

Richness of diversity in non-economic values of competition law (from the Volume Editor)

Keynote Introductory Words (Krystyna Kowalik-Bańczyk)

ARTICLES

Kamil Bułakowski, Living wage agreements from the perspective of the prohibition of anticompetitive agreements

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Summary: The article discusses the issue of living wage agreements in the context of the prohibition of anticompetitive agreements. The article discusses the concept of the living wage and analyzes wage-fixing agreements, including collective bargaining agreements, naked wage-fixing agreements and living wage agreements. A legal evaluation of the admissibility of living wage agreements is presented, including the most significant risks associated with their application. Additionally, the article presents the latest directions of potential developments of competition policy regarding the discussed practices.

Key words: anticompetitive agreements; wage-fixing agreements; living wage.

JEL: K21, K31, J38

Jan Polański, The Antitrust Déjà Vu? Freedom of Speech in the Antitrust Analysis

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Summary: Since antitrust laws are enforced in virtually all fields of economic activity, their scope is exceptionally broad. In consequence, antitrust can also be relatively easily linked with various issues which, at a given time, attract the attention of the ‘public opinion’ and decision-makers. In practical terms, this may concern both general industrial policies and specific policies, such as sustainable growth, ‘social goals’ present in the times of a sudden economic decline, and other goals which go beyond narrow ‘consumer welfare’. In the age of digital economy based on the flows of information, one of the issues which can be seen as a ‘non-economic’ interest is free speech, that is, the ability to freely communicate information (views, opinions, beliefs). Freedom of speech is in particular invoked in the context of ‘private censorship’, but in Poland it also attracted attention due the 2021 decision of the Polish ombudsman to appeal an antitrust decision consenting to a merger between a press conglomerate and a state-owned oil company. The article shows that the free speech narrative, which started to appear in Poland, is in fact closely connected to similar discussions in the United States, which took place in the past and are again occurring today. The article discusses possible ways of including free speech values in an antitrust analysis and obstacles in doing so. The article concludes that the discussion about antitrust and free speech can be seen as part of broader trends affecting antitrust.

Key words: antitrust; Big Tech; Chicago School; competition law; freedom of press; freedom of speech; marketplace of ideas; media; merger control; neobrandeisianism; neoliberalism; ordoliberalism; pluralism.

JEL: K21

Natan Waśniowski, Market dualism in EU merger control: a review of the assessment of the notifying parties’ market shares in the EU and in the global market on the example of Decision M.8677 and other selected EC decisions.

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Summary: This article presents concentration decisions of the European Commission (EC) in terms of assessing the market shares of the participants in the proceedings whose merger was deemed to adversely affect EU competition. Particular attention is given to the EC's opposition to the M.8677 SIEMENS/ALSTOM concentration. The conditional approval decisions M.9779 ALSTROM/BOMBARDIER and M.7278 GE/ALSTROM are presented in comparison. The review of the process of assessing economic effects of a concentration is considered in the context of the frequent exclusion of China from the relevant global geographic market, while it is increasingly the Chinese players that exert a competitive pressure on the global market both vertically or horizontally. The second part of the article provides the author's argumentation in moving away from an EU-centric economic assessment of concentration towards a global, objectified approach, specifically taking into account the EU market, and notes the absence of an overriding EU interest imperative catalogue.

Key words: merger control; European championship; competition law development; relevant market; entry barriers; competitive pressure from Chinese entrepreneurs; overriding EU interest; imperatives; Acquisition-Trap Strategy.

