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Mateusz Błachucki, *Ponadnarodowe sieci organów administracji publicznej oraz ich wpływ na krajowy porządek prawny (na przykładzie ponadnarodowych sieci organów ochrony konkurencji)* [*Transgovernmental networks and their impact on domestic legal order (case study of competition authorities networks)*], The Institute of Law Studies of the Polish Academy of Sciences, Warsaw 2019, 688 p.

Networks are very much in vogue, and rightly so, since the world we live in is more connected than ever (Pulford, 2018, p. 212). The academia is not an exception in this respect. The ubiquitous, but still fuzzy term 'network' has been used (sometimes overused) in a variety of ways spanning a number of academic disciplines (Wijen et al., 2012, p. 511). Within the social sciences there has been an increasing interest in network analyses in the past few decades. Not only political science and economics, but also the law have been directing their attention to network phenomena to a great extent (Streck and Dellas, 2012, p. 511). As a result, a 'Babylonian' variety of policy network concepts and applications can be found in the literature (Börzel, 2002, p. 253). Notwithstanding certain problems for jurisprudence created by the term 'network' itself, and even if – according to Richard Buxbaum's apodictic judgement – a network is not a legal concept at all, a new legal scholarship on networks is apparently emerging (Buxbaum, 1993, p. 704; Teubner, 2011, p. 73; Terhechte, 2011, p. 14). The growing literature in law and political science points to the prominence of transgovernmental networks as a subset of the larger phenomenon of 'government networks'. Although defined differently depending on the writer and the context, this particular form of international cooperation exhibits patterns of regular and purposive relations among like government units working across the borders, and is based on loosely-structured, peer-to-peer ties developed through frequent interaction rather than formal negotiations (Slaughter, 2004, p. 14; Raustiala, 2002, p. 5). While the phenomenon is not wholly new, in the past few decades intergovernmental networks have become a defining feature of contemporary global governance (Bach, Newman, 2010, p. 505). They have proliferated in almost every area of government regulation, in a plethora of issue-specific fields stretching from the environment to the financial world and everything in between, including antitrust (Slaugher and Hale, 2010, p. 51; Slaughter and Zaring, 2006, p. 216).

For some, they herald a new and attractive form of global governance or an institutional innovation that can help to optimise the trade-offs between benefits and problems of centralisation and decentralisation, as well as to enhance the ability of states to work together to address common problems without the centralized bureaucracy of formal international institutions (Slaughter, 2001a, p. 347; Kerber and Wendel, 2016, p. 110). Proponents believe that transgovernmental networks are becoming so widespread and important that they constitutes, in Anne-Marie Slaughter's famous ascertainments, 'the optimal form of organization for the Information Age', 'a blueprint for the international architecture of the 21st century', and eventually 'a new world order' (Slaughter, 2001b, p. 204; Slaughter, 1997, p. 197; Slaughter, 2004, p. 261–272).

The enthusiasm of advocates of transgovernmental networks is matched by the scepticism of doubters. For the latter, these networks present significant accountability and legitimacy concerns, and portend a vast technocratic conspiracy – a shadowy world of regulators bent on 'de-politicizing' global issues in ways that will inevitably benefit the rich and powerful at the expense of the poor and weak (Slaughter, 2001, p. 347; Slaughter, 2003, p. 1043).

The ambiguities and ambivalences that affect the issue of transgovernmental networks make them an even more important and intriguing topic for scholars and policymakers. This sentiment seems to be echoed also by Dr. Mateusz Błachucki, the Author of the book entitled *Transgovernmental networks and their impact on domestic legal order (case study of competition authorities networks)*, published recently by The Institute of Law Studies of the Polish Academy of Sciences (hereinafter: PAS). Dr. Błachucki, as a scholar (professor *in spe* of the PAS) and an expert (*inter alia* at the Office of Competition and Consumer Protection), specializing in competition and administrative law, is particularly well-placed to undertake such an ambitious project. The result of his vast knowledge, experience and effort is an exceptional piece of scientific work, based on a large-scale study. This timely, eloquently written and hefty monograph (spanning over 600 pages) makes a very welcome, thoughtful and thought-provoking contribution to administrative law science. The book aspires to fill a gap in existing literature by explaining the legal nature of transgovernmental networks, classifying them and, most importantly, evaluating their impact on the national legal order and the functioning of Polish administrative authorities involved in the networks. Especially the last point renders the book unique. Given that competition policy represents a prime example of supranational governance, where among the most paradigmatic and instructive instances of transgovernmental networks are those from the area of antitrust, formed universally by competition authorities. Given also that contemporary competition (or antitrust) law has been developed to a large extent through and by such networks, they were rightly chosen as a representative exemplification of the subject problem.

