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The conflict of values in antitrust proceedings before the President of the Office of Competition and Consumer Protection

Konflikt wartości w postępowaniu antymonopolowym przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów

Конфликт ценностей в антимонопольном разбирательстве перед председателем Управления по защите конкуренции и защите прав потребителей

Конфлікт цінностей в антимонопольному провадженні перед Головою Управління з питань захисту конкуренції та прав споживачів

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Summary: The decisions of the President of the OCCP in antitrust cases usually resolve the dilemma as to which (constitutional) value should be given priority: economic freedom or fair competition. The purpose of the present article is to examine what considerations and factors guide the President of the OCCP when there is a conflict between the values indicated and what decisions and of what content can potentially be made. The present paper focuses on the proceedings in cases of restrictive practices and approvals for mergers and acqiusitions of entrepreneurs. The study has indicated the reasons why the President of the OCCP, at the expense of competition protection, allows the existence of agreements between entrepreneurs or approvals of the concentration of entrepreneurs. The research has used the dogmatic legal and formal-legal method, based on the Polish law and EU law; in addition, the content of existing decisions of the President of the OCCP has been analysed.

Key words: business mergers and acqiusitions, competition authority, concentration approval, economic freedom

Streszczenie: Decyzje Prezesa Urzędu Ochrony Konkurencji i Konsumentów w sprawach antymonopolowych rozwiązują zazwyczaj dylemat, której wartości (konstytucyjnej) nadać priorytet: wolności gospodarczej czy uczciwej konkurencji. Celem artykułu jest zbadanie, jakimi przesłankami i czynnikami kieruje się Prezes UOKiK w przypadku konfliktu pomiędzy wskazanymi wartościami i decyzje jakiej treści mogą być potencjalnie podejmowane. Uwzględniono przede wszystkim postępowania w sprawach praktyk ograniczających konkurencję oraz zgód na koncentrację przedsiębiorców. Wskazano przyczyny, dla których Prezes UOKiK, kosztem ochrony konkurencji, pozwala na istnienie porozumień pomiędzy przedsiębiorcami albo wyraża zgodę na koncentrację przedsiębiorców. W badaniach wykorzystano metodę dogmatyczno-prawną i formalno-prawną, bazując na prawie polskim i prawie Unii Europejskiej; uzupełniająco zaś analizowano treść istniejących decyzji Prezesa UOKiK.

Słowa kluczowe: koncentracje przedsiębiorców, urząd ochrony konkurencji, zgoda na koncentrację, wolność gospodarcza

Резюме: Решения председателя Управления по защите конкуренции и защите прав потребителей Республики Польша (UOKiK) в антимонопольных делах обычно разрешают дилемму о том, какой (конституционной) ценности отдать предпочтение: свободе предпринимательской деятельности или добросовестной конкуренции. Цель данной статьи – рассмотреть, какими предпосылками и факторами

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руководствуется председатель UOKiK, когда возникает конфликт между указанными ценностями, и какие решения потенциально могут быть приняты. Основное внимание уделяется производствам по делам о соглашениях, ограничивающих конкуренцию, а также по решениям о согласии на экономическую концентрацию. Были указаны причины, по которым председатель UOKiK, в ущерб защите конкуренции, допускает существование соглашений между предпринимателями или дает согласие на экономическую концентрацию. В исследовании использовались догматико-правовой и формально-юридический методы, основываясь на польском законодательстве и законодательстве Европейского союза; также было проанализировано содержание существующих постановлений председателя UOKiK.

Ключевые слова: экономическая концентрация, Управление по защите конкуренции, согласие на экономическую концентрацию, свобода предпринимательской деятельности

Резюме: Рішення Голови Управління з питань захисту конкуренції та прав споживачів у антимонопольних справах зазвичай вирішують дилему, якій (конституційній) цінності віддати пріоритет: економічній свободі чи чесній конкуренції. Метою статті є дослідити, якими передумовами та чинниками керується Голова УОКіК у разі конфлікту між вказаними цінностями та які рішення потенційно можуть бути прийняті. Насамперед, бралися до уваги провадження у справах про дії які обмежують концентрацію та дозволів на концентрацію підприємців. Зазначено причини, з яких Голова УОКіК на шкоду захисту конкуренції допускає наявність угод між підприємцями або дає згоду на концентрацію підприємців. У дослідженні використано догматично-правовий та формально-юридичний методи, зосереджуючись на польському праві та праві Європейського Союзу; додатково проаналізовано зміст чинних рішень Голови УОКіК.

Ключові слова: концентрація підприємців, управління захисту конкуренції, згода на концентрацію, економічна свобода

Introduction

When defining the basis of the economic system (Article 20), the Constitution of the Republic of Poland of 2 April 1997, indicates, among other things, economic freedom as one of its elements. In turn, Article 9 of the Act – the Entrepreneurs Act[1] demands that entrepreneurs, while performing business activities, do so 'in observance of the principles of fair competition, and with respect for good manners and legitimate interests of other entrepreneurs.' The essence of competition is the rivalry between independent entities in order to gain an advantage permitting maximum economic benefit, as a rule, by freely chosen means, consistent with the law.[2] Thus, economic freedom as a subjective right reaches its limits where the freedoms of other entitled persons are realised.

