

Rajmund Molski

"Międzynarodowa koordynacja polityki konkurencji", Bartosz Michalski, Warszawa 2009 : [recenzja]

Yearbook of Antitrust and Regulatory Studies 3 (3), 317-321

2010

Artykuł został opracowany do udostępnienia w internecie przez Muzeum Historii Polski w ramach prac podejmowanych na rzecz zapewnienia otwartego, powszechnego i trwałego dostępu do polskiego dorobku naukowego i kulturalnego. Artykuł jest umieszczony w kolekcji cyfrowej bazhum.muzhp.pl, gromadzącej zawartość polskich czasopism humanistycznych i społecznych.

Tekst jest udostępniony do wykorzystania w ramach dozwolonego użytku.

**Bartosz Michalski, *Międzynarodowa koordynacja polityki konkurencji*
[*International co-ordination of competition policy*],
Wydawnictwo Difin, Warszawa 2009, 255 p.**

In the face of continuing and increasing globalisation and the proliferation of national and regional competition laws, international competition law and policy has become over the last two decades one of the hottest and most widely discussed topics in the area of antitrust. As a result, extensive scholarly literature has accumulated on this subject.

Dr. Bartosz Michalski of the University of Wrocław (Institute of International Relations) has given his readers a very approachable book, which may not be a novelty to the cognoscenti, familiar with the extensive foreign writings on international competition law and policy, but which still manages to make a major contribution to the rather scarce Polish literature on this topic¹.

According to the Author, the main aim of this book is to explore the issue of international co-ordination of competition policy and to find out whether it has the potential to build a common competition order in the world economy (p. 14). Though the Author is an economist, his ambition was to also consider non-economic factors, in particular political and historical considerations. His book fulfils that task to a substantial degree.

Following an introductory section, the book is organised into five chapters and a summary. The first chapter provides a brief overview of the origins of competition policy, its functions and goals. This part explains and sets out the basics of competition policy. It also contains a thorough analysis of the effects of competition policy on competitiveness.

¹ Previous relevant contributions on this subject by Polish authors have been made by T. Skoczny, 'Projekt Międzynarodowego Kodeksu Antymonopolowego' ['The Project of International Antitrust Code'] [in:] *Stosunki międzynarodowe i polityka. Wyzwania końca stulecia. Księga Jubileuszowa na 65-lecie Profesora Bogusława Mrozka* [*International Relations and Politics. Challenges of the End of the Century. Jubilee Book on 65th Anniversary of Professor Bogusław Mrozek*], Warszawa 1995; R. Molski, *Prawo antymonopolowe w obliczu globalizacji. Kierunki rozwoju* [*Antitrust Law in the Face of Globalisation. Directions of Development*], Bydgoszcz-Szczecin 2007; and M. K. Kolasiński, 'Perspektywy międzynarodowej harmonizacji prawa antymonopolowego' ['Prospects for international harmonisation of antitrust law'] (2008) 10 *Państwo i Prawo*.

The following four chapters examine the development of international co-operation in competition law and policy undertaken in the framework of the World Trade Organisation (WTO), the Organisation for Economic Co-operation and Development (OECD), the United Nations Conference of Trade and Development (UNCTAD) and the International Competition Network (ICN). The Author argues (p. 15) that out of all the international initiatives that have global governance ambitions and wish to influence the international co-ordination of competition policy, only those four focus on this issue in a comprehensive manner. He intentionally does not consider the efforts of the European Community (now the European Union), because of its regional organisation status. Michalski acknowledges however the EU's significant influence on global developments.