The overall structure of the book is generally well conceived and neatly organized. For ease of reading and reference, it comprises twelve chapters, which can be segmented into four main parts. Each chapter is further subdivided into thematic subchapters, reflecting a sequence of research steps. As a minor remark, perhaps

some subtitles in the table of contents could have been a little more polished. For example, State aid appears to be located outside the competition protection area, whereas the competition-policy-related reasoning for establishing State aid control is deeply embedded especially in the World Trade Organization subsidy law and EU State aid law, the latter forming a constituent (and an increasingly important) part of EU competition law (Hofmann, 2016, p. 6; Jacobs, 2004, p. vii).

The first four chapters serve as a tool for the development of the theoretical concept of network administration, as used in the legal and social sciences scholarship, both Polish and foreign. In line with the methodological guidelines, the background introductory chapter sets the stage conceptually and methodologically for the entire study. It outlines in detail the classic components of the opening chapter, by describing the scope of the research undertaken and the book's aims and objectives, as well as by discussing the research methodology employed. Additionally, we will find there compelling reasons for the choice of the research subject, the main argument and thesis of the study with the list of accompanying research questions, bibliographic tips (or rather quite extensive overview of the subject literature), as well as several terminological and technical remarks. For some readers, such an elaborated and unconventionally lengthy (nearly 30 pages) introduction might look a bit too wordy, nonetheless it demonstrates a high level of the Author's methodological proficiency and care.

The book is impressive in its scope of coverage and in the wide range of jurisdictions consulted. However, contrary to what it might seem from the wording of the book's main title, this range does not appear to be unlimited. Hence, for the sake of accuracy it should be noted that the title phrase 'domestic legal order' (on which transgovernmental networks do have impact), actually refers mainly to the 'Polish legal order', what seems to be clear even after an initial analysis of the table of contents and the introductory chapter.

As regards the research methods employed in the book, one should mention a legal and dogmatic (or formal-dogmatic) method (as a basic one), as well as historical and comparative methods (as subsidiary ones). These methods, typical for legal science, are appropriate for the research undertaken. As implicated by the particular nature of the studied phenomenon, the book is the result of a multi-layer analysis, yet with the natural preponderance of administrative law science. Such a methodological approach deserves praise, even more so given the originality of the presented inquiries, which stems from the research attitude looking at transgovernmental networks from the bottom up, or from the perspective of the national legal order. Bearing in mind the interdisciplinary nature of the substantial part of the research, it should be appreciated that extensive scholarship from a variety of legal disciplines was employed in the book, including specifically competition law, public international law and administrative law, enriched by the findings of political science and economics on transgovernmental networks.

After the introductory chapter the Author contemplates the 'phenomenology'[1] of transgovernmental networks. At the beginning, all research efforts are oriented toward

[1] This term is borrowed from A.M. Slaughter, D. Zaring, 2006, p. 215.

identifying the legal character and formulating a legal classification of the networks in question. Afterwards, these findings are confronted with the Polish doctrine of administrative law and international law scholarship. Specifically, traditional forms of cooperation between public authorities and traditional forms of interstate cooperation are discussed in the context of transgovernmental networks. This part of the study is followed by the identification of general means and forms of international cooperation between competition authorities, and by an evaluation of all the international activities undertaken by the Polish competition authority. Thanks to these studies, the role and significance of transgovernmental networks in international cooperation of the Polish competition authority can be better understood.

The second part of the book, consisting of chapters five and six, contains a careful description and evaluation of a broad spectrum of transgovernmental networks, both involving competition authorities and others. The latter ones, involving consumer protection and regulatory authorities respectively, were chosen as an illustration serving to comprehend whether competition networks are distinctive or represent typical solutions in administrative cooperation at a transgovernmental level.

In the third and largest part of the book, comprising chapters seven to ten, the Author offers a detailed and methodical discussion of various issues identified during the exploration of transgovernmental networks. In particular, he provides a comprehensive analysis of the regime and the jurisdiction of national authorities involved in transgovernmental networks. This is followed by a thorough examination of the forms of cooperation within the networks and how they affect national administrative authorities in exercising their jurisdiction. This analysis leads to the identification of spheres and the scope of influence of transgovernmental networks over the domestic legal order and the function of public administration in Poland. In discussing the problem of multilevel governance, national administration is analysed through the prism of emerging European and global levels of governance. Other issues contemplated include legal mechanisms for administrative and judicial supervision over the activities of transgovernmental networks and participating national authorities, as well as legitimacy and accountability of transgovernmental networks.

