

Implementation of the ECN+ Directive in Poland
– towards a more effective application of EU competition law?
Conference of the Office of Competition and Consumer Protection
and the Centre for Antitrust and Regulatory Studies,
Warsaw, 2 March 2021

On 2 March 2021, the Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumentów*, hereinafter: UOKiK) and the Centre for Antitrust and Regulatory Studies, Faculty of Management, University of Warsaw (hereinafter: CARS) organised a joint conference, this time held remotely, dedicated to the implementation of the ECN+ Directive in Poland. The presentation delivered by Anna Vernet of the European Commission's Directorate-General for Competition and the key note speech given by Professor William Kovacic of the George Washington University set the conference within the broader EU and international contexts.

The conference was opened by Tomasz Chróstny, President of UOKiK, and Prof. Dr. hab. Grzegorz Karasiewicz, Dean of the Faculty of Management of the University of Warsaw. The speakers mentioned, among other things, current competition law challenges associated with digital markets and the need for UOKiK to cooperate with the academic communities to address these challenges.

Next, as a special guest of the conference, Anna Vernet of the European Commission's Directorate-General for Competition presented the origins, assumptions and goals of the decentralised system of EU competition rules and increased cooperation between the National Competition Authorities of EU Member States (hereinafter: NCAs). Anna Vernet noted the evolution of EU law in this regard and underlined that the ECN+ Directive of 2021 aims to give better protection to the independence of NCAs, among other things by ensuring the authorities have proper financing and personnel. Ms Vernet also stressed that the ECN+ Directive provides for the full harmonization of leniency programmes, which is to enable undertaking to take advantage of this tool.

The first panel discussion was moderated by Prof. Dr. hab. Agata Jurkowska-Gomułka of the University of Information Technology and Management. It was dedicated to the independence and resources of the President of UOKiK. Dr. Daniel Mańkowski, Director of the UOKiK Legal Department, pointed out, inter alia, that there is a growth tendency in the context of both UOKiK's budget and the number of its employees. Dr. Mańkowski also stressed the planned amendments to the Act on Competition and Consumer Protection, which will transpose the ECN+ Directive in Poland, a fact

that will translate into greater independence of the President of UOKiK, since the amendments will introduce a tenure (set term of office) of the UOKiK President.

Dr. hab. Maciej Bernatt, Director of CARS, offered reflections on the formal and actual independence of the Polish NCA. Professor Bernatt concentrated in particular on his research findings suggesting UOKiK's self-restraint in (non)-instituting proceedings against certain types of companies, for instance, companies in which the State Treasury holds a stake. In the speaker's opinion, increased market concentration involving State Treasury, offers additional challenges for effective competition law enforcement in several sectors of the economy in Central and Eastern Europe. Professor Bernatt found that while the Polish draft implementation of the ECN+ Directive could contribute towards increased formal independence of the President of UOKiK, it lacks solutions strengthening his/her actual independence. In particular, the draft lacks safeguards to ensure the necessary professional expertise of the authority's head – the President of UOKiK – and the transparency of his/her recruitment and appointment process. Responding to data presented by Dr. Mańkowski, Professor Bernatt expressed doubts whether the higher level of employment at UOKiK actually applies to the Department of Competition Protection, which is its key division responsible for the effective enforcement of competition law in Poland.

Dr. Małgorzata Kozak of the Utrecht University agreed with earlier comments, pointing out the need to take care of all aspects of the independence of a competition authority, that is, impartiality, honesty and *de iure* and *de facto* independence, which are guaranteed by, inter alia, ensuring professional expertise and sufficient financial resources for the authority. The introduction of a fixed tenure of the UOKiK President, and a closed list of dismissal grounds are long-awaited changes to the Polish system. Dr. Kozak also noted that before the ECN+ Directive was adopted, there were no *expressis verbis* requirements in EU law on the independence of NCAs. The ECN+ Directive has altered that by introducing a postulate ensuring such independence, however, in Dr. Kozak's opinion, this postulate is merely a declaration and should be specified in a best practice code. However, the aforementioned draft amendments to the Polish Act on Competition and Consumer Protection do not provide for the introduction of such guidelines. For those reasons, according to Dr. Kozak, the implementation of the ECN+ Directive will be incomplete in Poland. Dr. Kozak also stressed that potential penalties which Poland might face for failing to correctly implement EU law may be higher than the funds that would be designated for increasing UOKiK's budget.

