

Agata Jurkowska-Gomułka (ed.), *Orzecznictwo sądów wspólnotowych w sprawach konkurencji w latach 2004–2009*
[*Jurisprudence of the European Community Courts in competition matters in years 2004–2009*],
Wolters Kluwer, Warszawa 2010, 388 p.

The publication under review here edited by Dr. Agata Jurkowska–Gomułka from the University of Warsaw (Centre for Antitrust and Regulatory Studies) is a collection of case studies concerning European competition law prepared by a number of individual authors both academics and practitioners. As a presentation of landmark judgments of EU courts, it is a continuation of the 2007 publication entitled: *Jurisprudence of the European Community Courts in competition matters in years 1964- 2004* edited by Professor Tadeusz Skoczny and Dr. Agata Jurkowska (hereafter, Volume I). The current book (hereinafter, Volume II), commences with 1 May 2004 – an important date for this publication for two key reasons: first, because of its correlation with Poland’s EU accession and second, because of its correlation with the entry into force of Regulation 1/2003. However, the presented judgments do not refer to Regulation 1/2003 primarily due to the lengthy nature of judicial proceedings. There was thus no chance, before the publication of Volume II, to discuss any jurisprudence based on this act.

The subject matter of this study concerns topics such as: standard of proof in merger control proceedings; EU liability for damages resulting from incorrect decisions issued in merger cases; private enforcement of EU competition law; application of competition law in the sports field and pricing agreements.

Before analyzing the substance of the book, some comments on its methodology should be made. The publication is divided into three parts. It commences with an introduction by Agata Jurkowska-Gomułka, where the editor summarizes the quantitative and qualitative characteristics of the recent jurisprudence of EU courts noting among other things that 135 judgments were issued overall between 1 May 2004 and 30 April 2009. The second part of this publications contains 10 rulings delivered by the Court of Justice of the European Communities (hereafter, ECJ) and 5 judgments of the Court of First Instance (hereafter, CFI). All judgments under review are presented in a chronological order. The scope of the jurisprudence covered by Volume II is clearly much smaller than that of Volume I mainly because of the expensive coverage of the earlier publication. Despite the fact that the selection of the judgments to be assessed must have been challenging, the result is praiseworthy.

The case comments were created by 15 different authors, including the editor. The last part of Volume II contains not only a list of all judgments of ECJ and CFI in competition matters in years 2004-2009 but also a helpful index of acts, subject index and sector index.

The studies were made primarily with respect to the Polish-language versions of the judgments available in the Eur-Lex and the Curia databases. However, due to the low quality of the official translations, the editor indicated that authors have made use of other language versions of the judgments as well. Summaries of two previously unpublished ruling were made by the authors themselves, other studies used the official text available in Eur-lex. Readers familiar with the set of judgments covered by Volume I, will notice two main differences in Volume II – while it contains a significantly smaller number of cases, each judgment is analyzed in much greater detail than those covered by Volume I. Importantly also, each study contains an index and final summary. The commentaries are composed of the factual and procedural background of each case as well as the authors' assessment of their key findings – indicating the importance of each judgments is extremely helpful to the readers.

The jurisprudence under review covers the activities of both the ECJ and the CFI focusing primarily on Article 81 and 82 of the Treaty of the European Community (hereafter, TEC), currently Article 101 and 102 of the Treaty on the functioning of the European Union (hereafter, TFEU). Considered also are Article 86 TEC (powers of the European Commission), currently Article 106 TFEU, and Article 288 TEC (guarantee of a fair trial), currently Article 340 TFEU, as well as the more specific provisions of Article 18 Regulation 4064/89 (Regulation 2008/48). In terms of this publications layout, ECJ rulings are presented first followed by the chosen judgments of the CFI. Despite the current applicability of the Treaty on the Functioning of the European Union, this book review will refer to the provisions of the EC Treaty because most of the judgments covered by Volume II were based on the older Treaty.

The first judgment to be assessed is *Tetra Leval BV*¹ discussed by Rafał Stankiewicz. The ECJ commented here on some of the key issues of EU competition law such as: 1) the standard of proof and scope of the Commission's recognition during the consideration of individual cases; 2) the scope of EU jurisdiction over Commission decisions; 3) the method of assessing the prerequisites concerning concentrations and; 4) assessing conglomerate concentrations. The ECJ clearly indicated that it is unacceptable for the Commission to manipulate the provisions of European legislation so as to apply them to circumstances which they do not cover. It was confirmed also that without sufficient evidence to support its concerns, the Commission is not allowed to prohibit a merger solely because of its reservations about the future and uncertain behaviors of dominant companies. As correctly noted by the author, the *Tetra/Leval BV* ruling had a direct impact on the settlement of the *General Electric / Honeywell*² case pending before the CFI. It was stated therein as a result, that the Commission

¹ Case C-12/03 P *Commission of the European Communities v Tetra Laval BV* (no. 1 in Volume II, p. 37).

