

## Preventive control of concentrations – a topic always current (from the editor)

Aleksandra Mariak, **Infringement of the standstill obligation (*gun jumping*) in the decisional practice of the European Commission and in EU jurisprudence**

### Table of contents:

- I. Preliminary remarks
- II. Obligation to notify mergers and the standstill obligation under EU competition law
  1. Legal framework
  2. Consequences arising from a premature implementation of a concentration
- III. Gun jumping in the decisional practice of the EC and in EU jurisprudence
  1. Ineos/Kerling
  2. Bertelsmann/Kirch/Premiere
  3. Electrabel/ Compagnie Nationale du Rhône
  4. Marine Harvest/Morpo
  5. Canon and Altice
  6. Ernst & Young/ Konkurrencerådet
- IV. Conclusions
  1. The scope of the standstill obligation
  2. Fining policy for *gun jumping* violations
  3. *De lege ferenda* remarks

**Summary:** The aim of this paper is to present the issue of *gun jumping* in the decisional practice of the EC and in EU case law. Outlined at the outset is the general framework of competition law obligations imposed on merging parties prior to obtaining a merger clearance. Presented next is the decisional practice of the EC and the judgments of EU courts regarding *gun jumping*. On that basis, the paper provides conclusions as to the scope of the standstill obligation and the current approach of the EC to fining *gun jumping*. The article also discusses possible solutions meant to increase legal certainty for undertakings in the field of *gun jumping*.

**Key words:** *gun jumping*; merger control; standstill obligation.

**JEL:** K21

## Adrian Bielecki, **Staggered or creeping concentrations under the EU merger control system**

### Table of contents:

- I. Introduction
- II. General remarks
- III. Selected issues
  1. Personal scope of the application of staggered concentrations
  2. Acquisition of sole and joint control through staggered concentrations
  3. Relationships between transactions constituting a staggered concentration
  4. National competition authority's approval of a part of a staggered concentration
  5. Subsequent transactions
- IV. Summary

**Summary:** The paper provides an analysis of rules on staggered or creeping concentrations (i.e. group of transactions treated as a single transaction for the purposes of the assessment of an obligation to notify such operation to the European Commission) under the EU merger control system as well as the enforcement of these rules. The paper includes, *inter alia*, an analysis of rules on subsequent transactions as well as suggestions how to improve the rules on staggered concentrations.

**Key words:** merger control; staggered concentrations; creeping concentrations; EU law.

**JEL:** K21

Łukasz Kryśkiewicz, **Goals of preventive concentration control**

**Table of contents:**

- I. Introduction
- II. Essence and concept of concentrations of enterprises
  1. Concept of competitiveness of enterprises
  2. Essence and types of concentrations
- III. Goals of competition law
- IV. Preventive concentration control
  1. Essence and goals of concentration control
  2. Consequences of conducting preventive concentration control of enterprises
- V. Summary

**Summary:** The article presents selected aspects of preventive concentration control of enterprises. The goals and the different nature of this review (different from those usually applied to entrepreneurs) are particularly interesting and important from the standpoint of competition protection. Therefore, considered in this article are issues related to the competitiveness of enterprises and selected aspects of their concentrations. Analyzed are also the goals of competition law. The last part of the paper contains comments concerning the essence, objectives and effects of preventive concentration control.

**Key words:** concentration control; competitiveness; concentration.

**JEL:** D41

Dariusz Aziewicz, **Preventive supervision of concentrations of entrepreneurs and selected economic operations related to investment funds**

**Table of contents:**

- I. Introduction
- II. Administrative supervision of investment funds and investment fund companies
- III. An investment fund – a legal entity with a special character within the meaning an ‘entrepreneur’ under the Polish Competition and Consumer Protection Act (uokik)
- IV. An investment fund company as an entrepreneur that holds control over an investment fund within the meaning of uokik
- V. Joint control over an investment fund within the meaning of uokik
- VI. Selected economic operations related to investment funds and preventive state supervision of concentrations of entrepreneurs
- VII. Summary

**Summary:** The article concerns concentration control on the investment funds market under Polish competition law. The author focuses on the basis of notifications of intended concentrations, indicating what forms of concentrations should be considered in case of particular business operations that include investments funds.

