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Cartel Facilitating as a Special Form of Participation in Anticompetitive Agreements under EU and Polish Competition Law. Warsaw, 3 April 2019

On 3rd April 2019, a scientific seminar entitled '**Cartel facilitating as a special form of participation in anticompetitive agreements under EU and Polish competition law'**, organized by the Department of Competition Law of the Institute of Law Studies of the Polish Academy of Sciences, was held in Warsaw. During the event lectures were given by Paweł Podrecki (professor of the Institute of Law Studies of the Polish Academy of Sciences – INP PAN), Katarzyna Wiese (L.LM., PhD) and Grzegorz Materna (professor of the Institute of Law Studies of the Polish Academy of Sciences – INP PAN).

At the beginning, Professor **Grzegorz Materna** (INP PAN) drew attention to the tendency of competition authorities to extend antitrust liability due to a broad interpretation of the scope of anticompetitive agreements, as well as new forms of involvement in an infringement of competition, other than 'perpetrators', which regards to cartel facilitators.

In the first speech, Professor **Paweł Podrecki** (INP PAN) presented the concept of new forms of 'group practices' restricting competition. The Speaker emphasized that the emergence of new forms of agreements is mainly the result of the development of innovative business models, such as Uber. Subsequently, Professor Podrecki analysed intermediary liability on the examples of liability of internet service providers, liability of intermediaries for infringements of intellectual property rights, and liability of instigators and helpers under the Polish Civil Code. According to the Speaker, competition law might not be suitable for a proper market regulation in times when traditional agreements concluded in smoke-filled rooms shift toward the digital market and when algorithms are used to bring anticompetitive effects.

The next speech, given by **Katarzyna Wiese** (PhD), focused on antitrust liability of cartel facilitators on the basis of EU law. A cartel facilitator is an undertaking that knowingly contributes to the common anticompetitive goal of the agreement. According to the practice of the European Commission (EC) and case-law of the Court of Justice of the European Union (CJEU), agreements that distort competition in the EU are caught by Article 101 of the Treaty on the Functioning of the European Union (TFEU), irrespective of whether the parties operate in the same market. Therefore, cartel facilitators can be liable for such conduct even where such facilitators are not active on the cartelized product market as well as when the cartel

does not limit their autonomy of intent. According to the Speaker, neither Article 101 TFEU, nor any other provision of EU competition law, provide for a legal basis for an extension of its scope on undertakings that do not realize directly the premises of the prohibited practice, but merely support actions undertaken by others. Katarzyna Wiese recommended an adjustment of the liability test of cartel facilitators so that it includes an additional qualitative premise, namely the appreciability of a contribution to the common anticompetitive goal.

In the last speech, Professor **Grzegorz Materna** (INP PAN) presented critical remarks regarding the application of the EU concept of cartel facilitators' liability in antitrust proceedings before the Polish Competition Authority. According to the Speaker, the concept of liability for a single and continuous infringement and the concept of anticompetitive agreement, which was adopted by the CJEU as a basis for cartel facilitators' liability, are not adequate tools in such cases. That's because the problem of cartel facilitators' liability regards instead a different issue, namely the scope of antitrust liability, which should expressly stem from the letter of the law. Polish competition law provides for antitrust liability of the direct participant to a prohibited practice only, that is, the undertaking concluding an agreement restricting competition, not of 'contributing' or 'facilitating' involvement of other parties in the agreement. Therefore, the application of the concept of cartel facilitators raises serious doubts in the light of the principle of certainty in relation to legislation providing for financial penalties. When the Polish Competition Authority conducts antimonopoly proceeding under Article 6 of the Polish Competition Act[1] exclusively, this concept should not be used by the Authority. In the case of parallel application of Polish and EU competition law, the possibility of using the above mentioned concept of cartel facilitators' liability is also doubtful. Article 3 para. 1 Council Regulation No 1/2003 (OJ L 1, 4.1.2003, p. 1–25) stipulates that where the competition authorities apply national competition law to agreements which may affect trade between Member States, they also apply Article 101 TFEU. Therefore, according to Professor Grzegorz Matera, the lack of grounds for cartel facilitator's liability under the Polish Competition Act excludes the competence of the Polish Competition Authority to address to them antimonopoly decisions through the application of Article 101 TFEU.

During the discussion with the audience that followed two opposing positions regarding the legitimacy of the concept of a cartel facilitators' liability were presented. In the opinion of Professor **Małgorzata Król-Bogomilska** (WPiA UW), taking into consideration such common patterns pertaining to criminal liability for aiding and abetting (helpers and instigators), they should also be 'transplanted' into competition law respectively. Thanks to this, the principle of specificity that offences and penalties must be defined by law, also binding in antitrust law, would be fulfilled.

By contrast, according to **Jan Polański** (LL.M., Department of Competition Protection, UOKiK), due to the effectiveness of EU competition law, the Polish Competition Authority has to apply the concept of a cartel facilitators' liability,

[1] Act of 16 February 2007 on competition and consumer protection (uniform text: Official Journal of the Republic of Poland of 2009, pos. 369).

created by the CJEU case law, regardless of the lack of a clear legal basis in Polish law, insofar as a given agreement may affect trade between Member States. The provisions of the prohibition of an anticompetitive agreement do not specify that the concept of an 'anticompetitive agreement' relates only to 'perpetrators'. It should be rather admitted that this concept also includes agreements with other undertaking such as facilitators, as long as they have an anticompetitive effect.

In response to a question from the audience, Professor **Grzegorz Materna** explained that in some cases, undertakings referred to as facilitators are at the same time direct participants of the cartel, operating on the same cartel market or related market. Therefore, they are interested in the success of this cartel (that is, the implementation of its anticompetitive effects). In these cases, their liability should not raise any objections (for instance, participants of hub and spoke agreements).

In the opinion of **Agnieszka Stefanowicz-Barańska** (Dentons, attorney at law), there is a possibility under Article 101 TFEU that a given agreement between a facilitator and a cartelist would have as their object or effect the prevention, restriction or distortion of competition within the internal market. Had there been no legal basis for cartel facilitators' liability (confirming by the CJEU), proceedings against undertakings for actively contributing to a restriction of competition in the relevant market could have been blocked.

Katarzyna Wiese (PhD) did not agree with the above mentioned opinion. She pointed out that even if it had been established that the action taken by a cartel facilitator had a positive effect on the operation of the cartel, by making it more effective and concealing it, the effects of that action on competition stem exclusively from the conduct of the cartel members. In this situation, when there is no clear legal basis, and the CJEU case-law has contributed to blurring the definition of an 'anticompetitive agreement', it is hard to accept that effectiveness of EU competition law could justify such liability in itself.

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