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New Amendments Introduced to European Union Competition Law Due to the Expiration of Block Exemption Regulations Conference at Łazarski University. Report

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On 7 June 2010, a conference under the title *New Amendments Introduced to European Union Competition Law Due to the Expiration of Block Exemption Regulations* took place at the Łazarski University in Warsaw.

The conference was opened by Professor Zbigniew Lasocik, the Dean of the Law Faculty of the Łazarski University, who started his speech by introducing the University and emphasizing the Faculty of Law's aim to ensure high quality legal education.

During the conference, four panels addressed the following issues: 1) EU competition law – reform and why? 2) Pricing strategies and self-compliance procedures; 3) The economic approach to distribution law of the European Union – myth or necessity? 4) The future of EU competition law in relation to the distribution sector. The conference was attended by academics, private legal practitioners and judges from Polish competition courts.

First session

The first panel presented the background of the reform introduced by Regulation 330/2010 and the actual state of play concerning different aspects of vertical agreements. The session was chaired by Mr. Carlos Rapallo from Garrigues who welcomed the speakers: Prof. Valentine Korah from the University College London, Mr. Andrei Gurin from the European Commission and Ms. Małgorzata Kozak from Łazarski University.

The preliminary remarks made by Ms. Kozak concerned the general overview of Article 101(1) and (3) of Treaty on the Functioning of the European Union (TFEU). The speaker emphasized the difficulties in the application of Article 101 TFEU to vertical agreements including the questions surrounding the standard of proof in 'vertical cases'. She outlined also the general legal basis of the EU block exemptions system.

Prof. Valentine Korah gave a presentation on the retrospective analysis of vertical agreements in the EU. She emphasized the necessity to introduce an economic assessment, including efficiencies, into the approach of the European Commission's to vertical agreements and the resulting key policy change. She explained that the assessments of the 1960s centered on a strict legal *ex post* analysis without taking into

account issues such as incentives and investment costs. Early cases focused therefore on exclusive distribution, single branding and export bans. The first block exemption regulations were introduced in the 1980s and contained formalistic definitions. The use of individual exemptions led at the same time to an overburdening of the Commission's sparse resources. The economic approach was introduced in the 1990s when Klaus Dieter Ehlermann became director General of DG IV (now DG Comp). This major policy shift was reflected in the new vertical block exemption issued in 1999 and the accompanying Commission Guidelines. This regulation became the model for subsequent block exemptions. Prof. V. Korah concluded that the regulation of 1999 has worked well, and expressed the hope that the current revision would not change much. Still, she considered that the justifications of the recent reform are less helpful than those prepared in 2000.

As the next speaker, Mr. Andrei Gurin emphasized positive past experiences associated with the vertical block exemption from the perspective of someone who has worked on the preparation of Regulation 330/2010 and the accompanying Guidelines. The objective of the reform was to update the effects-based approach and not to revolutionize the system. Mr. Gurin analyzed the key change in the new act – the introduction of a new condition concerning its applicability. Accordingly, Regulation 330/2010 is applicable to vertical agreements where the threshold market share of the buyers does not exceed of 30% with respect to the market where they purchase the contract products from their suppliers. The speaker explained that this new requirement is necessary in order to counterbalance the impact exercised on vertical relations by powerful buyers. The new market-share threshold for buyers is thus particularly beneficial to small and medium sized enterprises. Mr. Gurin stressed also that Regulation 330/2010 does not fundamentally change the list of hardcore resale restrictions. He referred to the US *Legeen* case that abolished the *per se* approach to Resale Price Maintenance (hereafter, RPM) and emphasized that it is indeed possible to show efficiencies even in a case of a hardcore restriction (by object). Mr. Gurin proceeded to present the issue of Internet sales and noted that the new act was meant to refine the notion of active and passive sales in the on-line environment. He emphasized in this context that distributors should be free to have a website and engage in Internet sales. During the closing discussion, Dr. Marta Sendrowicz commented on the Polish Competition Authority's policy to treat RPM as illegal *per se*.

