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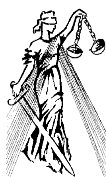
Anna Piszcz

COMPETITION LAW
IN COMPARATIVE PERSPECTIVE



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ACCP	– Polish Act of 16.2.2007 on Competition and Consumer Protection (Journal of Laws No. 50, item 331, as amended; in English at: www.uokik.gov.pl/download.php?plik=7624 (last accessed 31.3.2011)
APC	– Czech Act No. 143/2001 of 4.4.2001 on the Protection of Competition and on Amendment to Certain Acts; in English at: http://www.compet.cz/fileadmin/user_upload/Legislativa/HS/CR/Act_143_2001_consolidated.pdf (last accessed 31.3.2011)
CFI	– Court of First Instance (currently GC)
CJEU	– Court of Justice of the European Union (before 1.12.2009 ECJ)
EC	– European Community
ECJ	– European Court of Justice (currently CJEU)
ECN	– European Competition Network
ECR	– European Court Reports
EEC	– European Economic Community
EU	– European Union
GC	– General Court (before 1.12.2009 CFI)
NCA	– National Competition Authority
OCCP	– Office of Competition and Consumer Protection
OFT	– Office of Fair Trading
OJ	– Official Journal
TEC	– Treaty establishing the European Community (EC Treaty)
TFEU	– Treaty on the functioning of the European Union
YARS	– Yearbook of Antitrust and Regulatory Studies; see http://www.yars.wz.uw.edu.pl/ (last accessed 31.3.2011)

INTRODUCTION

This book presents and discusses a selection of major topics within various areas of competition laws. It is divided into 8 parts. The first three parts contain introductory materials, as well as reviews of competition authorities and some basic concepts of competition law. Parts 4 and 5 present the prohibition of anti–competitive agreements and the prohibition of the abuse of a dominant position. Part 6 discusses legal sanctions for prohibited practices and procedures relating to such practices. Part 7 is devoted to the control of concentrations. The last part adds some information on the relation between competition and the state.

The purpose of this study is to introduce the readers to the basic information on competition law of the European Union and national competition laws of Poland, United Kingdom, Spain and the Czech Republic. For such selection of material I take sole responsibility.

This is not the first book on competition law in comparative perspective. However, there are rarely any studies that offer such a combination of the competition laws being compared.

Although I had been working on this book for a long time, I was able to complete it owing to circumstances created for me by the Dean of the Faculty of Law, University of Bialystok. I am grateful also to fellow lecturers and students who encouraged me to develop a book in English on competition law. Without discussions with them, the completion of this work would not have been possible; they inspired me to make several corrections and improvements to the text of the book. The exchange of experience and access to various, sometimes difficult to find foreign books, were essential stages of the book's completion.

A significant range of bibliographic resources that I had access to forced me to select material. In the footnotes, however, I tried to focus

on sources in English. Those who are interested in the details thereof are referred to them for further information.

Being aware of the fact that the book is not free of errors, I kindly request your comments. I would be grateful if you could email them to piszcz@uwb.edu.pl.

Anna Piszcz

Part 1

INTRODUCTION TO COMPETITION LAW

1. Various systems of competition law

1.1. National systems of competition law

1.1.1. Introduction

Analysing the problem of competition law regimes should be preceded by comments of terminological nature. Competition law in the United States is known as "antitrust law". In Europe, the term "antitrust law" is used to identify areas of competition law other than the regulation of merger control and state aid[1] (state aid law applies to distortions in the market resulting from government intervention in the form of various subsidies, which undermine equality of competition).

Secondly, the term "competition law" is narrower than "competition policy". Competition policy as a set of measures taken by the state in order to protect competition includes a system of competition law. Competition law embodies competition policy. It is necessary because the market is imperfect. Traders left to themselves might conspire to the detriment of other market participants or create monopolies (markets in which there is only one seller). The basic criterion for classification of systems of competition law is their geographical scope. Because of this criterion there can be distinguished:

1) **national systems**,
2) **international regimes**, which include international conventions, the law of international organisations and European Union competition law.

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1 A. Jones, B. Sufrin, *EC Competition Law: Text, Cases and Materials*, Oxford, 2007, p. 3.

Globally, there are over one hundred national competition law systems. The differences between these systems result from different levels of economic development of countries and their specific economic and social problems[2]. There is no unified standard for the competition protection, in spite of quite a number of initiatives in this regard (among others, in the World Trade Organisation). These initiatives do not produce the expected results. It seems it is time to engage in a more productive debate regarding this subject.

As said earlier, there are tens of national competition law systems the details of which vary from country to country but which in many respects follow one of two general patterns. Some of the national competition laws are modelled on the U.S. system (e.g. Australian[3] or Japanese[4] systems). Others include elements of the Germanic model of competition law.

The national competition law systems of the EU Member States adopted a series of legislative solutions similar to the model solutions to European competition law. Some national systems combine elements drawn from different models. There are also such national systems which, compared with others, remain unique (or some of their elements are unique).

The doctrine also includes a division of systems of competition law into **abuse–based systems** and **prohibition–based systems**[5]. In the case of the first one the control is based on the detection of abuse, and the agreements that have an impact on competition, are generally allowed. In the case of prohibition–based systems agreements that restrict competition are prohibited. In practice, the prevailing ones are prohibition–based systems.

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2 B. Van Bockel, *The Ne Bis In Idem Principle in EU Law*, Alphen aan den Rijn, 2010, p. 106.

3 OECD, *OECD Reviews of Regulatory Reform: Australia 2010 – Towards a Seamless National Economy*, Paris, 2010, p. 160.

4 K. Suzuki, *Competition Law Reform in Britain and Japan: Comparative Analysis of Policy Networks*, London–New York, 2002, p. 76.

5 P.J. Slot, A. Johnston, *An Introduction to Competition Law*, Oxford–Portland, 2006, p. 24–25.

1.1.2. American system of competition law

The first modern system of competition law was the system of the United States, belonging to the prohibition–based systems[6]. Its story began in 1890, when the U.S. Congress passed the Sherman Antitrust Act. It must be emphasised here that there are three components of American law (in general): constitutional law (consisting of the federal and state constitutions as well as the judicial decisions interpreting and applying them), statutory law (consisting of statutes enacted by the legislature both at the federal and the state level as well as regulations enacted by administrative agencies pursuant to statutory authority) and "common law" (it consists of a body of past judicial decisions rendered in particular cases and prior factually similar cases constitute precedent for subsequent cases that must be followed by courts under the principle of stare decisis)[7]. The last one is unique to Anglo–American law (brought by British Empire to different countries on all continents, i.a. the United States, Australia, English Canada, New Zealand, India and other former British colonies)[8]. Other countries' systems rely primarily on comprehensive written codes. The major source of U.S. antitrust law is case law, which derived from judicial precedent. Antitrust standards "originate" from the content of judgments handed down in individual cases.

The three primary sources of federal statutory antitrust law are now: **the Sherman Antitrust Act**, **the Clayton Act** and **the Federal Trade Commission Act**[9].

According to Section 1 of the Sherman Antitrust Act:

– every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several States, or with foreign nations, is declared to be illegal;

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6 A. Jones, B. Sufrin, *EC Competition Law…*, p. 19.

7 See: E.H. Hanks, M.E. Herz, S.S. Nemerson, *Elements of Law*, New York, 2010, p. 3.

8 See: G.F. Bell, *The U.S. Legal Tradition in Western Legal Systems* [in:] J.C. Ginsburg, *Legal Methods. Cases and materials*, Westbury, 1996, p. 20.

9 A broad overview is provided in: T. Skoczny, *Ustawodawstwo antymonopolowe na świecie w latach 1890–1989*, Warsaw, 1990, p. 10–22.

– every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony (...).

Section 2 of the Sherman Antitrust Act provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony (…)"[10].

For the above mentioned offenses individual violators can be punished with fines of up to USD 1 million and sentenced to up to 10 years in prison for each offense. Fines of up to USD 100 million for each offense may be imposed on corporations[11]. In certain circumstances, fines may exceed the above mentioned thresholds and be up to twice the gain of the perpetrator or the victim's losses associated with the offense[12]. In some cases, both individuals and corporations may obtain immunity if they provide information needed to prosecute others for antitrust violations[13].

The Clayton Act was enacted in 1914 and significantly amended in 1950. Unlike the Sherman Antitrust Act, it does not provide for criminal sanctions. The Clayton Act prohibits particularly anti–competitive mergers and acquisitions.

The Federal Trade Commission Act of 1914 prohibits unfair methods of competition in interstate commerce, and the method of competition is considered unfair if it violates the Sherman Antitrust Act or the Clayton Act. The Federal Trade Commission Act focuses on protecting consumers[14]. Like the Clayton Act, it does not provide for criminal sanctions, either.

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10 Ch.F. Beach, *A Treatise on the Law of Monopolies and Industrial Trusts, As Administered in England and in the United States of America*, Clark, 2007, p. 601.

11 D.F. Broder, J. Maitland–Walker, *A Guide to US Antitrust Law*, London, 2005, p. 251.

12 American Bar Association Section of Antitrust Law, *Criminal Antitrust Litigation Handbook*, Chicago, 2006, p. 466.

13 K.P. Ewing, *Competition Rules for the 21st Century: Principles from America's Experience*, Alphen aan den Rijn, 2006, p. 575 and next.

14 M. Neumann, *Competition Policy: History, Theory and Practice*, Cheltenham, 2001, p. 171.

Federal competition authorities in the USA are **the Antitrust Division of the Department of Justice (DOJ)** and **the Federal Trade Commission (FTC)**[15]. The last one was created in 1914 to prevent unfair competition partly in reaction to the failure of prior federal efforts, namely, judicial enforcement of the Sherman Antitrust Act[16]. At a specific level it regulates private economic activities, significant aspects of particular industries. Its principal duty is the enforcement of statutory prohibitions. The FTC conducts administrative proceedings which culminate in either a finding of a violation or no violation of the Federal Trade Commission Act[17]. However, the FTC routinely seeks settlements (as an alternative to formal adjudication) in a manner akin to civil litigation.

On the other hand, the DOJ acts as prosecutor in criminal proceedings. In addition, both authorities bring civil actions against violators. The DOJ has wide powers of investigation, inter alia it may conduct a search with permission of the court.

Also, private parties (whether an individual or a business entity) may claim damages in civil lawsuits before the federal courts. One can sue an antitrust violator for three times their actual damages (treble damages) and reimbursement of legal fees and attorneys' costs[18]. Moreover, state attorneys general can bring an action on behalf of injured consumers in each state. Civil actions may be brought also by a group of consumers (class action)[19].

In the USA antitrust law was adopted not only at the federal level, but also most states have their state anti–trust laws. State law is modelled on federal law, but applies to violations that occur exclusively in the territory of the state[20].

15 F.M. Rowe, F.G. Jacobs, M.R. Joelson (eds.), *Enterprise Law of the 80s: European and American Perspectives on Competition and Industrial Organization*, Chicago, 1980, p. 218.
16 J.L. Mashaw, R.A. Merrill, P.M. Shane, *Administrative Law. The American Public Law System. Cases and Materials*, St. Paul, 2009, p. 6.
17 K.N. Hylton, *Antitrust Law: Economic Theory and Common Law Evolution*, New York, 2003, p. 48.
18 D.F. Broder, J. Maitland–Walker, *A Guide to US…*, p. 29.
19 R.J. Baker, *Pricing on Purpose: Creating and Capturing Value*, Hoboken, 2006, p. 286.
20 W.T. Lifland, *State Antitrust Law*, New York, 1984, p. 5–6.

1.1.3. National systems of competition law in Europe

The first national system of competition law in Europe was created in Germany[21]. In 1909, the Act Against Unfair Competition was passed. Although it was passed around the same time as the U.S. Federal Trade Commission Act, it differed from the Federal Trade Commission Act that was also aimed at protecting businesses from competition failing to generally accepted standards of fairness[22]. German economy in the period preceding World War II became more concentrated. While in 1875 there were eight cartels in Germany, in 1905 – about 400, and by 1925 their number had increased to about two thousand[23]. In 1923, the Cartel Act was passed. The Cartel Act allowed cartels, but only those which were moderately restricting competition[24]. Regulatory authority was the court, entitled to assess cartel agreements. The Nazis modified the regulation of cartels in 1933, giving broad regulatory powers to the Minister of Economy.

In the 1920's and 30's, legislation on anti–competitive practices was introduced in several European countries (and many of them were inspired by the Germanic model.) These included Sweden, Norway, the Netherlands, Denmark, Czechoslovakia, Yugoslavia and Poland[25].

History of Polish competition law began with the private competition law in the form of **the Act on Combating Unfair Competition of 1926**[26]. A few years later, the public competition law was introduced, namely **the Cartel Act of 1933**[27], replaced by the Act on Cartel Agreements of 1939[28]. Further development of competition law in Poland was prevented by the outbreak of World War II.

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21 A. Jones, B. Sufrin, *EC Competition Law…*, p. 36.
22 M. Neumann, *Competition Policy…*, p. 171.
23 J.O. Haley, *Error, Irony and Convergence: A Comparative Study of the Origins and Development of Competition Policy in Postwar Germany and Japan* [in:] B. Grossfeld, W. Fikentscher, *Festschrift für Wolfgang Fikentscher zum 70. Geburtstag*, Tübingen, 1998, p. 878.
24 T.A. Freyer, *Antitrust and Global Capitalism, 1930–2004*, Cambridge, 2006, p. 64.
25 C. Harding, J. Joshua, *Regulating Cartels in Europe: a Study of Legal Control of Corporate Delinquency*, Oxford, 2003, p. 78–79.
26 Act of 2.8.1926 on Combating Unfair Competition (Journal of Laws 1930, No. 56, *item* 467).
27 Cartel Act of 28.3.1933 (Journal of Laws No. 31, *item* 270, as amended).
28 Act of 13.7.1939 on Cartel Agreements (Journal of Laws No. 63, *item* 416, as amended).

In post–war West Germany decartelisation was carried out[29]. In 1958, the Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen) was passed. This created a national system of competition law, combining some ideas of American antitrust law with the earlier German experience[30]. This system combined two elements: administrative and judicial. The Federal Cartel Office (Bundeskartellamt) was introduced as an administrative regulatory authority, whose decisions may be appealed to the courts. The courts also hear private claims for damages for certain types of anti–competitive practices.

After World War II, the United States insisted on its allies to accept antitrust laws. United Kingdom (unlike Australia or Japan), rather than refer to the American prohibition–based system, accepted the abuse model, adopting the Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948[31].

Just **in the first two decades after World War II, competition law existed in most Western European countries**[32]. Among them, there were: Germany, Great Britain, Ireland, Austria, Denmark, Finland, France, Belgium, the Netherlands, Norway, Sweden, Switzerland, Spain. For example, in Spain the first attempt to establish a system of competition law was the Repression of Anti–competitive Practices Act No. 110/63 of 1963 (Ley 110/63 de Represión de Prácticas de la competencia Restrictivas), which in practice was simply not applied[33].

National laws at that time formed an interesting patchwork[34]. On the one hand, some systems, such as French, Belgian and Dutch, have remained relatively tolerant. On the other hand, there have emerged also stricter regimes, such as German, Norwegian and Danish.

29 C. Harding, J. Joshua, *Regulating Cartels in Europe…*, p. 87.
30 *Ibid*, p. 99.
31 H. Ullrich (ed.), *The Evolution of European Competition Law: Whose Regulation, which Competition?*, Cheltenham, 2006, p. 26.
32 C. Harding, J. Joshua, *Regulating Cartels in Europe…*, p. 96.
33 L. Cases, *Competition Law and Policy in Spain: Implementation in an Interventionist Tradition* [in:] G. Majone, *Regulating Europe*, London, 1996, p. 180.
34 *Ibidem*, p. 108.

The creation of the European Economic Community was not without impact on national systems of competition law. Constructing solutions in the field of competition the Community used, to some extent, the German standards. Then, **in particular since the mid–1980's the impact of European Community competition law on national legal systems has been evident**. The German model was transformed into a European standard, „travelling first to the EC and then in due course back to other national systems from there"[35]. Some Member States have introduced competition law for the first time (e.g. Italy), others have begun to modify the existing competition law in order to make it similar to Community competition law[36]. For example, the UK Competition Act of 1998[37] contained solutions similar to Articles 81 and 82 TEC (thus, United Kingdom has accepted the prohibition–based system)[38].

The countries of Central and Eastern Europe turned to the centrally planned economy after World War II. This type of economy was characterised by a lack of competition between traders. The entrepreneurs competed with each other only by exceeding their economic plans because activities were not conducted for profit, but in order to execute the plan. The plan replaced the laws of supply and demand, and the government as a central planner selected the winners and losers in the market. At the same time, there was no freedom of economic activity, and business units were created by the government. The ownership of the means of production was, in principle, public (social). Freedom to purchase goods and services by consumers was marginal due to the distribution of wealth by the state.

Such situation occurred also in Poland. Immediately after World War II, in the People's Republic of Poland the Act of 1939 on Cartel Agreements obviously was not applied, even though it was not formally repealed by the legislature[39]. **In a centrally planned economy, there**

35 *Ibidem*, p. 99.
36 D.J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, New York, 2001, p. 8.
37 www.legislation.gov.uk/ukpga/1998/41/contents (last accessed 31.3.2011).
38 H. Ullrich (ed.), *The Evolution of European…*, p. 26.
39 A. Rzepliński, *Principles and Practice of Socialist Justice in Poland* [in:] G. Bender, U. Falk (eds.), *Recht im Sozialismus: Analysen zur Normdurchsetzung in Osteuropäischen*

was no need for legal regulation of competition. Also, the Act on Combating Unfair Competition of 1926, though never formally repealed, in practice was not applicable in times of controlled economy in the People's Republic of Poland[40].

In the late 1980's, the countries of Central and Eastern Europe experienced sudden and often traumatic changes in almost all aspects of political, economic and social development, including changing the type of economy[41]. This evolution was not as rapid in some countries as in others, however it was noticeable to a substantial degree in all of them. Changing the type of economy was connected with the creation of competition law systems. Freedom of economic activity (profit–oriented), which is typical of the market economy, is the basis of competition. According to the Constitution of the Republic of Poland of April 2, 1997[42]:

– a social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland (Article 20),
– limitations upon the freedom of economic activity may be imposed only by means of bill (act) and only for important public reasons (Article 22)[43].

Free functioning of many entrepreneurs competing for the same consumers (who are free to choose the goods or services) in the market makes the goods and services quality better and their price lower than in the case where there are no competitors. Resource allocation is determined solely by supply and demand, not by government regulation.

Nachkriegsgesellschaften (1944/45–1989), Frankfurt am Main, 1999, p. 18.

40 F. Henning–Bodewig, *Unfair Competition Law: European Union and Member States*, Alphen aan den Rijn 2006, p. 209.

41 J. Scott, *Participation* [in:] H. Jonuschat, M. Knoll (eds.), *Regional Transformation Processes in Central and Eastern Europe*, Berlin, 2008, p. 50.

42 Journal of Laws No. 78, *item* 483.

43 English version at http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (last accessed 31.3.2011).

Competition policy is an important part of the economic landscape of countries with market economies. For example, Polish Act of July 2, 2004 on Freedom of Economic Activity[44] states that entrepreneurs shall conduct their economic activity based on the principles of fair competition and due respect of good practices and legitimate interest of consumers[45].

By the end of the twentieth century, competition law systems arose particularly in the Czech Republic, Slovakia, Lithuania, Estonia, Hungary, Bulgaria[46]. Interrupted Polish story of competition law was continued by the Act of 1987 on Counteracting Monopolistic Practices in the National Economy[47], which was replaced by the Act of 1990 on Counteracting Monopolistic Practices and Protection of Consumer Interests[48]. Soon after the latter, **another act was passed in 1993 – the Act on Combating Unfair Competition[49] (unfair competition law)**. An important step in the development of competition law in Poland was **the Act of 2000 on Competition and Consumer Protection**[50]. This Act defined the principle of operation of the entire system of competition and consumer protection. **On February 16, 2007 a new Act on Competition and Consumer Protection (ACCP)[51] was passed**. It provides for equally high level of competition and consumer protection as the law of the European Union.

44 Consolidated version Journal of Laws 2010, No. 220, *item* 1447, as amended.

45 English version at http://ec.europa.eu/information_society/policy/psi/docs/pdfs/implementation/po_trans–dz–u–04–173–1807.doc (last accessed 31.3.2011).

46 H.S. Harris, C.S. Goldman, *Competition Laws outside the United States, Volume 2*, Chicago, 2001, p. 69–83.

47 Act of 28.1.1987 on Combating Monopolistic Practices in the National Economy (Journal of Laws No. 3, *item* 18, as amended).

48 Act of 24.2.1990 on Counteracting Monopolistic Practices and Protection of Consumer Interests (consolidated version Journal of Laws 1999, No. 52, *item* 547, as amended). More: T. Skoczny, *Polish Competition Law in the 1990s – on the Way to Higher Effectiveness and Deeper Conformity with EC Competition Rules* [in:] T. Einhorn (ed.), *Spontaneous Order, Organization and the Law. Roads to a European Civil Society. Liber Amicorum Ernst–Joachim Mestmäcker*, Cambridge, 2003, p. 351.

49 Act of 16.4.1993 on Combating Unfair Competition (consolidated version Journal of Laws 2003, No. 153, *item* 1503, as amended); www.uokik.gov.pl/download.php?plik=7635 (last accessed 31.3.2011).

50 Act of 15.12.2000 on Competition and Consumer Protection (consolidated version Journal of Laws 2005, No. 244, *item* 2080, as amended).

51 Journal of Laws No. 50, *item* 331, as amended. English version at: www.uokik.gov.pl/download.php?plik=7624 (last accessed 31.3.2011).

1.2. International dimension

1.2.1. Combined system of the Member States' and European competition laws

The European system of competition law – like the American system – is a prohibition–based system. In the European treaty arrangements for the protection of competition one can find some similarities to the American Sherman Antitrust Act[52].

Founding treaty (EEC Treaty, later EC Treaty), since December 1, 2009 called Treaty on the Functioning of the European Union[53] (TFEU), provides in Article 3(1)(b) that the European Union shall have exclusive competence in the establishing of the competition rules necessary for the functioning of the internal market. The Union's aim is establishing and ensuring the functioning of the internal market that shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties (Article 26 TFEU). This goal will be undermined if entrepreneurs – in the absence of state barriers to trade – will engage in anti–competitive practices. In order to prevent this effect, the Treaty contains in particular **prohibition of anti–competitive agreements** (Article 101 TFEU, ex Article 81 TEC) **and of the abuse of a dominant position** (Article 102 TFEU, ex Article 82 TEC). In addition to the provisions of the Treaty, the European competition law also includes a number of regulations, as well the so–called "soft law" category of EU acts that are not formally binding upon their addressees (guidelines, notices, recommendations etc.)[54].

Practices which may affect trade between Member States, must be assessed in terms of their compliance with EU competition law. However, practices that have or may have an effect only in the territory

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52 H. Ullrich (ed.), *The Evolution of European…*, p. 26.

53 Consolidated version OJ C 2008/115/47.

54 L. Senden, *Soft Law in European Community Law*, Oxford, 2004, p. 148 and next; see also: K. Kowalik–Bańczyk, *The Publication of the European Commission's Guidelines in an Official Language of a New Member State as a Condition for their Application. Case Comment to the Order of the Polish Supreme Court of 3 September 2009 (Ref. No. III SK 16/09) to Refer a Preliminary Question to the Court of Justice of the European Union (C–410/99 Polska Telefonia Cyfrowa sp. z o.o. v Prezes Urzędu Komunikacji Elektronicznej)*, "YARS" 3/2010, p. 307.

of a Member State are subject to the provisions of national competition law[55].

Since May 1, 2004 European legislation on competition has been an integral part of the Polish legal system. This date is not only a moment of the accession of ten countries, including the Republic of Poland, to the European Union. The accession coincided with the **decentralisation of the enforcement of Community competition law** resulting from Council Regulation (EC) No. 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter, the Regulation 1/2003)[56]. **On May 1, 2004, national competition authorities (NCAs) were included in the founded on the same day European Competition Network (ECN).** Regulation 1/2003 created "system of parallel competences in which the Commission and the Member States' competition authorities (…) can apply Article 81 and Article 82 of the EC Treaty"[57]. In accordance with Article 35(1) of Regulation 1/2003 "the Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with (…)". NCAs thus acquired the competence to apply in individual cases the Treaty provisions concerning anti–competitive practices which may affect trade between Member States.

NCA, on any matter concerning anti–competitive practices, checks whether the agreement or practice may affect trade between Member States. If not, only national competition law is applied by NCA. If so, then – depending on the choice of the national legislature – either only EU competition law is applied, or both, EU and national legislation are applied (e.g., the Polish legislature has chosen to apply the two laws). In Poland, an example of such a case, among others, is the case of ZAiKS Authors' Association and the Polish Filmmakers Association (SFP)[58]. Polish NCA provided that in order to maximise their profits

55 More: P.J. Slot, A. Johnston, *An Introduction…*, p. 43–44, 292–298.
56 OJ L 2003/1/1.
57 Commission Notice on cooperation within the Network of Competition Authorities, OJ C 2004/101/43.
58 http://uokik.gov.pl/news.php?news_id=1058 (last accessed 31.3.2011).

the organisations had made an agreement fixing uniform fees for using audiovisual works and refused to negotiate the fees with the users of the works. The case was simultaneously assessed pursuant to European competition protection rules. Therefore, the case was consulted with the European Commission (Article 11 of Regulation 1/2003).

NCAs, according to Article 101 or Article 102 TFEU:

– shall inform the Commission in writing before or without delay after commencing the first formal investigative measure; the initiation by the Commission of proceedings shall relieve the NCAs of their competence to apply Articles 101 and 102 TFEU;
– cannot take decisions which would run counter to the decision adopted by the Commission when they rule on agreements, decisions or practices under Article 101 or Article 102 TFEU which are already the subject of a Commission decision (Article 16 of Regulation 1/2003);
– may suspend the proceedings before them or reject the complaint, where another NCA has received a complaint or is acting on its own initiative under Article 101 or Article 102 TFEU against the same agreement, decision of an association or practice (Article 13 of Regulation 1/2003).

1.2.2. International agreements

Due to the processes of globalisation, anti–competitive practices cross national borders. In response to the problems arising from this, "**effects doctrine**"[59] was born in the USA. According to this doctrine, U.S. antitrust law applies to activities outside the United States, where the activity has an impact on competition in the United States. For many years, other countries objected to the exterritorial application of U.S. antitrust law. It was not until the early 1990's that both the EC and the USA reached the first agreement on bilateral cooperation in the field of competition protection. **The agreement between the Government of the United States of America and the Commission of the European**

59 P.J. Slot, A. Johnston, *An Introduction…*, p. 298.

Communities regarding the application of their competition laws of September 23, 1991[60] provides for consultations and exchange of information between the parties, however, "neither Party is required to provide information to the other Party if disclosure of that information to the requesting Party is prohibited by the law of the Party possessing the information or would be incompatible with important interests of the Party possessing the information". In addition, the agreement provides for cooperation and coordination in enforcement activities, as well as mechanisms of avoiding conflicts over enforcement activities. This agreement was a model for EC agreements with Canada and Japan[61]. **The second EC agreement with the United States was signed on June 4, 1998**. The agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws[62] clarifies the mechanisms of cooperation identified in the agreement of 1991 and provides for positive comity ("the competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anti–competitive activities in accordance with the Requested Party's competition laws. Such a request may be made regardless of whether the activities also violate the Requesting Party's competition laws, and regardless of whether the competition authorities of the Requesting Party have commenced or contemplate taking enforcement activities under their own competition laws"). The provisions of both agreements designate a general framework for cooperation.

The advantage of these bilateral agreements is to align the states parties' cultures of competition. In this way, there appears a kind of **de facto harmonisation**, convergence between the competition laws. Today, it is impossible to imagine the case of an American DOJ who in the early 1980s turned to the Saudi Arabian authorities for access to documents on the purposes of an investigation it was carrying out. The

60 OJ L 1995/95/47.
61 See: F. Canino [in:] G.L. Tosato, L. Bellodi, EU Competition Law. Volume I. Procedure. Antitrust–Mergers–State Aid, Leuven, 2006, p. 251–252.
62 OJ L 1998/173/2.

Saudis responded by telephone: "You will receive either the documents or oil, but not both of these things"[63].

The conclusion of bilateral agreements is even more important now that it is highly unlikely to unify the standard of competition protection at the World Trade Organisation[64].

It needs to be added that International Competition Network (ICN) works informally to promote convergence between the competition laws[65]. It unifies national competition authorities from both the countries which have a long tradition in the protection of competition (e.g. USA) and the countries making their first steps in this area (e.g. some countries in Africa, Asia and Eastern Europe). ICN has a flexible structure and a virtual character. It is not a legal entity, it does not create a secretariat or conclude contracts, it has no property.

2. Goals of competition law

The goals of competition law influence the way the law in books becomes the law in action[66]. The differences in the goals of competition laws often result in identical or very similar rules being applied differently in different jurisdictions.

In the United States the goals of competition law have undergone significant evolution. The early Supreme Court case law (from the late 19th century) indicated that the basis of competition law is the desirability of maintaining a market in which numerous small businesses compete[67]. In the 1940's case law Supreme Court has already claimed that American antitrust law did not exist to protect the small competitor but the competitive process[68]. However, recent decisions confirm

63 See: R. Molski, *Prawo antymonopolowe w obliczu globalizacji,* Bydgoszcz–Szczecin, 2008, p. 207.
64 P.J. Slot, A. Johnston, *An Introduction…*, p. 302.
65 http://www.internationalcompetitionnetwork.org/ (last accessed 31.3.2011).
66 D. Miąsik, *Controlled Chaos with Consumer Welfare as the Winner – a Study of the Goals of Polish Antitrust Law*, "YARS" 1/2008, p. 34.
67 See: United States v. Trans–Missouri, 166 U.S. 290 (1897).
68 See: United States v. Socony–Vacuum Oil Co., 310 U.S. 150 (1940).

that U.S. antitrust law is increasingly aimed at protecting consumer interests[69].

Most of the market economies have a system of competition law which aims to allow the market to function optimally, i.e. to increase economic efficiency (allocative, productive and dynamic efficiency)[70]. EU competition law (formerly EC) aims also at promoting the functioning of the internal market. This distinguishes it from national competition laws, both the Member States' and the United States' laws, as well as others. Community competition law has served two masters – both **the functioning of the internal market and competition**[71]. **In the 1990's consumer protection joined these goals**. The European Commission and EC Courts in their case law began to increasingly refer to the consumer's position in the common market.

As for the Polish competition law, even the title of the Act of 2007 itself (the Act on Competition and Consumer Protection) suggests that **the Act has two goals: to safeguard competition and protect consumers**. In accordance with Article 1 ACCP:

"1. The Act determines conditions for the development and protection of competition as well as the rules on protection of interests of undertakings and consumers, undertaken in the public interest.

2. The Act regulates the rules and measures of counteracting practices restricting competition and practices violating collective consumer interests, as well as anti–competitive concentrations of undertakings and associations thereof, where such practices or concentrations cause or may cause effects in the territory of the Republic of Poland.

3. The Act also defines the authorities competent in competition and consumer protection issues".

On the one hand, the scope of activities of national competition authority focuses on counteracting practices violating collective consumer interests (as a result of the implementation of Directive

69 See: Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). See also: P.J. Slot, A. Johnston, *An Introduction…*, p. 3; K.N. Hylton, *Antitrust Law…*, p. 40.

70 P.J. Slot, A. Johnston, *An Introduction…*, p. 1–2.

71 A. Jones, B. Sufrin, *EC Competition Law…*, p. 42.

98/27/EC of the European Parliament and of the Council of May 19, 1998 on injunctions for the protection of consumers' interests[72]). On the other hand, it seems that the interests of consumers may play an important role in antitrust prohibitions specified in the Act[73]. A better understanding of goals of competition law could be facilitated through the use of preambles which is required in European Union legislation and is very rare in Poland. Examination of preambles of acts may give interpreters both a clearer understanding of goals of competition law and information about how the legislature has wanted to resolve particular questions.

Whenever the goal of competition law is to protect both competition (economic efficiency), as well as consumers, the problem arises to determine the relationship between these two goals. One view on this issue assumes that these goals can be treated as separate and implemented directly[74]. According to the second approach, immediate implementation of competition protection helps to achieve an indirect "further" target, i.e. the consumer welfare[75]. In my opinion, **the consumer is always the final beneficiary of market competition**. A multitude of competitive suppliers lies in the interest of the consumer. However, each case requires individual assessment. It may be reasonable to prohibit behaviour favourable to consumers at the time of its legal assessment. This would be required if such conduct was detrimental to the interests of consumers in the future[76].

Competition and consumer protection are closely linked to each other and it does not appear possible that they will be dealt with separately today. These two areas are complementary and interact with each other[77].

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72 OJ L 1998/166/51.

73 D. Miąsik, *Controlled Chaos…*, p. 40–41.

74 O. Andriychuk, *Does Competition Matter? An Attempt of Analytical "Unbundling" of Competition from Consumer Welfare: A Response to Miąsik*, "YARS" 2/2009, p. 20 and next.