Economic freedom manifests itself not only in the opportunity for an unfettered decision concerning the fact of undertaking (or not) economic activity; the scope (including territorial), its subject matter and the absence of possible administrative

1 The Act of 6 March 2018 – Entrepreneurs Act, Journal of Laws [Dziennik Ustaw] 2021 item 162 as amended.

2 K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2008, p. 45.

restrictions on its undertaking and conduct (such as the requirement to obtain licences, permits). Economic freedom is also the exercise of freedom of contract (concluded on many levels – with suppliers and customers, with competitors, with consumers[3]) and freedom to choose an organisational and legal form in which business activities will be conducted. In addition, economic freedom becomes a reality through the freedom to set prices in such a way as to gain an advantage over rivals in the market game. Economic freedom is also the freedom to form coalitions, to cooperate, to make alliances and agreements. The implementation of most of the said formulas is subject to evaluation by competition authorities. In turn, a restriction of freedom can only occur due to an important public interest, such as security, public order, freedoms and rights of others (Article 31), and be a solution that is proportional to the protected good.[4] In the same way, the public interest justifying the restriction of constitutional economic freedom should be seen in the maintenance of free, equal and fair competition as a right of entrepreneurs and the flywheel of economic growth as well as the contribution of competition between entrepreneurs to the welfare of citizens (consumers). The essence and content of freedom of economic activity as a constitutional freedom has received considerable attention in both the constitutional law literature[5] and the literature on public economic law;[6] in contrast to the very conflict that may arise between economic freedom and the protection of competition understood as a right of entrepreneurs.

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3 M. Łolik, *Kilka uwag o zasadzie swobody umów w świetle zasad ogólnych prawa unijnego*, Europejski Przegląd Sądowy 2022, no. 3, pp. 15–22.

4 P. Tuleja, *Komentarz do art. 31*, in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, 2021 [LEX database]; L. Garlicki, M. Zubik, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 2, 2nd ed. [LEX database]; K. Strzyczkowski, *Wolność gospodarcza w świetle konstytucji gospodarczej RP*, Studia Prawnoustrojowe 2011, no. 14.

5 Inter alia: K. Stępniak, *Wolność gospodarcza i jej gwarancje konstytucyjne*, Studia Prawnicze i Administracyjne 2018, no. 23 (1), pp. 19–23; A. Rytel-Warzocha, *Wolność działalności gospodarczej w świetle orzecznictwa polskiego Trybunału Konstytucyjnego*, Gdańskie Studia Prawnicze 2017, vol. 37, pp. 155–166; J. Ciapała, *Konstytucyjna wolność działalności gospodarczej w Rzeczypospolitej Polskiej*, Szczecin 2009; K. Klecha, *Wolność działalności gospodarczej w Konstytucji RP*, Warszawa 2009; A. Wilczyńska, *Interes publiczny w prawie stanowionym i orzecznictwie Trybunału Konstytucyjnego*, Przegląd Prawa Handlowego 2009, no. 6, pp. 48–55.

6 E.g.: P. Adamczewski, in: *Prawo konkurencji – 25 lat. Pierwszy Polski Kongres Prawa Konkurencji, Stosowanie prawa konkurencji na rynkach regulowanych – udział państwa w gospodarce a ochrona konkurencji*, ed. T. Skoczny, Warszawa 2015; J. Ciechanowicz-McLean, *Konstytucyjna zasada wolności gospodarczej a ochrona środowiska*, Gdańskie Studia Prawnicze 2014, vol. 31, pp. 99–108; A. Powałowski, *Społeczna gospodarka rynkowa w prawie polskim*, Gdańskie Studia Prawnicze 2017, vol. 37, pp. 51–62; M. Szydło, *Wolność działalności gospodarczej jako prawo podstawowe*, Bydgoszcz–Wrocław 2011; A. Żurawik, *Klauzula interesu publicznego w prawie gospodarczym krajowym i unijnym*, Europejski Przegląd Sądowy 2012, no. 12, pp. 24–30.

Therefore, the present article focuses on the dilemmas faced by the President of the Office of Competition and Consumer Protection (OCCP) when conducting antitrust proceedings.

The basis for a resolution in favour of one of these values should be included in legal acts of statutory rank. Meanwhile, these restrictions sometimes derive from executive regulations or even *soft law* documents, which can be considered an undesirable phenomenon.

In antitrust proceedings, the President of the OCCP actually seeks a balance between implementing economic freedom as a constitutional value and contributing to the maintenance of free, equal and fair competition by entrepreneurs, in the public interest. In particular, it applies to the effects of restrictive agreements used by entrepreneurs (such as overpricing, market sharing, rationing of supply, squeezing competitors out of the market) and concentration of entrepreneurs. Thus, the right of entrepreneurs and the public interest; economic freedom and fair, equal competition; fair competition and public interest stand in opposition to one another, while the scales of gravity do not always tilt in the same direction, which is particularly evident in the content of the decisions of the President of the OCCP issued in antitrust cases, when the public interest once becomes a reason to prohibit a concentration, at other times it becomes a reason to grant permission, despite the violation of competition.

