

Change has more than one name (from the Editor-in-Chief)

Articles

Anna Mokrysz-Olszyńska, **Dual quality standards for branded products in the EU – in search of solutions**

Table of contents:

- I. Introduction
- II. The European Commission's position on dual quality of branded products
- III. A system for counteracting dual quality standards on the basis of the Commission Notice
- IV. Looking for solutions – stick or carrot?

Summary: The issue of 'dual quality food' was publicized in 2015 by the Czech Republic and subsequently taken up by the Visegrad Group and the EU forum. It exemplifies the wider problem of the undesirable phenomena present on the EU market of dual standards of branded products. The European Commission has published a set of guidelines on the application of current EU food law and consumer protection law against unfair market practices (Notice of 26 September 2017) to help national authorities determine whether a company violates EU law by selling dual quality products in different Member States. The aim of this article is to look at the current proposals to solve this problem in terms of their effectiveness, and to inquire into the existence of other possible solutions that ensure greater efficiency.

Key words: double quality standards; branded products; European Union; single market; unfair commercial practices; independent comparative product testing.

JEL: K2

Małgorzata Salitra, **Prevention of the abuse of significant market power in the sale of agricultural and food products in the Czech Republic – selected issues**

Table of contents:

- I. Introduction
- II. Subjective and objective scope of the Act
- III. Amendment of the Significant Market Power Act – causes and important changes
- IV. Definition of 'significant market power'
- V. Prohibited forms of significant market power abuse
- VI. Mandatory requirements of purchase contracts
- VII. *Kaufland* case
- VIII. Conclusions

Summary: The article presents an outline of regulations concerning the abuse of significant market power in the sale of agricultural and food products in the Czech Republic. The article presents selected, most significant – in the author's opinion – changes introduced as a result of the amendment of the Significant Market Power Act in the sale of agricultural and food products and

its abuse. The publication focuses mainly on material and legal rules, in particular: the subjective and objective scope of the Act, the definition of 'significant market power', the list of practices that constitute an abuse of significant market power, and the assessment of when significant market power is abused. The article provides also comments to the decision of the Czech Office for Protection of Economic Competition in the *Kaufland* case and the court judgment issued in this case, which undoubtedly affected the current shape of the Act.

Key words: contractual advantage; agricultural and food products; unfair use of contractual advantage; unfair practices; competition; buyers; buying power; retail chains.

JEL: K29, K40, K41

Grzegorz Materna, **Draft ECN+ Directive – discussion concerning the need for another amendment of Polish competition law**

Table of contents:

- I. Introduction
- II. Effective enforcement of EU competition law by national enforcers: identified problems
- III. Measures intended to solve the identified problems in the light of the Draft Directive
 1. Fundamental rights
 2. Independence and resources
 3. Powers
 4. Fines and periodic penalty payments
 5. Leniency
 6. Mutual assistance
 7. Limitation periods
 8. General provisions
- IV. Polish competition law in the light of the Draft Directive
 1. Fundamental rights
 2. Independence and resources
 3. Powers
 4. Fines and periodic penalty payments
 5. Leniency
 6. Mutual assistance
 7. Limitation periods
 8. General provisions
- V. Final remarks

Summary: The article concerns the new EU Draft Directive (ECN+ Directive) – an initiative of the European Commission to modernize the decentralized system of EU competition law enforcement introduced by Council Regulation (EC) No 1/2003. The Draft Directive broadly interferes with the status and investigative powers of national competition authorities (NCAs). It establishes the minimum scope of the investigative and decision-making powers of NCAs, enhances convergence of many procedural aspects in this area and the power to impose sanctions. The aim of the article is to present, in a comprehensive way, the proposed act and to determine its possible impact on Polish competition law, if the Directive does come into force.

Key words: Article 101 and 102 of the Treaty; effective enforcement of the EU competition law; European Competition Network; Polish competition law.

JEL: K21, K40, K49

Michał Surdyk, **An undertaking's liability for an infringement of competition law made by its associates in European case law**

Table of contents:

- I. Introduction
- II. The *voestalpine* case
 1. Introduction
 2. Facts of the case
 3. Legal assessment of the Commission
 4. Legal assessment of the General Court
 5. Comments on the *voestalpine* case
- III. The *AC-Treuhand 2* case
 1. Introduction
 2. Facts of the case
 3. Opinion of Advocate General Wahl
 4. Legal assessment of the Court of Justice
 5. Comments on the *AC-Treuhand 2* case
- IV. The *Remonts* case
 1. Introduction
 2. Facts of the case
 3. Opinion of Advocate General Wathelet
 4. Legal assessment of the Court of Justice
 5. Comments on the *Remonts* case
- V. Concluding remarks

Summary: This article analyzes latest EU case law on the liability of undertakings for infringements of competition law committed by their associates, understood as persons providing services to those undertakings. The article highlights important implications of the views expressed in the case law. In particular, the article discusses the extending of the concept of a single economic unit and accepting of an undertaking's liability for certain third persons, which are independent from the single economic unit concept.

