Private enforcement of competition rules: closer and closer (From the Volume Editor)

The academic achievements of Professor Stanislaw Sołtysiński in the widely defined competition law field (laudation by Professor Marek Szydło commemorating the granting of the Great Owl Award for the entirety of Professor Sołtysiński’s academic achievements in the competition law field)

Discretion in competition law: the perspective of Dr Cezary Banasiński (laudation by Professor Agata Jurkowska-Gomułka commemorating the granting of the CARS Award 2016)

Articles
Dorothy Hansberry-Bieguńska, Małgorzata Krasnodębska-Tomkiew, Grzegorz Maternia, Leniency programmes in Polish and US antitrust law and the access to leniency materials in private damages actions in cases of cartels and other restrictive agreements

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**Summary:** The article addresses issues concerning access to *leniency* materials by private damages action litigants in cases of restrictive agreements, and analyzes relevant legal provisions in Polish and US laws. With regard to the former, the article considers both its current rules as well as a draft act which will serve to implement the EU Damages Directive (Directive 2014/104/EU). The issue of disclosure of *leniency* materials to private damages action litigants is analyzed from the perspective of its impact on the effectiveness of *leniency* programmes. This article questions whether the upcoming legislation concerning access to *leniency* materials may lessen the readiness of undertakings to submit *leniency* applications. A consequence of a dampening of the interest in seeking *leniency* would be a decrease in the effectiveness of public enforcement of competition rules. The authors make therefore certain proposals *de lege ferenda*. At the same time, a comparison of relevant Polish and US provisions and practices leads the authors to the conclusion that it is the US and its judicial decisions that design the relationships between public and private competition enforcement so that each of these instruments interacts with each other without lowering the other’s effectiveness.

**Keywords:** Polish competition law; US competition law; Section 1 of the Sherman Act; *leniency* programmes; private actions for damages; EU damages directive; access to *leniency* materials; discovery in civil cases; criminal liability.

**JEL:** K21; K41; K42
Joanna Lenart, Teresa Kaczyńska, The binding effect of final decisions by the President of the Office for Competition and Consumer Protection, the Court for Competition and Consumer Protection and the Court of Appeal, and its consequences for public and private competition law enforcement

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Summary: This article analyses the issues linked to the binding effect of national competition authorities’ and appeal courts’ final decisions on civil courts, introduced by Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the Directive), which requires implementation into the Polish legal system.

Although in principle the adoption of this solution should contribute to an increase in the effectiveness of private competition law enforcement, its shape and scope might be problematic to a certain extent. Therefore, in this article the authors consider the scope of the binding force of the President of the OCCP’s final decisions and analyse in detail the impact of the nature of joint participation in civil proceedings in competition law cases on the possibility and effectiveness of private competition law enforcement, in particular in terms of legal certainty. In addition, the authors indicate substantial risks which may arise in this context. These considerations expressly demonstrate the existence of a conflict between several general rules underlying the Directive. The article concludes with the de lege ferenda proposals regarding the Polish provisions which would implement the Directive.

Key words: private enforcement directive 2014/104/EU; private enforcement; antitrust infringement; effect of national competition authorities’ decisions; binding effect of final decisions; joint participation in civil proceedings; statutory limitation period

JEL: K21; K41, K42
Katarzyna Wiese, *Reducing antitrust fines and limiting the liability of SME for antitrust violations – proposal of the interpretation of the specific inability to pay criterion*

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VII. Conclusions

**Summary:** Directive 2014/104/EU provides for a limitation of the liability of SMEs in cases where the application of its normal rules on joint and several liability would irretrievably jeopardise their economic viability and cause their assets to lose all their value. The meaning of this provision is everything but clear and commentators have voiced unanimous and harsh criticism of the chosen wording. This article presents a proposal for the interpretation of this provision based on its observed parallel with the requirements for a reduction of the fine imposed by the European Commission in antitrust cases.

**Key words:** directive 2014/104/EU; reduction of fines; SME; antitrust fines; insolvency; inability to pay; competition law infringement.

*JEL:* K21

Łukasz Stępkowski, *Reimbursement of State aid under Article 108(3) third sentence TFEU within the context of private enforcement of EU State aid law*

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I. Introduction
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III. Enforcement of Article 108(3) third sentence TFEU under Polish law – preliminary remarks
IV. Reimbursement of illegal State aid and the jurisdiction of an administrative court
V. Ordinary courts and the reimbursement of illegal State aid
VI. Conclusions

**Summary:** This paper constitutes an attempt at suggesting practical means of enforcement of Article 108(3) third sentence TFEU under Polish law. The author undertakes to analyse the norm of EU law and seeks a procedural basis of its enforcement under Polish law (as a law of an EU Member State). The goal is to verify whether there are any means to secure effectiveness for Article 108(3) third sentence TFEU under Polish law. The paper takes account of the jurisprudence of the CJEU as well as that of Polish courts.

