

Guidelines, communications and others: acts of soft law in the application of competition law (from the Editors-in-Chief)

ARTICLES

Anna Młostoń-Olszewska, **A few critical remarks on the ‘Explanatory note for entrepreneurs – searches’, issued by the President of Polish Office of Competition and Consumer Protection on 9 December 2019**

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Summary: The subject of the article is the ‘Explanatory note for entrepreneurs – searches’, which was issued by the President of the Polish Office of Competition and Consumer Protection (hereinafter; President of UOKiK) on 9 December 2019. This Explanatory note is an act of soft law, which, by definition, should be the source of information for entrepreneurs about the interpretation of the law made by the President of UOKiK. It was pointed out in the article that the Explanatory note doesn’t refer to many important problems connected with searches provided by the President of UOKiK, which can negatively affect entrepreneurs’ rights. Consequently, the most important problems requiring interpretation, which should be added and explained in the Explanatory note were listed in the article.

Key words: competition law; human rights protection; legal procedure.

JEL classification: K21, K38, K40

Jarosław Łukawski, **On the need for the President of UOKiK to issue guidelines on conditional clearance decisions for mergers between undertakings**

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Summary: The article provides an analysis of whether the current legal regulations concerning conditional clearance decisions in merger control cases, as well as the practice of their application by the President of the Office of Competition and Consumer Protection, justify the need for the Polish antitrust authority to publish detailed guidelines on conditional consents. The analysis has been conducted on the basis of the position of the case law and doctrine regarding the need for the Polish antitrust authority to publish guidelines on the provisions of competition law as well as practical problems that arise on the grounds of conditional consents issued so far by the antitrust authority.

Key words: conditional clearance decision; conditions; clarifications; guidelines; merger control.

JEL classification: K21, G34

Marcin Kulesza, **A non-compete clause covering the entity ultimately controlling the seller in transactional contracts and the Commission notice and case law concerning ancillary restraints**

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- II. Ancillary restraints
- III. Entities subject to a non-compete clause according to the Commission notice on ancillary restraints
- IV. A non-compete clause extending to an entity that dominates a participant to the transaction in the decisional practice of the President of UOKiK
- V. Summary

Summary: The paper presents an analysis of the European Commission Notice on restrictions directly related and necessary to concentrations and Commission merger control decisions from the perspective of the admissibility of ancillary restrictions including non-compete clauses covering as their subject, apart from a direct seller, entities placed above it in its capital group's structure, including persons or entities ultimately controlling the seller. Such clauses often appear in transactional practice, usually raising doubts as to their compatibility with competition laws. The paper aims at presenting arguments supporting the admissibility of such clauses derived from the Notice and from Commission decisions. In addition, it studies decisions of the President of UOKiK regarding this issue.

Key words: non-competition; non-compete; ancillary restraints; capital group; controlling entity; merger control.

JEL classification: K12, K21

Jan Polański, **Neobrandisianism and the Political Content of Antitrust**

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- VI. Conclusions

Summary: The rise of Big Tech reinvigorated the debate on the role of antitrust enforcement. While in Europe antitrust authorities have taken an active stance on policing the actions of Big Tech, in the United States the emergence of the digital giants provided a platform to voice concerns over the philosophy underlying modern antitrust. The prevailing view that antitrust should become more and more economic and less ‘political’ has been questioned by the supporters of the New Brandeis Movement, who argue that ‘antitrust is dead’. According to Neo-Brandisians, for antitrust to be reborn, a fundamental change in the perception of antitrust is needed. The article discusses the state of the debate on the New Brandeis Movement in the United States and the possible impact of Neo-Brandisianism on the antitrust enforcement in Poland. The article argues that while Polish antitrust never fully embraced the Chicago revolution, there are reasons to believe that it may move further towards the ‘welfarist’ goals of antitrust, which – in a similar vein as in the United States – might not be in line with the intended purpose of antitrust policy. Taking that into account, the article argues that a further discussion on the shape of Polish antitrust and its ordoliberal foundations might be advisable. The article concludes, however, that it is unclear whether the New Brandeis Movement will prove to be successful and that, ultimately, the role of antitrust might depend on external factors driving the debate on economic policy which go beyond simple antitrust considerations.

Key words: Big Tech; brandeisianism; goals; deregulation; law and economics; antitrust; neo-brandeisianism; neoliberalism; ordoliberalism; antimonopoly; competition law; structuralism; Chicago School of Economics.

