

Continuation of the debate on the 2013 Draft Amendment to the Competition Act

(From the Editor-in-Chief)

Amendment Debate

Aleksander Maziarz, **A few comments on the Draft Amendment to the Act on Competition and Consumer Protection**

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- I. Introduction
- II. Remedies
- III. Liability of individuals
- IV. Non-contest plea
- V. Fines
- VI. Leniency Program
- VII. Conclusions

Summary: This paper presents some of the changes proposed by the Draft Act Amending the Law on Competition and Consumer Protection of 2007. They are analyzed in comparison with analogous solutions adopted in EU law as well as in selected countries. The article also assesses the planned amendments in light of the views expressed by Polish doctrine. The summary of the article contains a synthetic evaluation of the entire Draft Amendment Act.

Keywords: changes in the Act on competition and consumer protection, remedies, penalties, leniency program.

Dominik Wolski, A few remarks on selected institutions proposed in the Draft Amendments to the Polish Competition Act**Table of content:**

- I. Introductory remarks
- II. Merger control
- III. Managers' responsibility
- IV. Voluntary submission to penalties (settlements)
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Summary: In this short article, the author mentions key legal institutions proposed in the 2013 Draft Amendment Act to the Polish Competition and Consumer Protection Act. It is the first time for all of these institutions to appear in the domestic competition law system. Key among them is the introduction of two-phase merger control proceedings and protection against abusing merger control rules where a concentration is conducted in multiple steps. Important is also the introduction of managers' responsibility for competition law breaches as well as voluntary submission to

penalties (*settlements*). Public disclosure of a possible violation of consumer law, that might cause significant loss or unfavorable consequences for a broad range of consumers, is also of note. The author aims not only to present the various doubts concerning these new institutions, in particular what obstacle might appear in legal practice, but also present those amendments, which should be evaluated positively.

Key words: competition and consumers protection act, amendments, merger control, managers' responsibility, voluntary submission to penalty, possibility of cause consumers significant damage.

Anna Piszcz, **The “manager” in the Government’s Draft Amendment Act to the Competition Act**

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- II. Definition of a “manager”
- III. Prerequisites for the liability of managers and its scope in Article 6a Competition Act
- IV. Setting fines on a manager under Article 106a Competition Act

Summary This article considers a number of legal provisions concerning “managers” that have been included in the Government’s 2013 Draft Amendment Act to the Competition and Consumers Protection of 2007. The author indicates some potential difficulties that might arise if such provisions were in fact to be introduced into the national competition law system. At the same time, the author attempts to answer questions such as how the Draft could be modified.

Key words: manager, undertaking, part of an undertaking, management liability, fines.

Piotr Semeniuk, Szymon Syp, **“Throwing out the baby with the bathwater” – about *leniency plus* in Poland**

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- III. The requirement of “another” agreement and its consequences
- IV. Various aspects of “another” agreement
 1. The time aspect
 2. The subject-based aspect
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- V. Conclusions – how to escape the standoff?

Summary: This paper aims to assess the planned changes to the Polish Competition Act of 2007 discussing in detail the introduction of a legal institution which is a *novum* for the Polish legal system – *leniency plus*. The goal of *leniency plus* is to grant an additional fine reduction to an entrepreneur that submitted an unsuccessful leniency application (which, under the current law, would not give rise to a fine reduction), but disclosed to the NCA information on another, so far unknown illegal agreement in which that company participates. The paper first discusses the institution of *leniency plus* and criticizes its economic justification, its proposed form and its role

in detecting anti-competitive agreements. The core of the paper presents various legal difficulties in determining the meaning of “another” agreement.

Key words: Polish competition law, changes to the Polish competition law, *leniency plus*, *amnesty plus*, administrative fines, another agreement.

Further voices in the Amendment Debate (Tomasz Bagdziński, Robert Gago i Przemysław Rosiak, Dariusz Aziewicz, Jarosław Sroczyński, Krystyna Kowalik-Bańczyk)

Articles

Antoni Bolecki, **Particular features of franchising in competition law**

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- VI. Non- compete clauses
- VII. Selective and exclusive distribution within the same franchise chain
- VIII. Point of sales location requirements
- IX. Conclusions

Summary: This article aims to identify those special elements of franchising, important to antitrust assessment, which differentiate it from traditional distribution. It is fair to say that some restrictions on the rights of a franchisee contained in franchise agreements will be treated with more leniency than if they were included in a standard distribution agreement. The analysis covers the following areas: a) general restrictions typical to franchising; b) RPM; c) non-compete obligations; d) combining selective and exclusive distribution; e) point-of-sale location requirements.

Keywords: franchising, vertical restraints, exclusive distribution, selective distribution, non-compete obligation, restrictions related to intellectual property rights, restrictions related to location, exchange of information in vertical relations, sale price reporting, unification of advertising campaigns, RPM.