1. Decisions on practices limiting competition

The prohibition against agreements between entrepreneurs, introduced to protect the public interest, is generally a more highly placed value than the right to carry out business activities in a free manner and the freedom to enter into contracts. Nevertheless, the legally established exceptions to the categorically negative assessment of agreements between entrepreneurs mean that the President of the OCCP is often faced with the dilemma as to which statutory value – economic freedom or fair competition – should be given priority. In addition, he should consider which agreements are able to pose a real threat to competition.[7]

The *rule of reason* derived from American law allows for certain categories of agreements, despite their negative effects on competition. The European law, in

[7] *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, ed. T. Skoczny, Warszawa 2014, p. 336; K. Kohutek, M. Sieradzka, *Ustawa o ochronie*…, p. 311.

turn, provides for three types of exceptions to the ban on agreements, followed by the Polish law. These are the so-called '*de minimis* agreements,' agreements regarded as compatible with competition under one of the block exemptions, and individually assessed agreements deemed permissible.

The EU *Notice de minimis agreements*[8] is a guideline on how to reconcile attempts to gain market advantage with methods regarded as fair with regard to competitors and consumers. It provides a non-binding benchmark on which the EU member states should rely. While the Notice as a *soft law* act is not binding on national authorities, in resolving the conflict between economic freedom and fair competition, national authorities should be inspired by it, if only on the basis of the general principle of loyal cooperation resulting from the TFEU (Treaty on the Functioning of the European Union). The Polish legislator acknowledges that due to the small scale of their impact, *de minimis* agreements are not able to restrict competition in a noticeable way. Thus, the legislator assumes that there is no conflict between economic freedom (freedom to contract) and fair competition. For the domestic market, unimportance limits of 5% and 10% of the share in the relevant market have been adopted (Article 7 of the Office of Competition and Consumer Protection),[9] for participants in horizontal and vertical agreements, respectively. One has to agree with the view,[10] that increasing the entrepreneurial freedom of action, including the creation of alliances and groups by small and medium-sized entrepreneurs, would contribute to competition rather than be detrimental to it, as it would create a counterbalance to the already existing players in a given market. The framework in which entrepreneurs have to operate reduces their chances of stabilising their position in the market while implementing innovations.[11]

In addition, looking for a compromise between the freedom to create agreements and the protection of competition touches the issue of entrepreneurs' intentions. The EC notice assumes that no exemption is possible for any agreement if its

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8 Notice on agreements of minor importance which do not appreciably restrict competition under Article 101 (1) of the Treaty on the Functioning of the European Union (De Minimis Notice), OJ C 291, 30.08.2014, p. 1. K. Wiese, *Porozumienia o antykonkurencyjnym celu w nowym zawiadomieniu de minimis,* Monitor Prawniczy 2015, no. 16, p. 865; P. Podrecki, in: *System Prawa Prywatnego*, vol. 15. *Prawo konkurencji*, ed. M. Kępiński, Warszawa 2013, p. 825.

9 The Act of 16 February 2007 on competition and consumer protection, consolidated text: Journal of Laws 2021 item 275 as amended.

10 A. Stawicki, *Gdzie jesteśmy i dokąd zmierzamy? Refleksje wokół możliwych kierunków zmian przepisów polskiego prawa konkurencji*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2021, no. 5 (10), p. 51.

11 R. Molski, *Prawo antymonopolowe a polityka wspierania rozwoju małych i średnich przedsiębiorców*, Acta Universitatis Wratislaviensis no. 3977. Prawo 2019, no. 329, pp. 372, 376.

purpose is (and not merely the effect, however unintentional) to restrict or infringe competition. The perceptibility of the effects is presumed in the cases in question, regardless of the size of the relevant market shares of the participants in such an agreement. The indicated point of view, included in the notice, is the fruit of, among other things, the Court's (preliminary) ruling)[12] of 13 December 2012 in the EXPEDIA case, in which it was pointed out that it was not the market share thresholds held, that ultimately determined whether competition was actually affected or infringed, but the purpose of the action and the actual impact of the agreements on the relevant market, and that, as an agreement restricting competition by virtue of its purpose, it was automatically deemed to be noticeable for competition.[13] The entrepreneurs' freedom to decide whether and to what extent they may enter into alliances is therefore subject to automatic narrowing due to the purpose of the actions taken. If, on the other hand, the anticompetitive effects are unavoidable then it must be assumed that the restriction of competition was intentional.

Meanwhile, Article 7 of the Competition and Consumer Protection Act does not add the abovementioned proviso and allows, ruling in favour of economic freedom, to consider as permissible even those agreements whose objective was the restriction of competition, as long as the size of the agreements remained trivial.[14] In the context of weighing values, it does not seem to be an appropriate approach. On the other hand, the dilemma of whether to give primacy to freedom of economic activity or fair competition is resolved by the legislator in favour of protecting free, equal and fair competition by stipulating that agreements (even of the smallest size) do not enjoy the privilege of admissibility if they constitute a price cartel, a quota cartel, establish market sharing or constitute a procurement agreement. It is thus acknowledged that the said agreements intrinsically distort competition, without having to examine the factual and economic impact of such agreements on the market.[15]

The law (in Article 8 of the OCCP), modelling itself on Article 101 (3) of the TFEU (Treaty on the Functioning of the European Union), also permits agreements that simultaneously: a) contribute to the improvement of production, distribution

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[12] The Ruling of the Court (Second Chamber) of 13 December 2012, EXPEDIA Inc. v. Autorité de la concurrence et Others, C-226/11, ECLI:EU:C:2012:795, p. 6.

