Antitrust or Regulation in Telecommunications.
CARS & Wierzbowski Eversheds Workshop

On 23 October 2008, the Centre of Antitrust and Regulatory Studies (CARS) organised together with the Wierzbowski Eversheds law firm a workshop on the relationship between sector-specific regulation and antitrust law. The workshop consisted of two parts:

- a joint presentation by Attorney Małgorzata Modzelewska de Raad and Dr Arwid Mednis of the Wierzbowski Eversheds law firm and
- a discussion moderated by Professor Tadeusz Skoczny, Head of CARS.

The presentation by Att. Małgorzata Modzelewska de Raad and Dr. Arwid Mednis

In the first part of their presentation, Att. Modzelewska and Dr. Mednis presented the aims of antitrust law and sector-specific regulation and basic differences between them. They also presented regulated industries, legal instruments of industry regulators, safeguards of their independence and key characteristics of the regulators. Three areas of overlap between antitrust law and sector-specific regulations were identified: law, organs (competence disputes) and individual decisions ("preliminary decision" disputes). Also presented were examples and principles of systemic resolutions of competence disputes in various countries.
The following part of the speech addressed the regulation of the Polish telecoms sector and, in particular, the cooperation patterns between the President of the Office for Competition and Consumer Protection (UOKiK) and the President of Office for Electronic Communications (UKE). A review was then presented of Polish and EC judgments concerning the relationship between competition law and sector-specific regulations in their horizontal (overlap between sector-specific and competition rules) and vertical (Community and national regulations) aspect. Listed among the issues addressed by the courts in individual cases of conflict were: the effectiveness of the "regulated conduct defense", the scope of cross-application of rules by each of the authorities, the extent to which the competence of a regulator is limited by a decision of a competition authority and the influence of regulatory decision on the final decision of a competition authority.

This part of the speech described the approach of the Supreme Court presented in two of its judgments concerning the telecoms sector (i.e. resolution of the Supreme Court of 7 December 2005, III SZP 3/05, and Supreme Court judgment of 19 October 2006, III SK 15/05) as well as judgments of EC and Member States' courts that addressed competence

disputes between these two types of authorities. The presentation concluded with a detailed analysis of the Commission's decision of 4 July 2007 concerning Telefónica (COMP/38.784) and the CFI's judgment of 10 April 2008 concerning Deutsche Telekom (T-271/03).

Discussion

To start with, Prof. Skoczny identified three levels of sector-specific regulation (applicable also to telecoms):

- primary regulation (by the Parliament),
- intermediary regulation (by the Minister of Economy),
- regulation by regulatory authorities.

Prof. Skoczny mentioned that in fact only the latter level of regulation reflects the essence of individual *ex ante* regulation, especially of sector-specific competition-aimed regulation. Talking about the relationship between competition-aimed regulation in telecoms and competition protection itself, Prof. Skoczny highlighted the significance of disputes over the meaning of antitrust axiology. He also stressed the importance of the question whether the aim of competition protection is to protect the freedom of undertakings to compete on the market (ordoliberal approach) or to protect consumer welfare. He emphasised Article 3 of the Polish Competition Act and mentioned the relationship between Polish and EC law regarding the "regulated conduct defense". Finally, he introduced the problem of whether the overlapping authority between regulators and competition authorities concerns also competition restricting agreements.

The next to speak was Dr. Dawid Miąsik of the Competition Department of the Institute of Law of the Polish Academy of Science. He noted that Article 1(3) of the Polish Telecommunications Act (PT), concerning the non-interference with the Competition Act, delimitates the competence of the UKE President. If an undertaking's action is regulated by sector-specific regulation but also infringes the Competition Act, it has to be determined whether the practice complies with sector-specific norms or whether it is prohibited by the Competition Act. According to Dr. Miąsik, it can be argued that the relationship between Article 1(3) PT and Article 3 of the Competition Act is not a classical relationship between *lex specialis – lex generalis*. If two administrative proceedings are conducted and it is possible that one activity will be sanctioned twice, it is possible to argue *ne bis in idem*. Dr Miąsik argued that even though there still is a large area of legal uncertainty, general solutions should be avoided. Instead, good, case-based practice should be developed since the relationship between sector-specific regulation and antitrust law should not be delineated without taking in to account actual circumstances of each case.

In the opinion of Counsel Urszula Zaroń of Telekomunikacja Polska (TP), the UKE President does not seem to think that Article 1(3) PT delimits sector-specific regulation from competition law. Instead, the UKE President seems to regard this provision to be the source of the regulator's competence to apply competition law - the UKE President does not refer in her decisions to consumer welfare but interprets competition law instead. Counsel Zaroń pointed out that antitrust proceedings are sometimes lacking in instruments to examine issues that are specific to the telecoms or the energy sector. In addition, while the UOKiK President seems to be open to discuss the overlapping authority between the two organs, the regulator is rather reluctant.

