

## Novelty after novelty (from the Volume Editor)

### Articles

Agata Jurkowska-Gomułka, **UOKiK President as the authority competent in cases of practices consisting of an unfair use of superior bargaining power – critical remarks**

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- III. Does the public interest protected by the Act on Counteracting the Unfair Use of Bargaining Power correspond with the public interest understood within the meaning of the Act on Competition and Consumer Protection?
- IV. Final remarks

**Summary:** The article provides an analysis of the provisions of the Act on Counteracting Unfair Use of Superior Bargaining Power from an institutional perspective. A set of arguments is presented supporting the view of the incorrectness of the provision whereby the UOKiK President is responsible for the implementation of this Act. The rules of the Act on Competition and Consumer Protection provide a point of reference for the analysis contained in this article. The author stipulates that competences with respect to counteracting the unfair use of superior bargaining power should be transferred from the UOKiK President to a specialized administrative body in the agricultural sector.

**Key words:** public interest; private interest; administrative body; bargaining power; agricultural sector

**JEL:** K20

Michał Zaremba, **The protection of small and medium-sized enterprises from exploitation by big market players (relation B2b)**

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- II. Economic framework of the problem of economic dependence

- III. Protection of small and medium-sized enterprises from economic exploitation – the *de lege lata* situation
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- IV. Protection of small and medium-sized enterprises from economic exploitation – *de lege ferenda* proposals

**Summary:** The article presents arguments in favor of strengthening the protection mechanisms for small and medium-sized enterprises against economic exploitation by large companies. Apart from discussing the economic conditions and features of this phenomenon, presented are also national provisions that currently protect domestic entrepreneurs against exploitation. Moreover, a catalogue of prohibited practices, which should be implemented into the legal system either by means of appropriate judicial practice or by introducing some changes into legislation, has been created and is proposed in the article.

**Key words:** economic analysis of law; the abuse of economic dependence; unfair market practices

**JEL:** K23

Katarzyna Manteuffel, Mikołaj Piaskowski, **Relation between the general clause and the example catalogue of unfair practices in the Act on Combating the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Sector**

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- IV. Closing remarks

**Summary:** The article presents an analysis of the relation between the general clause provided in Article 7(2) of the Act on Combating the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Sector and the example catalogue of unfair practices listed in Article 7(3) of this Act. The authors consider also the function of the general clause included in this Act as well the scope of particular example practices expressly described therein.

**Key words:** unfair practice; general clause; catalog of unfair practices; contractual power

**JEL:** K23

Kamil Kłopocki, **Is a legal definition of a cartel necessary? Discussion based on the proposal of the definition of a ‘cartel’ included in the draft act on claims for damages arising from competition law infringements**

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- II. Previous attempts to define cartels and the respective definitions included in Directive 2014/104 and the draft act on claims for damages arising from infringements of the competition law provisions of the Member States
- III. The definition of an ‘agreement’ included in the Act on competition and consumer protection
- IV. Is the legal definition of a ‘cartel’ necessary?

**Summary:** The Polish draft of the act on claims for damages arising from competition law infringements implements Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. Therein, a definition of a ‘cartel’ has been, for the first time, included in the Polish legal system. Not unlike its predecessors, the Polish legislature defined in the Act of 16 February 2007 on competition and consumer protection the term ‘agreement’ which infringes competition. There is no doubt that both terms are partly similar. A ‘cartel’ constitutes a form of an agreement. So is a separate legal definition of a cartel necessary? Will we be able to meet the challenges specified in the Damages Directive regarding the presumption of a damage caused by a cartel if we do not implement the definition of a cartel into the Polish legal system? The draft act provides that this presumption includes also other competition restricting practices. However, this solution seems to be in conflict not only with the ideas behind the conception of the definition of a cartel provided in the Damages Directive, but with the Directive itself. As such it will have to be changed during the legislative procedure. There is no doubt that other types of competition restricting practices cause less damage than cartels and that they do not always result in damages. Even for that reason, the definition of a cartel seems to be not only useful but also necessary.

