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"Pojęcie przedsiębiorcy w polskim i europejskim prawie ochrony konkurencji", Grzegorz Materna, Warszawa 2009 : [recenzja]

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Grzegorz Materna, *Pojęcie przedsiębiorcy w polskim i europejskim prawie ochrony konkurencji*
[The notion of an entrepreneur in Polish and European competition law],
Wolters Kluwer, Warszawa 2009, 296 p.

The notion of an ‘undertaking’ (used by Community competition law) or ‘entrepreneur’ (used by Polish antitrust law) is one of the most fundamental concepts of every competition law system because it defines the personal scope of its application. In other words, the understanding of this term determines the addressees of the material and procedural provisions included in specific competition law rules. Community competition law does not contain a legal definition of the notion of an ‘undertaking’ and thus the term must be reconstructed from the jurisprudence of the ECJ. The core of the definition was formulated in case *C-41/90 Höfner i Elser v Macrotron*¹ where the ECJ ruled that the notion of an ‘undertaking’ encompass every entity engaged in an economic activity, regardless of their legal status and the way in which they are financed. Since the original definition was clearly of a general nature, the Court was frequently required to develop it further determining whether and under what conditions can the status of an undertaking be attributed to a specific type of entity (e.g. those engaged in some form of social activities, individual agents or employees, institutions exercising public authority).

In contrast to EU law, Article 4(1) of the Polish Act of 16 February 2007 on Competition and Consumers Protection² (hereafter, Competition Act) contains an applicable legal definition which is similar but not identical to EU law. However, Member States are entitled to enact and apply their own national competition laws and their contents do not have to fully reflect Articles 101 and 102 TFEU. That is the case both in the field of practices that may, and in the field of practices that may not affect intra Community trade (contrary to what may seem at first glance, this conclusion is neither excluded by Article 3 Regulation 1/2003 nor by Article 3 TFEU)³.

¹ [1991] ECR I-1979.

² Journal Laws 2007 No. 50, item 331, as amended.

³ The fact whether the given agreement (decision by associations of undertakings or concerted practice) restricts competition within the meaning of Article 101(1) TFEU should be assessed in accordance with an economic approach i.e. the main focus is on the assessment whether the agreement is likely to have an appreciable adverse impact on the parameters of competition on the market such as price, output, product quality, product variety and innovation (Commission Guidelines on the Application of Article 81(3) of the Treaty, par. 16); see also

This fact is of great importance here as the content and scope of the definition of an ‘entrepreneur’ is a tool associated with a particular competition policy carried out at a given time and in a specific place. It influences the way in which the aims of that competition law system are accomplished and determines how uniformly and effectively will they be achieved. A definition that is too narrow can hamper the effectiveness of the law. In turn, a definition which is too broad can allow its aims to be achieved more effectively. However, it can also cause many grave consequences such as hindering the realization of social policy, infrastructure and regional development or other social aims.

The aforementioned issues are the main basis of the book by Grzegorz Materna entitled *The notion of an entrepreneur in Polish and European competition law*. The publication is divided into four chapters which logically organize the content presented therein. The first chapter covers the basics of the modern competition law model by describing its rational and *modus operandi*. Chapter 2, which is the core of the publication, examines the term ‘entrepreneur’ as used in the Polish Competition Act and compares it to the notion of an ‘undertaking’ under Article 101 and 102 TFEU. The discussion covers both Polish and EU concepts involving a range of subjects such as associations of undertakings and public law concepts such as self-government bodies, municipal units and public utility services’ providers. Readers interested in the status of public buyers will be disappointed however as no reference is made to this very current topic. The third chapter is devoted to the examination of the relationship between Polish and EU competition law as far as the notion of an ‘entrepreneur’ is concerned. He describes the way in which Polish law was adapted to Community competition law and explains the way in which EU law principles should be applied (such as supremacy and direct effect). The most interesting problem mentioned here is the scope of the definition of an ‘entrepreneur’ under national law. Clues are given at this point to the question whether national law can see the notion of an ‘undertaking’ in a narrower or wider sense than the EU. In the last chapter, Materna sums up his previous considerations and formulates several *de lege ferenda* recommendations. The book raises a number of important issues – the most interesting considerations are presented below.