The last part of the book has two chapters and contains conclusions drawn in the earlier parts. In particular, it examines the prospects for the development of transgovernmental networks. On the basis of general conclusions, areas for further research are identified. In the final pages of the book, the Author offers interesting legislative recommendations.

Since it is not possible to cover in a short review all of the themes, arguments, and insights of this important book, I shall comment on just a few of them.

The book's core argument is that notwithstanding the heterogeneous character of transgovernmental networks, they increasingly influence the functioning of the administrative authorities involved, leading in turn to institutional, substantial and procedural changes within the Polish legal order and administrative authorities. At the same time, as is further demonstrated, the provisions of Polish administrative law are not sufficiently developed to create an adequate regulatory framework for the proper functioning of Polish authorities within transgovernmental networks. Essentially, there

are no adequate regulations allowing the chief organs of Polish administration to supervise the international activities of other Polish authorities, which in consequence are very autonomous in nature, and are generally not subject to any supervision. Hence, as the Author justly observes, the development of transgovernmental networks poses a challenge for Polish administrative science, and for Polish administration itself. In my view, the main thesis of the book is sound, and Dr. Błachucki succeeds in vindicating it. His numerous important (albeit not entirely novel) observations and conclusions on various implications of transgovernmental networks provide a substantial contribution to the field.

Turning to more specific questions, particularly remarkable are the Author's findings confirming the widespread belief that even if transgovernmental networks are already playing a crucial role, and will likely become increasingly common, they are by no means the ideal institutional arrangement for every setting and cannot solve all the challenges of governing the globe. To put it metaphorically, they have a Janus-face image, and are not a 'silver bullet' to the world's problems (Eberlein and Newman, 2008, p. 28; Slaugher and Hale, 2010, p. 49; Eberlein, 2002, p. 136). Particularly instructive in this context are the Author's reflections on the networks to enforce EU law (with the European Competition Network as a prime example). On the one hand, as was demonstrated, such bodies were established for a more consistent, mutually concerted implementation and application of EU law, to the benefit of all stakeholders, including businesses. According to the Author's analysis, this innovative tool to 'govern' EU law proved to be very effective in its role. On the other hand, however, this success comes with certain costs in terms of legitimacy, accountability and due process. In particular, as is further exemplified in a broader (worldwide) context, network-based governance unfolds through a two-step process. First, domestic regulators – often without close supervision by elected officials – engage in international policymaking via networks to harmonize standards and technical rules across borders. Subsequently, these regulators implement these standards, rules, and best practices at home (Bach and Newman, 2014, pp. 395–396). This phenomenon was similarly described elsewhere in literature in the context of EU enforcement networks, which may have a paradoxical 'boomerang effect' on the distribution of power at the supranational level (Eberlein and Newman, 2008, p. 28; Poncibò, 2012, p. 191). Admittedly, in most areas member states have resolutely resisted the formal delegation of regulatory powers to EU agencies in order to retain national control. However, now they may find that horizontal delegation to domestic regulators might result in a similar loss of control as national regulators collectively leverage domestic authority to advance supranational harmonization(Eberlein and Newman, 2008, p. 28; Poncibò, 2012, p. 191). Therefore, Dr. Błachucki quite rightly raises a deeply significant question whether the activity of domestic regulators within transgovernmental networks has gotten out of democratic and administrative control. Moreover, he also provides a flagrant example of the instrumentalization of transgovernmental network for the strengthening position of international organisation, and the weakening influence of national governments on national antitrust administration. According to the Author, a clear manifestation of this anomaly is the, at that time, proposal for a Directive to empower the competition

authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (the ECN+ Directive).[2]

The book under review reveals not only the Author's high level of expertise, but also his passionate, polemical temperament, especially when he firmly criticises certain aspects of the competition law and policy regime in Poland. Some of these critical assessments invite further reflection, which I will offer not necessarily to defend the status quo, but to better understand the reasons behind it, and mindful of the value of a more nuanced understanding of competition authorities' interdependencies. Incidentally, the Author's critique, while fairly balanced overall, for some readers may seem a little overdone occasionally, especially when on rare occasions he falls into a quasi-journalistic tone, in the otherwise elegantly written and deeply scholarly work.

