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Extraterritorial application of Polish regulations prohibiting anti-competitive practices - from lawfulness to the effectiveness of the norm

SUMMARY

Ph. D. dissertation prepared
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under the supervision of
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Lodz 2018

The dissertation examines the issue of extraterritorial application of Polish regulations prohibiting anti-competitive practices. It raises questions of the legality of the domestic legislation based on effects' doctrine and the effectiveness of such legislation. Two research hypotheses are put forward. The first one - that the effects' doctrine is currently recognized by public international law as the jurisdictional basis applicable in the field of competition law, the second one - that no legal mechanisms exist which would ensure the efficient extraterritorial application of the norms prohibiting anti-competitive practices, stipulated in the Act on competition and consumer protection (later on referred to as: OKiKu)¹.

The "extraterritorial application" means the application of rules of Polish national law prohibiting anticompetitive practices to actions of foreign companies, undertaken abroad, causing detrimental, anticompetitive effects within the territory of Poland.

The conducted research confirmed the accuracy of the hypothesis claiming the legality of the effects' doctrine. The evolution of this doctrine has been going on for several decades, almost for a century. Originally - in the second and third decades of the 20th century - this doctrine was applied by the US courts in criminal cases. The first voices of the academia accepting this concept can also be dated to the 1920s.

There are two key stages of the emergence of the effects' doctrine as it is currently known in competition law. The first was a change in the way of comprehending the objective territoriality principle, which took place in the field of criminal law. Originally, this principle was applied when one of the "constitutive elements of an offence", i.e. the behavior of the (co- offender "consummating" the incriminated act, took place in the territory of the state claiming jurisdiction over the perpetrators of this offence. Gradually, however, instead of an "act", i.e., human behaviour itself, the physical effect of such behavior started to be recognized the "constitutive element of an offence". In this way, the jurisdictional link in the form of "behaviour" (physical activity) of a perpetrator present within the territory of the *forum* state, has been replaced with the "effect" of the behaviour. The existence of such an effect in the territory of the *forum* state did not necessarily required, that perpetrator himself was present in that territory. The second stage was the extrapolation of such a way of understanding of effects as "constitutive elements of the occurrence" to the field of competition protection law. The physical (material) effects have been replaced by non-physical (economic) ones. Moreover, the regulatory method used in competition law favoured translating the "behavior" into "effects". Norms of this field of law do not specify in detail the objective features of behaviour declared

¹ The Act of February 16, 2007, on competition and consumer protection (Journal of Laws of 2017, pos. 229) – Ustawa z 16 lutego 2007 r. o ochronie konkurencji i konsumentów, Dz. U. z 2017 r., poz. 229.

by the legislator to be unlawful. Such behaviour is defined "by effect". Any behaviour that distorts the mechanism of competition is unlawful. As a result, the occurrence of anticompetitive repercussions on the domestic market of the behaviour undertaken outside this market (i.e. abroad), was gradually accepted as a distinct jurisdictional link (constituting, however, the variation of territorial link).

The source of the effects' doctrine in international public law is primarily the international custom - unilateral states' practice, combined with their conviction, that this practice reflects applicable law (*opinio iuris*). The United States of America has applied the effects' doctrine in antitrust cases since 1945. Extrapolation of the effects' doctrine to competition law was initially opposed by European countries. Gradually, however, they began to apply it in their own national competition law regimes. Germany was the first to do so (from January 1, 1958). Since the beginning of the 1960s, the occurrence of detrimental domestic economic effects of foreign behavior has been treated as a jurisdictional nexus in cases pending before the EEC authorities. Gradually, effects' doctrine became accepted in European countries. The last protest against the application of the effects test by the American court (*Hartford Fire* case) was expressed by the government of Great Britain, in its *amicus curiae* brief (1992).

Also in the 1990's, EEC and USA concluded treaties on mutual assistance in trans-border antitrust cases. It implied the legality of jurisdiction based on effects. The 1990s can therefore be regarded as the moment of accepting the effects' doctrine as a principle of jurisdiction. Outside of Europe today it is accepted, among others, by Japan, South Korea, China, Taiwan, Canada, Brasil and Russia.

Although there exists an international consensus, that the effect's doctrine is a separate jurisdictional basis applicable in competition law, the discourse on the specific issues is still open. It concerns two problems mainly. Firstly - the character of effects which justify the exercise of jurisdiction, i.e. whether the emergence of "any" effects in the *forum* state is sufficient, or do the effects need to be "qualified" (esp. direct, immediate, substantial, intended). Secondly – how tight the causality link should be between the foreign behavior and its domestic effects.