In summarising the panel discussion, Dr. hab. Agata Jurkowska-Gomułka of the University of Information Technology and Management noted that the postulate of formal and actual independence of a public administration authority is correct and worth developing in legal literature and case law. Professor Jurkowska-Gomułka also shared her doubts of whether it is possible to ensure full independence of an authority that deals with competition policy. Dr. Majchrowski added that it is possible, but unusually difficult, to ensure such independence. In Dr. Kozak's opinion, it is crucial for the voice of the President of UOKiK to be taken into account when competition policy is being developed.

After the discussion, the special guest of the conference, Professor William Kovacic of the George Washington University, delivered an inspiring key note speech concerning factors that have an impact on the effective application of competition law. Professor Kovacic mentioned here, *inter alia*, political leaders, the competition authority and its managerial personnel and staff as well as supporting institutions. Answering a question posed by Professor Bernatt, Professor Kovacic pointed out that it is also necessary to take into account changing political and economic conditions when assessing a competition law regime of a given country.

The second panel discussion, moderated by Dr. Tomasz Bagdziński, Director of the UOKiK Department of Competition Protection, focused on fines and investigative powers.

The panel was opened by Adam Jasser, former President of UOKiK, currently Deputy Director of CARS, who shared his observations on the effectiveness of competition law enforcement in light of the changes to the rules on penalties, introduced in the draft amendment of the Polish Act on Competition and Consumer Protection. He expressed his doubts concerning, among others, the place of statement of objections (hereinafter: SOs) in the draft amendment. Although until now the issue of SOs has not been regulated by law in Poland, it was customary for it to be presented after the end of the investigation. The amendment provides that the SO must be presented when the investigation commences, which may *de facto* prevent undertakings from familiarising themselves with the allegations and the evidence collected by UOKiK in the course of the investigation. Adam Jasser also pointed out, the expansion of the investigative powers of the President of UOKiK as well as of the range of penalties, especially against individuals, without counterbalancing these solutions with the strengthening of the right to defence, as well as the failure to ensure adequate human and technical resources for UOKiK.

Dr. Łukasz Grzejdziak of the Łódź University presented his research on the effectiveness of sanctions in competition law. The research covered mainly decisions on anticompetitive agreements issued in 2010–2020. Dr. Grzejdziak's research demonstrates that the fines imposed by the President of UOKiK have, on average, a very low nominal value and are, moreover, often reduced by the Competition and Consumer Protection Court. Additionally, there is a long period between the issuing of a UOKiK decision and the payment of the fine, which may weaken its preventive function. The speaker also mentioned the issue of penalising small enterprises and micro-enterprises, as well as natural persons (51% of fines), with a simultaneous failure to impose fines on medium and large entities. Only 21 out of the 160 decisions issued by the President of UOKiK concerned business associations. For that reason, Dr. Grzejdziak welcomed the changes introduced by the ECN+ Directive in this respect. According to Dr. Grzejdziak, the implementation of the ECN+ Directive also has the potential to eliminate the problem of low fines. However, he emphasised the interpretational ambiguities relating to the Polish draft amendment of the Act on Competition and Consumer Protection, concerning, among other things, the lack of clear indication that the infringements (rather than the subject of the anti-competitive agreement) must relate to the activities of the business association.

Grzegorz Lang, Legal Counsel of the Federation of Polish Entrepreneurs, discussed the liability of business associations and the members of business organisations. He pointed out not only the ambiguity of the Polish draft amendments to the Act on Competition and Consumer Protection (for example, as to the term ‘business associations’ encompassing too many entities, or the risk of penalising companies that delegate their employees to work for the governing bodies of the associations), but also the lack of any dialogue between the government and business organisations that are the main addressees of these provisions. Similarly to Dr. Kozak, Mr Lang emphasised the need to establish good practices in order to clarify the new regulations.

