

Institutional framework of competition law system
(from the volume editors)

CARS Honorary Award for Professor Andrzej Wróbel

ARTICLES

Paweł Podrecki, Mateusz Mroczek, Katarzyna Menszig-Wiese, **About the need of transition of the President of the Office of Competition and Consumer Protection into a collegiate competition authority**

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- I. Introduction
- II. The importance of the institutional model of competition law enforcement
- III. Monocratic-monistic institutional model of competition authority
- IV. Proposed shape and principles of functioning of a collegiate competition authority in Poland
 1. Two Authorities – one Office
 2. The remit and methods of operation of the Competition Protection Commission
 3. Composition and the appointment rules of the Competition Protection Commission
- V. Advantages of the proposed model - summary and conclusions

Summary: Taking into account the approaching 30th anniversary of the establishment of a modern competition protection system in Poland, based on a one-man central administrative body – the President of the Office of Competition and Consumer Protection, the authors of the article want to start anew and join to the debate on institutional form of the Polish competition authority. This article briefly summarizes the discussions conducted by representatives of jurisprudence on the issue. The authors also identify the most important deficits of the current institutional model – primarily in the light of human rights protection standards and the requirements set out in the ECN+ directive. The article also puts forward a concrete proposal to transform the current monocratic Polish competition authority into a collegiate body (the Commission for Protection of Competition) and arguments in favor of the proposed model.

Key words: national competition authority, collegial body, Office for Competition and Consumer Protection, impartiality and independence of NCA.

JEL: K21

Małgorzata Kozak, **One, three and two, and independent will be you... On the necessity of the wider analysis of independence of Polish National Competition Authority in the light of ECN+ directive**

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- I. Introduction
- II. Independence: The Concept, its Limits, and Components
 1. The Concept of Independence

- 2. Impartiality
- 3. Accountability and Transparency
- III. Independence in the Context of the Authority's Function
- IV. Independence in the EU Law
 - 1. Legal Situation Before the Admission of Directive ECN+
 - 2. Independence and Accountability in the Light of Directive ECN+
- V. Implementation in Poland
- VI. Summary

Summary: The article is an attempt to analyze the issue of assuring the independence of competition authorities in connection with the adoption of Directive 2019/1. It analyzes: the independence in the context of the authority functions, components and boundaries of the concept itself (accountability and transparency) and how the Directive 2019/1 and attempts to implement it so far in Poland (still at the stage of a draft) carry out the postulates made by *academia*. The author indicates that shaping the independence of a competition authority cannot be made in isolation from the objectives and functions performed by that authority, and in particular must take into account the context of ensuring the effectiveness of the authority's operation and protection of procedural rights of undertakings whose activities the authority deals with. Implementation of the Directive 2019/1 in Poland should be preceded by an in-depth discussion on the position of the OCCP in the context of these principles.

Key words: competition protection, OCCP, independence, accountability, entrepreneurs' rights, directive ECN+, directive 2019/1 ECN.

JEL: K210, L490

Maciej Majewski, **Cartel and its participant within the meaning of the Act on the actions for damages for infringements of competition law**

Table of contents:

- I. Introduction
- II. Rationality behind introducing the term cartel to Polish legal language
 - 1. General remarks
 - 2. Rationality behind differentiating the scope of rights and obligations of cartel participants solely in private enforcement
 - 3. Method of harmonisation
 - 4. Summary
- III. The scope of terms 'cartel' and 'participant in a secret cartel' – controversies
 - 1. General remarks
 - 2. Formal requirement
 - 3. Subjective requirement
 - 4. Objective requirement
 - 5. Secret nature of the cartel
- IV. Proposal on interpretation

Summary: This article concentrates on the problem of interpretation of the term 'cartel' used in the Act of 21 April 2017 on the actions for damages for infringements of competition law which

implements to the Polish legal system the 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. To begin with, the analysis covers the rationality behind introducing the term 'cartel' to the Polish legal language. Next, presented are certain controversies regarding this term's interpretation. The article ends with a proposal on how to understand the provisions of the Act concerning cartels or their participants.

Key words: horizontal agreement; cartel; participant in a secret cartel; infringement of competition law; action for damages; directive 2014/104/EU, private enforcement.

JEL: K21

Agnieszka Chudyba, **The Binding Effects of Soft Law. Some remarks from the EU Competition Law perspective**

Table of contents:

- I. Introduction
- II. The use of soft law at the EU level
 1. Self-binding effect
 2. Enforceability in court
- III. The use of soft law at the national level
 1. Binding effects
 2. Enforceability against individuals

Summary: The use of EU soft law raises many doubts. On the one hand, the question is whether the legality of soft law acts may be challenged before the European courts. On the other hand, one may wonder to what extent the EU and national institutions should be bound by soft law instruments. The author focuses on this second issue. Firstly, she examines the so-called self-binding effect of EU soft law as well as its enforcement by the EU courts. Secondly, the author examines whether this binding effect of soft law may be observed at the national level. Competition law is a perfect example in this respect.

