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Wyłączenia grupowe spod zakazu porozumień ograniczających konkurencję
we Wspólnocie Europejskiej i w Polsce [Block Exemptions From
the Prohibition of Competition Restricting Agreements in the EC and Poland]
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The reviewed book contains a detailed and comprehensive analysis of the EU and Polish legal system enabling the exemption of certain categories of agreements from the general prohibition on competition restricting agreements based on Article 81(3) EC and Article 8(1) of the Act of 16 February 2007 regarding competition and consumer protection (Competition Act) respectively. The authors do not analyse the applicable laws as regards the prohibitions *per se* (Article 81(1) EC, Article 6 of the Competition Act) or their enforcement systems. They also do not dwell on *de minimis* agreements exempted from the prohibition on account of the small market share of the contracting parties. Instead, this publication concerns itself with a certain aspect of this system – block (group) exemptions. Such narrow focus facilitates an in-depth analysis of the issues at hand and thus produces some valuable insights.

Emphasis is placed first of all on the special legal status of group exemption regulations (those promulgated at the EU level as well as domestically in Poland). This is a very important issue here because reaching a consensus on the exact nature of these acts has proven elusive even among legal practitioners. Regulations concerning group exemptions amount to a *de facto* elaboration of Article 81(3) EC and/or of Article 8(1) of the Competition Act since they apply these basic competition law rules to certain recurring sets of circumstances (specific kinds of agreement). What can be said with certainty about these circumstances is that they do not translate into a material inhibition of competition and that, at the same time, they amount to a desirable solution which is beneficial for the market. In other words, group exemptions constitute a type of “hint” for businesses as to the possibility – or not – of including certain contractual clauses in their agreements. The very nature of these regulations means that only some companies – those that opt for a certain form of cooperation (distribution arrangements, franchise, joint research or specialisation) – are eligible to benefit from them. In this light, group exemptions may be thought of as “quasi-guidelines” suggesting what may be permitted and what may be prohibited

(and, consequently, contrary to Article 81(1) EC and/or to Article 6 of the Competition Act) for a given form of cooperation between enterprises.

The publication also elaborates upon the relationship between exemption regulations currently in force and the provisions of Article 81(3) EC and of Article 8(1) of the Competition Act (which constitute the material basis for their promulgation). In this context, the authors refer to the previous system of individual exemptions granted by the European Commission on an *ex ante* basis. They explain that its significance is now purely historical. Presently, Article 81(3) EC and Article 8(1) of the Competition Act may provide an individual basis for assessing a specific agreement from the perspective of its pro-competitive aspects. They may no longer however provide the basis for a formal evaluation (decision) by a competition authority handed down before the proposed agreement is actually executed. The publication analyses this relationship in great detail.

Discussed is also the issue of parallel application of EC and Polish group exemptions since it is not unheard of for both to be in force at the same time for the same category of agreement. This fact is clear to the authors but not so for some market participants and legal practitioners. Some lawyers are inclined to view EC group exemptions from the perspective of the primacy and direct applicability of EC law principles, leading them to argue that “implementation” or “transposition” of such regulations into the Polish legal system must be erroneous as well as pointless. Yet antitrust experts and literature agree that the fact that Polish law includes legal acts which are nearly identical to similar instruments promulgated at the EU level is not the result of their “implementation”. Instead, it illustrates the need to extend the benefit of block exemptions to certain categories of agreement which may not fulfil the EC prerequisite of “influence on trade between Member States” (even if only potentially) since it is only to those that the EC-wide exemptions may be applied.

The authors have divided the publication into chapters thematically corresponding to the various group exemptions and thus the consecutive parts discuss the group exemption of: cooperation agreements, vertical agreements, agreements concerning the motor vehicle sector, technology transfer agreements, insurance cooperation agreements and maritime and air transport aviation agreements. Such a subdivision is quite natural, it is also reflected in actual legal practice. On this basis, general exemptions (referring to a certain category of cooperation between businesses whatever their sector) are differentiated from sector-specific ones (concerning a specific relevant market, e.g. motor vehicle sector). Such an approach provides a logical exploration of the subject matter to its readers who also benefit from the fact that the book contains the texts of relevant Polish and EU legal acts; these can be found in the subsequent chapters.

First to be discussed are the exemptions for cooperation agreements including those whose object comprises R&D or specialisation. It is worth noting that unlike EU law which regulates the exemptions for R&D and specialisation agreements separately, Polish law deals with both in a single Council of Ministers regulation. The authors present a detailed discussion of the criteria which need to be met in order to qualify for a group exemption under EU and under Polish law. In doing so, they

explain the importance of the market share criterion (where it exceeds the threshold values set in the appropriate regulation, the agreement does not qualify and, at best, may be subject to an individual evaluation under Article 81(3) EC or Article 8(1) of the Competition Act). The authors then proceed to discuss the qualitative criteria the fulfilment of which is a prerequisite for deeming a given agreement to be legal in spite of the prohibition. In doing so, they make it clear (and rightly so) that cooperation agreements containing even one of the prohibited “black list” clauses disqualify its parties from seeking the benefit of a group exemption. The value of this chapter lies in its outline of the emergence of exemptions for cooperation agreements in EU and Polish law and in their juxtaposition.

