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Maciej Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [*Procedural fairness in the proceedings before the competition authority*], Wydawnictwo Naukowe Wydziału Zarządzania, Warszawa 2011, 373 p.

Dr. Maciej Bernatt's book – *Procedural fairness in the proceedings before the competition authority* was published in 2011 by the Scientific Publishing Office of the Faculty of Management of the University of Warsaw, being a part of the highly-assessed series 'Textbooks and Monographs' Bernatt's book consists of 373 pages, divided into seven chapters, and includes a summary, an abstract in English, a list of court decisions and opinions as well as relevant legal acts, and a bibliography.

Fragments of positive reviews adorn the cover of the book to encourage and inform potential readers. In these fragments, we discover that Professor dr. hab. Janusz Borkowski is of the opinion that the author's book is a 'thorough and wide-ranging analysis, sometimes quite detailed, of the legal bases and elements underlying the procedures of national competition agencies, taking into particular account those particular elements which are recognized as guarantees of the important values of procedural justice (. . .) The author demonstrates his high degree of professional competence in presenting, in a well-formulated and balanced fashion, assessments of the legal status and practical application of these procedural guarantees'. Professor Małgorzata Król-Bogomilska of the University of Warsaw, Polish Academy of Sciences, and Institute of Legal Science asserts that 'this work contains clearly-formulated aims and research issues, focused on extremely well-selected questions and problems, which allow the author to concentrate on those scholarly issues which are of particular importance in practical application'. Any reader who undertakes a thorough reading of Dr. Bernatt's work will undoubtedly agree with the above scholarly assessments.

The author is a Doctor of Legal Science and an adjunct at the Department of European Economic Law of the Faculty of Management of the University of Warsaw, as well as an active member of the University's Centre for Anti-monopoly and Regulatory Studies. His areas of special interest and expertise include Competition and Consumer Protection Law, administrative procedural law, and human rights' law. Dr. Bernatt's professional engagement beyond academia is strongly reflected in his book. He has worked for the Helsinki Human Rights Foundation and is presently Assistant President of the Polish Constitutional Court.

Chapter I is of an introductory nature. The author presents the axiology of competition protection and defines the scope and subject of his research. His

preliminary remarks concerning the system of values underlying anti-monopoly doctrine set the tone for his explication of the corollaries which flow from his analysis. He conducts an invaluable examination, rarely undertaken in anti-monopoly scholarship, into the connection between the values underlying anti-monopoly doctrine and basic human rights. Making reference to the jurisprudence of the Polish Constitutional Court. he stresses the freedom to conduct economic activities and points out that the 'interpretation of the law *in dubio pro libertate* means that, in doubtful situations, the law should be interpreted in the fashion most advantageous for entrepreneurs, favoring the freedom to conduct economic activities, and not its restriction'. (p. 23). He also points out that 'the need to respect the legal rights of entrepreneurs, in the case of administrative proceedings conducted by competition enforcement agencies, is also based on and found in the jurisprudence of the European Court of Human Rights relating to the rights of entrepreneurs to due process under Article 6 of the European Convention of Human Rights (hereafter, ECHR) and the right to privacy contained in Article 8 ECHR' (p. 23).

Dr. Bernatt's omission of a thorough economic analysis may be viewed as a certain gap in his axiological reflections. It seems an oversimplification for him to assert that 'the direct aim of competition law is (. . .) is the protection of competition (and competition mechanisms) on the market – and its overriding aim is the prosperity (economic interests) of consumers' (p. 22). In certain instances there is tension, even conflict, between the aim to assure the competitive structure of the market and the optimalization of efficiency. Not in every case does the sharpening of competition serve the best interests of consumers[1]. Having mentioned this point, it should also be pointed out that the absence of an economic analysis in the discussed axiology underlying anti-monopoly law does not detract from the further reflections contained in the work.

In defining the scope of his research, Dr. Bernatt focuses in the first instance on the proceedings in front of the Polish national competition agency (the President of the Office of Competition and Consumer Protection – hereafter the UOKiK President), adding that his research also encompasses 'an analysis of the procedural rules applied before the European Union Competition Protection Agency, i.e. the European Commission' (p. 25). The author also states that his book examines whether the evidentiary, remedial, and execution measures used in competition enforcement proceedings are applied in a manner which 'does not violate the values inherent in procedural justice' (p. 27).