**Key words:** cartel; agreement; competitors; entrepreneurs.

**JEL:** K21

Aleksandra Milewska, **Joint and several liability of the perpetrators of competition law violations in the draft act on claims for damages caused by a competition law infringement of 7 February 2017 – subjective aspect**

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2.2. No restriction of joint responsibility of SMEs

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V. Conclusion

**Summary:** The purpose of this article is to analyze issues related to the design of joint and several liability of cartel members provided for in the act on claims for damages caused by a competition law infringement of 7 February 2017. The latter implements into the Polish legal system Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. The author presents considerations relating to exceptions provided in this law with respect to joint and several liability of cartel members, analyzes in detail the responsibilities of small and medium-sized enterprises and entrepreneurs who made a leniency application. In the summary of this article, the author presents conclusions and proposals on the effects of the entry into force and the application of the new Polish law implementing the Directive.

**Key words:** Directive 2014/10/EU; liability for damages; joint and several liability; breach of competition law; cartel; SME leniency

**JEL:** K21

Anna Tworkowska-Baraniuk, **Limitation of claims for damages arising from competition law infringements – Polish attempt to implement the Damages Directive with respect to limitation periods**

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II. Limitation periods for damages claims according to the Civil Code

III. Limitation periods laid down in Damages Directive 2014/104/EU

IV. Polish activities related to the implementation of the Damages Directive 2014/104/EU

V. Conclusions

**Summary:** The Polish legislator faces the introduction of the Act on claims for damages arising from competition law infringements. The above Act comprehensively regulates the issue of private enforcement. The implementation of the new legislation is necessary due to the laps (as of 27 December 2016) of the deadline for the implementation into national legislation of the Member States of the European Union of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. The draft act regulating the procedure for bringing before civil courts claims based on a breach of competition law modifies, for example, the general statute of limitations for damages claims. This article provides an analysis of EU rules applicable to national laws and draft changes in the limitation of claims for damages arising from a breach of competition rules.

**Key words:** private enforcement; the Directive 2014/104/EU.

**JEL:** K15, K21

Patrycja Szot, **Collecting evidence and hearing cases in the Polish draft act on claims for damages arising from competition law infringements**

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- VI. Competent court
- VII. Support of NGOs
- VIII. Closing remarks

**Summary:** This article presents a brief overview of the draft act on claims for damages arising from competition law infringements implementing into the Polish legal system the Damages Directive 2014/104/EU. It focuses on procedural provisions that facilitate actions for damages caused by infringements of competition law. The article covers the issue of evidence collection, necessary to prove the infringement and the resulting harm, as well as the hearing of such cases. The article accounts also for institutions such as presumption of fault and harm as well as the passing-on of overcharges, estimation of harm and access to evidence by way of disclosure. Discussed further one are some other procedural solutions such as an intervention by a NGOs in proceedings in support of claims for damages or the possibility to sue an infringer on behalf of the wronged party. The author emphasises that the success of the new legislation in aiding future plaintiffs depends on the judicial practice and therefore its real impact on private enforcement will have to be assessed in future.

**Key words:** Damages Directive 2014/104/EU; claims for damages; disclosure of evidence; presumption; tort liability; presumption of fault; infringement of competition law; passing-on of overcharges; umbrella effect; leniency statement; vertical leniency; settlements.

**JEL:** K21

Radosław Niwiński, **Does FIFA's ban on third-party ownership infringe EU competition rules?**

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- I. Introduction
- II. Analysis of the transfer market
- III. Essence of third-party ownership
- IV. Background to the dispute

V. Third-party ownership vs competition law

VI. Summary

**Summary:** The article refers to the mechanism of third-party ownership (TPO) in football. The author confronts the transfer market sectors with the necessity of external funding by investment funds. The author emphasizes the meaning of Brussel's court decision in case Doyen Sport & Seraing United vs FIFA, UEFA and Belgium Football Association, which refers to the conformity of FIFA's ban on TPO with Article 101 and 102 TFEU. The author compares this decision with CJEU jurisprudence related to the sport sector.

**Key words:** third-party ownership; TPO; FIFA; competition; dominant position

**JEL:** K21, K33, K39

Paulina Korycińska-Rządca, **Liability under competition and criminal law of a natural person in connection to entering into collusive tendering by an entrepreneur**

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  1. Concurrence of the liability basis of a natural person in connection to collusive tendering
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- V. Conclusion

**Summary:** The article discusses mutual relations between the scope of administrative and criminal liability of a natural person for intentionally engaging an entrepreneur in collusive tendering. Presented first are legal provisions on administrative and criminal liability of a natural person with



relation to engaging an entrepreneur in collusive tendering. Subsequently, the existing differences between the subject and the object of those provisions are described, indicating the arrears where the concurrence of the basis of a natural person's liability in connection to collusive tendering may occur, and the arrears where there is no legal basis to impose a penalty on such a natural person. In the last part of the article, the author assesses currently existing rules governing administrative and criminal liability of a natural person for intentionally engaging an entrepreneur in collusive tendering.