The publication proceeds to a presentation of exemptions for vertical agreements. This chapter centres on an analysis of Commission Regulation No. 2790/1999 concerning the exemption of vertical agreements and of the analogous Polish act – the Council of Minister regulation from 2007. In addition, the authors cite the extremely important pointers laid down in the Commission’s Guidelines concerning the application of Article 81(3) EC to vertical agreements. The chapter opens with some historical references concerning the development of group exemptions for vertical agreements under EU law. This introduction helps explain their origins and nature as well as the absolute necessity of regulations instituting some exceptions from the general prohibition of competition restricting agreements in recognition of the fact that some business practices are very important for the market in that they actually stimulate competition. The authors also discuss the most common categories of vertical cooperation which may qualify for a block exemption such as: exclusive distribution contracts, selective distribution contracts and franchising. They explain that, despite the various limitations, such forms of cooperation can be legal provided that they do not include any hard core restrictions such as minimum price fixing for the sale of goods considered to be the most important of those unconditionally prohibited clauses. Special attention is devoted to selective distribution of a qualitative or quantitative character, already established as having a positive impact on the market.

An extensive analysis of the exemptions for vertical agreements in the automotive industry is presented in a separate chapter. As a sector-specific exemption, its effects are clearly felt in the market for the production and distribution of motor vehicles. Companies often rely on the EU Regulation on the group exemptions for the automotive sector as well as the corresponding Polish act even though their application occasionally gives rise to controversy. Accordingly, a detailed analysis of the pertinent rules, as endeavoured by the authors, may provide important insights for automotive sector players. The authors elaborate upon the conditions that must be met in order to benefit from an exemption. As with most of the group exemptions, the market share of the participants is presented as a key factor in this context also since only if the prohibited threshold values are not exceeded may a group exemption be sought on the basis of these acts. If, meanwhile, the market share of the participants is too high, only an individual assessment pursuant to Article 81(3) EC or Article 8(1) of the Competition Act remains. The authors also list certain “black listed” clauses which may not be used because of their restrictive effect and may not benefit from an

exemption; as in other areas, such clauses include those which attempt to fix minimum prices. The fact that the authors choose to analyse the automotive sector agreements separately is laudable even though, technically speaking, this is a category of vertical agreement and could be discussed as such; this solution follows from the systemic approach which the authors do well to follow throughout the book.

The publication undertakes also a separate discussion of the rules concerning the exemptions for technology transfer agreements (at EU level as well as in Poland). Such agreements may be either horizontal or vertical in nature. In their various guises (e.g. patent licence agreements, agreements for the provision of know-how etc), technology transfer agreements are very important for the market, facilitating the optimum use of technological achievements and innovations and thus further progress. Generally, antitrust law adopts a positive view of technology transfer agreements, provided that they do not incorporate serious impediments to competition deemed to be redundant to their pro-competitive objectives. The authors indicate that benefiting from a group exemption is conditional first and foremost, upon the market share of the parties. In order to make the nature of the technology transfer exemption more approachable for their readers, the authors include some historical notes. They also offer, justifiably enough, a positive appraisal of the newest legislative instrument regulating this subject matter – Commission Regulation No. 772/2004, which adopts a more economic approach to technology transfer issues. The publication also cites the EU Guidelines on technology transfer – a valuable interpretative tool in this context, especially seeing as question concerning technology transfer issues tend to be very complex.

The consecutive chapters discuss sector-specific exemptions in the areas of insurance, maritime transport and air transport industries (indicating in the latter case that the aviation sector no longer benefits from group exemptions). The authors provide a detailed discussion of the exemption criteria applicable in each case. Such thorough discussion of group exemptions for the insurance, maritime transport and air transport industries is important. While many earlier publications tended to gloss over these issues (focusing instead on vertical agreements or cooperation agreements as a general category), the authors of this book consider and evaluate the entire block exemption system.

To summarise, the reviewed publication presents a solid source of comprehensive knowledge about Polish and EU competition law in the area of group exemptions from the prohibition of competition restricting agreements. Its structured approach leads it to analyse the covered areas in detail one by one in a manner conducive to a serious, in-depth study. The book may well provide a foundation for the further development of antitrust doctrine as well as a useful tool for practitioners. Its clear added value lies in the fact that it includes the full texts of the various legislative instruments discussed in the publication.

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