Second session

The second panel was moderated by Mr. Jarosław Sroczyński from Markiewicz & Sroczyński and concerned pricing strategies and self-compliance procedures. Dr. Marta Sendrowicz from the University of Warsaw, Dr. Katarzyna Karasiewicz of Sołtysiński, Kawecki, Szlęzak and Ms. Dorothy Hansberry-Bieguńska of Wardyński & Partners discussed how a company's distribution strategy must be prepared in order to achieve compliance with competition law requirements especially with respect to pricing policies.

Dr. Marta Sendrowicz spoke of competition compliance and pricing strategies. She discussed the various factors relevant to competition compliance programmes. The first issue she addressed was what competition law compliance actually is. She referred to efficiencies and fairness defining the latter as taking the right choice in objectively justifiable terms. She emphasized the role of lawyers in teaching their clients to carry out their business fairly – to take justified business decisions based on appropriate considerations. She stressed that there is no contradiction between fairness and efficiencies. The second issue commented on by Dr. Sendrowicz was the transparency in the policy pursued by competition law enforcement agencies. She welcomed in this context the work of the European Commission in preparing new enforcement guidelines. She referred also to the policy of the Polish Competition Authority which still treats RPM as illegal *per se* without taking into consideration its possible efficiencies.

Dr. Katarzyna Karasiewicz talked about in-house procedures and how to create them. She emphasized the importance of transparency in the activities of competition authorities. She continued on to discuss the role of internal competition compliance audits and the methods of identifying the risks of potential non-compliance. She noted the necessity to monitor the effectiveness of all compliance procedures including not only those within the company but also those affecting its communication with its contractors and competitors. Dr. Karasiewicz stressed that compliance procedures must be in line with antitrust rules but also allow the company to do business comfortably. Compliance programmes should use tools such as workshops and seminars for their employees and managers which must be dedicated to particular tasks performed within the company. Proper communication during dawn raids must also be ensured. According to the speaker, good compliance programmers should not be limited to antitrust lawyers but should cover all areas of legal expertise whereby good implementation is the key to success here. Dr. Karasiewicz concluded that it is ultimately better to prevent than to cure.

Ms. Dorothy Hansberry-Bieguńska talked about the recognition and avoidance of competition restricting conduct within a company. She emphasized the importance of pricing strategies pointing to the risks that high profit expectations could act as an incentive for possible competition law violations. She noted that it is the role of managers to monitor the situation in their companies. She analyzed also in what way should managers oversee the internal workings of their business in order to prevent any illegal price information sharing. Ms. Hansberry-Bieguńska pointed out finally that it is possible in Poland to apply for leniency in vertical agreements also.

Third session

The third panel was moderated by Dr. Agata Jurkowska from the University of Warsaw and concerned the economic approach to distribution law of the European Union. Dr. Jurkowska-Gomułka emphasized in particular the necessity to use the economic approach in the application of competition law.

Mr. Maciej Fornalczyk from Comper Fornalczyk & Partners commented on the meaning of the economic approach to competition law. He stressed that the new vertical block exemption maintains the policy line introduced by its predecessor. He concluded that the act does not leave any room for an economic analysis since the 30% threshold limits the scope of its application. The speaker pointed out that the definition of the relevant market is the very first step of defining the existence of market power. With reference to geographical markets, Mr. Fornalczyk identified the price (including sales, transportation and implementation price) as a key factor for the definition of a relevant market. He finished his presentation with the question whether it is possible to apply the same analysis in vertical cases as in the assessment of dominance. He ultimately concluded that Regulation 330/2010 does not leave much space for an economic analysis, save the market definition stage, except for 'the good-old 101(3) TFUE analysis', which is left outside the Regulation 330/2010.

