HANSBERRY TOMKIEL

Quantification of harm in competition cases

Beijing, 16.03.2016

Małgorzata Krasnodębska-Tomkiel
malgorzata@hansberrytomkiel.com

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> INTRODUCTION

EU Competition Law: no need to prove effects or harm in Article 101(1) "restriction by object" cases

- Article 101(1) of the Treaty on the Functioning of the European Union (the Treaty) prohibits agreements between undertakings which may affect trade between Member States **and which have as their object or effect** the prevention, restriction or distortion of competition within the internal market.

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> INTRODUCTION

EU Competition Law: no need to prove effects or harm in Article 101(1) “restriction by object” cases

- **The distinction between "restrictions by object" and "restrictions by effect" arises from the fact that certain forms of collusion between undertakings reveal such a sufficient degree of harm to competition that there is no need to examine their actual or potential effects**.

  Such **types of coordination** between undertakings can be regarded, **by their** very **nature**, as being **harmful to** the proper functioning of normal **competition**. These are restrictions which in the light of the objectives pursued by the Union competition rules are so **likely to have negative effects on competition**, in particular on the price, quantity or quality of goods or services, that it is unnecessary to demonstrate any actual or likely anti-competitive effects (harm) on the market.

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> INTRODUCTION

EU Competition Law: no need to prove effects or harm in Article 101(1) "restriction by object" cases

- The three classical **"by object"** restrictions in agreements between competitors are **price fixing, output limitation and market sharing** (sharing of geographical or product markets or customers).
- The identification of a restriction by object therefore means that the Commission or any National Competition Authority does not have to conduct a fully-fledged analysis of the competitive impact (harm) of an agreement.

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> INTRODUCTION

Restrictions of competition by effect

- Violations by Effect
- If an agreement does not have the object of harming competition, it can still violate Article 101 if it has the effect of harming competition.
- To determine effects on competition, a Member State Competition Authority looks at the factual circumstances surrounding the action, which includes not only the legal and economic context of the actions but also an economic analysis of what happened to the market once the action occurred.

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> INTRODUCTION

Why abuse of dominance is considered dangerous to the market?

Abuse of dominance conduct is considered to be bad both because it is presumptively economically inefficient and because it is unfair. Thus, such conduct is economically inefficient because:

- it would be unprofitable but for its tendency to reduce the attractiveness of the offers of the competitors of the dominant company; and
- its tendency to reduce the attractiveness of rivals' competing offers will generally **reduce** economic efficiency **at the same time as it yields** profits for the dominant company.

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> INTRODUCTION

Article 102: a restriction of competition by object and often, also by effect

Under the EU case law on Article 102 TFEU, once intent is equated with object, this means that in the presence of intent (which is sufficiently established by subjective intent in the case law) the absence of proof of effects can be disregarded in a Competition Authority's finding of abuse because the case law does not require proof of effects to establish abuse. Thus, abuse can be established on the basis of intent (which can be established on the basis of internal documents) without having to demonstrate actual or likely effects.

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> INTRODUCTION

Counterfactuals

In order to make a counterfactual analysis, a Competition Authority can use a variety of techniques:

- Demonstrate the anticompetitive effects of a practice by comparing prices that are charged on the relevant market with prices on a comparable product/geographic market that is not affected by the challenged practice.
- Simulate counterfactual market outcomes on the basis of economic models. Models range from monopoly to perfect competition with intermediate models.
- Use a cost-based method, which estimates the level of prices that would have been charged (or offered) absent the infringement by calculating the investigated firm's production costs per unit and adding a mark-up representing a "reasonable" profit in the non-infringement scenario

HANSBERRY TOMKIEL

Quantification of harm in competition cases

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> POLAND

Poland is among those jurisdictions in which the **competition law does not require quantification of harm** caused by competition law infringements in the course of antitrust proceedings.

During its investigations, the Polish Competition Authority generally does not carry out an analysis of the quantification of the harm caused by a violation of the competition law.

