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CSAiR
Centre of Antitrust and Regulatory Studies, University of Warsaw, Faculty of Management
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Rajmund Molski, *Prawo antymonopolowe w obliczu globalizacji. Kierunki rozwoju* [*Antitrust Law in the Face of Globalization. Directions of Development*], Oficyna Wydawnicza Branta, Bydgoszcz-Szczecin 2008, 336 p.

The majority of Polish competition law publications focus on domestic and/or European, and exceptionally American, enforcement practice. Many have a comparative nature whereby EC or US experiences are considered to be a point of reference for domestic (Polish) solutions. The reviewed book is the first on the Polish market that concerns itself exclusively with international aspects of antitrust which, as a title suggests, means in this case a "world" (global) context. Molski's book surely contributes to the growth of legal literature dedicated to international competition law[1]. It focuses on problems of past, present and future developments of antitrust in the context of the challenges posed by globalization. The author is absolutely right claiming that domestic law cannot be an adequate means of solving antitrust problems of an international dimension (p. 172). Still, he also stipulates that "[s]ingle international (global) competition rules would not be a panacea to world antitrust problems" (p. 177). These two statements create the analytical framework of this book.

The publication centres on two basic notions: competition law (antitrust law) and globalization. The author declares that the first concept refers to "[t]hose legal systems (orders) that impose legal sanctions on activities restricting competition on the market (or creating such a danger)" (p. 18). Antitrust law as understood in this book refers to competition restricting practices (anti-competitive agreements and abuse of dominance) and to the control of economic concentration (consolidation). However, issues connected to combating unfair competition, as such included in competition law *sensu largo*, are outside the scope of this publication. Such defined antitrust law is analyzed in the context of globalization, predefined by the Author (following Th. Levitt[2]) in the Introduction to the book as „[a] process of realizing a free of borders

[1] See e.g.: D.A. Crane, "Substance, Procedure and Institution in the International Harmonization of Competition Policy" (2009) 10(1) *The Chicago Journal of International Law* 143; J. Drexl (ed.), *The Future of Transnational Antitrust – From Comparative to Common Competition Law*, Berne 2003; E. M. Graham, "Internationalizing" competition policy: an assessment of the two main alternatives" (2003) 48(4) *Antitrust Bulletin*. The reviewed book provides a good record of the resources available on that issue.

[2] Th. Levitt, "The globalization of markets" (1983) 61(3) *Harvard Business Review* 92.

global economy where undertakings engage in activities on the international arena, regardless of national frontiers" (p. 19).

Aware of the multitude of aspects of globalization, Molski correctly stipulates that the considerations presented in the book are limited to its economic and legal aspects only. A separate part of the book (2.1. Phenomenon of globalization and its attributes) is dedicated to the qualification and interpretation of the concept of globalization. The impossibility of presenting a rigid and universal definition of globalization is pointed out in there. The lack of such a definition cannot be irrelevant for a scope of the content of the reviewed book. The context of problems analyzed in the book should be seen mainly as a phenomenon defined by dynamic processes (such as e.g. the globalization of law, the redefinition of the functions of the state, the increasing role of multinational corporations or the appearance of global competition). Simultaneously, the global dimension of the problems described in this book requires the consideration of several levels of the functioning of legal systems (making and applying the law): domestic, regional, supra-regional and the world (global) level.

The discussion is based on the assumption that if, in the globalization era, anti-competitive effects of the actions of undertakings go beyond territorial borders, this may lead to two types of dangers: first, legal gaps with the result of "[a]voiding an adequate antitrust reaction" in relation to some anti-competitive behaviours; and second, "[e]xcessive regulation aimed at harmless or even desired market behaviors (mainly when it is a result of activities of a bigger number of states)" (p. 20).

Molski's book is divided into five chapters. The first two arrange the area of the author's interests: antitrust of law (Chapter 1) and the phenomenon of globalization (Chapter 2). The subsequent chapters deal with particular problems occurring in this context: the sovereignty of states and the development of competition law in the globalization era (Chapter 3), positive and negative co-relationships between antitrust law and international trade law (Chapter 4), and optimizing competition law under the conditions of globalization (Chapter 5). I believe the last of these to be the key point of the author's considerations and, simultaneously, the most important and creative part of the book.

Chapter 1: On the genesis, justification and specificity of competition law starts with a historical overview presenting the beginnings of antitrust interventions in ancient Greece, Rome, India, mediaeval England and XIXth Century Japan (p. 26–29). On this basis it is possible to see that the development of societies has always been accompanied by "[a] disapproval for oppressive use of economic power" (the basis for contemporary competition rules). Next to be discussed is the shaping of antitrust law and yet this is done on a somewhat surprising choice of examples (Chapter 1.1.2. p. 29–46) – the global context of this book suggests that its analysis should make reference to countries representing all of the continents, or at least their majority. Unfortunately, the author limits his assessment to the US, three European (Austria, Germany, Poland) and one African state (Kenya), omitting both Asia and Latin America. Though it is rather difficult not to share Molski's opinion that the cradle of modern antitrust law is in the US and the EC, it does not seems convincing to say that this fact alone constitutes a sufficient reason for dedicating all

the considerations of this chapter to those legal systems only. While most readers will be rather familiar with the US and EC experiences, knowledge of the genesis of, for instance, Chinese competition law is pretty low even though it seems essential in the context of the globalization of antitrust.

