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Competition Law - New Tendencies, New Tools and New Enforcement Methods from an EC and Polish Perspective. Conference of the Global Competition Law Centre in the Natolin Campus of the College of Europe. Report

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I. Introduction

The Global Competition Law Centre (GCLC), a research centre of the College of Europe, held on 13 March 2009 in Warsaw its first Natolin competition law conference entitled ‘New Tendencies, New Tools and New Enforcement Methods from an EC and Polish Perspective’.

The conference was opened by Professor Paul Demaret, the Rector of the College of Europe, who started his speech by introducing GCLC and explaining the objective of its activities. He clarified that GCLC is dedicated to the promotion of rigorous legal and economic analysis of competition policy reforms both in the EU and globally. He stressed also that GCLC is meant to provide a discussion forum for academics, practitioners and enforcement officers in the antitrust field. After some preliminary remarks, the conference and its programme were presented by Jacques Bourgeois, the President of GCLC and a professor at the College of Europe and Massimo Merola, a member of GCLC’s Executive Committee and a professor at the College of Europe.

Prof. Bourgeois acted as the chair of the first session welcoming its first speakers, Małgorzata Krasnodębska-Tomkiel, the President of the Polish Office of Competition and Consumer Protection (UOKiK) as well as Anthony Whelan, the head of the cabinet of Ms. Kroes, the European Commissioner in charge of Competition Policy.

The introductory remarks made by Mrs Krasnodębska-Tomkiel concerned the effectiveness of competition law. She started by recalling its origins and objectives because in her view, an assessment of the effectiveness of antitrust law requires the understanding of its philosophical background and aims. She continued to explain that the market can only then be effectively protected from the negative consequences of anti-competitive practices if the law is interpreted coherently and uniformly and if the legal system is organised in a way that allows its competition authority to carry out effective enforcement. Mrs Krasnodębska-Tomkiel mentioned among the instruments allowing UOKiK to carry out such enforcement: the sanction system, the right to conduct unannounced inspections and the possibility of issuing commitment decisions and ordering interim measures. In her opinion, the procedural powers of the Polish competition authority, which give it sole discretion in deciding which cases to pursue, give

it a chance to increase the effectiveness of competition law enforcement. On this basis, UOKiK is able to focus its limited resources on top priority issues. Mrs Krasnodębska-Tomkiel concluded that even an ideally designed legal system is insufficient, the determination of those appointed to enforce the law is equally important.

In his keynote speech, Anthony Whelan talked about the general trends of antitrust enforcement by the European Commission.

The conference was attended by academics, representatives of private legal practice, UOKiK officials and judges from the Polish competition courts.

II. First session

The first part of the conference was chaired by Professor Tadeusz Skoczny (Centre of Antitrust and Regulatory Studies, University of Warsaw) with the participation of: Paul Csiszár (DG Competition, European Commission), Dr. Dawid Miąsik (Polish Academy of Science; Bureau of Studies and Analyses of the Supreme Court), Katarzyna Racka and Anna Sekinda (the Competition Protection Department, UOKiK) and José Rivas, Professor at the Natolin Campus of the College of Europe and a Partner at the law firm Bird & Bird.

Paul Csiszár gave a presentation on actions for damages for the breach of EU antitrust rules. He explained the context and objectives of the 2008 White Paper where, following the judgment of the Court of Justice in *Courage & Manfredi*, the Commission suggested specific policy options and measures that would help give victims of EU antitrust infringements access to effective redress in order to gain compensation for the harm suffered. Mr Csiszár presented selected issues addressed in the White Paper which were in his opinion of primary importance for the system to be effective such as standing and collective redress, evidence access and the binding effect of decisions by competition authorities. He then briefly summarised the outcome of the public consultation with its 175 submissions filed by national governments, NCA's, judges, businesses, consumer associations, law firms, academics and individuals. He noted that the participants generally agreed on the existence of obstacles to compensation and the need to have balanced and genuinely European measures. At the same time, divergent views were expressed on the particular measures proposed in the White Paper. Mr Csiszár concluded by explaining that the issue of whether the next step would be an EU legislative proposal is still being debated. In particular, the questions remain open whether, when and what the content of such a proposal would be.

