

Responsibility has many names (from the Editor-in-Chief)

ARTICLES

Joanna Affre, Przemysław Rybicki, **The tort liability of cartel participants – subjective aspects in the light of selected case-law**

Table of contents:

- I. Introduction
- II. Legal grounds for pursuing claims against cartelists
- III. Case law
 1. The lift cartel
 2. Liability of cartel participants for damages resulting from the price umbrella effect (C-557/12 *Konne and others*)
 3. Liability of cartel participants for damages towards entities not operating on the relevant market (C-435/18 *Otis GmbH and others*)
 4. The ‘rail cartel’ in Germany
 5. Personal liability of cartel participants for damages caused by competition law infringements
- IV. Summary

Summary: The article concentrates on the problem of the liability of cartel participants towards third parties for infringements of competition law. First of all, the legal basis for the redress and the resulting rights for third parties were analysed. This was followed by judgments of the CJEU and national courts, in which victims – not bound by a contract with the cartel participants – claimed damages from them. The analysis of the case-law shows how far the liability of the cartel participants reaches and what are the limitations of this liability.

Key words: cartel; cartel participant; competition law infringement; claim for compensation; directive 2014/104/UE, *private enforcement*; the price umbrella effect.

JEL: K21, K42

Mateusz Dąbroś, **Piercing the corporate veil applied in private enforcement**

Table of contents:

- I. Preliminary remarks
- II. The CJEU ‘Skanska’ judgment
- III. The jurisprudence of public enforcement of competition law
 1. The doctrine of economic succession
 2. The concept of single economic unit
- IV. Piercing the corporate veil
- V. Summary

Summary: In the context of private enforcement of competition law, the issue of piercing the corporate veil, that is, the possibility of holding a non-direct infringer liable becomes particularly important. Pursuant to the thesis of the CJEU ‘Skanska’ judgment, civil courts adjudicating in cases

of damages for infringements of competition law should understand the concept of ‘undertaking’ in accordance with Article 101 TFEU and its established interpretation by the Court, which may mean also adopting, under private law, the doctrine of economic succession (economic continuity) and the concept of a single economic unit. Individual member states, such as Spain and Portugal, have already adopted relevant legal regulations regarding the issue in question. In other countries, this matter has become the subject of judicial considerations. In Poland, neither of these two situations occurs. One should opt for the broad adoption of the concept of piercing the corporate veil in the context of liability for damages arising from an infringement of competition law – with both EU and national dimension.

Key words: private enforcement; infringement of competition law; compensation; single economic unit; economic succession; piercing the corporate veil

JEL: K13, K21

Agnieszka Jelska, **The ‘cartel facilitator’ doctrine – the beginning and development in the practice of European competition authorities and case-law of EU courts**

Table of contents:

- I. Introduction
- II. The European Commission’s decision-making practice
 1. First decisions involving cartel facilitators
 2. The groundbreaking Organic Peroxides case – imposing a symbolic fine on a consultancy firm
 3. The Deltafina case
 4. The Marine Hoses case
 5. The AC Treuhand II case
 6. The ICAP case
- III. Impact of the ‘cartel facilitator’ doctrine on the decision-making practice of national competition authorities
 1. The decision-making practice of the Dutch competition authority
 2. The decision-making practice of the Lithuanian competition authority
 3. The decision-making practice of the UK competition authority
- IV. Summary

Summary: The purpose of the article is to present the issue of the ‘cartel facilitator’ doctrine based on the decision-making practice of the European competition authorities and the case-law of EU courts. The article is an attempt to approximate the behaviour of third parties, which have so far been assessed in terms of their compliance with competition law, as well as the criteria developed in EU judicial decisions, which must be met in order to be able to hold such entities liable for violations of competition law.

Key words: cartel facilitator; responsibility; anticompetitive agreements

JEL: K21

Aleksandra A. Koziół, **Responsibility and the free movement of people, goods and services within the EU. Outline of the problem**

Table of contents:

- I. Preliminary issues
- II. Works on the codification of institutions of responsibility within EU bodies
 1. Historical conditions of the work on the codification of private law within the EU
 2. Projects regarding liability institutions
 3. The problem of EU rights and codification of private law
- III. Legislative work on the issue of responsibility within the EU
- IV. Case-law of the CJEU
- V. Summary

Summary: The article is an attempt to present the problem of the impact of building the Security, Freedom and Justice Space on the institution of responsibility. Works on the codification of private law within groups and teams have been analyzed. A special place in these works was occupied by works on codifying tort liability. The European Union is also trying to sort out liability issues in the form of legal acts resolutions. The Court of Justice of the European Union also plays an important role in interpreting the application of law.