The following part is dedicated to the development of bilateral and regional co-operation in antitrust cases (p. 46–60) whereby EC competition law is regarded as its clearest example. Molski accurately identifies the characteristics of EC competition law as "[a] paradigm of regional antitrust law, fully integrating not only its procedural but also material (single competition rules) and institutional (common competition authority) substratum (….)" (p. 50). On the other hand, he points out that supra-regional initiatives aimed at the creation of an international (supra-regional) system of antitrust law (under the auspices of the League of Nations, UN, OECD or WTO) turned out to be far less effective (p. 60–74). Still, Molski stresses that they cannot be overlooked, even if they were ultimately unsuccessful, since they have certainly advanced the debate on the internationalization of competition policy. Nevertheless, I share the Author's doubts that the development of antitrust policy and co-operation in two directions – within the WTO and the International Competition Network (promoted by EC) – indeed weakens the effectiveness of the process of the internationalization of antitrust regulation.

Further on, Molski formulates a catalogue of goals and priorities of antitrust law – in that way the Author seems to reject opinions contesting a ratio of existence of antitrust law. He directly supports the opinion that „[a]ntitrust intervention may be justified as neither economic freedom nor free competition is a constant attribute of the market economy" (p. 78). Working out a list of goals is a *sine qua non* condition of the rationalization of the process of shaping competition law. The author speaks of three groups of goals of antitrust law: (a) economic, (b) social, (c) political as well as of either definite or indefinite objectives of competition law (p. 81). He also stipulates that the categorization presented in his book refers to a "sufficiently representative" group of goals even though the classifications of goals of antitrust law are only conventional (p. 82). Among these sufficiently representative goals Molski lists: competition protection, increase of economic effectiveness, support of small and medium enterprises, promotion of national market leaders, support of economic reforms, consumer interest protection, support of foreign investments, assistance of integration processes, deregulation of markets, political and social issues, justice-related issues. In my opinion, the analysis of the latter is an interesting contribution to the antitrust doctrine. It is a pity however that the Author, making an interesting analysis of the goals of antitrust, does not express his own opinion concerning which of those objectives should be the basis for global competition law.

Chapter 1 closes with some deliberations on competition as an object of legal protection (p. 120–134) and on the specifics of antitrust law (p. 134–148) stressing such of its features as: interdisciplinary and discretionary character, high costs as well as national and negative character of competition law. It is a shame that while assessing the particular characteristics of antitrust, Molski does not explain how they could function in the area of global competition law.

In **Chapter 2: Globalization and its implications for antitrust law**, the Author presents the definition of globalization (p. 149–156) and its attributes (p. 156–172). He also refers to the phenomenon of the globalization of law. The process of creating soft laws on an ever growing scale is identified as one of the specific features of global (also antitrust) law. However, this in turn results in a desired elasticity of law but it also weakens the traditional role of law, transparency and stability of legal systems (p. 169). Molski appropriately notes that the most important challenges relating to the globalization of modern antitrust law are found in "a disjunction between the generally national character of this branch of law and the increasingly international or global dimension of the economic processes and phenomena regulated by that law" (p. 172).

The author moves on to analyse a few selected problems that constitute challenges for the functioning of modern competition law in the conditions of globalization. He divides them into four groups: challenges resulting from domestic antitrust rules (p. 178–186), international conflicts in the context of applying competition law (p. 187–190), anti-competitive restraints in the access to foreign investments by undertakings (p. 190–195), problems deriving from the inconsistencies of domestic antitrust systems (p. 195–201). Such categorization and generalization fosters the transparency of Molski's analysis, a fact that seems particularly important in the context of the extremely wide and multidimensional meaning of globalization. Their presentation and assessment is in my opinion complex and exhaustive – the Author presents both procedural issues (e.g. co-operation of national competition authorities) as well as material problems (e.g. differences between leniency rules), but he correctly does not limit the analysis to such a simple dichotomy of challenges of global antitrust law.

