

## **7th International PhD Students' Conference on Competition Law Białystok, 10 October 2017**

The 7<sup>th</sup> International PhD Students' Conference on Competition Law took place on 10 October 2017 at the Faculty of Law of the University of Białystok (Poland). The Conference was organized by the Department of Public Economic Law at the Faculty of Law of the University of Białystok and focused on issues related to private enforcement of competition law as well as State aid. The conference was conducted in English.

The Conference was opened by Professor Anna Piszcz (University of Białystok) who welcomed the participants and introduced the guests including: Professor Anna Nylund (University of Tromsø The Arctic University of Norway), Professor Amedeo Arena (University of Naples 'Federico II') and Professor Raimundas Moisejevas (Mykolas Romeris University, Vilnius). Subsequently, Professor Anna Piszcz presented the main assumptions and scope of the Conference.

The Conference was divided into two parts. In the first one, chaired by Professor Anna Piszcz, the supervisors delivered their papers.

The first presentation entitled *Competition Law and Damages on the Outskirts of the EU: the Norwegian Perspective* was delivered by Professor Anna Nylund. In her speech, she drew attention to issues related to the adaptation of Norwegian law to that of the European Union, emphasizing the fact that Norway is not a Member of the European Union, but only a party to the Agreement on the European Economic Area (EEA Agreement). This means that the way of introducing legal solutions adopted in EU law is different in Norway and requires, each time, amendments to the EEA Agreement. Professor Anna Nylund indicated also that the implementation of substantive EU competition law to Norwegian law is not problematic, because substantive competition law is part of the EEA Agreement. By contrast, the issue of procedural standards is different, since the States that are parties to the EEA Agreement have retained their procedural autonomy. Therefore, due to the fact that Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the Damages Directive) contains also procedural rules, their inclusion into the Norwegian legal order is associated with certain challenges. In the last part of the presentation, Professor Anna Nylund pointed out that some of the solutions provided for in the Damages Directive, such as the disclosure of evidence procedure, were provided

for in Norwegian law already. She indicated that the procedural rules contained in the Damages Directive are very general and do not refer to general norms of civil procedure.

Professor Anna Piszcz spoke next presenting a paper entitled *Competition Law and Damages on the Other Outskirts of the EU: The CEE Perspective*. At the beginning, Professor Anna Piszcz pointed out that despite the harmonisation made as a result of the adoption and implementation of the Damages Directive, there are still discrepancies between national legal orders. As a result, national laws of some countries of the Central and Eastern European (CEE) region provide more attractive solutions for victims who consider pursuing claims resulting from competition law infringements than solutions in force in other countries of this region. She indicated that the private enforcement of competition law in CEE Countries is ineffective. In the later part of the presentation, the speaker focused on searching for the answer to the following question: what distinguishes the legal systems of CEE Countries from States perceived as having most attractive solutions, such as Great Britain or Germany. She mainly focused on differences in the field of the disclosure of evidence, the effect of decisions, competent courts, compensatory collective redress and settlements. At the end, Professor Anna Piszcz expressed the view that the Damages Directive should strengthen the position of those affected by infringements of competition law in CEE Countries. Nevertheless, sole implementation made by way of the 'copy-and-paste' method will not be sufficient to increase the efficiency of private enforcement of competition law in CEE Countries. In order to increase efficiency, it is also necessary to deal with challenges left outside the Damages Directive such as institutional design, collective redress and Consumer Dispute Resolution.

Professor Amedeo Arena presented a paper entitled *The Commission's Decisions on National Tax Rulings before the CJEU: Untangling the Legal Conundrums of a Recent Trend in Fiscal Aids*. In the presentation, he drew attention to the activities undertaken by the European Commission under the programme of combating harmful tax competition, one of which is the analysis of individual tax rulings issued by national authorities in terms of their compliance with EU State aid law. Professor Amedeo Arena focused on the decisions regarding tax rulings addressed to multinational enterprises such as Fiat, Starbucks, Amazon, etc.. In these decisions, the European Commission considered that as a result of the individual tax rulings, national authorities approved an interpretation of their legal provisions that allowed tax avoidance or a significant reduction of the taxable income, which in effect constituted State aid granted contrary to EU State aid law. Professor Amedeo Arena examined the most controversial aspects of these decisions of the European Commission and analysed the possible outcomes of the appeals pending before the Court of Justice of the European Union.

The last paper in the supervisors' session entitled *Some Experiences with the State Aid Cases in Lithuania* was presented by Professor Raimundas Moisejevas. On the basis of cases related to State aid in Lithuania, the speaker discussed selected issues regarding State aid. Professor Raimundas Moisejevas presented first the case of State aid granted for the construction of connecting infrastructure necessary for the

