

**Daria Kostecka-Jurczyk,**  
***Koncentracja w formie wspólnego przedsiębiorstwa a ryzyko konkurencyjne  
w świetle prawa antymonopolowego [The concentration in the form  
of a joint venture and the competition risk in the light of antimonopoly law],***  
**C.H. Beck, Warsaw 2017, 304 p.**

Joint ventures may create risks for competition. Those risks may be carried by the very structure of the relevant market, or the creation of conditions fostering the coordination of the market conduct of a joint venture and its parent entities or the parent entities themselves. At the end of last year, Dr. Daria Kostecka-Jurczyk, an academic active in the area of EU law, economic law and competition law, published the book *Koncentracja w formie wspólnego przedsiębiorstwa a ryzyko konkurencyjne w świetle prawa antymonopolowego [The concentration in the form of a joint venture and the competition risk in the light of antimonopoly law]* (C.H. Beck). She analyses therein various risks that competition is exposed to when joint ventures are established; the author studied them carefully and summarized them in the individual chapters of the book. However, her analysis goes beyond the interpretation of EU and Polish competition laws, jurisprudence and legal literature; she examines all aspects of joint ventures from, primarily, a legal perspective, but also from an economic point of view. This approach draws the attention of the reader to the author's versatility and ability to switch from one discipline to another with ease.

The author believes that the distinction between full-function joint ventures and non-full-function joint ventures is not a sufficient tool to draw a line between joint ventures that are concentrations and those that are anti-competitive agreements, because this distinction does not make it possible to capture the risk for competition. Besides this main hypothesis, she identifies seven sub-hypotheses which the book sets out to test and, I would add, proves. Although deliberately composed of six chapters (as well as, of course, an introduction and the summary), the book focuses on three main research areas.

First, the author explains expressions such as 'risk', 'risk of a restriction of competition' and exemplifies reasons for which joint ventures are created between undertakings. She also defines the term 'joint venture' and offers classifications of joint ventures. Another important issue that is taken up in the book is the question what characterises the particular types of joint ventures. Further on, the author describes when the intention of the creation of a joint venture needs to be notified

to the competent competition authority. The EC Merger Regulation No 139/2004<sup>1</sup> distinguishes a joint venture performing, on a lasting basis, all the functions of an autonomous economic entity; however, it is unclear how to verify whether a joint venture is a ‘full-function’ one or not. This is due as much to doubts resulting from Regulation No 139/2004 on how to interpret changes in the scope of the activities of the joint venture, as it is to difficulties with the interpretation of the variety of changes regarding its parent entities that, in fact, may take place. To complicate things a little further, it is not clear whether Article 3(4) of Regulation No 139/2004 puts any limits on the application of Article 3(1)(b) and what is the relationship between both provisions.

Second, the author analyses Article 2(3), (4) and (5) of Regulation No 139/2004 and asks further questions connected with her work. She scrutinises the concepts of horizontal coordination, vertical coordination, collective dominant position and parallel behaviours. To a great extent, she employs the theory of oligopoly. There is an important question answered in this part of the book: how to amend Article 2 Regulation No 139/2004 so that the assessment of coordination is comprehensive and coherent? She believes that Article 2(4) and (5) of Regulation No 139/2004 should be repealed and coordination should be assessed in the light of Article 2(3) under the SIEC-test.

Third, the book covers spill-over effects from the joint venture on the remaining independent activities of the parent entities, including coordinated and non-coordinated effects (included in the SIEC-test). The author proves that both Article 2(3) and Article 2(4) of Regulation No 139/2004 include the risk of coordinated effects and, furthermore, that non-coordinated effects cannot be subsumed under coordination. The author also proves that joint venture agreements *ex definitione* result in structural changes, whereas they do not regulate any competitive behaviours of the parent entities. In other words, such behaviours can be agreed upon in separate contractual clauses only as ancillary restraints to the concentration in question.

The author analyses also the respective Polish legal framework. Provisions contained in the 2007 Act on Competition and Consumer Protection<sup>2</sup> are concise; however, there are many uncertainties regarding concentrations in the form of joint ventures, particularly because of the differences between the Polish rules and Regulation No 139/2004. The author asks the right questions here and correctly diagnoses the problems in the Polish legal provisions. Their ‘pro-EU type’ interpretation applied from time to time does not make it much easier for the Polish competition authority to apply the 2007 Act. Perhaps unsurprisingly given these findings, the author also finds that this means that a legislative initiative to amend the 2007 Act may be needed.

Under Polish competition law, all joint ventures that meet its quantitative criteria need to be notified to the competition authority on the basis of the Article 13 of the

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<sup>1</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (Text with EEA relevance), OJ L 24, 29.01.2004, p. 1-22.

<sup>2</sup> Act of 16 February 2007 on Competition and Consumer Protection (consolidated text Journal of Laws of the Republic of Poland 2017, item 229 as amended).

2007 Act. This notification duty is based on the literal (linguistic) interpretation of this provision (Article 13 para. 2 p. 3). The author supports the view that the scope of the 2007 Act in this regard is too broad, and only full-function joint ventures should be subject to the merger notification regime provided for in the 2007 Act. However, it remains to be seen whether this proposal will be taken into account on the occasion of future amendments of the 2007 Act. The rationale favouring a merger notification regime without the full functionality test may be that it is more efficient in terms of preventing infringements of competition law. For instance, in the absence of the broad scope of the 2007 Act, Poland would be only capable of an *ex post* intervention via competition law in the case of the joint venture that was to handle the design, financing and construction, as well as meant to operate the Nord Stream 2 gas pipeline, running from the Russian Baltic coast to an exit point near Greifswald (Germany).<sup>3</sup> Furthermore, Poland is not the only European state maintaining this type of a merger notification regime. In continental Europe, also Austrian, German and Lithuanian regimes may be considered perfect examples of the above.<sup>4</sup>

The reviewed book is the first publication in Polish that approaches the issue of joint ventures in such comprehensive and systematic way, offering certain *de lege ferenda* proposals. It highlights many gaps in knowledge on joint ventures that need to be filled and raises many questions. The author managed not only to tackle numerous issues in her book but also to provide guidance for further research by way of references to relevant cases and publications in its extensive footnotes. So, I sincerely recommend the reviewed book to both researchers and practitioners specialising in competition law.

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<sup>3</sup> On that joint venture see *Nord Stream 2 – Application withdrawn*, [https://www.uokik.gov.pl/news.php?news\\_id=12511](https://www.uokik.gov.pl/news.php?news_id=12511); *UOKiK against Nord Stream 2*, [https://www.uokik.gov.pl/news.php?news\\_id=14323](https://www.uokik.gov.pl/news.php?news_id=14323) (1.07.2018).

<sup>4</sup> See D. Cardwell and C. Hatton, *The European, Middle Eastern and African Antitrust Review 2017. EU: Joint Ventures*, <https://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2017/1067818/eu-joint-ventures> (1.07.2018).