75 See: D. Miąsik, *Controlled Chaos…*, p. 44; K.J. Cseres, *Competition Law and Consumer Protection,* Hague, 2005, p. 332.

76 D. Miąsik, *A Short Comment on Andriychuk*, "YARS" 2/2009, p. 30–31.

77 R. Kjeldahl, *Competition and consumer protection in Europe: the consumer perspective* [in:] *Consumer Protection and Competition Policy – working together?*, Warsaw, 2006, p. 151 and next; J.A. Rivière y Martí, *Consumer and competition policy working together at the European Commission* [in:] *Consumer Protection and…*, p. 155 and next; M. Niepokulczycka, *European Economic and Social Committee recommendations on consumer and competition protection*

It should be added that we cannot include non–economic objectives, such as moral purposes, in the goals of competition law[78].

3. Sector–specific regulation

3.1. Introduction

Protection of competition refers essentially to all market segments (business areas). However, in certain sectors simple application of competition law is not adequate to the specificities of these sectors. For example, it may not be sufficient to create a competitive environment.

One way to solve this problem is to exclude the sector from the application of normal competition rules and to establish a regime tailored to the needs of the sector. An example of this may be the Financial Services and Markets Act 2000 in Great Britain[79].

Another approach to the specific nature of problems in some sectors is the introduction of sectoral legislation and the establishment of the sectoral regulator together with this sector's concomitant use of the regulatory instrument in the form of normal competition rules[80]. **Competition authorities intervene ex post, and regulatory authorities intervene ex ante**[81]. Regulatory remedy is price monitoring, amongst other remedies[82].

Such a pro–competitive **sector–specific regulation is aimed at supporting the development of competition**. It is a surrogate for competition, as long as the sector does not develop effective

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policy in the European Union [in:] *Consumer Protection and…*, p. 163 and next; B. Acoca, *The interface between consumer and competition policy: activities of the OECD Committee on Consumer Policy* [in:] *Consumer Protection and…*, p. 171 and next.

78 See: D. Miąsik, *Controlled Chaos…*, p. 52–53; P.J. Slot, A. Johnston, *An Introduction…*, p. 4. But see: A. Jones, B. Sufrin, *EC Competition Law…*, p. 18.

79 P.J. Slot, A. Johnston, *An Introduction…*, p. 47.

80 See: E.D. Sage, *Who Controls Polish Transmission Masts? At the Intersection of Antitrust and Regulation*, "YARS" 3/2010, p. 133 and next.

81 T. Skoczny, *Ochrona konkurencji a prokonkurencyjna regulacja sektorowa*, "Problemy Zarządzania" 3/2004, p. 7–34.

82 See: S. Piątek, *Investment and Regulation in Telecommunications*, "YARS" 1/2008, p. 124 and next.

competition. Therefore, sector–specific regulation is often viewed as a transitional regime.

Such interventions are applied in the communication sector, postal sector, energy sector, to some extent – the transport sector (i.e. network sectors or network–bound sectors). Liberalisation of the "closed sectors", following the international trend, started in the EU in the late 1980's[83]. They began to introduce national legislation on privatisation and opening markets to competition and consumer choice. Network operators were obliged to make their networks available to competitors.

3.2. Communication sector

In the USA the telecommunications sector is governed by specific rules[84]. At the height of its deregulatory fervour in the 1990s the U.S. Congress, encouraged by a business–friendly administration in the White House, passed legislation loosening government restrictions in telecommunications and thus promoting the return to market discipline and competition in this sector[85]. The Telecommunications Act of 1996 was designed to promote the gradual erosion of the monopoly positions in local telephony. It prohibited state monopoly franchises. It was accompanied by a set of network access and pricing regulations designed to foster competition. Then the legislature have reduced barriers in areas such as mobile phone services and provision of high–speed Internet access.

At the same time, antitrust laws are applicable to the telecommunications operators. Enforcement of the regulatory framework is dealt with by the regulators: the Federal Communications Commission, Antitrust Division of the Department of Justice, Federal Trade Commission, various state commissions and federal courts[86].

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83 P.J. Slot, A. Johnston, *An Introduction…*, p. 324–327.
84 http://www.fcc.gov/telecom.html (last accessed 31.3.2011).
85 J.L. Mashaw, R.A. Merrill, P.M. Shane, *Administrative Law…*, p. 59.
86 D. Géradin, M. Kerf, *Controlling Market Power in Telecommunications: Antitrust vs Sector–Specific Regulation*, New York, 2003, p. 78.

Liberalisation in the telecoms sector in the EC, was launched in the mid 1980's. In Europe, several years ago, the telecommunications sector was seen as a sector separate from the electronic media sector. Today it is one sector – **the sector of electronic communications. The package of directives regarding this sector was adopted in the EC in 2002**. The package includes:

- Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities[87],
- Directive 2002/20/EC on the authorisation of electronic communications networks and services,
- Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services[88],
- Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services[89],
- Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector.

This package has been reformed in 2009 by Directives 2009/136/EC and 2009/140/EC. The year 2011 was the deadline for transposition of the amendments to the national laws of the Member States.

An element of the reform is to create **Body of European Regulators of Electronic Communications (BEREC)**[90], which replaced the "loose" cooperation between national regulators (European Regulators

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87 See i.a.: E.J. Galewska, *How to determine a price of wholesale line rental? Case comment to the judgment of the Court of the Competition and Consumer Protection of 10 December 2007 – Tele2 (Ref. No. XVII AmT 17/07)*, "YARS" 1/2008, p. 275.

88 See i.a.: M. Kozak, *Wide scope of administrative discretion justified by features of telecommunications markets. Case comment to the judgment of the Polish Supreme Court of 2 April 2009 – TP SA v. the President of the Electronic Communications Office (Ref. No. III SK 28/08)*, "YARS" 3/2010, p. 284 and next.

89 See i.a.: M. Wach, *Should a fee for mobile phone number portability be determined solely by subscriber preferences? Comments to the judgments of the Court of Competition and Consumers Protection of 8 January 2007 (Ref. No. XVII AmT 29/06) and 6 March 2007 (Ref. No. XVII AmT 33/06) – Portability fee*, "YARS" 1/2008, p. 266 and next; R. Piwowarska, *Consumer protection in the telecommunications market in Poland. Alternative Dispute Resolution* [in:] *Consumer Protection and…*, p. 175.

90 Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25.11.2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office (OJ L 2009/337/1).

Group). At least till the year 2013, European Network and Information Security Agency (ENISA) will remain a separate agency.

Individual Member States have their national regulators, such as:

– United Kingdom – the Office of Communications (Ofcom),
– Spain – Comisión del Mercado de las Telecomunicaciones,
– Czech Republic – the Czech Telecommunication Office (Český telekomunikační úřad),
– Poland – the President of the Office of Electronic Communications (Prezes Urzędu Komunikacji Elektronicznej) and to some extent the National Broadcasting Council[91].

It should be added that the Court of Justice of the European Union held Polish telecommunications market regulation as excessive[92].

3.3. Postal sector

The United States is traditionally viewed as being behind other countries in the postal reform[93]. On the one hand, starting in the late 1970's, the market was opened in the shipment sorting and transport. On the other hand, the system remains bound by regulation and the state postal operator remained in important respects a monopolist, a beneficiary of state subsidies. When in 2010 it fell into financial trouble, they began to consider its privatisation[94].

The EU framework for postal services is set out in:

– Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service,

91 See i.a.: B. Cebula, *Impact of concentration on pluralism in media* [in:] *Consumer Protection and…*, p. 183.

92 See: S. Piątek, *Stopping the creeping telecoms regulation. Case comment to the judgment of the European Court of Justice of 13 November 2008 European Commission v. Republic of Poland (Case C–227/07)*, "YARS" 2/2009, p. 232.

93 M. Bradley, J. Colvin, M. Perkins, *Assessing Liberalization in Context* [in:] M.A. Crew, P.R. Kleindorfer, *Postal and Delivery Services: Pricing, Productivity, Regulation and Strategy*, Norwell, 2002, p. 57.

94 http://www.theoaklandpress.com/articles/2010/10/23/opinion/doc4cc3a237064f2250546497.txt (last accessed 31.3.2011).

– Directive 2002/39/EC amending Directive 97/67/EC with regard to the further opening to competition of Community postal services,
– Directive 2008/06/EC amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (“3rd Postal Directive”).

Some Member States have liberalised the postal sector in full, others (including Poland) benefit from the extended deadline for the opening of the sector (January 1, 2013)[95]. The regulatory authority in Poland is the President of the Office of Electronic Communications (Prezes Urzędu Komunikacji Elektronicznej)[96].

3.4. Energy sector

Both in the USA[97] as well as EU, efforts were made to liberalise the energy sector. Several states have opened up retail sales of electricity to households, some however, with no success (for example, California has granted customers the right to choose their supplier, and then withdrew it)[98].

The EU Commission’s task is to create a single–EU market for electricity and gas. **Two different models of the energy sector liberalisation can be recognised in the Member States**:
– the UK approach that encompasses: ownership unbundling, less market concentration, less public ownership and more private capital in the industry;

95 See i.a.: A. Jurkowska, *A courier service as a postal universal service – can a court asses the correctness of a legal qualification of a service of a courier company that was not contested by the company in an earlier decision taken by the postal regulator? Case comment to the judgment of the Supreme Court of 25 April 2007 – Courier services (Ref. No. III SK 2/07)*, “YARS” 1/2008, p. 264; R. Illinicz, *Legislative Developments in the Postal Sector in 2008*, “YARS” 2/2009, p. 211–212.

96 See i.a.: K. Kosmala, *Legislative Developments in the Telecoms Sector in 2008*, “YARS” 2/2009, p. 205–206; K. Kosmala, *2009 Legislative and Juridical Developments in Telecommunications*, “YARS” 3/2010, p. 239.

97 The list of the many U.S. regulators for the energy sector is presented in: S.H. Jacobs, *Regulatory Reform in the United States*, Paris, 1999, p. 277.

98 C. Robinson, *Utility Regulation in Competitive Markets: Problems and Progress*, Cheltenham, 2007, p. 13.

– the continental model that encompasses: more concentration and vertical integration and more State or public ownership in the energy field[99].

The European Regulators' Group for Electricity and Gas (ERGEG) is the European Commission's formal advisory group of energy regulatory authorities of the Member States. Rules applying to the internal market in electricity are determined primarily by Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC. Since March 3, 2012, the Member States must unbundle transmission systems and transmission system operators. The Member States must also organise a system of third party access to transmission and distribution systems[100].

Individual Member States have their national regulators, such as:

– United Kingdom – the Gas and Electricity Markets Authority (Ofgem),
– Spain – Comisión Nacional de Energía,
– Czech Republic – Energetický regulační úřad (Energy Regulatory Office),
– Poland – Prezes Urzędu Regulacji Energetyki (the President of the Energy Regulatory Office)[101].

3.5. Transport sector

Within the transport sector, **air transport** and **railway transport** have traditionally been subjected to regulation.

In the USA aviation sector was subjected to strict regulation until the liberalisation of the domestic U.S. airline industry, which took place

99 B. Nowak, *Challenges of Liberalisation. The Case of Polish Electricity and Gas Sectors*, "YARS" 2/2009, p. 141 et seq.

100 More about "third party access" see: M. Będkowski–Kozioł, *What is the link between Article 6 Section 3a of the Energy Law Act and Article 490 of the Civil Code regarding the right of a grid operator to suspend the supply of electricity? Case comment to the judgment of the Supreme Court Judgment of 5 June 2007 – GZE (Ref No. III SK 11/07)*, "YARS" 1/2008, p. 257.

101 See i.a.: K. Bobińska, *The Defense of Monopoly as a Determinant of the Process of Transformation of State–owned Infrastructure Sectors in Poland*, "YARS" 1/2008, p. 131; F. Elżanowski, *Legislative Developments in the Energy Sector in 2008*, "YARS" 2/2009, p. 215–217.

in the late 1970's. In the EU the creation of a liberal aviation sector was a gradual process. In the late 1980's, a gradual reduction of regulatory barriers began and in 1997 the market was opened up[102].

Examples of national aviation regulators include the following:

– United Kingdom – the Civil Aviation Authority,
– Czech Republic – Úřad pro civilní letectví (the Civil Aviation Authority),
– Poland – Prezes Urzędu Lotnictwa Cywilnego (the President of the Civil Aviation Office)[103].

Railway transport, the emergence and development of which largely conditioned the industrial revolution of the 19th century, was not accidentally the first industry to be subjected to modern sector–specific regulation (in the USA – in 1887)[104]. Deregulation of US rail took place in 1980[105]. In the EU in 2007 the railway freight transport market was liberalised. Trans–European Rail Freight Network (TERFN) was created. Liberalisation of the international railway passenger transport market is under implementation and should be finalised by 2012[106].

Examples of national regulators include the following:

– United Kingdom – the Office of Rail Regulation (ORR),
– Czech Republic – Drážní úřad (the Rail Authority)[107],

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102 G. Goeteyn, *Remedies in the Air Transport Sector* [in:] D. Géradin, *Remedies in Network Industries: EC Competition Law vs. Sector–Specific Regulation*, Antwerp–Oxford, 2004, p. 224.

103 See i.a.: F. Czernicki, *Legislative Developments in the Civil Aviation Sector in 2008*, "YARS" 2/2009, p. 225–227; F. Czernicki, *Legislative Developments in the Civil Aviation Sector in 2009*, "YARS" 3/2010, p. 268–269.

104 M. Król, *Benefits and Costs of Vertical Separation in Network Industries. The Case of Railway Transport in the European Environment*, "YARS" 2/2009, p. 171–172.

105 F. Schwarz, *Intermodal Freight Network Modelling* [in:] J.W. Konings, H. Priemus, P. Nijkamp, *The Future of Intermodal Freight Transport: Operations, Design and Policy*, Cheltenham, 2008, p. 233.

106 About the process of liberalisation of the railway freight transport market in Poland in the years 1997–2009 see: M. Król, *Liberalization without a Regulator. The Rail Freight Transport Market in Poland in the Years 1996–2009*, "YARS" 3/2010, p. 165 and next; K. Zawisza, *Legislative Developments in Rail Transport in 2009*, "YARS" 3/2010, p. 255 and next.

107 OECD, *OECD Reviews of Regulatory Reform: Regulatory Reform in the Czech Republic*, Paris, 2001, p. 300.

– Poland – Prezes Urzędu Transportu Kolejowego (the President of the Railway Transport Office)[108].

108 See: K. Zawisza, *Legislative Developments in Rail Transport in 2008*, "YARS" 2/2009, p. 220 and next.

Part 2

COMPETITION AUTHORITIES

1. Administrative authorities

1.1. European Union

According to Article 105(1) TFEU, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. Before Regulation 1/2003 came into force, we observed one body enforcing EC competition law – the European Commission. Since 5.1.2004, when Regulation 1/2003 came into force, the power to apply Article 101 TFEU (ex Article 81 TEC) and Article 102 TFEU (ex Article 82 TEC), alongside the European Commission, has belonged to national competition authorities.

The segment of the Commission which deals with the executive enforcement of competition law is **Directorate–General for Competition**, located in Brussels (Belgium). The areas of its policy include: antitrust rules (Articles 101 and 102 TFEU), mergers (concentrations), liberalisation (Article 106 TFEU), state aid (Article 107 TFEU) and international cooperation.

The Directorate operates under the direction of Commissioner responsible for competition policy. But of course, the last word belongs to the Commission in each case.

It is worth mentioning that since 2003 the structure of the Directorate has employed the Chief Competition Economist, who manages a team of economists. The economists supply the Commission particularly with the economic analysis needed to resolve individual

cases. This is the proof of more economic approach (economisation of EU competition law)[1].

The Commission consults on issues of competition law with:

- the Advisory Committee on Restrictive Practices and Dominant Positions – Regulation 1/2003 calls it "forum for discussing cases",
- the Advisory Committee on Concentrations.

Advisory Committees consist of the representatives of national competition authorities.

National competition authorities together with the Commission form **the European Competition Network (ECN)**. However, the number of ECN members does not equal the number of the Member States plus one. In some Member States, national competition authority's function is carried out by more than one body. These include: Belgium (Direction générale de la concurrence and Conseil de la concurrence/Raad voor de Mededinging) and Luxembourg (Conseil de la Concurrence and Ministère de l'Economie et du Commerce Extérieur – Inspection de la Concurrence)[2]. Thus, there are now 30 ECN members.

ECN has no new powers, and consequently has no rights towards its members. This is only a forum for discussion and cooperation in cases to which Articles 101 and 102 TFEU can be applied. Members of ECN cooperate in particular through:

- exchange of information on new cases and decisions,
- coordinating the proceedings, if necessary,
- mutual assistance in investigations,
- exchange of evidence and other information,
- consulting the various issues of mutual interest[3].

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1 See: A. Piszcz, *Ekonomizacja prawa antymonopolowego* [in:] P. Chmielnicki, A. Dybała (eds.), *Nowe kierunki działań administracji publicznej w Polsce i Unii Europejskiej*, Warsaw, 2009, p. 209.

2 http://ec.europa.eu/competition/ecn/contact_points.pdf (last accessed 31.3.2011)

3 See: Commission Notice on cooperation within the Network of Competition Authorities (OJ C 2004/101/43).

A very natural and very material question arises: what might be the future of ECN? Will it last another (at least) seven years? Could the current forum for discussion and cooperation be replaced by an EU administrative body? From time to time the answer to these questions is debated, usually without agreement. However, a vision of such an administrative body is not as unreal as it might seem at first glance since the European Regulators Group for electronic communications networks and services was replaced by the Body of European Regulators for Electronic Communications (see part I paragraph 3.2. above).

1.2. EU Member States and others (classification)

1.2.1. The personal composition criterion

National competition authorities can be classified according to various criteria that are adopted for different purposes.

Due to the personal composition, we can distinguish between **individual bodies** and **collective bodies**.

The example of an individual body is the Polish NCA – the President of the Office of Competition and Consumer Protection (Prezes Urzędu Ochrony Konkurencji i Konsumentów), hereinafter, the President of the OCCP.

Examples of collective bodies are:

1) Spanish NCA – Comisión Nacional de la Competencia (the National Competition Commission); see Article 19 and next of the Competition Act 15/2007 of July 3, 2007[4],
2) Greek NCA – Epitropi Antagonismou (the Hellenic Competition Commission)[5].

1.2.2. The independence criterion

Another subdivision can be made according to **the criterion of independence of the NCA**. This division is not straightforward

4 Official State Gazette No. 159, of 4.7.2007. In English at: http://www.cncompetencia.es/Inicio/Legislacion/NormativaEstatal/tabid/81/Default.aspx (last accessed 31.3.2011).

5 See: Judgment of ECJ of 31.5.2005, C–53/03, Synetairisimos Farmakopoion Aitolias & Akarnanias (Syfait) et al, ECR 2005/I–4609.

because in practice it is impossible to divide the NCAs into authorities independent of the government and authorities which depend on it. Authorities that are formally independent of the government may in fact actually be under its influence. And vice versa – authorities formally dependent on the government may, in practice, experience a high degree of autonomy.

Traditional government powers are divided into three separate branches: legislative, executive and judicial. NCA is a body to enforce the law and as such it is part of the executive branch. NCA cannot be completely independent of the government structure, whose part it constitutes. Placing NCA in the structure of the ministry[6], however, does not imply that the government would improperly influence NCA. Independence is not a matter of formal organisational status of NCA and its place in the government structure, although institutional and budgetary independence can serve to protect NCA's decisions from being subordinated to the government objectives[7]. Many countries prefer to create NCAs as entities independent of the government.

With regard to the Polish NCA – the President of the OCCP, who according to Article 29 section 1 ACCP "shall be the central government administration body", there is claimed that he is not independent of the government. The Prime Minister shall supervise activities of the President of the Office (Article 29 section 1 ACCP). The Prime Minister shall nominate the President of the Office from among the persons selected as a result of an open and competitive recruitment process (Article 29 section 3) and dismiss the President of the Office (Article 29 section 4). It should be noted, however, that among the measures of supervision, there are no substantive measures, in particular the Prime Minister is not the appellate body for decisions issued by NCA. Means of supervision include dismissal of the President of the OCCP, which requires no justification. During examination of one case of a public company, the current President of the OCCP, Małgorzata Krasnodębska–Tomkiel, has declared a position contrary

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6 For example, in Luxembourg *Inspection de la Concurrence* in *Ministère de l'Economie et du Commerce Extérieur*.

7 OECD, *China in the Global Economy: Governance in China*, Paris, 2005, p. 366.

to the government's expectations. Some people in government circles implied that in the case of such a decision being issued by the President of the OCCP, the Prime Minister will dismiss her from the office. The reality was different. The President of the OCCP issued a decision other than what was expected by the government, and yet she was not dismissed[8].

The same is true about the Spanish NCA. According to Article 19 section 1 of the Competition Act of 2007 the National Competition Commission is a public law institution with its own legal personality and full public and private capacity, attached to the Ministry of Economy and Finance, which shall exercise efficacy control over its activity. Simultaneously, the Act states that the National Competition Commission shall develop its activity and fulfil its aims with organic and functional autonomy, fully independent of the public administrations. Formal Spanish NCA's independence of their government is greater than in the case of Polish NCA. The possibility of the Chairman of the Commission and the members of the Council of the Commission's dismissal is in fact limited by Article 30 of the Competition Act of 2007.

Czech NCA is even more formally independent. In light of the Act 273/1996 Coll. on the Scope of Competence of the Office for the Protection of Competition[9] the government only suggests the President of the Republic appointing or dismissing the Chairman of the Office for the Protection of Competition (Úřad pro ochranu hospodářské soutěže). Like in Spain, the possibilities of dismissal are limited.

1.2.3. The criterion of time to hold the office

Another criterion is the criterion of time to hold the office. There are **term bodies** (the office is held for a specific term of years after which NCA must be reappointed) and **NCAs appointed for an indefinite period**. The second group includes Polish NCA – the President of the OCCP. In practice, however, amongst competition authorities term bodies are more frequent. The examples of term bodies are:

8 http://www.uokik.gov.pl/news.php?news_id=2424 (last accessed 31.3.2011).
9 In English at: http://www.compet.cz/en/competition/legislation/ (last accessed 31.3.2011).

– Spanish NCA – “the mandate of the Chairman and the Council Members shall be six years without possibility of renewal” (Article 29 section 3 of the Competition Act of 2007);
– Czech NCA – “the term of office of the Chairman is 6 years” (§ 1 of the Act 273/1996 Coll.).

1.2.4. The competence criterion

Another division can be made on the basis of **NCA’s competence criterion**. Again we are dealing with a division which is not very simple. In the first place, we should mention **NCAs which have a very broad remit**. An example of this is the Polish NCA – the President of the OCCP. He is competent in cases concerning both the protection of competition and consumer protection (the President of the OCCP is also empowered to impose fines on the undertakings infringing the collective consumer interests)[10]. We can say that the Office gathers many policies under one roof.

The mid 1990s’ combination of antitrust policy and consumer protection in one administrative authority was very innovative at that time. It was argued that the combination of the two policies is also essential to reduce costs. They expected savings generated by joint administration, joint research projects, joint training and lower costs of services of various experts. Currently, the President of the OCCP is also involved in notifying the state aid schemes and individual state aid decisions (provides opinions on them before their notification to the European Commission), issues of general product safety (including publicising information on dangerous products), issues of CE product marking, issues of fuel quality[11]. It should be added that in the field of competition protection the President of the OCCP does not have an advisory body. As you can see, Polish NCA plays a multiple role[12].

10 See also: M. Modzelewska de Raad, P. Ciupa, J. Kruk–Kubarska, *Poland* [in:] “The European Antitrust Review 2009”, http://www.eversheds.pl/articlesFiles/469_The%20European%20Antitrust%20Review% 202009%20–%20Poland.pdf, p. 160.

11 See: M. Stefaniuk, *2008 Antitrust Law Developments in Poland*, “YARS” 2/2009, p. 193 and next.

12 See: K. Staszyńska, *Synergy of consumer and competition policies in the view of entrepreneurs and consumer associations* [in:] *Consumer Protection and…*, p. 121.

Currently, the dual role is also played by the British NCA – the Office of Fair Trading (OFT), which combines the competences in competition policy and consumer protection[13]. It should be added, however, that not all issues of competition policy are under the responsibility of the OFT because this area of activities is divided between the OFT and the second body – the Competition Commission. We actually do not know how long this situation will last as there are plans to introduce a reform. In 2011, in the UK there are public consultations on the merger of the OFT and the Competition Commission into one competition authority as well as the transfer of the consumer enforcement functions of the OFT to Trading Standards Services funded by local councils[14].

Many Member States have not entrusted NCAs with consumer protection policy, but created separate consumer protection bodies. For example, the Spanish NCA plays a single role. Their competence covers issues of competition policy (including issues related to state aid – see Article 11 of the Competition Act of 2007) while the Instituto Nacional del Consumo deals with consumer protection. Similarly, German NCA – Bundeskartellamt implements one policy[15].

Lastly, there are **NCAs that do not perform even a single policy in its entirety**. These include particularly cases where the investigation and adjudication functions are divided between two separate bodies. An example might be Luxembourg's Conseil de la Concurrence and Ministère de l'Economie et du Commerce Extérieur – Inspection de la Concurrence. We need to add that in France until 2008, that is until the Conseil de la concurrence[16] was converted into a new body – Autorité de la concurrence (the Competition Authority), preliminary inquiries and full investigations were separated between two bodies (DGCCRF and Conseil de la concurrence)[17]. We should emphasise that the separation

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13 H. Jennings, *Competition and consumer protection in the United Kingdom* [in:] *Consumer Protection and…*, p. 123 and next.

14 www.parliament.uk/briefing–papers/SN05717.pdf (last accessed 31.3.2011).

15 A. Reich, *German model of competition and consumer protection – present state of affairs and predicted changes* [in:] *Consumer Protection and…*, p. 139 and next; P. von Braunmühl, *The strengths and weaknesses of the German model of consumer protection and competition: the consumer perspective* [in:] *Consumer Protection and…*, p. 143 and next.

16 See: F. Amand, *French model of competition and consumer protection* [in:] *Consumer Protection and…*, p. 131 et seq.

17 http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=317 (last accessed 31.3.2011).

of these functions, which has its advantages, does not necessarily mean the creation of two separate bodies.

An example of a solution different from the Luxembourg solution is Spanish National Competition Commission. The investigation is carried out by one of its organisational units – the Directorate of Investigation (Dirección de Investigación), which does not issue decisions. Decisions are issued by the Council of the National Competition Commission. Both functions are performed independently under the supervision of the Chairman of the Commission. In Poland, in the OCCP there is no such separation between functions of investigation and adjudication. The President of the OCCP acts both as the "prosecutor" and "judge" (decision maker), as is the case with the European Commission (while the U.S. competition authorities mainly act as the "prosecutors", by bringing actions before the courts). For comparison, see the competition authorities in the USA – part I p. 1.1.2.

2. Courts

2.1. European Union

Actions may be brought against decisions of the European Commission competition on infringements of EU competition rules. According to Article 256(1) TFEU, in principle the General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in i.a. Article 263 TFEU. Before December 1, 2009, **the General Court** was known under the name of the Court of First Instance. The literature refers to it as "central administrative court"[18].

The General Court shall review the legality of acts of i.a. the Commission other than recommendations and opinions. It shall for this purpose have jurisdiction in actions brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their

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18 D. Chalmers, G. Davies, G. Monti, *European Union Law: Text and Materials*, New York, 2010, p. 147.

application, or misuse of powers. Any natural or legal person may, under the conditions laid down above, institute proceedings against an act addressed to that person or which is of direct and individual concern to them. The proceedings provided for in Article 263 TFEU shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

If the action is well founded, the act concerned shall be declared to be void (Article 264 TFEU). A specific provision is included in Article 31 of Regulation 1/2003, according to which "the Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed".

There is a right to appeal from the General Court to **the Court of Justice of the European Union (CJEU)**, before December 1, 2009 known as the European Court of Justice (ECJ), within two months of notification of the decision. The appeal must be on points of law[19]. CJEU does not comment on the facts of the cases dealt with in the first instance by the General Court. If CJEU finds the appeal to be well founded, it will quash the decision of the General Court. It then has the discretion to give the final judgment or to refer the matter back to the General Court[20].

EU courts, apart from function of appellate courts, have an interpretation function in cases relating to competition. The Treaty provides for the so–called preliminary rulings "concerning:

a) the interpretation of the Treaties;

b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision

19 *Ibidem*, p. 148.
20 *Ibidem*

on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court"[21].

In practice, the interpretation of the phrase **"the court or tribunal of a Member State"** has raised doubts. In one of its judgments the ECJ clarified the scope of this concept as follows: "In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent. In addition, a body may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. The Epitropi Antagonismou (Greek Competition Commission) does not satisfy those criteria. First of all, it is subject to the supervision of the Minister for Development, which implies that that minister is empowered, within certain limits, to review the lawfulness of its decisions. Next, even though its members enjoy personal and operational independence, there are no particular safeguards in respect of their dismissal or the termination of their appointment, which does not appear to constitute an effective safeguard against undue intervention or pressure from the executive on those members. In addition, its President is responsible for the coordination and general policy of its secretariat and is the supervisor of the personnel of that secretariat, with the result that, by virtue of the operational link between the Epitropi Antagonismou, a decision–making body, and its secretariat, a fact–finding body on the basis of whose proposal it adopts decisions, the Epitropi Antagonismou is not a clearly distinct third party in relation to the State body which, by virtue of its role, may be akin to a party in the course of competition proceedings. Finally, a

21 See: Article 256 section 3 and Article 267 TFEU.

competition authority such as the Epitropi Antagonismou is required to work in close cooperation with the Commission and may, pursuant to Article 11(6) of Regulation No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, be relieved of its competence by a decision of the Commission, with the consequence that the proceedings initiated before it will not lead to a decision of a judicial nature"[22].

2.2. EU Member States and others

2.2.1. Administrative courts as appellate courts

In several Member States hearing appeals against decisions of NCA was delegated to **the administrative courts**. Such solutions have been implemented, among others, in the Netherlands, Estonia, Finland, Hungary, Italy[23].

An interesting example of regulation of appeal against the decision of NCA can be observed in the Czech Republic. Appeals against decisions of the Office for the Protection of Competition are heard by the Chairman of the Office. The Chairman of the Office reviews the decision as a whole, both as regards matters of fact and matters of law. The Chairman's decisions can be appealed to the regional courts. The Supreme Administrative Court is an appellate court from these courts[24]. Administrative courts have so–called full jurisdiction, i.e. to establish newly the facts differently from the way they were established by the administrative body[25].

In Spain, in accordance with Article 48 of the Competition Act of 2007 no appeal by administrative procedure may be lodged against the resolutions and acts of the Chairman and of the Council of the National Competition Commission, and judicial appeals may only be

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22 See: Judgment of ECJ of 31.5.2005, C–53/03, Synetairisimos Farmakopoion Aitolias & Akarnanias (Syfait) et al, ECR 2005/I–4609.

23 D. Cahill, *The Modernisation of EU Competition Law Enforcement in the European Union: FIDE 2004 National Reports*, Cambridge, 2004, p. 114, 145, 261, 324, 411.

24 Act No. 150/2002 Coll. Code of Administrative Justice; in English at: http://www.nssoud.cz/docs/caj2002.pdf (last accessed 31.3.2011).

25 OECD Global Forum on Competition – The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency – Czech Republic; http://www.oecd.org/dataoecd/58/23/2486026.pdf (last accessed 31.3.2011).

lodged in the terms in Administrative Jurisdiction Act 29/1998, of 13 July. Appeals are heard by an administrative section of the court called National Court (Audiencia Nacional). Its judgments can be appealed only to the Supreme Court.

In the UK in cases where there is no statutory right of appeal (on fact or law), use has to be made of the inherent common law power of the court to grant judicial review of a decision in the High Court (Administrative)[26].

The choice between ordinary courts and administrative courts has been a matter of longstanding and continuing debate. Administrative courts sometimes have been regarded to be better prepared to deal with cases relating to competition, as they are, as a rule, specialised[27].

2.2.2. Ordinary courts as appellate courts

At first, the American example should be noted. American competition authorities mainly act as "prosecutors" by bringing actions before the courts, particularly under the Sherman Antitrust Act and the Clayton Act. Cases arising under federal laws properly belong in federal courts (the subject matter jurisdiction of federal courts is generally limited to cases that arise under federal law[28]). However, if the party violated the Federal Trade Commission Act, the FTC issues a cease and desist order in the administrative proceedings, which defendants can appeal within FTC to the Commissioners (for comparison see the Czech solution, paragraph 2.2.1. above). If the Commission upholds the decision, the defendant may appeal to the US Court of Appeals.

Transferring the function of appellate courts to **the ordinary courts** has taken place in Poland. Although the President of the OCCP is a public authority, his decisions and orders issued under the provisions of

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26 D. Longley, R. James, *Administrative Justice: Central Issues in UK and European Administrative Law*, London, 1999, p. 157. But appeals on the merits in respect of decisions made under the Competition Act of 1998 by OFT and the regulators are heard by the Competition Appeal Tribunal (CAT); see: http://www.catribunal.org.uk/242/About–the–Tribunal.html (last accessed 31.3.2011), as well as P.J. Slot, A. Johnston, *An Introduction*…, p. 237.

