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Public interest and competition-restricting agreements in the jurisprudential practice of the Bydgoszcz Branch of the Office of Competition and Consumer Protection

Interes publiczny a porozumienia ograniczające konkurencję w praktyce orzeczniczej Delegatury Urzędu Ochrony Konkurencji i Konsumentów w Bydgoszczy

Публичный интерес и ограничивающие конкуренцию соглашения в судебной практике Представительства Управления по защите конкуренции и потребителей в г. Быдгоще

Суспільний інтерес та угоди, що обмежують конкуренцію, у практиці Представництва Управління з питань захисту конкуренції та споживачів у Бидгощі

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Summary: The public interest constitutes a justification for limiting the constitutional principle of freedom of economic activity in the form of prohibiting agreements that restrict competition. It sets the scope of this limitation and identifies behaviours of entrepreneurs that will be considered anti-competitive. However, the public interest is normatively indeterminate, which results in various definitions depending on the adopted doctrinal basis of competition policy. This article presents the understanding of this term as adopted in doctrine and jurisprudence. This serves as a starting point for researching the method of identifying the public interest in the jurisprudential practice of the Branch of the Office of Competition and Consumer Protection in Bydgoszcz. To achieve this goal, decisions concerning agreements restricting competition issued by the President of the Office of Competition and Consumer Protection – Branch of the Office in Bydgoszcz, since the effective date of the Act of 16 February 2007, as well as court judgments resulting from appeals filed in these cases, were analysed. The analysis led to the conclusion that despite formally examining the admissibility of this intervention in each case, the efforts of the President of the Office of Competition and Consumer Protection focus primarily on demonstrating that entrepreneurs enter into competition-restricting agreements, thus violating Article 6 (1) of the Act of 16 February 2007.

Key words: public interest, competition law, competition-restricting agreements

Streszczenie: Interes publiczny stanowi uzasadnienie dla ograniczenia konstytucyjnej zasady wolności działalności gospodarczej w postaci zakazu zawierania porozumień ograniczających konkurencję. Wyznacza zakres tego ograniczenia i wskazuje zachowania przedsiębiorców, które będą uważane za antykonkurencyjne. Interes publiczny jest jednak niedookreślony normatywnie, przez co jest różnie definiowany w zależności m.in. od przyjętych podstaw doktrynalnych polityki konkurencji. Artykuł przedstawia prezentowane w doktrynie i orzecznictwie rozumienie interesu publicznego. Stanowi to punkt wyjścia do przeprowadzenia badań nad sposobem identyfikowania interesu publicznego w praktyce orzeczniczej Delegatury Urzędu Ochrony Konkurencji i Konsumentów w Bydgoszczy. W tym celu przeanalizowano decyzje dotyczące porozumień ograniczających konkurencję wydawane przez Prezesa UOKiK – Delegaturę w Bydgoszczy od czasu wejścia w życie obowiązującej ustawy, a także wyroki sądów, które zapadały w wyniku rozpatrzenia odwołań składanych w tych sprawach. Analiza ta

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pozwoliła na wyciągnięcie wniosku, że mimo formalnego badania dopuszczalności tej interwencji w każdej sprawie, wysiłki Prezesa UOKiK koncentrują się przede wszystkim na wykazaniu zawierania przez przedsiębiorców porozumień ograniczających konkurencję, naruszających przepis art. 6 ust. 1 ustawy z dnia 16 lutego 2007 r.
Słowa kluczowe: interes publiczny, prawo ochrony konkurencji, porozumienia ograniczające konkurencję

Резюме: Публичный интерес является обоснованием для ограничения конституционного принципа свободы хозяйственной деятельности в виде запрета на заключение соглашений, ограничивающих конкуренцию. Он определяет сферу действия данного ограничения и указывает на поведение предпринимателей, которое считается антиконкурентным. Однако публичный интерес не определен нормативно и поэтому определяется по-разному, в том числе и в зависимости от принятой доктринальной основы конкурентной политики. В данной статье представлено понимание публичного интереса, представленное в доктрине и судебной практике. Оно служит отправной точкой для проведения исследования того, как определяется общественный интерес в судебной практике Представительства Управления по защите конкуренции и потребителей в Быдгоще. С этой целью были проанализированы решения по ограничивающим конкуренцию соглашениям, вынесенные Председателем Управления по защите конкуренции и потребителей – Представительством в городе Быдгоще с момента вступления в силу действующего Закона, а также решения судов, вынесенные в результате рассмотрения поданных по этим делам апелляционных обжалований. Данный анализ позволил сделать вывод о том, что, несмотря на формальное рассмотрение вопроса о допустимости данного вмешательства в каждом конкретном случае, усилия Председателя Управления по защите конкуренции и потребителей направлены в первую очередь на подтверждение заключения предпринимателями ограничивающих конкуренцию соглашений, нарушающих положение статьи 6 (1) Закона от 16 февраля 2007 года.
Ключевые слова: публичный интерес, конкурентное право, ограничивающие конкуренцию соглашения

