Supervision over concentrations of entrepreneurs – a year different than any other (from the Editors-in-Chief)

Articles

Katarzyna Czapracka, Maciej Gac, Jakub Gubański, Iwo Małobęcki, Foreign investment control: A preliminary assessment of Polish legislation and practice in the context of European and global trends

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Summary: The article discusses the issue of foreign investment control, which has gained importance in Poland and in the world in recent years. The aim of the article is to show the Polish and international approach to controlling foreign investments, to make an initial assessment of the new Polish regime from the perspective of its two-year operation, and to draw up proposals for future laws to improve the domestic system of foreign investment control. The article also focuses on the practical aspects of international transactions in the current regulatory environment and

shows the challenges faced by investors engaged in cross-border operations (both in Poland and abroad).

Key words: foreign investment control; FDI; international transactions.
JEL: K21

Michał Konrad Derdak, Considering non-economic factors in the assessment of concentrations by the Polish NCA – the media plurality example

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Summary: At the beginning of 2021, the Polish NCA – the President of UOKiK – issued, only a few weeks apart, two merger decisions relating to intended concentrations in Polish media markets. This sparked a lively discussion not only among competition law specialists, but also in the wider legal community and even entered public discourse. This debate was revitalized in mid-2022 with the issuance of two court judgments reviewing these decisions. One ruling overturned the decision of the President of UOKiK that had banned the planned acquisition of Eurozet sp. z o.o. by Agora SA; the other judgment upheld the clearance given by the President of UOKiK to the acquisition of Polska Press sp. z o.o. by Polski Koncern Naftowy ORLEN SA. Among the key aspects of the said discussion is the attempt to position the issue of 'media plurality' in the merger review process, and to answer the question of whether, and to what extent should the President of UOKiK consider this value in merger proceedings. The first objective of this article is to consider and critique potential models for the inclusion of media pluralism in a merger control system. The second objective is to attempt to conceptualize the assessment of concentrations with a view to protect media plurality. As such, the paper makes an attempt to answer the question if it is reasonable to expect that an assessment of the impact of a concentration on media pluralism could result in a materially different outcome than a traditional economic analysis based on the significant impediment of effective competition test.

Key words: competition law; merger control; media plurality.
JEL: K21

Monika Woźniak-Cichuta, Ending 'killer acquisitions' or legal certainty? Reinterpretation of Article 22 of the EU Merger Regulation

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Summary: The article aims to assess the new EC policy towards potentially anti-competitive transactions concluded by digital platforms with significant market power. This policy was unveiled in the EC Communication of March 2021, and can function particularly effectively in conjunction with the Act on Digital Markets adopted by the European Parliament on 5 July 2022. First of all, the question should be asked of what are the so-called 'killer acquisitions' on digital markets, which the new EC policy is to counteract. Secondly, the article refers to other criteria for analysing potentially anti-competitive transactions concluded by large digital platforms, which have been adopted by some Member States (namely, the introduction of the 'transaction value' criterion). Based on a historical and teleological interpretation, the paper analyses the current functioning of Article 22 of the Merger Regulation, which was reinterpreted by the EC in the aforementioned Communication. It is indicated in the paper that the current interpretation of this provision deviates from its original *ratio legis*. Finally, the article refers to the relation between the new EC policy and the Digital Markets Act, which can strengthen the importance of the EC Communication. The article points out that the reinterpretation of Article 22 MR proposed by the EC seems to violate fundamental principles of EU law, such as the principle of legal certainty. While the increased interest of the EC towards merger control on digital markets should be assessed positively, the new policy should not contradict the basic guarantees provided in the EU to undertakings.

Key words: competition law; digital markets; digital platforms; DMA; gatekeepers; killer acquisitions; merger control.

JEL: K20, K21, K24, K41, K42

Katarzyna Racka, Weronika Herbet-Homenda, Wojciech Dorabialski, The treatment of retrospective rebates in competition law and in provisions on counteracting a contractual advantage in the trade of agricultural and food products

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Summary: Retro-rebates (also known as retrospective rebates or retroactive discounts) are one of the most common sales instruments that – especially recently – have attracted the attention of antitrust authorities. There is great diversity of discount models used by entrepreneurs as well as an ambiguity of the impact of this type of discounts on the state of market competition. Thus, the admissibility and conditions of using retrospective discounts have long been the subject of discussion on the foundations of antitrust rules and, in the current legal state – also on regulations aimed at counteracting the unfair use of a contractual advantage in the trade of agricultural and food products. The purpose of this article is to outline the legal framework and economic background for the assessment of this type of rebate systems. Analyzed will also be the main risk factors resulting from the hitherto position of competition authorities – the European Commission and the Polish NCA, the President of UOKiK – and from jurisprudence.

Key words: retrospective rebates; retrospective rebates; loyalty rebates; abuse of a dominant position; unfair use of contractual advantage; damage theory; suction effect; equally effective competitor test.

JEL: K21

Reviews of Law and Jurisdiction

Małgorzata Kozak, Case comment to the judgment of the Polish Court of Competition and Consumers Protection (SOKiK), from 12 May 2022, case no. XVII AmA 61/21

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Summary: This case comment contains an analysis of the judgment of the Competition Court in Warsaw (SOKiK) of 12 May 2022 (XVII AmA 61/21). This ruling was issued as a result of an appeal filed by Agora against the decision of the Polish NCA, the President of UOKiK (DKK-1/2021) that had prohibited a concentration whereby Agora intended to acquire control over Eurozet. The judgment is interesting in particular because of its in-depth analysis of the prerequisites for the existence of a collective dominant position, the issue of coordinated effects, and the burden of proof in competition law cases. This case comment largely approves of SOKiK's reasoning in the said case and values the clarity and comprehensiveness of the reasoning where the Court did not shy away from making a complex analysis of an economic and market nature.

Key words: coordinated effects; collective dominant position; oligopoly, quasi-duopoly; burden of proof.
JEL: K21, K40

Tomasz Krzyżewski, Case comment to the judgment of the Polish Court of Competition and Consmers Protection (SOKiK), from 7 June 2021, case no. XVII Amo 1/21

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Key words: merger control; antitrust law; competition law.
JEL: K21

Damian Kopera, Filip Wiliński, The issue of 'killer acquisitions' in the light of the *Illumina/Grail v European Commission* case

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Summary: The article refers to the issue of 'killer acquisitions' in the light of the *Illumina/Grail v. Commission* case. It explains the difficulties associated with so-called 'killer acquisitions', describes the facts of the analyzed case and the most important assumptions of the European Commission's new Guidelines on the application of Article 22 of the EU Merger Regulation. The paper presents also critical views concerning the *Illumina/Grail* case. The purpose of the article is to outline the issue of 'killer acquisitions' in light of the European Commission's new policy, as well as potential problems that the undertakings may face in this regard.

Key words: Article 22 of Regulation 139/2004; Grail; Illumina; merger control; legal certainty; internal market; killer acquisitions.
JEL: K21

Reports

Report from the Congress of Competition Protection Law (entitled 'Competition protection institutions – how do they serve us?'), held in Warsaw, 7 and 8 June, 2022 (Piotr Semeniuk)

Report from the conference 'Trends in competition protection in Poland' held in Warsaw, 14 June 2022 (Monika Woźniak-Cichuta)

Book Reviews

Review of the book of T. Krzyżewski: 'Non-compete obligations in Polish and EU antitrust law', C.H. Beck, Warsaw 2022 (Cezary Banasiński)