

**New has arrived, newer is coming**

(from the Volume Editor)

**Articles**

Adrian Bielecki, **Competition law infringement as a basis for the exclusion from public procurement in EU directives and CJEU jurisprudence**

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- I. Introduction
- II. Directive 2004/18
  1. Exclusion from public procurement
  2. Grave professional misconduct as a basis for exclusion
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- IV. Directive 2014/24
  1. Exclusion in Directive 2014/24
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- V. Guidance for Polish lawmakers
- VI. Summary

**Summary:** Relations between competition law and public procurement are multi-dimensional – competition law infringements acting as a basis for exclusion from public procurement are one of the key issues here. A tendency is visible alongside legislative and jurisprudential developments in EU law concerning public procurement, to broaden the scope for the exclusion of antitrust infringers from public procurement. In some case, exclusion from public procurement may prove a more severe penalty for economic operators than administrative fines levied by the President of UOKiK or the European Commission. However, such exclusion raises many questions including: what is the scope of the substantial infringements which might lead to exclusion or who and when is able to decide on the matter. Keeping in mind that Directive 2014/24 regarding public procurement must be implemented by 18 April 2016, it is fair to say that this is a very important issue at the moment. Hence, it is essential to fully understand EU directives and jurisprudence regarding that matter as presented in the paper.

**Keywords:** public procurement; exclusion; competition law; bid-rigging.

Mariusz Minkiewicz, **Protection of the procuring party against tender collusions in Polish criminal, antitrust and public procurements law**

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- I. Introduction
- II. Types of tender collusions in practice
- III. The scope of the prohibition of tender collusions in particular legal branches

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  4. Rules for establishing liability
- IV. Sanctions for tender collusions
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  4. Statute of limitations
- V. Possibilities to prove tender collusions
1. Introductory remarks
  2. Standard of proof in the circumstantial process
  3. Possibilities of gaining direct evidence
- VI. Conclusions

**Summary:** The purpose of this article is to compare the scope of the application of criminal law, competition law and public procurements law in protecting the procuring party against tender collusions. The article discusses the different types of tender collusions as well as “bid rigging”, it indicates which of them may be examined under the provisions of each legal branch, and presents potential sanctions to business entities and natural persons. Addressed also are procedural aspects of the issue, in particular the type of evidence which can be used and the standard of proof in proceedings based on circumstantial evidence. The article continues on to describe the issue of potential liability for tender collusion of persons holding an executive position and assesses it in the light of the *ne bis in idem* principle.

**Keywords:** tender collusion; “bid rigging”; Article 305 of the Criminal Code; public procurements; circumstantial evidence; *ne bis in idem*; innocent until proven guilty.

## Wojciech Łyszczarz, **New rules for the assessment of domestic effects of extraterritorial mergers in German competition law**

### **Table of contents:**

- I. Introduction
- II. Concept of extraterritorial application of competition law
- III. Concentration notification criteria in German competition law
- IV. Domestic effects of concentrations and extraterritorial application of German competition law – case-law developments
- V. Failure to notify a concentration by foreign undertakings – legal consequences
- VI. Legal character of the Bundeskartellamt’s Guidelines
- VII. Cases in which domestic effects can clearly be identified
- VIII. Cases in which domestic effects can clearly be ruled out („*safe harbour*”)
- IX. Case-by-case assessment of other cases
- X. Procedural issues
- XI. Summary

**Summary:** German competition law applies also to infringements committed outside the borders of the German Federal Republic which, however, have effects on its territory. The principle of

extraterritorial application of German competition law is also applicable to concentrations. In 2014, the German competition authority (Bundeskartellamt) issued a new version of its Guidance on domestic effects in merger control. The act is meant to help merging parties in self-assessing whether their planned concentration has domestic effects in Germany and, hence, whether it should be notified to the Bundeskartellamt. Outlined in this article are the main rules on the assessment of domestic effects of concentrations on the German market (according to the new Guidance) considering, in particular, their relevance to Polish undertakings.

**Keywords:** concentration control; extraterritorial application of competition law; notification thresholds; Bundeskartellamt.