[13] J. Polański, *O ramach analitycznych przy badaniu naruszeń „ze względu na cel"*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2019, no. 4 (8), p. 122.

[14] D. Kostecka-Jurczyk, *Zastosowanie art. 101 ust. 1 TFUE przez krajowe organy antymonopolowe w sytuacji, gdy porozumienie ograniczające konkurencję spełnia kryteria de minimis, a konkurencja zostaje w znacznym stopniu ograniczona – glosa do orzeczenia z dnia 13 grudnia 2012 r. w sprawie C-226/11 Expedia*, Acta Universitatis Wratislaviensis no. 3614. Prawo 2015, no. 317, p. 212.

[15] K. Kohutek, M. Sieradzka, *Ustawa o ochronie…*, pp. 303–304.

of goods, or to technical or economic progress; b) ensure that the buyer or user receives a fair share of the benefits arising from the agreements; furthermore, c) do not impose restrictions on the entrepreneurs concerned that are not necessary to achieve those objectives; and d) do not create opportunities for those entrepreneurs to eliminate competition in the relevant market for a substantial part of certain goods. Meeting the above-mentioned premises may constitute a basis for the introduction of general, generic exemptions from the prohibition (established by the Council of Ministers), as well as individual exemptions issued on the basis of each assessment of the facts by the President of the OCCP, in anti-trust proceedings.

The legislator, by making a derogation to the prohibition of agreements, by establishing such forms of them that benefit from block exemptions again, does not so much tip the scales towards economic freedom, at the expense of protecting competition, as it does for the benefit of consumers. Block exemptions, established by regulations of the Council of Ministers[16] indicate those types of agreements (including those divided into vertical and horizontal) and their subject matter whose existence may not interfere with fair competition in the relevant market. However, due to their preventive effect, the provisions of the Regulations limit the freedom of contractors by listing which clauses may constitute the content of an agreement, which may not, and for how long such agreements may be concluded. Thus, the content of the regulations directly affects the freedom of contracting and the formation of mutual rights and obligations of entrepreneurs, with a view to striking a balance between the freedom of entrepreneurs and the protection of fair, free and equal competition. The primary value emerging victorious from this dispute is the interests of consumers.

The fulfilment of all four conditions referred to in Article 8 (1) of the OCCP, implies greater freedom of action for entrepreneurs, despite the concomitant and undisputed harm to competition. The responsibility of proving the circumstances, of course, rests with the entrepreneurs, and it is up to the antitrust authority to assess which value – competition or freedom of economic activity – should prevail in a given situation. Entrepreneurs should demonstrate that the proportions of the benefits and negative effects resulting from the existence of the agreement argue in

16 Including those on specialisation agreements, technology transfer, research and innovation, car servicing. These are often modelled on EU normative acts similar in content such as the Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.04.2010, p. 1 or Commission Regulation (EU) No. 461/2010 of 27 May 2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 129, 28.05.2010, p. 52.

favour of the fact that it is the freedom of economic activity and the instruments for gaining a competitive advantage that should prevail.

One of the echoing decisions of the President of the OCCP permitting the agreement individually is the Decision on the case of the Pieniny Raftsmen. In the said case – in spite of the evident violation of the principle of competition – and despite the fact that the exception of Article 8 of the OCCP does not apply to price agreements, the President of the OCCP did not prohibit the agreement.[17] Basing only on an analysis of effects, the President of the Office decided that the agreement adopted by the Association of the Pieniny Raftsmen on the Dunajec River in Sromowce Niżne in the form of a resolution of the general meeting, determining, among other things, the prices and the place of provision of the tourist service of rafting on the Dunajec River, fulfilled the premise referred to in Article 8 (1) (1) of the OCCP. In the opinion of the President of the Office of Competition and Consumer Protection, the joint determination of prices and terms of service contributes to the provision of services in a more efficient manner and thus results in improved distribution of the indicated services. Moreover, the benefits of standardised prices have been passed on to consumers, not forced to engage in individual negotiations with rafters and possibly pay an inflated price.[18]

Continuing the same topic area, the issue of an alleged price cartel in the activities of the Circle of Sudetic Guides at the PTTK 'Western Sudetes' Branch in Jelenia Gora[19] accused of setting prices for guiding services, is worth mentioning. However, the relevant resolution of the said organisation included only the suggested prices leaving the guides free to ultimately apply or change them (both upward and downward). Thus, price competition was maintained as an instrument of competition for customers. It was further argued that an agreement, having the nature of a price agreement covering almost the entire share of the relevant market, did not have to be prohibited if it was not designed to restrict competition. The constitutional entrepreneurial freedom granted to entrepreneurs took precedence. In that case, it should have been assumed that the price agreement did not exist at all, since there was no firm price fixing, and consequently the proceeding should have been declared pointless.