Dr. Dawid Miąsik spoke of the approach to private enforcement of antitrust rules before Polish courts. He presented the varying types of private enforcement distinguishing offensive (i.e. on the victim's initiative) and defensive cases (i.e. in response to claims brought by an infringer) as well as follow-up proceedings (i.e. after the NCA's decision is issued) and those without the intervention of the NCA. Dr. Miąsik stressed that follow-up cases were always allowed before Polish courts whereas the private enforcement in stand-alone proceedings was until 2006 subject to contradictory judgments of the Polish Supreme Court. He continued to point out that according to the Supreme Court, a Polish court is allowed to apply competition

law where no proceedings have been instituted before the NCA (case files No. I CSK 454/06 and I CSK 83/05). That ability applies also to cases where such proceedings were instituted but resulted in a decision other than requiring an infringement to be ceased (case file No. I CSK 83/05) or finding that an infringement occurred. In follow-up cases, a [common] court is in principle bound by UOKiK's decision when an appeal against the decision has been filed because courts not only examine the legality of the decision of UOKiK but also rule on the merits of the case. Dr. Miąsik stressed the uncertainty as to whether a UOKiK decision to close proceedings without delivering a ruling on the merits is binding. Commenting on the scope and effects of the binding force of UOKiK decisions, he explained that [common] courts cannot examine whether the conduct under investigation violates competition rules and cannot reach conclusions (factual or legal) contrary to the findings made by UOKiK.

Assessing the prospects for actions for damages in Poland, Dr. Miąsik said in conclusion that the existing legal basis is adequate but the practice is not. There is still a need for further developments of domestic jurisprudence concerning substantive rules covering the notion of damages and that of a causal link. A radical change of current practice with respect to procedural rules, especially rules of evidence, is also required for example when it comes to evidence types, more recourse to factual presumptions and discretionary powers in setting the amount of damages to be awarded.

Katarzyna Racka and Anna Sekinda discussed next the influence of UOKiK's enforcement practice on new Polish leniency rules and the fining policy of the authority. They focused on the three Polish decisions where leniency applications were so far filed: Decision of 18 September 2006, DOK-107/06 (the *Polifarb* case); Decision of 31 December 2007, RKT-79/2007 (the *Tikkurila* case) and; Decision of 7 April 2008, DOK-1/08 (the *ICI* case). In *Polifarb*, the leniency application was submitted by Castorama Polska after a dawn raid and the opening of antitrust proceedings. A substantial reduction of the fine was awarded here for providing UOKiK with a range of documents which helped to explain the specific facts of the case. Relevant were in particular the statements submitted by the employees of Castorama listing the circumstances surrounding the conclusion of the agreement, which were recognised as evidence facilitating the conclusion of the case. Noted was also the fact that Castorama actively cooperated with UOKiK in the course of the entire proceedings, promptly providing all the requested information. In *Tikkurila*, the leniency application was filed by Tikkurila Polska in the course of explanatory proceedings. UOKiK recognised that Tikkurila admitted to having participated in the restrictive agreement since 2003. To prove its existence, the company provided copies of all the distribution agreements concerning its products sold under the Polifarb Dębica, Beckers and Tikkurila brands for 2003–2006. Data provided by the leniency applicant allowed UOKiK to establish that the agreement also covered products sold under the Tikkurila brand. By contrast in the *ICI* decision, the UOKiK refused for the first time to grant the leniency applicant (Castorama) either immunity or even a fine reduction because Castorama did not cease its participation in the agreement. According to UOKiK, the contested retail prices fixed by the supplier and Castorama were used by the retailer at least up to the date when the decision was issued. Mrs Racka and Sekinda also explained the new rules on

leniency introduced on 24 February 2009 by the Regulation of the Council of Ministers of 26 January 2009 as well as UOKiK guidelines on the leniency programme.