JEL classification: K21

Joanna Affre, Krzysztof Witek, **Soft law of the President of the Office of Competition and Consumer Protection (UOKiK) on the example of the ‘Information on how to file a motion to restrict the right to access’**

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- II. Soft law – a source of law?
- III. Soft law of the President of the Office of Competition and Consumer Protection
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- V. Protection of trade secrets in the Act on Combating Unfair Competition
- VI. Trade secrets and their protection in the Competition and Consumer Protection Act
- VII. Polish soft law: ‘Information on how to file a motion to restrict the right to access’
- VIII. Conclusion.

Summary: The article focuses on the problem of the relationship between the rights of defence of the parties in the proceedings before the President of UOKiK and the protection of trade secrets. The issue has been assessed taking into account the notion of the application of soft law by the Authority, including the information on how to submit applications to restrict the right to access in the proceeding. The text took into account the problem of the outdated soft law and possible risk for entrepreneurs following the instructions of the President of UOKiK.

Key words: trade secret; soft law; violation of the competition law; uokik.

JEL classification: K21, K23, K41

Katarzyna Racka, Weronika Herbet, **Defining the relevant market in the pharmaceutical sector in antitrust cases – role of the European Commission Notice on the definition of relevant market for the purposes of Community competition law**

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Summary: The relevant market is one of the key concepts of competition law; its determination is a fundamental element of any antitrust procedure, both at the EU and national level, and a tool allowing entrepreneurs to assess their market position for the purpose of identifying potential risks related to implemented operational activities. One of the instruments used to ensure consistency in the definition of the relevant market in the practice of antitrust authorities is the European Commission Notice on the definition of relevant market for the purpose of Community competition law. The aim of this article is to assess its adequacy in the context of the application of antitrust law to entrepreneurs operating in the pharmaceutical sector. The paper includes a discussion of the legal nature and meaning of the above mentioned notice, a concise discussion of its content in terms of guidelines for determining the relevant market in product and geographic terms. On the basis of the characteristics of the pharmaceutical sector – its participant and product structure, as well as the main factors shaping competition on pharmaceutical markets – the authors analyze: whether the guidelines included in the Commission Notice remain adequate and up-to-date in this respect; on which criteria, for the purposes of their own internal analysis, should entrepreneurs operating in the pharmaceutical sector rely; and what are the possible desirable changes to the discussed soft law in order to adapt it to specific market realities.

Key words: relevant market; pharmaceutical sector; notice of European Commission; soft law; substitutability of medicinal products.

JEL classification: K210

Szymon Murek, **Guidelines on the method of setting fines versus proportionality of fines imposed by the President of UOKiK – attempted analysis**

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- I. Introduction
- II. Fines in competition law
 1. Outline of the fining system
 2. Functions of fines
- III. Amount of fines imposed by the Polish Competition Authority
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- IV. Conclusion

Summary: In this article, the author discusses the policy of fining undertakings applied by the President of UOKiK through soft law acts pertaining to the method of calculating fines issued by the President of UOKiK. The initial part of the article outlines the system of fines in competition law, with particular emphasis on their functions. The next part of the article analyses the President of UOKiK's decision-making practice, in particular at the turn of 2019 and 2020,

in terms of the necessity of updating the Polish guidelines on fines with new categories of infringements.

Key words: fine; soft law; guidelines; amount of fines.

JEL classification: K21, K42, L49

Monika Iwaniec, **Soft law as a contemporary instrument for regulating economic life**

Table of contents:

- I. Introduction
- II. Legal nature of 'soft law'?
- III. Place and role of 'soft law' in the legal system
- IV. Validity of the law – legal significance or binding force
- V. Summary

Summary: This study focuses on the nature (Part II), functions (Part III) and legal effects of soft law instruments (Part IV) both in the national and international system. Its aim is to construct a theoretical and practical framework for legal compliance (in particular in the form of: guidelines, communications, compliance programmes, best practices, etc.) – in the discourse of national and EU courts. Courts do not convert soft law into hard law, but subject it to judicial interpretation and/or recognition. Recognition and binding force are used in cases where the judiciary clearly interprets – that is, agrees or disagrees with the content of the non-binding acts, or treats their content implicitly but in a circular manner – that is, without express reference to soft law instruments in the judgment, but rather more to moral, ethical norms and customs.

