

INTENSITY OF JUDICIAL REVIEW AND  
COMPETITION AUTHORITY  
INSTITUTIONAL STRUCTURE. FINDINGS  
FROM CENTRAL EUROPE

Maciej Bernatt  
University of Warsaw

# INTRO

- Importance of the topic:
  - role of administrative authorities in contemporary democracies so they respond efficiently to economic and social challenges
  - role of courts in controlling expert administration while not undermining it

# INTRO

- Research questions:
  - 1) what is the intensity of judicial review in PL, SK, CZ and HU competition authorities' decisions?
  - 2) is there a place for judicial deference to these NCAs expert determinations? → a study of conditions that have to be met before one agrees for deference

U.S. and EU + ECHR as a point of reference

# WHAT WAS COVERED IN RESEARCH?

- Law in books governing judicial review and the powers of courts in Poland, Czech Republic, Slovakia, Hungary
- Practice of judicial review
- Presence of the judicial deference variables

Research funded by Poland's National Science Centre (decision 2014/15/D/HS5/01562);

Information about Czech Republic, Slovakia and Hungary collected by co-investigators: Ondrej Blazo (SK, CZ), Borbala Domotorfy, Stella Simon (HU).

# UNDERSTANDING JUDICIAL DEFERENCE

Judicial deference relates to the intensity of judicial review; it is not about areas that are beyond judicial review but rather about respect to the choice made by expert administration (out of permissible ones) after effective judicial review is provided.

Independence of judiciary

# AREAS

The relevance of judicial deference in competition law in particular in the areas of:

- complex economic assessment (the choice of theory of harm, the choice of conclusion from economic assessment);
- fining (the choice of amount of fine)

# VARIABLES

Its permissibility relates to several variables such as

- due process guarantees during administrative proceedings,
- impartiality of administrative decision-makers, and
- expertise of the authority

# LAW IN BOOKS – COMPETENCES OF COURTS

- **Poland** – civil, Competition Court at 1<sup>st</sup> instance, *de novo* review, full competences (also to change the NCA decision on merits); Court of Appeal in Warsaw as 2nd instance + the Supreme Court (3rd tier);
- **Czech Republic** – general court at first instance (administrative panel) – Regional Court in Brno; the Supreme Administrative Court as a second-instance court; legality review but courts can complement fact-finding of the administrative authority

# LAW IN BOOKS – COMPETENCES OF COURTS

- **Slovakia** – general court at 1<sup>st</sup> instance, administrative division (Regional Court in Bratislava) and the Supreme Court) at 2<sup>nd</sup> instance; legality review (limited review of facts); full review of fines but restraint for example to the amount of fine (considered to be the part of administrative discretion)
- **Hungary** - administrative court as 1<sup>st</sup> instance (Metropolitan Administrative and Labour Court in Budapest), de novo review, full competences (also to change the competition authority decision); the Metropolitan Court (court of appeal) as 2<sup>nd</sup> instance and the Curia (Supreme Court) as a third tier

# PRACTICE OF JUDICIAL REVIEW - POLAND

Examples of superficial review by the 1<sup>st</sup> instance  
Competition Court and lack of court's own assessment and reasoning (criticism of the Court of Appeal in Warsaw and the Supreme Court), focus on the reduction of fines; active and competent Supreme Court

Lengthiness as a systemic problem?

# PRACTICE OF JUDICIAL REVIEW - POLAND

- No judicial deference in practice (Supreme Court level) – Emitel, Telekomunikacja Polska, Marquard Media, Autostrada Małopolska cases;
- Supreme Court judgements do not suggest there is a place for judicial respect to the UOKiK market definition;
- however, the UOKiK expertness (true market studies revealed in the justification of the UOKiK decisions) and active role during contradictory judicial proceedings may be of relevance in the future (Emitel); novel cases may be reviewed more thoroughly (Marquard Media)

# PRACTICE OF JUDICIAL REVIEW - CZECH REPUBLIC

- specialised judge, David Raus, antitrust expert involved in antitrust cases in the Regional Court in Brno;
- in practice intense review on merits with little deference; also Supreme Administrative Court is active in the assessment of evidence;
- the review may often lead to the annulment of the decisions
- no tendency to lower fines significantly