**Key words:** supervision of mergers; control of concentration; investment funds; investment fund company; takeover of control; creation of a joint venture.

**JEL:** K21

Tomasz Krzyżewski, **Non-compete clause as an ancillary restraint created by undertakings in the framework of concentrations of enterprises**

**Table of contents:**

- I. Introduction
- II. Ancillary restrictions
  1. General issues
  2. The premise of a direct relationship
  3. The premise of necessity
- III. Non- compete clauses
- IV. Summary

**Summary:** The article regards ancillary restraints created by undertakings in the framework of their concentrations. Analyzed in particular is the matter of the most commonly used ancillary restraint – a non-compete clause. The purpose of this article is to analyze non-compete clauses and to present proposed changes regarding their regulation and review on the grounds of Polish competition law.

**Key words:** non-compete; ancillary restraints; concentration control.

**JEL:** K21

Krzysztof Żebryk, **The influence of unbundling on the activity of Polish power grid enterprises**

**Table of contents:**

- I. Introduction
- II. The problem with competitiveness in the area of energy transmission and distribution
- III. Structural and ownership conditioning of Polish power grid enterprises in the context of unbundling
- IV. Development of community law, and then EU law, in the field of energy market regulation
- V. Implementation of unbundling requirements into the Polish energy law

**Summary:** The legal environment applied to Polish energy companies, operating within vertically integrated structures, has significantly changed after Poland's accession to the EU. Previously, the subject of the activity of the then power plants (operating as state-owned enterprises property of the State Treasury, and then transformed into sole-shareholder companies of the State Treasury) included both: transmission or distribution of energy as well as its sale or production. The functioning of these enterprises as monopolists in transmission or distribution of energy, and at the same time operating in the sphere of energy sales, was at that time diagnosed as the main barrier to the development of a free and competitive energy sales market. This created a real risk

of a monopolist giving unauthorized preferential treatment to its own integrated seller. In connection with this diagnosis, measures were taken to provide interested parties with non-discriminatory access to energy networks – the unbundling instrument became its main tool, understood as the separation of sales and energy production from network operations.

**Key words:** unbundling; vertically integrated enterprises; competition.

**JEL:** K21, K23

Beata Zwolińska, **Competition in Public Procurement Act after the amendment – selected issues**

**Table of contents:**

- I. Introduction
- II. Public Procurement Act and the Act on Competition and Consumer Protection
  1. Tender collusion
  2. Capital Group
- III. Public Procurement Act and the Act on Combating Unfair Competition
  1. An act of unfair competition
  2. A trade secret
  3. Open catalog
- IV. Summary

**Summary:** Polish Public Procurement Act contains many references to its competition law. There are references to the Competition and Consumer Protection Act and to the Combating Unfair Competition Act. These laws include definitions of terms such as “bid rigging”, “capital group”, “unfair competition act” or “trade secret”. In the article, the author examines links between Public Procurement Act, the Act on Competition and Consumer Protection and the Act on Combating Unfair Competition. The author recalls also changes introduced by the amendment of the Public Procurement Act in the field of competition law.

**Key words:** public procurement law; bid rigging; act of unfair competition; trade secret.

**JEL:** K10

Bartłomiej Miedzianowski, **On the obligation to cooperate within the course of a control during proceedings before competition authorities – once again**

**Table of contents:**

- I. Introduction
- II. The duty to cooperate in the law of the European Union
  1. Selected examples of lack of cooperation in EU law
  2. Penalties for failure to cooperate in European Union law
- III. Co-operation within the course of a control in Polish law
  1. The normative triad of co-operation in Poland
  2. Penalties for non-cooperation under national law
- IV. Conclusions

**Summary:** The article analyzes the requirement and importance of cooperation concerning the relationship between the controlling competition authority and the controlled economic entity. In

the light of EU and Polish jurisprudence, it presents the essence and role of proper cooperation within the course of control activities undertaken by the representatives of competition authorities. Also presented is the issue of possible financial penalties in the event of an improper or insufficient fulfillment of the co-operation obligation. The paper outlines then the manner of a control, so that the financial controller does not impose financial penalties upon the enterprise being controlled.