Key words: Responsibility, area of freedom of security and justice, European law

JEL: K20

Krzysztof Kanton, **Liability of undertakings for failure to provide information and documents at the request of the President of the Office of Competition and Consumer Protection—reflections following the Engie decision**

Table of contents:

- I. Introduction
- II. Required standard of request of the antitrust authority
 1. Mandatory elements of the request
 2. The purpose of the request
 3. The scope of the request
 4. The scope of undertaking's obligation
 5. Sanction for infringements of the obligation specified in Art. 50.1 of the Act
- III. Summary

Summary: The article contains an analysis of the solutions adopted in the Polish legal system governing the procedure for requesting information and documents by the President of the Office of Competition and Consumer Protection (President of UOKiK). In the first part of the article, the author discusses the basic standards that should be met by a request of the UOKiK, with regard to the scope of the request and its purpose, taking into account, in particular, the guidelines which follow from EU case-law. The author considers the scope of the obligation under Article 50 Section 1 of the Act on Competition and Consumer Protection (the Act), criticizing the solution that makes it impossible in practice to challenge the demands of the President of UOKiK without a risk of exposure to severe financial sanctions. The proposals for amendments of applicable regulations are also discussed, the aim of which would be to provide business undertakings with

an adequate standard of protection of their fundamental rights in connection with the procedure for submitting information and documents requested by the President of UOKiK. The second part of the article is devoted to issues concerning financial penalties for a breach of the obligation referred to in Article 50 Section 1 of the Act. The author discusses the current legal framework and indicates the need to introduce certain legislative changes in the future. The analysis also covers the practice of the Polish competition authority to impose penalties for a breach of the obligation under Article 50 Section 1 of the Act.

Key words: Procedural infringement; failure to provide documents; failure to provide information; financial penalty; request for information

JEL: K21, K42, L49

Konrad Kohutek, **The passing-on of overcharges in actions for antitrust damages: directive, case-law and selected national regulations**

Table of contents:

- I. Introduction
- II. Germany
 1. Statutory regulations
 2. The 'ORWI' case: indirect purchasers entitled to claim damages
 3. The 'Göttingen v. MAN' case: plaintiffs need not fear the passing-on defence?
- III. Great Britain
 1. Statutory regulations
 2. The 'Sainsbury Supermarkets v. MasterCard' case: demonstrating price increases on the downstream market as a condition of effective passing-on defence
- IV. Spain: the 'Llace v. Volvo / Renault' case: the lack of similarity between the market to which the overcharge was passed-on and the cartelized market precludes the passing-on defence?
- V. The Netherlands: the 'Tennet v. ABB' case: effectiveness of civil law antitrust liability 'more valuable' than avoiding overcompensation?
- VI. Poland
 1. General comments (provisions of the Act)
 2. The 'Cement cartel' case: 'compensation' for the increase in cartel prices
 3. The case of charges for access to railway infrastructure: the passing-on charge 'verbalized' in Polish case-law
- VII. Final remarks

Summary: The article presents the rules for applying the concept of the passing-on of overcharges by a party harmed by an infringement of competition law. These are the rules developed in the jurisprudence of selected Member States, as well as in the relevant national provisions (based on Directive 2014/104 / EU). The study is focused primarily on case-law. Judgments of the courts of those Member States in which the model of private enforcement (also before the entry into force of the above-mentioned directive) was relatively well developed (such as Germany, Great Britain) are cited and commented upon. The study also contains a reference to the judgments of Polish courts, which, however – in the area of private enforcement (including the issue of passing-on) – are very few.