# PRACTICE OF JUDICIAL REVIEW - SLOVAKIA

- lack of judges special knowledge;
- the courts extensively repeat positions of the parties, content of previous decisions, text of law and well-known case law (EU and Czech);
- The NCA's margin of appreciation in the determination of relevant market (judgment of the Supreme Court 28. February 2005, case No 2 Sž 14/2014)
- Still, many decisions are repealed by the courts on formal grounds such as impossibility to impose fine for infringement based on general clause definition or unclear operative part of the decision

# PRACTICE OF JUDICIAL REVIEW - HUNGARY

- courts review not only legal questions but also fact-finding of the competition authority; the review is on merits; recent case (*Railway Constructors*) shows that the review may become more stringent
- courts ready to lower fines imposed by NCA
- deferential approach when it comes to economic findings has been possible; is it still??

# SUMMARY (1)

The level of specialization of judges in competition law affects the intensity of judicial review more than the model of judicial review or level of the adjudicating court (PL, SK, Cz)

Problems with review on merits → formal, superficial review, focus on fines, lengthiness of proceedings (PL, SK); important difference with EU/US

## SUMMARY (2)

Judicial deference as a concept not fully embraced but signalled as possible also in *de novo* review systems (i.e. PL, HU in the past) → quality of reasoning of NCA (the proof of its expertise) of primary importance (PL, Cz)

BUT lack of elaboration of standards of reviews (for example different for ordinary facts and complex economic assessment) – main difference with EU or US model

ECHR standards understood more stringently by national courts than the ECtHR itself (Hu)

# VARIABLES OF JUDICIAL DEFERENCE

- Can we have a deferential system of judicial review?
  - 1) due process guarantees during administrative proceedings
  - 2) impartiality of administrative decision-makers (the division of prosecutorial and investigative functions from decision-making ones)
  - 3) expertise of competition authority

# JUDICIAL DEFERENCE VARIABLES — NCA EXPERTISE

- NCAs expertise may be insufficient for institutional and budgetary reasons
- the model of drafting the decisions (case-handlers rather than case teams)
- the NCAs economic experts happen to play an advisory, external roles since they do not work hand-in-hand with case-handlers (lawyers)

# JUDICIAL DEFERENCE VARIABLES — NCA EXPERTISE

- the model of appointment of the NCAs presidents is clearly politically-driven → people without any prior antitrust experience elected (in particular Cz and SK).
- lack of the NCA President independence and/or personal fluctuations may potentially adversely affect the decision-making (Poland, Hungary?)

# INSTITUTIONAL DESIGN AND DUE PROCESS RIGHTS

- lack of internal walls in PL, SK and Cz – the same case handlers investigate and draft the decisions
- in Hu the NCA decisions are delivered by the autonomous body - the Competition Council; case-handlers open proceedings and investigate, the Competition Council decides (BUT it also issues statement of objections)
- several challenges with due process rights (LPP, PASI) but generally improvements can be observed (S.O.)

# CONCLUSIONS (1)

- Weaknesses concerning review on merits (Poland, Slovakia); lengthiness of judicial proceedings
- Judicial deference is a possible option in the light of case-law even in de-novo systems

but improvements regarding NCAs expertise and impartiality necessary

## CONCLUSIONS (2)

- these improvements should be encouraged – they fit well into administrative (and not judicial) model of enforcement and inter-institutional balance

# FURTHER READING

*Transatlantic Perspective on Judicial Deference in Administrative Law*, Columbia Journal of European Law, 22(2), 2016

<http://ssrn.com/abstract=2648232>;

