforts and experiences cannot be directly copied because they will need to be adapted for every jurisdiction, they can serve as guidance and inspiration.

The involvement of international NGAs is certainly a further asset of the ICN. NGAs help the ICN working groups to identify projects, they offer important comments based on their professional experience on the work products and sometimes even help in producing these. This allows the ICN to portrait a plurality of views in the work products. At the workshops and Annual Conferences NGAs contribute actively to the discussion ensuring that all stakeholders' views are represented. They also help to promote and disseminate the ICN's work products.

Finally the informal nature of the ICN has helped to create a network in which support is easily found for young competition authorities. Workshops and the annual conference are great opportunities for first contacts with a vast number of other ICN members. In the recent past, the annual conference brought together over 500 participants from 90 jurisdictions, including 130 other representatives and stakeholders. These occasions offer a unique chance to establish new contacts which can then be followed up later by phone or email. Especially at the Annual Conference an overview of the current and future work product of the various working groups can be obtained. Interest to contribute to an ongoing work product can be expressed or discussions on substance can be held.

Future of the ICN

Shortly before being in existence for a decade the ICN took stock of its work and performance[73]. A report summarizing the results of the stock taking was

[73] http://www.internationalcompetitionnetwork.org/uploads/library/doc755.pdf

published in 2011. It stated that ICN work products had influenced agency practice of many ICN members and had also influenced legal and policy reforms in many ICN jurisdictions. In view of these impressive achievements, the ICN decided not to stand still and rest on its glories, but to ensure that the organisation remained an important player in global competition policy discussions.

For the second decade of the ICN's existence, the network intended to focus on four high level goals that included the encouragement of the dissemination of competition experience and best practices, the development of proposals for procedural and substantive convergence through a results-oriented agenda and structure, the support of competition advocacy; and to facilitate effective international cooperation. These four goals today form important guidance for the work of the ICN. Half way into the second decade the ICN has already made good progress.

ICN members are encouraged to engage in the governance of the network by giving feedback and input on the organisation of the ICN. Almost on a yearly basis, ICN Townhall meetings are organised with the ICN Chair and Vice-Chairs. At this occasion the members and NGAs are invited to make suggestions for the improvement of the ICN. This way it is ensured that the ICN deals with topical issues and meets the needs of its members.

To this unique worldwide network of competition authorities we welcome the Competition Authority of Georgia as one of its most recent members. We are looking forward to working together.

Grzegorz Pniewski

EXEMPTIONS FROM THE PROHIBITION OF COMPETITION RESTRICTING AGREEMENTS IN POLAND

1. Exemptions from the prohibition of the competition restriction

Both Polish and EU competition legislation prohibit the concluding of agreements that restrict competition. The prohibition has not been established to protect competition as a form of rivalry between undertakings but as a result of the positive effects that this rivalry may have on the economy. Therefore, if the protection of competition is not an absolute axiom, one may imagine situations in which, due to its positive impact for the economy, it would be permissible to restrict competition by entering into a prohibited agreement referred to in Article 6 of the Act of 16 February 2007 on competition and consumer protection (Journal of Laws No. 50, item 331, as amended, hereinafter referred to as the Competition Act).

2. Statutory exemption

Anticipating the possibility of a prohibited agreement benefitting the economy, the Polish legislature introduced provisions to Article 8 of the Competition Act to mitigate the prohibition. The regulation in question provides for both the possibility of an individual exemption of the agreement from the prohibition contained in Article 6 of the Competition Act (Article 8, paragraph 1, of the Competition Act) and the possibility of a block exemption on the basis of the regulation of the Council of Ministers (Article 8, paragraph 3, of the Competition Act).

2.1 Individual exemptions

According to the provisions of Article 8, paragraph 1, of the Competition Act, the prohibition to enter into an agreement whose purpose or effect is to eliminate or distort competition in the relevant market shall not apply to agreements which at the same time:

- improve the production or distribution of goods or contribute to technical or economic progress;

- allow the buyer or user a fair share of benefits resulting from the agreement;
- do not impose upon the undertakings concerned such impediments which are not indispensable to the attainment of these objectives;
- do not afford these undertakings the possibility of eliminating competition in the relevant market in respect of a substantial part of the goods in question.

These conditions form an exhaustive list of prerequisites which must be met jointly in order for the agreement to be eligible to benefit from the statutory exemption. Failure to meet one shall therefore preclude the others from analysis. Decisions issued by the European Commission indicate that the list may not be extended to agreements whose purpose is to create new jobs (European Commission Decision no. 93/49/EEC *Matra)* or to protect the natural environment (European Commission Decision no. 2000/476/EC *CECED)*. It should be noted here that pursuant to the provisions of the Polish Competition Act, other exemptions from the prohibition to enter into inadmissible agreement are permitted only in the case referred to in Article 3 of the Competition Act, which is in the case of the competition restrictions permitted under other laws.

In accordance with the provisions of Article 8, paragraph 2, the burden of proving that conditions for the exemption have been met rests upon undertakings that are parties to the agreement as entities which rely on the legal consequences derived from the fact that the agreement meets conditions for the exemption.

The form in which the agreement was concluded or the content of the agreement are irrelevant for the application of the exemption[74]. However, the practical application of this provision by the Office of Competition and Consumer Protection (hereinafter referred to as UOKiK) shows that the exemption under the provisions of Article 8, paragraph 1, should not apply to the most important restrictions of the competition. Decision of the President of the UOKiK no. RWA-37/2006 states that: “In view of the far-reaching adverse effects of the price cartels on competition, this type of agreement may only exceptionally be exempted from the prohibition in the form of an individual exemption”.

Further it should be noted that the status of an agreement may vary. Such an agreement is not prohibited as long as it meets the exemption conditions.

74 See Commentary on the Act on competition and consumer protection, ed. T. Skoczny, CH Beck, Warsaw 2009.

Undertakings which have entered into a given agreement must therefore constantly monitor whether they still meet the statutory conditions for the application of the exemption and must take into account the fact that the agreement status may change.

It is quite common in business transactions that cooperation between undertakings takes the form of a comprehensive agreement. When this occurs, fulfilment of the conditions laid down in Article 8, paragraph 1 of the Competition Act is examined only in relation to those elements of the agreement which restrict competition. For instance, Decision of the President of the UOKiK no. DAR-15/2006 examined the part of an agreement regarding Visa and Mastercard systems that pertained to the fixing of national interchange fee rates, and not the Visa and Mastercard systems themselves.

Conditions for the exemption can be divided into positive and negative prerequisites. This classification is based on the assumption that there must be a positive prerequisite in order for a given agreement to be exempted from the general prohibition while the negative prerequisite may not occur. The positive prerequisites are conditions set out in Article 8, paragraph 1, sub-paragraphs 1 and 2 of the Competition Act, while the negative prerequisites are conditions laid down in Article 8, paragraph 1, sub-paragraphs 3 and 4 of the Competition Act.

2.1.1 Increasing efficiency

The first condition laid down in Article 8, paragraph 1, sub-paragraph 1 of the Competition Act is the requirement that the agreements contribute to improving production or to technical or economic progress. This is a positive prerequisite. Due to the use of an alternative in the form of the connector "or" it is sufficient for the analysed agreement to contribute to the achievement of at least one of the improvements referred to in the provision in question in order to come to the conclusion that the prerequisite referred to in this provision has been met. Thus, there is no need for a cumulative fulfilment of all the conditions set out in that provision.

When analysing this prerequisite, it should be noted above all that increasing efficiency requires that the benefits resulting from the agreement be demonstrated. Such benefits may not be exclusive to the undertakings using the agreement[75]. Furthermore, it is argued that the benefit must actually

[75] K. Kohutek, M. Sieradzka, The Act on competition and consumer protection. A commentary. Wydawnictwo LEX, Warsaw 2014.

exist—it may not be hypothetical or conditional on the fulfilment of the other conditions[76].

When assessing whether this condition is met, one may consider the following factors, as indicated in the Decision of the President of the UOKiK no. DAR-15/2006:

- the type of benefits;
- the relationship between the agreement and the benefits;
- the likelihood that the benefits will occur and their size;
- how and when each of the benefits was granted.

Please note that in assessing whether there was a benefit, the situation before and after the agreement was concluded must be compared. In addition, there must be a causal relationship between the benefit and conclusion of the agreement; that is, the benefit must be a result of collaboration between undertakings arising from the concluded agreement.

As indicated above, the agreement should contribute to the improvement in one of three areas: production, technical or economic progress. Improving production should be understood as "any positive change that allows an increase to be achieved in production using the same resources (outlays)"[77]. Examples of such an improvement may include, inter alia, production growth, improved production profitability, introduction of a new product which none of the parties could develop alone, entrance into a new geographic market.

Improvement of the distribution of goods should be understood as improvement of the efficiency of the sale of goods. For example, increasing the availability of goods on the market, or improving services or a distribution network might all be regarded as improving production.

Technological advances may consist in, for example, developing new products, improving existing ones or implementing new technologies.

The most broad-ranging notion is that of economic progress, which includes the three above conditions as well as other circumstances that are beneficial from an economic point of view. As indicated by the doctrine, this provision requires a reference to the objectives set out in the Act and should be limited only to large-scale economic projects which are important at a national level[78].

[76] See Commentary on the Act on competition and consumer protection, ed. T. Skoczny, CH Beck, Warsaw 2009.

[77] See Commentary on the Act on competition and consumer protection, ed. T. Skoczny, CH Beck, Warsaw 2009.

[78] See Commentary on the Act on competition and consumer protection, ed. T. Skoczny, CH Beck, Warsaw 2009.

2.1.2. Providing benefits to other market participants

Another statutory positive prerequisite is the need to ensure that a relevant part of the benefits resulting from the agreement are extended to other market participants. This means that an agreement should not benefit only the parties in the agreement.

When referring to the beneficiaries of the agreement, the legislature uses the concepts of the buyer and the user. When interpreting these concepts in the spirit of the Act, the aims of which include ensuring the well-being of consumers, one assumes that they relate primarily to consumers. However, the doctrine shows that this concept should not be restricted only to consumers but rather be applied to all entities acting on the demand side, including undertakings, regardless of whether a purchase for business operations is made or not[79].

This prerequisite shows that an "adequate share of benefits" should be provided. That means that the undertaking does not have to share all benefits obtained as a result of the agreement with the buyer and user. It needs only share the relevant part of them, allowing it to counteract the agreement's negative effects on buyers or users[80]. It should be assumed that the concept of benefits should be interpreted broadly. It should therefore also be assumed that this may be a direct benefit consisting, for example, in offering products to consumers at lower prices. Yet this may also be an indirect benefit consisting in, for example, improving the quality of goods or the conditions of sale (European Commission Decision 86/405/EEC) or increasing mobile phone network coverage (European Commission Decision 2004/207/EC).

Note also that in its guidelines[81], the European Commission allows for the benefits resulting from an agreement to be be shifted in time, meaning they may occur at a later stage of the operation of the agreement and may be preceded by the agreement effects that are negative for the competition.

2.1.3. Indispensability of the competition restrictions

In order to benefit from the exemption provided for in Article 8, paragraph 1, of the Competition Act, it should be demonstrated that the agreement does not impose on the undertakings concerned restrictions which are not

79 K. Kohutek, M. Sieradzka, The Act on competition and consumer protection. A commentary. Wydawnictwo LEX, Warsaw 2014.

80 A. Stawicki, The Act on competition and consumer protection, Wydawnictwo LEX.

81 See paragraphs 87 to 89 of the European Commission guidelines on the application of Article 101, paragraph 3, of the EC Treaty, Official Journal of the EU, no. C 101, 27.04.2004.

indispensable to achieve the effects laid down in Article 8, paragraph 1, sub-paragraphs 1 and 2 of the Competition Act. The restrictions should be understood as restrictions on the competition laid down in Article 6 of the Competition Act.

This provision imposes the obligation to observe the principle of proportionality on undertakings concluding an agreement. The prerequisite of the principle of proportionality is the most dependent on evaluation and is therefore the most difficult to prove.

According to the Guidelines of the European Commission regarding the application of Article 101, paragraph 3 of the TEC[82], when analysing this prerequisite a test consisting of two parts should be performed. First, it should be assessed whether the conclusion of the agreement is necessary for the specified economic effects to occur. Second, it should be determined whether or not the anti-competitive provisions in the agreement are necessary.

Furthermore, in applying the first part of the test, it should be determined whether the economic effects indicated by the undertaking could have been achieved in a different manner that would be more favourable for the competition. Any alternative ways of achieving the economic effects must be real — that is to say achievable — by the undertaking in a given economic situation.