Key words: passing on overcharges, indirect purchaser, direct purchaser, antitrust damage, *private enforcement*; unjust enrichment

JEL: K21

Krzysztof Witek, **'Public compensation' of the President of UOKiK – an outline of the problem of unlawfulness**

Table of contents:

- I. Introduction
- II. An attempt to define public compensation
- III. Existing examples of public compensation
- IV. The problem of compliance of compensation with systemic and legal standards
- V. Conclusions

Summary: Over the past few years, the President of UOKiK began to use an institution unknown to the law: public compensation. The necessity of its creation is explained by the constant reduction of penalties imposed on entrepreneurs by the courts, and thus the weakening of the repressive effect. However, this practice is not based on legal provisions and may constitute a violation of a number of provisions of a systemic and guarantee nature. This article attempts to present and sort out the controversy related to the institution's use of the institution, indicating possible points of its contradiction with applicable law.

Key words: consumer protection; collective consumer interests; competition and consumer protection; public compensation; Polish Constitution

JEL: K23, K41

LEGISLATION AND CASE LAW REVIEW

Dominik Borek, **A critical comment to the judgment of the Supreme Administrative Court (NSA) of 6 March 2019, reference number II GSK 415/17**

Table of contents:

- I. Brief facts
- II. The NSA's main position
- III. Criticism of the NSA position

Summary: In this article, the first two points, marked with Roman numerals, are quoted on the basis of the case law of administrative courts (Provincial Administrative Court in Warsaw – WSA and the Supreme Administrative Court – NSA) discussed in the present case. Often, the facts are cited directly in the words of the courts, because in this way, in relation to the relevant documents, the facts and the decision were presented in a shortened form readily to readers. In this regard, in order to possibly broaden the knowledge, I refer directly to the decisions and judgments on the basis of which the summary and clear information was compiled.

Key words: hotel facility, hotel

JEL: K20

Piotr Cybula, **Application of the Act on tourist events and related tourist services to assess the effects of a client's withdrawal from a package travel contract concluded before its entry into force.**

Comment to the judgment of the District Court in Jędrzejów of October 3, 2019 (I C 820/18)

Table of contents:

- I. Introduction
- II. Facts
- III. Decision
- IV. Comment
- V. Summary

Summary: The subject of this comment is the judgment of the District Court in Jędrzejów of October 3, 2019 (I C 820/18). In this case, the court assumed that the Act of 24 November 2017 on package travel and linked travel arrangements, applies to the assessment of the effects of the client's withdrawal from the package travel agreement, which was concluded on September 27, 2017, i.e. during provisions of the Act of 29 August 1997 on tourist services, and before the entry into force of the Act on package travel and linked travel arrangements,. The comment criticized this position, indicating that there were no grounds to apply the said Act in this case. In particular, the financial legal consequences of the client's withdrawal from the contract cannot be considered in the context of art. 47 section 2 of this Act.

Key words: withdrawal from the contract; package travel contract, intertemporal law

JEL: K12

Mariusz Czyżak, **Breach of reporting obligation due to employee error, preventive and educational function of punishment.**

Comment to the judgment of the Court of Competition and Consumer Protection of 25 July 2019, XVII AmT 34/18 (Legalis No. 2244168)

Table of contents:

- I. Thesis
- II. Facts
- III. Comment

Summary: The judgment of the Court of Competition and Consumer Protection concerns criminal and administrative liability for failure to comply with the reporting obligation towards the President of the Office of Electronic Communications. The comment discussed the issue of the status of a partner in a civil law partnership, as an entity subject to a financial penalty, the issue of the objective nature of criminal and administrative liability in telecommunication law, as well as the problem of the impact of employee error on the liability of a telecommunications undertaking due to an administrative tort.

Key words: financial penalty; telecommunication; error

JEL: K23

BOOK REVIEWS

D. Borek, H. Zawistowska (ed.), **Commentary to the Act on package travel and linked travel arrangements, Publisher ODDK, Gdańsk 2020, pp. 573** (Jerzy Gospodarek)

Marek Rotkiewicz, **Act on the liability of public officials for a gross violation of law. Commentary** (Katarzyna Płonka-Bielenin)

D. Borek, H. Zawistowska (ed.), **Commentary to the Act on package travel and linked travel arrangements Publisher ODDK, Gdańsk 2020, pp. 573** (Dominik Wolski)

REPORTS

Kamila Staluszko-Sterna, **World Competition Day – Effective Combating Market Collusion, Conference of the Office of Competition and Consumer Protection on 10 December 2019**

Contents, Summaries and Key words