Chapter II is entitled 'The Principles of Procedural Justice'. In this chapter the author examines the next issue: the legal-theoretical sources of procedural justice, including the supra-legislative roots of procedural justice and procedural justice in administrative proceedings in Poland. He also presents his own views on the concept of procedural justice. Noteworthy is his assertion that, to a certain extent 'it is completely

[1] See R. Van den Bergh, 'The difficult reception of economic analysis in European competition law', [in:] A. Cucinotta, R. Pardolesi, R. Van den Bergh, *Post-Chicago Developments in Antitrust Law*, Cheltenham, Northampton 2002, p. 44.

justifiable to apply the legal right to access to a court to proceedings in front of the UOKiK President' (p. 63). This view is supported by his analysis of the jurisprudence of the Polish Constitutional Court. In Chapter II Dr. Bernatt identifies five specific 'values inherent in procedural justice which should be guaranteed in proceedings in front of the UOKiK President: right to a hearing; equality of the parties; opportunity to present a defense; confidentiality; and appealability' (p. 94). These five identified values determine the further structure of the book, with each chapter devoted to a separate analysis of each value in terms of its application to proceedings in front of competition protection agencies in general and the Polish national competition agency in particular.

Thus Chapter III examines the right to a hearing in proceedings in front of the competition protection agency. In particular the author examines the right of access to information and the documents contained in the case file, issues connecting with evidentiary proceedings, and the scope of hearings in specific administrative phases of a case. Dr. Bernatt quite successfully presents a synthesis of the complicated issue of cooperation and transfer of information between various national competition agencies, particularly focusing on cooperation within the European Competition Network.

Chapter IV examines the critically important issue – both in terms of the application of competition law and the formulation of legislation with regard thereto – of the right to equal participation in proceedings in front of competition enforcement agencies. Dr. Bernatt's research concerning this issue and Poland's practical application of the theoretical constructs leads him to criticize the existing Polish norms. He notes disapprovingly the fact that entrepreneurs who file petitions and request the institution of proceedings have a very limited right to active participation therein, consisting mainly of the possibility to present required information concerning the violation of competition law (p. 157). He also calls attention to the fact that Polish legal solutions are at variance '*in minus* – from the solutions applied in the European Commission's competition enforcement proceedings, resulting in (…) significant substantive restrictions on the right to a court trial, such as in the provisions providing for a right of appeal from the decisions of the UOKiK President to the specially-established Court of Competition and Consumer Protection' (p. 158).

At this point it should be noted that one of the most significant changes in Polish competition law brought about by the 2007 Act on Protection of Competition and Consumers[2]

Was that it deprived interested parties of the right to file legally operative petitions on the commencement of anti-monopoly proceedings before the UOKiK President. The only path open to parties interested in the commencement of litigation was to inform the President of the UOKiK in writing of their concerns over the competition-restrictive effects of a particular practice [Article 86(1) of the Act]. It is agreed in the legal doctrine that since the date the 2007 Act went into effect, 'petitioners no

[2] Act of 16 February 2007 on the Protection of Competition and Consumers (Journal of Law No. 50, item 331, as amended.

longer possess the status of 'parties' to proceedings instigated on the basis of their petitions, since the Act provides that only undertakings against which anti-monopoly proceedings alleging competition-restrictive practices are commenced will be granted the status of parties'[3]. The justification given for this procedural change was that 'in the public law tribunal (proceedings in front of the UOKiK President) only the most serious cases of competition-restrictive practices, those which have a significant negative influence on competition on the market, should be reviewed. Individual complaints by entrepreneurs and/or consumers who claim to have been damaged in connection with a particular anti-competitive practice should press their claim for a remedy (voidance of a contract, a cease and desist order, or money damages) in the civil courts'[4].

Dr. Bernatt considers that the scope of the change introduced is too far-reaching. He states that 'it would have been sufficient (…) to restrict the legally operative character of a petition lodged to those complaints acted upon by the UOKiK President. But depriving the party alleging to have been damaged by the practice involved from the right to equally participate in the proceedings must be critically assessed' (p. 159).