27 W. van Gerven [in:] J. Stuyck, H. Gilliams (eds.), *Modernisation of European Competition Law: the Commission's Proposal for a New Regulation Implementing Articles 81 and 82 EC*, Antwerp–Oxford–New York, 2002, p. 119.

28 E.H. Hanks, M.E. Herz, S.S. Nemerson, *Elements of*…, p. 21.

the ACCP may not be appealed to administrative courts. The only court that is competent to hear appeals and complaints against decisions and orders of the President of the OCCP is the court of competition and consumer protection (17th Division of the District Court in Warsaw), which, before December 15, 2002, was known as the antitrust court.

This Court has jurisdiction in the cases of: appeals against decisions and complaints against orders issued by the President of the OCCP or regulatory authorities (by the President of the Office of Electronic Communications[29], the President of the Energy Regulatory Office, the President of the Railway Transport Office), and regarding contract clauses as abusive (Article 479[28] of the Civil Procedure Code). The decision of the President of the OCCP shall be subject to an appeal to the court of consumer and competition protection (hereinafter, the court of CCP), lodged within two weeks from the date of delivering the decision (Article 81 ACCP), through the President of the OCCP. In such cases the President of the OCCP is the defendant before the court of CCP. Proceedings in the court of CCP are held before a single judge. If the court finds the appeal to be well founded, it will quash the decision of the President of the OCCP or modify it in whole or in part. The court cannot increase the fine imposed. A judgment from the court of CCP can be appealed to the Appeal Court in Warsaw where cases are reviewed by three–judge panels. There could be a further appeal against the judgment of the latter court brought to the Supreme Court (Polish "court of last resort").

The doctrine maintains that transferring these cases to the court of the CCP by the legislature was aimed at providing substantive control of the decisions of the President of the OCCP exercised by an ordinary court. If in these cases administrative courts ruled, their role would be confined only to controlling the legality which is specific to the administrative judiciary[30].

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29 See i.a.: S. Dudzik, *Enforceability of Regulatory Decisions and Protection of Rights of Telecommunications Undertakings*, "YARS" 1/2008, p. 102 and next.

30 A. Turliński, *Miejsce sądu ochrony konkurencji i konsumentów w systemie organów ochrony prawnej* [in:] C. Banasiński (ed.), *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej (studia prawno–ekonomiczne)*, Warsaw, 2005, p. 62–65.

It is worth noting the different British approach, resulting not from their laws but from the practice of the Competition Appeal Tribunal (CAT). This court hears appeals on the merits in respect of decisions made under the Competition Act of 1998 by the OFT. The CAT's powers include the power to i.a. confirm or set aside the OFT decision, to return the matter to the OFT, to impose, vary or revoke any penalty imposed. However, the CAT prefers remitting cases to the OFT rather than substitute its own finding on the matter of law at stake. It seems that the CAT does not wish to convert itself from an appellate tribunal into a general court of first instance on such matters[31].

2.2.3. Judicial protection of third parties in competition law

In the section above a brief reference was made to the courts applying competition law in proceedings on appeal against the decisions of the competition authorities. In this case we deal with the participation of courts (administrative or ordinary) in the process of regulatory (administrative) antitrust enforcement.

However, the courts apply competition law also in the process of **private antitrust enforcement**. Anti–competitive practice committed by the entrepreneur may result in loss to other parties. Market protection offered by competition authorities – although it is also in the interest of individual market participants, not just in the interest of the state – does not cover the damages. The courts can handle claims for damages caused by anti–competitive practices, even when the competition authority does not or did not conduct the proceedings. The national courts of the EU Member States apply, depending on the needs, national competition law or the Articles 101–102 TFEU (see Article 6 of Regulation 1/2003). This last point is referred to in the Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC[32]. In the light of these provisions national courts – depending on the functions attributed to them under national law – may be called upon to apply Articles 101 and 102 TFEU in administrative, civil or criminal proceedings. In particular, where a

31 P.J. Slot, A. Johnston, *An Introduction…*, p. 73.
32 OJ C 2004/101/54.

natural or legal person asks the national court to safeguard his individual rights, national courts play a specific role in the enforcement of Articles 101 and 102 TFEU, which is different from the enforcement in the public interest by the European Commission or by national competition authorities. Indeed, national courts can give effect to Articles 101 and 102 TFEU by finding agreements to be void or by awards of damages. The procedural conditions for the enforcement of EU competition rules by national courts and the sanctions they can impose in the case of an infringement of those rules, are largely covered by national law. In the light of Article 15(1) of Regulation 1/2003 in proceedings for the application of Article 101 or Article 102 TFEU, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of EU competition rules.

It seems that the courts of Great Britain and Spain, since they became Member States, have reached quite confidence with the EU competition law issues. On the other hand, the courts in Poland or Czech Republic (the Member States since May 1, 2004) have a serious problem, facing new issues of EU competition law. Apparently, there was no court judgment in Poland where Article 101 or 102 TFEU were applied in the dispute between the private parties.

On December 19, 2005 the European Commission published **Green Paper – Damages actions for breach of the EC antitrust rules**[33]. This publication practically coincided with an important ECJ judgment of February 13, 2006, in joined cases C–295/04 to C–298/04, Vincenzo Manfredi et al v. Lloyd Adriatico Assicurazioni SpA et al[34]. In that case the ECJ reiterated the principle already given on September 20, 2001 in case C–453/99, Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd et al[35], whereby "any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC" (at

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33 http://eur–lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0672en01.pdf (last accessed 31.3.2011).

34 ECR 2006/I–6619.

35 ECR 2001/I–06297.

present Article 101 TFEU). In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to:

1) lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from EU law, provided:
   - that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) – in accordance with the principle of equivalence, if it is possible to award specific damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on EU competition rules, it must also be possible to award such damages in actions founded on EU rules; however, EU law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by EU law does not entail the unjust enrichment of those who enjoy them;
   - that such rules do not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) – it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest;
2) prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under TFEU, provided that the principles of equivalence and effectiveness are observed; it is for the national court to determine whether a national rule which imposes a limitation period renders it practically impossible or excessively difficult to exercise the right to seek compensation for the harm suffered.

Obtaining compensation is not easy. To create a legal framework for more effective redress, on April 2, 2008 the Commission published **White Paper on damages actions for breach of the EC antitrust**

rules[36]. In the Paper, the Commission put emphasis on the following issues:

- the inter partes disclosure;
- the binding effect of NCA decisions;
- the fault requirement;
- the possibility for national courts to shift all or part of the costs to the winning defendant;
- the passing–on defence;
- the limitation period;
- the protection of leniency applications from disclosure;
- the removal of the joint liability for the immunity recipient;
- the availability of collective and representative actions.

Most of the issues raised in the EU forum also deal with the national courts' application of national antitrust laws in cases of compensation. Therefore, it has to be indicated that the antitrust laws do not regulate the quality of the competitive process. Unfair competition law deals with it and governs the methods of market competition (fair competition and unfair competition). Unfair competition law is applied by the courts or other authorities – depending on the solutions adopted in individual countries.

The level of codification of unfair competition law varies in individual countries. The core of Spanish unfair competition law is contained in the Unfair Competition Act of 1991, and to a lesser extent, in the General Publicity Act of 1998 and the General Consumer Protection Act of 1984[37]. Since an act of unfair competition can infringe all these acts simultaneously and, secondly, in some cases civil courts are competent, and in others – public authorities, the Spanish law of unfair competition can be described as complex.

36 http://eur–lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF (last accessed 31.3.2011).

37 T.M.J. Möllers, A. Heinemann, *The Enforcement of Competition Law in Europe*, New York, 2007, p. 49.

In the Czech Republic acts of unfair competition are referred to in the Commercial Code (Act 513/1991 Coll.)[38]. In Poland, the primary source of unfair competition law is the Act of 1993 on Combating Unfair Competition[39]. The Act provides for the opportunity to raise civil actions for infringement of fair competition rules. As to civil and criminal sanctions applicable under this Act, see part VI paragraph 1. below. It should be noted that unfair competition law is very often a part of consumer protection law. In Poland, they were separated by removing the body of consumer law from the Act on Combating Unfair Competition. Currently, it is regulated, among others, by the Act of 2007 on Combating Unfair Commercial Practices[40], transposing the Unfair Commercial Practices Directive into Polish law[41]. The so–called Unfair Commercial Practices Directive is Directive 2005/29/EC of the European Parliament and of the Council of May 11, 2005 concerning unfair business–to–consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council[42].

On the other hand, in Great Britain neither a general codification of the law of unfair competition exists nor has a blanket clause been developed by the courts[43]. Acts have been passed only to regulate certain narrow issues of unfair competition (e.g. the Unfair Contract Terms Act of 1977[44]).

In the United States, as in English law, the common law mainly gives private remedies for various types of interference with trade

38 http://www.wipo.int/wipolex/en/text.jsp?file_id=198074 (last accessed 31.3.2011).
39 Act of 16.4.1993 on Combating Unfair Competition (consolidated version Journal of Laws 2003, No. 153, *item* 1503, as amended); www.uokik.gov.pl/download.php?plik=7635 (last accessed 31.3.2011).
40 Act of 23.8.2007 on Combating Unfair Commercial Practices (Journal of Laws No. 171, *item* 1206, as amended); www.uokik.gov.pl/download.php?plik=7636 (last accessed 31.3.2011).
41 See: A. Piszcz, *Legal sanctions against unfair commercial practices in Poland* [in:] M. Popławski, D. Šramkova (eds.), *Legal sanctions: theoretical and practical aspects in Poland and the Czech Republic*, Brno, 2008, p. 159.
42 OJ L 2005/149/22.
43 T.M.J. Möllers, A. Heinemann, *The Enforcement of…*, p. 29.
44 http://www.legislation.gov.uk/ukpga/1977/50 (last accessed 31.3.2011).

relations[45]. As for the acts of the federal statutory law, unfair competition is subjected to some extent to the Federal Trade Commission Act of 1914 and the Lanham (Trademark) Act of 1946. The Federal Trade Commission shares jurisdiction to combat unfair practices with the states where the Attorneys General enforce state laws which prohibit unfair and deceptive acts or practices. Such laws exist in all states.

Protection of competition based on civil law does not seem to function properly within the European Union. For example, in the UK under private enforcement the first judgment awarding damages for breach of the Community competition law was given as late as 2004[46]. It was the judgment of the Court of Appeal of May 21, 2004, case Bernard Crehan v. Inntrepreneur Pub Company, overturned by the House of Lords on 19.07.2006. Another example of private enforcement of the Community competition law are damage actions by Cooper Tire & Rubber Co. (the second–largest U.S. tyre maker) and 25 other companies brought on December 21, 2007 to the High Court of England and Wales[47]. The action was brought against members of the cartel, whose existence was established by the European Commission's decision of November 29, 2006[48]. The decision concerned five groups of companies, including the Polish company Trade–Stomil Ltd. Like almost all other addressees of this decision, Trade–Stomil has lodged an appeal seeking its annulment[49].

The European Commission points out the need to introduce collective redress to the laws of individual Member States. The idea is modelled on a class action which was first developed in the United States. In literature, a class action is delimited as a category of proceedings, occurring in the United States, and a group action as a category of proceedings occurring in Europe[50].

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45 T.M.J. Möllers, A. Heinemann, *The Enforcement of…*, p. 68.

46 See: R. Subiotto, R. Snelders, *Antitrust Developments in Europe 2006*, Alphen aan den Rijn, 2007, p. 201–204.

47 K. Kuik, *2007 EC Competition Law and Sector–specific Regulatory Case Law Developments with a Nexus to Poland*, "YARS" 1/2008, p. 169–170.

48 http://ec.europa.eu/competition/antitrust/cases/dec_docs/38638/38638_826_1.pdf (last accessed 31.3.2011).

49 Case T–53/07, OJ C 2007/95/45.

50 M. Deguchi, *The Recent Legislation on the Consumer Group Action in Japan* [w:] *The Recent Tendencies of Development in Civil Procedure Law – between East and West*, Vilnius, 2007, p. 126.

In Europe such legislation is already binding in several Member States, including Austria, France, the Netherlands, Spain, the United Kingdom, Germany, Italy and Sweden. In Poland since July 19, 2010 the Act on Pursuing Claims in Group Proceedings[51] has been in force.

European solutions are designed in order to avoid traps which the United States fell into by admitting excessive litigation. Hence, the European legislation avoids punitive damages, pre–trial discovery and contingency fees. However, the question arises about **the effectiveness of private enforcement** in a situation where the potential for litigation is devoid of some attractive solutions for the plaintiffs. For example, as to the Polish group action one may fear that the habits of the parties and their attorneys, as well as the traditional training of the judges will minimise the use of group action in pursuing claims for damages for the breach of competition law[52].

51 http://bip.uokik.gov.pl/aktualnosci.php?news_id=2167 (last accessed 31.3.2011).

52 A. Piszcz, *Wybrane problemy związane ze stosowaniem prawa antymonopolowego Unii Europejskiej przez sądy krajowe* [in:] N. Szczęch (ed.), *Księga Jubileuszowa z okazji 5-lecia Wydziału Prawa Wyższej Szkoły Menedżerskiej w Legnicy „Ius est ars boni et aequi”*, Legnica, 2010, p. 547–562.

Part 3

ENTREPRENEUR IN THE MARKET – BASIC CONCEPTS OF COMPETITION LAW

1. Undertaking

1.1. European Union

Prohibitions set out in Articles 101 and 102 TFEU are addressed to **undertakings** and **associations of undertakings**. The concept of an undertaking appears in various disciplines of science and sometimes deviates far from what the science of antitrust law understands by it.

None of the above terms has been defined either in TFEU or in Regulation 1/2003. However, I here offer you a highly arbitrary selection of judgments (as courts fill gaps, the open spaces in the law) about what undertakings and associations of undertakings are. According to the jurisprudence of the ECJ, "in Community competition law, the definition of an 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. In that connection, it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity so that there is no need to dissociate the activity, of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity" (judgment of Nowember 7, 2006, C–205/03 P, Federación Espanola de Empresas de Tecnología Sanitaria v. Commision)[1]. As undertakings the Court understands, among others, companies, partnerships, self–employment, agricultural co–operatives. Moreover, according to the

1 ECR 2006/7A/I–06295.

ECJ jurisprudence, undertakings are – for the purpose of applying the competition rules – i.a.:

- a public employment agency engaged in the business of employment procurement (judgment of April 23, 1991, C–41/90, Klaus Höfner i Fritz Elser v. Macrotron GmbH)[2],
- a public placement office (judgment of December 11, 1997, C–55/96, Job Centre Coop. arl)[3],
- a customs agent (judgment of June 18, 1998, C–35/96, Commission v. Italy)[4].

According to the ECJ jurisprudence, we cannot treat as an undertaking the following:

- an organisation involved in the management of the public social security system, which fulfil an exclusively social function and perform an activity based on the principle of national solidarity which is entirely non–profit–making (judgment of February 17, 1993, joined cases C–159/91 and 160/91, Christian Poucet v. AGF & Camulrac and Daniel Pistre v. Cancava)[5],
- an international organisation such as Eurocontrol; "Eurocontrol's activities including the collection of route charges on behalf of the Contracting States, are connected with their nature, their aim and the rules to which they are subject, to the exercise of powers relating to the control and supervision of air space which are typically those of a public authority and are not of an economic nature justifying the application of the Treaty rules of competition" (judgment of January 19, 1994, C–364/92, SAT Fluggesellschaft mbH v. Eurocontrol)[6];
- a subsidiary; "for the purpose of applying the rules on competition, unity of conduct on the market as between a parent company and its subsidiaries overrides the formal separation between those companies resulting from their separate legal personality"

2 ECR 1991/4/I–01979.
3 ECR 1997/12/I–07119.
4 ECR 1998/7/I–03851.
5 ECR 1993/2/I–00637.
6 ECR 1994/1/I–00043.

(judgment of July 14, 1972, 48/69, Imperial Chemical Industries Ltd. v. Commission)[7].

Similarly, the broad notion of an undertaking is used for the purposes of state aid rules (see part VIII paragraph 1. below). The first step in the state aid assessment is to establish whether the recipient is, or is likely to become, an undertaking. The concept of an economic activity is central to this assessment. If none of the activities (or potential activities) of the recipient are economic, the recipient is not an undertaking and the support in favour of the recipient is not state aid. However, various charities, research and development institutions, universities, public sector bodies etc. may be deemed to be undertakings for the purposes of state aid rules when they are engaged in economic activity. As an example of case law on the subject we can cite the ECJ judgment of January 10, 2006, in Case C–222/04, Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze SpA and others[8], according to which:

– the mere fact of holding shares, even controlling shareholdings, is insufficient to characterise as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset; however an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof, must be regarded as taking part in the economic activity carried on by the controlled undertaking and must therefore itself, in that respect, be regarded as an undertaking; therefore, a legal person such as a banking foundation controlling the capital of a banking company, the statutes of which contain rules which reveal a function going beyond the simple placing of capital by an investor, make possible the exercise of functions relating to control, but also to direction and fi-

7 ECR1972/00619.

8 ECR 2006/I–00289. See also: R. Subiotto, R. Snelders, *Antitrust Developments in…*, p. 37–38.

nancial support, and thus illustrate the existence of organic and functional links between the banking foundations and the banking companies, may be treated as an undertaking;

- a legal person, such as a banking foundation the activity of which is limited to the payment of contributions to non–profit–making organisations, cannot be treated as an 'undertaking'; such an activity is of an exclusively social nature and is not carried on on the market in competition with other operators; as regards that activity, a banking foundation acts as a voluntary body or charitable organisation and not as an undertaking;
- where a banking foundation, acting itself in the fields of public interest and social assistance, uses the authorisation given it by the national legislature to effect the financial, commercial, real estate and asset operations necessary or opportune in order to achieve the aims prescribed for it, it is capable of offering goods or services on the market in competition with other operators, for example in fields like scientific research, education, art or health;
- such a banking foundation must be regarded as an undertaking, in that it engages in an economic activity, notwithstanding the fact that the offer of goods or services is made without profit motive, since that offer will be in competition with that of profit–making operators and must be subject to the application of the rules relating to state aid.

Obviously, the ECJ qualified a state controlled company as an undertaking for the purposes of state aid rules, when its objects included developing new technologies for the use of coal and providing specialist support services for authorities, public bodies and companies interested in the development of those technologies (run for profit)[9]. That assessment was not affected by the fact that the company was formed by public institutions and financed by means of resources

9 Judgment of 23.3.2006, C–237/04, Enirisorse v. Sotacarbo, ECR 2006/I–02862. See also: R. Subiotto, R. Snelders, *Antitrust Developments in…*, p. 38–39.

from the Italian State for the purpose of carrying out certain research activities.

When it comes to antitrust case law on **associations of undertakings**, as an example we can cite the CFI judgment of January 26, 2005, in Case T–193/02, Laurent Piau v. Commission, on Fédération Internationale de Football Associations (FIFA), in which the Court explained that "it is common ground that FIFA's members are national associations, which are groupings of football clubs for which the practice of football is an economic activity. These football clubs are therefore undertakings within the meaning of Article 81 EC and the national associations grouping them together are associations of undertakings within the meaning of that provision. (…) Since the national associations constitute associations of undertakings and also, by virtue of the economic activities that they pursue, undertakings, FIFA, an association grouping together national associations, also constitutes an association of undertakings within the meaning of Article 81 EC"[10].

1.2. EU Member States and others

American antitrust law does not apply the term "an undertaking" or "an association of undertakings" when basic prohibitions are formulated. However, American case law confirms that most actions of trade and professional associations result from the joint action of their members and thus are subject to Section 1 of the Sherman Antitrust Act[11].

On the other hand, in the EU Member States the nomenclature in this area is close to the network of concepts in TFEU. In some Member States **legal acts use the terms "an undertaking" and "an association of undertakings", but they do not define them** (like TFEU). As an example we can point out:

– Spanish Competition Act of 2007,
– UK Competition Act of 1998; the term "undertaking" is interpreted here in accordance with the position under EU law, de-

10 ECR 2005/1–2/II–00209.
11 American Bar Association, *Antitrust Health Care Handbook*, Chicago, 2010, p. 42–43.

scribed in paragraph 1.1. above; according to Section 60 of the Act "(…) so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community"[12].

Another approach is to place the definition of an undertaking or an association of undertakings in the act. Such a solution have been applied by countries such as the Czech Republic and Poland. According to Article 2(1) of the Czech Act No. 143/2001 of April 4, 2001 on the Protection of Competition and on Amendment to Certain Acts[13] (APC) "undertakings under this Act shall be deemed to mean natural or legal persons, their associations, associations of such associations and other groupings, even in the instance that such associations and groupings are not legal persons, provided they take part in competition or may influence competition by their activities, although they are not entrepreneurs".

In Poland, according to Article 4 subparagraph 1 ACCP, undertaking (przedsiębiorca) shall mean an undertaking in the meaning of the provisions on freedom of business activity[14] (i.e. a natural person, a legal person or a non–corporate organisational unit with legal capacity under provisions of a separate act, conducting economic activity on its own behalf; economic activity shall mean profit–making activity related to manufacturing, construction, trading, provision of services and prospecting, identification and extraction of minerals, as well as professional activity conducted in an organised and continuous fashion), as well as:

12 See: P.J. Slot, A. Johnston, *An Introduction…*, p. 32–35.

13 In English at: http://www.compet.cz/fileadmin/user_upload/Legislativa/HS/CR/Act_143_2001_consolidated.pdf (last accessed 31.3.2011).

14 The same term is defined in different ways in various legal acts; see: R. Molski, *The legal status of foreign undertakings – could undertakings with a registered seat abroad be regarded as undertakings entitled to file a request for the institution of antimonopoly proceedings under Polish antitrust law? Case comments to the judgment of the Supreme Court of 10 May 2007 – Netherlands Antilles (Ref. No. III SK 24/06)*, "YARS" 1/2008, p. 235.

a) natural and legal person as well as an organisational unit without a legal status to which legislation grants legal capacity, organising or rendering public utility services, which do not constitute business activity in the meaning of the provisions on freedom of business activity,

b) natural person exercising a profession on its own behalf and account or carrying out an activity as part of exercising such a profession,

c) natural person having control, in the meaning of subparagraph 4 herein, over at least one undertaking, even if the person does not carry out business activity in the meaning of the provisions on freedom of business activity, if this person undertakes further actions subject to the control of concentrations, referred to in Article 13 ACCP;

d) associations of undertakings – for the purposes of the provisions on competition–restricting practices and practices infringing collective consumer interests.

The President of the OCCP in his decisions considered among others, such specific entities as Polish Football Association (PZPN)[15], Union of Stage Artists and Critics (ZAiKS)[16] to be undertakings. Local governments are also consistently recognised in case law as undertakings[17].

However, according to Article 4 subparagraph 2 ACCP, associations of undertakings (związki przedsiębiorców) shall mean chambers, associations and other organisations associating undertakings referred to in subparagraph 1, as well as associations of such organisations. President of the OCCP in his decisions considered i.a. the National

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15 http://www.uokik.gov.pl/news.php?news_id=984 (last accessed 31.3.2011).

16 http://www.uokik.gov.pl/news.php?news_id=2219 (last accessed 31.3.2011).

17 M. Bernatt, *The legal status of an undertaking – should local governments be treated more favourably in relation to the penalties for breaching Polish antitrust law? Case comment to the judgment of the Supreme Court of 5 January 2007 – City Ostrołęka (Ref. No. III SK 16/06)*, “YARS” 1/2008, p. 220–221.

Chamber of Notaries (Krajowa Rada Notarialna)[18] and Chamber of Polish Architects to be associations of undertakings[19].

It is worth adding that the ACCP defines also many other concepts (such as competitors, consumer). Creating complex legal definitions is one of the distinguishing features of the Polish legislature compared with the above mentioned foreign solutions.

2. Relevant market

2.1. European Union

The definition of relevant market was introduced in the Commission Notice on the definition of relevant market for the purposes of Community competition law[20]. It is worth noting here the phenomenon of notices, guidelines, recommendations etc. The broadly worded Articles 101 and 102 TFEU only use the word "market" (as part of the phrase "internal market") or "markets". They have been followed by regulations containing comparably equivocal language and open–ended phrases. Then as years have passed the Commission have issued "soft law" explaining, interpreting, defining and sometimes even expanding the provisions of the regulations. Several words or even a single word in the Treaty or in regulations may give rise to hundreds of pages of text (the above mentioned Commission Notice on the definition of relevant market consists of 58 paragraphs, that is 9 pages of text). I am unconvinced, however, that such an "inflation of soft law" facilitates compliance by entrepreneurs with competition law.

According to the Commission Notice, the relevant market within which to assess a given competition issue is established by the combination of the product and geographic markets.

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the

18 http://www.uokik.gov.pl/news.php?news_id=2011 (last accessed 31.3.2011).
19 http://www.uokik.gov.pl/news.php?news_id=991 (last accessed 31.3.2011).
20 OJ EC C 1997/372/5.

consumer, by reason of the products' characteristics, their prices and their intended use. Note the following examples:

- there is the banana market, not the fresh fruit market; the studies of the banana market show that on this market there is no significant long term cross–elasticity any more than there is any seasonal substitutability in general between the banana and all the seasonal fruits, as this only exists between the banana and two fruits (peaches and table grapes)[21];
- there is the pork market or the beef market, not the fresh meat market[22];
- there is the market of different payment card schemes (not including other means of payment such as distance payments, cash or cheque)[23].

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area. Geographically, we can distinguish different types of markets – from local through national and regional (e.g. European) to global.

According to the literature the relevant market may have **a temporal dimension in addition to the product and geographical dimension**[24]. The structure of the relevant market should be established at the moment of the action of the entrepreneur to be assessed in order to

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21 Judgment of ECJ of 14.2.1978, 27/76, United Brands Company and United Brands Continentaal BV v. Commission, ECR 1978/00207.

22 Commission decision of 9.03.1999 relating to a proceeding under Council Regulation (EEC) No 4064/89 (Case No. IV/M.1313 – Danish Crown /Vestjyske Slagterier), OJ L 2000/20/1 (see: p. 3–6).

23 Commission decision of 24.7.2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/29.373 – Visa International – Multilateral Interchange Fee), OJ L 2002/318/17. See: K. Tosza, *Payment Card Systems as an Example of Two–sided Markets – a Challenge for Antitrust Authorities*, "YARS" 2/2009, p. 134–136. See: also http://www.uokik.gov.pl/news.php?news_id=2045 (last accessed 31.3.2011).

24 See: P.J. Slot, A. Johnston, *An Introduction…*, p. 18–19; T. Skoczny [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warsaw, 2009, p. 216.

classify it as a violation of antitrust law or as non–violating behaviour. It is necessary to determine the entrepreneur's market share on that day, compared with the share of its competitors. While a number of markets have no tendency to structural changes and are characterised by relative stability, there may be situations in which the share of entrepreneur in the relevant market is subject to significant fluctuations over time. For example, an entrepreneur can gain a dominant position in the market (or the opposite – lose it) only temporarily in connection with periodic shortages of specific goods or services (e.g. fuel crisis[25]), another difficult economic situation, or events such as fairs, sports events, festivals, etc. As a result, a third dimension of the relevant market emerges, i.e. the temporal dimension. It is also possible to relate the temporal dimension of the relevant market to the duration of the market. This approach appears to be significant. There are in fact situations where separate markets arise which exist only for a short period[26].

The term "relevant market" is vital for the prohibition set out in Article 102 TFEU, i.e. prohibition of the abuse of a dominant position. You can expect that a competition authority will draw markets narrowly to facilitate a finding of dominance, while defendants will opt for a wider market definition to escape the application of Article 102 TFEU[27].

The concept of the market and the size of the market share also play an important role in applying the provisions on the prohibition of anti–competitive agreements (Article 101 TFEU) and in merger cases. To simplify, we can say that the smaller the share of undertaking in the relevant market, the less likely it is to come into conflict with antitrust law (however, a number of types of anti–competitive agreements are prohibited, regardless of the size of the parties' market share).

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25 Commission Decision of 19.4.1977 relating to a proceeding under Article 86 of the EEC Treaty (IV/28.841 – ABG/Oil companies operating in the Netherlands), OJ L 1977/117/1.

26 A. Piszcz, *Czynnik czasu w prawie antymonopolowym* [in:] C. Kosikowski (ed.), *Czas w prawie*, „Białostockie Studia Prawnicze" 7/2010, p. 86–87.

27 D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law: Text and Materials*, New York, 2006, p. 1026.

2.2. EU Member States and others

The concept of relevant market is not the original European idea. The application of the American Sherman Antitrust Act required the definition and identification of relevant markets. Without this it would be impossible to measure monopoly power[28].

National systems of competition law in Europe also use the concept of the market or the relevant market. The concept of the market ("market") is used by, among others, the UK Competition Act of 1998 and the Spanish Competition Act of 2007, but they do not define it. In the UK, NCA passed the guideline "Market Definition: Understanding Competition Law"[29] following a similar approach to the European Commission's Notice on market definition (see part III paragraph 2.1. above).

The Czech APC of 2001 in Article 2(2) defines – after the concept of undertaking – the relevant market as "the market of goods, which are identical, comparable or mutually interchangeable from the point of view of their characteristics, price and their intended use in an area, where the conditions of competition are sufficiently homogenous and which can be clearly distinguished from neighbouring areas". The glossary included in the Czech APC of 2001 is ended with this definition.

In Poland, however, the relevant market (rynek właściwy) is defined in Article 4 subparagraph 9 ACCP as "a market of goods, which by reason of their intended use, price and characteristics, including quality, are regarded by the buyers as substitutes, and are offered in the area in which, by reason of their nature and characteristics, the existence of market access barriers, consumer preferences, significant differences in prices and transport costs, the conditions of competition are sufficiently homogeneous". In Article 4 subparagraph 7 ACCP goods were defined as items as well as all forms of energy, securities and other property rights, services as well as construction works.

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28 K.N. Hylton, *Antitrust Law…*, p. 230.

29 http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft403.pdf (last accessed 31.3.2011).

Among the solutions mentioned above, Czech and Polish systems draw attention because the basic definitions related to competition law are included in acts, i.e. "hard laws", which are applied directly and universally applicable. In the other jurisdictions studied, the basic definitions are formulated rather in the "soft law"[30] or case law. This is the result of different legal cultures of both groups of countries referred to above. In the Czech Republic and Poland, formalistic trends (the formal, dogmatic, positivistic approach) are stronger than anti–formalist trends.

30 See also: M.W. Hesselink, *The New European Private Law: Essays on the Future of Private Law in Europe*, Hague, 2002, p. 65.

Part 4

PROHIBITION OF ANTI–COMPETITIVE AGREEMENTS

1. Conditions of the prohibition

1.1. European Union

According to Article 101(1) TFEU "the following shall be prohibited as incompatible with the internal market: all **agreements** between undertakings, **decisions by associations** of undertakings and **concerted practices** which **may affect trade between Member States** and which have as their **object or effect** the prevention, restriction or distortion of competition within the internal market (…)"[1]. After this most important part of the provision there is a sample list of prohibited practices, i.e. " in particular those which:

a) directly or indirectly fix purchase or selling prices or any other trading conditions;

b) limit or control production, markets, technical development, or investment;

c) share markets or sources of supply;

d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

1 All emphases added.

On the other hand, according to Article 101(2) TFEU, any agreements or decisions prohibited pursuant to Article 101(1) TFEU shall be automatically void.

Over a period of the above mentioned prohibition in the EU (and previously the Community) a rich jurisprudence has accumulated around the various concepts used in its formulation. A number of decisions refer to the concept of "**agreements**". The ECJ judgments show that:

- in order to constitute an agreement, it is sufficient that an act or conduct which is apparently unilateral be the expression of the concurrence of wills of at least two parties, the form in which that concurrence is expressed not being by itself decisive (judgment of July 13, 2006, C–74/04 P, Commission v. Volkswagen AG)[2],
- Article 101 TFEU (ex Article 81 TEC) is applicable where the parallel conduct of a number of undertakings was due originally to an agreement and where it continues after the termination of that agreement without its replacement by a new agreement. With regard to agreements which are no longer in force, it is sufficient, for Article 101 TFEU to be applicable, that they continue to produce their effects after they have formally ceased to be in force (judgment of July 3, 1985, 243/83, SA Binon and Cie v. SA Agence et messageries de la presse[3]; judgment of June 15, 1976, 86/75, EMI Records Limited v. CBS Grammofon A/S[4]),
- a gentlemen's agreement constitutes a measure which may fall under the prohibition contained in Article 101 TFEU (ex Article 81 TEC) if its clauses amount to a faithful expression of the joint intention of the parties (judgment of July 15, 1970, 45/69, Boehringer Mannheim GmbH v. Commission)[5].

As for **the decisions by associations of undertakings** the ECJ explained that "a recommendation which emanates from an association

2 ECR 2006/7B/I–06585.
3 ECR 1985/6/02015.
4 ECR 1976/5/00871.
5 ECR 1970/2/00769.

of undertakings and which, regardless of its legal status, is an accurate statement of its policy of coordinating the conduct of its members on the market, constitutes a decision of an association of undertakings" (judgment of January 27, 1987, 45/85, Verband der Sachversicherer e.V. v. Commission)[6]. Similarly to the judgment of October 29, 1980 (joined cases 209/78 to 215/78 and 218/78, Heintz van Landewyck Sarl and others v. Commission[7]) the ECJ considered "a recommendation made by an association of undertakings and constituting a faithful expression of the members' intention to conduct themselves compulsorily on the market in conformity with the terms of the recommendation" as the decision of an association of undertakings.