² Case T-210-01 *General Electric/Honeywell v Commission of the European Communities*.

was obliged to demonstrate that the intended concentration would be able not only to transfer practices to other markets, but also that this particular behavior is actually likely in the relatively near future.

Procedural issues are not usually the main consideration of the presented judgments with the notable exception of the *T-mobile*³ case, analyzed by Arwid Mednis, which relates to Article 86(3) TEC in so far as it concerns the competences of the European Commission. On its basis, the Commission is obliged to ensure that Member States fulfill their duties based on Article 86 TEC. For this purpose the Commission is equipped with powers to intervene against the offending countries by issuing appropriate directives or decisions. Nonetheless, the *T-mobile* judgment clarified that the obligation to oversee Member States is not actually equivalent with a duty to take actions. Undertakings have therefore no subjective right to force the Commission to take a specific stand. Arwid Mednis's analysis of the principle of 'good governance' developed on the ground of this judgment is particularly interesting.

Ewa Wojtaszek-Mik assesses the *Volkswagen II*⁴ judgment where the ECJ considered if a request made by a motor vehicle manufacturer directed at car dealers could constitute a competition restricting agreement covered by Article 81 TEC despite being seemingly unilateral. The ECJ clarified here that such an act can qualify as such an agreement only if it is an expression of the common will of at least two parties, and that the form of the unilateral act is not critical for the evaluation of the agreement. Ultimately, the ECJ changed the contested decision because it found that no competition restricting agreement took place in the presented case. Unfortunately, the ECJ did not give any clear guidance on how to determine the existence of an agreement in cases of seemingly unilateral practices. The above judgment could thus not gain the status of a jurisprudential milestone, confining only the general need to consider all relevant factors of the case at hand.

The *Manfredi* case⁵, presented by Maciej Bernatt, has greatly influenced the directions of EU law. The ECJ established here first that agreements which constitute an infringement of national competition rules can also constitute an infringement of Article 81 TEC. This is possible if, due to the characteristics of the national market, there is a sufficient degree of probability that the agreement can have direct or indirect, real or potential influence on the sales of Civil Liability insurance, particularly membership, performed by entities with a registered seat in other Member States, and this influence is not insignificant. The author stresses the substantial connection between the *Manfredi* judgment and the *Courage* case⁶ as far as the possibility is concerned of claiming compensation by those harmed by an anti-competitive acts of an entity infringing competition rules. The judgment does not sanction a particular

³ Case C-141/02 P *Commission of the European Communities v T-Mobile Austria GmbH*, formerly *max-mobil Telekommunikation Service GmbH* (no. 2 in Volume II, p. 55).

⁴ Case C-74/04 P *Commission of the European Communities v Volkswagen AG*.

⁵ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* (no. 4 in Volume II, p. 76).

⁶ Case C-453/99 *Courage Ltd. v Bernard Crehan* (in Volume I).

procedure within this scope – the ECJ indicated only that private enforcement procedures must be based on national legislation. Once again however, it emphasized the rights of those injured by a competition law violation, provided they can prove a causal relationship between the damage and the illegal practice. The author indicates however, following the opinions expressed by ECJ, that some categories of entities, such as consumers for instance, are in fact very unlikely to be able to prove such relationship because of their inability to access the necessary evidence. The remaining issues covered by the judgment are also presented including: the method of calculating the limitation period for anti-competitive acts; the influence of how is the concept of effectiveness defined; the possibility of making claims and; the scope of compensation. It is worth noting that with respect to the latter, the ECJ stated that compensation must cover not only *damnum emergens* but also *lucrum cessans*.

