

Competition law, judicature, case-law and administrative economic law (from the Editor-in-Chief)

Articles

Jan Polański, The Road to Prosperity. Reflections on Polish Antitrust in Turbulent Times

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Summary: The “end of history”, which was once speculated, did not happen. In international politics, this resulted in much turbulence, in particular in 2022. In antitrust, in turn, there is a renewed interest in discussing its goals and assessment methods. When it comes to international politics and military reforms, Poland has taken important actions to ensure that in spite of the turbulent times, it will still take further steps on the road to prosperity, on which it had embarked in 1989. Less has been said about economic policy. Yet, it is economic policy that provides a solid base for an active international policy and the creation of a prosperous society. This article constitutes part of a “scoping exercise” aimed at facilitating a debate over antitrust policy in Poland. As a discursive text, it considers a number of more technical proposals that have been made in the last few years, and highlights some systemic issues that deserve further discussion. It concludes that even if none of those issues currently attract the attention of the general public in Poland, this does not mean that no discussion should take place.

Key words: antitrust enforcement; antitrust policy; antitrust reform; economic policy; effective enforcement; due process; non-economic goals

JEL: K21

Ioannis Apostolakis, Legal Tests and the Object–Effect Dichotomy under Article 102 TFEU**Table of contents**

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Summary: Despite the adoption of the “more economic approach” in the assessment of unilateral conduct, the object–effect dichotomy is still relevant under Article 102 TFEU, as it is under Article 101 TFEU. This article examines the tripartite classification of abusive conduct under Article 102 TFEU, namely “restrictions by object”, “restrictions by effect”, and “naked restrictions”, as a specific form of restrictions “by object”. It analyses the implications of this classification for the allocation of the burden of proof between the dominant undertaking, on the one hand, and the competition authority or private plaintiff, on the other.

Key words: abuse of dominance; restrictions by object; naked restraints; objective justifications

JEL: K21

Jadwiga Urban-Kozłowska, Acceptable forms of State Aid to Airlines During the COVID-19 Pandemic (part I)**Table of contents**

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Summary: The goal of this paper is to analyze the application of two types of State aid, namely exceptional aid (Article 107(2)(b) TFEU) and anti-crisis aid (Article 107(3)(b) TFEU), which played a key role in the process of supporting air carriers during the COVID-19 pandemic. This will allow us to compare these types of aid, and to answer the question of their significance and usefulness in the context of supporting air carriers, and more broadly other undertakings, during exceptional occurrences such as COVID-19.

The criteria for each of these exemptions will be discussed separately, and theoretical considerations will be accompanied by examples from the decision-making practice of the European Commission and the case law of EU courts. In terms of exceptional aid, three issues, which seem to be of particular importance, will be examined. First, it will be investigated whether the COVID-19 pandemic can be considered a phenomenon covered by Article 107(2)(b) TFEU. Second, it will be analyzed what kind of damage can be compensated on this basis. Third, methods of determining the amount of compensation due will be discussed, so that it meets the condition of proportionality.

The analysis of the anti-crisis aid exemption will begin with the presentation of the most important conditions for its admissibility. This will be followed by a detailed examination of the question of whether, and if possible in what cases, a national measure taking the form of an individual aid can be considered appropriate to remedy a serious disturbance in the economy of a Member State. Finally, the requirements for the proportionality of such aid will be examined.

The conducted analysis will show the most important differences and similarities between exceptional aid and anti-crisis aid. Presented in particular, will be the different purposes of these two types of aid. It will be shown that both exceptional aid and anti-crisis aid play an important role in the recovery process from the ongoing crisis, and that the resources granted under them complement each other. The discussed exemptions to the general prohibition of State aid provide therefore the necessary flexibility in the EU State aid regime, allowing Member States to adapt their economic policies in case of a serious disturbance or crisis.

