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"Współpraca Komisji Europejskiej z organami ochrony konkurencji w sprawach kontroli koncentracji przedsiębiorstw", Sławomir Dudzik, Warszawa 2010 : [recenzja]

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Tekst jest udostępniony do wykorzystania w ramach dozwolonego użytku.

**Sławomir Dudzik, *Współpraca Komisji Europejskiej z organami
ochrony konkurencji w sprawach kontroli koncentracji przedsiębiorstw*
[Co-operation of the European Commission and national competition
authorities in cases of control of concentration],
Wolters Kluwer Polska – OFICYNA, Warszawa 2010, 400 p.**

Sławomir Dudzik seminal work, *Cooperation between the Commission and national competition policy agencies in enterprise concentration control*, was published and issued in 2010 by Wolters Kluwer. It consists of a Preface, six chapters, and a separate Conclusion, totalling 355 pages. Mr. Dudzik's work is devoted to a very important element of competition law, which while theoretically complicated is of great practical significance. Already in the Preface the author relates, in a convincing fashion, that as a result, *inter alia*, of the processes of globalisation 'cooperation between governmental competition policy agencies in various jurisdictions in the matter of control over enterprise concentration has assumed a special significance in recent years' (p. 16). They have assigned to themselves the difficult task of defining the 'principles governing the division of competences between the European Commission and the national competition policy agencies of the member states of the EU with regard to enterprise concentration control, as well as delineation of the scope of EU jurisdiction in this area and related matters with regard to non-EU states' (p. 17). In the opinion of this reviewer, Mr. Dudzik fully realises the difficult task he set for himself.

Chapter 1 is of an introductory nature. The development of EU law concerning the control of enterprise concentration is set forth in a clear and accessible manner. The author points out that, contrary to the European Coal and Steel Community, 'the creators of the founding treaties of the European Union . . . did not introduce into the treaties specific provisions which would definitively delegate control to EU institutions, at the European level, over the process of concentration of enterprises in the economy' (p. 19). In this context the author demonstrates the role played by the Court of Justice of the European Union (hereafter the 'Court') in the process of building up a Community (EU) system of enterprise concentration control. S. Dudzik properly asserts that, by issuing decisions which recognised, in this area, that it was appropriate to apply legal norms and solutions prohibiting enterprises from abusing their dominant market position and from concluding agreements among themselves which would have the effect of limiting competition, the Court 'took on the role of a specific catalyser' of the development of Community legislation in the area (p. 22). The

author next describes the path which led to the passage of Commission Regulation No 4064/89 and its further amendments, along the way sketching out the main features of Commission Regulation No. 139/2004 and the supplemental Commission Regulation No 802/2004 (p. 29).

Chapter II is entitled 'The principle of exclusivity in Commission Regulation No 139/2004 and the principle of the European Commission's exclusive jurisdiction in assessing concentration in its Community dimension'. In further sections the author discusses: the concept of concentration; issues connected with the community dimension of concentration; the doctrine of exclusivity contained in Commission Regulation No. 139/2004 and the exclusive competence of the European Commission; followed by analytical research into the relationship between EU control over concentration and the Agreement on the European Economic Area.

Of particular interest are the author's arguments concerning the application, to concentration issues which fall within the confines of Commission Regulation No. 139/2004, of the prohibitions against abuse of dominant position and the conclusion of agreements limiting competition envisioned in Articles 101 and 102 of the Treaty on the Functioning of the European Union. Mr. Dudzik's point of departure for his considerations is the statement that 'the Commission Regulation, as an act of secondary law, cannot, without a clear authorisation in the basic treaties, change a provision of primary law', and that such an authorisation 'cannot be found in Commission Regulation No 139/2004' (p. 50). Next the author provides a very satisfying description of the theoretical debate over this issue in European jurisprudence. He cites, among others, the publication of authors C.J.Cook and S.J. Kerse¹, who maintain that 'the provisions of Article 21, sub-paragraph 1 of Commission Regulation No. 139/2004 concerning the exclusive jurisdiction contained in Commission Regulation No. 1/2003 do not exclude the jurisdiction of national courts with regard to the prohibition against cartels and abuse of dominant position in connection with enterprise concentration' (p. 51). S. Dudzik also presents the arguments of A. L. Schild², A. Jones and B. Sufirin³ and M. Szydło⁴ in further support of this position. The opinions of these authors also take into account the approaches and sentiments of D. G. Goyder⁵, P. Roth, and V. Rose⁶. S. Dudzik postulates that 'these authors exclude the possibility of the European Commission or national competition policy agencies applying Articles