Резюме: Суспільний інтерес є виправданням обмеження конституційного принципу свободи економічної діяльності у формі заборони укладати угоди, що обмежують конкуренцію. Він визначає сферу дії цього обмеження та вказує на поведінку підприємців, яка вважатиметься антиконкурентною. Однак суспільний інтерес є нормативно недостатньо визначеним і тому визначається по-різному, залежно зокрема, від прийнятих доктринальних засад конкурентної політики. У статті представлено розуміння суспільного інтересу в доктрині та практиці. Вона є початковою точкою для проведення дослідження того, як суспільний інтерес визначається в практиці Представництва Управління з питань захисту конкуренції та споживачів у Бидгощі. З цією метою було проаналізовано рішення щодо угод, які обмежують конкуренцію, прийняті Головою Управління з питань захисту конкуренції та споживачів – Бидгощське відділення з моменту набрання чинності чинним Законом, а також рішення судів, які були прийняті за результатами розгляду апеляцій поданих у цих справах. Цей аналіз дозволив зробити висновок, що, незважаючи на формальну перевірку допустимості такого втручання в кожному конкретному випадку, зусилля Голови Управління з питань захисту конкуренції та споживачів (УПЗКС) зосереджуються насамперед на доведенні укладення підприємцями угод, що обмежують конкуренцію, порушуючи положення ч. 1 ст. 6 Закону від 16 лютого 2007 року.
Ключові слова: суспільний інтерес, право захисту конкуренції, угоди, що обмежують конкуренцію

Introduction

The public interest provides a justification for restricting the constitutional principle of freedom of economic activity in the form of a ban on competition-restricting agreements. This concept is vague and normatively undefined, hence it is defined differently depending, among other things, on the accepted doctrinal basis of competition policy. It is largely dependent on the demands of society and its expecta-

tions regarding the rules of the market economy. Consequently, the public interest defined under certain circumstances, along with changes in society and the economic situation, is itself also subject to change. Thus, the general clause of public interest allows to correct its meaning in axiological, political or practical terms.[1]

The heterogeneous and variable nature of this clause, as well as the discrepancies observed in the doctrine as to its understanding, justify the study of the way in which the concept of public interest is interpreted in the rulings of the President of the Office of Competition and Consumer Protection (hereinafter: OCCP) regarding competition-restricting agreements during the effective period of the Competition and Consumer Protection Act of 16 February 2007 (hereinafter: the Act).[2] The research problem thus defined is of momentous practical importance. One of the public interest functions is a jurisdictional one, setting limits on the permissibility of the OCCP President's intervention. The way in which this concept is interpreted will directly affect the possibility of initiating antitrust proceedings and the further evaluation of the actions of entrepreneurs entering into agreements that restrict competition. The study will be conducted on the example of rulings issued by the OCCP Branch in Bydgoszcz. This will allow us to fulfil the purpose of this publication, i.e. to determine what is the jurisprudential practice of the President of the OCCP Branch in Bydgoszcz in cases involving competition-restricting agreements with regard to the interpretation of the concept of public interest against the background of judicial decisions and doctrinal achievements. The goal should also be to determine whether the interpretation of the concept of public interest adopted in the Bydgoszcz Branch reflects the trends in the OCCP President's jurisprudential practice in the rest of the country. Therefore, the OCCP President's decisions issued in other Branches will be examined, and their comparison will make it possible to determine whether the OCCP's practice is uniform in nature, or whether there are noticeable differences in the way it operates, depending on where the decision was issued.

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1 M. Bernatt, A. Jurkowska-Gomułka, T. Skoczny, *Podstawy i zakres publicznoprawnej ochrony konkurencji*, in: *System Prawa Prywatnego*, vol. 15. *Prawo konkurencji*, ed. M. Kępiński, Warszawa 2014, p. 742.