Agata Jurkowska-Gomułka presents the *Meca-Medina*⁷ judgment – the first conclusive ruling determining whether EU competition law is applicable to sports rules. The author notes that the so-called ‘sporting exception’ has already been embraced by past EU jurisprudence indicating that the principles associated with the organization of sports competitions are not regulated by the Treaty. Truthfully, no Polish court has ever had to face this issue but an antitrust case of that type can arise in the future. The importance of the *Meca-Medina* ruling is emphasized in this case comment because it shows the relationship between sports rules and EU competition law, even if only, as the author notes, as an attempt to strengthen the EU impact on the sports field. Still, as far as subjecting anti-doping rules to EU competition rules is concerned, a discrepancy in the perception of this issue among courts is visible when tracing this case’s particular stages. However, the ECJ has broken here the ‘special’ treatment associated so far with the activities of professional athletes. Agata Jurkowska-Gomułka gives a very interesting presentation of the position of the doctrine relating to this judgment both in plus and minus. The overall presentation allows readers to analyze the problem in detail as well as form their own opinion in this context.

Antoni Bolecki presents the *Asnef-Equifax*⁸ case of 2006 concerning the exchange of client information by loan institutions – a judgment that provided essential guidance for loan institutions until the issue of the Directive of European Parliament and The Council 2008/48/EC of 24 April 2008 on consumer credit agreements. The legality of creating and using a credit database results now directly from the directive. The above judgment contains an extremely interesting summary of past jurisprudence on information exchange by entrepreneurs. From the point of view of readers, the author’s references to other relevant EU rulings, such as *John Deere* or *Wietschaftsvereinigung Stahl* may also be helpful. Still, the content of the judgment is not without ambiguity

⁷ Case C-519/04 P *David Meca-Medina, Igor Majcen v Commission of the European Communities* (no. 5 in Volume II, p. 92).

⁸ Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL Asnef-Equifax, and Administración del Estado Administración del Estado v Asociación de Usuarios de Servicios Bancarios (Ausbanco)* (no. 6 in Volume II, p. 108).

and thus there may still be some doubts concerning the legality of exchanging even anonymous client information on concentrated markets.

An analysis of Article 81 and 82 TEC and Article 18(3) Regulation 4064/89 is contained in the sentence of *Bartelsmann and Sony*⁹ (hereafter, *Impala II*) discussed by Tadeusz Skoczny. This part of the review constitutes a wide-ranging study of the procedural institution of the ‘standard of proof’ covering both English as well as continental doctrine. Found in the study can also be the views on the ‘standards of argumentation’ expressed by D. Bailey, O. Budziński or A. Christiansen. The impression arises that the conclusion of this case constitutes in fact the beginning, rather than the end, of a wider discussion on evidentiary issues in concentration cases, within the scope of not only *Impala II* but also earlier judgments such as: *Impala I* and *Tetra Laval II*. The importance of this ruling is not limited however to procedural considerations only but covers also the notion of collective dominance.

The *Syfait II*¹⁰ judgment presented by Dawid Miąsik states, first of all, if the assessment of the refusal to realize the orders of entities taking part in parallel trade is compliant with the EU competition law (to determine whether it is a competition restricting practice within the meaning of Article 82 TEC).

Lukasz Grzejdziak analyses the *SELEX*¹¹ case which is of key importance with respect to the definition of an ‘undertaking’ within the meaning of EU competition rules. The judgment concerns furthermore the status of Eurocontrol (European Organisation for the Safety of Air Navigation) and the nature of activities performed by public entities. The author’s assessment covers also the application of upstream/downstream theory in industries other than social services sectors.

Among rulings concerning Article 82 TEC, Konrad Kohutek takes up the analysis of the multithreaded *Wanadoo Interactive*¹² judgment concerning primarily the problem of ‘predatory pricing’. The author indicates that the ECJ reconfirmed here past jurisprudential tests making it possible to determine if a dominant company deliberately sacrifices its profits in order to exclude its competitors from the market. Also discussed is the possibility of using the ‘meeting competition’ defense. ECJ judgments in *AKZO* and *Tetra Pak II* are used as reference as far as average variable cost and average total cost. Finally, the *British Airways* (C-95/04 P) case is noted with respect to the idea of market competition protection itself, not the idea of competition protection through protecting the consumer’s interest. Konrad Kohutek presents numerous references to European specialist literature on this subject.

The third part of this publication covers CFI rulings presented in a chronological, rather than thematic, order.

⁹ Case C- 413/06 P *Bartelsmann and Sony v Commission of the European Communities* (no 7 in Volume II, p. 126).

¹⁰ Joined cases C-468/06 do C-478/06 *Sot. Léloukas and Sia EE i in. v GlaxoSmithKline AEVE Farmakeftikon Proionton, former Glaxowellcome AEVE* (no. 8 in Volume II, p. 155).

¹¹ Case T-155/04 *Commission of the European Communities* (no. 9 in Volume II, p. 183).