The dynamic changes that are taking place in social life today are influencing changes that are related to the formalization of the sources of international law. Soft law should not be considered a 'normative disease' but rather, a symbol of the present day and a product of necessity. The strength of the state depends on the coherence of the law and the environment of non-legal regulations created, in particular, by large corporations, and which exert a significant influence on entities that conduct economic activities. Multicentricity, multisource, multi-level structure and the power of 'soft law' lead to the transformation of the law and changes in its functions. The aim of the article is to present the problem of applying soft law in practice, to draw attention to the 'fictitious' assumption that it has no binding force (in legal theory), but has a strong impact and fulfills many important functions in practice, mainly in economic law – hence its special place and role in the legal system.

Key words: coherence of the law; 'soft law'; regulations; recommendations; interpretative and decisional instruments; steering instruments; preparatory instruments; compliance; binding force.

JEL classification: K21, K42, L49

REVIEWS OF LAW AND JURISDICTION

Sabina Famirska, **The impact of soft law on the jurisprudence of Polish courts with reference to the imposition of fines for the use of competition-restricting practices (selected examples)**

Table of contents:

- I. Introduction
- II. Methodology of determining fines according to the Explanations

- III. Doubts about the methodological correctness of the Explanations
- IV. Courts' approach
- V. Unlimited scope of judicial decisions
- VI. Summary

Summary: The article analyses the impact of the President of UOKiK's official Explanations concerning the imposition of fines for practices restricting competition on the case law of Polish courts. First, the author analyses the methodology for determining fines resulting from the President of UOKiK's Explanations and presents reservations regarding this methodology that appear in literature. She then presents selected judgments of Polish courts, which apply or invoke the methodology applied by the President of UOKiK to a various degree. Finally, the article raises concerns pertaining to the application by courts of methodology taken from a non-binding document.

Key words: practices restricting competition; infringement of competition law; financial penalties; methodology of setting financial penalties; soft law; explanations concerning penalties for practices restricting competition; Polish case-law.

JEL classification: K21, K23

Agnieszka Chudyba, **Justiciability of soft law. The approach of the Court of Justice of the European Union in the light of the case law of selected Member States**

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 - 1. National level
 - 1.1. Plea of illegality
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 - 2. EU level
 - 2.1. Plea of illegality
 - 2.2. Preliminary ruling procedure

Summary: Should soft law issued by national regulators or the European Commission be subject to judicial review? On the one hand, given the non-binding nature of the soft law, the supporters of the traditional approach deny its justiciability. On the other hand, albeit non-binding, soft law may deploy significant legal effects. It not only limits the discretion of public authorities, but also impacts on the behavior of market participants. Leaving soft law outside the sphere of judicial review could amount to a violation of the right to an effective remedy. Having regard to these discrepancies, the article aims to present and compare different mechanisms of judicial review in the European Union and selected Member States.

Key words: soft law; droit souple; EU act which is not legally binding; justiciability; challengeable act; plea of illegality; legal effects; binding legal effects; recommendations; guidelines; notices; communication, regulation; soft regulation; new governance, EU competition law, antitrust.

JEL classification: K20, K21, K41

Ewa Weinar, **Leniency programme in Poland and France – legal and comparative analysis**

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- V. Leniency programme in France
 1. Prohibition of anti-competitive agreements
 2. Penalties for a violation of the prohibition
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- VI. Summary

Summary: The study is devoted to the leniency programme in the Polish and French legal system. As an introduction to the comparative analysis, the paper presents the genesis of the leniency institution in European law and the implementation of the Model Leniency Programme by the European Competition Network. This comparison of legal systems makes it possible to catch the differences between the two leniency models, which appear despite the fact that both competition authorities are members of the European Competition Network. The analysis gives an overview of the leniency programme in France and the way the French competition authority operates.

Key words: leniency; Polish competition law; French competition law; leniency programme; anti-competitive agreements.

JEL classification: K21, K23

BOOKS REVIEW

Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age, Columbia Global Reports, New York, 2018 (Jan Polański)

REPORTS

Report on the Seminar ‘Financial penalties for violations of competition and consumer protection law and the qualification of entrepreneurs’ behavior as elements of one or separate violations’, INP PAN, Warsaw, 30.01.2020 (Artur Szmigielski)

Report on the Seminar ‘Economic freedom and market regulation – in the light of the impact of EU and national market regulators on the activities of entrepreneurs’, WPiA UE, Warsaw, 23.05.2020 (Marta Rutynowska)

Contents, Summaries and Key words