2 Act on competition and consumer protection of 16 February 2007, consolidated text: Journal of Laws [Dziennik Ustaw] 2021 item 275 as amended.

1. Interpretation of the concept of public interest according to the doctrine

The discussion on the concept and nature of public interest has been going on in legal science for a long time.[3] However, there is no consensus on its conceptual scope. Doubts about the feasibility of formulating its definition have led some academics to advocate abandoning the use of this category. The view that the application of the general public interest clause is not useful for the legal order is an isolated one, and representatives of the doctrine have not stopped trying to develop an appropriate definition, which is particularly evident in the doctrine of administrative law in its broadest sense, including administrative business law.[4] In-depth analyses of this concept have resulted in the emergence of numerous concepts in this area. For an overview of positions on the understanding of the concept of public interest, see Artur Żurawik's publication.[5] The author systematised the existing literature, pointing out that four types of concepts have emerged: axiological, linking the public interest to values, praxeological – relating it to goals, concepts linking it to needs, or, finally, mixed concepts.

The concept of public interest in also non-uniform in competition law. The differences in the presented perspectives are due not only to different views regarding its role in this area of law, but also to the adoption of different assumptions and advocacy of one of the concepts indicated above. A convincing view is presented by Konrad Kohutek, who points out that clarifying the axiology of antitrust law is of significant practical importance. In his view, the ultimate value protected by this right is consumer welfare, and focusing on it allows for the consistent application of its regime. In this context, "the public interest is competition as a mechanism that promotes the economic well-being of consumers. The public interest clause allows for a correct understanding of competition as a value that is the subject of antitrust protection." Decisions by the President of the OCCP to intervene in the behaviour of entrepreneurs should depend on whether such behaviour harms the public interest (competition) as such. Introducing additional values into the axiology of antitrust law (which are also intended to be other criteria for the conduct of the

3 The category of public interest is of interest not only to lawyers, but also to political scientists, philosophers, economists and sociologists, see E. Komierzyńska, M. Zdyb, *Klauzula interesu publicznego w działaniach administracji publicznej*, Annales Universitatis Mariae Curie-Skłodowska. Sectio G 2016, vol. 63, no. 2, p. 165.

4 P. Bogdanowicz, *Interes publiczny w prawie energetycznym Unii Europejskiej*, Warszawa 2012, p. 72.

5 A. Żurawik, *Interes publiczny w prawie gospodarczym*, Warszawa 2013 [Legalis database], Chapter 2 § 2.

OCCP President) would typically lead to "inconsistent, unpredictable and, above all, incorrect application or incorrect non-application of the antitrust regime."[6]

The doctrine's considerations on the axiology of competition law are not reflected in the practice of the President of the OCCP.[7] When deciding cases in the field of competition-restricting agreements, he does not advocate any of the views presented in the literature; in fact, he rarely cites them. The separation of legal theory and practice means that in order to determine how the jurisprudential practice of the President of the OCCP – Bydgoszcz Branch is shaped, one should focus primarily on the analysis of the rulings issued.

2. Decisions of the President of the Office of Competition and Consumer Protection – Bydgoszcz Branch in cases of competition-restricting agreements

During the effective period of the Act, the President of the OCCP – Bydgoszcz Branch issued 15 decisions concerning agreements that restrict competition. Nearly half of them (seven) violated the prohibition under Article 6 (1) (1) of the Act, three violated the prohibition under Article 6 (1) (3), two violated the prohibition under Article 6 (1) (6), and three violated the prohibition under Article 6 (1) (7) of the Act.

Of all the violations of Article 6 (1) of the Act found, the largest group (7 cases) are price agreements. The subject of 4 of them was the trading of goods at different market levels, i.e. the agreements were concluded between a manufacturer and distributors.[8] Manufacturers imposed minimum resale prices on their goods, limiting intra-brand competition. This precluded the use of new, cheaper forms of distribution, which ultimately harmed the interests of consumers. The remaining 3 cases involved horizontal agreements that were entered into by competing entities.[9] At the

6 K. Kohutek, *Aksjologia publicznego prawa konkurencji*, in: *Aksjologia publicznego prawa gospodarczego*, ed. A. Powałowski, Warszawa 2022 [Legalis database], point 3. See idem, *Naruszenie interesu publicznego a naruszenie konkurencji (na tle praktyk rynkowych dominantów)*, Państwo i Prawo 2010, no. 7, pp. 45–56.