The Author quite correctly points out that the current (and even some anticipated) rules do not adequately secure the independence of the Polish national competition agency (the President of the Office of Competition and Consumer Protection), indicating, inter alia, the lack of security of tenure for the agency's head as one of the key issues. It could be added here that setting a term of office would certainly be helpful, but definitely insufficient and prone to capture, as evidenced by recent research on the politicisation of regulatory agencies (Ennser-Jedenastik, 2016, p. 507–518). The problem in question seems to be exemplified also by the Author's radical but justified critique of a bill to reintroduce security of tenure and irremovability for the head of the competition agency, as well as to cancel the current, quasi-competitive procedure for her appointment. Indeed, the controversial bill could give rise to the speculation that it was designed as an attempt to politicise the competition agency. However, it should be also noted that this critique, retaining its educational value, proved to be objectless due to the ephemeral nature of the questioned provisions (they were dropped from the bill prior to the start of the actual legislative process). In any case, it always pays to remember that the regulation introducing an appropriate tenure guarantee can be changed at any given time, so in general any independence written into the law may be more apparent than real (Martyniszyn and Bernatt, 2019, p. 13).

Yet another aspect, which affects the issue of independence of the Polish competition agency, is worth considering. It concerns a systemic weakness of the current legal regime in Poland, represented by a lack of a narrowly construed right of executive override (a systemic safety valve), which would allow to accommodate these rare instances where the state's key strategic interests surmount competition concerns, without undermining the agency's credibility (Martyniszyn and Bernatt, 2019, p. 27). Note that according to Polish law, the Prime Minister has no competence to interfere in the on-going work of the competition agency, preserving its decisional autonomy. Moreover, the government does not have tools to change the agency's decisions. In such circumstances, even if the agency head's independence was not

[2] Directive (EU) 2019/1 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market was signed into law on 11 December 2018, OJ L 11, 14.01.2019, p. 3–33.

formally safeguarded, she was able, for instance, to block a merger between state-owned PGE and Energa – the flagship project of the then government[3]. To compare, for example under German and Dutch competition law, government ministers have powers to intervene even in individual merger control cases, to meet public interest or welfare objectives (van de Gronden and de Vries, 2006, p. 64). Remarkably, in Germany, in the large and controversial E.ON/Ruhrgas case, the merger involved, which was originally blocked by the competition agency (the Federal Cartel Office) with a reputation of being one of the most independent, if not the most independent of all national competition agencies, was finally permitted by political authority (the then Federal Minister for Economic Affairs and Technology) (van de Gronden and de Vries, 2006, p. 64; Wils, 2019, p. 24).

According to the last Author's opinion, to which I will refer briefly, competition law is not especially charged politically, because it is based on universal economic concepts. My perception is somewhat different. I believe that, whether we like it or not, politics exerts enormous influence over nearly every aspect of competition law, most notably its goals and enforcement (including, but not limited to mergers control), particularly where this law becomes an instrument of strategic competition policy or antitrust protectionism (Budzinski, 2008, p. 53; Kerber and Budzinski, 2004, p. 41; Molski, 2015, p. 197). A vast amount of contributions by academics and practitioners, both supporting and objecting to the political dimension of competition law, bear witness to this. Due to the space limit, I will quote just a few of them, starting from the seminal warning of Robert Pitofsky: 'It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws' (Pitofsky, 1979, p. 1051). Other scholars admit that '[e]very antitrust orientation has a political side to it' (Podszun, 2016, p. 383), and that '[t]he substantive areas of antitrust law […] illustrate well the enduring political character of this body of law' (Bowman, 1996, p. 168), which 'subject matter, the regulation of corporate power, is primarily a political matter in the constitutional sense' (Bowman, 1996, p. 169), therefore '[p]olicy-making becomes unavoidable in antitrust decisions' (Bowman, 1996, p. 169). Yet other commentators are of the opinion that 'the harmonization of global antitrust laws is imbued with a broader political dimension'(Manne and Weinberger, 2012, p. 490), and view political externalities of antitrust policy as impediments to the adoption of a worldwide antitrust standard (Manne and Weinberger, 2012, p. 505; Sugden, 2002, p. 994).

In concluding of this review I can only express my great appreciation for Dr. Mateusz Błachucki for his deep, erudite, rigorously documented and intellectually stimulating study of a very topical and important subject. I highly recommend his impressive book not only to qualified audience within legal academia and practice, but also to anyone interested in the subject.

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[3] Decision of 13 January 2011, DKK 1/2011.

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