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> POLAND

There are a number of reasons for the absence of proof of harm in the Polish Authority's investigations:

- Certain forms of infringements (including cartels, illegal vertical conduct, abuses of dominance) are "restrictions by object violations" similar to EU law.
- In restriction by object cases, the Polish Competition Authority is not required by law to carry out an (in depth) examination of the effects of (or the harm caused by) the conduct in order to conclude that a violation occurred and to impose a fine.
- Assessing or proving harm is not a statutory prerequisite for the declaration of illegality or imposition of fines in object cases. There is no direct link between actual harm and the level of a fine.

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> POLAND

- Measuring harm in practice is difficult even in straightforward cartel cases because of data requirements and the need to construct a convincing “but for” counterfactual scenario (i.e. what would have happened in the market if the cartel had never existed).
- Fines might lose their very important purpose of serving to deter illegal conduct if, for instance, the lack of success of a cartel, or its “low level of harm” could be a reason to reduce a fine.

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> POLAND

However, there are examples of cases in which such analyses were conducted. This usually applies if the quantification of harm can be made in a reliable manner and if it could enhance the reasons for the Competition Authority's decision in later court proceedings.

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> POLAND

Collusion concerning mining products (2013)

- Three companies - **Minova Ekochem, A. Weber and Schaum-Chemie Mikołów – colluded on a tender, fixed prices and shared the market.** The prohibited agreement concerned tenders held by mines and mining companies for the supply of polyurethane adhesives as well as phenol and urea foams. These products are used for preventing fire and methane hazards underground and are sold mainly by way of tenders held by mines and coal companies.
- The companies were colluding from at least 2005 until 2011. **Since then, the prices offered by undertakings have decreased by about 50%.**
- All leading adhesives and foam producers, who in most tenders were the only bidders, became involved in the collusion. This means that **for 5 years** or more, mines and coal companies **were forced to pay approx. double prices for products under the agreement.** This affected their costs of operations, and indirectly, the price of coal they traded.

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> POLAND

Collusion concerning mining products (2013)

- Comparative analysis of prices and costs over time was made by economists for the purpose of the case. It was illustrated with diagrams reflecting those tendencies.
- In all groups of products could be observed the same phenomenon: prices much higher than the costs of production to 2010 inclusive and the significant drop in prices resulting in close to production costs. What significant, drop in prices is not in any way related to the decrease of production costs. For all product groups **collapse in prices** took place **in the year** in which these **costs have increased.**
- This fall further aggravated in the following year and it concerned all products.

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> POLAND

Similar type of comparative analyses occurs regularly in cases of certain types, e.g. bid rigging, abuse of dominance on the water and sewage services market.

In such cases the injury calculations is relatively easy and reliable, and can also enhance decision support on appeal.

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> POLAND

Notably, even in a decision in which the justifications have been estimating the damage, usually we have to deal with alleged violations of per se type. This approach reduces the risk of revocation of the decision because of insufficient evidence of the effects of the infringement (quantification of harm).

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> POLAND

The occurrence of market impact (harm and its quantification) in the event of a breach of competition law may have an impact on the punishment, as one of the circumstances affecting its calculation (mitigating or aggravating). But due to the need for fines to serve as a deterrent, the quantity effect does not lead to a reduction of fines.