As for **the concerted practices** the Court states that:

- by its very nature, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination, which becomes apparent from the behaviour of the participants. Although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market. This is especially the case if the parallel conduct is such as to enable those concerned to attempt to stabilize prices at a level different from that to which competition would have led, and to consolidate established positions to the detriment of effective freedom of movement of the products in the common market and of the freedom of consumers to choose their suppliers (judgment of July 14, 1972, 48/69, Imperial Chemical Industries Ltd. v. Commission)[8],
- the criteria of coordination and cooperation necessary for determining the existence of a concerted practice, far from requiring an actual "plan" to have been worked out, are to be understood

6 ECR 1987/1/00405.
7 ECR 1980/7/03125.
8 ECR 1972/00619.

in the light of the concept inherent in the Treaty provisions on competition, according to which each trader must determine independently the policy which he intends to adopt on the common market and the conditions which he intends to offer to his customers. Although it is correct to say that this requirement of independence does not deprive traders of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such traders, the object or effect of which is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market (judgment of May 28, 1998, C–7/95 P, John Deere Ltd v. Commission[9]; judgment of July 14, 1981, 172/80, Gerhard Züchner v. Bayerische Vereinsbank AG[10]),

– those criteria are not satisfied in the case of price announcements which are made by producers to users and which, in themselves, constitute market behaviour which does not lessen each undertaking's uncertainty as to the future attitude of its competitors since, at the time when each undertaking engages in such behaviour, it cannot be sure of the future conduct of the others (judgment of March 31, 1993, joined cases C–89/85, C–104/85, C–114/85, C–116/85, C–117/85 and C–125/85 to C–129/85, A. Ahlström Osakeyhtiö v. Commission)[11].

For purposes of this study all three categories together (agreements between undertakings, decisions by associations of undertakings and concerted practices) will be referred to as agreements or (collusive) practices.

For the agreements to be prohibited by Article 101 TFEU they must have as their **object or effect** the prevention, restriction or distortion of competition within the internal market (the prevention, restriction

9 ECR 1998/I–03111.
10 ECR 1981/6/02021.
11 ECR 1993/3/I–01307.

or distortion of competition will be all referred to as "restriction of competition"). This condition of the prohibition went through a detailed analysis of jurisprudence. The ECJ ruled out the possibility of interpreting the phrase "object or effect" as a conjunction, as the Italian version of the Treaty provisions suggested. In light of the jurisprudence of the Court there is no doubt that for there to be an infringement of Article 101 TFEU (ex Article 81 TEC), it is not necessary that an agreement should have both an anti–competitive object and an anti–competitive effect. The national version cannot prevail on its own over all the other language versions which, through the use of the word "or", show that the condition in question is alternative and not cumulative in nature. The uniform interpretation of EU law provisions requires that they be interpreted and applied in the light of the versions established in the other EU languages (see judgment of July 17, 1997, C–219/95 P, Ferriere Nord SpA v. Commission)[12]. So for the agreement to be covered by the prohibition of Article 101 TFEU, it is enough that it:

– aims at the restriction of competition, even if this goal is not achieved, or
– results in the restriction of competition, even if it was not the object of the agreement, or
– aims at the restriction of competition and produces the intended effect.

In light of the jurisprudence of the CFI, the fact that a clause in an agreement between undertakings, whose object is to restrict competition, has not been implemented by the contracting parties is not sufficient to remove it from the prohibition (judgment of July 14, 1994, T–77/92, Parker Pen Ltd v. Commission)[13]. The CFI went in the same direction in the subsequent judgment, according to which in order to apply the prohibition there is no need to take account of the concrete effects of an agreement when it is apparent that it has as its object the prevention, restriction or distortion of competition within the internal market. An undertaking which participates in an agreement sharing markets is not

12 ECR 1997/I–04411.
13 ECR 1994/II–00549.

exculpated by the fact that it does not subsequently observe the agreed prices and quotas (judgment of April 6, 1995, T–152/89, ILRO SpA v. Commission)[14].

In a case where it is accepted that the agreement does not have as its object a restriction of competition, the effects of the agreement should be considered. According to the CFI in such cases we should examine the impact of the agreement on existing and potential competition and the competition situation in the absence of the agreement, the two factors being intrinsically linked (judgment of May 2, 2006, T–328/03, O2 GmbH & Co. OHG v. Commission)[15].

Another condition of the prohibition is the fact that the agreement may affect trade between Member States. This condition, explained initially by case law, has the interpretation in the Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty[16]. Firstly, the concept of "trade" is not limited to traditional exchanges of goods and services across borders. It is a wider concept, covering all cross–border economic activity including establishment. This interpretation is consistent with the fundamental objective of the Treaty to promote free movement of goods, services, persons and capital[17]. Secondly, the requirement that there must be an effect on trade "between Member States" implies that there must be an impact on cross–border economic activity involving at least two Member States. It is not required that the agreement or practice affect trade between the whole of one Member State and the whole of another Member State[18]. Thirdly, the notion "may affect" implies that it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States[19].

14 ECR 1995/II–01197.
15 ECR 2006/II–01231.
16 OJ C 2004/101/81.
17 See: section 19 of the Notice.
18 See: section 21 of the Notice.
19 See: section 23 of the Notice and e.g. the judgment of ECJ of 11.2.1985, 42/84, Remia BV v. Commission, ECR 1985/02545.

Not every effect of an agreement on trade between Member States decides about the application of Article 101(1) TFEU, but only an appreciable effect. The criteria for division of agreements into those with high impact on trade between Member States and the ones without such impact are described in a rather complex way in the aforementioned Commission Notice[20], which develops the so–called "not appreciably affecting trade" rule (NAAT rule). To put it simply, agreements are not capable of appreciably affecting trade between Member States when the following cumulative conditions are met:

a) the aggregate market share of the parties on any relevant market within EU affected by the agreement does not exceed 5%, and

b) in the case of horizontal agreements, the aggregate annual EU turnover of the undertakings concerned in the products covered by the agreement does not exceed 40 million euro (in the case of agreements concerning the joint buying of products the relevant turnover shall be the parties' combined purchases of the products covered by the agreement), and in the case of vertical agreements, the aggregate annual EU turnover of the supplier in the products covered by the agreement does not exceed 40 million euro (in the case of licence agreements the relevant turnover shall be the aggregate turnover of the licensees in the products incorporating the licensed technology and the licensor's own turnover in such products; in cases involving agreements concluded between a buyer and several suppliers, the relevant turnover shall be the buyer's combined purchases of the products covered by the agreements).

Vertical agreements – as opposed to **horizontal agreements** – are agreements between undertakings which do not operate on the same level of production or distribution process.

If the agreement does not affect trade between Member States, it has to be assessed whether or not it violates the national antitrust laws of the Member States. An interesting solution was developed in this field in Great Britain. The national antitrust law in Great Britain has

20 See: section 52 of the Notice.

been constructed in such a way that its main elements are essentially the same as in the case of EU antitrust law. Therefore, British courts usually do not have to decide by which system the agreement is actually governed. In other words, the British courts need not determine whether the condition of the effect on trade between Member States has been satisfied[21].

1.2. EU Member Sates and others

The EU Member States, in principle, construct in their national antitrust laws a prohibition of anti–competitive agreements adopting a model contained in Article 101(1) TFEU. Section 2(1) of the UK Competition Act of 1998 and Article 3(1) of Czech APC, 2001, list the same three categories of prohibited practices as set out in Article 101(1) TFEU (see paragraph 1.1. above). The Spanish Competition Act of 2007, Article 1(1) lists agreements, collective decisions or recommendations and concerted or consciously parallel practices. However, in the case of Poland, Article 6 section 1 ACCP mentions only a prohibition of agreements. Note, however, that in Article 4 subparagraph 5 ACCP agreements are defined as:

a) agreements concluded between undertakings, between associations thereof and between undertakings and their associations, or certain provisions of such agreements,
b) concerted practices undertaken in any form by two or more undertakings or associations thereof[22],
c) resolutions or other acts of associations of undertakings or their statutory organs.

All national laws mentioned here use **the concept of "object or effect**". They use also the concepts like restriction or distortion of competition, however, presenting a different approach when it comes to the territory, which restriction or distortion of competition refers to. British law uses the words "within the United Kingdom", Polish law

21 P.J. Slot, A. Johnston, *An Introduction*…, p. 55–56.
22 See i.a.: D. Miąsik, *Solvents to the Rescue – a Historical Outline of the Impact of EU Law on the Application of Polish Competition Law by Polish Courts*, "YARS" 3/2010, p. 25.

talks about "relevant market", the Spanish one – about "all or part of the national market", and the Czech one does not define it at all. British law, unlike laws of the other Member States discussed here, and similarly to the EU law, contains a condition of prohibition based on the fact that the agreement "may affect trade within the United Kingdom".

The laws of the Member States also duplicate a sample catalogue of prohibited practices (see paragraph 1.1. above). In some of them the catalogue is wider than the catalogue of Article 101(1) TFEU. For example, Polish law lists two additional examples of categories of prohibited agreements:

- limiting access to the market or eliminating from the market undertakings which are not parties to the agreement,
- collusion between undertakings entering a tender, or by those undertakings and the undertaking being the tender organiser, of the terms and conditions of bids to be proposed, particularly as regards the scope of works and the price.

The Czech law mentions one additional example of the category of prohibited agreements, namely obligation of the parties to the agreement to refrain from trading or other economic cooperation with undertakings not being party to the agreement, or to otherwise harm such undertakings (group boycott).

For comparison, see the prohibition of anti–competitive agreements in the USA – part I paragraph 1.1.2. and, in particular, the cited Section 1 of the Sherman Antitrust Act. Section 1 is open–ended and broadly worded and as such amounts to a legislative invitation to create a sort of common law. It prohibits contracts restraining trade or commerce but at the same time it does not indicate what those are. Section 1 cannot be interpreted literally, as every contract restrains trade in the sense that it precludes a later transaction. If I sell certain goods to X, I will be restrained from selling them to Y. At the heart of Section 1 there is a basic preference for open competition as well as hostility toward cartels and concern over the effects of cartels (a cartel is a group of undertakings that seeks to increase profits by restricting price and

output competition among themselves)[23]. However, the Act does not provide the judiciary with much more guidance. Therefore, U.S. courts are not really interpreting the Act but they are developing a common law of antitrust. 120 years after the Act was passed, its text is practically irrelevant and antitrust law consists of the body of case law. And the particular rules arising from the judicial decisions have developed over the years without involvement of the legislature[24]. For example in terms of U.S. jurisprudence (like Article 101 TFEU and the case law under it in Europe) prohibition also includes consciously parallel conduct[25] (in Europe it is included in the category of "concerted practices", and in the USA it is a conspiracy).

Although the U.S. antitrust law uses other concepts (contract, combination, conspiracy), European law refers to many concepts that previously existed in American law. It should be noted that Article 101 TFEU – unlike Section 1 of the Sherman Antitrust Act – includes a sample catalogue of prohibited practices.

2. Exclusions and exemptions

2.1. European Union

2.1.1. De minimis rule

Prohibition of anti–competitive agreements is not absolute. Some agreements meeting the conditions of Article 101(1) TFEU are not able to produce anti–competitive effects. They are discussed in **the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)**[26]. According to de minimis rule, agreements between undertakings

23 K.N. Hylton, *Antitrust Law…*, p. 68. However, some authors are afraid that the only thing one can know for certain about the goals of the legislature in respect of the Sherman Antitrust Act is that the legislature wanted the courts to work out the relevant details; E.H. Hanks, M.E. Herz, S.S. Nemerson, *Elements of…*, p. 316.

24 E.H. Hanks, M.E. Herz, S.S. Nemerson, *Elements of…*, p. 316.

25 See: Interstate Circuit v. United States, 306 U.S. 208 (1939); American Tobacco v. United States, 328 U.S. 781 (1946).

26 OJ C 2001/368/13.

which affect trade between Member States do not appreciably restrict competition within the meaning of Article 101(1) TFEU:

a) if the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of these markets (**agreements between competitors**); or

b) if the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of these markets (**agreements between non–competitors**).

In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non–competitors, the 10% threshold is applicable[27]. Where in a relevant market competition is restricted by the cumulative effect of agreements for the sale of goods or services entered into by different suppliers or distributors (cumulative foreclosure effect of parallel networks of agreements having similar effects on the market), the market share thresholds are reduced to 5%, both for agreements between competitors and for agreements between non–competitors. Individual suppliers or distributors with a market share not exceeding 5% are in general not considered to contribute significantly to a cumulative foreclosure effect. A cumulative foreclosure effect is unlikely to exist if less than 30% of the relevant market is covered by parallel (networks of) agreements having similar effects[28]. Agreements are not restrictive of competition if the market shares do not exceed the thresholds of respectively 10%, 15% and 5% set out above during two successive calendar years by more than 2 percentage points[29].

The de minimis rule does not apply to agreements containing any of the hardcore restrictions mentioned in Section 11 of the Commission Notice.

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27 See: section 7 of the Notice.
28 See: section 8 of the Notice.
29 See: section 9 of the Notice.

2.1.2. Individual and block exemptions

2.1.2.1. Individual exemptions

Some agreements meeting the conditions of Article 101(1) TFEU may generate objective economic benefits (only objective benefits can be taken into account), which lessen the negative effects of restricting competition. Therefore, in accordance with Article 101(3) TFEU, the provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Until April 30, 2004 under these provisions before entering into an agreement meeting the conditions for **individual exemption** the interested entrepreneurs were obliged to notify the Commission of the intention to conclude an agreement. They were obliged to wait till the Commission issued a decision making the exemption. Changes in this area have been introduced on May 1, 2004, when Regulation 1/2003 came into force. In the light of Article 1(2) of Regulation 1/2003 agreements, decisions and concerted practices caught by Article 101(1) TFEU which satisfy the conditions of Article 101(3) TFEU shall not be prohibited, no prior decision to that effect being required. To most, this seems a salutary change.

The burden of proof was adjusted to the above. In the light of Article 2 of Regulation 1/2003 in any national or EU proceedings for the application of Article 101 TFEU, the burden of proving:

- an infringement of Article 101(1) TFEU shall rest on the party or the authority alleging the infringement;
- a fulfilment of the conditions of Article 101(3) TFEU shall rest on the undertaking or association of undertakings claiming the benefit of that paragraph.

The Commission presented its interpretation of the Treaty provisions on the individual exemption in **the Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty**[30]. It discusses the following **conditions for individual exemption (two positive and two negative)** :

1) **efficiency gains** (e.g. cost efficiencies or qualitative efficiencies) – e.g. cost efficiencies flowing from agreements between undertakings that originate from a number of different sources (one very important source of cost savings is the development of new production technologies and methods), synergies resulting from an integration of existing assets, new or improved goods and services, production of higher quality products or products with novel features;
2) **fair share for consumers** – consumers can be undertakings or final consumers (i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession); the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement; in making the assessment it must be taken into account that the value of a gain for consumers in the future is not the same as a present gain for consumers;
3) **indispensability of the restrictions** – the Commission will intervene where it is reasonably clear that there are realistic and attainable alternatives; the parties must explain and demonstrate

30 OJ C 2004/101/97.

why such seemingly realistic and significantly less restrictive alternatives to the agreement would be significantly less efficient;

4) **no elimination of competition** – the last condition recognises the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation.

Entrepreneurs have to prove before a competition authority that they meet the conditions for individual exemption, and the authority has to verify if there is a sufficient causal link between the agreement restricting competition and claimed efficiencies.

Block exemptions have as their purpose the creation of a safe harbour within which undertakings enjoy a degree of certainty as regards the compliance of agreements between them with Article 101(3) TFEU. Block exemptions are established for those areas where agreements generally produce greater benefits than anti–competitive effects. These exemptions are chronologically "younger" than individual exemptions. The idea of block exemptions was born when it became clear that so many entrepreneurs were applying for an individual exemption that the Commission could not deal with the flood of cases[31].

According to Article 103(1) TFEU, the appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament. Such regulations are also issued by virtue of the enabling regulation, by the Commission. Under Article 103(2)(b) TFEU, the regulations or directives referred to in paragraph 1 shall be designed in particular to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other.

The above mentioned institutions do not establish rules of block exemptions to last forever. As block exemption regulations are adopted

31 P.J. Slot, A. Johnston, *An Introduction…*, p. 63.

for a specified period the European legislature is able to adapt the rules of block exemptions to the demands of changing circumstances. And changing circumstances may cause the legislature to have to revise, tighten up or even extend the current regulation.

Currently[32] block exemption regulations, issued by the Commission, are applied to the following categories of agreements:

- vertical agreements and concerted practices in the motor vehicle sector – Regulation 461/2010 (shall expire on May 31, 2023)[33],
- research and development agreements – Regulation 1217/2010 (shall expire on December 31, 2022)[34],
- specialisation agreements – Regulation 1218/2010 (shall expire on December 31, 2022)[35],
- vertical agreements and concerted practices – Regulation 330/2010 (shall expire on May 31, 2022)[36],
- agreements, decisions and concerted practices in the insurance sector – Regulation 267/2010 (shall expire on May 31, 2017)[37],
- technology transfer agreements – Regulation 772/2004 (shall expire on April 30, 2014)[38].

Regulations specify the conditions for exemption, and the clauses that if contained in the agreement violate Article 101(1) TFEU (**so–called black list**). In the older regulations there were also placed lists of clauses which were considered common in contracts of a certain category and not limiting the competition (in normal conditions), i.e. **the co–called white list**. Currently, the trend is to withdraw from the approach of enumerating the white clauses. It happens, though, that the clauses are enumerated in the regulations that indeed restrict competition (slightly), but at the same time state the condition of securing the desired benefits for the parties and consumers, and so they

32 As of 31.3.2011.
33 OJ L 2010/129/52.
34 OJ L 2010/335/36.
35 OJ L 2010/335/43.
36 OJ L 2010/102/1.
37 OJ L 2010/83/1.
38 OJ L 2004/123/11.

are a necessary restriction on competition (**the so–called ancillary restraints**).

According to Article 29(1) of Regulation 1/2003, where the Commission, empowered by a Council Regulation to apply Article 101(3) TFEU by regulation, has declared Article 101(1) TFEU inapplicable to certain categories of agreements, decisions by associations of undertakings or concerted practices, it may, acting on its own initiative or on a complaint, **withdraw the benefit of such an exemption Regulation** when it finds that in any particular case an agreement, decision or concerted practice to which the exemption Regulation applies has certain effects which are incompatible with Article 101(3) TFEU. Where, in any particular case, agreements, decisions by associations of undertakings or concerted practices to which a Commission Regulation referred to in paragraph 1 applies have effects which are incompatible with Article 101(3) TFEU in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of the Regulation in question in respect of that territory.

In order to make the interpretation of the Regulations concerning block exemptions easier for entrepreneurs, the Commission has issued:

- Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements[39],
- Guidelines on Vertical Restraints[40],
- Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements[41].

39 OJ C 2011/11/1.
40 OJ C 2010/130/1.
41 OJ C 2004/101/2.

2.1.3. Conclusion

As said earlier, **since May 1, 2004, undertakings have been independently verifying whether certain behaviour violates the prohibition of Article 101(1) TFEU**. In this paragraph I show you, step by step, how to verify this. First of all, it is required to assess if a behaviour is capable of appreciably affecting trade between Member States in the meaning of the Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (see paragraph 1.1. above). To put it as succinctly as possible: if the answer to the above question is yes, it is required to verify whether:

- this behaviour is capable of appreciably restricting competition in the meaning of the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (see paragraph 2.1.1. above);
- it is outside the scope of block exemption regulations.

If the answer to these questions is yes, you must check the feasibility of applying an individual exemption under Article 101(3) TFEU. It is worth looking for similar cases in the Commission's decisions and the judgments of CJEU and GC. Another possibility is to seek **informal guidance of the Commission** under the Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)[42]. It is worth remembering that[43]:

- the Commission will not consider hypothetical questions and will not issue guidance letters on agreements or practices that are no longer being implemented by the parties; undertakings may, however, present a request for a guidance letter to the Commission in relation to questions raised by an agreement or practice that they envisage, i.e. before the implementation of that agreement or practice; in this case the transaction must have reached a sufficiently advanced stage for a request to be considered;

42 OJ C 2004/101/78.

43 See: sections 10–11 of the Notice.

– a request for a guidance letter is without prejudice to the power of the Commission to open proceedings in accordance with Regulation 1/2003 with regard to the facts presented in the request.

2.2. EU Member States and others

2.2.1. De minimis rule

The EU Member States in national antitrust laws, in principle, introduce a de minimis rule, but choose different methods in this field.

In Great Britain de minimis rule is applied in accordance with the position under EU law, described in paragraph 2.1.1. above, according to Section 60 of the Competition Act of 1998 (as to this provision, see part III paragraph 1.2. above).

Article 5 of the Spanish Competition Act of 2007 states that the prohibition of anti–comptitive agreements shall not apply to conduct which, due to their scant importance, are not capable of significantly affecting competition. The criteria for demarcating conduct of minor importance shall be determined according to regulations, taking into account, among others, the market share. What is more, Article 53 of the Spanish Competition Act of 2007 states that the resolutions of the Council of the National Competition Commission may declare the existence of conduct that, due to its scant importance, is not capable of significantly affecting competition. The Spanish government has prepared "the Defence of Competition Regulation"[44], approved by Royal Decree 261/2008 of February 22, 2008. Articles 1–3 of the Regulation deal with conducts of minor importance. The Regulation defines the market share thresholds similar to those of the EU law (see paragraph 2.1.1. above). Like the EU law, it enumerates the hardcore restrictions, to which de minimis rule does not apply. Moreover, it states that the Council of the National Competition Commission may waive application of the prohibition to conducts which, having regard to their legal and economic context, are not capable of having a significant

44 In English at: http://www.cncompetencia.es/Inicio/Legislacion/NormativaEstatal/tabid/81/Default.aspx (last accessed 31.3.2011).

effect on competition. Further, the Council, having heard the Defence of Competition Council, may approve Communications to develop the criteria for delimiting the conducts of minor importance.

Similarly, Article 3(1) of the Czech APC of 2001 provides that agreements with insignificant impact on competition shall not be prohibited. Detailed rules of determining whether an agreement would affect competition in a significant or insignificant way are set by Notice of the Office for the Protection of Competition on agreements of minor importance which do not appreciably restrict competition (de minimis)[45]. The Notice establishes market share thresholds similar to those of the EU law as well as contains a list of the hardcore restrictions to which de minimis rule does not apply similar to that of the EU law.

By contrast, in Poland Article 7 section 1 ACCP states that the prohibition of agreements shall not apply to agreements concluded between:

1) competitors whose combined market share in the calendar year preceding the conclusion of the agreement does not exceed 5%;
2) undertakings which are not competitors, if the market share of any of them in the calendar year preceding the conclusion of the agreement does not exceed 10%.

Market share thresholds are therefore lower than in the EU law and the laws in the Member States discussed above. Polish law is therefore less favourable for entrepreneurs. Article 7 section 2 ACCP lists the hardcore restrictions, to which de minimis rule does not apply. They include fixing prices and other trading conditions, limiting or controlling production, sale, technical development or investments, dividing markets, bid–rigging.

45 http://www.compet.cz/en/competition/legislation/ (last accessed 31.3.2011).

2.2.2. Individual and block exemptions

The EU Member States generally introduce provisions on individual exemptions in their national antitrust laws.

Section 9 of the UK Competition Act of 1998, Article 3(4) of the Czech APC of 2001 and Article 8, section 1 of the Polish ACCP follow the EU solution. Similarly, Article 1(3) of the Spanish Competition Act of 2007 reproduces the solution of Article 101(3) TFEU, though it clearly stresses that the individual exemption applies without the need for any prior decision for this purpose.

Sometimes, the Member States introduce block exemptions in their national antitrust laws. The solutions used by Member States are different.

Some Member States introduce **a reference to the mutatis mutandis application of regulations on block exemptions issued by the European Commission** to certain categories of agreement.

This solution was introduced in the UK by Section 10 of the Competition Act of 1998 as **the so–called parallel exemptions**[46]. This way an agreement is exempt from the prohibition, even if it does not affect trade between Member States, but corresponds to other conditions of EU Regulations. It should be added that Section 6 of the Act allows the Secretary of State for Trade and Industry, after the recommendation of the OFT, to accept other block exemptions. Due to the parallel exemptions system, so far only one such other exemption has come into force dealing with the system for public transport ticketing schemes[47].

In the light of Article 4 of the Czech APC of 2001 the prohibition shall not apply to agreements that may not effect trade between Member States pursuant to the Article 101 TFEU, which, however, fulfil other conditions laid down in block exemptions adopted on the basis of Article 103(1) TFEU in order to implement Article 101(3) TFEU by relevant Commission or Council Regulations, or in the exemption for the agriculture sector. The Office for the Protection of

46 See: P.J. Slot, A. Johnston, *An Introduction…*, p. 65.
47 *Ibidem*

Competition may also grant block exemptions to other categories of agreements, provided it is proved that the distortion of competition to which the block exemption would lead is prevailed by benefit for other participants of the market, in particular consumers. Moreover, the Act reserves for the Czech NCA the right to withdraw the benefit resulting from the exemption – modelled on the European Commission's powers – provided that, as a consequence of market development, an agreement subject to such exemption would not meet the conditions of individual exemption.

Similarly, in the light of Article 1(4) of the Spanish Competition Act of 2007, the prohibition shall not apply to agreements that comply with the provisions set out in the EU Regulations on block exemptions, including when the corresponding conduct may not affect trade between EU Member States. Moreover, the Government may also declare through Royal Decree the application of individual exemptions to certain categories of conduct, prior report by the Competition Council and the National Competition Commission.

When we move our attention from the above–presented group of solutions to the Polish solution, we will find out that it is significantly different. Instead of referring to the mutatis mutandis application of regulations issued by the European Commission, **the Polish legislature issues their own regulations**. According to Article 8 section 3 ACCP, the Council of Ministers may, by way of a regulation, exempt from the prohibition certain types of agreements which meet the conditions of individual exemption, taking into consideration the benefits resulting from such types of agreements. In the regulation, the Council of Ministers shall specify:

1) conditions which are to be satisfied for the agreement to be considered exempted from the prohibition;
2) clauses the existence of which in the agreement constitutes the infringement of the prohibition;
3) a period during which the exemption shall apply and may specify clauses the existence of which in the agreement is not considered to infringe.

The Council of Ministers adopted regulations referring to all these categories of agreements which are listed in paragraph 2.1.2. above as the subject of some of the European Commission Regulations.

From the perspective of entrepreneurs the Polish solution does not compare favourably against the British, Spanish or Czech solutions. If, instead of two different acts, an entrepreneur needed to know one act and adapt his actions to the requirements of only one act, he would save time and costs of advisory services. However, from the perspective of the national legislature, adopting UK solutions would mean no risk of incompatibility of national legislation with the European standard for antitrust protection[48]. In Poland, the discrepancy between the conditions of the national exemption and the conditions of exemptions in the EU can be seen, in particular, when the new EU regulation comes into force, and in the Polish legal system there is still a regulation designed on the basis of the EU regulation which is no longer in force. The Polish legislature constructs the national regulation in such a way that the Polish regulation expires one year later than the EU regulation. This difference allows the Polish legislature to take into account any changed approach of the EU legislature to the block exeptions of a certain category of agreements in the legislative process.

It has to be added that **Polish block exemptions cannot be withdrawn** by the President of the OCCP or the Council of Ministers. Furthermore, it should be emphasised that in Poland there are no documents based on the EU model – the Guidelines on Vertical Restraints or the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (see paragraph 2.1.2. above). However, Polish courts recognised that they could use the EU guidelines in national cases in the absence of domestic legislation (even in cases before the date of the Polish accession to the EU)[49]. A case concerning an agency agreement was resolved this way, taking into account the fact that the Polish legislature had not enacted domestic regulations regarding the

48 *Ibidem*

49 M. Kolasiński, *The economic approach in Polish courts: permitted agency agreements or prohibited price fixing? Case comment to the judgment of the Appeal Court in Warsaw of 13 February 2007 – Roche and Hand–Prod (Ref. No. VI AcA 819/06)*, “YARS” 1/2008, p. 245.

exclusion of agency agreements from the prohibition of competition restricting agreements while they were dealt with by the Notice[50].

2.2.3. Other exclusions, rule of reason and conclusion

The de minimis rule, individual and block exemptions are not the only solutions that the Member States' laws provide for in order to exclude certain agreements from the prohibition of anti–competitive agreements. For example, Section 3 of the UK Competition Act of 1998 provides for a number of other exclusions, which were developed in schedules to the Act. Schedule 1 excludes agreements to the extent that they result in mergers and concentrations; schedule 2 excludes situations subject to competition scrutiny under other enactments and schedule 3 covers exclusions for planning obligations and other general exclusions[51].

Contrary to the literal meaning of Section 1 of the Sherman Antitrust Act ("every agreement"), American prohibition of anti–competitive agreements is not absolute, either. The U.S. case law supports the view that Section 1 prohibits only "unreasonable" restraints on competition[52]. This means that the conduct must have a "substantial" or "significant" adverse effect on market–wide competition. When assessing whether an agreement "unreasonably" restrains competition courts apply one of three rules: **the per se rule, the rule of reason, or an intermediate standard (the so–called "quick look")**[53].

For **the per se standard** to be applied, the agreement must be of a nature or character that always, or almost always, would unreasonably restrain competition without offsetting pro–competitive effects[54]. In these cases the courts do not examine the relevant market or the pro–competitive effects of the agreement.

Unlike the per se rule, in the case of **the rule of reason** courts consider several factors, including relevant market, competitive

50 *Ibidem*
51 P.J. Slot, A. Johnston, *An Introduction…*, p. 53–54.
52 See: Leegin Creative Leather Prods. v. PSKS Inc., 551 U.S. 877, 885 (2007).
53 American Bar Association, *Antitrust Health…*, p. 48.
54 K.N. Hylton, *Antitrust Law…*, p. 104 and next.

conditions in the market before and after the restraint was imposed, as well as the restraint's history, purpose and effect[55]. The agreement is unlawful only if the agreement's anti–competitive effects predominate over the agreement's pro–competitive effects.

The "quick look" treats the agreement's pro–competitive effects as a starting point. If the defendant fails to raise plausible pro–competitive effects, the court will not examine the relevant market or the impact of the agreement on competition in the market[56].

In the United States there is **no legislation which would allow individual exemption**, as is the case of Article 101(3) TFEU.

As for the possibility of applying the rule of reason in Europe, one can notice two positions. According to the CFI opinion expressed in the judgment of September 18, 2001 (T–112/99, Métropole Télévision et al v. Commission)[57], "the existence of a rule of reason in Community competition law cannot be upheld". In my opinion, there are no bases in Europe to use US–style rule of reason in the application of competition law by the competition authorities or the courts. Another position assumes that some kind of rule of reason is constituted by European individual exemptions[58]. However, on the one hand, it is claimed that Article 101 TFEU (as well as Article 6 ACCP in Poland) contains no per se prohibitions because all agreements are theoretically susceptible to exemption based on the rule of reason[59]. On the other hand, there is an opinion that the practices mentioned in Article 6 ACCP, such as fixing prices and other trading conditions, limiting or controlling production, sale, technical development or investments, dividing markets and bid–rigging, are outside the scope of not only the de minimis rule, but also individual and block exemptions[60].

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55 See: Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).
56 American Bar Association, *Antitrust Health…*, p. 54–56.
57 ECR 2001/9–10/II–02459.
58 R. Molski, *Polish Antitrust Law in its Fight Against Cartels – Awaiting a Breakthrough*, "YARS" 2/2009, p. 53; A. Fornalczyk, *Economic Approach to Counteracting Cartels*, "YARS" 2/2009, p. 38.
59 *Ibidem*, p. 53–54.
60 A. Fornalczyk, *Economic Approach…*, p. 38.

In Europe, the rule of reason, in principle, is not treated as a justification of the so–called "crisis cartels". Already in the 1980s the European Commission responded to the formation of "crisis cartels"[61]. The Commission applied the individual exemption to:

– an agreement to make specific production cutbacks to deal with the overcapacity that the industry suffered from (Commission Decision of July 4, 1984)[62],
– a market–sharing agreement that enabled the parties to eliminate underutilised capacity, improve unit costs and eliminate losses (Commission Decision of July 19, 1984)[63].

Yet, the Commission – under its Guidelines on the Application of Article 81(3) of the EC Treaty[64] – has not made any statements that would indicate its position in the economic downturn. Thus, the exemption criteria must be construed narrowly, as usually. Similarly, the availability of exemption for crisis cartels under Polish law (Article 8 ACCP) is in principle limited[65].