The second part of the test requires a determination of whether the agreement would have been concluded without the anti-competitive provisions. It is also necessary to demonstrate a causal relationship between the imposed restrictions and the economic consequences. It must be proved that without these restrictions, economic consequences would either not have been achieved or would have been much more difficult[83].

2.1.4. No elimination of competition

According to the fourth and final prerequisite, the agreement may not create a possibility to eliminate competition in respect of a substantial part of the goods covered by the agreement.

Analysis of these conditions requires that the state of competition before the conclusion of the agreement be examined and any restrictions on the competition resulting from the introduction of the agreement be determined.

82 See paragraphs 73 and 79 of the European Commission guidelines on the application of Article 101, paragraph 3, of the EC Treaty, Official Journal of the EU no. C 101, 27.04.2004.

83 See Commentary on the Act on competition and consumer protection, ed. T. Skoczny, CH Beck, Warsaw 2009

The purpose of the term "a substantial part of the goods" used by the legislative authorities is to ensure that fulfilment of this prerequisite by undertakings that have a substantial share in the relevant market will be more difficult. The larger the share of the market owned by the undertakings entering the agreement is, the more difficult it will be for them to prove that the condition has been satisfied. The prerequisite may not be met if the agreement is aimed against other entities and is intended to impede their existence on the market[84].

2.1.5. The burden of proof

Assessment of whether the statutory prerequisites allowing one to exclude the agreement that the general prohibition has been met is made by the undertakings entering the agreement. Thus, they shall incur the legal risk associated with an incorrect assessment of the agreement, which may result in the President of the UOKiK issuing a decision on the use of illegal practices and imposing a penalty of up to 10% of the revenue generated in the financial year preceding the year in which the penalty was imposed.

The burden of proof is governed by the provisions of Article 8, paragraph 2, of the Competition Act, according to which the burden of providing evidence that the agreement may benefit from the exemption referred to in Article 8, paragraph 1, shall rest upon the undertakings that have entered into the agreement. The legislative authorities do not limit the list of evidence.

3. Block exemptions

Provisions of Article 8, paragraph 3 of the Competition Act contain the delegation of legislative powers to the Council of Ministers to issue a regulation exempting certain types of agreements from the prohibition of the competition restrictions. These agreements must comply with the conditions laid down in Article 8, paragraph 1, of the Competition Act. When issuing regulation on the basis of this delegation of legislative powers, the Council of Ministers must consider the benefits a given type of agreement may carry. Furthermore, the delegation of the legislative powers defines mandatory elements which the regulations governing exemptions must contain. The Council of Ministers Regulation lays down by way of a regulation:

- The conditions that must be met in order for the agreement to be considered exempted from the prohibition;

[84] See Commentary on the Act on competition and consumer protection, ed. T. Skoczny, CH Beck, Warsaw 2009.

- The clauses whose occurrence in the agreement constitutes a violation of the provisions of Article 6 of the Competition Act;
- The duration of the exemption.

Optionally, the Council of Ministers may also define the clauses whose occurrence shall not be considered a violation of the provisions of Article 6 of the Competition Act.

It should be emphasised that the agreements exempted under the regulation of the Council of Ministers issued on the basis of the delegation of legislative powers must meet all four criteria allowing an undertaking to benefit from the individual exemption. The legislative authorities are therefore entitled to assess whether the group of agreements which the block exemption should apply to actually satisfy this requirement.

3.1. Elements of the exemption regulation

3.1.1. Characteristics of the exempted agreements

It is first necessary to specify those agreements which are subject to the exemption. Agreements may be exempted due to their economic objectives, the type of cooperation to be undertaken (for instance production or distribution) or the method by which the cooperation is undertaken (for instance selective distribution, franchising). Describing the agreement in these terms is to use qualitative criteria.

Determining which agreements may be exempted can also be done using quantitative criteria, which look at the market power of the undertakings participating in the agreement. Quantitative criteria are meant to identify the extent to which these agreements may be exempted. The exempting regulations use quantitative criteria for the size of the market share (determined as a percentage) and the size of the undertaking (by indicating the undertaking's turnover). The current trend is to focus on the economic impact of the agreement rather than using the criterion of the size of an undertaking[85]. Nonetheless, the quantitative criteria in the exemption regulations are always complemented by qualitative criteria.

The exemption regulations often include provisions which allow temporary maintenance of an exemption should the specified thresholds be exceeded. The provisions in questions are designed so as to enable a temporary

---

85 The group exemptions from the prohibition to conclude agreements restricting competition in the European Community and Poland., ed. A. Jurkowska and T. Skoczny, Publishing House of the Faculty of Management at the University of Warsaw, Warsaw, 2008.

(1 to 2 years) application of the exemption for cases in which the thresholds are exceeded by no more than 5-10%. Such a solution helps make the rules more flexible so that the undertakings have sufficient time to change individual provisions of the agreement if the threshold has been exceeded, which can occur for reasons that are often beyond their control (for instance, a competitor withdrawing from the market).

3.1.2. Black clauses

Clauses whose occurrence in the agreement violates provisions of Article 6 of the Competition Act (black clauses) are a mandatory element of any exemption regulation issued pursuant to the delegation of legislative powers referred to in Article 8, paragraph 3, of the Competition Act. These clauses may occur in two forms. The first group of black clauses includes prohibited provisions whose occurrence in the agreement shall make the entire agreement null and void. The second group includes prohibited provisions which do not require the agreement to be voided if the clause is removed.

3.1.3 White clauses

Indication of the clauses whose occurrence in the agreement is allowed (white clauses) is an optional element of the exemption regulation. Including such a list in the regulation is beneficial for undertakings as it ensures that inclusion of a given clause in an agreement will not be deemed a breach of the competition. The current trend is to depart from listing such clauses in the regulations as they have led to the standardisation of agreements, which impeded the development of new forms of economic cooperation[86].

3.1.4. Gray clauses

Grey clauses are applied on a more limited basis depending on the circumstances (for instance, structure of the market or the subject of the clause call for them to be used), or by the passage of time.

3.1.5. Duration

The last element of an exemption regulation is the duration of a given exemption. This is a mandatory element. All parties concerned should be

[86] The group exemptions from the prohibition to conclude agreements restricting competition in the European Community and Poland., ed. A. Jurkowska and T. Skoczny, Publishing House of the Faculty of Management at the University of Warsaw, Warsaw, 2008.

aware of the connections between and differences in durations in the Polish exemption regulations and the European Union regulations. As a rule, Polish exemption regulations expire later than their EU counterparts. Exemptions applied in the European Union should be watched, while Polish exemptions may be adjusted accordingly.

4. Exemption regulations in Poland

The Polish legislative authorities have decided to issue the following exemption regulations:

- Regulation of the Council of Ministers of 30 July 2007 on the exemption of certain types of technology transfer agreements from the prohibition of agreements restricting competition;
- Regulation of the Council of Ministers of 30 March 2011 on the exemption of certain types of vertical agreements from the prohibition of agreements restricting competition;
- Regulation of the Council of Ministers of 22 March 2011 on the exemption of certain types of agreements concluded between undertakings carrying out insurance activities from the prohibition of agreements restricting competition;
- Regulation of the Council of Ministers of 13 December 2011 on the exclusion of certain specialization and research and development agreements from the prohibition of agreements restricting competition.

When adopting exemption regulations, the Polish legislative authorities usually follow the solutions adopted in the European Union. One justification for this approach is that it promotes the transparency of legislation – undertakings that have operated on the European market and intend to start a business on the Polish market will not be surprised by rules governing given categories of exemptions in a different way[87]. Another argument in favour of following EU provisions is there is a lack of significant differences between the characteristics of the Polish and EU markets. Finally, the content of the European Union exemption regulations has been affected by the long-term practice of applying the said exemptions in addition to European Court of Justice case law. Thus, by following European Union measures and solutions Poland indirectly benefits from these achievements.

87 Reasoning of the regulation of the Council of Ministers of 23 May 2013 amending the regulation on the exemption of certain types of vertical agreements from the prohibition of agreements restricting competition.

Katarzyna Racka

THE POLISH LENIENCY PROGRAMME

Introduction

Leniency programmes are considered the most effective tool for detecting cartels and obtaining evidence to prove their existence and effects. The main assumption of these programmes is to encourage cartel participants to confess their anticompetitive conduct and implicate their co-conspirators, providing first-hand, direct "insider" information or evidence of conduct. This enables competition authorities to uncover conspiracies that would otherwise go undetected and can destabilise existing cartels. They also act as a deterrent to those contemplating entering into cartel arrangements. However, for a leniency programme to succeed, it must be implemented with transparency and certainty. A leniency applicant needs to be able to anticipate with a high degree of certainty how it will be treated if it reports anticompetitive conduct.

Modelled mainly on the European Commission's leniency programme[88], Poland's programme has been in force since 2004 and is created by the appropriate regulations[89] (hereinafter "the leniency regulations"),the Guidelines for which were issued by the Polish Competition Authority (hereinafter "UOKiK"). They may be found on its website (www.uokik.gov.pl). The first amendment to the leniency regulations was adopted in 2009, followed by the introduction of a marker system and summary applications. On 18 January 2015, significant amendments to the Polish Act on competition and consumer protection (hereinafter "the amended Act") will enter into force. According to these amendments, inter alia, the UOKiK will be eligible to impose pecuniary sanctions for infringements of antitrust law not only on undertakings (as has been the case) but also on the specific category of individuals referred to as "performing managerial functions or belonging to the executive body of the undertaking"as well. As a result, the Polish leniency programme will be applied both to the undertakings and to individuals that do not have the

88 2002 Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 45, 19.2.2002, p.3-5.

89 Currently: article 109 of the Act on competition and consumer protection and the Regulation of the Council of Ministers of 26 January 2009 concerning the mode of proceeding in cases of enterprises' applications to the President of the Office of Competition and Consumer Protection for immunity from or a reduction of fines; from 18 January 2015: articles 113a-113k of the amended Act on competition and consumer protection and the new Regulation concerning the mode of proceeding with the application to the President of the Office of Competition and Consumer Protection for immunity from or a reduction of fines.

status of an undertaking. The rules of lenient treatment will be the same for them and their applications will be assessed in a single leniency queue. The leniency application of the undertaking will cover all above individuals (present and former). The liability of individuals will be conditional on the liability of undertakings, i.e. the manager may only be fined if the company is held liable. Single proceedings against the undertaking and individual will be conducted; fines will be imposed in the same decision for each of them. Moreover, the amended Act will introduce another element of the leniency programme—leniency plus (described below), which may attract leniency applications.

The Polish leniency programme applies both to horizontal and vertical agreements (in contrast to some jurisdictions where the leniency programmes can only be applied to cartels). At the outset of our leniency programme we opted to give it a wide scope in order to encourage undertakings to confess their anticompetitive behaviour and to familiarise them with leniency policy. We have not limited the scope of the leniency programme only to cartels, as practical experience suggests that vertical behaviour may facilitate horizontal cartel activity[90]. Ours is not an unprecedented model in the European Union—other leniency programmes also address in scope more than cartels, e.g. in the UK leniency may also be applied to vertical agreements, but is limited to resale price maintenance[91]. Moreover, the last revision of *ECN Model Leniency Programme* (hereinafter “the revised MLP”) confirms that not only strict secret cartels may be covered by the leniency programme (as has been the case). The explanatory notes of the revised MLP clarifies the concept of a secret cartel and states that not all the aspects of the cartel must be secret to be included in the scope of the leniency programme[92].

1. Criteria for granting lenient treatment (immunity from or reduction of a fine)

There are a number of criteria that the UOKiK applies when considering whether to grant lenient treatment. As a general rule, leniency should be available in circumstances both where the competition authority is unaware of the cartel and where it has information about an anticompetitive infringement (e.g. it has commenced explanatory proceedings), but does not have sufficient

90 There have been 56 leniency applications submitted to the UOKiK so far: 14 in the first five years of the leniency programme (up until 2009) and 42 from 2009 till the present. Most of these applications concern vertical agreements or “hub and spoke” agreements.

91 R. Whish, Competition law, Oxford, sixth edition, p. 407.

92 ECN Model Leniency Programme: 2012 revision. Explanatory notes, point 11.

evidence to issue a decision finding infringement. Lenient treatment should be available where the application facilitates the competition authority's ability to prove the existence of a cartel[93]. According to the Polish leniency programme, the criteria for granting lenient treatment are as follows:

1.1 Order of application

For leniency applicants one's place in the leniency queue is significant, as only the first applicant may expect to be granted total immunity from a fine. Subsequent leniency applicants may expect reductions to their fines. The first applicant may be eligible for immunity both if it had submitted its application before the UOKiK had information (knowledge) about an infringement and if the applicant applied for lenient treatment after the UOKiK had commenced proceedings, e.g. had conducted an inspection.