**Key words:** bid rigging; competition restricting agreement; fine; Article 305 of the Criminal Code

**JEL:** K14, K21

## Legislation and Case Law Review

Małgorzata Salitra, **Analysis of essential issues related to the act on counteracting the unfair use of superior bargaining power in the trade in agricultural and food products – what changes in Polish law?**

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- I. Introduction
- II. The act versus existing provisions governing protection from the unfair use of superior bargaining power
- III. Subjective and objective scope of the act
- IV. Prohibited practices of unfairly using superior bargaining power
- V. Penalties for violation of the prohibition of the unfair use of superior bargaining power
- VI. Proceeding before the President of UOKiK
- VII. Conclusions

**Summary:** The article presents selected provisions contained in the Act of 15 December 2016 on counteracting the unfair use of superior bargaining power in the trade in agricultural and food products, which has been prepared by the Ministry of Agriculture and Rural Development. The Act provides for an administrative fine for the unfair use of superior bargaining power. A proceeding of this nature shall be initiated by the President of UOKiK ex officio, rather than by request of any party to such proceeding. However, any entrepreneur with a reasonable suspicion of being the subject to a practices involving the unfair use of superior bargaining power may submit a complaint to UOKiK. It is the intention of the author to present a brief description of what are believed to be the key provisions contained in the new Act and show some difficulties that entrepreneurs may face when evaluating their activities for compliance with the provisions of this Act.

**Key words:** contractual advantage; agricultural and food products; fines; unfair use of contractual advantage; unfair practices; President of UOKiK; competition.

**JEL:** K29, K40, K41

Wojciech Łyszczarz, **Combating unfair use of superior bargaining power in the food retail sector in Germany**

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- I. Introduction
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- III. History of the regulation
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- IX. *Edeka* case – the stance of the German competition authority
- X. *Edeka* case – the decision of the German competition court
- XI. *Edeka* case – to be continued?
- XII. Conclusions

**Summary:** The adoption of the new Law on Combating Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products constitutes a good opportunity to compare legal provisions applicable in different states of the European Union in this regard. German solutions are particularly interesting. This is a result of, amongst others, assumptions and solutions introduced in Germany, which are analogous to those on which the Polish provisions are based. This paper summarizes the history of German regulation, theories of harm related to its introduction, its practical application and a recent pilot decision of the German competition authority seeking to spread its application. This paper describes also the newest surprising judgement of the German competition court in the above-mentioned pilot case.

**Key words:** combatting unfair competition; contractual advantage; German competition authority (*Bundeskartellamt*).

**JEL:** K21

**Tort liability of the EU for the infringement by the court of the right to the resolution of a case within a reasonable time.** Judgment of the Court of the EU of 10 January 2017 in case T-577/14 *Gascogne Sack Deutschland and Gascogne v EU* (Marta Michałek-Gervais)

**On commitments of an undertaking.** Judgment of the Court of the EU of 15 September 2016 in case T-76/14 *Morningstar, Inc. v the Commission* (Elwira Konopko)

**The franchise paradox.** Decision of the UOKiK President No DKK-191/2016 in the case of concentration of *Eurocash/Eko Holding* (Szymon Gołębiowski)

## Book Reviews

**Rafał Stankiewicz, Model racjonalizacji dostępu do produktu leczniczego. Zagadnienia publicznoprawne** [Rationalization model of access to medical products], C.H. Beck, Warszawa 2014, p. 537; review by Andrzej Powalowski

## Reports

Report on the Fifth Polish-Portuguese PhD Students Conference on Competition Law. Białystok, 14.10.2016 (Magdalena Knapp, Radosław Niwiński)



**i** Report on the Conference 'New prohibited practices of retail chains? The Act on counteracting the unfair use of bargaining power in the trade in agricultural and food products'. Warszawa, 30.11.2016 (Agata Jurkowska-Gomułka)

### **K** Notifications

Invitation to the Second Conference of CARS and the Law Faculty of the University of Białystok "Harmonization of Private Antitrust Enforcement: A Central and Eastern European Perspective", Supraśl, 29–30.06.2017

**A**

**R**