

Our Mission – from the Editor-in-Chief

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Time for Changes in Polish Competition Law

Articles

Aleksander Stawicki, Restrictions by “object” and restrictions by “effect” under Polish competition law: in search of delineation

Abstract: The article’s purpose is to define the terms “object” and “effect” of competition restricting agreements. It also aims to answer the question whether it is always sufficient for competition authorities to prove either the anticompetitive object or the anticompetitive effect of an agreement. It is suggested therein that focusing solely on the anticompetitive object of an agreement is only appropriate in cases of the so-called hard-core restrictions of competition. It is also argued that competition authorities must prove in all other cases the actual or potential anticompetitive effect on the agreement under consideration.

Key words: anticompetitive agreements; object of agreement; effect of agreement.

Antoni Bolecki, Restrictions of competition by object or by effect in recent Polish case law

Abstract: The article analyses recent decisions of the Polish competition authority which concern prohibitions on the grounds of an anticompetitive object or effect on an agreement. Three areas are taken into account in this context: (a) the authority’s understanding and use of the concept of “effect of anticompetitive agreement”; (b) the extent to which the authority considers the overall economic environment of the scrutinised agreements and; (c) the use by the authority of methods rationalising the prohibition of competition restricting agreements (i.e. ancillary restraints and objective justifications of a competition restriction).

The following conclusions are drawn from this analysis: (a) the Polish competition authority endeavours to prove the occurrence of anticompetitive effects even though this is not formally required if an anticompetitive object is sufficiently proven. *The authority tends to apply a simplified view of anticompetitive effects – it sees them more as a spot deformation of a narrow section of business activities rather than an actual restriction of competition mechanisms;* (b) *the authority takes into account the overall economic context of the scrutinised agreements only in some cases – it most often follows a formalistic approach;* (c) *there is no evidence of the authority trying to find new methods of rationalising its assessment by considering, for example, ancillary restraints or an objective justification of competition restrictions.*

Key words: competition restricting agreements – object of agreements – effect of agreements – formalistic approach – economic approach – ancillary restraints – objective justification.

Agata Jurkowska-Gomułka, Effects-oriented application of the prohibition of competition restricting agreements? Some comments on the decisions issued by the Polish competition authority on the basis of the Competition Act of 2007

Abstract: The article analyzes the method of assessing restrictive agreements from the perspective of an effects-based approach. The article discusses a number of signs of the use of this approach to agreements assessed on the basis of the Competition and Consumer Protection Act of 2007 including: 1) accepting consumer welfare as the basic prerequisite of an antitrust intervention; 2) considering the context in which an agreement was concluded and/or functioning as the ultimate determinant of an antitrust assessment; 3) references made (direct or indirect) to economically-based antitrust doctrines, such as that of a single economic unit or of ancillary restraints; 4) remitting antitrust proceedings because of the fulfillment of the conditions of legal exemption contained in Article 8(1) of the Competition Act 2007; 5) the use of commitments decisions on the basis of its Article 12.

Key words: consumer welfare; economic approach; effects-based approach; antitrust assessment; agreements; legal exception; exemptions.

Dawid Miąsik, Is a normative regulation of the IP/antitrust interface really needed?

Abstract: The article analyses Article 2 of the Polish Act on Competition and Consumer Protection 2007 as it regulates the intersection between Intellectual Property Rights (IPR) and antitrust in Poland. Discussed here is the evolution of national legislation dealing with this issue as well as the approach to it presented by different commentators. The author presents also his own interpretation of Article 2 critically evaluating its content and considering the necessity of its very existence. It is ultimately concluded that there is no need for a normative regulation of the IPR/antitrust interface in the Polish Competition Act 2007 and that it is appropriate to repeal its current Article 2.

Key words: Intellectual Property Rights; industrial property; innovations; IPR/antitrust interface.

Konrad Kohutek, Five years of the application of the prohibition of a dominant position abuse in the light of the Competition Act 2007: the evolution of the interpretation of its key concepts

Abstract: The paper presents the achievements of Polish jurisprudence concerning the prohibition of a dominant position abuse laid down in Article 9 of the Competition Act 2007. It is shown that the interpretative practice of its basic concepts has been shaped over the last five years, especially by the Supreme Court, facilitating its application to exclusionary abuse in particular. It is noted that Polish jurisprudence has developed in that time the understanding of key concepts such as the general definition of exclusionary abuse and the notion of market foreclosure. The article shows also that judicial interpretation of the main criteria used to determine that a dominant firm's conduct is exploitative – “unfairness” and “onerous character” of the imposed terms and conditions – moves towards a convergence of these two concepts. The article provides in conclusions suggestions *de lege ferenda* on possible changes to the content or design of Article 9 of the Competition Act 2007.

