

When the violation of competition is legally discovered? The limits of inspections

(from the Volume Editor)

Articles

Grzegorz Materna, **Conditions for the initiation of inspections or searches in antitrust cases conducted under the Competition Act and the requirements of Article 8 of the European Charter of Human Rights**

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Summary: The article presents the conditions for the initiation of inspection or search in antitrust cases conducted under the Act on Competition and Consumer Protection and the requirements of Article 8 of the European Charter of Human Rights. Basing on the latest jurisprudence of the Court of Human Rights, in particular on judgement in case no. 97/11 Delta Pekárny a.s. v. the Czech Republic, the author presents conditions for compliance of inspections and searches aimed at obtaining evidence of possible anti-competitive practices with the right to respect for private life and home. On this basis the conclusions are made on the need for amendments in Polish law of provisions on the conditions for the initiation of inspection or search.

Key words: inspection, search, UOKiK, European Convention on Human Rights, right to respect for private life and home.

JEL: K21

Marta Michałek-Gervais, **Limits of the powers of inspection of the European Commission in the light of the recent case law of the European Court of Justice**

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VI. Conclusions

Summary: The article analyzes the selected limits of the powers of inspection of the European Commission in the light of recent case law of the Court of Justice of the European Union, ie. cases *Nexans* and *Deutsche Bahn*. The author discusses the obligation to state reasons for decisions ordering inspections, problematic issues related to the abuse of the Commission's powers of inspection (*fishing expeditions* or the practice of subsequent review of entirely copied storage media at the Commission's premises) and the question of the results of exceeding of the limits of the Commission's powers of inspection. In conclusion the author suggests some changes aiming at strengthening the legal certainty and protection of the rights of undertakings.

Key words: inspections, powers of inspections, obligation to state reasons, *fishing expeditions*, fundamental rights of undertakings.

JEL: K21

Joanna Affre, Piotr Skołubowicz, '**Turnover-related-premium**', '**rebate**' and '**a charge other than commercial margin**'. **The principle expressed in resolution of Supreme Court of Poland of 18.11.2015 (III CZP 73/15) and its practical application**

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- I. Resolution of Supreme Court of Poland of 18.11.2015 (III CZP 73/15)
- II. Why rebate is not a 'charge other than commercial margin'?
 1. Charge other than commercial margin as a 'non-price-determining charge'
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 1. Construction of rebate in contracts and its functions
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- IV. Conclusion

Summary: The article weighs arguments essential for the answer to the juridical question, which the Supreme Court of Poland has been asked, whether rebate is a "charge other than commercial margin" from Article 15 par. 1 p. 4 of the Act on Combating Unfair Competition. Authors agree with the Supreme Court that the rebate is not a charge other than commercial margin, although they express doubts concerning statement that not every turnover-related-premium is a rebate. Furthermore, authors analyse judicature's assessment of the practice of including various premiums/bonuses/discounts in contracts and conditions which have to be fulfilled to assess them as rebates.

Key words: rebates, combating unfair competition, slotting fees, commercial margin, premium, bonus, equivalency of benefits.

JEL: K29

Małgorzata Salitra, **If you can't beat them, join them lawfully – consortium bidding in the view of the Polish Competition Act**

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- I. Introduction
- II. Definition and the nature of the consortium bidding
- III. The ability to assessment the consortium bidding under the Polish Competition Act
- IV. The assessment of legality of the consortium bidding from the perspective of the Polish Competition Act
- V. Exemptions for consortium bidding from the prohibition of restrictive agreements
- VI. Conclusions

Summary: The article presents some problematic issues due to the assessment of consortium bidding in the view of the Polish Competition Act. Competition law does not forbid consortium bids. Consortium bids can often be organised in a way that complies with competition law. The paper show that consortium bidding may give rise to competition concerns when one consortium member or a subset of the consortium members could fulfil the requirements of the tender competition or the contract on its own. The next part focus to identify the pro-competitive benefits that result from joint bidding and assess whether those pro-competitive benefits outweigh any anti-competitive effects.

Key words: consortium bidding, collusive tendering, anit-competitive agreements, cartels, tender.

JEL: K21

Mateusz Radziński, **Selected aspects of legal and ownership status of Polish transmission system operator on the example of Polskie Sieci Elektroenergetyczne S.A.**

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- I. Initial remarks
- II. Designation and certification of TSO in a nutshell
- III. Independence of TSO
- IV. Legal and ownership status of TSO in the light of article 9k of Electricity Act.
- V. Conclusions

Summary: This article aims to analyze the legal and ownership status of the electricity transmission system operator in Poland, in the context of TSO independence, which is determined by ownership unbundling rules.

Key words: Transmission System Operator, ownership unbundling, certification procedure, independence of TSO.

JEL: K23

Legislation and Case Law Review

Joanna Affre, Piotr Skołubowicz, **Analysis of issues related to regulation on relations between suppliers of food and agricultural products and multiple retailers, based on solutions proposed in bill on unfair commercial practices submitted by the Polish Peoples's Party**

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- II. Scope of application of the Bill and the current law
- III. Trends in the EU
- IV. Subjective scope of the Bill
- V. Catalogue of unfair practices
- VI. Prohibition of the collecting of slotting fees in the Bill
- VII. Procedure of application of the Bill
- VIII. Burden of proof in unfair commercial practices cases
- IX. Rules of Conducting the Business
- X. Constitutionality of the Bill
- XI. Conclusions

Summary: Article contains review of the solutions included in bill on combating the unfair commercial practices of the entrepreneurs conducting trade of agricultural and food products, against the suppliers of those products, submitted during the previous cadence of Polish Parliament by the group of deputies of Polish People's Party. Authors assess the bill critically, as drawn up inappropriately, not suiting the current law system and establishing the state control over the process of contracting on food market sector. The Article describes the "unfair commercial practices", in particular the new way of regulation on the issue of the slotting fees. Authors analyse the proposed procedure, indicating the risks in the matter of equality of the parties (reversed burden of proof) as well as the possible negative consequences to the efficiency of anti-monopoly office (model of request procedure). Article questions the compatibility of the bill with Polish constitution.

Key words: unfair commercial practices, slotting fees, suppliers, food products, agricultural products, constitution.

JEL: K29

Case comment to the judgment of the European Court of Human Rights of 2 October 2014 in case *Delta Pekárny a.s. v. the Czech Republic* (application no. 97/11) (Bartosz Turno, Emilia Wardęga)

Case comment to the judgement in case C-583/13 P *Deutsche Bahn AG and others v. Commission* (Katarzyna Manteuffel)

Case comment to the judgement in cases C-399/10 P and C-401/10 P *Bouygues i Bouygues Télécom v. Commission* (Aleksandra Kłoczko)

Books Reviews

Marta Michalek, *Right to defence in EU Competition Law: the case of inspections*, Wydawnictwo Naukowe Wydziału Zarządzania UW, Warszawa 2015, s. 431; review by Krystyna Kowalik-Bańczyk

Reports

Private Enforcement of Competition Law. Key Lessons from Recent International Developments, London, 5–6 March 2015 (Emilia Wardęga)

10 Jahre UGP-Richtlinie: Erfahrungen und Perspektiven, Berlin, 7–8 May 2015 (Monika Namysłowska, Agnieszka Jabłonowska)

Harmonisation of Private Antitrust Enforcement: A Central and Eastern European Perspective, Supraśl, 2–4 July 2015 (Paulina Korycińska)