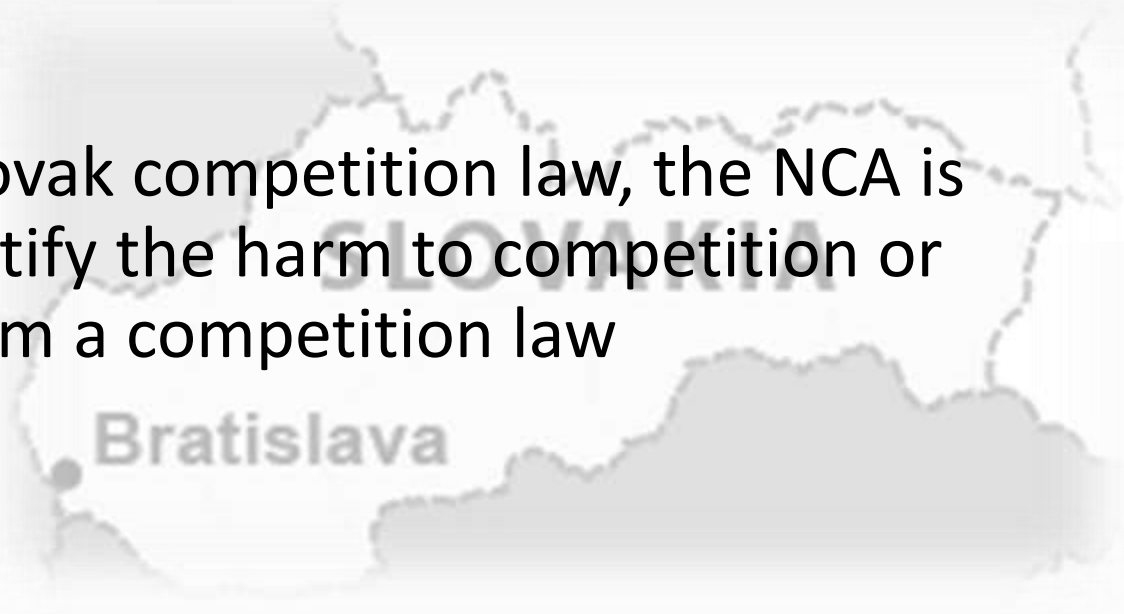
HANSBERRY TOMKIEL

Quantification of harm in competition cases

HANSBERRY TOMKIEL

Quantification of harm in competition cases
>> SLOVAKIA

According to the Slovak competition law, the NCA is not obliged to quantify the harm to competition or damages arising from a competition law infringement.



HANSBERRY TOMKIEL

Quantification of harm in competition cases >> SLOVAKIA

In few cases recently they tried to calculate these damages to facilitate claims of the victim of anticompetitive behaviour for compensation.

The starting point of calculation is the theory of harm and calculations are based on an average overcharge caused by the infringement to direct customers.

Lately, the court required this calculation when considering appeals against the decision, although it is not required by law (e.g. Slovnaft decision of 2007 was annulled, one reasons was lack of harm quantification).

HANSBERRY TOMKIEL

Quantification of harm in competition cases

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> HUNGARY

Quantification of harm to competition in public and private enforcement of national antitrust legislation does not play a special role in the enforcement of competition law in Hungary.

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> HUNGARY

Rebuttable presumption:

- In the course of civil proceedings for any claim conducted against a party to a restrictive agreement between competitors aimed at directly or indirectly fixing selling prices, sharing markets or setting production or sales quotas when proving the extent of the influence that the infringement exercised on the price applied by the infringer, it shall be presumed, unless the opposite is proved, that the infringement influenced the price to an extent of 10 percent.

- No case law on basis of this presumption to date.

HANSBERRY TOMKIEL

Quantification of harm in competition cases

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> GERMANY

The quantification of harm plays a significant role in the practice of the German competition authority and the courts in determining the levels of fines.