3. Some types of prohibited practices

3.1. Price–fixing

The EU and Member States laws prohibit **practices which directly or indirectly fix purchase or selling prices or any other trading conditions**. Price fixing practices are considered to be particularly harmful violations of competition. For example, in the judgment of February 23, 1994 (joined cases T–39/92 and T–40/92, Groupement des Cartes Bancaires "CB" and Europay International SA v. Commission)[66] the CFI stated: "By subscribing to the obligation to charge to traders affiliated to them a commission on the collection of foreign Eurocheques

61 R. Wesseling, *The Modernisation of EC Antitrust Law*, Portland, 2000, p. 38.
62 OJ L 1984/207/18.
63 OJ L 1984/212/1.
64 OJ C 2004/101/97.
65 A. Piszcz, *Antitrust in Times of Financial Crisis*, "Innovative Issues and Approaches in Social Sciences" 3/2009, p. 12.
66 ECR 1994/II–00049.

drawn on a foreign bank the members of a grouping of banks mutually deprived themselves of the freedom to content themselves with the interbank commission, at the expense of the drawers of such cheques, which they receive from the drawee bank as remuneration for the collection service rendered to the trader. It follows that the agreement had as its object to which to an applicable extent the freedom of conduct of the members of the grouping and therefore constitutes an agreement on the charging of a commission, (…)".

In Poland, one of the newest examples of horizontal price fixing is the cement cartel which was the subject of the decision of the President of the OCCP of December 8, 2009 (DOK–7/09)[67]. Maximum fines amounting to PLN 411 million have been imposed on the biggest producers of cement in Poland. This is the highest fine ever imposed in the 20 years history of the OCCP.

It could be expected that vertical price fixing will be treated more liberally than cartels (as for the division of agreements into horizontal and vertical, see paragraph 1.1. above). However, in practice, this does not apply to determination of minimum or fixed retail prices. In Poland fines for a total amount of over PLN 1.6 million were imposed by the President of the OCCP on the publisher and distributor of the Polish version of "Harry Potter and the Order of the Phoenix" due to the fact that books might not be sold at a price which would differ by more than 10% from the price printed on its cover[68]. Similarly, in Czech Republic the Office for the Protection of Competition fined "Albatros" publishing house for concluding several agreements on retail price maintenance in connection with the distribution of the Czech version of Harry Potter books[69].

Maximum retail prices seemed to be tolerated by the Polish courts. What is more, courts recognised that the situation where the fixed price could be reduced by discounts granted with the prior consent of the manufacturer was equivalent to creating a maximum price system.

67 http://uokik.gov.pl/news.php?news_id=1768 (last accessed 31.3.2011).
68 http://uokik.gov.pl/news.php?news_id=941; http://uokik.gov.pl/news.php?news_id=955 (last accessed 31.3.2011).
69 http://www.compet.cz/en/competition/news–competition/vertical–agreement–case–settled/ (last accessed 31.3.2011).

The doctrine stresses that if “the approach of the courts was indeed correct, the prohibition of price fixing could be easily circumvented by supplementing all price fixing contracts with a clause allowing the use of rebates upon agreement of the supplier”[70]. Such clause would give an alibi to prohibited price fixing contracts making it possible to claim that they merely constituted permitted maximum price setting agreements[71].

Identical behaviour of entrepreneurs in the market is considered to be the manifestation of the indirect price fixing[72]. It can be achieved through **the exchange of information among entrepreneurs**. In the aforementioned decision to do with the cement producers, the President of the OCCP considered the exchange of confidential commercial information as practice distinct from price fixing and ordered to refrain from it in a separate section of conclusion of the decision. Also the ECJ referred to the exchange of information. For example, in the judgment of May 28, 1998 (C–7/95 P, John Deere Ltd v. Commission[73]), it stated: “On a highly concentrated oligopolistic market, an agreement providing for an information exchange system among the undertakings on that market reduces or removes all uncertainty as to the operation of the market and is such as to impair competition between traders if the information exchanged:

- consists of business secrets allowing the undertakings which are parties to the agreement to know the sales made by their dealers within and beyond their allocated territory, and also the sales made by the other competing undertakings and their dealers who are parties to the agreement;
- is disseminated systematically and at short intervals, and
- is shared between the main suppliers, for their sole benefit, to the exclusion of other suppliers and of consumers”.

In the United States per se rule is applied to the most price–fixing agreements among competitors. The judgment passed in the case of Dr.

70 M. Kolasiński, *The economic approach…*, p. 244.
71 *Ibid*, p. 244–245.
72 A. Jurkowska [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie…*, p. 393.
73 ECR 1998/I–03111.

Miles Medical Co. v. John D. Park & Sons Co. is understood as per se condemnation of **retail price maintenance (RPM)**[74]. The existence of a patent or a copyright provides for no general exception to the rule against RPM[75]. A per se illegality rule applies to resale price agreements in retail networks. On the other hand, a per se legality rule governs the agency relationship[76].

On the other hand, price information exchanges are not per se violations of the Sherman Antitrust Act[77].

3.2. Limiting production etc.

The EU and Member States laws prohibit **the agreements which limit or control production, markets, technical development, or investment**.

One of the interesting examples of agreements of this type is imposing limits on parallel trade in prescription medicines[78]. Views on its nature have changed in European case law. The latest ECJ judgment of October 6, 2009 (joined cases C–501/06 P, C–513/06 P, C–515/06 P and C–519/06 P, GlaxoSmithKline Services Unlimited v. Commission, Commission v. GlaxoSmithKline Services Unlimited, European Association of Euro Pharmaceutical Companies v. Commission, Asociación de exportadores españoles de productos farmacéuticos v. Commission[79]) states that with respect to parallel trade, in principle, agreements aimed at prohibiting or limiting parallel trade have as their object the prevention of competition. In the light of Article 101 TFEU neither the wording of Article 101(1) TFEU nor the case law lends support to the position that, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies in so far as it may be presumed to deprive final consumers of the advantages of effective

74 220 U.S. 373 (1911).
75 K.N. Hylton, *Antitrust Law…*, p. 261.
76 *Ibid*, p. 269.
77 *Ibid*, p. 154.
78 I.S. Forrester, A. Dawes, *Parallel Trade in Prescription Medicines in the European Union: The Age of Reason*?, "YARS" 1/2008, p. 9 and next.
79 ECR 2009/I–09291.

competition in terms of supply or price. There is nothing in the wording of Article 101(1) TFEU to indicate that only those agreements which deprive consumers of certain advantages may have an anti–competitive object. Secondly, like other competition rules laid down in the Treaty, Article 101 TFEU aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti–competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price. It follows that a finding of an anti–competitive object of an agreement may not be made subject to a requirement of proof that the agreement entails disadvantages for final consumers. The principle according to which an agreement aimed at limiting parallel trade is a "restriction of competition by object" applies to the pharmaceuticals sector.

The Polish example of limiting production, which will be presented here, also applies to pharmaceuticals. The President of the OCCP in the decision of May 28, 2004 (RWA–12/2004) questioned the agreement between Johnson & Johnson Poland and Hurtofarm. The agreement concerning the distribution of Eprex (the medicine containing human recombined erythropoietin), the parties agreed that would not offer the medicine to hospitals listed in the document. Hurtofarm undertook to refrain from selling Eprex to some clinics to be opened next year. The sanction provided for failure to observe those provisions was non–payment of the contractual bonus, which was the only remuneration for Hurtofarm for the sale of Eprex. The President of the OCCP discovered the existence of an illegal agreement to control and limit the market for Eprex[80]. The court of competition and consumer protection heard the appeal against this decision and has not found the existence of a prohibited practice. However, the Appeal Court in Warsaw quashed the judgment of the court of CCP and sent the case back to be reheard.

In the United States agreements to limit production (thereby increasing scarcity, driving up demand and increasing price) are treated

80 http://www.uokik.gov.pl/news.php?news_id=939 (last accessed 31.3.2011).

under the per se standard[81]. Agreements, however, which limit or control technical development or investment generally are not illegal per se. Similarly, exclusivity agreements are analysed by the courts under the rule of reason[82].

3.3. Market–sharing

The EU and Member States laws prohibit **agreements which share markets or sources of supply**.

For example, in its judgment of July 8, 2004 (T–44/00, Mannesmannröhren–Werke AG v. Commission)[83] the CFI found the existence of a market–sharing agreement affecting seamless OCTG tubes. According to the Court, it was clear from the sharing key document that the Japanese producers, on the one hand, and the European producers, on the other, had accepted the principle that they had not been to sell certain seamless steel tubes on the other producers' domestic markets in the context of "open" invitations to tender.

The Polish examples of market–sharing include the already mentioned cement cartel referred to in the decision of the President of the OCCP of December 8, 2009 (DOK–7/09). See paragraph 3.1. above.

Per se rule is applied to most market–allocation agreements among competitors in the USA. The rule of reason, on the other hand, is applied to standard territorial allocation scheme, which are an important form of nonprice vertical restraint[84].

3.4. Discriminating agreements

The EU and Member States laws prohibit **the agreements which apply dissimilar conditions to equivalent transactions** with other trading parties, thereby placing them at a competitive disadvantage.

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81 A.L. Foster, P.R. Greene [in:] G. Blanke, P. Landolt (eds.), *EU and US Antitrust Arbitration. A Handbook for Practitioners*, Alphen aan den Rijn, 2010, p. 1310.

82 K.N. Hylton, *Antitrust Law…*, p. 264.

83 ECR 1995/II–00017.

84 K.N. Hylton, *Antitrust Law…*, p. 264–265.

In its judgment of January 12, 1995 (T–102/92, VIHO Europe BV v. Commission)[85] the CFI stated that Article 85 of the Treaty (now Article 101 TFEU) "prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. The discrimination at which this Article is aimed must therefore be the result of an agreement, a decision or a concerted practice between separate and autonomous economic entities and not the result of unilateral conduct by a single undertaking".

In practice, discriminatory practices take the form of imposing specific charges on certain customers or groups of customers, or using various discounts (rebates) that do not fall within the permitted differentiation of trading conditions. For example, in Poland the President of the OCCP in his decision of June 28, 2005 (RKR–44/2005) regarded the agreement between the Municipality of Gorlice and the manager of the municipal cemetery as a discriminatory agreement; insofar the agreement stipulated that the cemetery manager will perform at the cemetery – excluding other entrepreneurs – some services.

Discriminatory agreements are less common than unilateral discriminatory practices committed by entities having a dominant position.

The United States have a law that prohibits price discrimination, the rather controversial Robinson – Patman Act of 1936. Critics of this act argue that it protects competitors rather than competition[86]. Price discrimination while often condemned in the United States is not illegal per se and requires some inquiry into markets and anti–competitive effects[87].

85 ECR 2004/7–8A/II–02223.
86 B. Schlegelmilch, *Marketing Ethics. An International Perspective*, London, 1998, p. 91.
87 J. Dratler, *Licensing of Intellectual Property*, New York, 2006, p. 5–63.

3.5. Tying agreements

The EU and Member States laws prohibit the agreements which make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. In practice, tying agreements occur less often than unilateral tying practices committed by entities having a dominant position.

In the United States tying is not illegal per se and requires some inquiry into markets and anti–competitive effects[88]. But not always such an approach prevailed. Decades ago the American Supreme Court was of the view that "tying agreements serve hardly any purpose beyond the suppression of competition"[89].

3.6. Boycotts

Boycott, although it was not mentioned in Article 101(1) TFEU in the sample catalogue of prohibited practices, is recognised as a practice infringing Article 101(1) TFEU in case law. In its judgment of March 20, 2002 (T–23/99, LR AF 1998 A/S v. Commission)[90] the CFI stated that "a boycott may be attributed to an undertaking without there being any need for it actually to participate, or even be capable of participating, in its implementation". Were that not so, an undertaking which approved a boycott but did not have the opportunity to adopt a measure to implement it would avoid any form of liability for its participation in the agreement. In the Polish sample catalogue of prohibited practices boycott is included ("limiting access to the market or eliminating from the market undertakings which are not parties to the agreement"). An example of a decision of the President of the OCCP declaring the existence of a boycott is the decision in case of Canal+ and Polish Football Association (PZPN)[91]. The Polish Football Association had an exclusive right to grant the license for the live broadcast of football matches of the national 1st and 2nd league and the Polish Cup

88 *Ibidem*
89 See: Northern Pacific Railway Company v. United States, 356 U.S. 1 (1958).
90 ECR 2002/II–1705.
91 http://www.uokik.gov.pl/news.php?news_id=984 (last accessed 31.3.2011).

or their parts. The right for the broadcast is granted by the PZPN as an exclusive license to the broadcaster which submitted the best bid in terms of finance. In 2000 PZPN signed a contract on the broadcast with Canal+. There was a clause in the contract which granted Canal+ the priority to obtain the license. Pursuant to this provision the Association was obliged to inform Canal+ about the conditions of the bids submitted by its competitors. Canal+ obtained the license automatically if within 30 days it presented the conditions equal to the bid considered to be the most favourable by the Association. The President of the OCCP considered it a violation of the prohibition of boycott[92].

Similarly, the Czech sample catalogue of prohibited practices contains obligation of the parties to the agreement to refrain from trading or other economic cooperation with undertakings not being party to the agreement, or to otherwise harm such undertakings (group boycott).

In the United States group boycotts are considered to be violating Section 1 of the Sherman Antitrust Act. After many years of applying per se rule to them, the courts' approach towards boycott has changed in such a way that the per se rule applies only to certain categories of boycott[93].

3.7. Bid–rigging agreements

Bid–rigging agreement, although not mentioned in Article 101(1) TFEU in the sample catalogue of prohibited practices, is recognised in the jurisprudence as a practice infringing the prohibition of Article 101(1) TFEU. In its judgment of March 20, 2002 (T–9/99, HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG et al v. Commission)[94] the CFI considered "allocating individual projects to designated producers and manipulating the bidding procedure for those

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92 J. Sroczyński, *Permissibility of Exclusive Transactions: Few Remarks in the Context of Media Rights Exploitation*, "YARS" 3/2010, p. 115 and next. See also: A. Jurkowska–Gomułka, *Polish Antitrust Legislation and Case Law Review 2009*, "YARS" 3/2010, p. 219.

93 A.L. Foster, P.R. Greene [in:] G. Blanke, P. Landolt (eds.), *EU and US Antitrust*…, p. 1311–1312.

94 ECR 2002/3/II–01487.

projects in order to ensure that the assigned producer was awarded the contract in question" as a practice infringing the prohibition.

In the Polish sample catalogue of prohibited practices, bid–rigging agreements have been included ("collusion between undertakings entering a tender, or by those undertakings and the undertaking being the tender organiser, of the terms and conditions of bids to be proposed, particularly as regards the scope of works and the price"). An example of a decision of the President of the OCCP finding a bid–rigging is the decision of July 16, 2007 (RKT–22/2007), where three entrepreneurs from Silesia were fined for rigging their bids in a tender for the delivery and assembly of the equipment in the buildings on the border crossing in Dorohusk[95].

It should be added that the Polish case law states that the organisation of a public tender does not justify any restrictions of competition introduced by the motorway operator in its contracts with the selected accident assistance providers[96].

In the United States per se rule applies to most bid–rigging agreements among competitors.

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95 http://www.uokik.gov.pl/news.php?news_id=1026 (last accessed 31.3.2011).

96 R. Poździk, *Does a selection of contractors in a public tender constitute an infringement of a prohibition of competition restricting agreements? Case comment to the judgment of the Supreme Court of 25 April 2007 – STALEXPORT – TRANSROUTE (Ref. No. III SK 3/07)*, "YARS" 1/2008, p. 240.

Part 5

PROHIBITION OF THE ABUSE OF A DOMINANT POSITION

1. Conditions of the prohibition of the abuse of a dominant position

1.1. Concept of dominant position

1.1.1. European Union

The prohibition under Article 102 TFEU is addressed to the entities holding a dominant position. **The concept of dominant position** is not defined either in TFEU or Regulation 1/2003. What constitutes dominance (in EU terms) was clearified in the case law. In its judgment of February 13, 1979 (85/76, Hoffmann–La Roche & Co. AG v. Commission)[1], the ECJ stated that "the dominant position (…) relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers". In this judgment, the ECJ explained further that very large market shares were highly significant evidence of the existence of a dominant position. Other relevant factors are the relationship between the market shares of the undertaking concerned and of its competitors, especially those of the next largest, the technological lead of the undertaking over its competitors, the existence of a highly developed sales network and the absence of potential competition.

1 ECR 1979/1–2/00461.

Article 102 TFEU does not provide for any market share thresholds for defining dominance. However the ECJ case law shows that save in exceptional circumstances, very large market shares are in themselves evidence of the existence of a dominant position. That is the case where there is a market share of 50% (judgment of June 3, 1991, C–62/86, AKZO Chemie BV v. Commission[2]). A market share exceeding 50% proves the dominant position even more. For example, in its judgment of December 12, 1991 (T–30/89, Hilti v. Commission)[3] the CFI stated that "the existence of a dominant position may derive from a combination of several factors which, taken separately, are not necessarily determinative". However, amongst those factors, the existence of very large market shares is highly important and very large shares must be considered in themselves, save in exceptional circumstances, as evidence of a dominant position. Such is the case with a market share of 70% and 80%. And in its judgment of October 6, 1994 (T–83/91, Tetra Pak International SA v. Commission)[4] the CFI recognised that holding approximately 90% of the market was in itself, in the absence of exceptional circumstances, evidence of the existence of a dominant position. It is clear that holding such market shares means that the position on the market of the undertaking concerned makes it an inevitable partner for other operators and guarantees it the freedom of conduct characteristic of a dominant position.

A dominant position may be held **by a single undertaking or collectively** by two or more legally independent undertakings. As for a collective dominant position, the CFI ruled in the following way: "there is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis à vis the other operators on the same market" (judgment of March 10, 1992, T–68/89, Case Societa Italiano Vetro SpA v. Commission)[5]. On the other hand, the ECJ emphasised in its judgment of April 27, 1994 (C–393/92, Almelo v. Energiebedrijf Ijsselmij NV)[6] that "in order for

2 ECR 1991/7/I–03359.
3 ECR 1991/10/II–01439.
4 ECR 1994/8–10/II–00755.
5 ECR 1992/3/II–01403.
6 ECR 1994/4/I–01477.

such a collective dominant position to exist, the undertakings in the group must be linked in such a way that they adopt the same conduct on the market".

1.1.2. EU Member States and others

In the EU Member States, the nomenclature is similar to the network of concepts of TFEU. Legislation of the Member States uses the concept of dominant position, but often does not define it (like TFEU). As an example, we can take the Spanish Competition Act of 2007. The UK Competition Act of 1998, Section 18(3), on the other hand, only for the sake of this section merely states that "dominant position" means a dominant position within the United Kingdom; and "the United Kingdom" means the United Kingdom or any part of it.

Another approach is to place the definition of a dominant position in an act. Poland and the Czech Republic applied such a solution, introducing definitions which take into account the ECJ jurisprudence concerning the concept of dominant position into acts. In Poland, according to Article 4 subparagraph 10 ACCP dominant position shall mean a position of the undertaking which allows it to prevent the efficient competition within a relevant market thus enabling it to act in a significant degree independently of competitors, contracting parties and consumers. It is assumed that **the undertaking holds a dominant position if its market share exceeds 40% (rebuttable presumption)**. In one case examined by the Polish Supreme Court the state–owned Motor Transportation Enterprise (PPKS) seated in Słupsk questioned the existence of their dominant position in spite of over 40% market share[7]. PPKS claimed that "the weight of the market share criterion for the establishment of its dominance should be reduced as the population of the relevant market favoured PPKS for its reputation owed to more than 50 years of service provision"[8]. However, the Supreme Court

7 III SK 30/08.

8 R. Stankiewicz, *Does an undertaking's reputation affect its market power on the relevant market? Case comment to the judgment of the Supreme Court of 2 April 2009 – PPKS (Ref. No. III SK 30/08)*, "YARS" 3/2010, p. 292.

ruled that “reputation” arguments reaffirmed rather than defeated the statutory presumption of dominance[9].

Nonetheless, in accordance with Article 10 of the Czech APC, one or more undertakings jointly (joint dominance) shall be deemed to have a dominant position in the relevant market, if their market power enables them to behave independently to a significant extent of other undertakings or consumers. The Office shall assess the market power on the basis of the amount of ascertained volume of sales or purchases in the relevant market for the goods in question (market share), achieved by the relevant undertaking or undertakings in joint dominant position during the period examined pursuant to APC. Also on the basis of other indices, in particular the economic and financial power of the undertakings, legal or other obstacles for other undertakings to enter into the market, the level of vertical integration of undertakings, market structure and size of the market shares of their immediate competitors. Unless otherwise is indicated by the factors given above, an undertaking (or undertakings in joint dominance) shall be deemed not to be in a dominant position, if its (their) share in the relevant market achieved during the examined period does not exceed 40%. Moreover, Czech law has recently introduced the concept of “significant market power”. For more information, see paragraph 1.2.2. below.

American antitrust law does not use the notion of dominance or dominant position, but it uses the term “**monopoly power**” or “**market power**”. Monopoly power is defined as the power to control price or to exclude competition[10]. There are three methods of measuring market power. The first one consists in measuring market share. For this purpose it is necessary to define and identify the relevant market. Another method is to measure profits. In many cases U.S. courts recognised the significant gains as evidence of monopoly power. This method is not satisfactory, since it is difficult to measure the economic profit by analysing accounting profits[11]. There is no reason to expect that they are the same. The very existence of a positive accounting

9 *Ibidem*
10 K.N. Hylton, *Antitrust Law…*, p. 230.
11 *Ibidem*, p. 231.

profit does not mean that the entrepreneur has monopoly power. In addition, the amount of accounting profit depends largely on the entrepreneur's chosen method of accounting. Disadvantages of the two methods mentioned above led to the development of a third method, which involves determining the relevant market, but taking into account the undertaking's ability to raise prices without being constrained by competitors[12].

The Sherman Antitrust Act does not specify what market share is required to be able to find the existence of monopoly power. The case law regarding the 66% share of the market concluded that this could be evidence of monopoly power, market share of 75% was considered to be evidence of monopoly power, and 33% share of the market was considered too small to be evidence of monopoly power[13].

1.2. Other conditions of the prohibition of the abuse of a dominant position

1.2.1. European Union

According to Article 102 TFEU any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. The prohibition under Article 102 TFEU outlaws an **abuse of a dominant position**, not its actual possession. From the ECJ judgment of February 13, 1979 (85/76, Hoffmann–La Roche & Co. AG v. Commission)[14] it should be concluded that "the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of

12 *Ibidem*, p. 232.
13 *Ibidem*, p. 243.
14 ECR 1979/1–2/00461.

the degree of competition still existing in the market or the growth of that competition".

One should also pay attention to the condition contained in the phrase "**within the internal market or in a substantial part of it**" (previously, Article 82 TEC referred to the common market or a substantial part of it). The case law provides interesting examples of the interpretation of that condition. From the CFI judgment of October 21, 1997 (T–229/94, Deutsche Bahn AG v. Commission)[15] we should conclude that an agreement between the national rail undertakings of three Member States the purpose of which is to set up a common administration for the fixing of prices and tariffs for the carriage by rail of maritime containers to or from one of those States via the ports of those States, is incompatible with the common market. On the other hand, the ECJ judgment of June 18, 1999 (C–266/96, Corsica Ferries France SA v. Gruppo Antichi Ormeggiatori del Porto di Genova Coop. arl)[16] stated that the Genoa and La Spezia mooring groups had abused their dominant position in a substantial part of the common market, by charging unfair tariff rates, by preventing shipping companies from using their own qualified staff to carry out mooring operations, and by setting tariffs that varied from one port to another for identical services provided to identical vessels. As regards the definition of the market in question, it appears from the order for reference that it consists in the performance on behalf of third persons of mooring services relating to container freight in the ports of Genoa and La Spezia.

However, as for the conditions contained in the phrase "so far as it may affect trade between Member States" one needs to refer to **the Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty**[17] (see part IV paragraph 1.1. above).

Article 102 TFEU lists examples of an abuse of a dominant position. Such abuse may, in particular, consist in:

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15 ECR 1997/II–01689.
16 ECR 1998/I–03949.
17 OJ C 2004/101/81.

a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
b) limiting production, markets or technical development to the prejudice of consumers;
c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

As a framework for the interpretation of Article 102 TFEU Commission issued a "soft law", i.e. the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings[18].

1.2.2. EU Member States and others

At the beginning it should be noted that Article 3(2) of Regulation 1/2003 provides that Member States shall not under the Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings (stricter than Article 102 TFEU). **The convergence rule ("one level playing field rule")** applies only to Article 101 TFEU[19].

Article 102 TFEU served for Member States as a model for national laws. In particular, the catalogue inluding examples of the abuse of a dominant position serves as a "repertoire" of prohibited practices that Member States adapt, but also modify, in particular through its extension.

18 OJ C 2009/45/7.
19 B. van de Walle de Ghelcke, *Modernisation: Will It Increase Litigation in the National Courts and before National Authorities* [in:] D. Géradin, *Modernisation and Enlargement: Two Major Challenges for EC Competition Law*, Antwerp–Oxford, 2004, p. 147.

For example, in accordance with Section 18 of the UK Competition Act of 1998, as a rule, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom. Catalogue of examples of the abuse of a dominant position is analogous to that contained in Article 102 TFEU[20].

Similarly, the Spanish Competition Act of 2007, Article 2 states that any abuse by one or more undertakings of their dominant position in all or part of the national market is prohibited. However, the catalogue of examples of the abuse of a dominant position, compared with Article 102 TFEU, is already extended to unjustified refusal to satisfy the demands of purchase of products or provision of services.

Under Polish law, where according to Article 9 section 1 ACCP the abuse of a dominant position in the relevant market by one or more undertakings shall be prohibited, catalogue of examples of the abuse of a dominant position – compared with Article 102 TFEU – is extended to the following three types of prohibited practices:

- counteracting formation of conditions necessary for the emergence or development of competition;
- imposition by the undertaking of onerous agreement terms and conditions, yielding to this undertaking unjustified profits;
- market sharing according to territorial, product, or entity–related criteria.

Also in the Czech law, where according to Article 11 section 1 APC abuse of dominant position to the detriment of other undertakings or consumers shall be prohibited, a catalogue of examples of the abuse of a dominant position – compared with Article 102 TFEU – is extended to:

- consistent offer and sale of goods for unfairly low prices, which results or may result in distortion of competition,
- refusal to grant other undertakings access for a reasonable reimbursement, to own transmission grids or similar distribution

20 P.J. Slot, A. Johnston, *An Introduction*…, p. 105.

> networks or other infrastructure facilities, which are owned or used on other legal grounds by the undertaking in dominant position, provided other undertakings are unable for legal or other reasons to operate in the same market as the dominant undertakings without being able to jointly use such facilities, and such dominant undertakings fail to prove, that such joint use is unfeasible for operational or other reasons or that they cannot be reasonably requested to enable such use. The same also applies in due proportion to the refusal of access for a reasonable reimbursement, of other undertakings to the use of intellectual property or access to networks owned or used on other legal grounds by the undertaking in a dominant position, provided such use is necessary for participating in competition in the same market as the dominant undertakings or in any other market.

Czech system differs from others in that it has a specific regulation concerning the market for selling agricultural and food products. It is the Act No. 395/2009 of 9 September 2009 on Significant Market Power in the Sale of Agricultural and Food Products and Abuse thereof[21]. The Act No. 143/2001 on the Protection of Competition and on Amendment to Certain Acts (APC) is lex generalis in relation to the Act No. 395/2009[22].

According to Article 3 of the Act No. 395/2009, **significant market power** shall be deemed to be a relation between a buyer and a supplier in which, as a result of the situation in the market, the supplier becomes dependent on the buyer with regard to a possibility to supply own goods to consumers, and in which the buyer may impose unilaterally beneficial trade conditions on the supplier. Unless proven otherwise it shall be deemed that a buyer has significant market power if his net turnover exceeds CZK 5 billion. This Act prohibits the abuse of significant market power towards suppliers.

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21 In English available at: http://www.compet.cz/fileadmin/user_upload/Legislativa/legislativa_EN/2009_395_EN.pdf (last accessed 31.3.2011).

22 See: M. Nedelka, J. Linhartová, *Czech Republic* [in:] S. Goodman (ed.), *The Public Competition Enforcement Review*, London 2010, p. 127.

Among the forms of abuse the Act specifies: infringement of rules applied to invoicing stated in the Act, violation of general trading terms stated in the Act, breach of obligations resulting from the agreement between a supplier and a buyer, the non–observance of sale conditions specified in the Act, exercise of practices prohibited in the supplier – buyer relationship defined in the Act. Abuse of significant market power occurs when these behaviours have as their object or effect the distortion of competition in the relevant market. Supervision of adherence to the Act is carried out by the Czech NCA. According to some opinions, the Act creates barriers inside the internal market which deny consumers and businesses right to unrestricted access to goods and services[23].

In the United States the Sherman Antitrust Act prohibits **monopolisation and attempts to monopolise**. We are therefore faced with a different network of concepts than in the EU or the Member States. The key difference between an attempt and a monopolisation charge is that in the former, the defendant either did not succeed or the court does not find significant evidence of success[24]. An attempt is conduct that closely approaches but does not quite attain complete monopolisation (a dangeorus probability of success) plus a wrongful intent to monopolise[25]. On the other hand, in the absence of an intention to create or maintain a monopoly one has the right to deal with whomever one wishes (the Colgate doctrine)[26]. Generally, an entrepreneur who has no market power and refuses to deal with another need not worry of liability under attempt to monopolise charge[27]. In contrast, an entrepreneur who has monopoly power and refuses to deal with another cannot rely on the Colgate doctrine for protection[28].

23 See: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=–//EP//TEXT+WQ+E–2010–8516+0+DOC+XML+V0//EN&language=BG (last accessed 31.3.2011).
24 K.N. Hylton, *Antitrust Law…*, p. 244.
25 See: Swift & Co. v. United States, 196 U.S. 375 (1905).
26 K.N. Hylton, *Antitrust Law…*, p. 246.
27 *Ibidem*, p. 247–248.
28 *Ibidem*, p. 248.

2. The issue of exclusions and exemptions

On the basis of EU competition law no exemption may be granted, in any manner whatsoever, in respect of abuse of a dominant position; such abuse is simply prohibited by the Treaty and it is for the competent national authorities or the Commission, as the case may be, to act on that prohibition within the limits of their powers (see the ECJ judgment of April 11, 1989, 66/86, Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.)[29]. Thus, an exemption under Article 101(3) of the Treaty does not prevent the application of Article 102 (compare the CFI judgment of April 1, 1993, T–65/89, BPB Industries Plc and British Gypsum Ltd v. Commission)[30].

The exception is to be found in Article 106(2) TFEU concerning **the provision of services of general economic interest**. In Great Britain, its equivalent can be found in the Section 19 of the Competition Act of 1998[31].

Polish antitrust provisions (in line with Article 102 TFEU) do not stipulate any formal exceptions ("exemptions") from the prohibition of abuse[32].

As to the American rule of reason, see part IV paragraph 2.2.3. above.

Several American doctrines are also worth mentioning. The first one is **the so–called state action doctrine** (or the Parker v. Brown doctrine), which exempts state actions from the application of antitrust law (see also paragraph 8.2. below)[33]. The second one is **the so–called**

29 ECR 1989/00803.

30 ECR 1993/II–00389.

31 P.J. Slot, A. Johnston, *An Introduction…*, p. 107.

32 K. Kohutek, *Impact of the New Approach to Article 102 TFEU on the Enforcement of the Polish Prohibition of Dominant Position Abuse*, "YARS" 3/2010, p. 107.

33 See: Parker v. Brown, 317 U.S. 341 (1943). See also: K.N. Hylton, *Antitrust Law…*, p. 371–377. According to the European version of this doctrine, the undertaking shall not be found liable for a violation of the prohibition of dominant position abuse, if domestic legal provisions or decisions of public authorities impose on that undertaking the obligation of conduct that is incompatible with this prohibition; see: K. Kohutek, *A local government's right to determine the conditions of operating on the market for communal waste collection. Can such conditions lead to an anticompetitive foreclosure of that market? Case comment to the judgement of*

Noerr–Pennington doctrine, according to which attempts to influence passage or enforcement of laws by individuals are excluded from the scope of antitrust law[34].

3. Some types of prohibited practices

3.1. Unfair prices or other conditions

The ECJ recognised that "charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied may be an abuse of a dominant position; this excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin" (judgment of February 14, 1978, 27/76, United Brands Company & United Brands Continentaal B.V. v. Commission)[35]. The ECJ also explained that "a national copyright management society holding a dominant position in a substantial part of the common market imposed unfair trading conditions where the royalties which it charged to discotheques were appreciably higher than those charged in other Member States, the rates being compared on a consistent basis". That would not be the case if the copyright management society in question were able to justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States (judgment of July 13, 1989, 395/87, Ministere public v. Jean–Louis Tournier)[36].

Unfair prices are not only unfairly high prices, but also unfairly low prices. In the latter case they are usually referred to as **the "predatory pricing"**, which is where an undertaking has as its goal the removal of a competitor from the market by offering products at a price below

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the Supreme Court of 14 November 2008 – City Kalisz (Ref. No. III SK 9/08), "YARS" 2/2009, p. 238.

34 See: K.N. Hylton, *Antitrust Law…*, p. 354–371.

35 ECR 1978/00207.

36 ECR 1989/02521.

the cost price, so that the competitor must also offer his products at a price that forces him to make a loss[37]. Predatory pricing is treated as a violation of antitrust law in both Europe and the United States[38].