Ms. Małgorzata Modzelewska de Raad from Wierzbowski Eversheds focused in her speech on RPM pointing out that price competition is one of the most important forms of competition. She posed the question whether it is really fair to outright ban RPM and presented the history of the RPM prohibition. She continued on to name a number of the positive aspects of RPM as well as some distribution systems where it is justified. She also noted that despite the EU presumption of the illegality of RPM, the latter is nevertheless subject to an efficiency analysis (albeit in a limited scope). By contrast, RPM is subject to a presumption of illegality in Poland without efficiency analysis. Ms. Modzelewska de Raad welcomed the increasing use of the economic approach to RPM where an effects-based analysis is performed and consumer benefits and technical/ distribution development assessed.

Mr. Jarosław Sroczyński of Markiewicz & Sroczyński proceeded to analyze network distribution and the economic approach. He concentrated on the example of a distribution system posing the question: 'at which „melting” point will every subsequent exclusive distribution agreement adversely affect competition?' On the basis of a practical example, he showed that an analysis without an economic approach leads to an enigma. Mr. Sroczyński referred to the *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH* case as providing key guidelines for the assessment of anti-competitive effects in a vertical case.

Restrictions in Internet distribution were discussed by Dr. Bartosz Targański of the Warsaw School of Economics and Salans. He commenced his presentation by emphasizing how much does e-commerce benefit consumers. He pointed out also however that consumer benefits can be costly for suppliers since additional competitive pressure comes from distributors who do not participate in the costs of the upkeep of a distribution network and promotional activities in a given area. He also noted the discrepancy between the growth of domestic and cross border e-commerce and analyzed the main obstacles to the latter as well as the new Commission Guidelines of 2010. Dr. Targański posed the question whether the distinction between active and passive sales make at all sense in the on-line environment. He then presented the requirements that can be imposed on Internet distributors.

Fourth session

The future of EU competition law in relation to the distribution sector was discussed in the panel moderated by Mr. Morvan Le Berre of Wardyński & Partners. The panel included Mr. Andrei Gurin from the European Commission, Dr. Piotr Milczarek of Clifford Chance and Mr. Maciej Gaca of Garrigues.

Mr. Maciej Gaca presented selected issues associated with the recent reform from the perspective of a private legal practitioner. He posed the question whether competition lawyers working on particular transactions should not be accompanied by economists. He addressed three issues: on-line retailing, buyer power and RPM. Mr. Gaca analyzed passive sales in on-line retailing from a practitioner's point of view. With respect to buyer power, he posed the question how to protect medium and small suppliers. He emphasized also the need to consider the input of competition economics in the application of competition law.

Mr. Andrei Gurin commented on Mr. Gaca's remarks on Internet distribution. He recalled the two major exceptions to the rule that resale restrictions are anti-competitive by object, that is, exclusive and selective distribution. He addressed the proposition that every Internet sale is in fact an active sale. In his opinion, websites for each individual country must be specially prepared, advertised etc. and so the Commission had to adapt the concept of active and passive sales to modern developments. Mr. Gurin noted also that the issue of compliance costs was overestimated during the public consultation procedure preceding the new vertical block exemption. He considered that the majority of vertical agreements do not contain any competition restraints therefore they do not engage any compliance costs.

Dr. Piotr Milczarek of Clifford Chance talked about the consultation procedure that preceded the adoption of Regulation 330/2010 referring in particular to the observations submitted specifically by law firms – 25 opinions in total. He emphasized that practitioners emphasized therein the public interest and how important the clarity of the law is. He noted that law firms commented most commonly on buyers' market share threshold (22 opinions) and how it can be applied in practice. 9 opinions discussed online sales. He emphasized the difference between the US and the EU. Mr. Milczarek talked also about selective distribution and the modification of distribution. He emphasized the importance of this change in the case of the pharmaceutical industry. He referred to the opinions that concerned agency agreements and the third kind of risk included in the Guidelines. He noted also that some of the opinions expressed in the consultation procedure dealt with category management which could in some cases restrict competition. He concluded that the reform constituted an evolution rather than a revolution.

The conference was closed by Judge Jerzy Stępień of the Lazarski University. He thanked all participants for the interesting discussion. He also emphasized the importance of the topic.

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