Paulina Korycińska, **Legal framework on conditional approvals of concentrations after the recent amendment – can it meet the expectations of the entrepreneurs?**

**Table of contents:**

- I. Introduction
- II. Temporal confidentiality of the deadline for the completion of conditions
- III. Review clause
- IV. Changes in the negotiating procedure for conditions
- V. Conclusions and *de lege ferenda* proposals

**Summary:** This paper presents selected amendments to Polish rules on conditional approvals of concentrations that came into force on 18 January 2015. Discussed first are provisions authorizing the President of UOKiK to postpone the disclosure of this part of the conditional clearance decision which sets out the deadline for the implementation of the conditions imposed upon the entrepreneur. Analyzed next is the NCA's ability to change the conditional clearance decision at the request of the entrepreneur after the decision has been issued. Subsequently, the procedure is presented for the negotiation of conditions to be imposed upon the notifying entrepreneurs. The last part of the paper contains an assessment of the introduced amendments and *de lege ferenda* proposals.

**Keywords:** control of concentration; conditional decision; conditions; review clause.

Tomasz Bagdziński, **Arbitration and competition law – some input into the dispute** (A polemic)

**Table of contents:**

- I. Introduction
- II. Vindication of claims from competition law infringements
- III. Use of arbitration to resolve disputes involving competition law issues
- IV. Conclusions

**Summary:** This article is a voice in the discussion whether a competition law dispute may be resolved by way of arbitration. It constitutes a polemic response to an earlier article written by Piotr Nowaczyk and Szymon Syp who argue in favour of such a solution. By contrast, the author of this paper stresses the public-law character of competition law and the resulting repercussions, especially with respect to the goals of competition law and judicial control over its enforcement. The author notes also the potential difficulties with the execution of verdicts reached in arbitration.

**Keywords:** arbitration; competition law; antitrust.

## Legislation and case law reviews

Anna Piszcz, **Damages Directive 2014/104/EU – a review of selected rules**

### Table of contents:

- I. General problems
- II. Disclosure of evidence
- III. Effect of national decisions
- IV. Limitation periods
- V. Joint and several liability
- VI. Concluding remarks

**Summary:** The article presents selected provisions of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. The paper provides an outline of provisions on the disclosure of evidence, effect of national decisions, limitation periods as well as joint and several liability. Indicated are also some of the drawbacks of the adopted solutions as well as difficulties which the national legislature may face when transposing the Directive into the Polish legal order.

**Keywords:** Damages Directive 2014/104/EU; actions for damages; infringements of the competition law provisions; disclosure of evidence; effect of national decisions; limitation; joint and several liability.

Andrzej Madala, **Review of the 2014 amendments of the Competition and Consumer Protection Act with respect to the criteria for reporting the intention to concentrate**

### Table of contents:

- I. Introductory comments
- II. New terms of calculating domestic thresholds for different concentration types
  1. Rules on the calculation of capital groups' turnover for passive participants in concentrations taking the form of the takeover of control and partial asset acquisitions
  2. Calculation of the capital groups' turnover for participants in concentrations (the same principles apply to all concentration types)
- III. Requirement to notify multistage concentrations
- IV. Applicability of the 'negligible threshold' rule to concentrations which have so far not benefited from the *de minimis* exemption (broadening the catalogue of notification exemptions)
- V. Conclusions

**Summary:** The article reviews changes introduced by the Act of 10<sup>th</sup> June 2014 on the Amendment of the Competition and Consumer Protection Act and the Civil Procedure Code in relation to merger control rules contained in the Polish Competition and Consumer Protection Act of 16<sup>th</sup> February 2007. The paper thoroughly discusses changes made to the normative criteria for the applicability of the notification duty and critically analyses the new executive regulation on the method of turnover calculation for undertakings participating in a concentration. The aim of the paper is to assess the latest solutions from the perspective of the practical application of Polish merger control rules. New procedural-law institutions remain outside the scope of this paper.

**Keywords:** Competition and Consumer Protection Act; amendment; changes in merger control rules; new executive regulations in concentration matters; requirement to notify the intention to concentrate; turnover; domestic dimension; multistage concentrations; negligible concentrations; notification requirement exemptions.