The European **concept of "imposition"** means the elimination of another's choice as the result of the market power of a dominant firm. The absence of contract negotiation may be an expression of the lack of choice available to contractors and, consequently, of the imposition of trading terms[39]. It must be emphasised however, that the following behaviours do not appear to show the absence of choice:

– where a contractor does not make any attempt to negotiate trading terms,
– where a contractor forms irrational expectations concerning trading terms,
– where a contractor does not answer a dominant firm's proposal to put forth a draft contract and a dominant firm prepares its own draft[40].

In Poland under Article 9(2)(1) ACCP the abuse of a dominant position may consist, in particular, of the direct or indirect imposition of unfair prices, including exorbitant prices or excessively low prices, far–off payment dates or other trading conditions. In one of the cases, the lower instance courts concluded that a mere imposition of trading conditions other than unfair prices might be sufficient to constitute the abuse of a dominant position[41]. Thus, the imposition by a dominant firm of not just unfair trading conditions but in fact any trading conditions at all was deemed to be the abuse.

37 P.J. Slot, A. Johnston, *An Introduction…*, p. 121.
38 K.N. Hylton, *Antitrust Law…*, p. 212.
39 See: judgment of the Court of Appeals in Warsaw of 6 September 2006, VI Ca 196/06, unpublished; A. Piszcz, *Does forcing services on suppliers constitute an abuse of a dominant position? Case comment to the judgment of the Supreme Court of 19 February 2009 – DROP (Ref. No. III SK 31/08)*, "YARS" 3/2010, p. 277; K. Kohutek, *When will the imposition of the requirement to co–finance the construction of necessary facilities constitute an abuse of a dominant position? Case comment to the judgment of the Supreme Court of 5 January 2007 – Kolej Gondolowa (Ref. No. III SK 17/06)*, "YARS" 1/2008, p. 225.
40 See: judgment of the Antimonopoly Court of 6 November 2000, XVII Ama 3/00, "Wokanda" 6/2002, p. 51.
41 A. Piszcz, *Does forcing services on…*, p. 281.

Considering the wording of Article (9)(2)(1) ACCP, it is certainly true that the adjective “unfair” is placed directly in front of the noun “prices”. However, it is not necessary to repeat it in the later part of the sentence to extend its applicability to the term “other trading conditions”. A differentiation of classes of trading conditions referred to in Article 9(2)(1) would not be justified in light of the objectives of competition law nor in the context of the jurisprudential construction of the notion of an abuse of a dominant position. In principle, an imposition of fair trading conditions on a contracting party is not an abuse of a dominant position. It makes no sense to apply here an out–of–context literal interpretation of Article 9(2)(1) and by doing so, to limit the application of the adjective “unfair” to price considerations only. Secondly, the wording of the Polish provision is closely modelled, even though not identical, on Article 102(a) TFEU. According to this rule, an abuse of a dominant position may consist, in particular, of “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions”. The European legislature was “industrious” in this respect and attached the adjective “unfair” to both prices as well as other trading conditions[42].

The adjective “unfair” should be understood as “breaking binding or conventional norms”. Both legal and economic criteria must be used to assess unfairness. One has to look at the entirety of the circumstances in which an agreement was concluded. An unfair term is, without a doubt, the imposition of behaviour contrary to the law. However, a contractual term is not unfair simply because it is not applied in the relevant market or in trading relations of a given sort. On the other hand, an unfair term is one shifting costs from a dominant firm to its contractors[43]. An unfair term is also one that increases the costs of running a business by a contractor, one that prevents contractors from decreasing their costs or an imposed term that is not exacted by a dominant firm from itself nor from its associates[44]. However, a simple limitation of a contractor’s freedom to act is not sufficient to prove “unfairness” – the actual or

42 *Ibidem*

43 *Ibidem*, p. 282.

44 See: *ibidem*, p. 283, as well as judgment of the Court of CCP of 18 December 2007, XVII Ama 11/07, unpublished.

potential impact on competition in that market must be identified at the same time.

3.2. Refusal to deal

According to the ECJ, an undertaking which has a dominant position within the market in raw materials and which, with the object of reserving such raw materials for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position (judgment of 6.3.1974, 6/73, Istituto Chemioterapico Italiano SpA & Commercial Solvents Corporation v. Commission)[45].

Both in the USA and Europe, **denial of access to essential facility** (a cost–reducing facility) may also constitute violation of the antitrust laws[46]. Thus, an undertaking that owns such a facility must be prepared to share access with competitors on reasonable terms[47].

3.3. Discriminatory practices

The ECJ classified **fidelity rebates** as discriminatory practices. In its judgment of February 13, 1979 (85/76, Hoffmann–La Roche & Co. AG v. Commission)[48] the Court stated that "the effect of fidelity rebates is to apply dissimilar conditions to equivalent transactions with other trading parties in that two purchasers pay a different price for the same quantity of the same product depending on whether they obtain their supplies exclusively from the undertaking in a dominant position or have several sources of supply".

In Poland PKP Cargo's offering different terms and prices for the same service was challenged as discriminatory practices by the President

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45 ECR 1974/00223.

46 K.N. Hylton, *Antitrust Law…*, p. 207; P.J. Slot, A. Johnston, *An Introduction…*, p. 128.

47 J. Jeżewska, *Possible objective justification of a network monopoly's refusal to conclude an agreement on an interconnected market. Case comment to the judgement of the Supreme Court of 14 January 2009 – Commune Rychwał (Ref. No. III SK 24/08)*, "YARS" 3/2010, p. 272.

48 ECR 1979/1–2/00461.

of the OCCP[49]. The price level did not depend on objective economically based criteria that should be uniform for all the contractors[50]. Some clients of PKP Cargo were subject to high contractual penalties for non–utilisation of transportation services declared in their annual time schedule, while there was no rebate reduction in case of other clients. The right to impose contractual penalties for non–performance was not questioned. The illegal practice was to discriminate in this respect among contractors by the market dominating entity.

In the United States Section 2 of the Clayton Act (amended by the Robinson – Patman Act of 1936) deals with **price discrimination**. According to its provisions it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. However, sellers may resort to **statutory defenses** available to them. The defenses are that:

– the price differentials made only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to different purchasers sold or delivered (the “cost justification” defense),
– the prices changed in response to changing conditions affecting the market for or the marketability of the goods concerned, such

49 http://www.uokik.gov.pl/news.php?news_id=933 (last accessed 31.3.2011).
50 On price differentiation see: K. Kohutek, *Shall selective, above–cost price cutting in the newspaper market be qualified as anti–competitive exclusion? Case comment to the judgement of the Supreme Court of 19 August 2009 – Marquard Media Polska (Ref. No. III SK 5/09)*, “YARS” 3/2010, p. 296.

as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned;

– the price was made in good faith to meet an equally low price of a competitor (the "meeting competition" defense).

3.4. Tying

One of the best known examples of tying is the Microsoft case. Firstly, the basic product – the Microsoft operating system for PCs – was sold only in combination with Microsoft's own internet browser (Explorer), while these products did not necessarily have to be tied together[51]. The U.S. court considered this to be an infringement of antitrust law.

Secondly, the Commission questioned Microsoft's practice of supplying its operating system bundled with its media player[52]. In 2007 Microsoft lost their appeal.

51 P.J. Slot, A. Johnston, *An Introduction…*, p. 131.
52 *Ibidem*, p. 131–132.

Part 6

LEGAL SANCTIONS FOR PROHIBITED PRACTICES; PROCEDURES RELATING TO PROHIBITED PRACTICES

1. Legal sanctions for prohibited practices

1.1. Functions of legal sanctions

Functions of legal sanctions should be as follows[1]:

- **repressive function** – application of sanctions should be dissuasive enough so as to make the entrepreneur suffer the sanction in an appreciable way,
- **prevention and educational function**, including **the function of rehabilitation** – the applied sanctions should motivate entrepreneurs to comply with antitrust laws, and at the same time they should make the entrepreneur to whom the sanction was applied behave in accordance with antitrust laws and thereby deter him from re–offending;
- **compensatory function** – sanctions should ensure compensation for property loss to the entities which suffered damage due to entrepreneur's conduct violating antitrust laws;
- **restitution function** – sanctions should provide for restitution of previous state, or the state of compliance with law;
- **enforcement function** – sanctions should force their addressee to behave in accordance with law (e.g. practice abandonment or implementation of the decision when the addressee has not done it yet).

1 See also: J.E. Anderson, *Public Policymaking: An Introduction*, Boston, 2010, p. 257.

1.2. Fines and penalty payments

1.2.1. European Union

The EU law provides for the possibility of imposing on entrepreneurs committing prohibited practices:

- **fines** (Article 23 of Regulation 1/2003),
- **periodic penalty payments** (Article 24 of Regulation 1/2003).

Under Article 23(2) of Regulation 1/2003, the Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

a) they infringe Article 101 or Article 102 TFEU; or

b) they contravene a decision ordering interim measures under Article 8; or

c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine for a substantive infringement shall not exceed 10% of its total turnover in the preceding business year. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 are "soft law" applied by the Commission[2].

In addition, Article 23(1) of Regulation 1/2003 provides for **fines for procedural infringements**. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1% of the total turnover in the preceding business year where, intentionally or negligently:

a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);

b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or

2 OJ C 2006/210/2.

misleading information or do not supply information within the required time–limit;

c) they produce the required books or other records related to the business in incomplete form during inspections under Article 20 or refuse to submit to inspections ordered by a decision adopted pursuant to Article 20(4);

d) in response to a question asked in accordance with Article 20(2)(e),
   - they give an incorrect or misleading answer,
   - they fail to rectify within a time–limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
   - they fail or refuse to provide a complete answer on facts relating to the subject–matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4);

e) seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the Commission have been broken.

Periodic penalty payments may be imposed by the Commission's decision on undertakings and associations of undertakings in order to compel them:

a) to put an end to an infringement of Article 101 or Article 102 TFEU, in accordance with a decision taken pursuant to Article 7;

b) to comply with a decision ordering interim measures taken pursuant to Article 8;

c) to comply with a commitment made binding by a decision pursuant to Article 9;

d) to supply complete and correct information which it has requested by decision taken pursuant to Article 17 or Article 18(3);

e) to submit to an inspection which it has ordered by decision taken pursuant to Article 20(4).

Periodic penalty payments cannot exceed 5% of the average daily turnover in the preceding business year per day and are calculated from the date appointed by the decision.

The EU law following the American model introduced immunity from fines and reduction of fines in cartel cases (**the so–called leniency**). Since US and EU experiences clearly demonstrate that the most effective tool for cartel detection is a leniency scheme ("corporate amnesty"), a successful modernisation of competition law needs both: a successful leniency policy and effective private enforcement[3]. Details of the EU leniency programme are regulated by the Commission Notice on immunity from fines and reduction of fines in cartel cases[4]. An undertaking may apply for leniency in return for voluntary disclosure of information concerning the cartel and meeting specific criteria.

It should be emphasised that the above discussed legal sanctions may be imposed on undertakings and not on their directors or executives.

It should be added that Regulation 1/2003 provides for **limitation periods**. The powers conferred on the Commission by Articles 23 and 24 shall be subject to the following limitation periods:

a) 3 years in the case of infringements of provisions concerning requests for information or the conduct of inspections;
b) 5 years in the case of all other infringements.

Moreover, the power of the Commission to enforce decisions taken pursuant to Articles 23 and 24 shall be subject to a limitation period of 5 years.

1.2.2. EU Member States and others

In the national laws of the Member States fines for substantive infringements are usually the same as in the EU law (e.g. in British law or Polish, where from January 1, 2009 the President of the OCCP

3 E. Rumak, P. Sitarek, *Polish Leniency Programme and its Intersection with Private Enforcement of Competition Law*, "YARS" 2/2009, p. 100.
4 OJ C 2002/45/3.

applies “soft law” – Guidelines on setting fines for competition–restricting practices[5]). Slightly different solution is provided for under Article 22a(2) of the Czech APC, where the substantive infringements are threatened with a fine up to CZK 10 000 000 or up to 10% of the net turnover achieved by the undertaking in the last accounting period. A solution different from the EU one has been introduced also in Spanish law. Substantive infringements are divided into:

a) minor infringements with a fine of up to 1%,

b) serious infringements with a fine of up to 5%,

c) very serious infringements with a fine of up to 10%

– of the total turnover of the infringing undertaking in the business year immediately preceding to that of the imposition of the fine.

The issue of sanctions for procedural infringements was solved by the Spanish legislature in such a way that they are always treated as minor infringements and therefore are punished with a fine of up to 1%. On the other hand, in the Czech Republic entrepreneurs can be punished with a fine of up to CZK 300 000 or 1% of the net turnover achieved by the undertaking in the last accounting period for procedural infringements. Polish law punishes procedural infringements (lack of information within the required time–limit; false or misleading information; lack of cooperation in the course of the inspection being carried out within the framework of proceedings) with the equivalent of up to EUR 50 000 000. In Great Britain fines for non–compliance during investigations are governed by Sections 42–44 of the Competition Act of 1998[6].

In Member States, periodic penalty payments are sometimes constructed differently from the EU model. In Poland, they may be the equivalent of up to EUR 10 000 per day, in Spain up to EUR 12 000 per day. And the Czech APC of 2001 does not provide for “daily” fines, and failure to comply with commitments or measures for which other jurisdictions provide periodic penalty payments is punished in the same way as substantive infringements.

5 http://www.uokik.gov.pl/news.php?news_id=1075 (last accessed 31.3.2011).

6 P.J. Slot, A. Johnston, *An Introduction…*, p. 221.

It should be added that with the introduction of **the ECN Model Leniency Programme** in 2006 most Member States have already revised their existing programmes or adopted new ones to align with the Model Programme[7]. In Poland, the leniency programme was introduced in 2004. By the end of 2009, the President of the OCCP received 19 leniency applications (2004 – 1, 2005 – 2, 2006 – 2, 2007 – 6, 2008 – 5, 2009 – 3)[8]. In the Czech Republic leniency programme was introduced already in 2001, with the first reported case occurring in May 2004 and substantial changes in June 2007[9].

Some national laws provide for the possibility of **imposing fines on directors and executives**. In Poland, they can be punished with a fine up to fifty–fold the average salary, in order to force them to comply with a decision, order, judgment; or in order to punish them for unreliable or misleading information or lack of information within the required time–limit. Spanish law also provides that when the offender is a legal person, a fine may be imposed on each of its legal representatives or on the persons that comprise the management bodies that have participated in the agreement or decision. The fine may be up to EUR 60 000. Excluded from the sanction are those persons who, forming part of the collegiate administrative bodies, have not attended the meetings or who have voted against or saved their vote. Individual officers of companies are punishable also in Great Britain[10].

It also happens that national laws stipulate **limitation periods** other than in the EU law. In Poland they are 1 year in the case of substantive infringements except of concentrations (from the day on which the undertaking brings the practice to an end) and 5 years in other cases[11]. In Spain, very serious infringements shall lapse after 4 years, serious ones after 2 years and minor ones after 1 year. In the Czech Republic

7 On Polish programme see: E. Rumak, P. Sitarek, *Polish Leniency Programme…*, p. 99 and next.
8 Report on activities in 2009, p. 20, http://www.uokik.gov.pl/reports_on_activities.php (last accessed 31.3.2011).
9 http://www.globalcompetitionreview.com/reviews/28/sections/100/chapters/1100/czech–republic/ (last accessed 31.3.2011).
10 P.J. Slot, A. Johnston, *An Introduction…*, p. 220.
11 See i.a.: A. Bolecki, *Gratuitous transfer of ownership of energy transmission infrastructure as an abuse of a dominant position. Case comment to the judgement of the Supreme Court of 16 October 2008 – Kolej Gondolowa (Ref. No. III SK 2/08)*, “YARS” 2/2009, p. 246.

for the responsibility for the administrative offence not to lapse, NCA has to initiate administrative proceedings within 5 years following the day on which it learned of the administrative offence, but no later than 10 years after the administrative offence was committed. The fine for procedural infringement may not be imposed later than 1 year following the day on which the obligation was violated.

1.3. Civil sanctions

Civil sanctions are applied irrespective of whether the competition authority has already decided on the case. Legal proceedings relating to competition law infringements are autonomous with regard to their administrative counterparts. However, in Poland a decision of the NCA is prejudicial (or even binding if it is final) on a court in the same case[12].

Civil sanction is, first of all, **voidness**. According to Article 101(2) TFEU, any agreements or decisions prohibited pursuant to this Article shall be automatically void. The laws of the Member States such as the UK[13], Spain, Poland[14], the Czech Republic provide for an analogous solution. An unusual solution is the sanction of voidness in respect of acts constituting abuse of dominant position. Neither in EU competition law, nor in the national competition laws of the United Kingdom, Spain and the Czech Republic there is included directly a sanction of voidness for abuse of dominant position. However, according to Article 9 section 3 of the Polish ACCP, legal actions which constitute abuse of a dominant position shall be in their entirety or in the respective part void.

Civil sanctions are not applied by the European Commission or by the NCAs. Ordinary courts declare an action contrary to antitrust laws to be invalid and/or adjudicate compensation[15]. The second category

12 *Ibidem*, p. 79.
13 P.J. Slot, A. Johnston, *An Introduction…*, p. 62–63.
14 A. Jurkowska, *Antitrust Private Enforcement – Case of Poland*, “YARS” 1/2008, p. 62–63.
15 P. Podrecki, *Civil Law Actions in the Context of Competition Restricting Practices under Polish Law*, “YARS” 2/2009, p. 79.

of civil sanctions is **the compensation for damage**. See also part II paragraph 2.2.3. above.

In some countries those affected by the consequences of competition restricting practices may enjoy individual protection provided by a court under the law on unfair competition. Basically, antitrust law and unfair competition law are separated from each other, but some practices (acts) may fall under two regimes. See also part II paragraph 2.2.3. above.

In the Czech Republic Section 53 of the Commercial Code (Act 513/1991 Coll.)[16] provides that persons whose rights have been violated or jeopardised as a result of unfair competition can demand that the offender desists from such conduct and eliminate the improper state of affairs (resulting from it). They can also demand appropriate satisfaction, which may be rendered in money, compensation for damage (i.e. damages) and the surrender of unjust enrichment. And in Poland, Article 18, section 1 of the Act of 1993 on Combating Unfair Competition[17] allows the application of civil sanctions, providing the following applicable claims: damages and cessation claims, claims to hand over unjust profits and to remove the effects of an illegal action, claims to make a single or repeated statement of a given content and in a given form as well as claims to pay an adequate sum of money to benefit a specific social purpose related to the support of Polish culture or protection of national heritage[18]. The last of the above sanctions is specific. The function of this type of saction is clearly to impose an additional sanction on the infringer[19].

1.4. Criminal sanctions

In the USA, one of the types of legal sanctions applicable to infringements of antitrust law are criminal sanctions such as **imprisonment for individuals**. That is why in the United States, the most attractive element of the Corporate Leniency Programme is the

16 http://www.wipo.int/wipolex/en/text.jsp?file_id=198074 (last accessed 31.3.2011).
17 www.uokik.gov.pl/download.php?plik=7635 (last accessed 31.3.2011).
18 See: P. Podrecki, *Civil Law Actions in…*, p. 81.
19 *Ibidem*, p. 93.

ability to avoid all criminal sanctions, something that is not an issue in EU competition law[20]. In the EU the Commission can neither impose criminal sanctions nor fines on individuals in light of the wording of Articles 101–102 TFEU. According to Article 23(5) of Regulation 1/2003 decisions imposing fines on undertakings shall not be of a criminal law nature. This raises the issue of whether the EU should not turn to new forms of sanctions, such as criminal sanctions[21].

A minority of the EU Member States have introduced criminal sanctions for infringement of antitrust law[22]. Great Britain and Ireland are two notable Member States with criminal offences in place. In the UK, criminal sanctions are imposed for price–fixing, limiting supply and/or production, market–sharing and bid–rigging (but only horizontal agreements)[23]. The upper limit of criminal penalties of imprisonment is 5 years (to compare, in the United States it is 10 years – see part I paragraph 1.1.2. above).

In Poland, only the bid–rigging constitutes a criminal offense covered by the Penal Code. Moreover, the Act of 1993 on Combating Unfair Competition[24] contains several provisions (Articles 23–26) which recognise the most serious acts of unfair competition to be crimes or misdemeanors. But these are not acts that constitute a breach of Articles 6 or 9 ACCP.

A similar range of criminal sanctions was known in the Czech law, but from 2010 onwards there has been a significant change in it. Due to a belief that the added deterrence against cartels is salutary, prison sentences of up to three years were introduced for anyone entering into agreements with a competitor on price fixing, market sharing or other (horizontal) agreements with anti–competitive effects. The maximum

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20 D.J. Walsh, *Carrots and Sticks – Leniency and Fines in EC Cartel Cases*, “European Competition Law Review” 1/2009, p. 32.

21 D. Geradin, D. Henry, *The EC fining policy for violations of competition law: An empirical review of the Commission decisional practice and the Community courts' judgments*, “The Global Competition Law Centre Working Papers Series” 3/2005, p. 3.

22 See: K.J. Cseres, M.–P. Schinkel, F.O.W. Vogelaar, *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States*, Cheltenham – Northampton, 2006.

23 P.J. Slot, A. Johnston, *An Introduction…*, p. 231.

24 www.uokik.gov.pl/download.php?plik=7635 (last accessed 31.3.2011).

prison sentence is increased to between six months and five years if such act has been committed as part of an organised group or has been repeated, or considerable damage or profit for the guilty party was made. Should the damage or profit made be above CZK 5 million or such behaviour had led to insolvency of a third party, the minimum prison sentence is increased to between two and eight years. The use of criminal sanctions remains low[25].

1.5. Final remarks

For the antitrust law to be effective, legal sanctions should be chosen carefully in order to fulfil their functions (see paragraph 1.1. above). Generally worth recommending is the application of a broad scope of measures to react to antitrust infringements[26]. **Administrative sanctions** themselves such as administrative fines and orders to stop the prohibited practices (for decisions which can be awarded in proceedings before the competition authorities see paragraph 2. below) in practice may not be sufficient. Therefore, it is important to apply also **civil sanctions** against violators, in particular compensation for damage. Private parties may play significant role in antitrust law enforcement by initiating their own legal actions.

An issue to consider is the introduction of **criminal sanctions** for the most serious violations of antitrust law in the national laws, which currently do not have such sanctions. It must be emphasised here that the sanction of imprisonment is costly to impose. However, the state can lower its enforcement costs if the probability of sanctions is low (where sanctions are high enough to deter undesirable behaviours)[27].

It is also important to stigmatise the undertakings and individuals who commit prohibited practices, e.g. by publishing relevant information in a popular journal. For instance, Article 69 of the Spanish Competition Act of 2007 provides that the sanctions imposed pursuant

25 D. Bicková, A. Braun, *Czech Republic* [in:] "The European Antitrust Review 2011", http://www.globalcompetitionreview.com/reviews/28/sections/100/chapters/1100/czech–republic/ (last accessed 31.3.2011).

26 A. Jurkowska, *Antitrust Private Enforcement…*, p. 77.

27 S.M. Shavell [in:] H.E. Jackson, L. Kaplow, S.M. Shavell, W.K. Viscusi, D. Cope, *Analytical Methods for Lawyers*, New York, 2011, p. 432.

to this Act, their amount, the name of the offenders and the infringement committed shall be public, in the form and on the conditions that are set out according to regulations.

Another important issue is the application of legal sanctions against representatives of entrepreneurs who are not individuals. For example, in the UK there is a law which serves to disqualify the director involved from acting in that capacity in the future for up to a maximum period of 15 years[28].

At least in the case of Poland, **the effectiveness of legal sanctions** for prohibited anti–competitive practices is questionable. It would be an exaggeration to say that these sanctions form the completely developed system. It is doubtful whether above mentioned administrative, civil and "fragmentary" penal sanctions can be interpreted collectively as "mature system of sanctions". This is not an error–free or complete construction from both theoretical and practical points of view. Solutions used by the legislature seem to be incomplete. It seems that despite some differences in solutions (to a lesser or greater extent) other antitrust laws mentioned here are subject to similar shortcomings. However, even this solution deficiency has some value, as it shows different possibilities and cognitive perspectives.

2. Procedures relating to prohibited practices

2.1. Initiation of the procedure

In the light of Article 7(1) of Regulation 1/2003, the Commission may initiate proceedings **on a complaint or on its own initiative**. According to Article 5(1) of the Commission Regulation (EC) No. 773/2004 of April 7, 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty[29], natural and legal persons shall show a legitimate interest in order to be entitled to lodge a complaint for the purposes of Article 7 of Regulation No. 1/2003. Such complaints shall contain the information required by

28 P.J. Slot, A. Johnston, *An Introduction…*, p. 230.
29 OJ L 2004/123/18.

Regulation 773/2004. In addition, the Commission issued Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty[30].

The Commission may reject a complaint without initiating proceedings. If, however, the Commission initiates proceedings, complainants shall participate in proceedings. Where the Commission issues **a statement of objections** relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non–confidential version of the statement of objections and set a time–limit within which the complainant may make known its views in writing. Moreover, the Commission may, where appropriate, afford complainants the opportunity of expressing their views at **the oral hearing of the parties** to which a statement of objections has been issued, if complainants so request in their written comments.

In Poland, differently from the EU, the President of the OCCP acts in cases of anti–competitive practices exclusively ex officio (Czech APC contains similar provisions)[31]. According to Article 86 ACCP, everybody may submit to the President of the OCCP a written notification concerning a suspicion that competition–restricting practices have been applied, together with a justification. The President of the OCCP shall provide the notification submitter, with information in writing about the way of considering the notification together with its justification. However, if the President of the OCCP initiates proceedings, the notifier will not be a party to the proceedings (unless in this proceedings the President of the OCCP also alleges the notifier violated antitrust law). It is worth adding that, unlike in the proceedings before the Commission, in the Polish procedure there is no statement of objections. Thus, the right of defence applicable to Polish proceedings differs from the standards developed by the European Commission and courts[32].

30 OJ C 2004/101/65.

31 See also: M. Stefaniuk, *2007 Antitrust and Regulatory Developments in Legislation in Poland*, “YARS” 1/2008, p. 200.

32 M. Kolasiński, *Influence of General Principles of Community Law on the Polish Antitrust Procedure*, “YARS” 3/2010, p. 29 and next.

Accoding to Article 49(1) of the Spanish Competition Act of 2007, the proceedings are initiated ex officio by the Directorate of Investigation, be it on its own initiative or that of the Council of the National Competition Commission or by complaint. Any natural or legal person, interested or not, may submit a complaint. The Directorate of Investigation shall institute proceedings when rational signs are observed of the existence of prohibited conduct and it shall notify the interested parties of the decision to institute proceedings.

2.2. Investigations

In order to carry out the duties assigned to the Commission by Regulation 1/2003, the Commission may:

1) **by simple request or by decision**, require undertakings and associations of undertakings to provide all necessary information; the most significant difference between these two means of requesting information lies in the fact that in its decision the Commission shall indicate or impose the periodic penalty payments provided for in Article 24 of Regulation 1/2003, and the addressee of the decision has the right to have the decision reviewed by the Court of Justice (General Court), while the simple request is not binding[33]; lawyers duly authorised to act may supply the information on behalf of their clients and the latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading;
2) interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject–matter of an investigation;
3) conduct all necessary **inspections** of undertakings and associations of undertakings.

According to Article 27(2) of Regulation 1/2003 the rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's

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33 See also: A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham, 2008, p. 134.

file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States.

The officials and other accompanying persons (e.g. experts) authorised by the Commission to conduct an inspection are empowered:

a) to enter any premises, land and means of transport of undertakings and associations of undertakings;
b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
c) to take or obtain in any form copies of or extracts from such books or records;
d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject–matter and purpose of the inspection and to record the answers.

In the national laws of the Member States the right to request information by competition authorities is regulated differently than in the EU law. Authorities do not request information by decision (Section 26 of the UK Competition Act of 1998, Article 39 of the Spanish Competition Act of 2007, Article 50 of the Polish ACCP, Article 21e of the Czech APC), but failure to meet the request of the authority is subject to sanctions. In Great Britain, Poland and the Czech Republic there are fines for failure to provide information, and in Spain – periodic penalty payments for the same.

As to **confidential information**, NCAs, in principle, have to respect it. It does not mean, however, that parties have the right to refuse information because of their right for confidentiality. Parties must provide information, marking it as confidential to prevent its disclosure

by the NCA[34]. In the literature there are debates on the possible conflict between the guarantees of procedural fairness that find their expression in the right to be heard and in the protection of confidential information that should be properly balanced[35]. Unlike EU law, Polish legislation and jurisprudence proves to be inefficient in this respect[36]. According to Article 69 ACCP the President of the OCCP may, upon a request or on an ex officio basis, and by way of a resolution, limit to an extent indispensable the right to have access to evidence being attached to the records of proceedings, in case that rendering such evidence accessible would entail a risk that the business secret, or any other secrets being liable to protection under the relevant separate provisions, may be revealed. The protection of confidential information other than business secrets that would cover a broader, more flexibly understood notion of information the disclosure of which would harm the undertaking's interest to an extent smaller than business secrets (e.g. data relating to the identity of those notifying a suspicion of a competition law violation and information on the sources of the President of the OCCP) should be incorporated into Article 69 ACCP[37].

In turn, when it comes to powers of investigation, all of the above mentioned laws of the Member States provide for the powers of NCAs not less than the ones the European Commission has in the inspections carried out by it.

2.3. Decisions

In proceedings in cases of prohibited practices different types of decisions may take place.

Firstly, the Commission, acting on its own initiative, may by decision find that Article 101 TFEU is not applicable. The Commission may likewise make such a finding with reference to Article 102 TFEU.

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34 P.J. Slot, A. Johnston, *An Introduction…*, p. 219.

35 M. Bernatt, *Right to Be Heard or Protection of the Confidential Information? Competing Values of Procedural Fairness in the Proceedings in Front of the Competition Authority*, "YARS" 3/2010, p. 53 and next.

36 *Ibidem*, p. 54.

37 *Ibidem*, p. 69.

If the Commission has a legitimate interest in doing so, it may find that an infringement of Article 101 TFEU or of Article 102 TFEU has been committed in the past (Article 7 of Regulation 1/2003).

In cases where the Commission finds that there is an infringement, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any **behavioural or structural remedies** which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Behavioural remedies oblige them to behave in a certain way, e.g. to terminate the agreement, to amend certain provisions of the agreement, to change the prices or discounts, to give access to essential facilities, to supply (if previously refused). On the other hand, structural remedies interfere with the structure of the undertaking (organisational, capital or personal), for example, oblige it to sell shares in another undertaking, to dispose of subsidiaries, to dispose of certain business assets, to divide the company (undertaking)[38]. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy[39].

Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission. The Commission may, upon request or on its own initiative, reopen the proceedings where:

a) there has been a material change in any of the facts on which the decision was based;

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38 See: D.T. Keeling, *Intellectual Property Rights in EU Law: Free Movement and Competition Law*, New York, 2010, p. 303.

39 Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 2008/267/1.

b) the undertakings concerned act contrary to their commitments; or

c) the decision was based on incomplete, incorrect or misleading information provided by the parties.

In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order **interim measures** (e.g. oblige to give access to essential facilities during the proceedings)[40]. Such a decision shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate (Article 8 of Regulation 1/2003).

Similar categories of decisions are known in antitrust procedures of the Member States. There are, however, some differences in relation to the EU solutions in them. In the Spanish procedure decisions are in the form of resolutions of the Council of the National Competition Commission. Spanish equivalent of reopening the case is constructed differently than in the EU solution. According to Article 53(3) of the Competition Act of 2007, the Council of the National Competition Commission may, on the proposal of the Directorate of Investigation, which shall act ex officio or at the request of the parties, revise the conditions and obligations imposed in its resolution when a substantial and permanent modification of the circumstances taken into account when issuing them is accredited. Moreover, the Spanish procedure differs from those analysed here in a regulation on the effects of administrative silence in cases relating to prohibited practices. According to Article 38(1) of the Competition Act of 2007 the course of the maximum period of eighteen months established in Section 1 of Article 36 to resolve sanctioning proceedings regarding agreements and prohibited practices shall determine the expiry of proceedings.

Also in the Polish procedure there are several differences, although a number of solutions generally conform to the EU model (e.g.

40 See: M. Huybrechts, *Port Competitiveness. An Economic and Legal Analysis of the Factors Determining the Competitiveness of Seaports*, Antwerp, 2002, p. 130.

decisions on commitments[41] or interim measures). Firstly, the President of the OCCP may by decision require the undertakings concerned to bring an infringement to an end, but the decision cannot impose on them other behavioral or structural remedies (similarly to the Czech regulation). Secondly, the decision of the President of the OCCP does not state that the prohibition on practice is not applicable, but he issues a decision to discontinue the proceedings under Article 105 of the Code of Administrative Procedure of June 14, 1960 (the Code is applied in the case of matters not regulated by ACCP)[42]. Thirdly, the Polish equivalent of reopening of proceedings does not allow to revoke the decision without the consent of the party on the basis that there has been a material change in any of the facts on which the decision was based. It should be added that the Polish case law is of the opinion that when the party appeals the decision of the President of the OCCP, the court of CCP does not have to take an attitude towards procedural objections in detail every time, especially when the appellant does not prove that this type of failure affected the substantive content of the contested decision significantly[43].