Key words: soft law; EU act which is not legally binding; enforceability; challengeable act; legal effects; self-binding effect; guidelines; notices; communication.

JEL: K20, K21, K41

LEGISLATION AND CASE LAW REVIEWS

Agata Zawłocka-Turno, **Broad rewarding by the EC and OCCP of undertakings' cooperation within the proceedings concerning competition law infringements**

Table of contents:

- I. Introduction
- II. Legal basis for undertakings' cooperation with the EC and OCCP
 1. Negotiated enforcement of competition law
 2. Leniency
 3. Settlements

4. Commitments decisions
5. Guidelines on method on setting fines
- III. EC and OCCP decisional practice of rewarding undertakings' cooperation outside existing procedures of leniency, settlements and commitment decisions
 1. EC decisional practice
 2. EC guidance concerning reduction of fines for cooperation
 3. OCCP decisional practice
- IV. Reasons behind broad rewarding by the authorities of cooperation
- V. Assessment of broad rewarding by the authorities of cooperation
- VI. Summary

Summary: The Article presents recent decisional practice of EC showing the tendency to broad rewarding of undertakings' cooperation with the authorities outside existing procedures of leniency, settlements and commitment decisions. It also presents OCCP's approach in this respect. Furthermore it assess, whether the broad use of negotiated approach to the enforcement of competition law does not raise risks for the effectiveness of its enforcement.

Key words: reduction of fine; rewarding cooperation within the proceedings.

JEL: K21

Grzegorz Materna, **The introduction of the compliance programme as a mitigating circumstance in the light of the guidelines of the Italian competition authority (*Autorita' Garante della Concorrenza e del Mercato*)**

Table of contents:

- I. Introduction – compliance programmes in the policy of competition authorities
- II. The current AGCM approach to compliance programmes
- III. New „Guidelines on antitrust compliance”
 1. Overview of the Guidelines
 2. The scope of an effective compliance program
 3. Rules for applying for mitigating the level of administrative fine
 4. Benefits available due to the introduction of compliance programme
 5. Specific rules on antitrust repeat offender undertakings
 6. Special rules regarding liability within the capital group
 7. Compliance programme as an aggravating circumstance
- IV. Final observations and conclusions

Summary: The article's aim is to present the approach of the Italian competition authority (*Autorita' Garante della Concorrenza e del Mercato*) to the competition compliance programs introduced by undertakings. In this regards the Authority's recent case law and its new “Guidelines on antitrust compliance “ are presented. They provide that under certain conditions undertakings that infringed antitrust rules can apply for reduction of the financial penalty imposed by the Italian competition authority. Thus, *Autorita' Garante della Concorrenza e del Mercato* recognizes that rewarding undertakings' law enforcement efforts, even if the infringement has occurred, encourages them to engage resources in preventing violations. This is a different approach than accepted by the competition authority of Poland. For that reason it is even more worth presenting it to the Polish

reader as part of the discussion on the relationship between compliance programs and the public enforcement of competition law.

Key words: compliance programs, public enforcement of competition rules, administrative fines, mitigating circumstances.

JEL: K21

Jan Polański, **On the effectiveness of antitrust enforcement in relation to vertical infringements. A comment on the 15 February 2019 judgement of the Polish Supreme Court, case I NSK 10/18 (Anyro)**

Table of contents:

- I. Introduction
- II. Decision of the Polish Competition Authority and the court proceedings
- III. The judgement of the Supreme Court
- V. The assessment of the judgement of the Supreme Court
 1. Parties to the infringement, the sentencing part of the administrative decision and the grounds of the administrative decision
 2. Relevant market
 3. RPM as 'by object' restriction
- V. Conclusions

Summary: The article constitutes a comment on a judgement delivered by the Polish Supreme Court. In the judgement the Supreme Court took a negative stance in relation to a Court of Appeals ruling which had set aside an infringement decision issued by the Polish Competition Authority concerning price collusion in the market for watches. In the judgement, the Supreme Court presented its position in relation to three important issues: the determination of the parties to anticompetitive agreements and the addressees of infringement decisions, the definition of relevant market, and establishing 'by object' infringements. In relation to each of the aforementioned issues, the judgement of the Supreme Courts fosters effective competition enforcement and consistent application of the Polish and EU competition rules.

Keywords: effective enforcement, RPM, vertical agreement, anticompetitive object, anticompetitive effect, relevant market.

JEL: K21

REPORTS

Report on the International Conference 'Judicial Deference in Competition law', University of Warsaw, 11 October 2018 (Laura Zoboli, Magdalena Gniadzik)

Contents, Summaries and Key Words