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A short comment on Andriychuk

by

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When submitting my paper on the goals of Polish competition law, I was convinced that it would start a debate among Polish antitrust scholars and practitioners concerning this fundamental issue for any antitrust jurisdiction. I was also hoping that it would be reinforced by input from abroad. The fact that my contribution resulted in a discursive article confirms that the goals of antitrust law have always been, still are, and will continue to be a controversial and invigorating issue for further discussion.

My paper was not designed as a theoretical discussion on the notion of competition, preferable goals of antitrust law, or analytical methods of applying statutory prohibitions. It was also not meant to provide a practical solution to this problem. Considering the lack of similar studies, my paper was intended to present a review of the development of Polish jurisprudence between 1990 and 2008, which, I believe, has evolved in an interesting way. By stressing the importance of consumer interests, Polish jurisprudence has managed to avoid the pitfalls of a "restriction of the freedom of action" and "allocative efficiency", using instead the concept of "consumer detriment" as the denominator of competition restrictions. Given the form of my input, my paper should be viewed as an introduction to a wider debate. As such, it differs from Andriychuk's article, which is a clear statement on how this issue should be resolved, even though it is not related to Polish experiences.

I agree with Andriychuk's opinion that "statutory ambiguity belongs to universal attributes of law and legal interpretation". However, the degree of ambiguity of antitrust rules is very significant. The prohibitions of restrictive agreements and unilateral abuses of market power do not provide undertakings with exact information as to what is actually prohibited. What indicates that

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an agreement has anti-competitive aim or effect? What constitutes dominant position and the abuse thereof? Even if the exemplary lists of restrictive practices that fall within the scope of the two general prohibitions are considered, who can tell – just by reading the text of the legal rules – what an unfair price is (Article 82 a EC or Article 9(2)(1) of the Polish Competition and Consumer Protection Act) or whether a refusal to supply an undertaking interested in exporting the goods amounts to a dominant position abuse? Thus, while I can generally agree with Andriychuk's statement that "statutory provisions are *rules* and not *guidelines"*, I can accept it only in so far as statutory provisions do not refer to extralegal norms or values. If they do, then they become guidelines that show the direction of a possible interpretation, requiring business and judicial practice to develop to provide them with an actual content and meaning.

Referring back to one of the aforementioned examples, what constitutes an unfair price? It may be high or low or both. Until jurisprudence settles the issue, it is not possible to specify why a certain price is unfair, unless with reference to a comparative interpretation. As a result, judicial interpretation plays a more important role than has been traditionally attributed to it. The importance of judicial activism in determining the content of positive law has increased dramatically in the last 30 years, both with the proliferation of the courts of the highest instances at the European and international level and with the development of EC law. Judicial interpretation is of much more importance than accepted by Andriychuk, since ECJ's preliminary rulings are binding on the courts of Member States[1] and because the ECJ requires national judges to be "adventurous" when applying established principles of domestic law in proceedings where issues of EC law are at stake[2] (with the result that national courts must disregard nearly everything that stands in the way of the effectiveness of EC law). The great impact of judicial interpretation can also be attributed to the fact that, at the national level (at least in Poland), a judge can choose between the authority of the ECJ, the CFI, the European Court of Human Rights, the Supreme Court or the Constitutional Tribunal as well as between EC, international, national laws or Constitutions, when determining the legal basis of his or her decision. Once a continental judge uses the opportunity offered by such a variety of legal authorities, it is likely he will no longer be willing to follow the tradition of legal positivism and of the priority of a textual interpretation.

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[1] C-8/08 *T-Mobile Netherlands and others* (available at http://curia.europa.eu), para. 50: "In applying Article 81 EC, any interpretation that is provided by the Court is therefore binding on all the national courts and tribunals of the Member States".

[2] C-453/99 *Courage and Crehan* [2001] ECR I-6297.

Andriychuk states that pursuant to *deontological* antitrust theories competition is "a distinctive feature of liberal democracy that should be protected irrespective of the outcomes which it brings to society" since "competition constitutes the essence of a liberal society". It follows that "competition deserves protection as a matter of principle and public choice, even in cases where it does not necessarily bring the best economic results". After all, from an etymological point of view, and therefore following a textual interpretation, "*competition* is a notion which encompasses a process, more than a result". He then writes that "If competition law was to be perceived through the perspective of efficiency, that would mean that competition does not have an intrinsic value in and of itself but is seen only as a means of increasing consumer welfare". This is the core thesis of Andriychuk's response to my review and I would like to focus my comments on this statement.

First of all, competition in general is not a feature peculiar to or present in a liberal democracy only, even though it is indeed of special importance to this type of government.

Second, while it is true that the meaning of "competition" in common language is "rivalry", it is nevertheless questionable to assume that competition law protects only competition, and hence the "process of rivalry" or the "competitive environment". Legal norms are always used to achieve a certain result. Why should competition law be any different? If the EC's concept of effective competition is considered, competition (and hence competition law) is viewed from a utilitarian perspective because "effective competition" means "as much competition as needed to achieve the goals of the Treaty"[3]. In this case, what if the legislator decides to focus on the results rather than the process?

