CONTENTS, SUMMARIES AND KEY WORDS

Amendments and implementations, or competition law in the era of changes (from the Editors-in-Chief)

Articles

Paulina Korycińska-Rządca, Eva Zorková, Harmonisation of the powers of NCAs in EU Member States. A few remarks on the basis of the experiences of the Czech Republic and Poland after the deadline for the transposition of the ECN+ Directive has passed

Table of contents

I. Introduction

II. Transposition of the ECN+ Directive in the Czech Republic and Poland

III. NCAs’ investigative powers
   1. Initial remarks
   2. Power to inspect business and non-business premises
      2.1. EU legal framework
      2.2. The Czech Republic
      2.3. Poland
   3. Information requests
      3.1. EU legal framework
      3.2. The Czech Republic
      3.3. Poland
   4. Interviews
      4.1. EU legal framework
      4.2. The Czech Republic
      4.3. Poland

IV. NCAs’ decision-making powers
   1. Initial remarks
   2. Finding and termination of infringements
      2.1. EU legal framework
      2.2. The Czech Republic
      2.3. Poland
   3. Interim measures and their expedited judicial review
      3.1. EU legal framework
      3.2. The Czech Republic
      3.3. Poland
   4. Commitments
      4.1. EU legal framework
4.2. The Czech Republic

4.3. Poland

V. Conclusions

Summary: This article critically discusses how legal frameworks in the Czech Republic and Poland correspond to the requirements of ECN+ Directive with regard to the powers of NCAs. For that purpose, the authors analyse the obligations of EU Member States – within this scope – under this directive, as well as the legal frameworks in the Czech Republic and Poland. Subsequently, the article compares the manner of regulating these issues in the national legal orders of these two countries to the standard required by the ECN+ Directive. The aim of this publication is to verify whether, and how, those two EU Member States meet those requirements, and to determine any potential differences in the approach taken by legislators in these EU Member States.

Key words: NCAs’ Powers; Competition law; Competition law enforcement; Directive (EU) 2019/1; ECN+ Directive

JEL: K21, K42

Łukasz Grzejdziak, Between Chicago and post-Chicago. Should the EU non-horizontal merger Guidelines be revised?

Table of contents

I. Introduction

II. Non-horizontal mergers, the Chicago school and its criticism

1. Vertical mergers and limiting access to the market

2. The concept of a monopolist’s single profit

3. Vertical integration and the elimination of double marginalization

4. The issue of other economic efficiencies resulting from vertical mergers

5. Empirical studies on the effects of vertical mergers

III. Harm and Efficiency Theories in Commission Guidelines

IV. Evaluation of the Commission guidelines

V. Summary

Summary: The assessment of vertical mergers is largely based on the paradigms of the Chicago school of law and economics. Its proponents emphasize the positive effects that such concentrations have on competition, while downgrading the significance of their possible anti-competitive consequences. They believed that vertical mergers inevitably lead to economic efficiencies, including the elimination of double marginalization. The current approach of competition authorities to vertical concentrations is now criticized on both sides of the Atlantic for being too lenient, and inconsistent with the contemporary economics scholarship. In the United States, this criticism resulted in the adoption, in 2020, by the Federal Trade Commission and the Department of Justice of new guidelines on vertical mergers. Although these guidelines provided for much stricter assessment rules, both US competition authorities decided to continue working on rules that go further in this direction. The EU Commission Guidelines on non-horizontal mergers are more in line with contemporary economics views and results of empirical studies, than their US counterpart. However, their revision is still necessary.
**Key words:** EU competition law; American antitrust law; nonhorizontal concentrations; Chicago school of law and economics; post-Chicago school

**JEL:** B25, D20, D23, D41, D42, D43, K21, L11, L12, L13, L14, L49

Aleksander Maziarz, Some remarks on the draft block exemption regulations for horizontal co-operation agreements

**Summary:** The article addresses the issues of the proposed changes in EU regulations establishing block exemptions for horizontal co-operation agreements. The article analyses the draft regulations (establishing block exemptions for research & development agreements and for specialization agreements, as well as guidelines on the application of Art. 101 TFEU to horizontal cooperation agreements) that are subject to public consultation. The aim of the article is to analyze selected changes designed by the European Commission and assess their impact on EU competition law.