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17 The Decision of the President of the Office for Competition and Consumer Protection of 4 November 2011, RKT-33/2011, https://decyzje.uokik.gov.pl/bp/dec_prez.nsf [access: 3.07.2023].

18 A. Jurkowska-Gomułka, *Stosowanie zakazu porozumień ograniczających konkurencję zorientowane na ocenę skutków ekonomicznych? Uwagi na tle praktyki decyzyjnej Prezesa Urzędu Ochrony Konkurencji i Konsumentów w odniesieniu do ustawy o ochronie konkurencji i konsumentów z 2007 roku*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2012, no. 1 (1), p. 42.

19 The Decision of the President of the Office for Competition and Consumer Protection of 29 November 2011, RKT-37/2011, https://decyzje.uokik.gov.pl/bp/dec_prez.nsf [access: 3.07.2023].

The Act – Entrepreneurs Act, commonly referred to as the Constitution for Business, indicates, among other things, the guiding principles for exercising freedom of business activity. It includes the obligation of businessmen to observe good morals as well as to take into account the legitimate interests of other entrepreneurs. They represent legally protected values. Given that fair competition is not only a right but also an obligation of entrepreneurs conducting business, the scope of the said subjective right is determined by the limits of the rights granted to other co-participants in the market as well as by extra-normative values. Undeniably, the law, in order to be applied, should reflect universally recognised social and moral values. Therefore, in order to protect fair competition as much as possible, entrepreneurs themselves should guarantee each other's loyalty and consideration of interests – including intangible assets (e.g., good name). The leniency program is one of the solutions used in antitrust proceedings to help detect antitrust agreements. This program subjects businessmen to a test of loyalty and mutual trust. What is contrasted here is the effectiveness of combating violations of competition and good morals. Indeed, the indicated programme bases on voluntary disclosure by entrepreneurs of the existence of an agreement. The trouble is that the greatest benefit (in the form of exemption from fines) goes to the entrepreneur who is the first to provide the President with evidence of the existence of an agreement, worsening the situation of the other participants in the agreement.[20] In this case, the strongest conflict may seem to be the one between the restoration of fair, free and equal competition (which is a matter of public interest), and good morals as well as the consideration of the interests of entrepreneurs. While the denunciation of a cooperating entrepreneur, and at the same time a competitor, can hardly be considered an action undertaken in accordance with good morals, it is difficult to call it a 'legitimate' interest to keep an entrepreneur's violation of the law secret from the antitrust authority. The value by far superior under these circumstances remains that of free, equal and fair competition. This is not, in my opinion, a just solution.[21] The legislator who takes seriously the issues of business ethics should by no means create this kind of dilemma and conflict between the effectiveness of the law and morally reprehensible behaviour.

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[20] E. Weinar, *Program łagodzenia kar (leniency) w Polsce i we Francji – analiza prawno-porównawcza*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2020, no. 5 (9), p. 176.

[21] A. Dobaczewska, *Program łagodzenia kar jako przyczynek do ujawniania porozumień naruszających konkurencję*, Przegląd Naukowy Disputatio 2015, vol. 19, pp. 33–44.

2. Decisions on giving consent to entrepreneurs' concentration

The second type of antitrust proceedings (in addition to practices restricting competition), is the procedure aimed at providing consent to a concentration of entrepreneurs. The law provides for four forms of concentration, including a merger of entrepreneurs, an acquisition of control over another entrepreneur (including through the acquisition of a block of his shares), an acquisition of a statutorily designated amount of property of another enterprise, or a joint establishment of a new entrepreneur. With these types of transactions, the freedom of entrepreneurs to create the legal form and size of their enterprises is carried out. Not all such transactions necessarily pose a threat to fair competition. The concentrations of smaller sizes, again guided by the so-called rule of reason, are regarded by both EU and national regulations as not conflictive with competition.[22] Concentrations planned by entrepreneurs who jointly achieve a turnover below the legally indicated ceilings in the relevant market (worldwide or internal/Polish, respectively) are understood as the ones that do not pose a threat to competition.[23] The triviality of the concentrations means that the legislator, followed by the antitrust authority, does not see a conflict between the creation of capital structures and the need to protect competition and does not require the filing of a notification of intent to concentrate.

An exemption from the need to obtain approval for a concentration is also granted in the situations specified in Article 13 (2) of the OCCP. The acquisition of control of another undertaking by a financial institution, or by a creditor to secure debts, could as such distort competition if it were not for their temporary nature. Therefore, already at the stage of the law-making process, it was acknowledged to be unnecessary to assess the consequences of such a concentration, as long as the acquirer was not going to exercise the voting rights of the acquired shares, i.e. de facto did not affect the state of competition among the participants in the relevant market. Thus, competition is protected at the price of limiting the freedom of contract and property rights.

