

Changes, changes, changes... (from the Volume Editor)

Articles

Jarosław Fidala, **RPM agreements in the context of the book market**

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Summary: This article considers two controversial and highly significant issues – the assessment of RPM vertical pricing agreements within competition law, and the attempts of the Polish legislator to introduce a law on the so-called fixed price of books. Both issues imply answering the question whether the RPM mechanism interferes or fosters the competitiveness of the book market. The starting point for answering this question is to distinguish between “pro” and “anti” competitive RPM agreements from the perspective of the objective of competition law, the latter being connected to the welfare concept. In the context of the book market, the RPM mechanism may realize this objective insofar as it would positively influence the parameters of efficient competition on the book market. It would thus also contribute to the satisfaction and optimization of the various economic needs of different entities (authors, publishers, booksellers, consumers).

Key words: RPM agreements; anti-competitiveness; effects-based approach; fixed price of book; objective of competition law; socio-market welfare.

JEL: K21

Piotr Semeniuk, **Non-competition law based review of mergers on audiovisual, real estate and pharmaceutical markets**

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- III. Review of mergers in light of the law on acquiring real estate by foreigners
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Summary: The author lists and analyzes those provisions of the Polish Law on Radio and Television, the Law on Acquiring Real Estate by Foreigners and the Pharmaceutical Law, which grant competences to review mergers to, respectively: the President of the National Broadcasting

Council, minister responsible for internal affairs and regional (voivodships') pharmaceutical inspectors. In particular, the author focuses on the fact that the criteria for the review of such mergers' legality, as well as the objectives of merger control performed by these specialized administrative bodies, differ from those considered during competition law based merger control performed by the President of the Office of Competition and Consumer Protection. Discussed are problems related to the interpretation of legal provisions on non-competition law based merger control resulting from attempts by companies to bypass them. It is argued that entrepreneurs often try to escape such control through the creation of multilevel corporate vehicles. The author proposes such interpretation of the discussed provisions that will prevent companies from doing so and will thus be consistent with the intention of the legislator.

Key words: merger control; merger review; UOKiK; National Broadcasting Council; minister responsible for internal affairs; pharmaceutical inspection; radio-television concession; acquiring real estate by foreigners; protection of small business; protection of the Polish capital.

JEL: K23

Joanna Lenart, Teresa Kaczyńska, **When will the creation of a new company not be classified as a joint venture? Practical considerations regarding joint ventures under Polish competition law**

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Summary: The purpose of this article is to analyze the creation of a new joint venture company under Polish competition law. This analysis covers cases and situations which, in the authors' opinion, should and should not be classified as the creation of a joint venture in the decisional practice of the UOKiK President. The authors provide an overview of potential problems and discrepancies between the definitions of a joint venture under Polish and EU competition law. These differences are of crucial importance in practice. The article discusses in detail the obligation to notify an intended concentration involving the establishment of a joint venture under Polish competition law and the resulting practical difficulties for firms. These considerations give rise to a discussion on an alternative legal classification of the establishment of a new company and the need to ensure the highest level of legal certainty in the application of the relevant legal provisions regarding the establishment of a joint venture. The article concludes with *de lege ferenda* proposals regarding Polish competition law provisions on the creation of joint ventures.

Key words: joint venture; merger control.

JEL: K21

Ewa Mandrosz, **“Mystery shopper” as a new tool for obtaining evidence of practices harmful to the collective interests of consumers**

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- III. Functions (use) of the institution of a “mystery shopper”
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Summary: The article discusses the institution of a “mystery shopper” which will be introduced into the Polish Act on Competition and Consumer Protection on 17 April 2016. This institution will make it possible to conduct activities related to the purchase of goods during an inspection, with the possibility of recording these activities via audio or visual recording equipment, without informing of that fact the undertaking subject to the inspection. In the expectations of the legislature, this institution is designed to be a tool for obtaining evidence of practices harmful to the collective interests of consumers. The paper provides an assessment of this institution, especially in the context of the purposes for which it was established. Some of the drawbacks of the adopted solutions are also noted.

