

Małgorzata Król-Bogomilska,
Zwalczanie karteli w prawie antymonopolowym i karnym
[Combating cartels in antitrust and criminal law],
Warszawa 2013, 511 p.

Antitrust law has been shaped in various national (or supranational) legal systems either as administrative or criminal law. Naturally, as the jurisprudence of the European Court of Human Rights has shown, this categorization is not very strict and a few features of criminal law, mainly criminal proceedings, can be attributed to antitrust law even if it is considered administrative in nature in a particular national legal system. Additionally, antitrust law has been facing a worldwide tendency to become criminalized. These two factors make it recommendable to analyse cartels in a double manner – from a (pure) antitrust and a criminal point of view. Nevertheless, such an approach has been rather rare in Polish antitrust doctrine, mainly because domestic antitrust law belongs to the vast area of administrative law (or, to be more precise, to administrative (public) economic law). This gap in Polish literature on antitrust has been largely covered by the book titled *Combating cartels in antitrust and criminal law* written by Prof. Małgorzata Król-Bogomilska, published in 2013 in Warsaw by Wydawnictwo Naukowe Scholar. The Author explains that working on this book was motivated by the conviction that the most important insights come to light while conducting inter-disciplinary research (p. 15).

The book contains 12 chapters followed by final conclusions, which are a separate part of the book albeit not numbered. In the first chapter ('Introduction'), the Author juxtaposes data on cartel fines in the European Union and criminal sanctions for cartels in the United States. She also provides a list of countries where violations of antitrust law have been criminalized. In the EU, these are: the Czech Republic, Estonia, France, Greece, Ireland, Romania, Slovenia and Great Britain. Outside the EU (apart from the US and Canada), they include: Australia, Brazil, Israel, Japan, South Korea, Mexico, and Russia. In the first chapter of the book, the Author formulates five fundamental research questions to be developed in its further parts (p. 27–28). First, Prof. M. Król-Bogomilska asks about the real scale of the similarities and the differences in the legal methods of combating cartels in the field of antitrust (based on the concept of 'administrative delict') and in criminal law (providing a 'standard' criminal liability). Second, the Author considers the consequences of differences that should primarily be searched for in practice. Yet in the Professor's opinion, it is also very important to analyse these consequences with a view to future

legal solutions. [unclear, consider revising] Third, a question appears on a (positive or negative) assessment of legal provisions in various legal systems. [grammatically correct but unclear meaning] Forth, the Author asks about the possibility to apply legal constructions specific to liability for an administrative (antitrust) delict in criminal liability, and to apply criminal elements in administrative (antitrust) liability. Finally, the Author decides to consider the perspectives for the criminalization of cartels in Poland with a nexus to post-Lisbon EU law.

The second chapter is dedicated to legal and economic characteristics of cartels ('Combating cartels – legal and economic problems'). Economics and market issues seem to act as the basic criteria for describing cartels in this chapter. The Author refers here, for instance, to concepts and theories of the Harvard and the Chicago schools (p. 47–49). Professor M. Król-Bogomilska also draws the attention of the readers to the significance of the tendencies for an economization of antitrust analysis (p. 51–54).

The third chapter ('Basis for liability for cartel infringements in EU and Polish antitrust law') analyzes EU and Polish competition law. Apart from the presentation of their respective antitrust provisions, also from a historic perspective, the chapter provides also a further analysis of various concepts specific to competition law, such as the notion of an undertaking (p. 76–85). The analysis goes far beyond a basic application of the prohibition of cartels. For instance, while writing about undertakings, the Author presents the single economic unit doctrine (p. 78–81). It is worth mentioning that the chapter refers to many 'fresh' antitrust concepts and ideas such as developments of the single economic unit doctrine mentioned above or hub and spoke cartels (p. 95–96). However, it is not totally clear why substantive rules of EU and Polish competition law are presented separately here. As a result, it is sometimes difficult to guess if a certain concept or interpretative direction, described in the chapter with reference to EU law, can be, or has been applied in national law and practice.

The fourth chapter ('Special form of participation in cartels') provides an excellent analysis of the different roles played by cartel participants. This is likely to be the first example in Polish antitrust literature when such problems as the role of a leader and instigator of a cartel, as well as facilitator liability or passive members' liability, are commented on. Professor M. Król-Bogomilska, being a criminal lawyer by origin, is absolutely entitled to conclude that a special legal basis for liability for assisting cartel activities as well as for encouraging cartels should be introduced into antitrust law. Additionally, the Author points out that the role of a cartel leader could be differentiated from other roles of cartel members (p. 122).