The second chapter describes the activities of the WTO. After presenting the genesis of multilateral co-operation in the field of competition law and policy, starting from the Havana Charter of 1948², it surveys the most important proposals concerning international competition law and policy made and discussed in the WTO. The chapter opens with some historic considerations concerning the Singapore, Geneva, Seattle, Doha and Cancún WTO Ministerial Conferences. It continues with a more detailed discussion of several particularly significant problems negotiated within the WTO Working Group on the Interaction between Trade and Competition Policy: the interconnections between trade and competition policy in fostering economic development and growth; the impact of anti-competitive practices on the development of international trade; the relationship between competition policy and foreign direct investments; the exchange of information and technical assistance in capacity building to developing countries and, finally; WTO's failed efforts to achieve global consensus and to complete a formal agreement on competition policy matters. The positions of Poland and the EU, approving those efforts and promoting the idea of an international competition agreement within the WTO, are duly presented.

The third chapter is dedicated to the co-ordination of competition policy among the members of the OECD. After some remarks concerning the genesis and specific attributes of its co-operation, the Author describes the series of non-binding recommendations issued by the OECD concerning 'best practices' with respect to cartels, mergers and co-operation. He also explores competition policy challenges typical for developed countries with well established competition law systems, i.e. the abuse of dominant position, cartels, anticompetitive mergers and sectors regulated by the state. Emphasis is placed here also on the need to set free the 'invisible hand of market' from the bureaucratic burden. This part of the discussion may serve as a brief but solid explanation of the practical problems of competition policy enforcement and the deepening of international co-operation in this field.

² The earliest recorded proposals for regulating international anti-competitive conduct actually date back as far as a World Economic Forum hosted by the League of Nations in 1927; see D. J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford 2003, pp. 159–161; W. L. Runciman, 'The World Economic Conference at Geneva' (1927) 37(147) *The Economic Journal* 468.

The fourth chapter highlights the contribution of UNCTAD to the emergence of an international competition order and the specifics of the approach pursued by this body. The legal and organisational aspects of its co-operation are among the issues covered. Particular attention is paid to one of its most remarkable achievements – the 1980 Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, which remains the only universally applicable instrument in the area of antitrust, though it has no binding force and little effect in practical terms. Another important effort of UNCTAD discussed here in greater detail is the model law on competition, conceived as a manual for developing countries implementing competition law. Considering UNCTAD's aim to assist the latter in the promotion of their economies and integrating them into the world economy, it is quite natural that the Author specifically explores the idea of competition law and policy as the factor which stimulates economic growth and progress of developing countries.

The fifth chapter is devoted to the emerging role of the ICN. This is a relatively new form of international co-operation which, due to its dynamics, proves to be quite successful especially in relation to the transfer of knowledge and expertise, which in turn spreads competition culture amongst antitrust agencies all over the world. The ICN is an informal network of competition authorities from developed as well as developing countries which has the form of a virtual organisation. Its purpose is to facilitate co-ordination by maintaining regular contacts between national competition authorities and addressing practical competition concerns. The ICN is meant to complement and to fill the gaps in the work of other international forums such as the WTO, the OECD and UNCTAD rather than to duplicate their efforts. It focuses on issues essential from the perspective of the world economy (multijurisdictional mergers, cartel agreements, technical assistance related to competition policy implementation as well as regulated and state owned sectors).

On the basis of the research carried out in this monograph, Michalski concludes in the summary that the efforts put into the formalisation and reinforcement of international co-operation in competition policy have been induced by the successful trade liberalisation (p. 231). As he points out, it somewhat resembles the phenomenon of progression in the process of economic integration which starts with simple and progresses to more complex stages. Increasingly, international organisations take actions in order to protect the benefits of trade liberalisation from anticompetitive practices of international business. Such activities are usually resisted by countries the economic systems of which (because of 'the heritage of the past') are not yet prepared for the potential challenges of the new reality. Michalski aptly observes that a level of scepticism persists concerning the principles of the world's economic order adopted or negotiated nowadays, because they condemn the activities recently used and appreciated by the advanced economies as stimulating economic growth and development (pp. 231–232). The Author puts it bluntly that the theory stands in stark opposition to the declarations and suggested reforms (p. 232).