**Key words:** state aid; reimbursement; national court; EU law.

*JEL:* K21, K29, K41, K42
Joanna Piechucka, Marta Stryszowska, **Calculating damages caused by bid rigging**

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**Summary**

The article discusses the various stages and methods of estimating damages caused by bid-rigging. Emphasized first is the importance and essence of constructing a counterfactual scenario describing what would have happened in the absence of bid-rigging. Discussed next are the technical and practical aspects of the use of the various damage-estimation methods. They include: comparator-based methods, financial-analysis-based methods, and market-structure-based methods. The description of each method is accompanied by examples of their use. Finally, the article analyses the practical considerations related to the choice of a given method (among the range of various methods available) in the context of the availability of the relevant data and credibility of the underlying assumptions.

**Key words:** damage estimation, bid rigging, comparator-based methods, financial-analysis-based methods, market-structure-based methods

**JEL:** C13, D22, L41

**Legislation and Case Law Review**

**Discussion of the implementation process of Directive 2014/104/UE/EU in Poland, Spain and the UK** (Jacek Sadurski)

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I. Introduction
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III. Problem of forum shopping in damages claims
IV. Polish approach to the implementation process
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VII. *De lege lata* proposals concerning the Polish draft Act

**Summary**

This article deals with a number of chosen topics concerning the implementation process of Directive 2014/104/UE of the European Parliament and of the Council of 26 November 2014 on certain
rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. The Author endeavors to compare legislative solutions and steps with regards to the implementation process of the Directive which are being currently undertaken in Poland, Spain and Great Britain. He notes certain legislative initiatives which may be taken into consideration during the preparation process on the final text of the Polish Draft Act implementing the Directive.

**Key words**: damages directive 2014/104/UE; claims for damages; breach of competition rules; implementation; legislative proposals

**JEL**: K21; K42

The termination of a license agreement on the use of a repertoire by a collective rights management organization that abuses its dominant position with respect to neighbouring rights. A case comment to a judgement of the Court of Appeals in Cracow of 25 June 2015, I ACa 466/15 (Marcin Mioduszewski)

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I. Overview of the key elements of the judgement
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III. Cumulative use of the set of prerequisites of Article 106(2) of the Act on Copyright and Related Rights and in Article 9(3) of the Act on Competition and Consumer Protection for the evaluation of the effectiveness of the termination of a license agreement
IV. Assessment of royalty rates offered by the organization
V. Important reasons of the collective rights management organization for the refusal to contract
VI. Dominant position of the collective rights management organization in light of the refusal to contract
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**Summary**: Collective rights management organizations (which manage copyright as well as related/neighbouring rights) operating without an approved tables of copyright royalties, are entitled to license, or to terminate an existing license agreement, only for an important reasons. The dispute over a mere royalty rate, without the presence of any other disputable issue, cannot be considered as an important reason under Article 106(2) of the Act on Copyright and Related Rights, justifying the termination of a license agreement for the repertoire of such organization, or a refusal to enter into such contract at all. The shape of the collective management system in Poland makes each organization a monopolist within the scope of its activity (within its own repertoire). Even if a particular repertoire is represented by more than one organization, the nature of the user’s business activity, and the specifics of using the protected content, makes it necessary for the legal user to sign a license contract with all relevant organizations at the same time, which in turn makes product substitutability virtually nonexistent.

Refusal to license made under Article 106(2) of the Act on Copyright and Related Rights may constitute the sole and independent ground for establishing an abuse by a collective rights management organization. Provided that conditions of the above Act are fulfilled i.e. the refusal
is made for an important reasons, a separate economic scrutiny of the adequacy of royalty fees in terms of article 9(1(1)) of the Act on the Protection of Competition and Consumers may be redundant.

**Key words:** collective management of copyright and related rights; abuse of dominant position; copyright; related rights; producer’s rights; refusal to contract; relevant market

**JEL:** K21; K42

**Books Reviews**

Anna Piszcz, Dominik Wolski (eds.), *Pursuing damages claims based on competition law breaches before Polish courts* [in Polish: *Dochodzenie przed sądem polskim roszczeń odszkodowawczych z tytułu naruszenia regul konkurencji*], Wydawnictwo Naukowe Wydziału Zarządzania UW, Warszawa 2016 (review by Piotr Machnikowski)


Piotr Semeniuk, *The concept of a “single economic unit” in competition law* [in Polish: *Koncepcja jednego organizmu gospodarczego w prawie ochrony konkurencji*], Wydawnictwo Naukowe Wydziału Zarządzania UW, Warszawa 2015 (review by Zbigniew Jurczyk)

**Reports**

*CARS Activity Report 2014–2015* (Nina Łazarczyk)

*Polish-Portuguese PhD Seminar, Białystok, 10 June 2016* (Magdalena Knapp, Radosław Niwiński)