

From the Editor (Maciej Bernatt)

Articles

Maciej Marek, **Exemption of the Selective Distribution from the Prohibition of Agreements Restricting Competition**

Contents:

- I. Introduction
- II. General rules of assessing selective distribution
- III. Selective distribution on the ground of block exemptions
- IV. Individual exemption of selective distribution
- V. Conclusions

Summary: The article studies the application of block exemptions and individual exemption to selective distribution systems. The author examines the conditions of applying Polish and European general block exemption and the possibility of combining selective distribution with common additional restrictions. Also, the article describes the methodology used by the European courts to individually exempt selective distribution systems and examines the relation of the prerequisites of individual exemption and the Metro doctrine.

Key words: selective distribution, block exemptions, individual exemption, Metro doctrine

JEL: K210, L420

Adrian Bielecki, **Interlocking directorates under Polish competition law**

Contents:

- I. Introduction
- II. Static and dynamic dimension of interlocking directorates
- III. Interlocking directorates in the Act on Competition and Consumer Protection dated 15.12.2000
- IV. Interlocking directorates in the Act on Competition and Consumer Protection dated 16.02.2007
 1. Acquisition of control and the concept of control
 2. Structure of interlocking directorates
 3. When to notify interlocking directorate
- V. Decisional practice of the President of UOKiK regarding interlocking directorates
 1. President of UOKiK's decisions dated 18.11.2008, case no. DKK-89/08 and case no. DKK-88/08 (Sadrob's and Exdrob's case)
 2. President of UOKiK's decision dated 22.10.2013, case no. DKK-132/2013 (Terg and Electro.pl's case)
- VI. Summary

Summary: Interlocking directorates ("IDs") refers to a practice of members of a corporate board of directors serving on the boards of more than one corporation. There is no uniform approach to IDs in different legal systems. Under Polish law, ID is an element of the definition of the acquisition of control. The subject matter of the paper is critical analysis of historical development of regulation

of IDs under Polish law, current rules governing IDs under Polish law and decisional practice of Polish Competition Authority in that respect. In the author's view, current Polish antitrust rules on IDs are flawed because they consider the mere existence of ID as a measure enabling exercise of control over undertaking. The paper provides more detailed analysis on the relationship between ID and the concept of control. It also provides ideas how to properly understand IDs under the current Polish law as well as it shows how the regulation of IDs should be reformed.

Key words: interlocking directorates, merger control, corporate group

JEL: K21

Marta de Bazelaire de Ruppierre, **Failure to state of reasons as a ground for annulment of the European Commission's decision in the light of current CJEU case-law on the control of undertakings**

Contents:

- I. Introduction
- II. The general obligation to state the reasons
- III. The obligation to state the reasons for the Commission's decision concerning the control of undertakings
 1. Introduction
 2. The decision on the inspection
 3. The decision on the request of information
 4. The decision on penalties
- IV. The annulment of the decision of the European Commission
 1. Introduction
 2. The scope of judicial review of Commission's decision on the control of undertakings
 3. Failure to state the reasons as a breach of an essential procedural requirement
 4. Legal effects of the annulment
- V. Summary

Summary: This article aims to analyse the European Commission's obligation to state the reasons for decision issued in connection with the control of an undertaking suspected of anti-competitive activities. It indicates requirements that statement of reasons has to meet in order to remain in conformity with Article 296 TFEU and the case-law, as well as depicts the criteria of assessment used by the CJEU to verify the fulfilment of those conditions. It also addresses the issue of legal effects of the judgment annulling the decision and it ponders on the effectiveness of the protection of the rights of undertakings.

Key words: obligation to state reasons, annulment procedure, fundamental rights of undertakings, inspections, penalties, the obligation to provide information.

JEL: K21

Joanna Piechucka, Marta Stryzowska, **Methods of detecting bid rigging**

Contents:

- I. Introduction
- II. Structural approach
- III. Behavioral approach
 1. Suspicious bid rigging patterns
 2. Price variance screen
 3. Relationship between costs and bids
 4. Relationship between bids
- IV. Final remarks

Summary: The present article discusses the use of tools of economic analysis to detect bid rigging by taking a two-step approach. Firstly, the structural approach to identify markets that are more susceptible to bid rigging is presented. Secondly, the behavioral approach consisting of identifying suspicious behavior in tenders is discussed. Within the latter approach, tools for the identification of suspicious bid rigging patterns, price variance analysis and other tests used to study whether bidding behavior is more consistent with collusion rather than competition are analyzed. Finally, the extent to which tools of economic analysis could be used in practice by competition authorities in detecting bid rigging behavior is commented.

Key words: bid rigging; variance screen for collusion; empirical analysis of bidding behavior

JEL: C13, D22, L41

Joanna Affre, Joanna Piechucka, Piotr Skołubowicz, Marta Stryzowska, **Impeding market access as a prerequisite of unfair competition practice of collecting slotting allowances that ought to be examined in every case**

Contents:

- I. Introduction
- II. Meaning of prerequisite of “impeding market access” in the contest of slotting allowances
 1. Article 15 in the system of combating unfair competition Act (CUCA)
 2. Meaning of the term of “market” in Article 15 Sec. 4 of CUCA
 3. Unfair impeding market access
- III. Relation between impeding market access and collecting allowances other than commercial margin for accepting goods for sale
 1. Catalogue of possible interpretations
 2. Interpretations of Article 15 Sec. 4 P. of CUCA in judicature
 3. Interpretations of Article 15 Sec. 4 P. of CUCA in doctrine
- IV. Examination of impeding market access with economic criteria
 1. Symptoms of impeding market access
 2. Causal nexus between using slotting allowances and potentially impeded market access
 3. Other factors causing impeded market access
- V. Conclusions

Summary: Article concerns ways of examination, when the unfair competition practice set forth in the article 15 sec. 1 p. 4 of Combating Unfair Competition Act takes place. Authors present

different views on meaning of “impeding market access” in this provision and support the concept that it should be considered as one of prerequisites of committing this practice. They also explain why this prerequisite should be examined in every case before the court. Further, authors describe how, with the economical approach, this examination can be executed.