The subject of examination in antitrust proceedings is determining whether competition may be restricted as a result of the concentration, in particular through the creation or strengthening of a dominant position in the relevant market. Where

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22 K. Kohutek, M. Sieradzka, *Ustawa o ochronie*…, pp. 560–561.

23 According to Article 13 of the Competition and Consumer Protection Office, it is respectively EUR 1 billion and EUR 50 million; and according to Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 20.01.2004, vol. 8, the turnover ceiling for concentrations with a Community dimension is EUR 5 billion on the world market or EUR 250 million on the internal market.

the President of the Office for Competition and Consumer Protection, after conducting a proper investigation, sees no threat to fair competition, he permits the concentration without resolving the conflict between the values in question. However, if, in the opinion of the antitrust authority, competition would be threatened by the concentration, additional conditions may be stipulated, and the applicants may be required to meet them. In addition, the approval for a concentration, known as extraordinary approval, can also be granted.

In case of conditional approval, the conflict between the obligation to guarantee fair and free competition and the freedom of contracting and shaping the form and size of business activities is eliminated. Should the entrepreneurs fail to fulfil the conditions imposed on them in the decision within a specified period of time, the President of the OCCP is obliged to revoke his decision and decide the case once again. It can be assumed that he will then absolutely stand on the side of fair and equal competition, blocking the right to do business freely. By disapproving a concentration or setting conditions for it, the President limits the manifestations of economic freedom and the building of market position by entrepreneurs. However, this is done in order to maintain the rules of fair market play.

A slightly more complicated matter is the issuance of the so-called 'extraordinary approval,' mentioned above, by the President of the OCCP. The solution provided for in Article 20 (2) of the OCCP is that the anti-trust authority issues its consent to concentrations (without imposing additional requirements) despite the existence of circumstances that unequivocally negatively affect competition. The extraordinary nature of the consent stems from the fact that it is issued only insofar as it is justified by other (read: higher placed) goods or values serving the public interest. The essence of the said procedure is its two-stage nature. The first one establishes the threat to fair competition, understood as the public interest. The basic premise, included in the wording stating that the President gives his consent 'in the event that a waiver of the concentration ban is justified' can turn out to be problematic and it is so general that in fact it does not provide practically sufficient guidance as to the circumstances that should be taken into account in evaluating the notified concentration.[24]

[24] Guidance can be provided by EC decision-making practice and guidelines from the Commission. Cf.: Wytyczne w sprawie oceny horyzontalnego połączenia przedsiębiorstw na mocy rozporządzenia Rady w sprawie kontroli koncentracji przedsiębiorstw, OJ C 31, 5.02.2004 and Wytyczne w sprawie oceny niehoryzontalnych połączeń przedsiębiorstw na mocy rozporządzenia Rady w sprawie kontroli koncentracji przedsiębiorstw, OJ C 265, 18.10.2008, p. 7.

After all, if the public interest were not to be jeopardized, the interference of the President of the OCCP would be unnecessary, as is clear from Article 1 of the OCCP,[25] and there would at most be grounds for issuing consent on the basis of Article 18 of the OCCP. In the second stage, an inference is made as to whether there are other values sufficiently justifying the concentration. Thus, the following analysis of the effects of the intended concentration is provided for: initially from the point of view of the public interest in protecting competition, and then from the point of view of the public interest pursuing other values.[26] The cases in which the President of the OCCP faced such an axiological choice were not particularly numerous, and they occurred mainly during the period of building a free market economic system. Invariably, the value placed above fair competition should be economy-wide goods. The legislator pointed to several examples in Article 20 (2), including: economic development, technical progress and other positive impacts on the national economy.

Thus, the Act makes use of a general clause, an open-ended list of reasons for granting extraordinary approval, indicating only by way of example the public interest manifested in, among other things, social and economic benefits other than fair competition.[27] Thus, it is up to the President of the OCCP to decide whether, and to what extent, these other values are relevant. At this point, it is worth noting that part of the doctrine[28] maintains that it is the role of the President of the OCCP (and not the applicants concerned) to demonstrate the existence of the premises necessary for the issuance of emergency approval. However, it seems that although the host of the proceedings is the administrative body supposed to strive for a comprehensive explanation of the case, given that the application (notification of the intention of concentration) is filed by entrepreneurs and it is they who derive the effects from the statement that the concentration will be the best solution for the public interest, then it is on their side to prove their case. As a side note, it is worth mentioning that the European Commission's Horizontal Concentration Guidelines[29]

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25 T. Skoczny, M. Kolasiński, in: *Ustawa o ochronie*…, ed. T. Skoczny, p. 721.

26 Ibidem, p. 718.

27 J. Olszewski, *Nadzór nad koncentracją przedsiębiorców jako forma prewencyjnej ochrony konkurencji*, Rzeszów 2004, p. 344; M. Wierzbowski, K. Karasiewicz, R. Stankiewicz, *System Prawa Prywatnego*, vol. 15, p. 1088.

28 M. Idźkowski, *Nadzwyczajna zgoda Prezesa UOKiK na dokonanie koncentracji*, Studia Prawnoustrojowe 2015, no. 30, p. 119; A. Jurkowska-Gomułka, in: *Ustawa o ochronie*…, ed. T. Skoczny, p. 908. A different opinion is presented by M. Błachucki, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2016, p. 304, arguing that it is up to traders to demonstrate that the proposed concentration will have an overall economic benefit.