**Key words:** control; cooperation; dawn raid; anti-trust proceedings; control rights.

**JEL:** K21

### Legislation and Case Law Reviews

Monika Bychowska, **Assessment of the ‘significance of the restriction of competition’ premise in the context of defining relevant markets in the case-law on concentration control of entrepreneurs**

#### Table of contents:

- I. Introduction
- II. Conflicting interests
- III. Significant restriction of competition
- IV. Summary

**Summary:** Control of concentration is one of the competences of the President of the Polish competition authority. The exercise of this competence is intended to prevent competition restrictions resulting from structural behaviors of entrepreneurs. A ‘significant restriction of competition’ is the premise examined during the adjudication process in matters related to the control of concentrations. There are no uniform tests that would allow a clear determination of the fulfillment of this premise. A significant restriction of competition is always analyzed in an individual case of an actual concentration.

**Key words:** concentration of undertakings; control of concentration; significant restrictions on competition; horizontal impact; vertical impact; relevant market.

**JEL:** K21

Władysław Hydzik, **Economic evidence in the assessment of concentrations on the example of taking control over EDF Polska S.A. by PGE Polska Grupa Energetyczna SA**

#### Table of contents:

- I. Introduction
- II. Negative conditions for concentrations
- III. Presentation of the Capital Group Polska Grupa Energetyczna S.A.
- IV. Analysis of economic evidence contained in the Decision
- V. Conclusion

**Summary:** The article discusses the issue of assessing the economic effects of a vertical concentration, with particular emphasis on the possibility of restricting access to the factor of production. An example of a concentration in the power sector was selected for the analysis – the takeover of EDF’s assets by the Polish Energy Group PGE. The issues raised above all relate to economic evidence that indicated the possibility of restricting access to the wholesale electricity

market after the concentration of PGE and the EDF Group and to identify the unexplained factors in accordance with the Guidelines on the assessment of non-horizontal business combinations under the Council Regulation on the control of concentrations between undertakings.

**Keywords:** concentration; factor; competition.

**JEL:** K21

Teresa Kaczyńska-Kochaniec, **Are changes coming concerning the approach of competition authorities regarding conditional rebates applied by dominant companies?** Judgment of the Court (Grand Chamber) dated 6 September 2017 in case C413/14 P *Intel Corp. Inc. vs. European Commission*

**Summary:** This article provides a concise description of the main competition problems related to the proceedings initiated by the European Commission against the Intel Corporation Inc., the world leader in the market for computer processors. The purpose of this article is to outline the proceedings up to now in the context of the use by dominant companies of conditional rebates, in particular loyalty rebates. Within the framework of this article, the author has assessed the ECJ's judgment and noted both the positive and negative aspects of this ruling.

**Keywords:** dominant position; conditional rebates; loyalty rebates; AEC test; as efficient competitor test.

**JEL:** K21

### Book Reviews

Daria Kostecka-Jurczyk, **Concentration in the form of a joint venture and the competitive risk in the light of competition law**, C.H. Beck, Warsaw 2017, pp. 304 (Rajmund Molski)

Dariusz Aziewicz, **Assessment of the market power of an entrepreneur within the supervision of horizontal concentrations of entrepreneurs**, University of Warsaw Faculty of Management Press, Warsaw 2017, pp. 329 (Cezary Banasiński)

### Reports

Seminar **“Challenges in trade relations in the food supply chain after the entry into force of the law on contractual advantage”**, March 7<sup>th</sup>, 2018, Faculty of Management of the University of Warsaw (Adam Jasser)