7 D. Miąsik, T. Skoczny, in: *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, ed. T. Skoczny, Warszawa 2014 [Legalis database], Commentary on Article 1, thesis 70.

8 Decisions of the President of the OCCP of: 31 December 2010, RBG-24/2010; 30 August 2012, RBG-19/2012; 4 December 2012, RBG-30/2012 and 30 December 2013, RBG-42/2013.

9 Decisions of the President of the OCCP of: 16 June 2010, RBG-6/2010; 8 July 2011, RBG-9/2011 and 26 November 2012, RBG-29/2012.

same time, as a result of the mutual exchange of information at informal meetings, competitors were raising the price level of their services. The negative consequences affecting consumers are obvious with such practices.

During the period under review, three decisions were issued in the area under the authority of the Office's Branch in Bydgoszcz, stating violations of the prohibition on agreements involving market sharing. The first of these concerned an agreement in the insurance market. The entrepreneurs were to divide the domestic market for the sale of group accident insurance among themselves. Ultimately, the decision was overturned by a judgment of the Court of Competition and Consumer Protection following an appeal filed by the entrepreneurs, and the judgment of the court of first instance was subsequently upheld by the Court of Appeal in Warsaw.[10] Two other decisions concerned the same entity – a manufacturer and seller of industrial feed for livestock.[11] They concerned unauthorised arrangements between two companies in the same line of business, agreeing not to compete with each other and not to sell products to customers to whom they were supplied by the other party to the agreement. Thus, there was a division of the domestic sales market based on entity criteria. The amount of fines imposed on colluding entrepreneurs was among the highest in 2020 antitrust cases.

Two decisions had a basis in Article 6 (1) (6) of the Act. Both of the identified cases of the restriction of market access concerned the market for funeral services and the prevention of entrepreneurs not covered by the agreement from providing grave digging services and organising burials in cemeteries belonging to Roman Catholic parishes.[12] The activity of the OCCP Branch in Bydgoszcz in this regard was included in an extensive study of the freedom to provide funeral services in cemeteries, conducted since 2000 by the President of the OCCP.[13]

During the period under review, there were also three cases of collusive bidding by entrepreneurs joining tenders organised by public entities.[14] These decisions

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10 Decision of the President of the OCCP of 30 December 2011, RBG-28/2011; Judgment of the Regional Court – Court of Competition and Consumer Protection of 27 March 2015, XVII AmA 82/12 and Judgment of the Court of Appeal in Warsaw of 23 January 2019, VII AGa 1408/18.

11 Decisions of the President of the OCCP of 5 August 2020, RBG-7/2020 and of 28 December 2020, RBG-14/2020.

12 Decisions of the President of the OCCP of 5 December 2011, RBG-21/2011 and of 7 December 2011, RBG-23/2011.

13 P. Adamczewski, *Świadczenie usług cmentarnych i pogrzebowych. Obowiązki zarządcy cmentarza w świetle ustawy o ochronie konkurencji i konsumentów*, Warszawa 2014, https://uokik.gov.pl/publikacje.php?news_page=1&tag=2 [access: 6.06.2022].

14 Decisions of the President of the OCCP of: 21 December 2011, RBG-27/2011; 31 December 2013, RBG-47/2013 and 31 December 2014, RBG-47/2014.

concerned activities involving the agreement of the terms of bids, including in particular the price, in the local markets for the performance of forestry services and the trading of agricultural real estate, as well as in the national market for the provision of road lane, street and car park cleaning and mowing services.

3. Interpretation of the concept of public interest in the decisions of the President of the OCCP – Branch in Bydgoszcz

In order to determine how the concept of public interest was interpreted by the President of the OCCP – Bydgoszcz Branch, the legal justifications of the decisions indicated in the section entitled 'public interest' were examined. Even a brief analysis of them makes it possible to see that the explanations of what constitutes a violation of the public interest by a given practice are based on repeated patterns. The indicated sections of the decision are divided into two parts: a theoretical consideration of the essence of this concept and an examination of whether the premise of antitrust intervention is applicable to the case at hand. Of the 15 decisions issued, 13 were prepared according to a previously adopted template. In terms of the general analysis of the concept of public interest, a total of four models were used.