**K** Marcin Kulesza, The **personal scope of the term “managing person” in the amended Competition and Consumer Protection Act**

**Table of contents:**

- I. Introduction
- II. The definition
- III. Interpretation attempt
- IV. Conclusion

**Summary:**

**A**  
**R** The paper discusses the term “managing person”, introduced into the Polish Competition and Consumer Protection Act by its Amendment of 10 June 2014. It presents the new statutory definition and criticises its explanation provided in the justification to the draft act. The paper aims also to provide a linguistic interpretation and systemic arguments regarding the definition and other terms included therein. The paper draws conclusions as to the personal scope of the definition of “managing person”.

**Keywords:** competition restricting agreements; managing person; manager; undertaking; liability of individuals; management liability.

Tomasz Bagdziński, **Proposed changes to competition law and civil procedure – a few subjective comments**

**Table of contents:**

- I. Introduction
- II. General verification of standard agreements
- III. Financial services
- IV. Changes in procedure
- V. Conclusions

**Summary:** This article presents a subjective opinion of the author on some changes, currently championed by the Polish competition authority, to be introduced into Polish competition law as well as its civil procedure rules. Presented in the paper is the essence of these draft amendments, the views of the Author on this draft as well as shows alternative solutions to key problems defined by the NCA and addressed in the draft.

**Keywords:** competition law, consumer protection.

Michał Strzelecki, **Jurisprudence of the common courts concerning abstractive control of standard contract terms in years 2012–2015**

**Table of contents:**

- I. Introduction
- II. Jurisprudence of the common courts up to the end of 2012
  1. Resolutions of the Supreme Court in the III CZP 80/08 and III CZP 95/03 cases
  2. Jurisprudence of the common courts in 2012
  3. First judicial attempts to fight the flood of lawsuits
- III. Change of trend in the jurisprudence of common courts
- IV. Reason for development of a new judicial approach
- V. Summary

**Summary:** The article focuses on the change in the jurisprudential trend of common courts visible in cases concerning actions for the recognition of contract terms as being unfair. The author identifies a drastic increase in the number of lawsuits filed by quasi-consumer organizations as the principal cause for the above change which now results in many lawsuits concerning unfair contractual terms (listed on the register kept by the President of UOKiK) being rejected by common courts.

**Keywords:** unfair contract terms; abusive clauses; abstractive control; *res judicata*.

**The scope of extended validity of a judgment declaring a provision of standard contract terms illegal.** Commentary on the judgment of the Court of Appeals in Warsaw of 16 January 2015, VI ACa 253/14 (Małgorzata Sieradzka)

**Article 101(3) TFEU and two-sided payment systems.** Judgment of the Court of Justice of the European Union of 11 September 2014 in C-382/12 P MasterCard Inc. and others v European Commission (Beata Mäihäniemi)

**Should making the leniency programme effective become a priority?** Judgment of the Supreme Court of 24 September 2014, III SK 90/13 (Marzena Borowik)

**Can one fight against unfair competition only on an individual basis?** Judgment of the Regional Court in Warsaw of 12 July 2013, XVI GC 595/11, *Link4* (Anna Piszcz)

**Detailed analysis of conglomerate effects in the practice of the President of UOKiK.** Decision in case *Geberit/Sanitec* of 30 January 2015, No. DKK-24/2015 (Teresa Kaczyńska)

**Events and activity reports**

**Report on the 19<sup>th</sup> CARS Open PhD Seminar *Liability of parent companies and the concept of guilt of collective entities in Polish competition law.*** Warsaw, 25/03/2015 (Marta Michalek)

**Report on the Conference *Ten Years of Decentralized EU Competition Law Enforcement: Success or Failure?*** Amsterdam, 14/11/2014 (Dominik Wolski)

**Report on the Second National Conference *The consumer in the rail passenger market,*** Łódź, 18/03/2015 (Marcin Kraśniewski, Marcin Ziarkowski)

**Notifications**

**Conference on the Harmonization of Private Antitrust Enforcement: A Central and Eastern European Perspective,** Supraśl, 2-4/07/2015