1.2 Quality of evidence provided

Both an applicant for immunity and an applicant for the reduction of a fine must meet the required evidential thresholds, which are different for each of them.

Conditions for immunity from a fine

To be eligible for immunity an applicant must be the first to provide the UOKiK with:

- information that the UOKiK does not have at the time of making the leniency application concerning the existence of an agreement and which is sufficient to enable the UOKiK to institute antitrust proceedings;
- evidence that the UOKiK does not have at the time of making the leniency application and that will make it possible for the UOKiK to issue a decision finding infringement or information enabling it to obtain such evidence.

For the undertaking that did not meet the conditions for the immunity from a fine it is still possible to get a reduced fine, if it meets the evidential threshold for the reduction and if it applied for the reduction.

93 International Competition Network, Anti-cartel enforcement manual, Chapter 2 – Drafting and implementing an effective leniency policy, April 2014, p. 7.

Conditions for the reduction of a fine

The reduction of a fine is available to the applicant that provides upon its own initiative evidence which the UOKiK does not have at the time the leniency application was filed and which to an essential extent will contribute to the UOKiK's ability to issue a decision finding infringement.

How the UOKiK reduces fines

If it finds infringement of competition law the UOKiK may impose a penalty not exceeding 10% of the revenue earned in the accounting year preceding the year within which the penalty is imposed.

According to the Polish leniency programme[94] the undertaking wishing to benefit from a reduction of a fine may expect the following reductions of fines[95] by:

- 30-50% for the undertaking which is the first to meet the evidential thresholds;
- 20-30% for the undertaking which is the second to meet the evidential thresholds;
- a maximum of 20% for other undertakings which have met the evidential thresholds.

1.3 Cooperation with the competition authority

Cooperation is an essential feature of each of the leniency programmes that reward those who assist the competition authority in its investigation. An applicant may receive favourable treatment under the leniency programme if its cooperation with the authority is full, genuine, sincere, and done in good faith, by providing accurate and complete information that is not misleading[96]. Full cooperation means in practice:

- providing the UOKiK with all relevant information and evidence that comes into the applicant's possession;

[94] According to art. 113.2 of the amended Act. Currently (till 18 January 2015) fines may be reduced as follows: not exceeding of, appropriately, 5%, 7% or 8% of the revenue – upon the undertaking which has, appropriately, as the first, second or another, met the evidential thresholds.

[95] The fine is determined according to the Guidelines on setting fines for competition restricting practices (available on the UOKiK's website: http://www.uokik.gov.pl/en/press_office/press_releases/art143.html). Firstly, under the Guidelines on setting fines for competition restricting practices, the general amount of the fine is determined and then the reduction is made from this amount.

[96] See the judgment of the Court of Justice of 29 June 2006 in case C-301/04 P, Commission v. SGL Carbon AG, a.o., at paras 66-80; the judgment of the Court of Justice of 28 June 2005 in cases C-189/02 P, C 202/02 P, C-205/02 P, C-208/02 P and C-213/02 P, Dansk Rorindustri A/S a.o. v Commission, at paras 395-399.

- remaining at the disposal of the UOKiK to reply promptly to any requests that may contribute to the establishment of relevant facts;
- not making it difficult for employees and persons performing managerial functions or belonging to the executive body of the undertaking to produce explanations for the UOKiK;
- not destroying, falsifying or concealing relevant information or evidence;
- not disclosing the fact or any of the content of the leniency application without the consent of the UOKiK;
- when considering whether to file an application but prior to doing so (e.g. during the UOKiK's inspection), not destroying evidence and not disclosing the intention to submit an application.

1.4 The role an undertaking plays in a cartel

The leniency programmes may provide for the exlusion of applicants from immunity (but not from reductions of fines). This means that certain types of leniency applicants are not eligible for immunity because of the role they have played in the cartel, e.g. initiators, coercers, ringleaders. In the Polish leniency programme immunity from a fine may be granted only if the first applicant was not the initiator of the cartel and did not coerce other undertakings to participate in anticompetitive behaviour. According to the amended Act, only the undertaking that coerced to infringement can be excluded from immunity. While initiator may be granted immunity.

The exclusion should be predictible and measurable by the undertakings. A potential applicant should be in a position to assess from the outset whether it will qualify for immunity. Therefore, the exclusion should avoid purely subjective criteria or the need for an extensive internal investigation. To ensure it does the scope of the exlusion should be narrow.

1.5 Termination of participation in an anticompetitive agreement

As a rule, the leniency applicant ought to cease its participation in the agreement not later than the time when it submits the leniency application. However, under some circumstances, the competition authority may decide that the leniency applicant should continue its involvement in the agreement, e.g. there should be room for the authority and the applicant to agree that the applicant should, for instance, passively participate in some cartel meetings, so as to give the authority sufficient time to prepare for the dawn raid.

According to the current Polish leniency programme, the applicant must terminate its involvement in an anticompetitive agreement at the latest on the date on which it submits the leniency application. Whereas, the amended Act specifies that the applicant that has not terminated its anticompetitive behaviour prior to submitting the leniency application shall do so immediately following the submission. This amendment is justified by the need to ensure that a sudden withdrawal from a cartel does not alert other participants to the detriment of enforcement measures being taken by the UOKiK.

2. Other elements of the Polish leniency programme

2.1 Marker system

The Polish leniency programme foresees markers both for immunity and for reduction of fine applicants (i.e. for the first and for subsequent applicants). The principal purpose of the marker is to protect an applicant's place in the leniency queue for a given period of time so it can gather the information and evidence required to meet the relevant evidential threshold for immunity or the reduction of a fine. In practice the marker means the undertaking may submit an abridged leniency application if at the time it submits the application it does not possess all of the information required. The abridged application guarantees the undertaking a place in the leniency queue if and only if the application is subsequently completed. The UOKiK determines in each case the scope of information and evidence required to perfect the marker.

According to the leniency regulations, the marker (abridged application) should contain a general description of the agreement, indicating at the very least, the following:

- the parties to the alleged infringement;
- the products or services to which the agreement refers;
- the territory the agreement covers;
- the purpose of the agreement;
- the duration of the agreement;
- the names and official positions of the persons who performed significant (key) functions with respect to the agreement;
- whether an application for immunity from or the reduction of a fine has also been submitted to the competition protection authorities of the European Union Member States or of the European Commission.

A marker is granted automatically insofar as the submission of the application for a marker containing the foreseen requirements secures a place in the leniency queue. At the same time, the UOKiK reserves the right to assess whether the applicant has fulfilled these requirements. However, it does not immediately inform the applicant that it has been granted a marker unless it requests the applicant complete the application.

The deadline for perfecting the application is determined by the UOKiK on a case-by-case basis. It generally runs to a few weeks. An applicant may request an extension to the deadline in justified cases, though the UOKiK is not bound by the request and can refuse it. An application completed by the deadline is considered submitted on the date of the abridged application's submission. The UOKiK then assesses the completed application and decides whether the applicant meets the required evidential thresholds for immunity or a reduced fine and whether it should be granted conditional immunity/leniency. An applicant that does not perfect its application loses its place in the leniency queue (the UOKiK does not grant it the marker) and cannot earn conditional leniency.

Since 2009, when the marker was introduced to the Polish leniency regulations, the UOKiK has received 11 applications for markers, constituting 27% of all leniency applications (there have been 41 in total, i.e. 11 abridged applications and 30 full applications). The marker is clearly popular among leniency applicants.

The UOKiK recognises that the key benefit of the marker system is that it can increase the race to the UOKiK by allowing the applicant to come forward on the basis of very limited information, i.e. as soon as the applicant knows of the conduct infringement and before it could have completed an internal investigation. This extra incentive offers a high degree of security, especially for the first-mover's fate in the further investigation since it can, at an early stage, secure its position at the front of the leniency queue without having to provide a complete application. As a result, the marker system encourages applications and may therefore have a destabilising effect on cartels. Moreover, the marker can create an incentive to apply for immunity since it increases the legal certainty and security from an early stage and fosters spontaneous early cooperation. However, in order to achieve this aim, the criteria under which the authority assesses a marker application should be clear from the leniency regulations and not too detailed to enable potential applicants to estimate with a sufficient level of predictability if a future application would be successful or not in view of the information at hand. The Polish leniency regulations specify the requirements for a marker application (see above), but if a potential applicant has any doubts concerning these requirements it may contact the UOKiK before beginning the application to request clarification.

In a number of situations, after having been provided a marker application by a first-mover, the UOKiK received a full leniency application with information or evidence which had not been provided by the first-mover marker applicant. This raises the question of how to assess each of the applications and which applicant is eligible for immunity. Even if the application for a marker is completed by the deadline set by the UOKiK, it will still be done later than the application of the second leniency applicant, who has provided the UOKiK with a full application. However, because the applicant for a marker as the first mover decided to provide the UOKiK with information about a cartel, it should be granted first place in the leniency queue along with conditional immunity. Such situations lead to the conclusion that the UOKiK should base its assessment of leniency applications, including applications for a marker, on the existence of cartel behaviour and other requirements specified in the leniency regulations such as a lack of the information or evidence the Authority requests. On the other hand, markers should not be denied for reasons not related to the assessment of the application itself (e.g. submission of a full application by a subsequent applicant or the assumption that other undertakings could be willing to file a full application), while refusal to grant a marker should be based on objective reasons such as the failure to meet the thresholds.

2.2 Leniency plus

With an eye to creating further incentives for undertakings to use the leniency programme, the amended Act will provide for what is called leniency plus, a proactive antitrust enforcement strategy aimed at attracting leniency applications by encouraging companies already under investigation for belonging to one cartel to report other cartels unknown to the competition agency. Leniency plus in Poland will concern a leniency applicant that does not fulfill the requirements for immunity but may still be eligible for a reduced fine in one case (proceedings), and at the same time it discloses, as a first leniency applicant another, still undetected, anticompetitive agreement which has not been the subject of investigation by the authority. Such a leniency applicant would receive an additional 30% reduction of its fine in the first case and immunity in the second case (if the UOKiK commences an investigation and issues a decision finding the second anticompetitive agreement).

2.3 Summary applications

In the event that an anticompetitive agreement concerns the territory of at least three Member States an undertaking may submit a leniency application to the European Commission. It may at the same time submit a summary application to the UOKiK, if the territory of Poland is affected by the agreement. Submission of a summary application to the UOKiK creates an automatic and indefinite “summary application marker”, since in this way an applicant secures its place in the queue under the national leniency programme, subject to a possible later assessment by the UOKiK of eventual full (completed) leniency applications. The UOKiK requests the applicant complete the application only after proceedings concerning the case to which the application refers have been initiated by the UOKiK. Before the UOKiK initiates proceedings, the undertaking produces all the information required and cooperates with the European Commission.

Having received the summary application, the UOKiK informs the undertaking (both first and subsequent) in writing of the date and time of receipt of the application. Additionally, according to the amended Act, the UOKiK informs the first summary applicant of the order of its summary application as well, and subsequent summary applicants will be informed of the fact that a first summary application has been received. This information could not be understood as a notification stating that the undertaking may preliminarily meet the requirements.

3. Procedural issues

3.1 Submission forms for leniency applications

Before submitting the leniency application, an undertaking may contact the UOKiK, e.g. by phone to obtain information on the leniency programme. In particular, a potential applicant may present “hypothetical” circumstances of the case (describe anonymously the agreement which it is/has been party to) for preliminary assessment of its eligibility for the leniency programme.

The leniency application may be submitted orally for the record prepared by an employee of the UOKiK or in writing personally, by e-mail, fax or post. If the application is submitted by e-mail or fax, the original (or a certified copy) must be delivered within 3 days (from 18 January 2015 - 5 working days) of the date when the application was received by the UOKiK by e-mail or fax . In such an event, the date and time an application was submitted by these means is considered the date and time the application was received.

3.2 Handling the leniency applications

The UOKiK assesses the leniency applications according to the order of their submission; there are a few stages of the assessment:

- formal assessment – e.g. the UOKiK verifies if the application has all the required attachments or contains formal defects;
- assessment in merit – the UOKiK verifies if the applicant meets the required conditions;
- conditional granting of immunity from a fine or the reduction of a fine – if the UOKiK preliminary states that the applicant may fulfill its requirements;
- final assessment in a decision finding an anticompetitive agreement – if the UOKiK finds that one or more conditions required by the leniency programme have not been fulfilled, the undertaking will not benefit from any lenient treatment under this programme.