Key words: consumer; protection of consumer; protection of collective interests of consumers; mystery shopper; controlled purchase; collective interests of consumers.

JEL: K23

Marcin Kolasiński, **Self-regulation of advertising in Poland – opportunities and threats to competition and consumer protection**

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Summary: This paper addresses the problems of self-regulation of advertising activities in Poland. Experiences show that the pursuit of the objectives of consumer protection do not go hand in hand with ensuring the protection of the rights of entrepreneurs outside the self-regulation system. The paper presents therefore an analysis of the essence of self-regulation and those of its requirements that are necessary to recognize it as being in compliance with generally applicable legal provisions. The paper also presents arguments supporting the assessment of self-regulation activities in the light of both competition and consumer protection rules, as well as those on combating unfair competition.

Key words: self-regulation; advertising; advertising industry; industry code; Advertising Council; President of the UOKiK.

JEL: K20, K21

Anna Tworkowska-Baraniuk, **The Internet as a place of unfair competition practices – the issue of legal protection for a domain name**

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Summary: The Internet is now an indispensable part of both social and economic life around the world. As a relatively new place of entrepreneurial activity, the Internet may also be the place for various types of law infringements. The Internet experiences also an increasing number of new, specific forms of unfair competition practices. The fundamental problem facing those trying to prevent such practices, is the fact that there are no separate regulations on unfair online trading. This article aims to provide examples of practices typical for the Internet environment, which can be qualified as acts of unfair competition, as well as ways of their legal interpretation. The analysis focuses on the intersection between unfair competition rules and the new forms taken by such practices. The article's main objective is to assess whether existing legislation provides an adequate legal framework for the protection against unfair competition practices on the Internet.

Key words: domain names; the Internet; metatagging; trademarks.

JEL: K20, K21

Legislation and Case Law Review

Kinga Bryl, **Transposition of the EU Capital Requirements Directive and the EU Capital Requirements Regulation into Polish law**

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- VI. Conclusions

Summary: This paper considers the Polish Act for Macro-Prudential Oversight of the Financial System and Crisis Management in the Financial System of 5 August 2015. The above act transposes into the Polish legal system Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on Access to the Activity of Credit Institutions and the Prudential

Supervision of Credit Institutions and Investment Firms, amending Directive 2002/87/EC as well as repealing Directives 2006/48/EC and 2006/49/EC (CRDIV). The new Polish Act implements also to the necessary extent Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on Prudential Requirements for Credit Institutions and Investment Firms and amending Regulation (EU) No 648/2012 (CRR).

Key words: CRD III; CAD; CRD IV; CRR; Basel III.

JEL: K23

Magdalena Knapp, **New Polish technology transfer block exemption – which agreements meet its requirements?**

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- II. EU Technology Transfer Block Exemption Regulation (BER)
- III. Technology transfer BER in Polish law
- IV. What if the Polish Technology Transfer BER does not apply to the agreement? Potential traps to be aware of
- V. Final remarks

Summary: The aim of this paper is to analyze key changes introduced by the new Polish Technology Transfer Block Exemption Regulation (BER) of 17 April 2015. A year earlier, on 21 March 2014, the European Commission adopted its own revised Technology Transfer BER as well as accompanying Guidelines. The article briefly discusses the scope and structure of the EU BER since the new Polish legislation is modeled on EU rules. The paper identifies also which factors should be considered in particular by undertakings entering into technology transfer agreements in light of the special characteristics of these markets. The Polish BER requires a thorough analysis and so the issues discussed in this article may help interested parties to assess whether their agreements satisfy the requirements of the Polish BER.

Key words: technology transfer agreements; block exemption; license agreements.