Summing up the panel discussion, the moderator, Dr. Bagdziński, shared his reflections on the reduced effectiveness of programmes such as leniency, due to the excessive length of their proceedings. Dr Grzejdziaak agreed with this view, stating that excessively long proceedings are a systemic problem. During the following Q&A session, a potential increase in the interest in antitrust compliance programmes among parent companies of corporate groups (due to the introduction of parental liability) was also mentioned. Adam Jasser emphasised also the role of UOKiK’s activities (advocacy) in promoting competition law among entrepreneurs.

Following a discussion and a break, the third panel discussion started, moderated by Professor Dr. hab. Sławomir Dudzik, Chair of European Law at the Jagiellonian University. The panel discussion concerned cooperation between competition authorities. The moderator pointed out in the introduction that the ECN+ Directive fills a gap consisting of the lack of sufficient provisions regulating the cooperation between NCAs.

Dr. Małgorzata Krasnodębska-Tomkiel, former President of UOKiK, now of the Institute of Legal Sciences at the Polish Academy of Sciences, outlined the Polish perspective on the development of cooperation between NCAs and the consecutive stages of setting up the European Competition Network. She emphasised the importance of NCAs’ sharing their experiences and pointed out the role of the President of UOKiK, who was one of the first European authorities vested with powers to investigate both competition and consumer protection cases. The ECN+ Directive, as the latest initiative for cooperation between NCAs, leads to the harmonization of procedures and sanctions, a fact that has been feared by Member States. Dr. Krasnodębska-Tomkiel pointed out that the institutional position of UOKiK still needs to be improved and its authority should be strengthened both nationally and internationally; also, closer links should be forged with the NCAs of other Member States, including by conducting joint proceedings.

Aleksandra Ołdakowska, Chief Specialist at the UOKiK Department of Competition Protection, presented the process of transposing the particular solutions of the ECN+ Directive into the Polish draft amendment of its Act on Competition and Consumer Protection, concerning, among other things, cooperation in investigative activities, notification of preliminary objections and enforcement of decisions to impose fines.

Dr. hab. Mateusz Błachucki of the Institute of Law Studies at the Polish Academy of Sciences pointed out the shortcomings of the solutions provided for in both – the Polish draft amendment of the Act on Competition and Consumer Protection and

in the ECN+ Directive itself. In his view, the changes resulting from the ECN+ Directive that most affect the legal order of the Member States are, in fact, the amendments related to international cooperation and to the mutual recognition of administrative acts. Yet these important changes, which will require a serious intrusion into the national legal order, are not subject to much discussion seeing as public opinion focuses on other aspects of the ECN+ Directive. The speaker indicated that the ECN+ Directive is the first act of law referring to the existence of the ECN, even granting it the powers to adopt soft law acts in the form of guidelines. The enhanced international cooperation will concern the provisions on inspections and searches (although there will be few changes to the Polish legal system), procedural assistance, cross-border assistance in the field of service of process, and the recognition and enforcement of foreign decisions. Dr. hab. Błachucki spoke critically about the draft amendment to the Act on Competition and Consumer Protection, which literally transposes the provisions of the ECN+ Directive.

During the following discussion, the moderator asked the panellists a number of questions, which allowed them to expand on previously raised problems related to international cooperation between competition authorities, such as the transmission of information, service of documents and enforcement of fines.

The conference ended with a summary delivered by the conference's moderator, Monika Woźniak-Cichuta of the University of Warsaw. The event attracted over 3,000 participants from 7 countries and 3 continents including the representatives of academia and private sectors involved in competition law. It was a valuable platform for discussing the upcoming legal changes and the challenges they aim to address.

More details on the conference, including presentations and videos, are available at <https://cars.wz.uw.edu.pl/pl/wydarzenia/konferencje-i-seminaria/1151-konferencja-implementacja-dyrektywy-ecn-w-polsce-w-strone-skuteczniejszego-stosowania-prawa-konkurencji.html>

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