Key words: abuse of a dominant position; market foreclosure; exclusionary/exploitative practices/abuses; leveraging; unfair/onerous terms and conditions.

Marcin Kolasiński, Polish merger control policy – current state of play and possible changes

Abstract: The article assesses the practical implementation of a number of policy changes declared during the formulation of the Act on Competition and Consumer Protection 2007 with respect to the control of concentrations. The focus of these changes was to reduce the number of merger proceedings conducted by the Polish competition authority allowing it to focus on transitions with a significant impact on competition only. The author analyzes the legal and organizational reasons causing an actual rise in Polish merger proceedings – a trend which is in fact contrary to the intentions of the legislator. Assessed is also how the increased number of merger proceedings affects the quality of the proceedings themselves as well as the quality of the resulting decisions. The article refers also to the currently envisaged reform of Polish policy and procedure on the control of concentration as signaled by the competition authority.

Key words: Merger control policy – Reform of merger control policy – Merger control notification – Procedure of merger control proceedings

Maciej Bernatt, Need for revision of the Act on competition and consumer protection. A perspective of procedural fairness

Abstract: The purpose of this article is to analyze which of the rules contained in the currently applicable Competition Act 2007 must be amended in order to increase the level of procedural fairness during proceedings held before the Polish competition authority. The solutions proposed in the article are made in the context of the legislative works conducted at present by the competition authority which aim to improve its effectiveness in detecting infringements of competition rules. It is argued that the currently prepared amendments should be complemented by legislative efforts meant to eliminate existing shortcomings in the Competition Act 2007 as far as procedural fairness is concerned. The proposals made in the article take also into account the criminal character of proceedings concerning competition restricting practices in the sense of Article 6 of the European Convention on Human Rights.

Key words: competition law – competition proceedings – procedural fairness – rights of undertakings in competition proceedings – effective competition protection – amendment of the Competition Act 2007

Jarosław Sroczyński, Violations of collective consumer interests: commitment decisions (practical remarks and *de lege ferenda* proposals)

Abstract: The article presents the characteristic features of commitment decisions issued by the Polish competition authority in matters of practices violating collective consumer interests. The article stresses the positive effects of such decisions for undertakings as well as for the social sphere overall primarily because of the promptness and dynamics of their proceedings. Emphasized at the same time is the need to make some amendments, or additions, to existing procedural provisions or at least, to the Polish competition authority's "soft laws". The article contains several conclusions *de lege ferenda* concerning: the need to define the criteria under which commitment decisions can be issued; the need to equalize, in terms of penalization, the status of decisions declaring that a violation has ceased with that of commitment decisions and finally; the need to introduce a procedure that makes it possible to change the manner, or deadline, in which commitments must be performed imposed in commitment decisions.

Key words: consumer protection – collective consumer interests – commitment decisions.

Legislation and Case Law Reviews

Anna Piszcz, Review of changes to Polish competition law in 2010-211 (part 1)

Anna Piszcz, Review of Polish antitrust case law from 2010-2011 (part 1)

Case Comments

Do we still need national competition laws?

Case comment to the judgment of the Court of Justice of 14 February 2012 C-17/10 *Toshiba v Úřad pro ochranu hospodářské soutěže* (Katarzyna Zawisza-Bożekowska)

Let there be diversification.

Decision of the European Commission of 5 October 2011 clearing state aid for the construction of liquefied natural gas terminal in Świnoujście (Kamil Ciupak)

Book Reviews

Maciej Bernatt, *Procedural fairness in proceedings before the competition authority*. University of Warsaw Faculty of Management Press, Warsaw 2011, 373 p.

Reviewed by Prof. Dr. Janusz Borkowski

Events and Activity Reports

Some issues concerning the control of concentrations.

Conference of the Competition and Consumer Protection Scientific Circle (Warsaw, 27.03.2012).
Reported by Elzbieta Krajewska.

How to protect the market effectively – is it time for a legislative change?

Conference of the Office for Competition and Consumer Protection, Faculty of Law, Administration and Economics of the University of Wrocław (Wrocław, 28.03.2012). Reported by Elzbieta Krajewska.

Information on the activities of the Polish Competition Law Association.

Reported by Agnieszka Stefanowicz-Barańska and Magdalena Pawlak.