3.3 Confidentiality

The appropriate protection of leniency information or evidence is necessary to eliminate fears that such information or evidence may be used against the leniency applicant in civil damage claims. Of course it should be said that civil damage claims and leniency programmes are complementary tools to enforce competition law and deter further infringements. However, the experience of the competition authorities shows that when deciding whether or not to cooperate with the authority under a leniency programme, a potential applicant considers an important factor to be the impact of such cooperation on its position in civil proceedings as compared with those times when it decides not to cooperate[97]. An undertaking which cooperates with the authority in revealing illegal agreements should not be placed in a worse position in respect of civil damage claims than participants of the agreements that do not disclose information about an infringement and do not cooperate. In order to limit any such negative consequences the leniency programme should stipulate that limited access will be granted to any record of any leniency statements (oral and written).

With regard to the confidentiality of leniency applications, the Polish leniency regulations[98] currently foresee general rules applied to the leniency documents and statements. As a rule, only the parties of the proceedings have access to the information and evidence received by the UOKiK under

97 See Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012 – Protection of leniency material in the context of civil damages actions.

98 Article 70 of the Act on competition and consumer protection.

the leniency procedure; however, they gain that access only at the final stage of the proceedings, prior to the decision being issued. This rule is not applied, and information and evidence may be made accessible to the other parties of the proceedings at earlier stage of the proceedings, if the applicant for leniency agrees in writing to make available the information and evidence submitted to the UOKiK. Moreover, according to the amended Act[99], documents containing an applicant's statement may be copied by a party of the proceedings only if the applicant provides written consent. The party may take notes provided it commits to using the information gained thereby solely for proceedings before the UOKiK or the court, the latter of which is conducted as the result of a UOKiK decision being appealed.

While leniency applications may, in practice, currently only be submitted in writing, the UOKiK, bearing in mind the above concerns, has been considering taking oral submissions for the applications, with no signature required, if they are done on the record. At the present time, an applicant may submit the application orally for the record, but the UOKiK employee preparing the record puts the date and the time on the document and both the employee and the applicant must sign the document.

[99] Article 70.4 of the amended Act.

Tadeusz Skoczny

RECENT DEVELOPMENTS IN POLISH COMPETITION LAW

1. Introduction

1. Poland's new Antimonopoly Act was adopted[100] as early as the beginning of the 1990s in the framework of the Balcerowicz Plan and its legal instrumentation. Poland's antimonopoly enforcement authorities were created at the same time. The Antimonopoly Office (AMO) was created in 1990. Since 1996, the President of the Office of Competition and Consumer Protection (the UOKiK President) has been fulfilling the functions of the Polish competition authority. Simultaneously, the Antimonopoly Court was created in 1991; it was later renamed the Competition and Consumer Protection Court (SOKiK). It exercises 1st instance judicial control over the decisions of the UOKiK President. Moreover, before the end of the 1990s, many other legal acts meant to protect consumers were enacted giving the Polish competition authority a variety of discretionary powers.

2. At the same time, Poland commenced its integration process with the European Union. The full implementation of the Europe Agreement of 1992[101] created a solid basis for its EU Accession. Importantly, the Europe Agreement included competition rules that reflected those of the European Communities. In order to implement the *acquis communautaire* in the area of competition law, a new Competition and Consumer Protection Act was passed in 2000[102]. The CCP Act of 2000 was subject to major amendments shortly before Poland's accession to the EU in 2004[103]. The CCP Act of 2000

100 The Act of 24 February 1990 on Counteracting Monopolistic Practices (*Journal of Laws* No. 14, item 89 with several small amendments); see in detail T. Skoczny, Poland: Chapter 3 – Competition Law, in: S. Breidenbach/Ch. Campbell (eds.) *Business Transactions in Eastern Europe*, vol. 2 (Lexis Publishing 1977) § 2.

101 Europe Agreement Establishing and Association between the Republic of Poland, on the One Part, and the European Communities and Their Member States, on the other Part signed on 16 December 1991. See Decision of the Council and the Commission of 13 December 1993 on the conclusion of this Agreement (OJ [1993] L 348/1).

102 Act of 15 December 2000 on competition and consumers protection (*Journal of Laws* 2000, No. 122, item 1319 with later amendments. see in detail T. Skoczny, Polish Competition Law in the 1990s – on the Way to Higher Effectiveness and Deeper Conformity with EC Competition Rules, *European Business Organization Law Review* (EBOR), 2001, 2: 777-793.

103 Act of 16 April 2004 on Amendment of the Act on the Protection of Competition and Consumers and of other Acts (*Journal of Laws* 2004, No. 93, item 891).

was finally replaced in 2007 by the Competition and Consumer Protection Act (CCP Act of 2007)[104] currently in force.

3. After more than two years of preparations and widespread discussions initiated and led by the services of the UOKiK President, major changes were recently introduced into the CCP Act of 2007 by the Amendment Act of 2014[105] (Amendment Act 2014). The Amendment Act of 2014 will enter into force on 18 January 2015. According to the document "Competition Policy 2011-2013" and the strong will of the President of the UOKiK who initiated the preparation of this Act, the amendment seeks, first, to increase the effectiveness of competition law enforcement in Poland, and, second, to simplify and shorten national merger control proceedings[106].

4. Effective antitrust enforcement is a key success factor for any competition authority. It comes therefore as no surprise that the UOKiK President would try to use the amendment process to add new instruments to its already well-equipped toolbox. In order to increase the efficacy of competition law enforcement in Poland, the Parliament accepted the UOKiK President's proposal to introduce into the national legal system a number of completely new instruments of competition law enforcement, and to make significant changes to a number of existing ones. Among the newly created instruments are: the use of remedies in antitrust cases, fines imposed on individuals (managers) for anti-competitive behaviours, and settlements. Leniency Plus has been introduced as a new element of the already existing national Leniency programme. A number of other changes were meant to clarify the inspection powers of the UOKiK President.

2. Increasing the effectiveness of the enforcement of the prohibition of anti-competitive practices

2.1. Remedies in antitrust cases

5. Before the Amendment Act of 2014, if an infringement of the prohibition of restrictive practices (that is, anti-competitive agreements or an abuse of

104 The Act of 16 February 2007 on the Protection of Competition and Consumers (*Journal of Laws* 2007, No. 50, item 331 with later amendments); available in English at http://www.uokik.gov.pl/.

105 The Act of 10 June 2014 amending the Act on the Protection of Competition and Consumers and the Code of Civil Procedure (Journal of Laws of 17 July 2014, available in Polish at http://orka.sejm.gov.pl/.

106 The justification of the Amendment Act of 2014 is available in Polish at http://orka.sejm.gov.pl/ and the official statement of the UOKiK President (M. Krasnodębska-Tomkiel) published in Polish in internetowy *Kwartalnik Antymonopolowy i Regulacyjny* (iKAR) No 1(1) vol. 2012, p. 7-9 available in Polish at http://www.ikar.wz.uw.edu.pl/.

a dominant position – Article 6-9 of the CCP Act of 2007 or Article 101 or 102 TFUE) was found, the UOKiK President could only issue "infringement" decisions or "commitment decisions. In an infringement decision, the President could order the offending undertakings to refrain from engaging in the forbidden practice in the future (only negative obligations) and impose an antitrust fine upon them[107]. Alternatively, the President could issue a "commitment" decision that imposed on the undertakings an obligation to undertake certain activities that were meant to counteract the violations[108].

6. Once the Amendment Act of 2014 enters into force, the President will also be able to determine in his infringement decisions how an undertaking should go about terminating the infringement or remove its effects by imposing remedies (also positive obligations)[109]. This new legal institution is modelled on Article 7 of Regulation 1/2003[110].

7. As in the EU, remedies in Poland can be of a behavioural or structural nature. The Amendment Act of 2014 provides an open list of behavioural remedies, naming four types "in particular". Hence, the President may:

1) order an IPR licence to be granted,
2) grant access to certain infrastructure or,
3) deliver to other entities goods or provide certain services. These remedies must be granted on non-discriminatory conditions. The President may also
4) change any concluded contract.

Furthermore, according to the new text of Article 10(5) of the CCP Act, the President may also impose structural remedies aimed at the reorganisation of an undertaking's business. Structural remedies may provide for "allocating" of a given economic activity to specific entities within an undertaking's capital group or to an organisationally separate unit within the structure of the undertaking. This may pertain, for instance, to a wholesale activity of a vertically integrated business. These exhaustedly listed forms of structural remedies can be imposed only when using behavioural remedies would not be effective, or when other measures – while equally effective – would be more burdensome for the undertakings involved.

8. Behavioural and structural antitrust remedies must be proportionate to the gravity and type of the infringement at hand. They must also be necessary

---

107 Article 10(1-3) and Article 106(1)(1-2) of the CCP Act of 2007.

108 Article 12 of the CCP Act of 2007.

109 Article 10(4-9) of the CCP Act of 2007 as provided by the Amendment Act of 2014.

110 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1–25).

to bring it to an end and remove its effects. The expected positive results of this new instrument will depend mostly on successful dialogue between the UOKiK President (who is obliged to inform the undertakings about his intention to impose certain remedies) and the undertakings being investigated. The latter have the right to express their position on the President's proposals. They also later have an obligation to provide the President information on the extent of implementation of the remedies required of it.

2.2. Leniency Plus

9. The UOKiK President has been able, since 2004, to completely refrain from imposing a fine, or to reduce the level of a fine for an undertaking which has concluded an anti-competitive agreement prohibited under Article 6(1) CCP Act of 2007 or Article 101(1) TFUE[111] (Leniency procedure). The national Leniency programme has been used many times in recent years, though, interestingly, it has mostly been applied in cases of vertical (rather than horizontal) agreements.

10. As the UOKiK President strongly desired, the Amendment Act of 2014 enhanced the Polish Leniency programme by introducing "Leniency plus". This instrument allows a Leniency applicant that was not able to qualify for full immunity (i.e. 100% reduction of a fine), to get an additional ("plus") reduction of the fine imposed for its participation in a prohibited agreement, in exchange for disclosing another, yet unknown, illegal anti-competitive agreement on a different market, provided it co-operates with the competition authority in that regard. This means that a whistleblower may receive full immunity (a 100% reduction of its fine) under the general leniency rule for the additionally disclosed agreement as well as a fine reduction in the original case.

11. As a result of this legal change, as well as because such Leniency will also be open to "managing persons", the UOKiK President expects an increase in the number of Leniency applications overall, even if Leniency plus is just an option for any undertaking to disclose another agreement it has taken part in. However, Polish Leniency plus offers numerous benefits for undertakings while presenting them with few risks. When considering filing a Leniency plus application, those that participate in an anti-competitive agreement are aware of the set – and very high – level of fine reductions (always 30%) attached to the disclosure of every new illegal agreement separately. In each such case, the undertaking secures for itself the 1st position in the Leniency line for the additional agreement. The whistleblower is also not excluded

[111] Article 109 of the CCP Act of 2007 with the implementing regulation of 26 January 2009 (*Journal of Laws* No. 20, item 109).

from the circle of entities which can apply for immunity. It must refrain from its own participation in such agreements, at least at the moment of delivering its Leniency plus application. For all these reasons, cartel participants may try to use Leniency plus to secure immunity from future fines.

2.3. Settlement procedure

12. Up until 2014, the Leniency programme was the only element of the Polish competition law system providing a way to have a fine for infringement of antitrust prohibitions reduced[112].

13. The Amendment Act of 2014 introduced a new settlement instrument. The law makes it possible for infringers (undertakings or individuals) of antitrust prohibitions to settle with the Polish competition authority in exchange for a 10% reduction in the fine to be imposed for an antitrust breach it admits to. That reduction is available to those who voluntarily submit to the fine and agree not to appeal it (if an appeal is submitted, they lose the "discount"). This completely new legal instrument, called in Poland "voluntary submission to a fine" (*dobrowolne poddanie się karze*), can be implemented only if the UOKiK President believes that the settlement procedure will lead to the acceleration of the proceedings. At the same time, however, settlement can be used in any type of antitrust case, including not only horizontal but also vertical anti-competitive agreements as well as the abuse of a dominant position[113]. Moreover, the use of the settlement procedure saves major resources (on both sides) and is much faster in providing undertakings with legal certainty since they will not have to be further preoccupied with an eventual court proceeding.

