

Mergers and acquisitions: anything new under the Sun? (from the Volume Editor)

ARTICLES

Dariusz Aziewicz, **Is it worth talking about concentrations? Considerations on the possibility, legitimacy and a method of introducing a hearing to an antitrust proceeding as an obligatory element**

Table of contents:

- I. An oral proceeding as an exception to the written rule of administrative proceedings conducted by the UOKiK President
- II. A hearing in proceedings before the UOKiK President
- III. European Commission's practice in concentration proceedings
- IV. Specificity of antitrust proceedings in concentration cases
- V. A hearing and general rules of the Code of Administrative Procedure and a right to an oral hearing before a competition authority
- VI. Summary

Summary: The article concerns issues regarding the possibility of conducting oral hearings as part of Polish merger control proceedings conducted by the President of the Office of Competition and Consumer Protection. The subject of this article is the possibility and legitimacy, as well as the way of introducing an oral hearing into antitrust proceedings concerning merger control as an obligatory element of these proceedings.

Key words: supervision over concentrations; merger control; merger control proceedings, oral hearing.

JEL: K21, K40

Anna Laszczyk, **A vehicle blind spot - considerations on gun-jumping**

Table of contents:

- I. Introduction
- II. Suspensive effect of a notification of a concentration in EU law
- III. Content of a *standstill* duty according to the CJEU
- IV. Partial contribution to a change in control as a violation of a *standstill* duty
 1. *Altice* case
 2. *Canon/Toshiba* case
 3. (Still) vehicle blind spot?
- V. Gun-jumping and the Polish system of concentration control
 1. Basic rules of the Polish system of concentration control
 2. False start in an acquisition of property according to competition law
 3. Vehicle blind spot, or gun-jumping and JV in Polish law
- VI. Summary

Summary: A vehicle blind spot, that is, an area that cannot be seen in a car mirror. This article claims that, despite the development of the EC's and CJEU's case law, gun-jumping consisting of a partial contribution to the change of control is a blind spot of EU merger control. The CJEU explained that the key criterion for the assessment of the standstill obligation is the lasting change of control, but it also encompasses said partial contribution and this leaves a wide margin of interpretation. EC's decision practice does not so far allow for anticipating behaviour that would be considered as gun-jumping. The article also discusses the Polish NCA's experience in gun-jumping and considers gun-jumping in relation to the creation of a joint-venture as a blind spot.

Key words: gun-jumping; merger control; lasting change of control.

JEL: K21

Irena Gajewska-Leite, Małgorzata Modzelewska de Raad, **Inspections and searches conducted by the UOKiK President. Five years of experience after these institutions were separated – already apart or still together?**

Table of contents:

- I. Introduction
- II. An inspection and a search before amendments dated from 10 June 2014. The purpose of separating these institutions
- III. An inspection and a search as a method to obtain evidence – in the system and comparative context
- IV. An inspection and a search in the Act on Competition and Consumer Protection
- V. The essence and legal basis of an inspection conducted by the UOKiK President. Application of the Entrepreneurs' Act
- VI. The essence and legal basis of a search conducted by the UOKiK President. Application of the Code of Penal Procedure
- VII. Activities in inspections and searches – practical comparison
- VIII. Inspections and searches conducted by the UOKiK President: practice and statistics in 2015–2020. Conclusions
- IX. Entrepreneur's obligations and sanctions for non-compliance
- X. Legal protection measures for entrepreneurs. Possibility to verify the legitimacy and legality.
- XI. Protection of an advocate/a legal adviser's secrecy
- XII. Summary – *de lege ferenda* proposals

Summary: The article aims at comparing inspections and searches, two procedures used by the UOKiK President to obtain evidence of anticompetitive practices. The paper does not provide an exhaustive description of these two institutions but rather, it shows them from the point of view of their significant similarities and differences. The analysis is limited to antitrust cases where the two discussed tools play an incomparably greater role than in consumer cases where their application is rare.

Key words: inspection; search; procedural guarantees; right to be heard.

JEL: K21, K40

Janusz Michałek, Mirosław Pachucki, Mateusz Rzeszowski, **Polish Investment Zone – a technology transfer tool for the development of industry 4.0. De lege ferenda conclusions**

Table of contents:

- I. Introduction to the Polish Investment Zone
- II. Tasks of the Polish Invest Zone's area managers
- III. Industry 4.0 in actions of special economic zones
- IV. National programmes promoting R&D
- V. Technology transfer in the Polish Investment Zone as a tool for industry development 4.0

Summary: In this article, the authors analyze the legal aspects of using the state aid instrument within the Polish Investment Zone for technology transfer to SME companies. In the opinion of the authors, granting public aid to entrepreneurs operating on the basis of a decision on support, implementing new investment projects in support areas, should be an incentive not only for the implementation of projects, but also to create conditions for the sharing of technological solutions with contractors and subcontractors. An appropriate modification of the regulations on the Polish Investment Zone may constitute an element of intensification of technology transfer on the investor–contractors line, in particular SME companies would be the potential recipient. In addition, the authors analyze the chances of implementing their *de lege ferenda* conclusions in the context of the benefits of absorbing Industry 4.0 solutions – the fourth industrial revolution.