41 T. Kozieł, *Commitment Decisions under the Polish Competition Act – Enforcement Practice and Future Perspectives*, "YARS" 3/2010, p. 71 and next.

42 Journal of Laws 2000, No. 98, *item* 1071, as amended; in English at: www.ec.europa.eu/information_society/policy/psi/docs/pdfs/implementation/po_translation_dz–u–0098–1071.doc (last accessed 31.3.2011).

43 M. Bernatt, *The control of Polish courts over the infringements of procedural rules by the national competition authority Case comment to the judgement of the Supreme Court of 19 August 2009 – Marquard Media Polska (Ref. No. III SK 5/09)*, "YARS" 3/2010, p. 300 and next.

Part 7

CONTROL OF CONCENTRATIONS

1. Concept of concentration

1.1. European Union

According to Article 3(1) of Council Regulation No.139/2004 of January 20, 2004 on the control of concentrations between undertakings[1] (hereinafter, the Regulation 139/2004), a concentration shall be deemed to arise – at first – where a change of control on a lasting basis results from **the merger of two or more previously independent undertakings or parts of undertakings** (incorporation or fusion). Secondly, a concentration occurs where a change of control on a lasting basis results from **the acquisition**, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, **of direct or indirect control of the whole or parts of one or more other undertakings**. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

a) ownership or the right to use all or part of the assets of an undertaking;

b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

1 OJ L 2004/24/1.

Control is acquired by persons or undertakings which:

a) are holders of the rights or entitled to rights under the contracts concerned; or

b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

The second case mentioned above, i.e. the acquisition, also includes **the creation of a joint venture** performing on a lasting basis all the functions of an autonomous economic entity. This concept is further explained in the Commission Notice on the concept of full–function joint ventures under Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings[2].

One example of this kind of concentration assessed by the Commission was the notified to the Commission proposed concentration of undertakings Courtaulds plc (UK) and SNIA Fibre S.p.A. (Italy)[3]. The undertakings were planning to create a joint venture in the acetate filament yarn sector by way of the transfer of their existing activities to a newly created company (Novaceta Limited). In addition, the conclusion of the following agreements was stipulated:

– four lease agreements in respect of the three UK sites (owned by Courtaulds) and the Italian site (to be transferred to SNIA),
– an agreement providing for certain services (including safety, fire, security, environment, electricity, steam, gas, water and effluent treatment) to be made available on arm’s length terms by Courtaulds to the joint venture at two of its sites in the UK,
– an agreement providing for certain administrative services to be provided by SNIA to the joint venture in Italy on arm's length terms for five years (terminable on 12 months’ notice),
– a Know–How and Technical Services Agreement for a period of five years (terminable on 12 months’ notice).

2 OJ C 1998/66/5.
3 Case No IV/M.113 – Courtaulds/SNIA; http://ec.europa.eu/competition/mergers/cases/decisions/m113_en.pdf (last accessed 31.3.2011).

The European Commission has ruled on the case as follows: “None of these agreements jeopardise the joint venture’s capacity to perform on a lasting basis all the functions of an autonomous economic entity since by their very nature they do not enable the parent to exercise any significant influence on the joint venture”[4]. In practice, a contract duration of 10–15 years is sufficient to consider the joint venture to have been set up “on a lasting basis” and a period of three years is not sufficient[5].

The concept of concentration is further explained in the Commission Notice on the concept of concentration under Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings[6].

1.2. EU Member States and others

Laws of the EU Member States are to a large extent inspired by the EU concept of concentration. However, British regulation indicates relevant merger situations differently than the EU regulation. A relevant merger situation has been created if two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within Section 24 of the Enterprises Act of 2002[7]. The following editorial units will discuss distinctiveness of the British rules on concentrations, which are even more important from the perspective of entrepreneurs.

The Polish regulation, on the other hand, contains some differences in terms of the concept of concentration. Provisions on control of concetrations concern the intention of:

1) a merger of two or more independent undertakings;
2) taking over – by way of acquisition or entering into a possession of stocks, other securities, shares or in any other way obtaining direct or indirect control over one or more undertakings by one or more undertakings;

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4 *Ibidem*

5 A. Antapassis, L. Athanassiou, E. Rosaeg, *Competition and Regulation in Shipping and Shipping Related Industries*, Leiden, 2009, p. 134.

6 OJ C 1998/66/1.

7 http://www.legislation.gov.uk/ukpga/2002/40/contents (last accessed 31.3.2011). See also: D.J. Laing, L.A. Gomez, *Global Merger Control Manual*, London, 2007, p. 562; P.J. Slot, A. Johnston, *An Introduction…*, p. 181.

3) creation by undertakings of one joint undertaking;

4) **acquisition by the undertaking, of a part of another undertaking's property** (the entirety or part of the undertaking), if the turnover achieved by the property in any of the two financial years preceding the notification exceeded in the territory of the Republic of Poland, the equivalent of EUR 10 000 000.

Moreover, Article 4 subparagraph 4 ACCP defines "taking over control" as any form of direct or indirect acquisition of powers by an undertaking, allowing the undertaking, to exert, individually or jointly, taking into account all legal or factual circumstances, a decisive influence upon another undertaking or other undertakings[8]. Such powers follow in particular from:

a) holding directly or indirectly a majority of votes in the meeting of company members or general shareholders' meeting, also in the capacity of a pledgee or user, or in the management board of another undertaking (dependent undertaking), including based on agreements with other persons,

b) the right to appoint or recall a majority of members of the management board or supervisory board of another undertaking (dependent undertaking), including based on agreements with other persons,

c) members of the undertaking's management board or supervisory board constituting more than half of the members of another undertaking's (dependent undertaking's) management board,

d) holding directly or indirectly a majority of votes in a dependent partnership or in the general meeting of a dependent cooperative, including based on agreements with other persons,

e) holding a title to the entire or a part of the property of another undertaking (dependent undertaking),

f) contract which envisages managing another undertaking (dependent undertaking) or such undertaking transferring its profits.

8 See also: Ł. Adamczyk, *Poland* [in:] G. Maisto, *International and EC Tax Aspects of Groups of Companies*, Amsterdam, 2008, p. 425.

It is worth pointing out here the U.S. solutions when it comes to the concept of concentration. On the one hand, the sphere of interest of antitrust laws includes horizontal acquisitions and mergers. On the other hand also non–horizontal mergers can raise competitive concerns. By definition, non–horizontal mergers involve firms that do not operate in the same market. On August 19, 2010 the U.S. Department of Justice and the Federal Trade Commission issued the latest Horizontal Merger Guidelines[9]. These guidelines are not law but enforcement–policy statements. Nevertheless, the antitrust enforcement agencies use them to analyse proposed transactions. This document outlines the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission with respect to mergers and acquisitions involving actual or potential competitors (horizontal mergers) under the federal antitrust laws. The relevant statutory provisions include Section 7 of the Clayton Act, Sections 1 and 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act. In light of these provisions we deal with mergers where the person engaged in commerce or in any activity affecting commerce acquires, directly or indirectly, the whole or any part of the stock or other share capital or acquires the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce. The term "mergers" is not limited only to mergers between two or more companies, or even to acquisitions of control of another company[10]. The federal enforcement agencies have used Section 7 of the Clayton Act to challenge acquisitions of a 50% interest and of a minority stake, as well as joint ventures and other collaborations[11].

9 http://www.justice.gov/atr/public/guidelines/hmg–2010.html (last accessed 31.3.2011).

10 See: American Bar Association Section of Antitrust Law, *The Merger Review Process. A Step–by–step Guide to Federal Merger Review*, Chicago, 2001, p. 5.

11 *Ibid*, p. 5–6.

2. Obligation of notification and exceptions

2.1. European Union

The EU law bases the control of concentrations on obligation of prior notification of concentrations. According to Article 4(1) of Regulation 139/2004 **concentrations with a Community dimension shall be notified to the Commission prior to their implementation**. A concentration has a Community dimension where:

a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

b) the aggregate Community–wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two–thirds of its aggregate Community–wide turnover within one and the same Member State.

A concentration that does not meet the **thresholds** laid down above has a Community dimension where:

a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;

b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

d) the aggregate Community–wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two–thirds of its aggregate Community–wide turnover within one and the same Member State. Details of the turnover calculation are determined by the Commission Notice on calculation of turnover under

Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings[12].

The Regulation 139/2004 also stipulates which transactions are not covered by the obligation of prior notification to the Commission regardless of the participants' turnover (no concentration arises). According to Article 3(5) of Regulation 139/2004, a concentration shall not be deemed to arise where:

a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place **within one year** of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;

b) control is acquired by an office–holder according to the law of a Member State relating to **liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings**;

c) the acquisition of control is carried out by the financial holding companies referred to in Article 5(3) of Fourth Council Directive 78/660/EEC of July 25, 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies[13] provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the

12 OJ C 1998/66/25.
13 OJ L 1978/222/11.

> undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

Concentrations not covered by any of the exceptions and fulfilling the conditions described above are to be notified to the Commission. They fall within the Commission's exclusive jurisdiction. It is the so–called **one–stop–shop rule**[14]. Undertakings do not notify such concentrations to the authorities of the Member States and the Member States cannot apply their merger regimes to such concentrations except in cases where the Commission under Article 4(4) of Regulation 139/2004 refers the case to the authorities of the Member States upon a reasoned submission of the undertakings informing that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State. On the other hand, if a concentration does not have a Community dimension and is capable of being reviewed under the national competition laws of at least three Member States undertakings can apply to the Commission for referral to the Commission before any notification to the competent authorities. Where at least one such Member State has expressed its disagreement, the case shall not be referred to the Commission. But where no Member State has expressed its disagreement, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission.

There are four referral posibilities. They are widely described in the Commission Notice on case referral in respect of concentrations[15].

The entrepreneurs need to assess whether the transaction is not covered by the exception mentioned above and whether it should be notified to the Commission or to the authority of the Member State. In particular, merging parties may not derive legitimate expectations from an opinion issued by a national competition authority as to the qualification of a transaction as a concentration having a Community

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14 M.P. Broberg, *The European Commission's Jurisdiction to Scrutinise Mergers*, Hague, 2003, p. 6.

15 OJ C 2005/56/2.

dimension (see judgment of the CFI of February 23, 2006, T–282/02, Cementbouw Handel & Industrie BV v. Commission)[16].

2.2. EU Member States and others

Laws of the EU Member States generally provide for the obligation of notification of the intention of concentration to the competent authority. Consequently, all concentrations can be divided into three groups: those that have to be notified to the European Commission, those that have to be notified to the national authority and those that are not subject to notification to any of these authorities. In the individual Member States the boundary between the second and third group varies in thresholds on which the obligation of notification or lack of it is based.

For example, in Poland, Article 13 ACCP requires notification to the President of the OCCP before implementation of an intended concentration where there is exceeded at least one of two thresholds:

1) the combined **worldwide** turnover of undertakings participating in the concentration in the financial year preceding the year of the notification exceeds the equivalent of EUR 1 billion, or
2) the combined turnover of undertakings participating in the concentration **in the territory of the Republic of Poland** in the financial year preceding the year of the notification exceeds the equivalent of EUR 50 million.

Different thresholds are laid down in Article 13 of the Czech APC. Firstly, there is no threshold on the combined worldwide turnover of undertakings participating in the concentration, and for the combined turnover of undertakings participating in the concentration in the territory of the Czech Republic the threshold is CZK 1.5 billion. Secondly, there is a threshold of CZK 250 million for each of at least two of the undertakings concerned achieved in the market of the Czech Republic in the last accounting period. Thirdly, there are individual thresholds of CZK 1.5 billion. Fourthly, for some categories

16 ECR 2006/II–00319.

of concentration which comply with inter alia the conditions for certain market share thresholds, simplified concentration approval proceedings have been provided for (Article 16a APC).

Yet another solution is contained in Article 8 of the Spanish Competition Act of 2007. For the combined turnover of undertakings participating in the concentration in the territory of Spain the threshold is EUR 240 million, while at least two of the participants have to achieve an individual turnover in Spain of more than EUR 60 million. An alternative condition of the obligation of notification of the intention of concentration is that as a consequence of the concentration, a share equal to or higher than 30% of the relevant product or service market at a national level or in a geographical market defined within the same, is acquired or increased.

The British solution is far from all solutions discussed here. In the UK generally there is no legal duty imposed upon companies to notify a deal prior to the completion of a merger[17]. Notification is voluntary.

Laws of the Member States in which there is an obligation of notification specify exceptions to this requirement, or exceptions to the concept of concentration. As a rule, the exceptions regarding acquisition of control by the financial institutions for a period of up to 1 year and the ones regarding insolvency etc. are copied from the EU law (see the Czech law, Spanish law, Polish law). For example, in Poland concentration control is not applicable at all when the concentration arises as an effect of insolvency proceedings (excluding the cases where the firm is to be taken over by a competitor or a participant of the capital group to which the competitors of the to–be–taken firm belong).

As for the United States, their solution is to a certain extent similar to the EU and most EU Member States solutions, but not to the British one. The U.S. pre–merger antitrust filing scheme is embodied in the Hart–Scott–Rodino Antitrust Improvements Act of 1976 (hereinafter, the HSR Act). The HSR Act requires filing and complying with waiting periods before closing the transaction corresponding to different

17 P.J. Slot, A. Johnston, *An Introduction…*, p. 179.

requirements as to the size, and in some cases the size of companies involved in it[18]. The thresholds are as follows:

1) the value of the assets or voting securities (any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions) being acquired exceeding USD 263.8 million, or
2) the value of transaction exceeding USD 66 million, and:
   - the worldwide assets or net turnover of the acquiring party equaling or exceeding USD 131.9 million, and the worldwide assets or net turnover if a manufacturer, of the acquired party equaling or exceeding USD 13.2 million, or
   - the worldwide assets or net turnover of the acquiring party equaling or exceeding USD 13.2 million, and the worldwide assets or net turnover of the acquired party equaling or exceeding USD 131.9 million[19].

American catalogue of classes of exempted transactions is relatively wide and includes, among others, acquisitions of goods or realty transferred in the ordinary course of business, acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities, transfers to or from a Federal agency or a State or political subdivision thereof, transactions specifically exempted from the antitrust laws by Federal statute, and others.

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18 R.H. Farrington, A.J. Lee, Ch. Moore, *Federal Trade Commission Revises Rules on Acquisitions of Foreign Assets and Voting Securities* [in:] J.M. Gidley, G.L. Paul, *Worldwide Merger Notification Requirements*, Alphen aan den Rijn, 2009, p. 3.

19 American Bar Association Section of Antitrust Law, *The Merger Review Process…*, p. 80–81; see also: Notice of the Federal Trade Commission – Revised Jurisdictional Thresholds for Section 7a of the Clayton Act, “Federal Register”, Vol. 76, No. 16, 2011, p. 4349–4350.

3. Procedures and decisions

3.1. European Union

According to Article 4(1) of Regulation 139/2004, concentrations with a Community dimension shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement[20] or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension.

A concentration which consists of a merger or in the acquisition of joint control shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

Details of the procedure are determined by Commission Regulation No. 802/2004 of April 7, 2004 implementing Council Regulation No. 139/2004 on the control of concentrations between undertakings[21].

According to Article 6(1) of Regulation 139/2004 the Commission shall examine the notification as soon as it is received (**pre–investigation or first phase**[22]). As a result of the examination of the notification, the first phase of the control of the notified concentration may be ended with one of the following Commission's decisions:

1) where it concludes that **the concentration notified does not fall within the scope of the Regulation**, it shall record that finding by means of a **decision**;

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20 It is possible to notify on the basis of a so–called "concept agreement"; P.J. Slot, A. Johnston, *An Introduction…*, p. 142.
21 OJ L 2004/133/1.
22 P.J. Slot, A. Johnston, *An Introduction…*, p. 144.

2) where it finds that the concentration notified, although falling within the scope of this Regulation, **does not raise serious doubts as to its compatibility** with the common market, it shall decide not to oppose it and shall **declare that it is compatible with the common market**; for certain categories of concentration the Commission adopts a short–form decision declaring a concentration compatible with the common market pursuant to the simplified procedure – see Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004[23]; the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with **the commitments** they have entered into vis–à–vis the Commission with a view to rendering the concentration compatible with the common market;

3) where it finds that **following modification by the undertakings concerned**, a notified **concentration no longer raises serious doubts**, it shall **declare the concentration compatible** with the common market;

4) where it finds that the concentration notified falls within the scope of the Regulation and **raises serious doubts as to its compatibility** with the common market, it shall decide to **initiate proceedings**.

If the Commission decides to initiate proceedings (second phase), such proceedings shall be closed by means of a **decision** as provided for in Article 8(1) to (4) of Regulation 139/2004, unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration. The procedure may end with a decision of one of the following types:

1) where the Commission finds that **a notified concentration would not significantly impede effective competition** in the common market or in a substantial part of it and, in the cases referred to in Article 2(4) of Regulation 139/2004 (joint

23 OJ C 2005/56/32.

ventures), a notified concentration fulfils the criteria laid down in Article 101(3) TFEU, it shall issue a **decision declaring the concentration compatible** with the common market;

2) where the Commission finds the above mentioned, following modification by the undertakings concerned, it shall issue a **decision declaring the concentration compatible with the common market**; the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis–à–vis the Commission with a view to rendering the concentration compatible with the common market;

3) where the Commission finds that **a notified concentration would significantly impede effective competition** in the common market or in a substantial part of it in particular as a result of the creation or strengthening of a dominant position and, in the cases referred to in Article 2(4) of Regulation139/2004 (joint ventures), a notified concentration does not fulfil the criteria laid down in Article 101(3) TFEU, it shall issue a **decision declaring that the concentration is incompatible** with the common market.

Nevertheless, where the Commission finds that a concentration:

a) has already been implemented and that concentration has been declared incompatible with the common market, or

b) has been implemented in contravention of a condition attached to a decision, which has found that, in the absence of the condition, the concentration would significantly impede effective competition in the common market or in a substantial part of it in particular as a result of the creation or strengthening of a dominant position and, in the cases referred to in Article 2(4) of Regulation 139/2004 (joint ventures), a notified concentration would not fulfil the criteria laid down in Article 101(3) TFEU,

the Commission may:

– require the undertakings concerned to **dissolve the concentration**, in particular through the dissolution of the

merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,

– order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

In cases falling within point 3 above, the measures referred to above may be imposed either in a decision pursuant to point 3 or by separate decision.

An example of the case in which the European Commission issued a decision declaring the concentration compatible with the common market, simultaneously adding to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis–à–vis the Commission with a view to rendering the concentration compatible with the common market, is the case of Kraft Foods/Cadbury (the Commission's decision of January 6, 2010 declaring a concentration to be compatible with the common market, Case No COMP/M.5644)[24]. The Commission claimed that Kraft Foods had a very strong position in most EU Member States except for Great Britain and Ireland, while Cadbury had a strong position in countries such as France, Poland, Romania and Portugal through local brands that it had purchased. Concentration would give rise to competition concerns in the Polish and Romanian chocolate markets. Kraft Foods committed to divest Cadbury's Polish confectionery business (Wedel) and its Romanian chocolate business till the end of June 2010. Consequently, the Commission has decided not to oppose the notified operation as modified by the commitments and to declare it compatible with the common market, subject to full

24 OJ 2010/29/4.

compliance with the conditions and the obligations contained in the commitments. Wedel was sold to Japanese Lotte.

It is worth considering whether the principle according to which a concentration that significantly impedes effective competition is not authorised has any exceptions. Such a question becomes particularly relevant in times of crisis, when the concentrations may save businesses from failure. Many jurisdictions can recognise a so–called **failing firm defence (failing firm doctrine)**, i.e. that the failing firm is going out of business and the only way to save it is for the buyer to take it on[25]. The practical application of the failing firm defence may vary from authority to authority. The European Commission used to apply this doctrine very narrowly. The Commission has recognised the possibility of the failing firm defence indicating three cumulative criteria which are relevant for the application of this defence[26]:

1) the failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking;
2) there is no less anti–competitive alternative purchase than the notified merger; and
3) in the absence of a merger the assets of the failing firm would inevitably exit the market.

If the Commission issues a decision declaring a concentration compatible, regardless of whether it is in the first or the second phase of the proceedings, such a decision shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration. Commission Notice on restrictions directly related and necessary to concentrations discusses this issue more widely[27].

From undertakings' point of view an extremely important solution is the so–called **tacit clearance**. Under Article 10 of Regulation

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25 A. Piszcz, *Antitrust in Times...*, p. 7–8.

26 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 2004/31/5. The Commission's view is consistent with the ECJ judgment in Kali und Salz case (joined cases C–68/94 and C–30/95, ECR 1998/I/1375).

27 OJ C 2005/56/24.

139/2004 in phase I of the control of the notified concetration the decision should be made within 25 working days at most, but this period may be increased to 35 working days in certain situations. In turn, once the second phase of the control is reached, in the phase II decisions shall be made within not more than 90 working days of the date on which the proceedings are initiated. This period may be increased (extended) or suspended in certain situations. If the Commission has not taken a decision within the above time limits, **the concentration shall be deemed to have been declared compatible** with the common market.

3.2. EU Member States and others

British law generally imposes on entrepreneurs no legal obligation to notify a deal prior to the completion of a merger. Notification is voluntary. However, many companies choose to notify their proposed or completed deals to the OFT[28]. In instances where an informal merger submission is made, after the OFT has issued a merger clearance or reference decision, the entrepreneur is obliged to pay the merger filing fee[29].

The Spanish, Czech and Polish laws (similarly to the EU law) provide for prior control of concentrations (*ex ante*), the obligation to notify the intended concentration and similarly to the EU law define a catalogue of parties obliged to notify. In Poland Article 97 section 2 ACCP states that the legal action pursuant to which the concentration is to be implemented may be performed under condition of the issuance by the President of the OCCP, by way of a decision, of the approval for implementing the concentration, or after the lapse of the time limit. Thus, an agreement between parties may be concluded under a suspensive condition.

In the EU Member States, the procedural issues are resolved in different ways. In Spain, proceedings are two–phase similarly to the proceedings before the European Commission. In the first phase of the proceedings, which lasts up to 1 month, the Council of the

28 P.J. Slot, A. Johnston, *An Introduction…*, p. 179.
29 R. Subiotto, R. Snelders, *Antitrust Developments in…*, p. 219–220.

National Competition Commission may authorise the concentration (unconditionally or conditionally), shelve the proceedings, refer the case to the European Commission under the provisions of Regulation 139/2004 or decide to initiate the second phase of the procedure, when it considers that the concentration may hinder the maintenance of effective competition in all or part of the national market. Once the second phase of the procedure has been initiated, the Directorate of Investigation shall elaborate a succinct note on the concentration that, once the confidential aspects of it have been resolved, shall be made public. The information about that is provided to the natural or legal persons that may be affected and the Consumer Council. They may submit their allegations within a period of 10 days. The possible obstacles to competition resulting from the concentration shall be included in a statement of objections drafted by the Directorate of Investigation, which shall be notified to the interested parties so that they can file any allegations within a period of 10 days. When the final proposal for resolution has been received from the Directorate of Investigation, the Council of the National Competition Commission shall adopt the final decision by means of a resolution, in which it may authorise the concentration (unconditionally or conditionally), shelve the proceedings, or prohibit the concentration. This second phase of the proceedings is supposed to last, as a rule, no longer than 2 months. An interesting Spanish solution is the possibility of an intervention of the Council of Ministers. The resolutions adopted by the Council of the National Competition Commission shall be notified to the Minister of Economy and Finance. The resolutions in second phase in which the Council of the National Competition Commission prohibits a concentration or authorise a concentration conditionally shall not be effective and shall not bring the procedure to an end:

- until the Minister of Economy and Finance has resolved not to refer the concentration to the Council of Ministers,
- in the event that the Minister of Economy and Finance has decided to refer the concentration to the Council of Ministers, until the Council of Ministers has adopted a decision on the concentration that confirms the resolution of the Council of the National Competition Commission; the Minister of Economy

and Finance may refer the decision to the Council of Ministers for reasons of general interest when, in the second phase, the Council of the National Competition Commission has resolved to prohibit the concentration or authorise the concentration conditionally. Thus, there may arise a question about excessive politicisation of the Spanish merger regime.

It should be added that, adopting a model contained in the EU law, the Spanish law provides for the so–called tacit clearance.

In Great Britain, when the OFT is informed of the concentration by the notification, either from its own market research or from third parties, it shall conduct the proceedings which can end in the first phase. However, if the OFT believes that it is or may be the case that the merger may (or may be expected to) result in a substantial lessening of competition in a UK market, it will conduct an in–depth phase II investigation. This two–phase structure of the proceedings differs from the European one in that in Great Britain the second phase of the proceedings is conducted by an authority other than the OFT. This authority is **the Competition Commission**. The OFT's decision to refer the case to the Commission should be made within 4 months of the completion of the merger or within 4 months of notice of the merger either having been given to the OFT or having been made public (where these are later than the date of the completion of the merger)[30]. The second phase, however, can not be longer than 24 weeks (exceptionally, this time limit may be extended for up to 8 weeks). In the first phase, the OFT may, inter alia, accept an undertaking from the merging parties that they will not take any steps to move forward with the merger (pre–emptive action) in such a way that any subsequent reference to the Commission might be obstructed in practice. The OFT may make an "initial enforcement order" where the OFT has reasonable grounds to believe that such pre–emptive action might be contemplated or underway. Through this order, in particular, the OFT may require the provision of information, prohibit certain acts or oblige the merging parties to safeguard assets. Finally, the OFT may: accept

30 P.J. Slot, A. Johnston, *An Introduction…*, p. 183.

undertakings from the merging parties in lieu of making a reference to the Commission, refer the case to the Commission, or decide to make no reference to the Commission. In the second phase, the principle is the prohibition of taking any further steps toward the completion of the merger. The Commission is empowered to accept interim undertakings and make interim orders. At last, the Commission may:

1) conclude that the concentration raises no competition problems,
2) accept final undertakings, or
3) take remedial action.

The Commission recognised in particular the following remedies[31]:

a) remedies designed to make a significant and direct change to the structure of a market by a requirement, for example, to divest a business or assets to a newcomer to the market or to an existing, perhaps smaller, competitor;
b) remedies designed to change the structure of a market less directly by reducing entry barriers[32] or switching costs, for example, by requiring the licensing of know–how or intellectual property rights or by extending the compatibility of products through industry–wide technical standards;
c) remedies directing firms (whether sellers or buyers) to discontinue certain behaviour (for example, giving advance notice of price changes) or to adopt certain behaviour (for example, more prominently displaying prices and other terms and conditions of sale);
d) remedies designed to restrain the way in which firms would otherwise behave, for example, the imposition of a price cap;

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31 *Market Investigation References: Competition Commission Guidelines*, June 2003, http://www.competition–commission.org.uk/rep_pub/rules_and_guide/pdf/cc3.pdf, p. 41 (last accessed 31.3.2011).

32 For a suggested classification of entry barriers see: D. Harbord, T. Hoehn, *Barriers to Entry and Exit in European Competition Policy*, "International Review of Law and Economics" 14/1994, p. 415, http://www.market–analysis.co.uk/PDF/Academic/barrierstoentryandexit.pdf (last accessed 31.3.2011).

e) monitoring remedies, for example, a requirement to provide the OFT with information on prices or profits.

The United Kingdom's approach to the failing firm defence is described succinctly in the guidelines of the Competition Commission and in the guidelines of the OFT[33]. In 2008 both authorities launched a joint review of their guidelines for the assessment and review of mergers in order to produce a single set of guidelines. Notwithstanding, on December 18, 2008 the OFT published a restatement of its position on the failing firm defence in merger analysis. According to the above mentioned restatement, in order to apply the failing firm defence, two conditions must be satisfied: "inevitable exit" condition and the absence of an alternative purchaser. The OFT also made clear that, in line with recent practice, it would offer informal, confidential guidance to parties to the merger relying on the failing firm defence[34].

It should be added that in the UK third parties are afforded a scope of rights in control of concentrations which is broader than in other countries referred to herein, or in the EU law[35]. If they have a "sufficient interest", they may bring an action for judicial review of decisions by the OFT and/or the Commission. Secondly, if they have suffered some loss or damage as a result of any breach of an enforcement undertaking made by the merging parties or an enforcement order imposed upon the merging parties, they are allowed to bring an action to recover that loss or damage.

Also in the Czech procedure there are two phases. The first phase of the procedure takes up to 30 days. If the concentration is not subject to approval by the Office for the Protection of Competition, the Office shall issue a decision to that effect within 30 days of the initiation of proceedings. In cases where the concentration is subject to approval and will not result in a substantial distortion of competition, the Office shall issue a decision approving the concentration within the aforementioned deadline. In the event that the Office finds the concentration raises serious concerns as to a significant impediment to competition,as it would

33 N. Parr, R. Finbow, M. Hughes, *UK Merger Control*, London, 2005, p. 384.
34 A. Piszcz, *Antitrust in Times...*, p. 9.
35 P.J. Slot, A. Johnston, *An Introduction…*, p. 201–205.

primarily create or strengthen a dominant position of the undertakings concerned or any of them, the Office shall inform the parties to the proceedings of this fact within the aforementioned deadline and inform them that it is continuing the proceedings. If the Office informs the parties to the proceedings in writing that it is continuing the proceedings, it shall be obliged to issue a decision within 5 months of the initiation of proceedings. Like in the EU model, Czech law provides for the so–called tacit clearance. It should be added that the procedures briefly discussed here are different from the so–called simplified concentration approval proceedings (see Article 13 of the Czech APC).

In Poland, the basic difference to the EU procedural law is the fact that the control of the notified concentration is not divided into two phases. President of the OCCP, after receiving the notification, may:

1) return the notification of the intention of concentration, if the intention of concentration is not subject to a notification or the notification fails to meet the requirements with which it should comply or the party notifying the intention of concentration fails to eliminate the indicated errors or supplement necessary information, in the appointed time limit;
2) issue, by way of a decision, a consent to implement a concentration, which shall not result in significant impediments to competition in the market;
3) issue, by way of a decision, a consent to implement a concentration when, upon fulfilment of the conditions by undertakings intending to implement the concentration, competition in the market will not be significantly impeded; the President of the OCCP may impose upon the undertaking or undertakings intending to implement a concentration an obligation, or accept their obligation, in particular:
   a) to dispose of the entirety or part of the assets of one or several undertakings,
   b) to divest control over an undertaking or undertakings, in particular by disposing of a block of stocks or shares, or to dismiss one or several undertakings from the position in the management or supervisory board,

c) to grant a competitor exclusive rights,
   – determining in the decision the time limit for meeting requirements;

4) prohibit, by way of a decision, the implementation of the concentration, if it results in a significant impediment to competition in the market, in particular by the creation or strengthening of a dominant position;
5) issue, by way of a decision, a consent for the implementation of the concentration as a result of which competition in the market will be significantly impeded, in particular by the creation or strengthening of a dominant position, in any case that the desistance from banning concentration is justifiable, and in particular:
   a) the concentration is expected to contribute to economic development or technical progress;
   b) it may exert a positive impact on the national economy.

The latter possibility mentioned here (point 5) is drafted in such a general and imprecise language that it leaves the President of the OCCP with wide margins of discretion and, thus, may be understood and applied in a substantially different way in normal times and in times of crisis. However, in Poland, the financial crisis has not caused any **so–called "shotgun marriages"**[36]. It is to be noted that the Polish failing firm doctrine is a defence to be applied very cautiously.

Based on the EU model, Polish laws provide for the possibility of ordering to take any measure appropriate to restore the situation prevailing prior to the implementation of the concentration. President of the OCCP took advantage of this possibility when he ordered Oficyna Wydawnicza Wielkopolski (publisher of "Głos Wielkopolski" daily newspaper) to terminate a permanent cooperation agreement with Prasa Poznańska (publisher of "Gazeta Poznańska") and to sell some

36 A. Piszcz, *Antitrust in Times...*, p. 8–10. On "shotgun marriages" see: J.M. Rich, T.G. Scriven, *Bank Consolidation Caused by the Financial Crisis: How Should the Antitrust Division Review "Shotgun Marriages"*?, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec08_Rich12_22f.authcheckdam.pdf (last accessed 31.3.2011).

of its assets[37]. Also based on the EU model, Polish laws provide for the so–called tacit clearance.

An example of the case in which the President of the OCCP issued a decision prohibiting the concentration is the case of Carey Agri/Jabłonna. In 2006 the President of the OCCP banned a takeover of the company Jablonna by Carey Agri (companies from the spirit branch) and probably prevented a vodka price increase. The concentration would seriously restrict competition on the national market of flavoured vodka. It would lead to the creation of the biggest entity on the flavoured vodka market. Such a strong position would allow the undertaking to prevent efficient competition[38].

The President of the OCCP rarely prohibits concentration; rarely does he issue conditional consents, either. Most frequently, the President of the OCCP issues unconditional consents. Statistical data in this area for the years 2007–2009 are shown in the following table:

Table 1. Cases concerning the control of concentrations conducted by the President of the OCCP in the years 2007–2009

Conclusion	Number		
	2007	2008	2009
Consent, of which: – consent to a concentration which will contribute to economic development or technical progress or may exert a positive influence on the national economy, even if competition in the market will be significantly restricted	205 2	153 0	97 0
Conditional consent	2	2	1
Prohibition	0	0	3
Discontinuation of the proceedings	40	6	3
Decisions imposing a fine for failure to report a transaction	4	3	2
Other conclusions	12	11	17
Total number of cases completed during the year	263	177	123

Source: *own study based on annual reports on activities of the President of the OCCP*

37 http://www.uokik.gov.pl/news.php?news_id=934 (last accessed 31.3.2011).
38 http://www.uokik.gov.pl/news.php?news_id=982 (last accessed 31.3.2011).