14. It will take time for it to become clear whether the settlement procedure, introduced by the Amendment Act of 2014 and modelled on the German and the French system[114], will fulfil these expectations. The CCP Act of 2007 states that a settlement procedure may be offered after the main anti-monopoly proceeding is completed, but before the decision is issued. And yet, even before talks about settlement can even begin, most Polish anti-monopoly procedures would have already taken many months. Moreover, the period between the moment when the UOKiK President starts to discuss a settlement (*ex officio* or on a party's motion) and takes his final decision may also be long. During settlements talks, all parties involved in the

112 Article 109 of the CCP Act of 2007 with the implementing regulation of 26 January 2009 (*Journal of Laws* No. 20, item 109).

113 See Article 89a of the CCP Act of 2007 as provided by the Amendment Act of 2014 (in particular Article 89a(1)).

114 See in details M. Martyniszyn, M. Bernatt, On Convergence with Hiccups. Recent Amendments to Poland's Competition Law, 2015, European Competition Law Review, Issue 1, p. 10.

infringement which have accepted the authority's initiation to settle must be informed of the initial findings established in the anti-monopoly proceeding. The President must also inform them of the decision he anticipates, including the extent of fine reductions they may expect. The parties must give their initial and formal settlement statement to the President's proposal whereby they assume liability (but not guilt) for the given infringement and accept the level of the reduced fine. The President and the parties may withdraw from the settlement procedure at any stage. In such situations, however, any information or evidence obtained by the President cannot be used as evidence in the given, or any other, proceedings.

15. As the extent of fine reduction offered in Poland for engaging in the settlement procedure is not especially high (10%), the Polish settlement procedure may rather lead undertakings to give up on appeals. However, lack of judicial review of cases decided with the use of the settlement procedure may also be seen as a weakness of this legal instrument. The consequences of the use of settlement on possible private antitrust enforcement are as yet also unknown.

2.4. The introduction of fines for individuals

16. The CCP Act of 2007 provides a set of financial penalties for breaking competition rules which include fines for breaking the prohibitions of restrictive practices[115]. In general, these fines have been imposed on undertakings. Up until now, individuals (e.g. managers) could be fined only for not implementing administrative decisions and judgements, not notifying a concentration, not supplying information demanded by the UOKiK President or not co-operating during an inspection[116].

17. The Polish competition authority wanted to use the Amendment Act of 2014 to toughen Poland's antitrust enforcement regime. It thus introduced the possibility to impose financial penalties on "managing persons" of undertakings (in particular members of their management boards)[117] for committing infringements of the prohibition of anti-competitive agreements (Article 6(1)(1-6) CCP Act of 2007 or Article 101(1)(a-e) TFUE). Hence, liability of natural persons covers both horizontal agreements (thereby going beyond black-listed practices) as well as vertical agreements. At the same time, however, managing persons will be able to apply for Leniency[118].

115 Articles 106(1)(1-2) of the CCP Act of 2007.
116 Article 108 of the CCP Act of 2007.
117 Article 4(3a) of the CCP Act of 2007, as provided by the Amendment Act of 2014.
118 Article 111h-113j of the CCP Act of 2007, as provided by the Amendment Act of 2014.

18. Personal liability of managers (even former managers) covers situations when, within their managing function, they intentionally by their actions or omissions allow the undertaking they work for to participate in an anti-competitive agreement[119]. However, an individual may be found in violation only if such a conclusion was reached with regard to the undertaking it works for, only in the decision addressed to that undertaking[120] and after the same administrative proceedings[121]. Individuals (natural persons) can in no way be fined for their actions or a failure to act before the Amendment Act of 2014 came into force.

19. The competition authority can impose a fine of up to 2 000 000 PLN (EUR 500 000)[122]. This might be regarded as a rather severe penalty, especially when compared to the fine of up to 10% of turnover that can be imposed on the undertaking[123]. Importantly, although this is an administrative fine, it is nevertheless criminal in nature in the sense of Article 6 of the European Convention of Human Rights (ECHR) according to the so called *Engel* criteria[124]. Only actual enforcement practice will show whether this instrument will be effective in combating restrictive practices in Poland, while at the same time managing to avoid violating the right of defence and the presumption of innocence of undertakings.

20. It is certainly worth noting that personal liability of individuals under the above regime does not apply to big rigging. In these cases, individuals can be fined under separate criminal legislation.

2.5. Inspection powers

21. The UOKiK President is quite well-equipped when it comes to his powers to conduct different sorts of inspections. In Poland, these include: a general "control"[125] (a simple inspection) of an undertaking as well as a "search"[126] of their premises – incidentally, the two types of inspections have not been

119 Article 6a of the CCP Act of 2007, as provided by the Amendment Act of 2014.

120 Article 106a(2) of the CCP Act of 2007, as provided by the Amendment Act of 2014.

121 Article 88(3-4) of the CCP Act of 2007, as provided by the Amendment Act of 2014.

122 Article 106a(1) of the CCP Act of 2007, as provided by the Amendment Act of 2014.

123 Article 106(1) of the CCP Act of 2007, as provided by the Amendment Act of 2014.

124 M. Martyniszyn, M. Bernatt, On Convergence with Hiccups…, op. cit., p. 13. See more A. Błachnio-Parzych, The Nature of Responsibility of an Undertaking in Antitrust proceedings and the Concept of 'Criminal Charge' in the Jurisprudence of the European Court of Human Rights, *Yearbook of Antitrust and Regulatory Studies* 2012, vol. 5(6), 939.

125 Articles 105a-105b and Article 105e-105l of the CCP Act of 2007.

126 Article 91 and Articles 105c-105d of the CCP Act of 2007.

easy to tell apart[127]. Both kinds of inspections have been regulated in a similar manner, although under the CCP Act of 2007, a search was permissible only with prior authorisation of the Court of Competition and Consumer Protection (SOKiK).

22. The Amendment Act of 2014 introduced significant changes in this context. First, it formally and clearly distinguished the regulation of the two kinds of inspections. A simple inspection[128] may be conducted by the services of the UOKiK President during both explanatory and anti-monopoly proceedings based on a written authorisation given by the UOKiK President. Such authorisation cannot be contested before SOKiK, or any other court, be it on legal or proportionality grounds. At the same time, the UOKiK President may impose a fine of up to EUR 50 million on an undertaking for denying access to premises or for failure to co-operate[129]. By contrast, in the case of a search[130], the inspected undertaking will be entitled to file a complaint to SOKiK if the actual search goes beyond the scope established in the judicial authorisation. However, such a complaint will not suspend the search itself[131].

23. Another change introduced by the Amendment Act of 2014 gives, *expressis verbis*, the UOKiK President a special power to copy data of the inspected undertaking, as well as to seize data storage devices and take them away from the undertaking's premises to be stored and analysed at the premises of the competition authority[132]. Such power should improve the effectiveness of the competition authority's inspection powers.

3. Simplifying and shortening merger control proceedings

24. According to the original version of the CCP Act of 2007, the notified concentrations were evaluated by the UOKiK President within an one-stage review process with a statutory period of two months to issue a decision[133]. In practice, even decisions in cases that did not generate any competition

127 See more M. Bernatt, The powers of Inspection of the Polish Competition Authority. The Question of Proportionality, *Yearbook of Antitrust and Regulatory Studies* 2011, vol. 4(5), p. 47, 53-55. Also available at www.yars.wz.uw.edu.pl/.

128 Article 105a-105b and Article 105d-105m of the CCP Act of 2007, as provided by the Amendment Act of 2014.

129 Article 106(2) and Article 108(2-6) of the CCP Act of 2007, as provided by the Amendment Act of 2014.

130 Article 105n-105q of the CCP Act of 2007, as provided by the Amendment Act of 2014.

131 Article 105p of the CCP Act of 2007, as provided by the Amendment Act of 2014.

132 Article 105b(1) and 105g of the CCP Act of 2007, as provided by the Amendment Act of 2014.

133 Articles 96 of the CCP Act of 2007.

problems were issued at the very end, later than the statutory period. More complex proceedings lasted far longer than 2 months.

25. As expected by many scholars and practitioners, starting from 18 January 2015, Poland will finally have a two-stage merger control system, which will replace the current one-stage review process. According to the new regime, cases that do not raise any significant competition concerns should be cleared in a simplified procedure which should last no more than 1 month[134]. It is expected that about 80% of notified concentrations will be reviewed and cleared in the 1st stage. In case of particularly complicated concentrations, with a justified probability of a significant competition restriction or where conducting market research might be required, the review process can enter the 2nd stage. It should last no more than an additional 4 months (on top of the 1 month prescribed for stage 1)[135].

26. This is a very good solution and is generally in accordance with the EU merger control system[136]. Unfortunately, and unlike the EU, the UOKiK President can "stop the clock" in both of the assessment stages every time the Authority poses additional questions, or requests new data, information or documents. This can lead to extensions of the merger procedures in both stages.

27. A very important change in the Polish merger review system is the introduction of a "competition concern" in the 2nd stage of the procedure (before a decision is issued). The UOKiK President will inform the undertakings of its justified concerns about the compatibility of the notified concentration with competition rules[137]. The merging undertakings will have an opportunity to respond to the concern and possibly modify the transaction in order to obtain clearance[138]. This institution can lead to more "negotiated" enforcement of merger control rules as undertakings will now be able to offer modifications to a contemplated transaction. Those amendments are likely to reduce the number of prohibitions (avoiding merger bans) and increase the number of conditional clearances.

28. Due to changes made with respect to rules on turnover calculation, and the introduction of new *de minimis* exemptions, the Amendment Act of 2014 is likely to reduce the number of "technical" notifications of concentrations planned by an undertaking with limited business activity in Poland.

134 Articles 96 of the CCP Act of 2007, as provided by the Amendment Act of 2014.

135 Article 96a of the CCP Act of 2007, as provided by the Amendment Act of 2014.

136 See Article 6 and 8 of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ, 29.01.2004, L 24/1).

137 Article 96a(3-4) of the CCP Act of 2007, as provided by the Amendment Act of 2014.

138 Article 96a(5-9) of the CCP Act of 2007, as provided by the Amendment Act of 2014.

This is because under the new version of the CCP Act of 2007, the turnover of the seller will not be calculated for the purpose of meeting the turnover thresholds, the exceeding of which triggers the notification duty. Moreover, the CCP Act of 2007 always contained a *de minimis* exemption from the notification duty for the acquisition of control, or the acquisition of assets, where the target's Polish turnover did not exceed 10 million EURO in any two preceding years. The Amendment Act of 2014 extends this exemption to two additional types of concentrations: a full merger and the creation of a joint venture. Such concentrations will now not be subject to the notification duty if the Polish turnover of any undertaking concerned did not exceed 10 million EURO in none of the two previous years[139].

29. From a practical point of view, one of the most significant, albeit small, changes introduced into the Polish merger control system by the Amendment Act of 2014 concerns the deadline for completing a divestment required as part of a remedy package. Before the Amendment Act of 2014, such a deadline was clearly stated inside the conditional clearance decision. After the change, it will have to be kept confidential[140].

4. Conclusions

30. It is too early to evaluate the reforms introduced into the Polish competition law regime by the Amendment Act of 2014. The full implications of the new provisions will have to be analysed in the next few months, or even years, not only by the UOKiK President but also by businesses themselves and scholars. For now, the amendment generates mixed feelings. Most of the changes are a definite step (or even a few steps) in the right direction; several may not work as desired. For example, some commentators advocate the changes that have been introduced into the Polish merger control regime and those on the settlement procedure. Amendments surrounding the issue of Leniency plus have been received as rather unfortunate. The introduction of individual fines for managers causes deep concern among businesses. The main questions, "to what extent the newly introduced instruments may increase the effectiveness of Polish competition law enforcement" and "how far merger procedures will be simpler and quicker", are generating generally positive feedback.

139 Article 14(1) of the CCP Act of 2007 and Article 14(1a-1b) of the CCP Act of 2007, as provided by the Amendment Act of 2014.

140 Article 19 of the CCP Act of 2007 and Article 19(4-6) of the CCP Act of 2007, as provided by the Amendment Act 2014.

31. The generally positive picture of the main changes brought about by the Amendment Act of 2014 has been further strengthened by other small, but very welcome adjustments. First, the new version of the CCP Act of 2007 extends the limitation period from 1 to 5 years running from the end of the year in which the anti-competitive practice was discontinued. This will broaden the powers of the UOKiK President to pursue infringers. Second, extending the period for appealing the President's decisions from 14 days to 1 month is an important amendment for undertakings. Unfortunately, the new deadline is still short in comparison to the two months allowed within the EU system.

