

## iKAR with comments to UOKiK (From the Volume Editor)

### Articles

Sławomir Dudzik, Aleksander Tombiński, **Defining product markets in order to assess concentrations of large retail store chains. Towards a convergence of national and EU approaches?**

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#### IV. Final Remarks

**Summary:** This article assesses whether there is a convergence in the approach of the EU and national competition authorities (NCAs) in how they define product markets for the purpose of merger control. The hypothesis of such convergence is tested in the sector of sales of groceries in large retail stores. The analysis of decisions issued by various European NCAs shows that some have adopted an asymmetric market definition: from the perspective of supermarkets and discount stores hypermarkets form part of the same product market, whilst hypermarkets are not constrained by supermarkets and discount stores. Conversely, there are also some NCAs that consider all three types of large retail stores as competitors and thus forming part of the same product market. These different conclusions do not seem to correspond to the inherent differences in the structure of competition on particular national markets. As a result, the initial hypothesis cannot be confirmed. The Authors therefore call for a more intense cooperation between NCAs in order to establish best practices when defining product markets for the purpose of merger control.

**Key words:** merger control; product market; asymmetric definition; grocery retailing.

Paweł Wanasz, **Most favoured nation (MFN) clauses in the newest doctrine and antitrust case law**

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- I. Introduction
- II. Types of MFN clauses
- III. Pro-competitive effects of MFN clauses
- IV. Theories of harm
- V. Competitive assessment of MFN clauses
- VI. Case law

**Summary:** Most favored nation (MFN) clauses have recently started drawing the attention of antitrust authorities, regardless of their common use in international trade and multilateral agreements, and irrespective of the common view that they have mostly pro-competitive effects. MFN clauses allow customers to obtain profitable commercial conditions, minimize the risk related to the launch of new products, as well as reduce transaction costs. However, antitrust authorities increasingly point out that MFN clauses have anticompetitive effects also, such as weakening market competition, creating market entry barriers for new players, or allowing for coordination of market activities between competitors. Decisions in such cases as HRS or E-books, as well as amendments to legal regulations in the USA resulting from the Blue Cross Shield Michigan case seem to confirm these antitrust concerns.

**Key words:** most favoured nation clause; MFN; types of MFN clauses; pro-competitive effects; theories of harm; restriction of competition.

Marcin Kolasiński, **The application of competition law to the activities of entities performing public tasks based on the principles of social solidarity – differences between the Polish and the EU approach**

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- III. The entrepreneur to which Polish competition law applies
  1. Differentiation between the ability to shape competition and exercising the prerogatives of a public authority
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- IV. Summary

**Summary:** This article is devoted to the issue of applying competition law to the assessment of the activities of entities performing public tasks on the basis of the principles of social solidarity. Bodies of this type primarily include entities operating in the area of redistribution of health contributions and social insurance contributions. The article contains therefore an analysis of the activities of the National Health Fund and the Social Insurance Institution. It also presents the differences in the approach to identifying such entities as entrepreneurs which are subject to competition law under Polish and EU competition law. Contrary to certain opinions, the specific tasks performed by these entities do not justify their complete exclusion from antitrust control. It is postulated that Polish competition law should be applied to all those manifestations of their activities which can shape competition.

**Key words:** competition law, shaping competition, definition of an entrepreneur, entities performing public tasks, social solidarity

### **Marta Stryszowska, Takeover of Media Regionalne by Polskapresse: economic perspective**

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- II. Overview of two-sided markets
- III. Key issues raised in the decision
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- V. Possible economic approach to the evaluation of merger effects
  1. Analysis of diversion ratios
  2. Preparation of questionnaires
  3. Simulation of merger effects
- VI. Conclusion

**Summary:** The article discusses the decision of the Polish competition authority (President of UOKiK) concerning the acquisition of Media Regionalne by Polskapresse. It presents a brief overview of the case and suggests what economic analyses could have been used in its market definition stage and for the evaluation of the merger's effects.

**Key words:** concentration; two-sided markets; market definition; merger effects.

### **Competition law abroad**

#### **Ilona Szwedziak-Bork, 8<sup>th</sup> Amendment of the German Act Against Restraints on Competition – an overview. *More “European” Approach?***

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**Summary:** This paper is devoted to the 8<sup>th</sup> Amendment of the German Act against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) that came into force in July 2013. Pointed out are the most important changes: the introduction of the SIEC test (*significant impediment of effective competition*) and the increase of the market share threshold for the presumption of “single” market dominance. Also among the key changes introduced by the 8<sup>th</sup> Amendment is partial applicability of German competition rules to statutory health insurance funds.