**Key words:** horizontal cooperation agreements; block exemption; agreements on sustainable development; prohibition of agreements restricting competition

**JEL:** K21

Jarosław Łukawski, Commission’s current approach to vertical restraints in light of Regulation 2022/720 and its accompanying guidelines

**Summary:** Agreements concluded between undertakings operating at different levels of trade, for the purpose of distributing goods or services, constitute one of the most often used agreements in the economic environment. The commonness of these types of agreements explains why antitrust assessment of certain clauses contained therein is of fundamental importance for business practice. The scale on which distribution agreements are concluded was one of the reasons why, as early as 1965, certain types of distribution agreements were exempted under EU competition
law from the prohibition of entering into competition restricting agreements. The approach to the assessment of such agreements has evolved significantly over the years, and is now reflected in Regulation 2022/720. This publication presents the Commission’s current approach to the antitrust assessment of vertical agreements by comparing the solutions adopted in Regulation 2022/720 with its predecessor, Regulation 330/2010, which ceased to apply on 31 May 2022. Although the article focuses on EU rules, the assessment presented herein, including criticisms as to the European Commission’s current approach, will also apply to domestic rules concerning the competition law assessment of vertical agreements. New national competition rules dedicated to distribution agreements replicate EU solutions almost entirely, both those that should be assessed positively from the suppliers’ and distributors’ perspective, and those that may raise doubts.

**Key words:** Competition; distribution; on-line sales; e-commerce; vertical agreements; European Commission

**JEL:** K21, L42

**Bartosz Targański**, Defining product markets in the digital economy in light of the new Draft Commission Notice on the definition of the relevant market for the purposes of Union competition law of 8 November 2022

**Table of contents**

I. Introduction

II. Product market definition for multi-sided platforms
   1. The Microsoft/LinkedIn case
   2. The Amazon Marketplace and Amazon Buy Box case

III. Analysis of the substitutability on the buyers’ side of the platform

IV. Primary and secondary product markets

V. Markets within the digital ecosystems and the Google Android case

VI. Relevant market share and other indicators of market power

VII. Reference period of market data

VIII. Commentary

**Summary:** The Commission Relevant Market Notice (Notice on the definition of the relevant market for the purposes of Union competition law) is being reviewed for the first time since its publication in 1997. Since then, the explosion in data transfer rates, together with the increase in processor computing power, has enabled sales and product distribution processes to be largely shifted to ICT networks. The digital economy that has resulted from these processes is characterized by competition of a new dynamic nature. In addition to traditional competitive parameters, such as price and product quality, market position is a determinant of online advertising, data access, network effects, multilateral aspects, buyer behavior, and the simultaneous presence of the entrepreneur in multiple distribution channels. It is therefore necessary to adapt the basic tool for measuring market power, which is the definition of product markets, to the new digital realities. The purpose of this article is to present the main aspects of defining relevant markets in the digital economy in the new Draft Commission Relevant Market Notice The principles for defining relevant markets in the digital economy constitute a new section of this EU soft-law document, and summarize the European Commission’s decisional practice from the most high-profile cases of recent years.
involving Silicon Valley companies. Reading the Draft Notice raises a general question – to what extent will the new guidance be helpful to average entrepreneurs, e.g. manufacturers and distributors of goods offered to consumers, in assessing market power by themselves. The article also comments on the issue of substitutability testing among buyers on multi-sided platforms.

**Key words:** relevant market; market share; digital economy

**JEL:** K21

---

**Reviews of Law and Jurisdiction**

**Wojciech Lewandowski**, Application of competition law by national competition authorities to sports on the example of the current activities of the Polish NCA (UOKiK)

**Table of content**

I. General information
II. Application of EU competition law to sports
III. Division of competences between NCAs and the European Commission
IV. Current activities of the Polish NCA
   1. Basketball league decision
      1.1. Premises for the application of competition law to sports - subjective delimitation of the relevant market and effect on trade between Member States
      1.2. Restriction of competition - type of practice, public interest, prevention, restriction or distortion of competition
      1.3. Justification of restrictions of competition
   2. Speedway league proceedings
V. Commentary
VI. Conclusion

**Summary:** Since the entry into force of Regulation 1/2003, the application of the TFEU antitrust rules in the internal market has been decentralized. National Competition Authorities (NCAs) should take over some of the duties related to the enforcement of TFEU antitrust provisions to ensure their effectiveness at the national level. As is evident from Case AT.40208 *International Skating Union* conducted by the European Commission, the activities of the NCAs in relation to sports can be a testing ground when conducting an EU competition law assessment of certain practices of international sports federations and national sports associations. Therefore, actions taken against one national sports association by a NCA, may be of interest to other Member States’ authorities and to the Commission itself, and contribute to the establishment of an EU-wide standard for the application of Articles 101 and 102 TFEU to sports. In this context, the current activities of the Polish NCA – the President of UOKiK (the Office of Competition and Consumer Protection) may become a model or benchmark for future developments in the area of competition law enforcement across the EU. This article provides an analysis of the current activities of the UOKiK with respect to basketball leagues and related legal issues, also in a comparative international context.