32. The Amendment Act of 2014 does not end the process of improving the Polish competition law regime. More changes are expected, some of which have been proposed many times in the past, for instance during the consultation process for the Amendment Act of 2014. It should be stressed that the recent act did not introduce changes in substantive provisions. Such amendments have, however, been expected by businesses and academic circles alike so as to achieve a higher level of conformity of Polish competition law with its EU equivalent. Indeed, about 60% of all proposals coming from academia and the business community ended up being completely omitted during the recent reform[141]. Unfortunately, the amendment process was also not used to ensure full conformity of the Polish enforcement framework with human rights requirements[142]. Finally, the specific issue of Legal Professional Privilege (LPP) is still not directly addressed[143] by the CCP Act of 2007.

33. In light of the results of the application of the new legal instruments I have discussed in this paper (especially Leniency plus, individual fines and merger control), and taking into consideration the many proposals made by scholars and the businesses community over the last two to three years that were left out, a new amendment initiative to further enhance the substantive rules and the enforcement framework of Polish competition law should be started soon.

[141] As estimated by M. Martyniszyn and M. Bernat, On Convergence with Hiccups…, op. cit., p. 8.

[142] As observed by M. Martyniszyn, M. Bernatt, On Convergence with Hiccups …, op. cit., p. 13.

[143] LPP remains to be eventually applied in the case of searches only under the particular provisions of the Code of Criminal Procedure; see Article 105q of the of the CCP Act of 2007, as provided by the Amendment Act 2014.

Nikodem Szadkowski

SOME SIMPLE ECONOMICS OF ANTICOMPETITIVE HORIZONTAL AGREEMENTS

Introduction

Anticompetitive horizontal agreements (cartels[144]) are the most conspicuous and common form of anti-competitive behaviour[145]. Cartels are economic creatures: their members respond to incentives created by the specificities of the markets they are active in, which influence their ability to sustainably raise prices or otherwise degrade the attractiveness of their offer to customers. Competition law enforcement activities, which seek to curb or even eliminate cartels, must be guided by the latter's economic nature in order to be able to tell innocuous agreements from harmful ones, detect and prove the existence of the latter as well as recognise the anticompetitive potential of legislation which may aid or even mandate anticompetitive behaviour by undertakings. This note aims to provide a (very) basic framework for understanding what's harmful about anticompetitive horizontal agreements, how and why they are formed and how they may be detected.

What bears particular emphasis is the fact that many agreements, even among competitors, benefit society. Competitors may need to work together to tackle complicated projects none of them would be able to carry out on their own, overcome information asymmetry (particularly in banking and insurance), provide interoperability (e.g. in payment systems) or for other reasons. Not all horizontal agreements ultimately restrict competition.

What's the harm?

The basic harm from horizontal agreements comes from the fact that they tend to raise prices (or, in general, make offers available in the market less

144 The terms "anticompetitive horizontal agreement" and "cartel" are used interchangeably here, as a matter of convenience, as the latter is the most conspicuous example of the former.

145 As noticed by Adam Smith in his „Wealth of Nations" (1776), *[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.*

attractive to customers). This, however, is not the end of the story: though cartels make their customers worse off, their members are certainly better off as a result of higher profits. From a strictly economic point of view, the transfer of resources from customers to cartel members is neutral and if the cartel members gained exactly what their customers lost, there wouldn't be an obvious loss to economic efficiency: the losses the one side endured would be offset by the other's gains.

Price increases resulting from anticompetitive agreements come at an additional cost, though: under normal circumstances (i.e. facing a downward-sloping demand curve) cartel members, in order to raise prices, have to decrease the supply of a product. As a result, some customers, who could be served profitably (they are willing to pay the price that covers the unit cost of production, including ordinary profits for producers, but not ready to pay the cartel price), are denied the product, to allow producers to exploit the remaining, less price-sensitive customers. The increase in cartel participants' profits (transfer from price-insensitive customers) is thus smaller than the loss of their customers' benefits[146] (transfer from price-insensitive customers and the loss of benefits for customers who would be able to buy the product at competitive price, but are unwilling to do so at a higher, cartel price), making a cartel inefficient from society's point of view: the total benefits reaped by all market participants—both producers and consumers—are higher under competition[147].

Aside from higher prices, cartels tend to introduce other inefficiencies. J. Hicks's famous quote on the greatest of all monopoly profits being the quiet sleep monopolists enjoy applies to cartels as well. A lack of competitive pressure is not conducive to innovation and increasing efficiency - after all, why bother, if the market is stable and customers have nowhere else to go? Therefore cartelised markets tend to include inefficient firms, which would not be able to turn a profit under competitive conditions; and even for the more efficient firms, incentives to improve their operations remain low. For similar reasons there is also little pressure to out-innovate competitors. Firms active in cartelised sectors will tend not to come up with new, disruptive products or services, especially if developing them is financially risky.

146 "Surplus" in economics parlance; it is defined as the difference between what consumers are willing to pay and what they actually have to pay.

147 In fact, most competition law regimes come down on the side of consumers: an agreement which leads to higher prices is deemed anticompetitive, even if the resulting benefits to its participants are higher than the consumer/customer losses it creates.

Why is there competition?

Estimates of typical cartel overcharges vary, but they are usually put at 10-30% of the competitive price[148]. If horizontal agreements are that lucrative, why aren't they the dominant mode of industrial organisation? Why don't market participants simply band together and enjoy higher profits? Why is there competition at all?

Luckily for consumers, there are powerful economic forces that make such behaviour difficult. Even though each producer would like a market-wide cartel, what he would like even more would be for his competitors to keep prices high, while he offers slightly lower prices and gets the whole market to himself. Since nobody wants to be left with high prices, while competitors undercut them and steal their customers, the result is everyone offering low prices.

The above can be illustrated with the following example. There are two firms competing in a one-off market (they compete only once and have no future interactions), which can either charge low or high prices. If they both charge high prices, they both obtain high profits (H). If they both charge low, competitive prices, they obtain normal (competitive) profits (N, N<H). If one of them charges high prices and the other does not, the latter will have the market to himself, reaping dominant firm profits (D, D>H) while the former sells nothing and obtains no profits (0). So, we have the following order of possible profits: D>H>N>0. The table below presents the firms' strategies (rows for firm A and columns for firm B) and their resulting profits.

	High prices (Firm B)	Low prices (Firm B)
High prices (Firm A)	H_A, H_B	$0_A, D_B$
Low prices (Firm A)	$D_A, 0_B$	N_A, N_B

Let's look at firm A's options. How should it respond to firm B's strategies? If firm B chooses to charge high prices, it is best for firm A to choose low prices, since it gets a higher profit (D) than if it charged high prices (H). If firm B chooses low prices, it is again best for firm A to choose low prices, since then it gets normal profits (N), while charging high prices leaves it without any profits (0). As can be readily seen, whatever the strategy of firm B,

148 See in particular J. M. Connor, Price-Fixing Overcharges: Revised 3rd Edition, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400780.

it is always best for firm A to choose low prices. Since firm B is exactly in the same position, it is also optimal for it to charge low prices, no matter what the other firm is doing. Thus both firms end up in the lower right corner of the table, charging low prices and realising normal profits.

It would, of course, be more profitable for them to cooperate and both charge high prices, but this result is unsustainable: if a competitor chooses high prices, it is optimal to charge low prices and reap higher profits by taking the whole market. Since the interaction is a one-shot affair (firms interact only once), there is no need to take into account the competitor's future reactions – only current profits matter.

This calculus changes when firms compete over time: collusion may become sustainable if the firms have to weigh current vs. future profits. If the number of interactions is known in advance, it is hard to sustain collusion, since in the final period the firms face the same incentive as in the one-shot game (no future), which carries on to a penultimate period (since it is known that in the final period it is best to charge low prices, there is no incentive to cooperate in the period preceding it, as there is no hope of gaining high profits in the remaining period) and so on to the first period. But if the number of interactions is unknown or infinite, future consequences of current behaviour must be taken into account and firms will weigh long-term gains from cooperation (choosing higher prices) against current gains from "cheating" (choosing lower prices). Collusion will be sustainable if the former outweigh the latter.

The above intuition can be captured with a simple model. Assume that collusion is sustained as long as everybody charges high prices. If any firm in the market "cheats" (charges low prices), collusion breaks down and low prices will prevail in the market from that point forward. Under such assumptions, for collusion to be profitable, for each market participant the sum of discounted collusive profits must be higher than the sum of the profit from "cheating" in the first period and discounted normal (competitive) profits:

$$(1) \qquad \Pi^c + \delta\Pi^c + \delta^2\Pi^c + \ldots \geq \Pi^d + \delta\Pi^n + \delta^2\Pi^n + \ldots,$$

where Π^C is a firm's collusive profit realised if all market players charge high prices in the given period, Π^d is the profit realised by the firm that deviates to charge lower prices while competitors charge high prices, Π^N is normal (competitive) profit realised when all firms charge low prices, and δ is the discount factor ($0<\delta<1$), which reflects the fact that profits in the future are not as valuable as the same profits today.

After rearranging the terms, we arrive at:

$$\frac{\delta}{1-\delta} \geq \frac{\Pi^d - \Pi^c}{\Pi^c - \Pi^n} \quad (2)$$

If the above inequality holds, it is possible to sustain collusion in the market. The terms may be interpreted the following way:

- the left-hand side term reflects the value cartel participants put on future profits (their *patience*): the higher the discount factor (δ), the more the future profits weigh on current decisions,
- the numerator of the right-hand side term reflects the *temptation to "cheat"* faced by cartel participants: the gain from choosing low prices while everybody else charges high prices,
- the denominator of the right-hand side term reflects the *benefits from collusion*: the increase in profits from collectively charging high prices, over competitive profits realised when everyone is charging low prices.

Some simple conclusions are readily apparent from the above inequality. First, the higher the value of the future (the higher the discount factor δ), the easier it is to sustain collusion (the value of the right-hand side of the inequality has to be higher to make collusion unsustainable). The more weight market participants ascribe to future profits, the less willing they will be to sacrifice them for short-term gains by "cheating". Conversely, if at least some market participants are "impatient" – they have a very strong preference for profits "here and now" (due, e.g. to financial problems, strong pressure from shareholders or short-termist corporate culture) – their discount factor δ is low and even large future profits from collusion may not be enough to convince them to cooperate with their competitors.

Second, the higher the difference between profits from "cheating" and collusive profits ("temptation"), the more difficult it is to sustain collusion. If by lowering prices a firm can obtain very high profits, the temptation may be too hard to resist. Large profits from "cheating" may be present in markets with many participants (where a single firm, by undercutting its competitors' prices, may gain a lot of new customers) or in those where orders are large and infrequent (which makes winning them a valuable prize). Third, the larger the difference between collusive and normal (competitive) profits (benefits from collusion), the easier it is to sustain collusion. Again, this result is quite intuitive – the larger the gains from collusion, the more valuable it is to sustain it.

The cartel organisational problem

As discussed above, raising prices above a competitive level is not always easy, though may be possible under certain conditions. To make this possibility a reality, cartel members will have to successfully handle four types of problems:

- reaching an agreement on desired, common market behaviour

In order to be able to keep prices high, cartel members must be able to agree on what the "right" level of prices (or, in general, market behaviour) should be. If their ideas about the proper level of prices strongly diverge or they have little idea about their competitors' preferences (e.g. due to an inability to communicate with them), coordinating market behaviour may not be possible.

- monitoring the behaviour of competitors

Even when competitors are able to agree on the desired market behaviour, if it is hard for them to monitor whether their counterparts actually conform to it (e.g. if prices are not observable, due to secret rebates granted to customers), collusion may be difficult. It will be easy for market participants to surreptitiously steal their competitors' customers or sell "on the side" more than their agreed allocation of supply. Widespread "cheating", leading to lower prices and mutual distrust among market participants, is likely to undermine any cartel.

- punishing deviations from collusive behaviour

Even if market participants are able to agree on a common policy and can monitor each other's behaviour, successful collusion may prove elusive if they are not able to punish each other for deviations from collusive behaviour (e.g. they have no spare capacity to increase supply and thus lower prices, or the punishment would be much more costly to the firms engaging in it than to the punished ones). If such deviations are not costly, incentives to stick to the collusive behaviour will be significantly weakened.

- preventing entry

If market participants are not able to prevent entry, an increase in prices will draw new firms to the market, forcing prices back to competitive levels.

Various market features will influence a cartel's sustainability through their impact on the ability of firms to tackle these four problems and their effect on the basic determinants of the cartel's sustainability (firms' patience, profits from deviation and profits from collusion). Below, the most important factors are discussed[149].