Key words: combating unfair competition, impeding market access, slotting allowances, market, presumption of impeding market access, economic analysis

JEL: K41, K42, D22

Case Law Reviews

Katarzyna Górna, Małgorzata Kozak, Anna Wawruch, **Restrictions of competition in vertical agreements – is there a place to study the effects? Comments in the light of the recent case-law of the Polish courts and the CJEU**

Contents:

- I. Introduction
 1. Purpose of the article
 2. The object or the effect of an agreement restricting competition
 3. The object of the agreement
 4. Consequences of proving the object of the agreement
 5. The effect of the agreement
- II. Selected examples of judgements relating to the distinction between anti-competitive object and effect in vertical agreements:
 1. *Allianz Hungaria Biztosito*
 2. *MasterCard Inc*
 3. *Cartes Bancaires*
 4. *SIA Maxima Latvija*
 5. *Toshiba*
 6. *Sfinx*
- III. Selected examples of decisions and judgements relating to *online* sales
 1. Restrictions on sales by the distributors
 2. Resale restrictions on platforms belonging to third parties
- IV. Conclusions

Summary: The subject of this article is to examine the current judicial practice of Polish common courts and the ECJ on the agreements that restrict competition by object or by effect. The article discusses the decisions and judgements, the content of which confirms that in the absence of that agreement to be restrictive of competition by object, it is necessary to carry out an extensive analysis of the economic and legal environment of the agreement for the assessment of its possible anti-competitive effects. The analysis leads to the conclusion that in the recent case law there is still a noticeable tendency to blur the boundary between these two types of anti-competitive agreements and a tendency to adopt simplifications assuming that if there is no certainty as to the validity of the qualification of an agreement as violation “by object”, its anti-competitive effects are shown.

Key words: competition restricting agreements; object of the agreement; effect of the agreement; legal and economic context of the agreement

JEL: K21

Marta Michałek-Gervais, **Possibility to hold a company liable for the anticompetitive behaviour of an independent service provider. Case comment to the judgment of the Court of Justice of the European Union of 21 July 2016 in case C-542/14 VM Remonts SIA, Ausma grupa SIA v. Konkurences padome (and Konkurences padome v. Pārtikas kompānija SIA)**

Contents:

- I. Introductory remarks
- II. Facts of the case
- III. Opinion of the Advocate General
- IV. Judgment of the Court of Justice
- V. Comment to the judgment

Summary: The case comment relates to the judgment the Court of Justice of the European Union of 21 July 2016 in the case *VM Remonts* (C-542/14), delivered in response to a preliminary reference made by the Latvian Supreme Court. The question at stake referred to possibility to hold a company liable (in the light of Article 101 of the Treaty on the Functioning of the European Union) for the anticompetitive behaviour of a third-party service provider. The Court of Justice did not follow the Opinion of the Advocate General Wathelet who suggested introducing rebuttable presumption of the company's liability in this respect. Instead, the Court of Justice held that a company should be only liable for the breach of competition law of a third-party service provider if one of three conditions are met (the service provider was acting under its direction or control; the company knew of the anticompetitive objectives of the service provider; or the company should have reasonably foreseen the anticompetitive behaviour of the service provider). The judgment is welcome as enforcing procedural justice and the companies' right to defence.

Key words: liability for breach of Article 101, liability for the anticompetitive behaviour of a third-party, independent service provider, right to defence, procedural justice

JEL: K21

Aleksandra Kędzior, **Control of Concentration Proceedings and Access to Public Information. Case comment to the judgment of Regional Administrative Court in Warsaw of 16 December 2015, SAB/Wa 796/15**

Inspections in the proceedings before UOKiK, Judgements of the SOKiK of 20 March 2015, XVII AmA 136/11 and 8 August 2014, XVII AmA 145/11 (Dariusz Aziewicz)

Book reviews

Jan Szczodrowski, *The Control of Oligopolistic Markets in Competition Law* [in Polish: *Kontrola rynków oligopolistycznych w prawie konkurencji*], LEX a Wolters Kluwer Business, Warszawa 2015 (Konrad Kohutek)

Anna M. Nolan, *EU Merger Law. Effectiveness of the System of Referrals of the Cases Involving Control of Concentrations* [in Polish: *Unijne prawo konkurencji. Efektywność systemu odesłań spraw dotyczących koncentracji przedsiębiorstw*] C.H. Beck, Warszawa 2015 (Dariusz Aziewicz)

Reports

Seminar *The most important changes in consumer protection law in the light of the Act of 5 August 2015 amending the Competition and Consumer Protection Act* [in Polish: *Najważniejsze zmiany w sferze ochrony konsumentów w świetle ustawy z dnia 5 sierpnia 2015 r. o zmianie ustawy o ochronie konkurencji i konsumentów oraz niektórych innych ustaw*], Instytut Nauk Prawnych PAN, Warszawa, 14 April 2016 r. (Jarosław Łukawski)

Guest Lecture by Professor Michael Jacobs, “*The Durability of the Chicago School in Antitrust: What Accounts for it?*” (Anna Tworkowska-Baraniuk)