JEL: K21

Aleksander Stawicki, Rights of undertakings as a prerequisite for effective enforcement of competition law – considerations concerning the implementation of the ECN+ Directive

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- II. Protecting the confidentiality of communications between an undertaking and its lawyer (legal professional privilege)
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Summary: The implementation of the ECN+ Directive will certainly be a crucial moment for the enforcement of competition law rules in Poland. The investigative powers of the President of the Office of Competition and Consumer Protection will be significantly extended. Also, the liability of undertakings for violations of the provisions will be increased. It is also difficult to find an adequate strengthening of the rights of each of the parties in antitrust proceedings. The proposed changes will also apply to the protection of confidentiality of written communications between an undertaking and its lawyer, disclosed in the course of dawn raid. The new wording of the provisions raises a number of doubts, primarily with respect to the disproportionate expansion of the authority's powers. Equally controversial changes are proposed in the provisions regarding requests for information or access to the file. Extending the group of entities obliged to cooperate with the antitrust authority will lead to a disproportionate expansion of the authority's "investigative" powers. Moreover, the new amendments do not seem to properly implement the ECN+ Directive, as the proposed solutions do not guarantee the *privilege* against self-incrimination for undertakings and individuals. In these areas, Polish solutions do not follow the standards developed in EU law and in law of other Member States. The amendment should have been seen as a unique opportunity to catch up with the existing backlog in this area. Unfortunately, its current form indicates that this chance will not be taken. Even worse, if the legislator does not change its approach to the amendments, which are crucial from this point of view, we risk taking a step backwards. Meanwhile, guarantees of undertakings' rights are – in the author's opinion – one of the necessary conditions for a truly effective enforcement of competition law. Without safeguards of these rights, the risk of wrong decisions (both false negatives and false positives) is significantly higher. The work carried out in the course of the proceedings both by representatives of the Office and by the parties (and their representatives) serves the same purpose, which is to issue a substantively correct decision in a manner that is consistent with the law (in its procedural aspect).

Key words: ECN+ Directive; Legal Professional Privilege; *privilege* against self-incrimination; fine; request for information; liability of individuals and dawn raid.

JEL: K 21; K 40; L 40

Małgorzata Kożuch, The Singapore Convention and the Settlement of Investment Disputes

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Summary: In 2020, the international legal space was enriched with a new legal instrument, the Singapore Convention on Mediation. Its use in the amicable settlement of investment disputes depends on the activity of the Member States and the EU, which may access it or may remain outside its area of enforcement. In the EU legal order, following the CJEU ruling C-284/16, the entry into force of the Convention could add an instrument that meets similar objectives as the

case law of arbitration courts in investment disputes. However, the take-up of this instrument requires thinking outside the legal box.

Key words: Arbitration, Mediation, Singapore Convention, Dispute Resolution, ADR, Investment, BIT.

JEL: K33, K42

CASE COMMENTS

Maciej Janik, The decision of the *Autorité de la Concurrence* concerning Google's infringement of related right for press publishers

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- V. Commentary

Summary: The article discusses the interim decision adopted by the French competition authority in April 2020 in connection with Google's refusal to enter into negotiations with French press publishers in order to establish the amount of remuneration for the use of publications protected by related rights for press publishers. France was the first EU country that partly implemented the Directive on Copyright in the Digital Single Market as early as 2019 by introducing the aforementioned right into the national legal order. These related rights make it possible for press publishers to control the exploitation of their press publications in the digital format by means of their reproduction and communication to the public. Google, in order to avoid the necessity of paying any remuneration to the rights-holders for their consent to make use of their press publications, decided to stop displaying the protected content in its services until it obtains a free license for this type of exploitation from the publishers. The authority obliged Google to enter into negotiations with the publishers in order to agree on the amount of remuneration that Google would have to pay for the related

rights. The discussed decision shows how competition law may become a redistributive instrument for the realization of socially relevant objectives, which include the protection of the press from dangers generated by the digital economy.

Key words: internet platform; two-sided markets; related right for press publishers; internet browsers; abuse of a dominant position; imposition of unfair trading conditions; non-price discrimination; circumvention of the law; browser neutrality.

JEL: K20, K21, K24, K42

REPORTS

“10th International PhD Students’ Conference on Competition Law: Enhancing Competition Enforcement by the Competition Authorities of the EU Member States: Procedural Issues”, 2 July 2021 (Magdalena Knapp, Paulina Korycińska-Rządca)