Third, should competition law protect the very existence of competition seen as a process of rivalry, then any restriction of rivalry would amount to a restriction of competition. Andriychuk's argument is appealing because of its simplicity, the legal certainty it offers and the fact that it facilitates the application of antitrust rules. However, it once again results in a substantial shift in antitrust analysis. If Article 81 is taken as an example (seeing as it is quite easy to establish whether certain behavior restricts competition by proving that collusion restricts rivalry on the relevant market), the key element of its application shifts from Article 81(1) to Article 81(3) EC. Considering that according to Andriychuk "from the structural perspective, the conditions

[3] See also direct references to consumer interests in 85/76 *Hoffmann La Roche & Co. v Commision of the European Communities* [1979] ECR 461 – "[A]rticle 86 therefore covers not only abuse which may directly prejudice consumers but also abuse which indirectly prejudices them by impairing the effective competitive structure as envisaged by Article 3(f) of the Treaty" (para. 125).

contained in Article 81(3) EC are not competition law *sensu stricto*. Rather, they constitute transitory guidelines on how to balance competition with innovation, economic efficiency and consumer welfare. They are a bridge between different policies, an algorithm for fine-tuning and balancing different interests and priorities within the EC; a compromise between competition and other legitimate goals, but not a competition policy as such", this shift means that certain anti-competitive agreements are not prohibited because they actually, or usually (group exemptions), promote certain non-competition related values. If so, then Article 81(3) has nothing to do with competition law.

This approach was criticized as early as the mid 1960s[4] and I do not think that it is acceptable today from a practical point of view. Following a strict application of Article 81(1), Article 81(3) can be treated as a set of statutory guidelines about what positive effects of a restriction of rivalry are relevant in order to avoid the application of the basic prohibition. This part of my comment on Andriychuk's thesis shows once again the deficiencies of the structure of Article 81: pursuant to Article 81(1), agreements restricting competition are prohibited, as incompatible with the common market but they escape this prohibition, and its legal consequences, if the conditions of Article 81(3) are met. However, as Andriychuk correctly observes, they remain anti-competitive from an ontological perspective since the restriction of competition forms a necessary condition for the application of Article 81(1). This structure was demolished by Regulation 1/2003 Article 1, leaving aside all the doubts concerning the legality of such an amendment of the Treaty, from 1 May 2004, agreements that fall within the scope of Article 81(1) but meet the conditions of Article 81(3) are not prohibited.

Last but not least, if competition law was to care only about competition itself, it would not be able to deal with various instances of exploitative abuses because it would only cover practices directed against competitors (actual or potential). Exploitative practices form an important part of Polish jurisprudence. As Andriychuk correctly points out, there may be instances when competition should be protected irrespective of the short term benefit to consumers. However, this should only be the case when it is necessary to avoid future or long term harm to consumer interests. Such negative effects can result from a behavior that, while beneficial to consumers at the time of its legal assessment, harms competitors or other market players that do not compete with parties to the agreement or the dominant undertaking. This approach is present in a series of Polish transport cases relating to very low (sometimes even predatory) prices introduced on selected routes by dominant

[4] Starting with Judge R. Joliet's dissertation *The rule of reason in antitrust law*, Hague 1967.

incumbent coach operators when faced with competition from new entrants. This body of case-law shows that consumer detriment can go hand to hand with ordoliberal competition protection.

Andriychuk writes that the current evaluation of restrictive agreements is based on the assumption that an agreement can be either pro- or anti-competitive. He claims however that in reality the same agreement can be simultaneously anti-competitive, pro-competitive as well as beneficial to consumers. If we stick to the definition of competition as a process of rivalry then an anti-competitive agreement (because it restricts rivalry between the parties) can be pro-competitive in the sense that it increases rivalry on the market. If it is, then I believe that such an agreement is beneficial to consumers because they benefit from increased competition on the market. Such understanding of consumer benefit (in order to avoid the sometimes misleading term of "consumer welfare") can easily be fitted into the requirements of Article 81(3) by, for instance, emphasizing the enlarged scope of the products on the market.

Although I have some reservations about Andriychuk's theory, I admit that his stimulating views find support in numerous rulings of the European courts, including a very recent one. In *Syfait II*[5], the analysis of the competitive impact of refusal to supply was almost non-existent, that this cases falls short of a form based approach or a *per se* prohibition of refusal to supply an existing customer engaged in parallel trade. In para. 34, the ECJ declares that refusal to supply "[c]onstitutes abuse of that dominant position under Article 82 EC where, without any objective justification, that conduct is liable to eliminate a trading party as a competitor". In para. 35, the ECJ tries to provide more details concerning the issue of when "a trading party" may be eliminated as a competitor if it acts as a distributor of the products of the supplier. In para. 37, the ECJ states that "[a] practice by which an undertaking in a dominant position aims to restrict parallel trade in the products that it puts on the market constitutes abuse of that dominant position". At this point, the core of the analysis shifts to the issue of objective justification, to which most of the ruling is devoted (para. 40-76). Similarly, in the C-209/07 *BIDS*[6] case, when explaining the notion of agreements that restrict competition by their "object", the ECJ states that this category covers arrangements meant to enable competitors to "[i]mplement a common policy which has as its object the encouragement of some of them to withdraw from the market and the reduction, as a consequence, of the overcapacity which affects their profitability by preventing them from achieving economies of scale", because

[5] C-468/06 to 478/06 *Sot. Lélos kai Sia EE* [2008] ECR I-7139.

[6] C-209/07 *Beef Industry Development Society and Barry Brothers*, available at http://curia.europa.eu.

such arrangements go against the basic concept whereby "[e]ach economic operator must determine independently the policy which it intends to adopt on the common market" (para. 34).

It is also not difficult to apply Andriychuk's theory to the market integration goal of EC competition law. It can easily be argued that a restriction on one's ability to buy or sell in another Member State limits competition because it restricts the rivalry between undertakings from other Member States. Such an approach is evident in *Syfait II*, where the EJC explains in para. 35 that refusal to meet the orders of an existing customer, who is a wholesaler exporting to other Member States, restricts competition. This is so, when it impedes the activities of such a wholesaler in the Member State of establishment and placing the order, or if it leads to the elimination of effective competition from this wholesaler in the distribution of the contested products on the markets of other Member States.

Andriychuk's response, my review and this commentary show clearly that there is still much to debate about the goals of antitrust law.