**Key words:** 8<sup>th</sup> Amendment, merger control, SIEC test, dominant position, statutory health insurance funds, consumer protection associations, procedural changes.

### Legislation and case law review

Agata Jurkowska-Gomułka, **ECN Recommendations of December 2013 – towards a better quality of European competition policy?**

#### Table of contents:

- I. Introductory remarks
- II. Recommendation on Inspections and Requests for Information
- III. Recommendation on the Power to Collect Evidence
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**Summary:** In December 2013, European Competition Network adopted a package of seven recommendations related to selected decision-making and investigative powers of national competition authorities (NCAs). Besides presenting the contents of the eight relevant documents, the paper provides a general characterisation of “Recommendations” as tools of competition policy and assesses them from the perspective of their impact on the quality of European competition policy.

**Key words:** decision-making powers; ECN; European Competition Network; investigative powers; recommendations.

Andrzej Madala, **Changes in the delineation of relevant markets in the modern channel of daily consumer goods retailing based on concentration decisions made by the President of UOKiK**

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- II. The notion of relevant market
- III. From the national consumer-goods retail market to local markets and the separation of the HSD sector
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  3. Increased significance of the HSD sector in the analysis of the daily consumer goods retail market and an unequivocal local determination of the geographic market
  4. HSD as a separate market relevant to daily consumer goods retail sales and a prediction of further divisions
- IV. Fragmentation within the modern distribution channel (HSD) and narrowing local markets
- V. Conclusions

**Summary:** This article reviews the decisions of the President of UOKiK in matters concerning the control of concentration of undertakings operating in the modern channel of consumer goods retailing (i.e. large-format stores) issued between 2001 and 2014. The decisions are examined from the perspective of the evolution in the approach of the NCA to delineating relevant markets in this sector of the economy. Trends and reasons are pointed out for changes in relevant-market definition. Attention is drawn to the NCA making use of the achievements of foreign competition authorities. Finally, the reviewed decisions are assessed.

**Key words:** control of concentrations between undertakings; relevant market; retail trade; hypermarkets, supermarkets and discount stores (HSD); modern distribution channel; fast moving consumer goods (FMCG) or daily consumer goods.

Natalia Matlak, **Review of the decisions of the President of UOKiK concerning infringements of collective consumers interests in the financial services market from 2012 to 2014**

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- I. Introductory remarks
- II. Applying forbidden abusive contract terms
- III. Misleading practices and breaching the obligation of giving consumers thorough, true and full information
- IV. The renunciation of passing information to the Polish Credit Information Bureau about the expiry of the borrowers' liabilities
- V. Summary

**Summary:** This study presents selected decisions of the President of UOKiK concerning infringements of collective consumer interests in the financial services market from 2012 to 2014. It describes common bank practices regarded as infringing the interests in question.

**Key words:** President of UOKiK decisions, infringements of the consumer collective interests; abusive clauses, misleading practices.

**D**ynamic competition in the Significant Impediment of Effective Competition Test. Case Comment to the Judgment of the Court T-79/12 *Cisco Systems, Inc. and Messagenet SpA v. the European Commission*, from 11 December 2013. (Dariusz Aziewicz)

**K**ivil liability of cartel members for damages resulting from an umbrella price effect. Judgment of the Court of Justice of 5 June 2014 in case C-557/12 *Kone AG, Otis GmbH, Schindler Aufzüge und Fahrtreppen GmbH, Schindler Liegenschaftsverwaltung GmbH, ThyssenKrupp Aufzüge GmbH versus ÖBB-Infrastruktur AG* (Agata Jurkowska-Gomułka)

**A**RPM does not always affect the public interest: closer to an individualized approach to vertical resale price fixing? Case comment to the judgment of the Supreme Court of May 2014 III 44/13 (Konrad Kohutek)

**R**The “average consumer model” as a reference point in the assessment of unfair commercial practices. A case commentary on the Supreme Court judgment of 4 March 2014, Case III SK 34/13 (Małgorzata Sieradzka)

How lucrative it to cease a competition restricting practice? Case comment to the judgment of the Supreme Court of 15 May 2014, III SK 54/13 (Anna Piszcz)

#### Book Review

Agata Jurkowska-Gomułka *Publiczne i prywatne egzekwowanie zakazów praktyk ograniczających konkurencję: w poszukiwaniu zrównoważonego modelu współistnienia* [Public and private enforcement of prohibitions of anticompetitive practices: searching for a sustainable model of co-existence] (Marek Szydło)

#### Reports

*Sprawozdanie z uroczystości wręczenia Nagrody CARS 2014 (9 June 2014)* [Report on the CARS Award Gala 2014] (Ilona Szwedziak-Bork)