**Key words:** Competition Law; EU sports law; NCA; restrictions of competition; basketball league

**JEL:** K210, L440
Anna Młostoń-Olszewska, On the need for legislative changes in terms of the operating principles of district (municipal) consumer ombudsmen

Table of contents
I. Introduction
II. Legal basis for the functioning of district (municipal) consumer ombudsmen and their evolution over time
   1. Historical background
   2. Current legal status
III. Legislative changes postulated by consumer ombudsmen
   1. Financing rules
   2. Organizational and human resources
   3. Freedom of speech
   4. Statutory exemption of consumer ombudsmen from court costs and costs of legal representation
   5. Professional self-government of consumer ombudsmen
   6. Cooperation of consumer ombudsmen with the President of UOKiK (the Office of Competition and Consumer Protection)
IV. Position of the President of UOKiK in relation to changes postulated by district (municipal) consumer ombudsmen
   1. Organizational and human resources
   2. Organizational support
   3. Tasks and competences
V. Assessment of the position of the President of UOKiK
   1. Areas covered in the position of the President of UOKiK
      1.1. Organizational and human resources
      1.2. Organizational support
      1.3. Tasks and competences
   2. Areas not covered in the position of the President of UOKiK but postulated by district (municipal) consumer ombudsmen
   3. Other areas
VI. Conclusions

Summary: The institution of the district (municipal) consumer ombudsman is regulated in the Polish Act on Competition and Consumer Protection. This institution has been functioning in the Polish legal system for over 20 years. During this period of time, several legislative changes were introduced to improve its operation. Despite significant changes in the legal environment having been made, the system has not been thoroughly reformed. Currently, the consumer ombudsman and the President of UOKiK are discussing further changes in the rules of operation of district (municipal) consumer ombudsmen. The purpose of this article is to present the main threads of this discussion and to evaluate the new legal solutions proposed in it.

Key words: administrative law; consumer protection law; consumer; consumer protection authority; the Office of Competition and Consumer Protection; local government; consumer ombudsman

JEL: K23
Marcin Kulesza, The scope of duties and powers of the ‘searching authority’ and the ‘searched entity’ during the search process initiated by the President of UOKiK – discussion of the order of SOKiK (the Polish Competition Court) of 22 November 2022 in Case XVII Amz 92/22

Table of contents
I. Introduction
II. Allegations of the searched entities
   1. First plea
   2. Second plea
   3. Third plea
III. Facts
IV. Dismissal of the complaint and SOKiK’s arguments
   1. Information and evidence in the context of the scope of the search
   2. Interruption with the activities of the searched entity
   3. Right to Defence and Recording of Searches
V. Short commentary

Summary: The article presents a discussion of the order of SOKiK (the Polish Competition Court) of 22 November 2022 in Case XVII Amz 92/22 which dismissed the complaint made by the searched party against UOKiK’s search activities, concerning the compatibility of the evidence obtained within the scope of the search, the possibility for the searched party to record the search activities (including from the point of view of the protection of third parties by the searchers), and the interference with the operation of the searched party by securing the necessary equipment and access to e-mail. The ruling may be relevant from the point of view of the right of the searched to defend themselves in proceedings before the UOKiK President.

Key words: law enforcement; competition; duties and powers; explanatory proceedings; competition restricting conduct; human rights; administrative law; rights of defence; procedure; search; material scope of search

JEL: K21, K23, K38, K40, K41, K42

Anna Kutylowska, Commentary to the judgment of the Court of Justice in Case C-721/20 DB Station & Service

Table of contents
I. General remarks
II. Summary of the facts
III. Commentary
   1. Application of the Court of Justice’s view expressed in CTL Logistics and Koleje Mazowieckie Cases
   2. Actions for damages under Article 102 TFUE in cases concerning the regulation of the rail transport sector
IV. Conclusions

Summary: This commentary concerns the judgment of the Court of Justice in Case C-721/20 DB Station & Service. It also discusses other jurisprudence of the Court of Justice related to the indicated proceedings, as well as relevant provisions of the EU regulation of the rail transport sector
and EU competition law. The commentary covers issues related to access to service facilities as well as rail-related services.

**Key words:** service facilities; rail-related services; rail transport sector; article 102 TFUE; actions for damages

**JEL:** K23

**Szymon Murek**, What constitutes the establishment of a joint venture? Remarks to SOKiK’s (the Polish Competition Court) judgment of 21 November 2022, XVII AmA 11/21 (*Gazprom*)

**Table of contents**

I. Introduction – general remarks
II. Outline of the facts of the case
III. Discussion on the position of SOKiK
IV. Author’s comments and conclusion

**Summary:** The article discusses the judgment of SOKiK (the Court of Competition and Consumer Protection) dealing with the appeal against the decision of the President of UOKiK (the Office of Competition and Consumer Protection) in *Nord Stream 2* (Gazprom and others). The article primarily discusses SOKiK’s position on the types of transactions constituting the establishment of a joint venture, the concept of the circumvention of law under the Polish Competition Act, as well as the political and economic background of the case.

**Key words:** merger; establishment of a joint venture; Nord Stream 2

**JEL:** K21, K42

**Reports**

Report on the INP PAN seminar “*Ne bis in idem* principle in competition law and sectorial regulation – towards greater protection against double prosecution and punishment?”, Warsaw, December 6, 2022 (*Kamil Flis*)