The fifth chapter ('Personal placement of liability for cartel violations') raises problems of parental liability and successor's liability for cartels. Certainly, these issues are often debated in antitrust jurisprudence and literature. In her consideration, the Author refers largely to ECJ's jurisprudence on parental and successor's liability. Actually, she is very critical about the views of the ECJ, specially regarding the reasons listed by the Court in order to justify the liability of a dominating company for cartel violations undertaken by members of the same economic unit. Prof. M. Król-Bogomilska rightly claims that the analysis of the real participation of a

parent company in a violation attributed to a daughter (dependant) company are somehow ignored either by courts or by representatives of antitrust doctrine. The critical approach to European jurisprudence becomes an incentive for the Author to formulate a few assumptions for a new direction in antitrust policy in this area (p. 136–141). She proposes resigning from the presumption of liability of a parent company and focusing on proving the role of the dominating company in the violation of antitrust law (p. 141). What seems somewhat unsatisfying in this part of the text, is the lack of any considerations regarding parental liability for antitrust infringements in Poland – even if domestic jurisprudence on this issue is rather modest, this topic has been highlighted in Polish antitrust literature. This weakness is eliminated in a further part of the chapter, concerning the liability of successors, which contains an analysis of Polish judicial and decisional practice referring to this problem (p. 145–146). The chapter finishes with the Author's view on successors' liability. Just as in the case of parental liability, she stresses the necessity to resign from any automatism in recognizing liability of an entity that was not personally involved in a cartel (although such liability cannot be excluded) (p. 148).

The title of the sixth chapter ('Administrative, penal and civil sanctions for antitrust violations in EU and Polish antitrust law') suggests that it provides an overall look on sanctions applied for antitrust violations. Actually, the title seems a bit confusing as the chapter also covers interim measures or commitments, which are not, as such, sanctions in the formal meaning of the word (however, measures mentioned above are considered in the chapter as administrative sanctions (p. 153–161), the Author claims that these sanctions can be reconstructed from a catalogue of decisions that can be adopted by the European Commission or Polish NCA). It is worth mentioning that the Author clearly classifies fines as penal (not administrative) sanctions (p. 161 and further). The importance of this chapter seems to centre on its considerations on the safeguarding function of rules for imposing fines – this issue is very important when a tendency to raise the level of fines has been recently visible in many countries, including – as the Author correctly points out – Poland (p. 177). It is fair to say that the most interesting (and also fruitful) part of these considerations is the analysis of the concepts of 'fault and negligence in antitrust law (p. 183–190) and its inspiring remarks on criminal liability of 'collective entities' (p. 191–194). This part of the analysis can be considered as very original.

The seventh chapter ('Leniency in cartel cases') presents rules (including soft law) on leniency in the US, the EU and its particular member states, and in Poland. The Author confirms that the number of countries worldwide which use leniency has grown in recent years. She also stresses that leniency is a specific dynamically developing institution of competition law (p. 223). Prof. M. Król-Bogomilska speaks in favour of harmonizing leniency, mainly in the EU, but she is critical about certain of its aspects, e.g. lack of one-stop-shop concerning a leniency application (*ibidem*). She also correctly points out that the scope of leniency in Poland (covers both horizontal and vertical agreements) is too broad (p. 224).

The eighth chapter ('Nature of penal sanctions in cartel administrative delicts from the perspective of Strasbourg and EU jurisprudence') presents the judicial and

doctrinal debate on the potentially penal character of fines in administrative law. This debate was held primarily in the framework of the European Convention on Human Rights and, secondly, through the lens of the EU Charter of Fundamental Rights. The Author's approval of a penal character of fines in antitrust law can be easily deduced from the following parts of a book (and found in her earlier works¹) so this chapter only develops the idea. Polish jurisprudence is also shortly referred to in the context of the problem raised in this chapter (p. 227). However, it is without a doubt a pity that the Polish perspective on this issue is not presented in a broader manner.

The ninth chapter ('Cartel offences. Between traditional and hidden criminalization') could be a separate book in itself because it analyses an extremely important and interesting tendency in modern antitrust law. What can be easily seen in this chapter, and what the Author probably wants to prove, is the variety of methods, dimensions and scopes of criminalization in particular countries. This makes it impossible to describe and to analyse criminalization of antitrust law as a uniform phenomenon. Penal character of antitrust law originates from the US, a fact that surely justifies dedicating a great part of this chapter to American law and practice (p. 256–271). Then Prof. M. Król-Bogomilska shows a dimension of criminalization of cartels in the majority of EU Member States (Austria, Czech Republic, Denmark, Estonia, France, Germany, Great Britain, Greece, Hungary, Ireland, Italy, Lithuania, The Netherlands, Portugal, Romania, Slovenia, Spain, Sweden). Commenting on a criminalization of cartels in Polish law the Author claims that its scope is very narrow and limited only to bid rigging that are offences by Art. 305 of the Polish Penal Code² (p. 340). A framework for penal sanctions under EU law is also pointed (p. 271–276). Surely this part of the reviewed book is a presentation of the most developed research on criminalization of antitrust law in Polish literature and conclusions contained in the last part of the chapter (p. 354–359) constitute so far the most complex voice in a – practically non-existing – debate upon this legal phenomenon. I personally appreciate a very reasonable (in fact critical) opinion expressed by the Author that administrative liability of natural persons that was finally introduced in the Polish Competition Act (although the Author refers to draft act) should have been replaced by criminal liability (p. 357).