Key words: antitrust liability; associates; service providers; European case law.

JEL: K21

Joanna Affre, Małgorzata Kozak, Anna Wawruch, **Protection of business secrets in proceedings before the President of the Polish Competition Authority**

Table of contents:

- I. Introduction
- II. The framework of business secrets
 1. Current status

2. Planned changes related to the implementation of the Directive on the protection of trade secrets

III. The standard of protection of business secrets in proceedings before the President of UOKiK

IV. The standard of protection of business secrets in European Union law

V. Appeal procedure

VI. The procedural nature of appeals against decisions of the President of UOKiK based on the limitation of access to case files

VII. Conclusions

Summary: The article aims to discuss the applicable standards, as far as the scope of the protection of confidential information (business secrecy) is concerned, in proceedings before the Polish National Competition Authority (President of UOKiK) as well as in appeal proceedings before the Court of Competition and Consumer Protection (SOKiK). It also includes comments regarding both the application of the provisions themselves and their amendment. The analysis of current provisions covers planned changes corresponding with the implementation of Directive 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. The analysis advocates the introduction of solutions aimed at increasing judicial control over decisions issue by the President of UOKiK in cases based on a limitation of the right to inspect evidence *ex officio*, and strengthening control over compliance by the NCA. Due to the conflict between the rights of defence, the principles of open proceedings and a company's right to protect confidentiality, the authors also propose to clarify the currently applicable provisions.

Key words: business secret; directive on confidentiality; complaint against a decision; rights of defense; transparency of proceedings.

JEL: K21

Legislation and Case Law Review

Kamil Dobosz, **Public enforcement versus private enforcement – commitment decision and claim for damages. Case comment to the judgement of the Court of Justice of 23 November 2017 in case C-547/16 *Gasorba SL, Josefa Rico Gil, Antonio Ferrándiz González v Repsol Comercial de Productos Petrolíferos SA***

Summary: The article deals with the Court of Justice judgement in the *Gasorba* case. Answering the preliminary question, the ECJ authorizes therein a national court to reach a different conclusion with respect to the practice at hand than the assessment found in a European Commission commitment decision, which was solely preliminary. The ECJ states that such a decision should be treated as evidence *prima facie* by a national court. The judgement constitutes a seminal input to the discussion on the relationship between private and public enforcement. Implications stemming from it, as well as the opinion of the Advocate General delivered in the case, have been included and thoroughly analysed in the paper.

Key words: commitment decision; private enforcement of competition law; public enforcement of competition law; action for damages; *amicus curiae*.

Patrycja Szot, **May Information Provided by a Leniency Applicant Be Included in a Public Version of an Infringement Decision? Case comment to the judgement of the Court of Justice of 14 March 2017 in case C-162/15 P *Evonik Degussa GmbH v the Commission***

Summary: The Article discusses the judgment of the Court of Justice in the *Evonik* case and the key findings stemming from it. Considered in particular are the following issues: the scope of a Hearing Officer's competences and legal grounds which leniency applicants may invoke in defence of their confidentiality claims. Further, the limits concerning the use of information provided in a leniency application are discussed, in particular the prohibition on including quotations from the leniency application and information enabling the identification of the source of other information provided in leniency documents. The author also examines the EU Commission's broad competences to decide on how much information provided in a leniency application may be disclosed in the public versions of resulting infringement decisions. The current standard for the professional secrecy obligation is also considered.

The author's key conclusion is that the judgment reinforces the EU Commission's discretion in deciding what information provided by a leniency applicant should be publicized, to the benefit of plaintiffs seeking damages in private enforcement actions. The judgment not only remains in line with the main principles of the Damages Directive, but also provides the EU Commission with new opportunities to stimulate the enforcement of competition law enforcement by way of private litigation. At the same time, however, it will increase uncertainty on the part of leniency beneficiaries. In the author's view, although the decision to broaden the Hearing Officer's competences is welcomed, chances are low that leniency applicants will defend their confidentiality claims with respect to information contained in the leniency documentation on the basis of the principle of justified expectations and equality of treatment.

Key words: cartel; publication of the decision; public version of the decision; justified expectations; equality of treatment; leniency; access to file; damages directive; private enforcement; damages claims; evidence disclosure; leniency statement; access to leniency.