The last presentation of the first part of the conference was delivered by Jose Rivas who presented the view of an EU law practitioner on leniency, settlements and fines in proceedings before the Commission. Professor Rivas started by pointing out the importance of the leniency programme for the enforcement of EU antitrust rules as illustrated by statistical data according to which 60% of all cartel decisions adopted by the Commission since 1 January 2003 are based on leniency applications. He explained further the EU rules stemming from the 2006 Leniency Policy, the 2006 Fining Guidelines and the EU settlement procedure. Professor Rivas concluded with respect to the 2006 Fining Guidelines that the following key issues are worth monitoring: the determination of the percentage of the value of sales and the entry fee; whether an increase for recidivism of up to 100% will apply for each infringement and; how will the multiplier factor be applied for deterrence. Professor Rivas continued to point out that the new settlement policy requires more transparent fining. He predicted that the success or failure of the new rules on settlements will depend on whether the disclosure of the essential elements of the infringement will be sufficient to understand its facts and accusation. It will also be extremely important for companies to fully understand fines. Professor Rivas stressed finally that it is worth observing whether a 10% fine reduction will prove a sufficient incentive for companies to submit a settlement proposal in cartel proceedings.

The first part of the conference ended with a panel discussion moderated by Mrs Małgorzata Sz waj of Linklaters and Mrs Dorothy Hansberry-Bieguńska of Wardyński & Partners. Mrs Sz waj welcomed the transparency in UOKiK's fining policy stemming from its new guidelines which she briefly applied to the facts of the Polifarb case concluding that a substantial part of the fine must have been attributed to deterrence. Mrs Hansberry-Bieguńska discussed the issue of whether leniency is rightly applied in cases of vertical agreements.

III. Second session

The second part of the conference was chaired by Professor Stanisław Sołtysiński (Sołtysiński Kawecki & Szlęzak) with the participation of: Dr. Agata Jurkowska (Centre of Antitrust and Regulatory Studies, University of Warsaw), Dr. Konrad Kohutek (Polish-German Centre for Banking Law at the Jagiellonian University), Professor Richard Wish (Kings College, London) and Mr. Alexander Kopke (DG Competition, European Commission).

Dr. Agata Jurkowska spoke of the implementation of an economic approach to the assessment of vertical restraints in Poland. She commenced with an explanation of the construction and use of exemptions in vertical relations. Vertical price fixing was analysed next in the context of the *Hand Prod* case where the Warsaw Court of Appeals stated that in order to assess the anti-competitive character of a vertical agreement, UOKiK could not only rely on the literal wording of the agreement, but should also consider the economic conditions existing on the relevant market. The

necessity of an economic analysis was emphasized to an even greater extent in the *yeast distribution* case adjudicated by SOKiK which concerned an exclusive purchase agreement. SOKiK found here that the mere inclusion of an exclusivity clause was not sufficient to classify the agreement as anti-competitive. It was necessary instead to consider also all those economic aspects of the case which were essential from a business point of view. Dr. Jurkowska concluded by discussing the status of purchasing and selling groups in competition law considering that they have a special status as they do not constitute a separate part of the distribution chain. Thus their role is close to that of an intermediary, whilst not being of a purely vertical nature.

The reasoning adopted by the court of first instance in the *yeast distribution* case was recently upheld by the Warsaw Court of Appeals (VI ACa 61/09) which stressed the need for an economic analysis of vertical relationships and stated that the burden of proof lies in this context with UOKiK. Even if the market share of a supplier exceeds 30% and falls outside the scope of the block exemption, the authority should carry out an in-depth market analysis in order to support its findings.