At present, two opposite trends are noticeable as for determining the geographical scope of jurisdiction based on effects' doctrine. US courts now tend to restrict it, denoting the lack of qualified effects. On the other hand, the EU authorities show a tendency to satisfy the pragmatic need to exercise jurisdiction over all market practices that interfere (potentially or actually) with the functioning of the competition mechanism within the EU. The recent decisions of the Commission and the EU courts reached the companies' activities that had taken place in the

South-East Asia.

Effect's doctrine has also gradually gained the acceptance of academia. In doctrinal writings emphasis is nowadays put on the need of cooperation between states in order to enforce domestic extraterritorial antitrust regulations effectively with regard to trans-border anticompetitive practices.

Also international organizations (OECD, WTO, ICN, UNCTAD) have taken actions to promote such cooperation. Especially OECD's recommendations encourage states to enter into conventions on mutual assistance in antitrust proceedings. The response is however not sufficient. From about 100 states that have domestic antitrust legal regime, less than 20 have concluded congruent treaties. Most of them stipulate the obligations to exchange information and transmit evidence. There is the lack of international legal framework which would guarantee assistance in services abroad of documents and mutual recognition and vindication abroad laid on in domestic decisions.

The foregoing shows, that effect's doctrine is recognized as the basis for legislative and adjudicative jurisdiction, but not executive jurisdiction.

The deficit of treaties concerning the cooperation in antitrust matters constitutes a part of a broader phenomenon – i.e. the general shortage of international agreements on cooperation in administrative matters.

This problem concerns Poland as well. Currently, Poland is not a party to any convention, which would include obligations of other countries to assist in extraterritorial enforcement of Polish domestic regulations prohibiting anticompetitive practices. This means in particular, that Polish authorities competent to enforce these regulations cannot rely on the assistance of their foreign counterparts neither in the collection of information or evidence abroad, nor in the service of documents abroad, nor in the use of coercive measures abroad. As a consequence, none of the foregoing actions can be undertaken by these authorities, as this would be contrary to the norms of international public law (*Lotus rule*). Thus, the second research hypothesis proves accurate – i.e. there are no legal mechanism to ensure the effective extraterritorial application of norms of Polish domestic law prohibiting anti-competitive practices. That way, the norm expressed in art. 1 par. 2 of the Act on competition and consumer protection, based on the effects' doctrine, requiring the extraterritorial application of the prohibitions of anti-competitive practices as laid down in art. 6 par. 1 or in art. 9 par. 1 and par. 2 of that Act, remains largely a "postulate" of the Polish legislator.

Regardless of the lack of proper international treaties ensuring the above-mentioned extraterritorial effectiveness, also the shortcomings of Polish domestic law can be identified, which stand in the way of such effectiveness.

First and foremost, there is the lack of provisions which would give the President of UOKiK² the competences to undertake international cooperation in the field of gathering of evidence abroad and service abroad of the documents. Such regulations should exist in domestic law despite the current lack of international agreements ensuring cooperation. They can be applied in case of *ad hoc* collaboration with other countries. Moreover, in relations with EU member states, one can expect, that the cooperation in antitrust proceedings will be strengthened after entering into force of the national regulations implementing the (drafted) ECN PLUS directive.

It is also desirable to introduce a regulation that will unambiguously allow for services of documents to branches and representative offices of foreign entrepreneurs in Poland, instead of to their headquarters located abroad. This applies to both civil and administrative proceedings. Such a legislative solution will eliminate some problems related to service of documents abroad.

The provisions on foreclosure proceedings also need to be revised. Namely, the Act on mutual assistance for the recovery of taxes, customs duties and other financial claims (UWP) should be changed in a way, so that its subject matter includes fines imposed in antimonopoly proceedings. The mechanisms provided for in the Act itself, as well as in regulations implementing it, are appropriate to enforce such fines.

It is necessary to introduce the changes described above despite the fact that Poland is not a party to any international agreement on assistance in antitrust proceedings. The introduction of these changes, pending the conclusion of such agreements, would at least provide the legal base for international *ad hoc* cooperation.

The obstacles in cooperation in the field of services and transmission of evidence could be partially overcome by the accession of the Republic of Poland to conventions on cooperation in administrative matters regarding assistance in the taking of evidence and services of documents concluded under the auspices of the Council of Europe. "Partially", because only a small group of states ratified these conventions.