Kamil Dobosz, **(Un)changeable application of national and EU competition law – about the relationship between national and EU antitrust regimes. Case comment to the judgement of the Court of the EU of 30 September 2016 in case T-70/15 *Trajektna luka Split d.d. v the Commission***

Summary: The article delves into the judgement of the General Court in the *Trajektna* case. The essential problem therein concerns a possibility to declare an assessment of market behaviour under national competition law as tantamount to an assessment under EU antitrust law. The very issue in this context is that domestic rules are equivalent to those in the Treaty. Nonetheless, such an approach may raise doubts since merely literal correlation does not suffice to render both legal bases exchangeable. Another relevant aspect is leaving a space to manoeuvre for national courts to act when the proceedings are carried out before them. This is indeed legitimate through the lens of the principle of loyalty with regard to the cooperation between national courts and the European Commission.

Key words: competition law of the European Union; national competition law; the best placement of a case; spontaneous harmonization; General Court's role.

Tomasz Bagdziński, **20th Century medicine for a 21st Century problem. Case comment to the judgement of the Court of Justice of 6 December 2017 in case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH***

Summary: The judgment itself as well as the reasoning of the Court of Justice will be welcomed by luxury brand owners. Protection of the luxury image of their products is, according to the Court, the sole (necessary) justification for implementing a selective distribution system, provided that the criteria imposed for entry into the system are objective, applied uniformly and in a non-discriminatory manner. The author believes however that the aim of maintaining a prestigious product image is a legitimate, but not sufficient reason for restricting competition.

Key words: selective distribution; Court of Justice.

Radosław Niwiński, **The withdrawal of the Commission decision and its replacement by another decision with one single legal act, in the absence of initiating a formal investigation procedure before issuing the second decision, as a breach of the right of interested parties to submit comments and adopt a position. Judgment of the Court of the EU of 17 November 2017 in case T-263/15 *Gmina Miasto Gdynia and Port Lotniczy Gdynia-Kosakowo sp. z o.o. v the Commission***

Summary: The author analyzes the Judgment of the General Court (Seventh Chamber) of 17 November 2017 *Gmina Miasto Gdynia and Port Lotniczy Gdynia-Kosakowo sp. z o.o. v. European Commission* (Case T-263/15). The author also compares opinions of legal doctrine and judicature whether the failure to initiate a formal investigation procedure before the adoption of a decision constitutes a breach of a fundamental and absolute procedural requirement in the form of the right of interested parties to submit comments and adopt a position.

Key words: formal investigation; state aid; hearing of the parties; withdrawal of a decision.

Julita Chomik, **Copying by inspectors of IT data carriers of the inspected party. Judgement of the SOKiK of 7 March 2017 in case XVII AmA 15/17**

Summary: The article presents the possibility of copying by inspectors of IT data carriers of the party under inspection, without selecting which information contained therein is necessary to achieve the aim of the inspection, and reviewing those records in the seat of the Polish Competition Authority (UOKiK) in the light of the judgment of the Competition and Consumer Protection Court dated 7 March 2017 no XVII Amz 15/17. This analysis is based on the interpretation of the applicable regulations under the Polish Competition Act in terms of the scope of an inspection and the inspected party's rights protection. The author also sets out the jurisprudence of the Court of Human Rights and the Court of Justice of the European Union concerning the selection of information placed on IT data carriers and IT solutions currently available for use in this area. The article contains the assessment of the qualification by the court of the copying of IT data carriers by the Polish NCA as 'securing the evidence' indicating a number of premises that were not taken into account by the court in resolving the matter being the subject of the judgment.

Key words: inspection; IT data carriers; copying; UOKiK; powers of inspections; rights of party under inspection; securing the evidence.

Book Reviews

Peter C. Carstensen, Competition Policy and the Control of Buyer Power: a Global Issue, Edward Elgar Publishing 2017, p. 304; review by Karolina Liberadzka-Czubowska

Reports

Report on the Seventh International PhD Students Conference on Competition Law. Białystok, 10.10.2017 (Paulina Korycińska-Rządca)

Report on the Seminar 'More effective enforcement of EU competition law in the light of the draft Parliament and Council directive – what changes to the Polish law?' Warszawa, 17.10.2017 (Anna Młostoń-Olszewska)

Report on the Seminar 'Signaling – a remedy for the limited effectiveness of competition authorities or the implementation of a social duty by law-abiding citizens'. Warszawa, 28.11.2017 (Marcin Mleczko)

Contents, Summaries and Key Words