HANSBERRY TOMKIEL

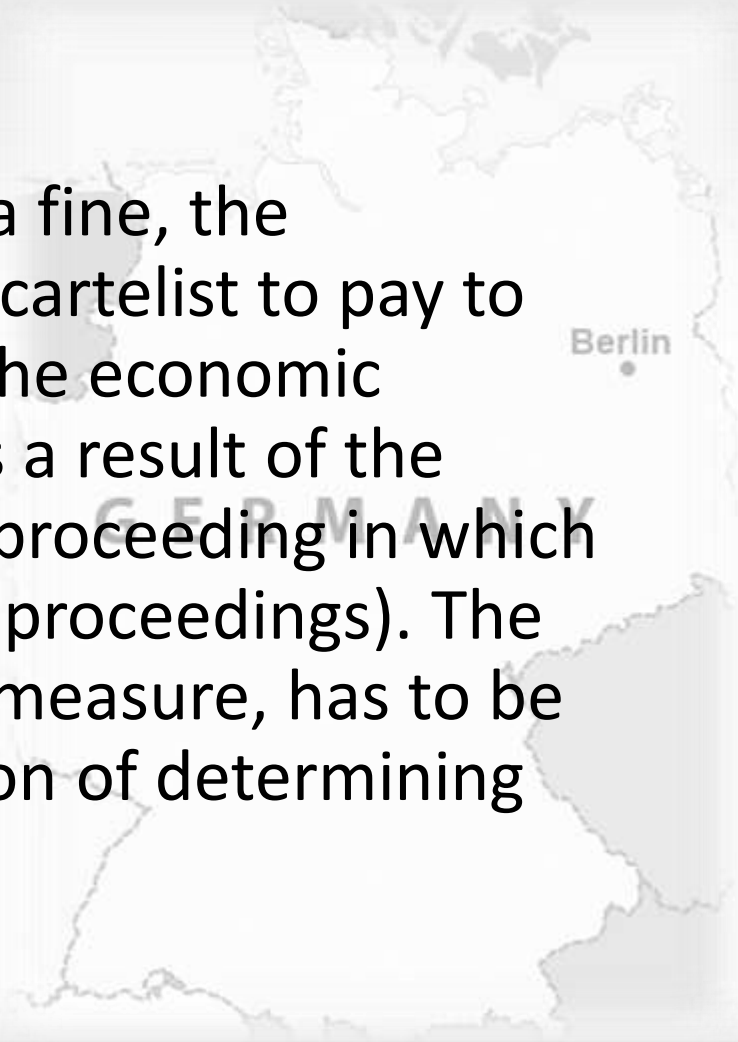
Quantification of harm in competition cases
>> GERMANY

According to German law the **fines imposed must not exceed 10 percent of the worldwide turnover** of the fined company in the previous business year.

The **calculation of fines** must be determined by the **duration** and **severity** of the **infringement.** A major **indication of the severity** is **the volume of trade that has been affected by the infringement**. The overall harm to competition may be estimated and used as one criterion in the fine setting but it is not a priority in and of itself.

HANSBERRY TOMKIEL

Quantification of harm in competition cases
>> GERMANY



In addition to the imposition of a fine, the Bundeskartellamt may require a cartelist to pay to the Authority the equivalent of the economic benefits the cartelist obtained as a result of the cartel (alternatively in the same proceeding in which fines are imposed or in separate proceedings). The setting of the **fine**, as a punitive measure, has to be seen **separately** from the question of determining **specific economic benefits**.

HANSBERRY TOMKIEL

Quantification of harm in competition cases >> GERMANY

The most popular method of quantification is **comparative markets approach**. The comparative market may differ from the market under review in terms of time, region or product. This approach needs to address the challenge of adequately limiting the market used for comparison.

HANSBERRY TOMKIEL

Quantification of harm in competition cases
>> GERMANY

It is a real challenge for the Authority to establish practically relevant results of “harm caused” within a limited time. Thus, a trade-off between accuracy and feasibility may be unavoidable (for instance, because of limited time and resources, requirements of procedural standards of proof).

The **Federal Court of Justice** also stated that the **comparative market approach**, i.e. comparing cartelised prices to prices in other, unaffected markets (in terms of region or time), has to be the **preferred method** to quantify additional earnings. A different approach should only be used if an estimate based on a comparison with competitive markets is not feasible.

HANSBERRY TOMKIEL

THANK YOU

Małgorzata Krasnodębska-Tomkiel
malgorzata@hansberrytomkiel.com