Fundamental factors for a cartel's sustainability include high entry barriers, high frequency of interaction and price adjustments, as well as little innovation. Without *high entry barriers*, as already mentioned, price increases will attract new entrants, forcing the prices down. *High frequency of interaction* ensures that market participants are able to react to what is going on in the market, in particular to deviations from collusive pricing. If interactions are infrequent, the lag between the detection of deviation and its possible punishment may be too large for collusion to remain sustainable. *High levels of innovation* in the industry make it ill-suited to cartelisation, as innovation tends to be destabilising, allowing one firm (or a group of them) to gain advantage over the others.

Cartel sustainability is also helped by small number of firms, symmetry among them, as well as structural links or cooperation among them. *High number of firms* makes it harder for them to agree on a desired price level or market behaviour and increases gains from deviation (in a symmetric duopoly the deviator gains half of the market; if there are 10 symmetric firms in the market which share collusive profits, 90% of the market is up for grabs for the deviating firm). *Symmetry* (in cost structures, production capacities, product ranges, market shares, goals, etc.) is important for several reasons. It is much easier for symmetric firms to understand each other's motivation and trust one another. Conversely, asymmetric firms, with different cost structures or goals find it difficult to agree on common market behaviour. Asymmetry may also adversely affect the ability to punish deviators. It is difficult for example to discipline more efficient (low cost) firms, since lowering prices would be less costly to them than to firms meting out the punishment. Also firms with higher capacity than their competitors have higher incentives to undercut competitors, to make better use of their capacity, and are less vulnerable to retaliation, as it is more costly to competitors. The presence in the market of firms that are highly different from other market participants (e.g. focused on short term profits and competing at all costs) may make collusion all but impossible.

Structural links (e.g. cross-ownership) *and cooperation* among firms (e.g. through joint ventures or cooperation agreements) may make collusion

[149] Based on P. Rey, Collective Dominance in the Telecommunications Industry, 7.09.2002, European Commission, available at http://ec.europa.eu/competition/sectors/telecommunications/archive/telecom/collective_dominance.pdf. For a more technical (but still accessible) discussion see M. Ivaldi, B. Jullien, P. Seabright, J. Tirole, The Economics of Tacit Collusion, March 2003, Final Report for DG Competition, European Commission, available at http://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf.

easier. Cross-ownership makes undercutting competitors less likely (as competing with them would lower the value of their shares), while joint ventures and cooperation agreements increase the scope for retaliation (deviations in one market may be punished not only by lowering prices there, but also by making cooperation in a different area more difficult) and may allow better information about competitors to be obtained (which in turn increases the ability to reach an understanding as to the desired behaviour in the market).

Finally, other factors influencing the sustainability of collusion include: market transparency, the pattern of demand changes, product differentiation, the presence of powerful buyers, and multi-market contacts. *Market transparency* affects cartel stability chiefly through its impact on the ability of the firms to monitor each other's market behaviour. If prices or market shares are readily observable, it is easy to determine whether market participants conform to the tacit or explicit agreement. If, on the other hand, the market is less transparent and it is difficult to observe prices (for example due to the prevalence of secret discounts granted to customers, which is common in B2B, especially wholesale markets, as opposed to retail B2C markets, where prices are usually public) and market share (e.g. due to a lack of reliable data on the size of the market) it is difficult to see whether the agreement is actually being followed. Unable to infer whether a reduction in their sales is the result of an overall demand decrease, or a surreptitious price cut by a competitor, firms will struggle to sustain high prices.

Product differentiation has an ambiguous influence on the sustainability of collusion. If products are differentiated horizontally (products with different combinations of characteristics, with some consumers preferring one over another even at the same prices, e.g. Coca Cola and Pepsi Cola), so that there are consumers who have preferences for one or the other product, there is less incentive to undercut competitors (as their customers prefer their products, a decrease in competitors' prices will have less effect then if those products were perfect substitutes), but also less scope for retaliation (for the same reasons, lowering prices of one's product will not hurt competitors as much). It may, however, be more difficult for firms to observe their competitors' prices, since horizontally differentiated products have different features and are difficult to compare directly. This tends to destabilise collusion. For vertically differentiated products (where products have similar properties, but different quality and consumers would clearly prefer one to another if they were sold at the same price, e.g. BMW and Fiat cars) collusion is harder, as this kind of product differentiation introduces asymmetry, with all its consequences, among the firms.

Demand growth helps to sustain collusion, due to the opportunity for higher future profits that it opens up: the prize for sustaining collusion is larger. (It is sometimes claimed that rising demand is a factor that hinders collusion. This is correct only for markets where barriers to entry are low and collusion in the market [or the good prospects such a growing market offers] attracts new entrants, disrupting cooperation among incumbents. If barriers to entry are high, this mechanism cannot operate.) In declining markets, on the other hand, collusion is more difficult to sustain, as future profits are small and dwindling further, making it less worthwhile to abide by the collusive agreement. *Powerful buyers* may hinder collusion to the extent they are able to play suppliers one against another (e.g. by concentrating orders with one of them and thus increasing short term gains from deviating from a tacit or explicit agreement). *Multi-market contacts* increase the scope for retaliation (firms can be punished not only in the market where they deviated from collusion, but also in other ones) and decrease asymmetries among firms (firms that are strong in one market and weak in another may have a similar position overall to a competitor who is weak in the first market and strong in the second one).

How to collude successfully

To overcome forces hindering collusion, cartel members will usually have to act together to make the market more amenable to coordinated conduct. At times those efforts will be comprehensive, if many issues need to be tackled, while at others they will focus on one particular aspect of the way the market in question works (i.e. problems with monitoring competitors' actions). As in any common enterprise, cartel participants will aim to build mutual trust and commitment to each other (rather than to customers)[150] as well as make sure their relations are predictable and there are as few surprises as possible. They will also try to minimise the scope for disagreements (by setting cartel terms [prices, division of customers, etc.] that all participants consider "just") and creating a framework for conflict resolution, in case any disagreements (i.e. over the division of the market) arise. If successful, such efforts tend to lead to an environment in which price increases are stable and market shocks or misunderstandings among participants are much less of a threat to the cartel's existence.

150 As one of the executives in a lysine cartel meeting put it to his competitors: *I want to be closer to you than I am to any customer. (...) Let's all agree on what we're going to do and let's walk out of here and do it.* (as quoted in J.M. Connor, Archer Midlands: the Price Fixer to the World, Staff Paper 98-10, May 98, Department of Agricultural Economics, Purdue University, p. 56).

In practice, there are some predictable activities cartel members engage in. *Periodic meetings* to set prices and/or allocate customers[151] will usually be necessary to set the cartel's overall goals. Such meetings are normally limited to a small number of executives, to keep the existence of the cartel secret. The *exchange of information*, both on future market conduct (contemplated price increases) and on current and past behaviour (prices, customers served) helps to stabilise cartels. Information on future conduct provides predictability, while knowledge of competitors' current and past market behaviour allows members to monitor each other's activities and make sure no one is "cheating" by offering secret discounts or poaching competitors' customers. Based on this information, cartel participants may create "fake competition" – setting up the facade of competitive bidding for customers, while in fact having determined in advance who will win which customer. The exchange of information may be done directly by cartel participants, but often a third party is used for that purpose. Cartel participants may also allow the third party or even their competitors to *monitor compliance with the cartel policy directly*, by accessing their books and other sensitive information.

In order to stabilise the cartel, *compensation schemes* are often used, aiming to make even accidental deviations from cartel policy unprofitable. For example, if the cartel seeks to achieve certain sales quotas for market participants, and at the end of the year some of them fall short while the others sell more (as may happen for various reasons even in the most tightly run cartel), a "buy back" scheme may be employed. In such a scheme, in order to end up with the predetermined market shares, those market players who sold more than their quotas will be obliged to buy from those firms that sold less than their cartel allocation. Thus, even market fluctuations will not threaten the agreed division of the market. Cartel members also need to be able to *accommodate changing market conditions*, which can include the appearance of new market players and changing production capacity of existing ones, among others. They can do this by, for example, creating a negotiating framework that allows them to change the terms of the cartel agreement by adjusting quotas and/or reallocating customers. In general, however, cartel participants will try to avoid changes, since negotiations over a new market allocation may lead to a cartel breakdown, as solutions satisfactory for everyone may be hard to find. That's why cartels tend not to thrive in dynamic, changing markets.

151 Both activities tend to go together (even though theoretically they are equivalent).

How to spot collusion (and have reasonable confidence it is in fact harmful)

Knowing how cartels operate may help in their detection or proving their existence before courts. Some empirical markers indicating their existence may include[152]:

- increased product standardisation, introduced to help coordination and avoid "cheating" (reducing the numbers of dimensions on which coordination is necessary makes it easier),
- increased uniformity across firms in terms of product price, quality, and the prices they charge for ancillary services (again, to make coordination easier and "cheating" more difficult),
- reduced variation in prices across customers (while competing, firms may provide "special offers" to potential customers they want to win, or lower prices to reflect some temporary decrease in costs; under cartel conditions, not needing to fight for customers, they will tend to charge much more consistent prices),
- a series of steady price increases is preceded by steep price declines (sometimes cartels are created in reaction to a crisis in the industry, which sharply reduces its profitability; firms get together in order to "reduce overcapacity" or "restore normal market conditions"),
- market shares (or relative market shares among the colluding group) are highly stable over time (as mentioned above, renegotiation of cartel terms, including market shares, is a possible threat to the stability of the cartel, so initial market share allocation tends to persist).

Other suspicious phenomena may include:

- a decrease in trade flows between geographic regions (markets tend to be divided on a proximity basis; thus under cartel conditions firms will often be awarded customers in regions close to their production facilities [countries or regions], while withdrawing from their competitors' "home turf"),
- inter-firm sales (as mentioned, such sales may be used to compensate firms which did not achieve their cartel quotas; under competitive conditions such sales are not common, though they may occur [e.g. if the firm does not have the capacity to handle a given contract in the short term, it may buy the product from competitors; in some other markets – for example the retail petrol market – buying a product from

---

152 Based on J. E. Harrington, Jr., How Do Cartels Operate, March 27, 2006, Working Paper, available at: http://krieger2.jhu.edu/economics/wp-content/uploads/pdf/papers/wp531harrington.pdf.

competitors at a wholesale level may be cheaper than transporting it from a firm's own production facilities]),

- suspicious bid rotation (when there is a clear pattern in the identity of firms winning tenders),
- a collapse in prices and increase in their variance (when cartels form, prices go up and their variance decreases; when they break up, the reverse tends to happen: to win customers, firms lower their prices and make use of "special offers").

It bears underlining that the above phenomena do not constitute conclusive proof of cartel activities on their own – they may be observed for various reasons other than those associated with cartel activities. They may, however, be a starting point in a more thorough investigation of an industry or provide supporting evidence of anticompetitive behaviour.

The knowledge of what cartels are trying to achieve and by what means is also crucial for telling apart anticompetitive horizontal agreements from innocuous or even pro-competitive forms of cooperation between competitors. There are two basic questions to ask here. One is whether the observed agreement or suspicious market behaviour makes sense from an efficiency point of view (does the cooperation help make things or provide services cheaper or more efficiently? is it necessary for a given venture to operate successfully? etc.). The second one is whether the agreement or behaviour makes sense in light of the way cartels function. Does it help to achieve agreement on common market behaviour? Implement better monitoring of competitors' actions? Increase the scope or speed of punishment for deviating from the collusive behaviour? Keep outsiders from entering the market and putting pressure on prices?

Both issues need to be looked at in their actual economic and market context. A given behaviour may theoretically be efficiency-enhancing, but not under conditions that prevail in the market at hand (e.g. cooperation may theoretically enable several firms to collectively undertake projects a single firm would not be able to take on, but the project that is actually being undertaken jointly can be easily handled alone by each of the cooperating parties). The same may be true for alleged anticompetitive effects – though theoretically possible, they may be unlikely under particular market conditions. For example, information exchange may help monitor the behaviour of competitors and increase the collusion's sustainability, but if the market is fragmented and firms highly differentiated, such an effect is unlikely. In this context, it is also particularly helpful to think in counterfactuals: what would happen if a given behaviour was discontinued or substituted with a different one? Would the market work better for the firms' customers? Would they obtain better offers? Is such an alternative plausible in light of the way the market functions?

Final remarks

Fighting anticompetitive horizontal agreements remains one of the fundamental goals of competition law. The economic logic of such agreements is to escape the natural forces of competition by creating and taking advantage of an environment in which cooperating to the detriment of customers, not competing, is the rational thing to do. Building on this insight allows for a helpful analytical framework, making it easier to detect them, prove their existence or prevent them, as well as telling them apart from acts of socially beneficial cooperation among firms.