In **Chapter 3: Antitrust law of the global era and State sovereignty,** Molski revives a dominant (in his view) opinion that "[a]n idea of international antitrust law implies too many deficiencies in the sovereignty of states" (p. 223). The author convincingly argues that "creating an international (global) antitrust system, especially if it was to be administered by an international institution, would be probably bound to a necessity of limiting (at least to a certain degree) the sovereign prerogatives of States participating in that system" (p. 223/224). Nonetheless, States may benefit from the system for instance by "eliminating negative repercussions of unilateral, exterritorial antitrust interventions (frequently with protectionist character)" (p. 223). The author considers EC competition law as an example of an effective international antitrust system where, apart from transferring competences from Member States to the European Commission, a reverse process may be also noticed, that is, strengthening the participation of States in the implementation of competition law. He concludes that a deficit of multilateral co-operation in competition matters *de facto* leads to the weakening of real sovereignty (understood as a practical ability to implement "theoretically owned" prerogatives).

Chapter 4: Antitrust law versus international trade law is concluded with a statement that those two areas of law are subsidiary and complementary to each other and none of them is able to achieve its goals autonomously. The author stresses

the fact that the relationships between antitrust law and international trade law are multidimensional – they are reflected either in a convergence or in conflicts of those two legal branches. Molski points out that a lack of effective competition law could eliminate the benefits of trade liberalization (they may disappear as a result of individual anti-competitive practices). Still, a conflict between them may occur in a case of an anti-dumping intervention when practices, to which anti-dumping measures are applied, are actually harmless in the import country (p. 258).

Chapter 5: Ideas on the optimization of antitrust law inspired by the challenges of globalization constitutes, without a doubt, the most important and most interesting part of the reviewed book. Molski analyzes here two key models: competing (decentralized) antitrust systems (p. 259–267) and international co-operation in antitrust matters (p. 268–317). Among the advantages of the former is its "[e]lasticity and ability to react to new challenges that can generate the endogenously evolutionary character of market competition" (p. 267). However, as the author stresses, the "competing" model can easily become a source of conflict and it may be incoherent.

The co-operative model may be implemented on a bilateral, regional, plurilateral or multilateral basis at various levels of advance. Most of Molski's attention is dedicated to a multilateral antitrust agreement that seems to be, in his opinion, the most ambitious way of optimizing competition law but, simultaneously, also the best out of all the available options (p. 283). The author remains rather sceptic towards the possibilities of actually working an effective multilateral agreement, finding difficulties, among other things, in Article 34 of the Vienna Convention according to which a treaty can create neither duties nor rights for third states without their consent (p. 286). The co-operative model is analyzed on the basis of, and with reference to, the Competition Policy Doha Ministerial Declaration, Official Positions on Multilateral Framework on Competition and the views expressed in legal doctrine.

An international antitrust agreement should be based on transparency, non-discrimination and procedural justice rules. The basic material provision of such an agreement should be a prohibition of hardcore cartels, though its formula (*per se* or rule of reason?) is open to discussion. While a prohibition of hardcore cartels is commonly accepted, a prohibition of other anti-competitive practices causes significant doubts. The author tries to analyze the potential of harmonizing key areas of competition law (agreements other than hardcore cartels; abuse of dominance; merger control) but the results of this analysis are not unequivocal. Molski's doubts seem to be justified taking into account the directions of the evolution of competition law e.g. over the last decade in the EC. Finally, considering the institutional dimension of such a multilateral agreement, Molski speaks of basic problems relating to its implementation. Three models are described in the book: (1) implementation by existing domestic/regional competition authorities and courts; (2) centralized implementation of antitrust law by a newly created organization (authority); (3) implementation by one of the existing bodies. The author seems to be in favour of the latter model with WTO at its centre (p. 312-317). The reviewed publication touches upon a wide spectrum of issues relating to the globalization of antitrust law, exhaustively analyzing and summarizing worldwide research records on this issue. Appreciating the fact that

the Author thoroughly presents all the "pros" and "cons" relevant in this context, I am slightly disappointed that the book has a past- rather than future orientation. Molski does not state his own detailed views on the anticipated development of the globalization of antitrust law – the predictions presented in the summary of this book are nothing more but a gathering of the various arguments and opinions presented in earlier chapters. Being aware of all the restraints (they are known to readers as well), Molski could have nevertheless tried to present his own vision, a sort of a roadmap for the hypothetical development of competition law in the era of globalization of the 21st century. As a reader, I would be also interested in his detailed assessment of the anticipated role either of the EC or of the "Asian tigers" in the future development (or underdevelopment) of global antitrust law.

The Author is certainly entitled to take on such a challenge, which would undoubtedly increase the attractiveness of this publication, considering his high level of competence, knowledge and a thorough research workshop. It is likely that Molski decided that an analysis of that type would have gone far beyond the main scope of this book, which I guess was the identification of the basic problems relating to the functioning of antitrust law in the era of globalization. Still, the high scientific value of the reviewed publication is not decreased by this recommendation. One must also note the impressive bibliography used in this book which constitutes its important additional quality. Molski's book should certainly be recommended as a point of reference for other authors dealing with globalization problems of antitrust law.

Dr. Agata Jurkowska
Jean Monnet Chair on European Economic Law,
Faculty of Management, University of Warsaw