¹² Case C-202/07 *France Telecom SA v Commission of the European Communities* (no 10 in Volume II, p. 200).

Grzegorz Materna takes up once more the issue of 'sport' analyzing the *Laurent Piau*¹³ judgment. Considered here is the status of sports federations such as FIFA as the addressee of the prohibition of competition restricting agreements stipulated in Article 81 TEC. Discussed also is the applicability of the prohibition of dominant position abuse contained in Article 82 TEC, with reference to associations of undertakings as well as the criteria for the determination of collective dominance elaborated on in *Airtours plc* (T-342/99). Most importantly, the CFI indicated in the *Laurent Piau* case that entities performing activities connected with sport may be, in particular situations, considered as 'undertakings' within the meaning of EU competition law and must thus be subjected to the limitations contained therein. According to the CFI, the status of an undertakings can be associated with sport agents, for example, as well as sport clubs and national football federations with respect to their business activities in situation when they participate in sport events organized by FIFA and profit from the exclusive sale of transmission rights to their matches.

Michał Będkowski-Koziół analyses the now invalid Regulation 4064/89 (replaced by Regulation 139/2004) in relation to the *General Electric Company* judgment¹⁴. This particular case was widely publicized because the Commission decided to prohibit the concentration of General Electric and Honeywell due to its expected conglomerate results. The Commission was concerned that competitors might be excluded from their markets because the merging companies produced complementary products. Although the CFI sustained the merger prohibition, the judgment became a warning light for the Commission.

The *O2 (Germany) GmbH & Co. OHG* case¹⁵ concerning the interpretation of Article 81 TEC was presented by Małgorzata Modzelewska de Raad, who noted the significance of this judgment for the application on the ground of EU law of the originally American doctrine of the 'rule of reason'. The extreme importance of this case was associated also with its findings on the standard of proof and allocation of the burden of proof in Article 81(1) TEC cases as well as the method of assessing the consequences of agreements on the basis of a detailed market analysis of the situation before, and after the operation. The author indicates that the *O2* judgment sees the CFI adopt more of an economic approach to the assessment of agreements on the basis of Article 81(1) TEC.

Krystyna Kowalik-Bańczyk analyses the *Schneider III* case¹⁶ concerning the non-contractual liability of EU institution for mistakes made by the Commission within merger proceedings leading to the prohibition of a concentration. Including this ruling in this publication is most appropriate because it is the first EU judgment obliging

¹³ Case T-193/02 *Laurent Piau v Commission of the European Communities* (no. 11 in Volume II, p. 223).

¹⁴ Case T- 210/01 *General Electric Company v Commission of the European Communities* (no. 12 in Volume II, p. 2380).

¹⁵ Case T-328/03 *O2 (Germany) GmbH & Co. OHG v Commission of the European Communities* (no. 13 in Volume II, p. 263).

¹⁶ Case T-351/03 *Schneider Electric SA v Commission of the European Communities* (no. 14 in Volume II, p. 279).

the Commission to compensate an undertaking for part of its damage incurred by an incorrect merger prohibition. The CFI indicated in this case that a violation by the Commission of the basic procedural right of a fair trial, stipulated in the Article 288(2) TEC, can justify a compensation claim. As noted by the author, the approach of the CFI gives hope that damage claims directed at EU institution could constitute an effective tool for disciplining the Commission in concentration cases.

Tomasz Bagdziński analyses the *Microsoft Corp.*¹⁷ case concerning intellectual property rights issues. The issue concerned the possibility to refuse granting a license by the right owner holding a dominant market position. This ruling was perceived as a chance for the CFI to define the relationship between competition law and intellectual property rights reaching beyond established jurisprudence. Objectively however, the CFI must be criticized for failing to refer to the mutual relations of competition law and intellectual property rights or to the justification of Microsoft's refusal to grant a license.

Concluding, the authors present interesting references to other jurisprudence showing their extensive knowledge of European competition law. It is fair to say that their presentation of both approving and disapproving opinions in this matter is helpful to the readers not only because of the transparency of the structure of the overall case comment but also because of its coverage of the doctrine. Other relevant matters are also considered as is the jurisdiction of both the ECJ and the CFI as well as the jurisdiction of the Court of Competition and Consumer Protection in Warsaw.

Marlena Kadej-Barwik

Faculty of Law, University of Białystok

¹⁷ Case T-201/04 *Microsoft Corp. v Commission of the European Communities* (no. 15 in Volume II, p. 308).