The table above reveals a downward trend in the number of cases in the field of merger control, that may be shaped by the global economic crisis, which has also affected Polish entrepreneurs. As regards mergers, two contradicting trends can be observed around the world in times of crisis. On the one hand, in some markets one can observe an increasing merger wave[39]. On the other hand, there are markets where mergers and acquisitions seem to be typical of times of prosperity whereas in times of crisis enterprises are more oriented towards protecting their positions in the market[40]. Polish markets can be used as examples of this second tendency. Unlike in other countries, the financial crises did not lead to **so–called rescue mergers** or nationalisation of banks in Poland[41].

As for the U.S. federal procedure, it has certain features in common with European procedure. If the conditions for the notification of a concentration are met, except as exempted, a merger shall not be implemented, unless both parties (or in the case of a tender offer, the acquiring party) file notification and the waiting period has expired. The waiting period shall begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice of the completed notification, or if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance, from both persons, or, in the case of a tender offer, the acquiring person. By principle, the waiting period shall end on the thirtieth day after the date of such receipt. The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period and allow any person to proceed with any acquisition, and promptly shall cause to be published in the Federal Register a notice that neither intends to take any action within such period with respect to such acquisition.

If unresolved antitrust issues remain at the conclusion of the initial waiting period, the investigating agency may issue a Second Request.

39 S.M. Stolz, *Bank Capital and Risk–taking: the Impact of Capital Regulation, Charter Value, and the Business Cycle*, Berlin–New York, 2007, p. 94.

40 A. Piszcz, *Antitrust in Times...*, p. 7.

41 D. Kośka, K. Kuik, *2008 and 2009 EU Competition Law and Sector–specific Regulatory Case Law Developments with a Nexus to Poland*, “YARS” 3/2010, p. 196–197.

The issuance of a Second Request extends the waiting period by principle to 30 days after the date on which the parties (or in the case of a tender offer, the acquiring party) complied with the Second Request[42]. During this period of time, the parties should obtain a decision as to whether the agency will challenge transaction (agencies themselves do not prohibit the concentration, but in order to prohibit a transaction, must seek an order from a federal district court preventing the transaction or undoing it) or negotiate a consent agreement resolving competitive concerns[43]. However, this time is often not sufficient for the agency, so they ask the involved parties and the parties interested in avoiding litigation with the government grant additional time in response to such agency request[44].

The U.S. regime offers the unique possibilities of selective enforcement. It appears extremely flexible in comparison to other national regimes. Although American rules remain almost unchanged for over a hundred years, enforcement reflects changes of existing economic circumstances and social needs as well as of economic theories and legal concepts. Enforcement agencies have used to push for *per se* tests. Courts, on the other hand, have tended toward the application of an economic reasonableness test to mergers, after rejecting the incipiency doctrine, which holds roughly that because of evidence of a trend toward concentration, a court may hold that a merger violates the Clayton Act even though it does not result in significant concentration levels[45].

In the USA, three grounds should be mentioned that determine the possibility of clearing anti–competitive mergers:

1) the failing firm defence under the Horizontal Merger Guidelines[46],
2) the General Dynamics defence and
3) the flailing firm defence.

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42 American Bar Association Section of Antitrust Law, *The Merger Review…*, p. 60.
43 *Ibidem*, p. 62.
44 *Ibidem*
45 K.N. Hylton, *Antitrust Law…*, p. 326, 330, 339.
46 http://www.justice.gov/atr/public/guidelines/hmg–2010.html (last accessed 31.3.2011). See also: K.N. Hylton, *Antitrust Law…*, p. 327–328.

The failing firm defence focuses on the following aspects: the firm will be unable to meet its obligations in the near future, the failing firm has no realistic prospect for a successful reorganisation, there is no identifiable purchaser that would not pose antitrust concerns, and the assets would likely exit the market absent the transaction. The General Dynamics defence relies on the U.S. Supreme Court's decision[47] where the Court concluded that, even provided that a company was not going to exit the market, if the company lacked resources to be able to engage in new competition in the future, acquisition of that company would not be unlawful. On the contrary, the flailing firm defence – a variant of the General Dynamics defence – may be applied when the firm would likely have some competitive influence going forward[48].

It seems that no matter what views the competition authority might hold on the two last of the aforementioned defences, the crisis might cause it to be more receptive to the needs of businesses. Proper merger analysis of a transaction that raises competition issues takes much time whereas restructurings are usually urgently needed to maintain the economic stability. Speed of response does not necessarily go hand in hand with fulfilling usual roles of competition law. Therefore, the competition authorities are more open to play the emergency role to rescue economies if they are equipped with some "corrective" tools. The U.S. competition authorities possess a tool such as the **"pocket decree" (or "blank check")** that permits a transaction to close immediately, but also permits the authority to require a divestiture at a later date if the authority concludes that a remedy is necessary. These tools provide authority with some comfort but the other side of the coin is the uncertainty of decisions by the authority[49].

47 United States v. General Dynamics Corp., 415 U.S. 486 (1974).

48 United States v. UPM–Kymmene Oyj, 2003 WL 21781902, 2003–2 Trade Cas. (CCH) 74,101 (N.D. Ill. 2003).

49 A. Piszcz, *Antitrust in Times...*, p. 9–11.

4. Legal sanctions

Where there is an obligation to notify the intention of concentration, failure to do so is subject to legal sanctions. In addition to the order to dissolve the concentration (not always imposed on undertakings, anyway) undertakings that fail to fulfil the obligation can expect fines.

Fines and periodic penalty payments for infringements of merger control legislation provided for in the EU law are basically the same as the ones provided for in Regulation 1/2003 – see part VI paragraph 1.2.1. above (up to 10% of the aggregate turnover, up to 1% of the aggregate turnover and up to 5% of the average daily aggregate turnover).

Similarly, in the Czech Republic fines for substantive infringements which mean implementation of a concentration without the previous consent of the Office for the Protection of Competition are the same as the fines for anti–competitive practices.

Also in Poland fines and periodic penalty payments for infringements of merger control legislation are similar to the ones described for anti–competitive practices – see part VI paragraph 1.2.1. above. A concentration without the prior consent of the President of the OCCP can be punished with a fine up to 10% of the total turnover in the preceding business year. In publicly available database of decisions of the President of the OCCP, you can find 24 decisions from the years 2003–2009, in which the President of the OCCP imposed such fines on entrepreneurs. Only in 10 decisions, the information on what percentage of entrepreneur turnover constituted an imposed fine was not concealed. Out of these 10 decisions only one imposed the maximum fine, while in other cases the fines were less than half of the maximum fine. In 8 cases, the fines were less than 1% of the entrepreneurs' turnover. It should be added that on entrepreneurs who did not report themselves to the President of the OCCP as having infringed the law fines of 0,02–0,03% were imposed. Interestingly, fines of this level, sometimes lower and sometimes higher (in relation to turnover) are also imposed on entrepreneurs, who reported themselves to the President of the OCCP as having infringed the law. The published decisions show that the

entrepreneurs who reported themselves to the President of the OCCP as having infringed the law were punished with fines from PLN 180 to PLN 70 000. Those whose infrigements (not voluntarily reported) were detected by the President of the OCCP were punished with fines from PLN 9 000 to PLN 235 000.

Apart from fines for substantive infringements, the President of the OCCP may impose fines for procedural infringements of up to EUR 50 000 000 and periodic penalty payments of up to EUR 10 000 a day. Moreover, the President of the OCCP may impose fines on directors and executives amounting up to fifty–fold the average salary for non–notified concentration.

The Spanish solution is interesting. According to Article 9(5) of the Competition Act of 2007, "in the event that when the National Competition Commission has not been notified of a concentration subject to control pursuant to the provisions of the Act, it, *ex officio*, shall require the obliged parties to notify it so that they make the corresponding notification within a period no longer than twenty days as of the reception of the requirement. The positive silence shall not benefit concentrations notified on the requirement of the National Competition Commission. After the notification period has elapsed without the notification having been made, the Directorate of Investigation may initiate *ex officio* concentration control proceedings, notwithstanding the application of the fines and periodic penalty payments". Thus, entrepreneurs are given a second chance by the Commission (which is not the case in the EU law or the Member States laws referred to above).

As for fines, it should be noted that the Spanish merger control legislation (as in the case of anti–competitive practices) provides for three categories of infringements – minor, serious and very serious – and three different limits of fines for each category (see part VI paragraph 1.2.2. above). In terms of concentrations:

1) minor infringements are punished with fines of up to 1% of the total turnover of the infringing undertaking in the business year immediately preceding to that of the imposition of the fine, and they include:

- notification of a concentration to the National Competition Commission outside the periods laid down in Articles 9(3)(a) and 9(5) of the Competition Act of 2007,
- failure to notify the National Competition Commission of a concentration which has been required by the Commission *ex officio* under Article 9(5) of the Competition Act of 2007,

2) serious infringements are punished with fines of up to 5% of the total turnover of the infringing undertaking in the business year immediately preceding the one of the imposition of the fine, and they include the execution of a concentration subject to control in accordance with the provisions of the Act before it is notified to the National Competition Commission or before an express or tacit resolution authorising it has been issued and has become executive, without the lifting of the suspension having been decided;
3) very serious infringements are punished with fines of up to 10% of the total turnover of the infringing undertaking in the business year immediately preceding the one of the fine imposition, and they include not complying with or contravening a resolution, decision or commitment adopted in application of the Act, regarding concentration control.

In Great Britain, as the notification of a concentration is voluntary, there is no sanction for the implementation of concentration itself without notification of its intention. However, there are established legal sanctions for procedural infringements in the investigation and information gathering process of the Competition Commission[50]. According to Section 111 of the Enterprise Act of 2002, a penalty shall be of such amount as the Commission considers appropriate. The amount may be a fixed amount, an amount calculated by reference to a daily rate or a combination of a fixed amount and an amount calculated by reference to a daily rate. An appeal may be lodged against the imposition of any such penalty before the Competition Appeal Tribunal. Moreover, a person commits an offence if (s)he intentionally alters,

50 P.J. Slot, A. Johnston, *An Introduction…*, p. 185–186.

suppresses or destroys any document which (s)he has been required to produce by a notice under Section 109 of the Enterprise Act of 2002. Such an offence can be punished by a fine or imprisonment for a term not exceeding two years or both.

Since undertakings and orders (see paragraph 3.2. above) can be enforced in the civil courts, the OFT or the Commission may secure compliance with an undertaking or an order by seeking an injunction[51]. Competition authorities can bring civil proceedings for an injunction or for interdict or for any other appropriate relief or remedy.

Also American solutions are specific. As already indicated, the agencies themselves do not prohibit the concentration, but in order to prohibit a transaction, must seek an order from a federal district court preventing the transaction or undoing it. Should the parties merge without observing the requirements of the Clayton Act, the competent authority may seek both injunctive relief and civil penalties, as appropriate, under Section 7A(g) of the Clayton Act. Under this provision, any person, or any officer, director, or partner thereof, who fails to comply with any provision of Section 7A shall be liable to the United States for a civil penalty of not more than USD 11 000 for each day during which such person is in violation of this Section. Such penalty may be recovered in a civil action brought by the United States. However, if any person, or any officer, director, partner, agent, or employee thereof, substantially fails to comply with the notification requirement or any request for the submission of additional information or documentary material within the waiting period, the United States district court:

– may order compliance,
– shall extend the waiting period and
– may grant such other equitable relief as the court in its discretion determines necessary or appropriate.

The court decides upon application of the Federal Trade Commission or the Assistant Attorney General.

51 *Ibidem*, p. 201.

Part 8

COMPETITION AND THE STATE

1. European Union

Examining relationship between state and competition, market structure, economic performance etc. inevitably poses questions around **state aid**. It is disputable whether originally the Cinderella of competition law was state aid control or it was anti–cartel activity[1]. However, decisions regarding state aid are not rare any more.

According to Article 107(1) TFEU, save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market. The phrase "**in any form whatsoever**" means that state aid can take a variety of forms (the transfer of resources or the relief from charges which an undertaking normally has to bear) including:

- subsidies or grants from public bodies,
- interest–free or low–interest loans, long–term loans,
- state guarantees,
- tax or other exemptions from lawfully due payments (social security, other public levies),

1 See: D. Grespan, L. Bellodi [in:] G.L. Tosato, L. Bellodi, *EU Competition Law…*, p. 327; J. Joshua, *The Criminalisation of Antitrust Leniency and Enforcement: the Carrot and the Stick. A View from Europe*, http://www.morganlewis.com/pubs/013FB9BA–8DD0–4247–966A2DED530FE33D_Publication.pdf (last accessed 31.3.2011), p. 1.

– agreements to pay the debt in instalments, waiver of interest normally due on late payment,
– favourable (non–commercial) prices for goods or services provided by public undertakings,
– preferential procurement coming from the public sector,
– overpriced prices for shares in the case of acquisitions of companies by the public sector or in the case of conversion of a company's debts to equity (according to the jurisprudence of the ECJ: "it is necessary to assess whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size, having regard in particular to the information available and foreseeable developments at the date of those contributions"[2]),
– premiums for achieving a certain level of employment,
– public funding in the form of services (e.g. consultancy or legal services) provided free or at a reduced rate,
– contributing to financing salaries,
– lease of public land or property at discounted rates (less than market rates),
– reimbursement of specified costs in the case of the success of a project.

Article 107(1) TFEU sets out the criteria to establish if state aid is present. State aid exists if aid meets all of the following conditions which are parts of **the cumulative test**:

1) aid is granted by a Member State or provided through State resources (**anti–competitiveness of the aid**),
2) **aid distorts or threatens to distort competition**,
3) aid favours certain undertakings or the production of certain goods (**favouritism and selectivity**),
4) **aid affects trade between Member States**.

2 Judgment of 16.5.2002, C–482/99, French Republic v. Commission, ECR 2002/I–04397.

The first condition is satisfied where aid is granted by the state, either directly (central government, devolved administrations, local or regional authorities) or by companies (e.g. state or local authority companies) and agencies established by the state to distribute public funds. Funding which is allocated under the control of the state will be classified as a state resource even if those funds do not originate from a state budget (e.g. structural funds money). However, according to the jurisprudence of the ECJ, the distinction made "between aid granted by a Member State and aid granted through State resources does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by that State. Therefore, statutory provisions of a Member State which, first, require private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, distribute the financial burden resulting from that obligation between those electricity supply undertakings and upstream private electricity network operators do not constitute State aid" (judgment of March 13, 2001, C–379/98, PreussenElektra AG v. Schhleswag AG)[3].

The second condition is satisfied where aid at least threatens to distort competition. Therefore, the onus is not on the Commission to establish that the aid in question affected the competitive position of certain undertakings[4]. A decision of the Commission does not have to define the relevant market (unlike under Articles 101 and 102 TFUE) from the standpoint of the product and in point of time, the market pattern and the relations between competitors resulting therefrom which might in a given case be distorted by the aid in question[5]. The Commission interprets the second condition very widely and it is for a Member State to prove there is no threat of distortion of competition.

3 ECR 2001/I–02099.

4 CFI judgment of 4.4.2001, T–288/97, Regione Friuli Venezia Giulia v. Commission, ECR 2001/II–01169.

5 ECJ judgment of 17.9.1980, 730/79, Philip Morris Holland BV v. Commission, ECR 1980/02671.

A distortion of competition arises by the very nature of aid which strengthens the competitive position of the recipient by reducing its costs in relation to its rivals. The recipient's share of the market or the size of the distortion of competition are irrelevant. Even small effects are sufficient to result in distortion of competition. However, **the so–called de minimis aid** (not exceeding a ceiling of EUR 200 000 over any period of three years) does not distort or threaten to distort competition. I will add some more details about de minimis aid when describing the fourth condition.

The third condition is satisfied where aid favours some selected undertakings (but not others) or the production of some selected goods (but not others), that is, confers an advantage on selected recipients. A selective aid measure is one that targets particular undertakings, types of undertakings e.g. small and medium sized enterprises (SMEs), particular locations (e.g. measure providing support to all undertakings in Podlasie, Moravian Region, Andalusia or Scotland) or a specific sector (sectors). An aid measure affecting the whole of the Member State's economy e.g. a nation–wide tax measure, is not considered a state aid.

An advantage is conferred if an aid measure relieves the burdens normally assumed in a recipient's budget and gives the recipient an economic benefit which it would not have obtained under normal market conditions. State aid is a benefit that is granted, free of charge or on favourable terms, to a recipient. Transactions involving a state body done at commercial rates do not represent an advantage.

Favouritism (or its lack) is assessed under a number of tests referring to the particular situation in which the state is operating in a commercial context in the market economy:

- **the "private investor test"** – this test applies when the state measures in question provides a benefit to a private or public company through classic investments (capital injections, re–capitalisation, and contribution of assets, etc.); in applying this test the Commission rules on whether a private investor would have made the proposed investment under the same conditions; according to the CFI, for the purposes of determining whether a

measure of state aid constitutes an advantage, a distinction must be drawn between the obligations which the state must assume as an undertaking exercising an economic activity and its obligations as a public authority – while it is clearly necessary, when the state acts as an undertaking operating as a private investor, to analyse its conduct by reference to the principle of the private investor in a market economy, application of that principle must be excluded in the event that the state acts as a public authority because then the conduct of the state can never be compared to that of an operator or private investor in a market economy (judgment of December 17, 2008, T–196/04, Ryanair Ltd v. Commission[6]);

– **the "private creditor test"** – this test applies when the state measure in question regards a loan or a guarantee in result of which the state becomes a creditor, or if it regards payment facilities of a debt owed by the undertaking to the state (cancellation of debt, repayment agreements, rescheduling of debts); the public creditor's behaviour is compared with that of a hypothetical private creditor finding himself, as far as possible, in the same situation[7];
– **the "private purchaser test"** – this test applies when the state enters into an agreement to purchase goods or services; in applying this test the Commission assesses whether a private purchaser would have entered into the proposed agreement under the same conditions[8];
– **the "private vendor test"** – this test applies when the state acts as a seller in the market, for example when privatisation is effected or the sale of real estate occurs; in applying this test the

6 ECR 2008/II–03643.

7 See i.a.: M. Lienemeyer, *The Restructuring of Huta Czestochowa – the Commission's Decision Finding Compliance with Private Creditor Test but Ordering Recovery of Some Previously Granted Restructuring Aid*, "Competition Policy Newsletter" 1/2006, p. 100–101; see also: Case T–1/08, Buczek Automotive sp. z o.o. v. Commission (before the General Court); Commission Decision of 31.10.2000 amending Decision 97/21/ECSC, EC on State aid implemented in favour of Compañía Española de Tubos por Extrusión SA, located in Llodio, Álava (OJ L 2011/52/26), p. 25.

8 See e.g.: CFI judgment of 28.1.1999, T–14/96, Bretagne Angleterre Irlande (BAI) v. Commission, ECR 1999/II–00139.

Commission assesses whether a buyer would have obtained equally favourable conditions from a private vendor (seller); according to the CFI, where a public–sector undertaking sells a plot of land to a private undertaking occupying that land and the purchase price is paid only after several months of occupation, the Commission must consider whether a private operator could have required payment of the purchase price on an earlier date and, if that is not the case, whether he could have required a payment in respect of the period during which the land was occupied before payment of the purchase price[9].

The question whether an undertaking has received an economic advantage was the central issue in the famous **Altmark judgment regarding aid in the form of compensation for the public services**[10]. According to the ECJ opinion, where a state measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 87(1) TEC – now Article 107(1) TFEU; however, for such compensation to escape classification as state aid in a particular case, a number of conditions must be satisfied:

- the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined;
- the parameters on the basis of which the compensation will be calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advanta-

9 Judgment of 6.3.2002, joined cases Territorio Histórico de Álava – Diputación Foral de Álava (T–127/99), Comunidad Autónoma del País Vasco and Gasteizko Industria Lurra, SA (T–129/99) and Daewoo Electronics Manufacturing España, SA (T–148/99) v. Commission, ECR 2002/II–01275.

10 Judgment of ECJ of 24.7.2003, C–280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundes verwaltungsgericht, ECR 2003/I–07747.

ge which may favour the recipient undertaking over competing undertakings;

- the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations; compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position;
- where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

Lastly, the fourth condition contained in Article 107(1) TFEU is satisfied where aid affects trade between Member States. The Commission's (and the courts') interpretation of this condition is very broad. Most goods and services are subject to trade between Member States and thus aid for any selected undertaking or the production of any selected goods is capable of affecting trade between Member States even if the recipient itself does not trade with other Member States. Undertakings do not have to be involved in exporting goods themselves in order for there to be an effect on trade between Member States. It is enough that particular goods or services are traded between Member States. Consequently, most of them are viewed as tradable. The recipient's share of the market or the size of the effect on trade are irrelevant. In case concerning aid provided by the Italian Government to Alfa Romeo, the ECJ stated that where an undertaking operated in

a sector in which there was surplus production capacity and producers from various Member States competed, any aid which it might receive from the public authorities was liable to affect trade between the Member States and impair competition, inasmuch as its continuing presence on the market prevented competitors from increasing their market share and reduced their chances of increasing exports (the court noted that, on the Italian market alone, Alfa Romeo's share was 14.6% in 1986, while the Italian Republic claimed that Alfa Romeo's share in the European market was marginal and that the contested intervention did not lead to any reduction in the market share of competing undertakings)[11].

However, **de minimis aid** does not affect trade between Member States. In light of the wording of Article 2 of the Commission Regulation No. 1998/2006 of December 15, 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid[12], aid measures shall be deemed not to meet all the criteria of state aid and shall therefore be exempt from notification to the Commission, if the total de minimis aid granted to any one undertaking does not exceed EUR 200 000 over any period of three fiscal years. The total de minimis aid granted to any one undertaking active in the road transport sector cannot exceed EUR 100 000 over any period of three fiscal years. These ceilings apply irrespective of the form of the de minimis aid or the objective pursued and regardless of whether the aid granted by the Member State is financed entirely or partly by resources of EU origin. When an overall aid amount provided under an aid measure exceeds this ceiling, that aid amount cannot benefit from the Regulation, even for a fraction not exceeding that ceiling. In such a case, the benefit of the Regulation cannot be claimed for this aid measure either at the time the aid is granted or at any subsequent time. The Regulation is applied only to aid in respect of which it is possible to calculate precisely the gross grant equivalent of the aid ex ante without need to undertake a risk assessement ("**transparent aid**"). According to Article 6 of the Regulation "it shall apply from 1 January 2007 until 31 December 2013".

11 Judgment of 21.3.1991, C–305/89, Italian Republic v. Commission, ECR 1991/I–01603.
12 OJ L 2006/379/5.

Fortunately for Member States, there are **exemptions** to the prohibition of state aid despite the fact that state aid can distort competition between undertakings, which can in turn, limit economic performance, prosperity and quality for consumers (but on the other hand it can be constructive means of supporting economies, including supporting research and development processes as well as supporting undertakings in crisis). They are the following:

1) **mandatory exemptions (exemptions ex lege)** contained in Article 107(2) TFEU,
2) **discretionary exemptions** contained in Article 107(3) TFEU,
3) exemptions allowed by Article 106(2) TFEU ("Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue–producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union"),
4) exemptions in **agriculture** under Article 42 TFEU ("The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39. The Council, on a proposal from the Commission, may authorise the granting of aid: (a) for the protection of enterprises handicapped by structural or natural conditions; (b) within the framework of economic development programmes"),
5) exemptions in **transport** under:
   - Article 93 TFEU ("Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service");

– Article 96(1) TFEU ("The imposition by a Member State, in respect of transport operations carried out within the Union, of rates and conditions involving any element of support or protection in the interest of one or more particular undertakings or industries shall be prohibited, unless authorised by the Commission"),
– Article 98 TFEU ("The provisions of this Title shall not form an obstacle to the application of measures taken in the Federal Republic of Germany to the extent that such measures are required in order to compensate for the economic disadvantages caused by the division of Germany to the economy of certain areas of the Federal Republic affected by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this Article"),
– Article 100 TFEU ("1. The provisions of this Title shall apply to transport by rail, road and inland waterway. 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions");

6) exemptions in **military industry** under Article 346(1)(b) TFEU ("The provisions of the Treaties shall not preclude the application of the following rules: (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes");

7) exemptions allowed by Article 207(1) TFEU ("The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property,

foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action”).

Mandatory exemptions referred to in Article 107(2) TFEU cover:

a) “aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned” – the courts[13] were reluctant to apply this exemption to buying travel vouchers by the public authorities to be used on the Bilbao–Portsmouth route; the courts argued that: firstly, vouchers had only been purchased from one undertaking and the authorities had failed to prove that the company had been selected in a transparent manner, secondly, the authorities had been able to achieve identical social goals with a diversified travel offer (it had not been established that the social objectives pursued by that aid could be achieved only by purchasing travel vouchers from that one undertaking);

b) “aid to make good the damage caused by natural disasters or exceptional occurrences” – for example by the earthquake in the Abruzzo region, the eruption of Sicily’s Mount Etna, floods in Poland;

c) “aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division” – according to the ECJ opinion, it cannot be presumed that this provision has been devoid of purpose since the reunification of Germany; this provision cannot, on the other hand, without disregarding

13 See: judgment of ECJ of 1.06.2006, joined Cases P & O European Ferries (Vizcaya) SA (C–442/03 P) and Diputación Foral de Vizcaya (C–471/03 P) v. Commission, ECR 2006/I–04845.

its nature as a derogation and its context and aims, be interpreted as permitting full compensation for the undeniable economic backwardness of the new Länder, a backwardness which is attributable to the outcome of the specific economic policy choices made by the German Democratic Republic; the economic disadvantages suffered by the new Länder as a whole were not directly caused by the geographical division of Germany and the exemption is not intended to overcome the special situation resulting from the political and economic division of Germany[14]. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing Article 107(2)(c) TFEU.

The above listed categories of aid are compatible with the internal market.

Discretionary exemptions referred to in Article 107(3) TFEU cover:

b) "aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation" – this derogation concerns only areas where the economic situation is extremely unfavourable in relation to the EU as a whole, i.e. regions with a gross domestic product (GDP) per capita of less than 75% of the EU average and the EU's outermost regions[15];

c) "aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State";

d) "aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely

14 Judgment of ECJ of 30.9.2003, joined Cases Freistaat Sachsen (C–57/00 P) and Volkswagen AG and Volkswagen Sachsen GmbH (C–61/00 P) v, Commission, ECR 2003/I–09975.

15 See also: P. De Ridder, *The Regional State Aid Maps for 2007–2013: Less and Better Targeted Regional Aid*, "Competition Policy Newsletter" 1/2008, p. 13.

affect trading conditions to an extent contrary to the common interest";

e) "aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest";

f) "such other categories of aid as may be specified by decision of the Council on a proposal from the Commission".

These types of aid may be considered to be compatible with the internal market.

According to Article 108 TFEU, the Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a state or through state resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission[16]. If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the CJEU direct. On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid.

Pursuant to Article 109 TFEU, the Council, on a proposal from the Commission and after consulting the European Parliament, may make

16 More on the procedure before the Commission: D. Grespan, L. Bellodi [in:] G.L. Tosato, L. Bellodi, *EU Competition Law…*, p. 342–383.

any appropriate regulations for the application of Articles 107 and 108 TFEU. The most important regulations made by the Council are:

- Council Regulation No. 659/1999 of March 22, 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (hereinafter, the Regulation 659/1999)[17],
- Council Regulation No. 994/98 of May 7, 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid[18].

The last one authorises the Commission to adopt regulations declaring that the following categories of aid should be compatible with the common market and shall not be subject to the notification requirements of the Treaty:

a) aid in favour of: small and medium–sized enterprises, research and development, environmental protection, employment and training,
b) aid that complies with the map approved by the Commission for each Member State for the grant of regional aid.

2. EU Member States and others

In principle[19], the EU Member States are obliged to notify their planned state aid measures to the Commission before their implementation and wait for clearance (authorisation). As a rule, the EU Member States are not those who decide on the compatibility with the common market of a planned measure. Such a power rests only in the hands of the Commission. The Commission is responsible for monitoring, deciding on compatibility and empowered to order Member States to recover aid that is unlawfully implemented or incompatible with the common market. On the other hand, the EU Member States

17 OJ L 1999/3/1.
18 OJ L 1998/142/1.
19 As an exception see the Commission Regulation (EC) No. 800/2008 of 6.8.2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 2008/214/3.

are competent to adopt their national laws regarding the procedural issues concerning state aid (like preparations for notification, principles of representation of a Member State at the EU Courts, principles of state aid recovery and principles for state aid monitoring by a Member State). An example of this is the Polish Act of 30 April 2004 on the Procedural Issues Concerning State Aid[20].

State aid is also present in the USA where it is still implemented in significant amounts. The question of application of the antitrust regime to private undertakings who seek state aid in erecting competitive barriers is given a high priority. The state can build competitive entry barriers in markets and thus many private undertakings have tried (sometimes successfully) to enlist the aid of the state in supporting anti–competitive schemes[21]. There have also been attempts to justify their conduct by claiming that it was regulated (authorised) by a state or the federal government[22].

With regard to state aid, the USA have lessons to offer to the European Union (and vice versa). There are two areas of development of American law that come into play while discussing federal regulation of state aid: **the state action doctrine and the policy of the commerce clause**[23].

The antitrust state action immunity doctrine originated in the 1943 decision by the Supreme Court in the case of Parker v. Brown[24]. Brown, a producer and packer of raisins in California, challenged pooling arrangements promulgated under the California Prorate Act of 1933 which served to control surpluses in the raisin industry. He considered it as a violation of the Sherman Act. The Supreme Court found nothing in the Sherman Act which suggested that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. It stated: "(…) the California prorate program would

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20 Journal of Laws 2007, No. 59, *item* 404, as amended.

21 K.N. Hylton, *Antitrust Law…*, p. 352.

22 See: United States v. Trans–Missouri, 166 U.S. 290 (1897); United States v. Socony–Vacuum Oil Co., 310 U.S. 150 (1940).

23 S. Martin, P. Valbonesi, State aid to business, [in:] P. Bianchi, S. Labory (eds.), *International handbook on industrial policy*, Cheltenham–Northampton, 2006, p. 141 and next.

24 Parker v. Brown, 317 U.S. 341 (1943).

violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate. We may assume also, without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce. Occupation of a legislative 'field' by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws. (…) In a dual system of government in which, under the Constitution, the states are sovereign save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to 'persons', including corporations (§7), and it authorizes suits under it by persons and corporations (…) There is no suggestion of a purpose to restrain state action in the Act's legislative history"[25].

The state action doctrine protects governments from liability for decisions they take in taxing and subsidising markets. However, according to literature, narrowing the scope of the state action doctrine would not necessarily reach tax and subsidy decisions of states that distort inter–state commerce[26].

The commerce clause is one of the most far–reaching grants of power to Congress. It permits a Congressional authority over inter–state commerce and wide variety of federal laws with regard to it. States are forbidden from employing taxes that discriminate against inter–state commerce. This involves state taxes which disadvantage out–of–state competitors of in–state undertakings. One of examples of a law discriminating against inter–state commerce was Massachusetts' law that imposed a tax on sales of milk produced both in Massachusetts

25 http://supreme.justia.com/us/317/341/case.html
26 S. Martin, P. Valbonesi, *State aid to business*, [in:] P. Bianchi, S. Labory (eds.), *International handbook…*, p. 142.

and out of state but at the same time provided subsidies exclusively to Massachusetts dairy farmers[27].

On the other hand, the favourable taxes or selective subsidies are in favour of the undertaking that receives benefit, irrespective of whether the undertaking has an initial presence in the granting state. Such measures distort competition between the undertaking and its competitors who do not receive the benefit. The inter–state commerce is distorted if those entities are engaged in it. However, the commerce clause is limited to tax measures which disadvantage out–of–state competitors of in–state undertakings. It does not reach:

– favouring of one in–state undertaking over other in–state undertakings,
– selective subsidies[28].

Compared to substantially transparent state aid in the EU the amounts of aid granted at both the state and the national level seem essentially opaque (while at the same time the U.S. transparency in lobbying expenses at the national level is higher than the EU transparency with regard to them). It would change if the USA established federal control of state aid distorting inter–state commerce[29].

27 West Lynn Creamery, Inc., et al. v. Healy, 512 U.S. 186 (1994). The Supreme Court stated: "The pricing order in this case, (…), is funded principally from taxes on the sale of milk produced in other States. By so funding the subsidy, respondent not only assists local farmers, but burdens interstate commerce. The pricing order thus violates the cardinal principle that a State may not 'benefit in–state economic interests by burdening out–of–state competitors'." See: http://supreme.justia.com/us/512/186/case.html

28 S. Martin, P. Valbonesi, *State aid to business*, [in:] P. Bianchi, S. Labory (eds.), *International handbook…*, p. 143.

29 *Ibidem*, p. 147.

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