Prof. Tadeusz Skoczny pointed towards the second EC regulatory package as the source of antitrust orientation for regulatory activity. Under the new rules, the telecoms regulator is obliged to base its decisions on antitrust case-law. Such approach is right on the condition that the same axiology lies at the heart of both legal systems. Prof. Skoczny mentioned that the current Commission's Guidelines suggest that ordoliberal axiology has lost on impact.

Att. Modzelewska stated, the overlap between rules may also occur in relation to competition restricting agreements (prohibited by Article 6 of the Competition Act) since a regulatory obligation to shape agreements in a specific manner may be imposed on non-dominant undertakings as well.

Prof. Tadeusz Skoczny disagreed arguing that according to German literature the conflict does not occur in the area of competition restricting agreements or in the field of merger control.

According to Att. Modzelewska, the confrontation between regulatory and antitrust authority does sometimes results in their cooperation in the exercise of their competence. For instance, there is an EU case law relating to mergers where the antitrust authority sets out the conditions under which a merger can take place while the control of their execution is attributed to the regulator. Moreover, Att. Modzelewska pointed out that the aim of the legal formula "does not interfere with the provisions of the law", included in Article 1(3) PT, is to resolve the conflict which occurs in three fields:

- law interpretation: telecoms law should be interpreted by the regulator with consideration of competition law.
- normative: can the regulator apply competition law?
- administrative proceedings: should access proceedings be stayed pending proceedings before the antitrust authority and can proceedings before the UKE President and before the UOKiK President be initiated simultaneously?

Professor Skoczny responded that in German practice competition law precedes other regulations. However, in his opinion, such an approach is correct only where competition protection is considered in the perspective of economic values.

Att. Przemysław Rosiak of D. Dobkowski law firm stressed that undertakings must take competition law requirements into account within the scope of their freedom of action. As regards the relationship between the possibility to impose double sanctions and the prohibition to judge the case twice, he claimed that in order to apply the *ne bis in idem* rule, it is necessary to prove that the subject, event and protected goods are identical in both proceedings. However, the issue of the identity of the protected goods is still open.

Att. Modzelewska addressed the question whether competition law fulfils economic goals only. In her opinion, the "public interest" criteria set out in Article 1 of the Competition Act, determines that competition law protects the interests of ultimate consumers. In her speeches, Commissioner Nelly Kroes has always declared consumer interest to be the ultimate goal of a competitive economy. Also the Polish antitrust authority goes beyond pursuing economic goals. This approach is supported by the existence of block exemptions for certain agreements and innovation-protecting rules. The "Social package TP" (in Polish: Plan socjalny tp) built an interesting case. The offer was examined by the regulator, the competition authority, the Competition Court and common courts (abusive clause). Seeing as the PT is concerned with a whole range of various goals and that competition is protected "in the public interest", it has to be stressed that the UOKiK President has not found an anticompetitive practice to have taken place because the "Social package TP" served well various groups of consumers. Thus, in this case, the aim of the competition authority was not limited to pure competition protection.

Dr Arwid Mednis added that the "Social package TP" limited the possibility for consumers to use the services of other operators in return for a low subscription fee paid to TP. Details of the decision regarding this offer might be presented against goals of particular authorities.

Prof. Tadeusz Skoczny was of the opinion that as much as sector-specific regulation may indeed not be limited to the protection of competition in its economic aspect only but instead have more varied goals including social aims or security protection, the admissibility of other goals for competition law is disputable. In other words, the question has to be posed of whether "public interest" may comprise other aims than ensuring effective competition. In the opinion of Prof. Skoczny, the essence of the new economic approach to competition law is

that “competition”, in the economic sense of the word, is the key aim of antitrust intervention since “competition” results in consumer welfare.

In conclusion Prof. Skoczny noted that public intervention based on the Competition Act taken in the name of a more broadly defined “public interest” has sometimes gone too far in Poland. For example, the approval of the consolidation of a large part of the Polish energy sector (creating the Polish Energy Group) due to the merger’s positive impact on the employment market, strays far away from antitrust axiology even if it is formally based on Article 20 section 2 of the Competition Act. Such decision significantly restricts competition, while it is the later that increases the level of consumer welfare. In comparison, the German Bundeskartellamt is only driven by economic axiology in its antitrust decisions while it is left to the Minister of the Economy to decide on mergers of extraordinary cartels based on a different axiology. In Prof. Skoczny’s opinion, it would be best if competition law intervention was structured and exercised from the economic perspective.

Finally, Att. Przemysław Rosiak pointed out that the European Commission sees undisturbed competition as the principal goal.

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