29 As a side note, it is worth highlighting that the European Commission, in its guidelines on horizontal concentrations, explicitly states that the onus is on applicants to demonstrate the superiority of values

unequivocally state that the onus is on applicants to demonstrate the superiority of values in favour of consent.

The President of the OCCP should precede his decisions with an economic test, assessing whether and to what extent competition will be infringed and calculating which scenario will be more profitable for the public. He will always resolve the conflict between two values – fair competition and the value presented in the application – when issuing an emergency approval.

The examples of rulings by the President of the Office of Competition and Consumer Protection and possible case law come to the rescue when weighing the values to be used as a basis for extraordinary approval. The creation of an effective structure of the relevant market,[30] national security,[31] energy security and implementation of state economic policy,[32] the creation of a financially stable and technologically strong (state) entrepreneur capable of international competition,[33] an increase in budget revenues,[34] environmental protection,[35] consumer protection, protection or creation of jobs[36] turned out to be the goods classified in this way, belonging to the broadly understood public interest, standing in opposition to the state of violation of fair competition found earlier. Among other things, energy security and guarantees of continuity of supply,[37] pluralism of the media (televisions), opportunities to improve production technology and improve quality,[38] the emergence of new products on the market,[39] the implementation of restructuring

in favour of consent, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.02.2004, point 91.

30 The Decision of the President of the OCCP of 6 August 2002, DDI-61/2002, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

31 Ibidem.

32 The Decision of the President of the OCCP of 22 December 2006, DOK-163/2006; the Decision of 27 September 2007, DKK-32/2007; the Decision of the President of the OCCP of 8 March 2007, DOK 29/2007, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

33 The Decision of the President of the OCCP of 15 November 2003, RWA-16/2003, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

34 Ibidem.

35 The Decision of the President of the OCCP of 5 March 2004, RPZ-4/04, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

36 The Decision of the President of the OCCP of 15 November 2003, RWA-16/2003, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

37 The Decision of the President of the OCCP of 5 March 2004, RPZ-4/04, https://decyzje.uokik.gov.pl [access: 3.07.2023].

38 The Decision of the President of the OCCP of 22 December 2006, DOK-163/2006, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

39 Ibidem; the Decision of the President of the OCCP of 17 July 2006, RKT-48/2006, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

strategies and ownership transformations in the sector (for example, aviation and radio-electric sectors)[40] were placed on the scales against fair competition.

The argument of economic efficiency was used on several occasions, including in the case,[41] in which a merger of entrepreneurs in the digital pay-TV market was allowed (it was Cyfra+ and UPC), recognising that one operator must have a sufficient number of customers for its services in a certain area to ensure that its business was profitable; whereas in the case of a co-existence of more competitors, it would not be able to acquire a sufficiently large number of customers. Monopoly was therefore a condition for the survival of any service provider. Thus, despite the violation of competition in a significant way, the Decision of the President of the OCCP was made in favour of this 'other' value.

The value placed higher than maintaining the market balance of the participants turned out to be the public safety and the implementation of the strategy of structuring the relevant market on the basis of previously adopted strategies.[42] Namely, that was when PHZ Bumar Limited Liability Company took control of more than a dozen companies producing weapons, explosives, chemicals, measuring tools and many others. Despite the unambiguous acquisition of a dominant position in the relevant market by the merged entrepreneurs, the President of the Office of Competition and Consumer Protection (OCCP) agreed to the concentration, recognising that it would allow them to better compete abroad, since individual bids would be technologically less attractive to (potential) buyers.[43]

It should be noted that the rationale for granting extraordinary approval cannot be the positive impact of the concentration on the parties involved. The benefits for those who seek concentration approval may at best coincide with the public interest, but are not a sufficient premise. The legislator unequivocally requires that the President of the OCCP demonstrates the existence of a public interest, e.g. in the form of technical progress, and therefore a benefit for many entrepreneurs, the entire industry and even the entire economy.[44] The decision taken by the President

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40 The Decision of the President of the OCCP of 29 August 2002, DDI-70/2002; the Decision of the President of the OCCP of 8 March 2007, DOK-29/2007, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

41 The Decision of the President of the OCCP of 5 April 2005, RPZ-9/2005 and the subsequent ruling XVII Ama 52/98 non-publ. and XVII Ama 12/01 after T. Skoczny, M. Kolasiński, in: *Ustawa o ochronie…*, ed. T. Skoczny, p. 724.

42 Strategy for Structural Transformation of the Industrial Defence Potential in 2002–2005, The Resolution of the Council of Ministers of 14 May 2002.

43 The Decision of the President of OCCP of 17 July 2006, RKT 48/2006, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

44 E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2002, p. 171.

of the OCCP approving the concentration turned out to be at least questionable, for yet another reason – a divergent assessment as to the existence of a conflict of values as such in this case. This is because the justification for the decision did not show that the concentration would cause negative effects on competition. Thus, since it had not been documented at the first stage of the evidentiary proceedings that there would be a significant infringement of competition, the issuance of emergency approval was essentially pointless. The President of the Office of Competition and Consumer Protection had a stable basis for issuing the consent under Article 20 (1) of the OCCP.