Anna Mokrysz-Olszyńska, **Directive 2011/83/EU of 25 October 2011 on consumer rights as the next step towards the creation of uniform rules of competition on the EU market**

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- IV. Evaluation of Directive 2011/83/EU from the point of view of its impact on undertakings and consumers as well as the tasks of national legislature
- V. Conclusions

Summary: Directive 2011/83/EU on consumer rights was adopted on 25 October 2011 repealing Directive 85/577/EEC on contracts negotiated away from business premises and Directive 97/7/EC on the protection of consumers in respect of distance contracts. It also amended Directive 93/13/EEC on unfair terms in consumer contracts and Directive 1999/44/EC on the sale of consumer goods and associated guarantees. Directive 2011/83/EU is the next step in the clarification and the adjustment to current market conditions of traditional principles of freedom and sanctity of contracts. At the same time, the new Directive is the result of a compromise, which finalized several years of discussions on the replacement of minimum harmonisation by complete harmonisation in the area of consumer rights in the EU. Introducing complete harmonisation of matters covered by the repealed Directive, the Directive constitutes a breakthrough in the manner in which EU consumer law is formulated, which used to only set minimum standards of consumer protection. The new Directive sets a new direction for EU consumer law. It is now expected that the historically derived differences in national provisions applicable so far in the internal market will be gradually standardized in the area of traditional contracts also, similarly to what already took place in relation to atypical contracts (contracts negotiated away from business premises and distance contracts, including e-commerce). In particular, the paper evaluates the 2011/83/EU Directive from the perspective of its impact on undertakings and consumers as well as the tasks of national legislature.

Key words: directive on consumer rights, functioning of internal market, harmonisation, consumer protection, EU law, consumer contracts.

Maciej Fornalczyk, **Teckal doctrine – exception which becomes rule**

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- I. Introduction
- II. Notion of a market in public services
- III. Specifics of public services markets
- IV. Teckal doctrine as an instrument of public intervention
- V. Conclusions

Summary: Public services are often perceived as extraordinary goods despite the fact that they constitute a normal article of market economy and are subjected to economic mechanisms, like any other. Not unlike other entrepreneur, suppliers of public services bear costs and risks of their economic activity – they compete “on the market” or “for the market”. Free competition allows

consumers to receive a fair share of efficiencies and welfare. Yet public services are specific in that they must meet certain (defined) criteria, both qualitative and quantitative. This leads to the conclusion that public authorities play a significant role in the definition of specific relevant markets for the delivery of public services – they are responsible for setting the boundaries of such markets. Public authorities play a regulatory role with respect to the relevant markets in question. Costs of the fulfilment of the publically imposed requirements push consumer price upwards, a fact that will make such service less common (universal). Public intervention focuses on mitigating these negative budgetary results for consumers. In a massive number of cases, public intervention eliminates competition from the market due to the common use of direct awards of public contract. The use of the Teckal doctrine erodes efficient competition, which in turn leads to the limitation of consumer welfare.

Key words: competition, Teckal doctrine, assignment of public services, demand, supply, equilibrium price, relevant market, territorial self-government unit

Competition law abroad

Marta Michałek, **An outline of Swiss competition law**

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- IV. Aim and scope of the application of the Act
- V. Competition law authorities
- VI. Anti-competitive agreements
- VII. Abuse of dominant position
- VIII. Control of concentrations
- IX. Sanctions
- X. Concluding remarks

Summary: This article focuses on Swiss competition law, as outlined on the basis of the relevant legislation and case law. The paper presents selected key aspects (in relation to both substantive and procedural law) of Swiss anti-trust law regarding, *inter alia*, its scope, competition protection authorities, as well as “the three traditional pillars of competition law” (agreements restricting competition, abuse of dominance and control of concentrations). Noted in the text are some of the differences and some of the similarities between Swiss, Polish and EU competition law. The imminent revision of the Federal Act on cartels and other competition restrictions is considered in the closing remarks, as is the strengthening of the relations between Switzerland and the European Union in the field of competition law.

Key words: undertaking, hardcore agreement, prohibition per se, dominant position, control, dominance plus test, sanctions, leniency program, amendment

Antitrust law in the USA. A subjective overview of the developments of recent months (Tomasz Bagdziński)

Legislation and case law reviews

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Italy has infringed its obligation to implement EU rail transport provisions.

Judgment of the Court of 3 October 2013 in case C-369/11 *European Commission v Italian Republic* (Łukasz Gołąb)

Decision of the UOKiK President concerning a cartel on the fixing of minimal prices for the assignment of rights to access TV broadcasts in a „pay-per-view” system (Tomasz Krzyżewski)

Books reviews

Mateusz Błachucki, *Polish Competition Law – Commentary, Case Law and Texts, Office of Competition and Consumer Protection*, Warsaw 2013, 184 s. (Anna Laszczyk)

Marcin Olszak, *Bankowe normy ostrożnościowe [Banking prudential norms]*, Wydawnictwo Temida 2, Białystok 2011 (Wojciech Podlasiński)

Joanna Cygler, Maria Aluchna, Elżbieta Marciszewska, Marzanna Katarzyna Witek-Hajduk, Grzegorz Materna, *Kooperencja przedsiębiorstw w dobie globalizacji. Wyzwania strategiczne, uwarunkowania prawne [Cooperation between undertakings in the globalisation era. Strategic challenges, legal considerations]*, Oficyna a Wolters Kluwer business, Warszawa 2013 (Agata Jurkowska-Gomułka)

Events and activity reports

Report on the Workshop on „Control of Concentrations – new challenges in Europe”

(12 September 2013, Office of Competition and Consumers Protection, Warsaw) (Dariusz Aziewicz)

First time for Poland in the ICAO Council (Marta Chylińska)