Dr. Kohutek followed with a discussion of the aim behind the prohibition of a dominant position abuse in light of consumer welfare, which is the main objective of competition law. In cases of exclusionary abuse, consumer harm was presented as a constitutive element of the notion of an abuse. Dr. Kohutek saw the 'equally efficient competitor test' as a useful tool in assessing whether an abuse took place in cases of price-based exclusionary conduct since it centres on the assumption that consumers are harmed when an equally efficient competitor is excluded from the market by an abuser. The test may be omitted in cases of presumed abuse, i.e. conduct which has an anti-competitive objective or in cases with harm to commercial consumers. Still, this presumption can be rebutted by demonstrating the objective need to act in such manner or by the application of an efficiency defence. In order to apply the efficiency defence, three conditions must be fulfilled cumulatively: that the efficiency is a direct result of the abuse (i.e. that the abuse is indispensable in creating that efficiency); that no net harm is caused to consumers and; that there is no elimination of effective competition. The second condition (no net harm to consumers) is the hardest to satisfy as it requires a balancing of the gains and losses caused to consumers by the abuse.

Professor Richard Whish discussed the upcoming reform of Regulation 1/2003. He noted current criticisms of the act including those provisions which in the opinion of competition law practitioners should be revised. Professor Wish stressed here the need for greater clarity as to the allocation of jurisdiction. The bulk of his speech was devoted to existing procedural problems and the necessity for procedural harmonization between national and EU laws in the area of competition. The lack of coordination between the Commission and NCAs, especially in cases involving dual investigations of the same subject matter, was the subject of much debate and caused deep concerns among participants. According to Professor Wish, the Commission's investigative and adjudicative powers should be separated. Still, some of the provisions of Regulation 1/2003 cause problems in the application of such a separation, the overall result of which could otherwise be a considerable success. In conclusion, he presented statistical data on antitrust cases conducted by NCAs and the Commission.

The final presentation was given by Mr. Kopke and dealt with the referral mechanism under the EC Merger Regulation. After describing the system of referring cases between NCAs and the Commission, he focused on the specific referral criteria which are essential in establishing whether the scrutinised concentration has a community dimension and how to apply the rule of the most appropriate authority under Article 4(4). Mr. Kopke presented a detailed timetable for the referral procedure and statistical data concerning referrals under Article 4(4) (including the economic sectors of the referrals and their outcomes). It should be noted that, according to the presented data, 63% of the referrals received clearance, 34% a conditional clearance and just 3% were prohibited. Referrals under Article 4(5) were then analysed in the same manner. First Mr. Kopke described the detailed conditions that must be fulfilled in order to make a referral under Article 4(5) with great emphasis placed on the notion of the location of the effects on competition. Particular attention was paid to factors such as a cross-border nature of cases and their effects on competition in the territories of more than one Member State. Statistical data concerning the numbers and economic sectors of the said referrals was also presented. In conclusion, Mr. Kopke explained the criteria of the so-called German (Article 9) and Dutch clauses (Article 22) which, respectively, make referrals possible from the Commission to a Member State and vice versa.

This part of the conference concluded with a panel discussion. Mr. Robert Gago (Hogan Lovells) expressed the view that the Polish courts were right to go against UOKiK's mechanical qualification of vertical agreements as an infringement of competition law by their very object. He noted that an economic analysis was often omitted simply to make life easier for the case handlers. In response to Dr. Kohutek's presentation, Ms Bettina Volpi (Bonelili Erede Pappalardo) described the new trends seen in the assessment of abuse cases by the Court of Justice of the European Union. Mr. Kanton (Softysiński Kawecki & Szlęzak) highlighted then the views shared by many practitioners regarding the reform of Regulation 1/2003. He was also in favour of the use of an economic approach to vertical agreements.

In his concluding remarks, Prof. Jacques Bourgeois (President of the GCLC) stressed that this was the first conference on competition law held in the Warsaw Natolin Campus. He saw it as a great success for GCLC, the College of Europe in Warsaw, the supporting organisers and local competition law practitioners. He noted that the conference brought with it the opportunity to exchange important experience, ideas and concepts. The need for such a debate was demonstrated by the fact that so many distinguished representatives of the academia, competition enforcement agencies, practitioners and, most importantly, Polish judges have gathered to discuss such sophisticated competition law problems. He also stressed that the Natolin campus, with its 18th century manor house, was the ideal venue for this type of initiative and expressed his hope that a similar conference will be held there in two years' time.

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