¹ See C.J. Cook, C.S. Kerse, *EC Merger Control*, London 2005, pp. 20–24.

² See L.A. Schild, (in: G. Hirsch, F. Montaż, F.J. Hacker, *Competition Law: European Community Practice and Procedure. Article-by-Article Commentary*, London 2008, pp. 2430–2431.

³ See A. Jones, B. Sufirin, *EC Competition Law*, Oxford 2008, pp. 992–994.

⁴ See M. Szydło, *Stosowanie art. 81 i 82 Traktatu ustanawiającego Wspólnotę Europejską do operacji koncentracyjnych* (Application of Articles 81 and 82 of the Treaty on the Functioning of the European Union to concentration operations) *Państwo i Prawo* 2006, zeszyt 1, pp. 64–66. Mr. Dudzik indicates that the author's position is very radical.

⁵ See D.G. Goyder, A. Goyder, A. Albors-Llorens, A. Goyder's *EC Competition Law*, Oxford 2009, p. 454.

⁶ See P. Roth, V. Rose (red.), Bellami & Child *European Community Law of Competition*, Oxford 2008, pp. 792–793.

101 and 102 of TFUE to concentration (. . .), acknowledging that national courts are not authorised to apply, with regard to issues of concentration, Article 101 of TFUE', while adding that 'it is commonly accepted that Commission Regulation No 139/2004 did not deprive the national courts of the possibility of applying Article 102 of TFUE' (pp. 52–53). S. Dudzik appropriately acknowledges the position of O. Koch, who accepts the premise that 'the will of the EU law gives that concentration (in its community dimension – MKK) be assessed solely on the basis of the provisions of Commission Regulation No. 139/2004 has significance for (. . .) the application of Articles 101 and 102 of TFUE' (page 53), and that based on this, as well as on an analysis of the Court's decisions, it may be postulated that the provisions of Art. 21 of Commission Regulation No. 139/2004 do not forejudge "the issue of the applicability of Articles 101 and 102 of TFUE to the question of concentration in its community dimension'. The same author also questions the possibility of applying, with regards to the issue of concentration in its community dimension, Art. 101 and 102 of TFUE in the Commission and national courts (p. 54).

However one may assess the propriety of the positions taken by Mr. Dudzik, it is beyond question that he presents the European jurisprudence and the Court's decisions on the issue in a composite and faithful manner, and furthermore that he does not hesitate to offer his own well-reasoned opinions in his discussions. In Chapter II the author also points out the problems associated with the manner in which the undefined normative concept of 'interested enterprises' is understood, and in addition provides a critical analysis of the community (EU) criteria for gauging concentration (p. 44 and following).

Chapter III is devoted to issues surrounding the cooperation between the Commission and the national competition policy organs of the member states in matters involving enterprise concentration control. The author begins by presenting the principle of loyalty in cooperation, followed by his research analysis into specific aspects of the issue, such as cooperation within the framework of proceedings undertaken by the Commission, the system for referral of matters between the Commission and national organs, and the protection of the legitimate national interests of the member states, taking into account as well the protection of their national security interests.