Dr. Bernatt goes on to quite competently compare Polish legal solutions with EU standards. He states that 'unlike Polish regulatory solutions, EU law envisions the possibility that a Commission decision refusing to institute an action may be appealed to the EU courts by the initiating party' (p. 162). He goes on to note that 'EU law also provides that a third party may appeal the final decision of the Commission to the EU courts and demand its annulment' (p. 163). Dr. Bernatt concludes that '*de lege ferenda* it is necessary to widen the scope of entities entitled to file an appeal from a decision of the UOKiK President and to participate in such an appeal as parties to the proceedings' (p. 163).

Dr. Bernatt also engages in a critical analysis of the issues surrounding the protection and/or distribution of information submitted in support of leniency claims. He notes that 'the institutions and mechanisms aimed at protecting the confidentiality of information provided by parties to the proceedings are justified by legislators on the grounds that the protection of confidentiality will encourage undertakings to participate in such proceedings' but he points out that the application of the solutions adopted by the Polish legislators 'may lead to an unjustifiable discrimination in the procedural rights of parties to a proceeding in front of the UOKiK President, particularly with regard to the right to be heard' (p. 170).

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[3] A. Jurkowska, D. Miąsik, T. Skoczny, M. Szydło, 'Nowa uokik z 2007 r. – kolejny krok w kierunku doskonalenia podstaw publicznoprawnej ochrony konkurencji w Polsce' ['A new UOKiK in 2007 – another step toward improving the public law protections of competition in Poland'] (2007) 4 *Przegląd Ustawodawstwa Gospodarczego* 5. Art. 88(1) establishes that the parties to a proceeding are those undertakings against which allegations of anti-competitive practices are commenced..

[4] Justification for the government project on the law on the Protection of Competition and Consumers, Sejm publication nr 1110 of 26 October 2006, available at http://orka.sejm.gov.pl/Druki5ka.nsf/0/06AED0325C1F3B3FC125722600445A4A/$file/1110.pdf, pp. 18, 19.

The author also points out that grants of confidentiality to information submitted in leniency proceedings raises issues in later private civil suits brought by parties aggrieved by the practices at the core of the leniency proceedings. This part of the author's work would have been enriched had he engaged in a comparative analysis, in particular taking into account the antitrust law of the United States, in which the position of the 'repentant' undertaking is better in subsequent civil proceedings for damages than the position of the other members of the cartel. However, in the American system this effect was able to be obtained without infringing upon the rights of third parties damaged by an undertaking's actions to obtain compensation. The legal solution applied in the US is to limit the liability of the 'repentant' party for its actions only to those situations whereby the party damaged by an antitrust infringement would be otherwise entitled to treble damages[5].

In Chapter V Dr. Bernatt criticizes 'the lack of clear legal regulations guaranteeing to undertakings the right against self-incrimination in proceedings before the UOKiK President' (p. 327), and also expresses doubts concerning 'scope of the privilege guaranteeing the confidentiality of legal advice' (p. 327). He also cites with disapproval the assumption contained in the jurisprudence of the Polish Supreme Court that 'the Court of Protection of Competition and Consumers need not respond in detail to each and every complaint concerning procedural issues raised on appeal from a decision of the UOKiK President' (p. 329, Chapter VII). On the other hand, the author is of the opinion that an undertaking's trade secrets and/or confidential business information is protected to a satisfactory degree in proceedings before both the UOKiK President as well as the Court of Protection of Competition and Consumers (Chapter VI).

One excellent feature of the book under review is the way it summarizes the author's conclusions. Each chapter concludes with a sub-chapter entitled 'Conclusions'. It should also be pointed out that the author formulates his conclusions in a bold yet at the same time responsible manner. Even if the reader does not agree with all of them, they undoubtedly contribute to sharpening and enhancing the discussion concerning proceedings before competition enforcement agencies. Much use may be had in particular of the author's criticisms of solutions adopted into the Polish law concerning the access, or rather lack thereof, to proceedings in front of the UOKiK President by all parties affected by a particular practice under review.

In summary, it may be said that this excellent work by Dr. Bernatt should be found in the library of every Polish lawyer interested in or engaged in competition law.

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[5] Por. J. Pheasant, 'Damages Actions for Breach of the EC Antitrust Rules: The European Commission`s Green Paper' (2006) 27(7) *European Competition Law Review* 368.