Key words: industry 4.0; research and development; technology transfer; tooling; Polish investment zone; qualitative criteria; tax incentives; European development strategy.

JEL: O38, O30, O33, K33, K34

CASE LAW REVIEWS

Aneta Sakowicz, **On an attempt to interpret the scope of the duty to suspend a concentration in EU competition law. Commentary on the judgment of the Court of Justice of the European Union of 31 May 2018 in the case C-633/16 – *Ernst & Young versus Konkurrenserådet***

Table of contents:

- I. Introductory remarks
 1. Information regarding the CJEU judgment
 2. Standstill obligation under EU competition law
 3. Violation of the standstill obligation as indication of gun-jumping
 4. The European Commission's approach to the scope of the standstill obligation prior to the CJEU judgment
- II. Facts and legal framework
 1. Facts
 2. Jurisdiction of the CJEU and questions referred
- III. CJEU's ruling
- IV. Analysis and commentary
 1. "Contribution to the change in control" – test
 2. Delimitation between Article 7 EUMR and Article 101 TFEU

V. Impact on the EC's practice

1. Case *Altice/ PT Portugal*2. Case *Canon/ Toshiba Medical Systems Corporation*

VI. Summary and conclusions

Summary: The purpose of this article is to discuss the judgment of the CJEU of 31 May 2018 in case C-633/16, *Ernst & Young P/ S v. Konkurrencerådet* due to its significance for the qualification of specific behaviors of the merging-parties within the broadly understood gun-jumping practice. According to the judgment, the approach of the CJEU to the scope of the standstill obligation, as well as to other anti-competitive cooperation of entrepreneurs at the stage preceding the implementation of the concentration, will be presented. The above mentioned issues will be then analyzed and commented on. Furthermore the article will explore the impact of the judgment on the European Commission's decisional practice. As the summary, some conclusions resulting from the judgment of the CJEU will be drawn, which should be considered in future M&A transactions.

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

JEL: K21

Eliza Iwaniszyn, **Acquisition of a part of an entrepreneur's property as a premise for notifying the intention of a concentration on the example of the UOKiK President's decision of 31 December 2019 in the case of *Dino Polska S.A.***

Table of contents:

I. Introduction

II. General remarks

III. Intention of a concentration and the moment of notification

IV. Definition of acquisition of property

V. Attribution of turnover to the acquired property

VI. Summary

Key words: *gun-jumping*; concentration; acquiring of a part of property; notification of a concentration.

JEL: K21

Konrad Zawodziński, **Decisions on the derogation of both Nord Stream gas pipelines as an element of the multilevel enforcement of EU law**

Table of contents:

I. Introduction

II. EU context of amendments to the Gas Directive

III. National context of an application of the amended Gas Directive

IV. Jurisdiction of a national authority and a requirement of the completion of infrastructure

V. Nature of the term "until 24 May 2020" and the powers of the national authority

VI. Summary

Summary: The decisions of the German regulator, Bundesnetzagentur, announced in the second half of May 2020, regarding the derogation from EU rules of the common gas market for Nord Stream and the refusal to grant it to Nord Stream 2, are a consequence of the amendment to the Gas Directive adopted on 17 April 2019, which is in line with a wider context. They contribute to

the discourse on the validity of the EU regulatory regime in time and space, and also constitute an important example of the complex application of procedural and substantive law in the case of episodic regulation. They are accompanied by CJEU decisions rejecting the complaints of Nord Stream companies against the amendment to the Gas Directive and the announcement of procedural orders by the arbitral tribunal examining Nord Stream 2 AG's complaint against the EU, co-determining the multilevel enforcement of EU law.

Key words: derogation; energy solidarity; Gas Directive; Nord Stream; regulatory exemption.

JEL: K20, K23, K33

Marcin Kulesza, **Feature of a valuable consideration of “free” Facebook service – a thesis of the judgement of the Regional Administrative Court of Lazio (Rome), dated 10.01.2020, in case no. 261/20 Facebook**

Table of contents:

- I. Introduction
- II. AGCM decision regarding Facebook
- III. Court judgment – valuable consideration for Facebook service
- IV. Commentary

Summary: The article presents a thread of a decision of the Italian competition and consumer protection authority and of a judgment of the administrative court deciding the case on an appeal, regarding the acknowledgement of the economic value of data provided to Facebook by users subscribing to its service. The court confirmed the AGCM's finding that data have such economic value and, therefore, the transaction of service subscription is mutual and, further, it creates certain operator's obligations towards the user treated as a consumer. It is the first instance of such a decision of an authority or of a court of an EU Member State.

Key words: consumer law; consumer; consumer agreement; value of data; personal data.

JEL: D18, D86, K12, K15, K23, K24, K41

CONFERENCE REPORTS

ASCOLA Central Europe Chapter webinars series, 'Competition Law Enforcement and Covid-19: Developments in Central Europe', June-July 2020 (*Maciej Bernatt, Laura Zoboli*)