Key words: State aid; COVID-19 pandemic; aviation law; EU competition law; airlines

JEL: H84, K33

Michalina Szpyrka, The Significance of the Independence of the Polish Telecommunications Regulatory Authority (the President of UKE) for the Implementation of EU Fundamental Rights on the Example of Proceedings for the Imposition of Fines on the Basis of Polish Telecommunications Law

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Summary: Independence is one of the basic requirements for judiciary bodies, which decide authoritatively about the rights and obligations of legal entities. However, these functions are more and more often taken over by public administration entities that issue decisions granting powers, and even impose severe fines. In connection with this trend in the doctrine and jurisprudence,

a discussion has arisen on the need for public administration bodies to be independent. This need is also recognized by EU institutions, which introduce a requirement of ensuring the independence of competition protection (NCAs) and regulatory authorities (NRAs). In connection with the EU review of the telecommunications market, the issues of the regulation of the independence of NRAs was extended in the European Code of Electronic Communications (ECEC), which should have been implemented into MSs' national legal orders by 21 December 2020. The regulation of independence adopted in the ECEC is formal and residual. It does not provide any powers to the "regulated" entities to enforce the requirement of independence of the NRAs, and its vagueness may lead to incorrect implementation and politicization of National Telecommunications Regulatory Authorities.

Key words: independence; President of UKE; European Code of Electronic Communications; Telecommunications law

JEL: K230, K210

Mariusz Czyżak, Penal-Administrative Liability of the Person that Manages an Essential Service Operator for Breaching their Duty of Due Diligence

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Summary: This article discusses the liability of the manager of an essential service operator for violating their due diligence obligations while performing the duties of that operator. These duties include implementing a security management system in the information system used to provide the essential service, appointing a responsible person to maintain contacts with the entities of the national cybersecurity system, and ensuring security audits of the information system used to provide the essential service. An individual who manages or co-manages such entity, especially a member of its governing body (such as the board of directors), may be considered the "manager" of a key service operator. The liability of a manager is distinct from that of the operator itself. According to legal doctrine and jurisprudence, observing due diligence requires professionalism and conscientiousness. The cybersecurity authority imposes a monetary penalty for the failure to exercise due diligence, guided by the requirements stated in the Polish Code of Administrative Procedure. The article provides *de lege ferenda* conclusions, including proposals for a specific allocation of funds from such monetary penalty to the Cybersecurity Fund.

Key words: Cybersecurity; monetary penalty; operator of essential service

JEL: K23, K24, K32, K42

Reviews of Law and Jurisdiction

Anna Celejewska-Rajchert, Filip Drgas, Judicial Control of the Decisions of the Polish NCA (the President of UOKiK) in Merger Control Cases - Selected Aspects Based on Latest Case Law (*Agora/Eurozet* and *Orlen/Polska Press*)

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Summary: In this article, the authors discuss selected aspects of judicial review of decisions issued by the Polish NCA (President of UOKiK), which have become the subject of judicial review, in most recent cases involving appeals against merger control decisions of the President of UOKiK, that is, decision No. DKK-1/2021 in the *Agora/Eurozet* case and decision No. DKK-34/2021 in the *PKN Orlen/Polska Press* case. The article focuses on procedural aspects, such as the possibility of changing a merger decision of the President of UOKiK by the court, certain aspects of evidentiary proceedings, such as the burden of proof and the evidence initiative, or the suspension of the enforcement of administrative decisions and court judgments in merger cases.

Key words: merger control; merger prohibition; appeal to SOKiK; judicial control of the President of UOKiK's decisions; SOKiK's reformatory judgement; change of the President of UOKiK's decision; the enforcement suspension of the President of UOKiK decision; the enforcement suspension of the merger decision; burden of proof; hybrid proceedings

JEL: K21, K41

Reports

Report on the international conference "Antitrust Private Enforcement: Lessons for Poland", Warsaw, 30 May 2023 (**Szymon Gołębiowski, Marcin Alberski**)