

**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

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**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?*

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**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

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**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

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**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

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**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)

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**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 Mlostoń-Olszewska**, On the need for legislative changes in terms of the operating principles of district (municipal) consumer ombudsmen

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**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*

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**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*

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**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*)

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**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**)