natural gas transmission system, in order to reduce Lithuania's dependence on its sole gas supplier, Gazprom (State aid to Klaipėdos Nafta). In this case, the European Commission considered that the Lithuania acted in breach of Article 108(3) TFEU by putting into effect the part of the aid measures which related to the investment. However, the European Commission has decided to consider the aid to be compatible with the internal market, pursuant to Articles 107(3)(c) as regards the investment aid, and pursuant to Article 106(2) TFEU as regards the operating aid. Professor Raimundas Moisejevas pointed out that the practice of the European Commission shows that aid measures supporting the construction of energy infrastructure may be declared compatible directly under Article 107(3)(c) TFEU. That is so if they are necessary and proportionate and if the positive effects for the objective of common interest pursued by the aid outbalance its negative effects on competition and trade. Subsequently, Professor Raimundas Moisejevas presented a case related to the planned granting of State aid to the Lithuanian Shipping Company, which was at that time in a difficult economic situation. Due to the fact that the Competition Council of Lithuania publicly expressed the opinion that this aid could constitute State aid, Lithuanian Shipping Company was ultimately not given any support and it went bankrupt. After that, the speaker discussed a case related to the energy sector in Lithuania. He explained that in accordance with Lithuanian Law on Electricity, the services provided in the energy sector by some companies are regarded as services implementing the public interest and, therefore, they are compensated by a levy, which is distributed between the recipients on the basis of certain criteria. Against this background, a dispute arose initiated by the biggest payers of such levies in Lithuania. One of the issues in this dispute was whether the fulfilment of the requirements of State aid of the entirety of a specific levy scheme should be evaluated or, should the fulfillment of every separate situation be evaluated, when a certain company is supported.

The first session of the Conference concluded with a debate and comments regarding the presentations. The discussion was followed by the second part of the Conference, the students' session, which was moderated by Professor Anna Nylund.

Claudia Massa (University of Naples 'Federico II') delivered a presentation entitled *The Disclosure of Evidence under the Antitrust Damages Directive 2014/104/EU*. At the beginning, she described the general principles of the Damages Directive, focusing primarily on its objectives. In the following part of the presentation, she discussed in detail issues related to the legal provisions on the disclosure of evidence, as regulated in the Damages Directive. Subsequently, Claudia Massa presented selected judgments of European courts regarding the disclosure of leniency statements and settlement submissions before and after the entry into force of the Damages Directive. At the end, she emphasised that the EU competition law system is focused on public enforcement. This happened as a result not only of the actions of the EU legislator, who prefers public competition law enforcement, but also due to the case law of the Court of Justice of the European Union. The latter has always been cautious and emphasised that the assessment of the admissibility of disclosure of evidence

collected in proceedings conducted by competition authorities should be made on a case-by-case basis.

Paulina Korycińska-Rządca (University of Białystok) spoke next and presented a paper entitled *Penalties for Non-compliance with a Court Order for Disclosure of Evidence: The Perspective of Poland against the Background of the Other CEE Countries*. The speaker indicated that the success of private enforcement of competition law depends on effective mechanisms of collecting evidence, in order to prove the premises of liability for damages resulting from competition law infringements. Recognizing the important role of the disclosure procedure in the development of private enforcement of competition law, the EU legislator imposed on Member States the obligation to establish effective, proportionate and dissuasive sanctions for violations of the disclosure rules. However, the Directive did not indicate the specific types of sanctions to be used. In her presentation, Paulina Korycińska-Rządca briefly spoke of sanctions for non-compliance with a court order for the disclosure of evidence provided for in Polish law; she then compared them with the solutions adopted (or planned) in this regard by other CEE Countries. The speaker concluded that sanctions for non-compliance with a court disclosure order adopted or planned in the CEE Countries differ significantly. The widest divergences exist in the rules empowering the court to introduce pecuniary penalties for non-compliance with a court order for the disclosure of evidence – some countries decided to create severe pecuniary penalties, whereas others decided not to introduce this kind of penalties at all or to set them at an insignificant level. This diversity as to pecuniary penalties leads to the conclusion that the terms 'effective, proportionate and dissuasive' used by the Damages Directive have not been understood uniformly in CEE Countries. Paulina Korycińska-Rządca added in conclusion that the effectiveness of the disclosure of evidence would, in the end, depend on the application of these rules by national courts.

Małgorzata Salitra (University of Szczecin) presented a paper entitled *Passing-on of Overcharges: The EU Damages Directive Framework and the Polish Perspective*. In the first part of the presentation, the speaker explained the concept of the 'passing-on of overcharges' indicating that it may be used as a 'sword' (where an indirect purchaser alleges that it was harmed by an overcharge because of upstream passing-on) or as a 'shield' (where a defendant alleges that downstream passing-on by a claimant has reduced the size of the actual harm the latter has suffered). Discussed next were the legal regulations related to the passing-on of overcharges as set out in the Damages Directive. In the last part of the presentation, Małgorzata Salitra described the Polish legal solution regarding the passing-on of overcharges adopted as a result of the transposition of the Damages Directive. She stressed that not all of the provisions of the Damages Directive required implementation as some of them were already in force.

The last paper in this session entitled *State Aid in the Football Sector in the European Union* was presented by Radosław Niwiński (University of Białystok). Radosław Niwiński indicated that sport plays an important role in the European Union, which is manifested, for example, by Article 165 TFEU. He then explained what features certain aid must have in order for it to be seen as State aid. At the same

time, he pointed out that in the sport sector a number of measures taken by Member States may not be considered State aid because the beneficiary does not carry out an economic activity or there is no effect on trade between Member States. In the following part of his speech, Radosław Niwiński described the rules on State aid as set out by Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty. He also discussed selected cases regarding State aid in the sport sector.

The second session of the Conference concluded with a debate, comments and questions addressed to the students regarding their presentations.

The Conference was subsequently closed by Professor Anna Piszcz who assured the audience that this was not the last meeting in the series of international PhD conferences on competition law.

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