In the opinion of this reviewer, the most interesting part of S. Dudzik's monograph is Chapter IV, which is entitled 'Extra-territorial application of EU control over enterprise concentration'. The author quickly captures the reader's interest with his assertion that 'the extra-territorial application of competition law, including control over concentration, gives rise to a number of disputes between interested states and international organisations' (p. 161). S. Dudzik then undertakes a successful probe to research the subject matter, both at the level of generally applicable principles of international public law as well as on the 'legal plane established by the European Union itself' (p. 161). One element of S. Dudzik's considerations which particularly enriches Polish scientific discourse revolves around his comparative law analysis concerning United States antitrust law. The author presents a clear and concise analysis of the evolution of American case law and legislation, from the adoption of the Sherman Act through to and including the most current court decisions. Noteworthy

is his observation that 'the assessment of American antitrust organs concerning the influence of a projected merger on concentration within the appropriate market does not always correlate to the same assessment carried out by organs of other governments and the European Commission' (p. 194).

Section 4 of Chapter IV is devoted to issues surrounding the extra-territorial application of EU competition law. Two fundamental concepts are presented concerning the application of EU competition law to 'to enterprises outside the European Union (earlier the EC)'; to wit, the doctrine of effects *utile* and the principle of single enterprise. It should once again be observed that in these considerations the author makes effective use of comparative law analysis. S. Dudzik concludes that 'with regard to the jurisdictional issues, EU control over enterprise concentration is heading in the same directions contained in American law and practice' (p. 226). The author adds his own interesting propositions *de lege ferenda* and critically researches the postulates of EU legislative formulations with regard to competition doctrine (p. 220 and following). Chapter IV ends with a 'bridge section' to Chapter V, which concerns cooperation between the Commission and non-EU states (third parties) on the basis of bi-lateral agreements. The author notes at the conclusion of Chapter IV that 'a way to reduce (...) conflicts would involve the use of bi-lateral and multi-lateral international agreements concerning competition law' (p. 227).

In his Introduction to Chapter V Mr. Dudzik asserts that, in addition to the avoidance of international conflicts over jurisdiction, the use of international agreements should be aimed assuring 'the effective functioning of those organs involved in enforcing competition law in instances where its application has an international dimension' (p. 228). In particular the book under review presents a detailed analysis of the treaties between the European Union and Canada, Japan, Korea, and the United States. As regards the latter, in addition to the 1998 treaty between the EU and the United States, a series of so-called 'second generation' agreements have been concluded concerning matters such as notification of ongoing proceedings, exchange of disclosed information, consultations, and the use of mechanisms designated as *positive comity* and *negative comity*. The 1998 Treaty between the EU and the United States is very precise (considered to belong to the 'third generation') and envisions, for example, the exchange of confidential information.

S. Dudzik devotes the most attention to cooperation between the European Union and the United States. It should be emphasised that the author does not limit himself to a mere recitation of the contents of the treaties, but illustrates their place in the theoretical discussions concerning this area of collaboration and presents the most important current legal disputes concerning the topic.

The development of Polish legal science is also aided by the considerations in Chapter VI concerning the cooperation between the Commission and competition policy agencies in third countries in light of standards developed by selected international organisations. The comments concerning the World Trade Organisation (WTO) are particularly edifying. Following a sketch of the basic information necessary to understand the role of the WTO in the process, the monograph under review presents the on-going state of international cooperation concerning competition law

within the structure of the WTO, including discussion of current initiatives aimed at strengthening and deepening said cooperation. In the end however the author concludes that 'one should not expect that the WTO will return to work on this issue in the near future. The idea of a global anti-monopoly treaty has become more distant' (p. 290). In further sections of Chapter VI the author reviews cooperation in the area of competition law within the framework of the Organisation for Economic Cooperation and Development (OECD) as well as the International Competition Network. The conclusion of the monograph is concise and composite, constituting a summary of the results of the research presented in the work.

The seminal work reviewed herein is highly recommended both to theorists of the topic as well as practising lawyers. The former will find quite satisfactory the author's approach to argumentation concerning the difficult topics raised, as well as his professional use of the scientific tools available. It should be emphasised that S. Dudzik's work has obviously been prepared with great attention to detail, that the structure is logical and precise, and the conclusions presented are based on solid bibliographical research.

From the aesthetic point of view the book cover is attractive and readable. Some fragments of S. Dudzik's work could well serve as a detailed textbook on the topic, although this in no way detracts from its fully scholarly dimension.

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