JEL: K21

Aleksandra Kłoczko, **The principle of proportionality in calculating fines for competition law violations. Analysis of the fine calculation method in the EU, Turkey and Poland**

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- V. Legitimacy of changing the method of fine calculation on the basis of established guidelines
- VI. Conclusions

Summary: This paper analyses the compatibility with the principle of proportionality and the principle of fine individualisation of the fine calculation methodology used under Article 106 of the Polish

Competition and Consumer Protection Act. According to established CJEU jurisprudence, when calculating a fine it is possible to refer to either the company's entire turnover, which indicates the company's market power, or to the amount gained from sales of products covered by the infringement. It is apparent from CJEU jurisprudence that although Article 23(2) of Regulation No. 1/2003 leaves the Commission discretion as to setting the amount of fines, it nevertheless also limits the exercise of that discretion by establishing objective criteria to which the Commission must adhere. Hence, the amount of a competition law fine is subject to a quantifiable and absolute ceiling in the EU, with the result being that the its maximum amount can be determined in advance. The exercise of that discretion is also limited by the rules of conduct which the Commission imposed upon itself, in particular in the 2006 Guidelines. Point 13 of the 2006 Guidelines states, '[i]n determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly... relates in the relevant geographic area within the EEA'. By contrast, the UOKiK President in his/her decision-making practice calculates the fine by taking into account a company's entire turnover from the preceding financial year. This methodology often results in unreasonably high fines that are challenged and later reduced by the courts. Judges frequently state that in light of the principle of proportionality and individualization of fines, there is a need when setting individual fines to refer solely to that undertaking's revenue from the sale of the goods or services from the relevant market covered by the anticompetitive practice.

Key words: calculation method; financial fine; Poland; European Union; Turkey; turnover; proportionality; individualization of fine.

JEL: K21

Mariusz Motyka-Mojkowski, ***Private enforcement in Germany – review of recent jurisprudence***

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- XI. Summary

Summary: Alongside the United Kingdom and the Netherlands, Germany is among the EU Member States where private enforcement is becoming increasingly important in practice. This tendency shows clearly in the growing number of legal proceedings initiated by plaintiffs in either follow-on or

stand-alone cases. The goal of this paper is to present the most recent developments in German jurisprudence concerning private enforcement of competition law. Particular emphasis is paid to alternative models of collective enforcement. The paper also covers key changes introduced into the German legal system upon the implementation of Directive 2014/104.

Key words: private enforcement; passing-on; claim for damages; infringement of competition law; disclosure of evidence; effect of national decisions; collective actions; Germany.

JEL: K21

CASES

Anti-competitive provisions in commercial lease agreements of large surface shopping malls. Judgment of the Court of Justice of the European Union of 26 November 2015 in case C-345/14 *SIA Maxima Latvija v Konkurences padome* (Olga Stefanowicz)

Legal standard regarding vertical pricing restraints consisting of resale fixed (or minimal) price maintenance under the Polish Act on Competition and Consumer Protection. Judgment of the Supreme Court of 23 November 2011, III SK 21/11 (Agata Zawłocka-Turno, Bartosz Turno)

Does sending a file to a Recycle Bin constitute a breach of the duty to cooperate during an inspection conducted by the UOKiK President? Judgment of the Court of Appeals in Warsaw of 30 January 2015, VI ACa 446/14 (Radosław Niwiński)

Possibility of changing penalty payments imposed on undertakings. Judgment of the Court of Appeals in Warsaw of 18 July 2014, VI Aca 1515/13 (Justyna Piłńnik)

Books Reviews

Rajmund Molski, *Prawne i ekonomiczne aspekty polityki promowania narodowych czempionów* [*Legal and economic aspects of the policy of promoting national champions*], Wydawnictwo Naukowe Wydziału Zarządzania UW, Warszawa 2015, s. 329; review by Sławomir Dudzik

Reports

Report on the First National Conference *Changes in the Polish postal sector*, Łódź, 9.12.2015 (Marcin Kraśniewski)