Michalski is realistic in his assertion that 'soft' co-operation is the most effective method of building supranational competition governance. A formal (legally binding) agreement would certainly reduce the perceived freedom and sovereignty of many

states, the prospect of which attracts their strong opposition (p. 232). Nevertheless, he is fairly critical of the soft approach to international competition policy, which offers many advantages but could also result in a threat that only second or even third-best solutions are put into practice.

Michalski suggests that it is UNCTAD and the ICN that have the strongest potential to influence the legal and policy reform on the international level. He rightly notes that both the WTO and the OECD are still regarded as clubs dominated by the rich. This fact limits their credibility as far as offering solutions to improve the conditions of social and economic progress of developing countries. However, similar objections can be raised in relation to the UNCTAD forum, which is often perceived as unduly favouring the interests of developing nations³. Michalski rightly observes that the effectiveness of the WTO is limited *inter alia* by the single undertaking principle ('nothing is agreed until everything is agreed'). Nevertheless, its potential for building an international competition order (especially by providing the institutional vehicle for a plurilateral competition agreement) is somewhat underestimated⁴.

In his closing remarks Michalski strongly approves of the primacy of competition policy within the context of economic policy overall, both national and international (p. 233). One cannot agree more.

The book under review here is well researched and very informative. It offers articulate and thought-provoking narration on timely and important topic, contributing to the ongoing debate on the current trends of competition policy. The sources consulted by the Author are numerous including exceptionally rich documentation deriving from the aforementioned international institutions. Only legal writings on international antitrust are somewhat lacking.

Michalski prefers hard realism in considering the economic aspects of contemporary international relations as well as positive economic analysis, which is based on 'what is' in the economy rather than on what 'ought to be'. Such methodological attitude deserves respect.

This book, as any human enterprise, is not without shortcomings. It is by necessity selective in its coverage. Hence, some important topics are underrepresented or at all missing. The title aspires to portray international co-ordination in the realm of competition policy. However, the actual scope of the book is narrower – it is essentially a book on competition policy on multilateral or at least plurilateral level. Bilateral

³ See M. Taylor, *International Competition Law. A new Dimension for the WTO?*, Cambridge 2006, p. 426; see also D. D. Sokol, 'Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age' (2007) 4(1) *Berkeley Business Law Journal* 103–104 (noting that 'In many ways, the UNCTAD is the mirror image of the OECD, except that it pushes a developing-world agenda rather than a developed-world agenda', and further 'Even as the UNCTAD may offer greater legitimacy in representing the perceived needs of developing-world countries, it is for this very reason that the UNCTAD is less effective as a participatory vehicle for international antitrust harmonization and implementation').

⁴ For arguments in favour of the WTO as a suitable venue for the international competition agreement see e.g. M. Taylor, *International...*, pp. 147–184; M. M. Dabbah, *The Internationalisation of Antitrust Policy*, Cambridge 2003, p. 292–293.

and regional co-operation are left out almost completely, in spite of the fact that this type of co-operation is most prevalent in international antitrust today. Nevertheless, the principle of positive comity, typical for advanced bilateral antitrust co-operation agreements, has been covered to some extent. Unfortunately, that is not the case as far as the first comprehensive proposal for an international code of competition law is concerned presented to GATT/WTO and the OECD in 1993 by the so called Munich Group of antitrust scholars. Despite its failure, the Draft International Antitrust Code deserves at least some mention because of its reputation as the most ambitious project of international antitrust agreement undertaken so far⁵.

To sum up, the book under review here is a very good monograph written by a scholar with a strong sense of economics and international relations. It will provide a source of useful reference for its readers, academic scientists and students in particular, interested in the difficult and challenging problem of international co-ordination of competition policy.

Dr. hab. Rajmund Molski

Chair of Civil and Commercial Law,

Faculty of Law and Administration, University of Szczecin

⁵ See T. Skoczny, 'Projekt...'; D. J. Gifford, 'The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Away' (1997) 6 *Minnesota Journal of Global Trade*, pp. 1–66.