

Consumers and competition law: still developing and often discussed

(from the Volume Editor)

Articles

Wojciech J. Piwowarczyk, **Elements of a dynamic analysis of the impact assessment of a merger on the relevant market**

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Summary: The article covers issues related to dynamic impact assessment (for an individual relevant market) of mergers and, derived from that impact assessment, the permissibility of a merger. It presents criteria that should be taken into consideration by competition authorities during the relevant markets' prospective analysis, which is characterized by particular volatility (or potential volatility). This volatility in the prospective analysis goes beyond speculations and focuses on anticipated effects of the merger in the sphere of economic trends. The article presents various reasoning that has in practice been used in merger control cases, but has not been directly articulated. This reasoning concerns the effects of mergers and the time perspective in the prospective analysis.

Classification and keywords: K21, K20; competition law, merger control, prospective analysis.

Maciej Fornalczyk, **Is antitrust risk management possible and can it generate benefits?**

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- I. What should one do to manage economic risks?
- II. Is antitrust risk "manageable"
- III. Is it possible to measure the antitrust risk?
- IV. How to measure the antitrust risk and use the resulting calculation in business?
- V. Should competition authorities take into account implemented antitrust risk management solutions?
- VI. Observations and conclusions

Summary: Conducting an economic activity means the permanent clash of diverse economic risks, understood as the appearance of the undesirable event of a negative impact on economic efficiency expected by the entrepreneur. Some questions have to be addressed at this point: (1) is it possible to manage the risk in order to minimize the consequences of undesirable events; (2) how the decrees should be understood and; (3) what instruments should be used? An attempt is made in

this paper to answer these questions, or to indicate the need to clarify or to define their substantial scopes. Managing antitrust risk is of course possible – what is required in order to increase the efficiency of this process is to establish correct analytical mechanisms (precise principles of antitrust estimation), or even take one step further – to quantify such an evaluation. Specific algorithms of antitrust estimation, as well as their quantified figure (the formal figure could also be recorded as a function), make it possible to design a business activity so as to minimize the risk of that practice being categorized as an antitrust infringement and consequently, to minimize the risk of a fine being imposed on the entrepreneur (or on its manager). However, such analytical mechanisms could only be devised if the Polish NCA provided guidelines that could act as the basis for an antitrust compliance analysis of business strategies and plans and their appropriate modifications.

Classification and keywords: K21, K20; management, antitrust, competition protection, economics, risk, econometrics.

Małgorzata Sieradzka, **Anti-competitive or pro-competitive objective of consortium bidding in public procurement – analysis and opinion**

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- I. Introduction
- II. Essence of consortium bidding
- III. Analysis of the objectives of consortium participation in public procurement procedures
 1. Anti-competitive object or effect as basic factors in recognizing a tender consortium agreement as prohibited
 2. The condition of necessity as the economic justification of consortium bidding in public procurement procedures
- IV. Conclusions

Summary: This paper reviews issues arising when assessing the objectives of consortium participation in procedures for the award of public contracts. For economic operators, a bidding consortium is a legally acceptable form of participation in public procurement procedures. The essence of consortium bidding is a joint bid for a contract submitted and agreed upon by the members of the consortium. However, agreeing on how to bid by multiple economic operators entering a given public contract procedure is deemed restrictive to competition. It is thus crucial to determine the circumstances under which the submission of a joint bid is to be deemed anti-competitive. This is so in particular when the admission of the consortium to the procedure has not been subject to any conditions, such as the failure of the members to individually comply with the conditions of the participation in the public procurement procedure. Given the above, it is essential to define when the bidding consortium agreement is anti-competitive. These issues give rise to controversy, especially when it comes to assessing the consortium's goal to participate in the procedure in a situation where it is objectively possible for the contract to be performed independently by each member of the consortium. The paper focuses on the nature of bidding consortiums and on the assessment of the objectives of their participation in the procedure. The Author also presents reasons that can justify a consortium's participation in public procurement procedures.

Classification and keywords: K21; restrictive agreement, anti-competitive object or effect, consortium bidding, economic justification of consortium bidding in public procurement procedure.

Monika Szczotkowska, **Legal qualification of *spamming* as an act of unfair competition under the Law on Electronic Services and the Law on Unfair Competition**

Table of contents:

- I. Introduction
- II. Spamming as an act of unfair competition under the Law on Electronic Services
- III. Spamming as an act of unfair competition under the Law on Unfair Competition
- IV. Comparative analysis of the prerequisites and conclusions

Summary: The development of new technologies creates numerous conveniences for humans – they can make work easier, cheaper and eliminate errors. Thanks to new technologies, humans can optimize their actions, so that they are able to faster achieve their purpose. New technologies have also influenced the development of entrepreneurship, and in turn, they affect the shaping of competition. Today, almost every trader uses technological means of communication; almost every single one of them uses them for marketing activities. The fact that only minimal investment is needed for the transmission of information by technological means (electronic mail in particular), caused the emergence of the phenomenon commonly known as *spamming*. Since the transmission of unsolicited commercial communications is often associated with running a business (as well as being undesirable), the Author attempts to analyze the phenomenon as an infringement from the point of view of fair market competition. The Polish legislator rightly placed spamming in the catalogue of acts of unfair competition, but zealously stressing the problem of such violations committed against consumers, ignores the issue of abuse directed against competitors. Tools for fighting against unsolicited information are not very effective. It is therefore necessary to introduce changes leading to the economic unprofitability of such actions and facilitating ways for victims to assert their rights.