BIOGRAPHICAL NOTES

Giorgi Barabadze

Giorgi Barabadze has been a Chairman of Competition Agency of Georgia since April 2014. From January to April 2014 he served as an Adviser of the Legal Service in the Economic Council of the Prime Minister of Georgia, and previously, from 2007-2014, held a number of positions in the Revenue Service of Ministry of Finance of Georgia.

Giorgi Barabadze is a Doctor of Law and an Associate Professor. He graduated from Kutaisi University of Law and Economics and from Ivane Javakhishvili Tbilisi State University (postgraduate studies in the theory of criminal law). He has published a number of criminal problematic issues, 15 scientific papers (in particular "People and the Constitution", "Law", "Justice and Law") in international scientific-practical, peer-reviewed and referred journals. With the invitation of Batumi Shota Rustaveli State University he held a range of lectures on the subject of "Official corruption and economic crimes". He also reviewed several scientific papers, in particular: The state prosecutor in the court of first instance; and Defender in the criminal proceedings. He is a Scientific Head of masters works of the Criminal Law's certain problematic issues, and an author of several dogmatic researches and publications. He is often invited, as a scholar expert, to various conferences dedicated to the problems of the Law.

Wojciech Dorabialski

Wojciech Dorabialski is an Advisor to the President, Market Analyses Department, UOKiK.

Mr. Dorabialski received a M.A. in Quantitative Methods from the Warsaw School of Economics in 1998 and a Ph.D. in Economics from Rice University in Houston, Texas in 2003. He worked as an Assistant Professor at the International School of Commerce where he gave lectures on Game Theory, Industrial Organization. He joined the Office of Competition and Consumer Protection of Poland (UOKiK) in 2007, where he is responsible for the application of economic analysis in merger assessment, competition protection cases in regulatory impact analysis. He is a member of the Polish Competition Law Association and member of the Board of a non-government Centre for Economic Analysis (CenEA).

Dag Johansson

Dag Johansson is currently working in the International Relations Unit in the Directorate-General for Competition, where among other things he is a desk officer for Japan and he is responsible for negotiating the Competition Chapter in the ongoing free trade negotiations with Japan. Moreover, he is a desk officer for the Russian Federation and responsible for contacts with countries forming part of the European Neighbourhood Policy. Finally, he is also responsible the European Union enlargement negotiations in the field of competition.

His previous tasks include anti-trust enforcement and liberalisation in the telecoms and postal sectors, merger control in the pharmaceutical and financial sectors. He worked as a case handler at the Swedish Competition Ombudsman's Office (1991-1992), and as a case handler and policy expert at the Swedish Competition Authority (1992-1998).

He graduated from Lund University School of Economics and Management, Sweden with a Master of Science in Business Administration and Economics.

Carles Esteva Mosso

Carles Esteva Mosso is Acting Deputy Director General for mergers at the Competition Directorate General of the European Commission. Until recently, he was in charge of the Directorate for Policy and Strategy. His responsibilities included the development of policy, strategy and legislative instruments in the fields of antitrust, mergers and state aids as well as the coordination of the European Competition Network and the international dimension of competition policy.

Carles Esteva held previously a number of management positions in DG Competition. He was Head of the Private Enforcement Unit, in charge of developing initiatives to facilitate the compensation of damages deriving from the infringement of competition law rules. Before he had been Head of the Merger Control Unit in charge of the investigation and assessment of mergers in telecoms, media and IT related industries and Head of Unit for Merger Control Policy and Scrutiny.

Between 1999 and 2004, Carles Esteva was a Member of the Cabinet of the European Commissioner for Competition Policy Mario Monti. In this capacity, he advised the Commissioner on the enforcement of merger control, antitrust and cartel policy. He was also the Cabinet Member in charge of the process of modernisation and reform of antitrust and merger rules.

Since 1994 and before joining Mario Monti's cabinet, he had worked in several areas within DG Competition, including the Merger Task Force and the antitrust unit in charge of the financial sector. Prior to joining the European Commission, Carles Esteva worked in legal private practice. He is a member of the Barcelona's Bar.

Carles Esteva holds a Masters degree in European Law from the Institut d'Etudes Européennes, Université Libre de Bruxelles ; he also graduated in

Law and in Economics by the Universitat de Barcelona and in Political Science (International relations) by the Universitat Autònoma de Barcelona. He is a guest professor on competition law at the Barcelona Graduate School of Economics. He regularly participates in major conferences and academic seminars on competition law and policy.

Marta Gutkowska

Marta Gutkowska has been working in the Office of Competition and Consumer Protection in Warsaw since October 2005. She is Senior Expert in the Department of State Aid Monitoring. She deals with regional, cultural and *de minimis* aid. In 2009 she was a National Expert on Professional Training in State Aid Case Support Unit in the European Commission, DG Competition. Marta Gutkowska graduated from Warsaw School of Economics with the specialization in European Union politics and wrote the Master's thesis in the law of EU state aid under the supervision of professor Jan Barcz. She also made post-graduate studies in the Management of Projects Co-financed by the EC Funds at Leon Kozminski Academy of Entrepreneurship and Management. Marta Gutkowska represents the Department of State Aid Monitoring on multilateral meetings with the European Commission and participates in the projects aiming to support non-EU countries with the implementation of state aid rules. In October 2014 she took part in the project "Support of the Competition Agency of Georgia" and conducted a 2-day training in Tbilisi on "State aid procedures".

Adam Jasser

Adam Jasser served as Secretary of State in the Chancellery of the Adam Jasser served as Secretary of State in the Chancellery of the Prime Minister from March 2010 to March 2014. He was Secretary of Economic Council to the Prime Minister and oversaw the analytical and policy impact assessment department. He coordinated the government's legislative agenda, with special focus on economic policy, pension reform, business environment and energy. He co-designed and supervised an overhaul of the government's impact assessment process. Adam Jasser was Programme Director and Board Member of demosEuropa – Centre for European Strategy in 2009-2010, focusing on European economic and political issues. Before that, he spent almost 20 years at Reuters news agency, in roles stretching from translator and head of economic reporting in Warsaw, to bureau chief in Frankfurt and regional editor for central Europe, Balkans and Turkey. Adam Jasser graduated from the University of Warsaw with a Master's degree in English Philology. He was appointed by Prime Minister Donald Tusk as President of the Office of Competition and Consumer Protection on March 20, 2014.

Paweł Kułak

Paweł Kułak is Advisor to the President in the Competition Protection Department, Office of Competition and Consumer Protection (UOKiK). He graduated from Maria Curie Skłodowska University in Lublin, in 2012 became a member of Lublin Bar of Legal Advisors. Paweł Kułak was a case-handler in numerous cases concerning mainly transport and energy sectors. He regularly represents UOKiK in court cases and takes part in ECN working groups meetings.

Ketevan Lapachi

Ketevan Lapachi, Prof. Dr, is a Finance program coordinator at the Faculty of Business Management of the International Black Sea University (Tbilisi, Georgia). She is a former commissioner of the National Securities Commission of Georgia (Dec. 2001-October 2007) and Deputy Head of the State Antimonopoly Service of Georgia (1997-2001). Graduated from Tbilisi State University (1981) and Moscow Physics-Technological Institute (1987), in 1990 she received PhD (kandidatskaia) from Yerevan Institute of National Economy (Armenia). Since 1992, she (as a public servant or an independent expert) has been collaborating on competition issues with government and non-government organizations, international donor organizations and different projects. She was actively involved in competition policy reforms carried out by the Georgian government during 2012-2014 years. Participated in various International programs including: Public Utilities Regulation and Strategy (Gainesville, Florida), European Community Consumer Law (Belgium), Competition Policy (Vienna, Istanbul) and Antimonopoly Regulation: legislation and enforcement policy (Washington, USA, International Law Institute), etc. She is an author of more than 20 articles devoted to the various issues of investment, antimonopoly regulation, competition and consumer policies, published in Georgia and abroad (USA,UK and India), including: GEPLAC research papers: *"Policy Paper in Competition Policy"*(2009); *"Competition policy and enforcement of antimonopoly legislation in Georgia: the level of approximation with the EU competition provisions and the necessity of further harmonization"* (2008*); "Georgia - Profile" , Competition Regimes in the World – A Civil Society Report*, CUTS, India, 2005, pp.375-379; An examination of the present competition law of Georgia using Pittman's criteria, *The Antitrust Bulletin, - The Journal of American and Foreign Antitrust and Trade Regulation*, USA Federal Legal Publications, Inc.,Vol. XLVII, Number 1, Spring 2002, pp187 – 215;"Anti-monopoly Regulation in Transition Country: The Example of Georgia ",*European Competition Law Review*, Volume 22, Issue 9 (2001, London, "Sweet & Maxwell"), pp. 374 –382; "Some Aspects for the Improvement of Mechanisms of the Control over the Monopolistic Behavior". *Georgian Law Review (Georgian-European Policy and Legal Advice Center)*, Second Quarter 2001. pp. 55-65; etc.

Andreas Mundt

Andreas Mundt has been President of the German Bundeskartellamt (Federal Cartel Office) since December 2009. In September 2013 Andreas Mundt was elected to be the new Steering Group Chair of the International Competition Network. After qualifying as a lawyer following studies at the University of Bonn and the University of Lausanne, Switzerland, Andreas Mundt entered the Federal Ministry of Economics where he worked from 1991 to 1993. He then joined the staff of the Free Democratic Party in the German Parliament from 1993 to 2000, where he was in charge of the portfolio of labour and social law. In 2000 Andreas Mundt joined the Bundeskartellamt as rapporteur, with responsibility for banking and card payment systems issues. He was Head of the International Unit of the Bundeskartellamt from 2001 to 2005 and Director of General Policy from 2005 to 2009.

Grzegorz Pniewski

Grzegorz Pniewski is a lawyer employed in UOKiK since 2010. He started his career in UOKiK in press office, then moved to the unit responsible for international relations. Now he works as a legislator in Department of Legal Affairs. He used to work in working group responsible for drafting act amending act on competition and consumer protection which was passed by Polish Parliament in June 2014 and provided crucial changes in Polish antimonopoly law. Mr. Pniewski graduated from the University of Warsaw with a Master's Degree in Law. After graduation he became student of National School of Public Administration, which provides 18 month training for future civil servants. Mr. Pniewski speaks English and has a good command of German.

Katarzyna Racka

Katarzyna Racka graduated from the Faculty of Law and Administration and the Faculty of Historical and Social Sciences of the University of Cardinal Stefan Wyszynski in Warsaw. In 2012 Katarzyna became a member of Warsaw Bar of Legal Advisor. Since 2006 she has been working for the Competition Protection Department of the Office of Competition and Consumer Protection, where she has been a case-handler in numerous cases. She specialises in the cases regarding telecom and publishing market. Moreover, Katarzyna is an expert of leniency programme *inter alia* she is a member of ECN Working

Group Cartels: Practice and Policy, which activity concentrate on process of convergence national leniency programmes within EU. Katarzyna is also responsible for contact point concerning leniency.

Tadeusz Skoczny

Prof. dr hab. Tadeusz Skoczny is Professor of law, Department of European Economic Law at the Faculty of Management of the University of Warsaw. Holder of the Jean Monnet Chair on European Economic Economic Law. Director of the Centre for Antitrust and Regulatory Studies (CARS). Chief Advisor to the President of the Office of Competition and Consumers Protection. Specializing in comparative, European and Polish competition law, in particular in merger control law. Last book: “Zgody szczególne w prawie kontroli koncentracji” [Special clearances in merger control law], Warsaw 2012. Editor-in-Chief of the “Yearbook of Antitrust and Regulatory Studies” (YARS) and “internetowy Kwartalnik Antymonopolowy i Regulacyjny” (iKAR). Scientific editor of the Competition and Consumers Protection Act. Commentary, 2nd ed., Beck, Warsaw 2014.

Nikodem Szadkowski

Nikodem Szadkowski has been with UOKiK since 06.2003. Since 12.2005 head of economic analysis unit, since 12.2007 deputy director of the Market Analysis Department. His main responsibility is providing advice on economic issues in antitrust proceedings and preparing internal and external guidelines concerning economic aspects of UOKiK’s activities. He has been involved in a number of high-profile antitrust and merger cases in various sectors of the economy (payments, e-commerce, retail trade, pay-tv services) and has extensive experience with economic and legal aspects of competition protection system.

Office of Competition and Consumer Protection

pl. Powstańców Warszawy 1 < 00-950 Warsaw
tel.: 22 55 60 800 < uokik@uokik.gov.pl
www.uokik.gov.pl

ISBN 978-83-60632-95-6