Poland's membership in the EU and the resulting membership of the President of UOKiK in the European Competition Network (ECN) do not have a significant impact on

² UOKiK (Urząd Ochrony Konkurencji i Konsumentów) – The Office of Competition and Consumers Protection.

improving the efficiency of extraterritorial application of national regulations prohibiting anti-competitive practices. The functioning of ECN serves the application of art. 101 and art. 102 TFEU, but not of the domestic antitrust regulations of EU member states. The advantage of membership in ECN for the protection of competition in the territory of the Republic of Poland may be that competition authorities of other Member States, applying EU antitrust law, will issue decisions that can be effectively executed by them in their own territory (the principle of effective allocation of cases). The sanctions imposed in these decisions concerning the violation of art. 101 or art. 102 TFEU should reflect the gravity of the infringement (distortion of competition) throughout the EU, and so also in Poland. In this way, the proper functioning of competition in Poland can also gain protection. However, the existence of this mechanism is a phenomenon separate from the extraterritorial application of Polish regulations prohibiting anti-competitive practices.

Whether the evidence gathered within the ECN framework in order to apply art. 101 or art. 102 TFEU can be used only in purpose of application of domestic antitrust regulations, is unclear.

ECN legal framework provides neither for assistance in servicing of documents abroad, nor for recognition of antitrust decisions of other EU member states.

Secondary EU legislation neither harmonises, nor unifies the rules on international assistance in administrative matters. Although there exist some specific regulations (esp. on taxation), they do not concern antitrust.

The EU developed legal framework in the field of assistance in administrative foreclosure proceedings. It does not comprise antitrust matters either. However, the directive 2010/24/EU (of which UWP is the implementation) stipulates, that member states are free to enter into conventions providing wider subject – matter assistance. Should they do so, in order to fulfill their obligations resulting thereof, they are entitled to use the electronic communication network and standard forms, developed for the purposes of applying national regulations constituting the implementation of the 2010/24/EU directive. In Poland, there is the agency specialized in cooperation with EU Member States conducted on the basis of the UWP - the Tax Administration Chamber in Poznań. If, therefore, Poland would conclude with the other EU Member State a convention providing for assistance in the enforcement of fines imposed by the President of UOKiK, the existing, ready-made procedural solutions of national and EU law could be used for their recovery. Cooperation between EU Member States on the recovery of fines imposed due to violation of national competition laws may be strengthened due to the (anticipated) entry into force of the (drafted) ECN PLUS directive. Regulations included in the

draft (art. 25) impose on the requested authority the obligation to execute the fine imposed by the applicant authority for violation of art. 101 or art. 102 TFEU. As a procedural basis for this cooperation, UWP may be applied in Poland (and in other Member States - the relevant legal acts implementing directive 2010/24/EU). It should be emphasized, however, that the (drafted) ECN PLUS directive imposes the obligation to cooperate only with regard to national decisions declaring infringements of art. 101 or art.102 TFEU. Whether the fines imposed for violation of the norms of the domestic law of a Member State only will be included in the scope of this cooperation also will depend on the will of individual countries. This will may manifest itself in the conclusion of congruent conventions.

Although, it seems, the prospect of co-operation with regard to the recovery of fines in antimonopoly cases within the EU seems to be fading, there is the lack of such prospect in relations with other countries. No rule of public international law requires states to cooperate in the field of recognition and enforcement of foreign antitrust decisions. One should not expect Poland to conclude agreements (be it bilateral ones) in the near future that would allow for the execution abroad of Polish decisions in antitrust cases. For this reason, in this dissertation, it was proposed to introduce appropriate changes in Polish national law, which should improve the effectiveness of the extraterritorial application of norms prohibiting the conclusion of anticompetitive agreements and the abuse of a dominance.

The idea is based on the assumption, that the President of UOKiK (and the competent Polish courts) in cases concerning cross-border competition infringements should not have to rely on the assistance on their foreign counterparts, neither in the course of adjudicative, nor foreclosure proceedings - since they currently do not have such possibilities. The proposal aims at changing the model of liability for committing anticompetitive practices. The desired model is the one that establishes the liability of entrepreneurs having Polish (corporate) citizenship for the anti-competitive activities of their foreign daughter- companies taken abroad. Such a model will allow carrying out execution from assets located in Poland. The model uses the concept of *lifting corporate veil*. It assumes, that an effective tool to prevent a parent (controlling) company from "using" subsidiaries as its "tools" to commit violations of competition law (and thus – to avoid liability) is to impose on the parent company the financial liability for the activities of its subsidiaries, despite the fact, that formally they constitute separate legal entities. The model refers to the concept of *single economic unit* known in EU competition law. From the point of view of the norms of public international law, the proposed model is based on the active personality principle (personal jurisdiction over the company incorporated under national law).

The main difficulty that the national legislator will face in shaping the proposed regulation would be to determine exactly what links between companies justify one of them being held liable for the actions of the other. The changes to the liability model for violation of national regulations prohibiting anticompetitive practices introduced to OKiKu will also have to take into account regulations included in the (drafted) ECN PLUS directive, referring to the concept of a single economic unit ("enterprise").

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9 kniebia 2018r.