The first issue to note here is the question whether the notion of an ‘undertaking’ as understood by national law is allowed to be, in the light of EU law principles, broader than the definition used by Community competition law. According to Materna, a narrower scope under national law would go against the principle of loyalty as it would mean, in practice, that Member States would legalize agreements or practices forbidden by Community competition law (p. 203). The same principle stipulates that the ruling of a national court issued under domestic law should, as far as possible, interpret national provisions with conformity to the aims and content of EU law. Does

A. Nikpay, J. Faull, *Article 81* [in:] J. Faull, A. Nikpay (eds.), *The EC Law of Competition*, Oxford University Press 1999, p. 80 et seq.; M. Szydło, ‘The notion of an ‘undertaking’ within EU and national competition law in the light of convergence rule and the EU Law’s supremacy. Should there be any room for divergence?’ (2010) 4 *World Competition*.

this mean however that the Polish notion of an ‘entrepreneur’ must also not go beyond the definition established in the EU? The answer to this question, even though not given expressly or definitely by the Author, has to be negative. This view is justified on the basis of Article 3 Regulation 1/2003 which governs the relationship between national legal systems and EU law in the competition field (on the strength of TFEU). It represents a concretization of the general principle of supremacy of EU law over national legislation in the field of competition. It does not go as far as to exclude the existence or the application of national competition laws nor does it require a full substantive or verbal unification of national provisions with Article 101 TFEU, even with regard to agreements capable of affecting trade between Member States. Thus, the supremacy of Community competition law over national legal systems has its clear and unequivocal limits set in Article 3 Regulation 1/2003.

Another interesting issue analyzed by Materna concerns the inclusion into the Polish definition of an ‘entrepreneur’ of public authorities exercising their legislative, regulatory and administrative powers (so called *imperium*). It is commonly accepted that Article 101 and 102 TFEU are concerned solely with the activities undertaken in the sphere of *dominium* and economy, leaving the *imperium* sphere unregulated (p. 151). In other words, EU rules place those pursuing social aims only outside their scope. However, Member States are indeed allowed to shape the personal scope of the notion of an ‘undertaking’ under their own national competition laws in a manner wider than Community competition law. Moreover, there are many convincing reasons why the legislative and regulatory actions of Member States should be subject to an antitrust analysis, although not necessarily at EU level. For example, many national rules have, at least in part, corporatist features in that they are aimed at the protection of one category of competitors against another, e.g. small competitors against large ones or vice versa etc. Measures of an identical content should not be assessed differently depending on the fact whether they are implemented by undertakings (on the one hand) or by public bodies (on the other hand). Since these types of actions undertaken by Member States cannot be questioned on the ground of Community competition law (as they belong to the *imperium* sphere), it would be reasonable to subject them to national antitrust control. The broadening of the notion of an ‘entrepreneur’ (or an ‘undertaking’) seems to be the most obvious way to achieve this goal.

An interesting issue should be made at this point concerning public bodies such as healthcare and pension funds. EU case law has systematically emphasized the social nature of the aims pursued by such entities making it often hard to distinguish between ‘social aims’ and the ‘principle of solidarity’. As a result, an increasing blurring of the differences between economic and social activities is taking place, which can be particularly observed when the activities of public entities lie in the grey zone between economic and social activities or, probably more often, when public entities undertake both economic and social activities at the same time. Still, the ECJ has ruled that healthcare bodies and pension funds should not fall under the scope of the notion of an ‘undertaking’ provided that they meet the following criteria: they merely apply the law and cannot influence the amount of their contribution, the use of assets

or the fixing of the level of benefits provided to participants; their activity, based on the principle of national solidarity, is entirely not-for-profit and the benefits paid are statutory benefits bearing no relation to the amount of the contribution and; the given fund is based on a system of compulsory affiliation (p. 157).