Another reason why the antitrust authority decides to give extraordinary approval is sometimes social concerns. Considering that the result of competition is gaining an advantage at the expense of the failure of rivals and often the bankruptcy of the latter, antitrust authorities may consent to a merger of entrepreneurs, among other things, to prevent the social consequences of such bankruptcy. It cannot be ruled out that the social costs resulting from the loss of jobs (if the entrepreneur's assets were not allowed to be taken over) would be far higher than those from the creation of a dominant position in the relevant market. Preserving workplaces is a higher value in this case. Similarly, the situation of a takeover of a failing bank (described as *too big to fail*), constitutes an example of saving the savings of many consumers and counteracting the problems of many households as a good placed higher than the threat to fair competition by an entity gaining a dominant position in the relevant market. The antitrust authority should, in the situation of a projected bankruptcy of an entrepreneur, assess the effects of this event on the relevant market and competition also with regard to the scenario if the planned concentration had not taken place. The authority should assess what would happen if, in the absence of concentration approval, the entrepreneur were to go bankrupt, since then there would be one less competitor left on the market anyway (and what share of the relevant market would be taken by its market competitors). The said argument is referred to as the *failing company defence*, and the President of the OCCP should take it into account before deciding whether to approve the concentration.[45]

Concentrations may also potentially affect other constitutional values such as democratic order (including the freedom of speech), equal access to goods and services, changes in the ownership structure (nationalisation). All concentrations should be consistent with constitutional economic, social and political order; regardless of any harm done to fair competition. The provisions of Article 20 (2) of the OCCP – like any general clause – are potentially subject to an abuse of

45 T. Skoczny, M. Kolasiński, in: *Ustawa o ochronie*…, ed. T. Skoczny, p. 725.

interpretation. The greater the certainty as to the permissible understanding of the content of the provision, the more advantages for the entrepreneurs concerned, but also for the public interest. It would not be unreasonable, therefore, for the President of the OCCP to issue guidelines relating to the manner of interpreting the used terms 'economic development' or 'positive impact on the national economy.'

The principles of merging businesses or acquiring control over them are contained in several other normative acts, imposing additional restrictions. In the case of entities subject to financial supervision, the outcome of antitrust proceedings is subject to prior approval by the KNF (eng. the Polish Financial Supervision Authority). When, under Article 25h of the Banking Law[46] KNF determines that a concentration is not possible, not because it opposes fair competition, but because, for example, it is 'justified by the need for prudent and stable management of a national bank' (Article 25h (1) point 3 or because 'the submitter of the notifications gives the assurance of exercising its rights and obligations in a manner that duly safeguards the interests of the customers of the national bank and ensures the safety of funds collected in the national bank' (Article 25h (2) point 1), or when the bank's capital does not meet prudential requirements'; then the overriding value is consumer safety and market stability.

Another example of special regulations with regard to concentrations of entrepreneurs are the provisions of the Law on Principles of Management of Property of the State Treasury.[47] They either exclude completely or make concentrations of entrepreneurs of particular importance for the national economy, with regard to shares owned by the State Treasury or state legal persons, subject to the approval of the Council of Ministers. The law imposes an absolute ban on trading in shares of certain (explicitly mentioned) companies owned by the Treasury that are of special importance to the public interest. The public interest is therefore always a reason for not approving a concentration in their case. The applicants for approval should also document whether they can also guarantee protection of the interests of the employees of the company whose shares are to be divested. If such a transaction simultaneously meets the premises for a concentration included in the Law on Competition and Consumer Protection, the consent of the Council of Ministers is not a substitute for conducting anti-trust proceedings. Moreover, the assessment of the President of the OCCP of a given transaction may be completely different, as being based on other premises.

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46 Act of 29 August 1997 – Banking Law, Journal of Laws 2021 item 2439 as amended.

47 Act of 16 December 2016 on the principles of state property management, Journal of Laws 2021 item 1933 as amended.

Conclusions

The President of the OCCP faces a dilemma in almost every antitrust proceeding he conducts, whether to protect free competition as a value relevant to the economic system, or economic freedom as constitutionally guaranteed subjective rights of entrepreneurs (occurring in many guises), even though it may seem that the two values coexist and reinforce each other. The decisions of the President of the OCCP are admittedly made in conditions where the conflict between these values does not exist for its elimination has already taken place at the stage of law-making, such as *de minimis* agreements and concentrations. However, more often than not, the President of the OCCP, by virtue of his administrative decision, is obliged to eliminate or reduce this conflict through individual exemptions of agreements, or conditional approvals of concentrations. Occasionally, though, decisions are made despite the (continued) existence of a conflict of values between economic freedom and fair competition, giving one of them priority in the process of weighing the said values. Such is the case with emergency approval of a concentration. Thus, the application of the law does not always make it possible to eliminate the conflict of values. Even more so, the legislator does not succeed, in specific provisions, in eliminating this conflict a priori.

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