The tenth chapter ('Conjuncture of liability in cartel cases and a rule of proportionality and *ne bis in idem*') presents a very complex problem of current antitrust law that tends to use instruments taken from all key areas of law (administrative law, penal law, civil law). In this vast chapter (over 50 pages) Prof. M. Król-Bogomilska analyses a conjuncture of liability in many dimension, e.g. in a 'territorial' dimension: a conjuncture of sanctions in domestic and EU law (p. 373–376) or in the latter and the third countries (p. 376–385), a conjuncture of liability in a system of parallel competences of NRAs in the EU Member States (p. 388–391). Certainly, a great part

¹ M. Król-Bogomilska, *Kary pieniężne w prawie antymonopolowym: w ustawie o ochronie konkurencji i konsumentów, w europejskim prawie wspólnotowym* [Fines in antitrust law: in Act on Competition and Consumer Protection, in EC law], Warszawa 2011.

² Act of 6 June 1997 – Penal Code, Journal of Laws 1997 No. 88, item 553 as amended.

of the chapter is dedicated to a potential conflict of liability in a domestic law (p. 391-409). A scope of such analysis in reference to Polish law is impressive as the Author concerns either literature or jurisprudence from both areas: penal and administrative law. She correctly concludes that many problems of a concurs of liability has have not been solved yet (p. 409). Fortunately, Prof. M. Król-Bogomilska meets a challenge in the final part of the tenth chapter and proposes, if not detailed solutions, at least directions of desired changes. What makes these conclusions specially valuable (p. 409-417) for antitrust lawyers is a very deep insight into penal law.

The eleventh chapter ('Perspectives of co-operation for criminalization of cartels after the Treaty of Lisbon') focuses on perspectives of introducing penal provisions that could be applied in cartel cases. Such perspectives (potentially) appeared after the Treaty of Lisbon went into force (1 December 2009). The Author definitely rejects an opinion that TFEU provisions create any basis for a possibility for criminalization of cartels at the EU (p. 446), however she notices some opportunities to introduce under Art. 83 TFEU (even if it is partly unclear) minimally harmonized norms concerning cartel offences. Considerations contained in this chapter are very interesting and inspiring but in my view they does not deserve for a separate chapter and they could successfully be a part of the ninth chapter.

The twelfth chapter ('Compliance – a new form of a prevention from cartels') describes goals and advantages of compliance programmes, but the Author also sceptically comments on guidelines, dedicated for undertakings and published even by very distinguished organization, where compliance means in fact an avoidance of an intervention by antitrust authorities (p. 451-452). A final part of a chapter analyses an influence of compliance programmes on an amount of a fines in the ECJ's jurisprudence – a general conclusion of these analysis is that an existence of compliance programmes does not necessarily constitute a mitigating factor.

A book finishes with 'Summary and final conclusions' where the Author gathers her key findings and considerations from previous chapters and adds some extraordinary comments. What I find specially interesting in this part of a book are 'instructions' on criminal aspects on antitrust law, these instructions are expressed directly by titles of subchapters (e.g. 'Need to strengthen a guaranteeing function of principles for applying fines' – p. 472-473).

A book under review greatly contributes to Polish research on antitrust law. What can be quite astonishing there are no many publications dedicated to strictly cartel issues in Poland³ – a book by Prof. M. Król-Bogomilska just broadens a scope of Polish doctrine. A unique value of a book is a combination of antitrust and criminal perspective in multidimensional analysis of cartels. Therefore this book seems interesting not only for antitrust enthusiasts but also for criminal lawyers who usually do not posses any deeper knowledge upon cartels, even if this knowledge can be quite useful for applying Art. 305 of the Polish Criminal Code (a provision recognizing bid rigging as an offence). Even if for non-criminal lawyers (as myself) some ideas

³ Z. Jurczyk, *Kartele w polityce konkurencji Unii Europejskiej* [*Cartels in EU competition policy*], Warszawa 2013.

developed by the Author as expected amendments to antitrust legislation and practice are rather sophisticated, it is just valuable that such a discussion in Poland was initiated by a reviewed book.

It is worth mentioning that a book refers to and comments on the most recent EU and Polish case law. All the consideration are widely based on domestic and foreign literature concerning a topic. Even if a book was published in Spring 2013, before the Polish Act on Competition and Consumer Protection was seriously amended (July 2014), it touches many new institutions in Polish antitrust law that were prospected in draft amendments (studied by the Author) and finally introduced due to amendments (e.g. remarks on a settlements or remedies – p. 196–197, 201–202).

Certainly, a book by Prof. Bogomilska-Król signs in a general discussion on one of the most influential tendency in modern antitrust, which can be called ‘criminalization’, and as such should be read by everybody who is interested in this aspect of antitrust. It can be even recommended – and in my opinion it is an advantage of this book – for beginners in antitrust because a scope of book and a method of presenting ideas and concepts make them easily accessible.

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