However, the Polish Supreme Court has ruled that the National Health Fund (in Polish: *Narodowy Fundusz Zdrowia*; hereafter, NFZ) can distort competition due to its market power as a provider of public utility services and therefore it should be given the status of an entrepreneur⁴. This approach has a negative influence on the interests of those insured in an obligatory manner (consumers) since subjecting the NFZ to the same competition law constraints as normal undertakings does not necessary have to be of benefit to individuals. Admittedly, including the NFZ into the Polish definition of an ‘undertaking’ may also be treated as an instrument meant to protect public finances. The funds paid out by that entity under the supervision of competition law (that aims, after all, to ensure the optimum allocation of resources) can then be used in the most cost-effective way, taking into account the essential interests of those affiliated with it and the scarcity of the available funds. On the other hand, it is controversial whether such an approach is proper when fundamental values such as life and health are at stake. It also results in a different treatment of EU citizens within the internal market based on whether a Member State recognizes healthcare bodies and pension funds as undertakings or not.

It must be stressed however that the presumed extension of the notion of an ‘undertaking’ under national competition law is always dependent on domestic interests and specific values protected by various Member States. Competition law analysis forces parties subject to an antitrust scrutiny to become more economically effective, but efficiency as such is not always sufficient from the point of view of social aims that are pursued by those in question⁵. A uniform definition of an ‘undertaking’ established at the EU level and the exclusion of the possibility of its broadening by individual Member States would be highly undesirable. It would infringe the principle of subsidiarity and strongly interfere with legitimate national interests.

The analysis of the concept of an ‘entrepreneur’ would have been even deeper if the Author had considered the status of public buyers. The CFI and the ECJ have recently developed a formalistic and restrictive approach towards the analysis of public procurement activities from a competition law perspective. It was ruled in *Fenin* (T-319/99⁶ and C-205/03 P⁷) and *Selex* (C-113/07 P⁸) that the nature of the purchasing activity must be determined according to whether or not the subsequent

⁴ Judgment of the Supreme Court of 20 November 2008, III SK/08, not reported.

⁵ Not all consumers are equals on the market because their market power is determined by existing distribution of wealth. This radically unequal power of different market actors (inequality in distribution of resources) determines the ability of consumers to satisfy their preferences in a market system – T. Prosser, *The Limits of Competition Law. Markets and Public Services*, Oxford 2005, p. 29

⁶ [2003] ECR II-357.

⁷ [2006] ECR I-6295.

⁸ [2009] ECR I-2207.

use of the purchased goods amounts to an economic activity, which does not exempt just activities of social nature based on principle of solidarity from its scope, as the exclusions need broader interpretation. In practice therefore, public procurement activities will frequently stay outside the scope of antitrust scrutiny.

Polish competition law is more specific in relation to its approach to public buyers. Article 6(1) of the Competition Act (equivalent to Article 101(1) TFEU) bans arrangements among entrepreneurs that compete with each other in a public procurement procedure or between them and the entrepreneur that organizes it. Still, the notion of an entrepreneur organizing public procurement remains unclear. Most believe that private entities can also use this procedure and thus this provision will be definitely applicable to them, it is uncertain however whether its scope includes other entities that are obliged to use public procurement, especially in the light of the *Fenin* case.

Regardless, Materna's book deserves special attention. His approach to the analysis of the concept of an 'entrepreneur' is both comprehensive and detailed. The book is organized in a logical and transparent manner that allows its reader to quickly find the required information. As a result, they gain a publication that not only identifies many important scientific problems concerning the notion of an 'undertaking' but also presents several thoroughly justified answers to the many questions posed therein. The Author is not afraid to criticize the views expressed by both the doctrine as well as courts but does so with a very high level of substantive argumentation. It could be argued that the book fills the niche on one of the key elements of competition law. It was a great pleasure to read Materna's book; the publication deserves recommendation not only to the doctrine and judiciary but also to everyone interested in competition law both at the national and European level.

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