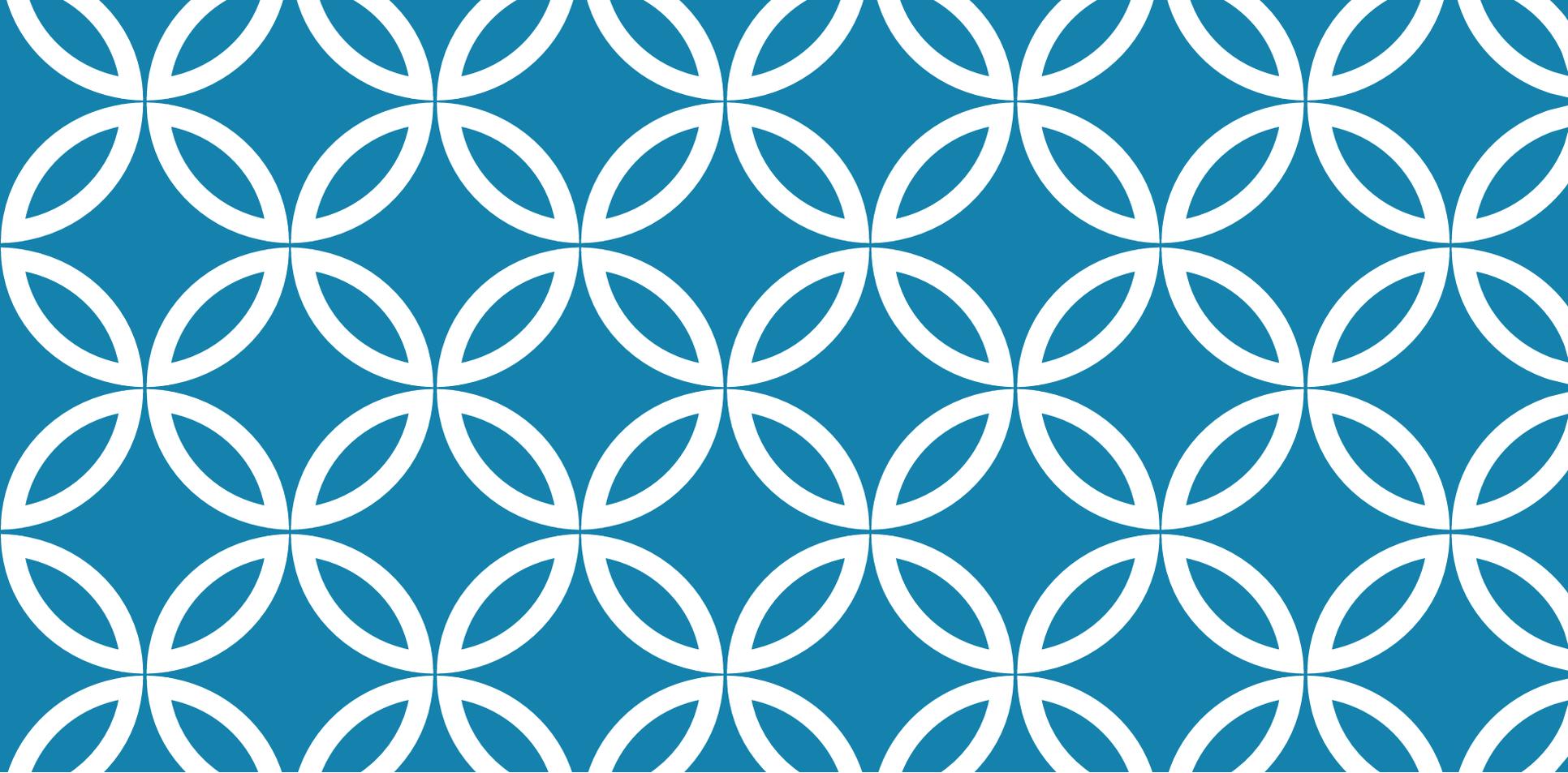
*Effectiveness of Judicial Review in the Polish Competition Law System and the Place for Judicial Deference*, Yearbook of Antitrust and Regulatory Studies, 9(14), 2016,

<https://ssrn.com/abstract=2896823>;

*McWane and Judicial Review of Federal Trade Commission decisions - Any Inspirations for EU Competition Law?* European Competition Law Review, 6/2017, <https://ssrn.com/abstract=3006294>

*Between Menarini and Delta Pekarny [in:] The procedural aspects of the application of competition law: European frameworks – Central European perspectives*, C.I. Nagy, ed., Europa Law Publishing, 2016, 4-19;

M. Bernatt, M. Botta, A. Svetlicinii, *The Right of Defense in the Decentralized System of EU Competition Law Enforcement. A Call for Harmonization from Central and Eastern Europe* 41(3) World Competition, 2018, <https://ssrn.com/abstract=3207709>



**MACIEJ BERNATT**

CENTRE FOR ANTITRUST AND REGULATORY STUDIES  
UNIVERSITY OF WARSAW

[M.BERNATT@WZ.UW.EDU.PL](mailto:M.BERNATT@WZ.UW.EDU.PL)

Thank you for  
your attention