Classification and keywords: K22; *spamming*, act of unfair competition, unfair advertising.

Monika Bychowska, Cezary Banasiński, **Between the effectiveness of administration and legal certainty of traders – comments to the Law of 5 August 2015 Amending the Polish Act on Competition and Consumer Protection and other Laws**

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- II. New instrument of consumer protection
- III. Specificity of the decision terminating the proceedings in cases in which the terms may be regarded as unfair
- IV. Reasons to repeal decisions in cases in which the terms may be regarded as unfair
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- VI. New, named practice infringing collective consumer interests
- VII. “Of-court” powers of the UOKiK President
- VIII. Interim decisions on consumer issues
- IX. The institution of “mystery shopper”
- X. Conclusions

Summary: This paper evaluates recent changes made to the Act on Competition and Consumer Protection of 2007. The new amendment concerns, in particular, the scope and method of protecting

weaker market participants (consumer) before their contracts concluded with business, and containing abusive clauses, actually become binding. The amendment has reoriented the current system in matters concerning abusive clauses as well as introduced a new practice infringing consumer interests in financial markets. The new rules give the UOKiK President a high level of discretion regarding his decisions; it remains to be seen in practice, whether the use of the new solutions will in fact increase consumer protection levels in Poland.

Classification and keywords: K21, K20; consumers, protection, financial services, secret client, abusive clauses.

Szymon Syp, **Arbitration and competition law – in response to Dr Tomasz Bagdziński**

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- I. Introduction
- II. On the issue of the redress mechanism in cases of claims resulting from competition law infringements
- III. On the issue of settling competition law disputes by arbitration courts
- IV. Conclusions

Summary:

The present article is a response to a polemical article written by Tomasz Bagdziński entitled: *Arbitration and competition law – a voice in the debate* in relation to an article entitled *Arbitration and competition law – a selected theoretical and practical issues*. In this paper, the Author focuses on two issues: the redress mechanism in cases of claims resulting from competition law infringement and settling competition law disputes by arbitration courts. In the response, the Author points to a number of legal issues still to be resolved, which are part of the discussion about the inter-relationship between competition law and arbitration.

Classification and keywords: K21, K42; competition law, arbitration, international commercial arbitration, settling disputes.

Competition law abroad

Wojciech Podlasin, **Procedural aspects of Singapore's merger control system**

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- II. Relevant merger control authorities
 1. Prohibition of mergers that have resulted, or may be expected to result, in a substantial lessening of competition
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 3. Notion of substantial lessening of competition
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- V. Sanctions
 1. Implementing a concentration that substantially lessens competition in Singapore
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VI. Non-fulfilment of commitments

VII. Appeals

VIII. Conclusions

Summary: This paper is devoted to procedural aspects of Singapore's merger control system, which is materially different from the regimes applicable in Poland and the EU. The Author presents issues related to: (i) major legal acts; (ii) relevant merger control authorities; (iii) the applicable prohibition of mergers that substantially lessen competition; (iv) the conduct of proceedings before merger control authorities as well as; (v) potential fines and; (vi) appeals.

Classification and keywords: K21; merger control, voluntary notification, Singapore.

Konrad Kohutek, **Authorisation of RPM in the decision of the Australian Antitrust Authority (Tooltechnic case from December 2014)**

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I. Introduction

II. Facts

III. Commentary

Summary: This paper describes the Australian Tooltechnic case, in which the antitrust authority – for the first time in history – has authorized application of resale price maintenance by that undertaking. Besides the presentation of the fact of the case, this article evaluates legal and economic arguments which determined the authorization of such practice and also their relevance for the application of Polish and European prohibition of competition restricting agreements relating to RPM.

Classification and keywords: K21; resale price maintenance, Australian competition law, "individual exemption from the prohibition of competition restricting agreements; free-riding

Legislation and case law reviews

Object-based competition restrictions

Case comment to the Judgment of the Court of Justice of the European Union of 16 July 2015 in case C-172/14 *ING Pensii v. Consiliul Concurentei* (Aleksander Stawicki, Paulina Komorowska)

Information exchange between competitors as a competition restriction

Case comment to the Judgment of the Court of Justice of the European Union of (second chamber) of 19 March 2015 in case C-286/13 P *Dole Food Company, Inc. i Dole Fresh Fruit Europe przeciwko Komisji Europejskiej* (Barbara Giermek)

Consequences of independent public healthcare providers not being granted the status of an "economic entity" in light of national and EU competition rules

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(Dariusz Aziewicz, Agnieszka Jabłonowska, Teresa Kaczyńska, Aleksandra Kłoczko, Katarzyna Skowrońska, Ilona Szwedziak-Bork, dr Bartosz Targański)

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Report on the 2nd Polish-Portuguese PhD Seminar (Białystok, 1 July 2015)
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