The decisions of the President of the OCCP – Bydgoszcz Branch clarify the concept of public interest through numerous references to judgments of the Court of Competition and Consumer Protection and the Supreme Court. In this way, the legal justifications for the decisions reflect the trends seen in case law. One issue that the judiciary has often attempted to resolve has been the question of understanding the public interest as a prerequisite for antitrust intervention. A kind of summary of the views in this regard was the Supreme Court's judgment of 5 June 2008, which discussed two opposing lines of jurisprudence.[15] According to the first one, referred to as the quantitative approach, "a violation of the public interest occurs when a «broader circle of market participants» and not just a single entity has been affected by the effects of illegal actions, or when these actions have caused other adverse phenomena in the market."[16] The second line of jurisprudence, on the other hand, "equates the public interest with the infringement of competition or causing (the possibility of causing) adverse effects on the market." The Supreme Court fully shared the position representing the qualitative approach, emphasising that "the

15 Ruling of the Supreme Court of 5 June 2008, III SK 40/07, LEX no. 479320 with case law cited therein.

16 The Court here quotes the Ruling of Supreme Court of 27 August 2003, I CKN 527/01, LEX no. 137525.

existence of a public interest should be assessed through a broader view, taking into account the totality of the negative effects of actions in a particular market."

The largest group of the decisions reviewed, five on price agreements and one on collusive bidding, stressed that the law does not address the protection of individual claims, and that the basis for applying its provisions is to determine whether there has been a violation of the public interest designated by the Act's provisions, not the interest of an individual or group. Reference was also made to a Supreme Court ruling of 27 August 2003, referring to the effects of prohibited activities affecting a wider range of market participants, as well as causing other adverse phenomena. This ruling was identified in the 2008 judgment cited above as representing the first line of jurisprudence, which would fit in with the quantitative approach. However, this approach was not adopted in its pure form. The arguments were supplemented with references to rulings, which are now cited as an example of a qualitative approach. The decisions described further cite, namely, the judgment of the Court of Competition and Consumer Protection of 21 March 2005, in which the protection of the public interest is equated with "the existence and development of competition in all relevant markets," and intended, in the opinion of the Supreme Court, to represent a qualitative approach.[17] Following the distinction between the lines of jurisprudence indicated in the 2008 judgment, it would be reasonable to assume that the Bydgoszcz Branch takes a mixed position and applies both the quantitative and qualitative approach. However, it does not seem to treat the described lines of jurisprudence as contradictory. One must agree with Konrad Kohutek, who points out that there are grounds for even seeing them as similar to each other. Both lines of jurisprudence allow a finding of a violation of the public interest in the event that the practices of entrepreneurs cause other adverse phenomena or effects; it is just that the second line does not emphasize the quantitative criterion.[18] A similar view was expressed by Tadeusz Skoczny, who counts among the rulings demonstrating the quantitative approach only those that directly refer to the number of market participants harmed by practices prohibited by the law, without reference to other criteria for determining the violation of the public interest.[19] Thus, it should be assumed that, in the judgment in question, the Supreme Court insufficiently separated the lines of case law presented, and their common features cause uncertainty about the position taken in the decision being drawn up.

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17 Judgment of Court of Competition and Consumer Protection of 21 March 2005, XVII AmA 16/04.

18 K. Kohutek, in: K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2014, Commentary on Article 1, pp. 58–59.

19 T. Skoczny, in: *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, ed. T. Skoczny, Commentary on Article 1, theses 48–55.

Other decisions issued by the President of the OCCP – Branch in Bydgoszcz do not raise questions of this kind. The elaborate analysis of the concept of public interest presented in them clearly indicates a qualitative approach. Accordingly, "the good protected under the provisions of the law is the public interest in ensuring proper conditions for the functioning of competition and ensuring the protection of the interests of entrepreneurs and consumers as institutional, collective phenomena. The purpose of the law is not to protect the private interest of either the entrepreneur or the consumer."[20] The differences in the ruling practice of the Bydgoszcz Branch are not related to the dates of the decisions. It should be assumed that the President of the OCCP – Bydgoszcz Branch has advocated the qualitative approach since the beginning of the application of the provisions of the Act, but at times his arguments are brief and consist only of quoting a passage from a Supreme Court judgment on "the action of an entrepreneur causing other adverse phenomena in the market' without providing commentary. The 2008 Supreme Court ruling determined the victory of the qualitative approach and the widespread application of public interest interpretations in accordance with the second line of jurisprudence. Subsequently, this position was not questioned, as evidenced by two decisions of the President of the OCCP – Branch in Bydgoszcz issued in 2020, which completely ignored the consideration of the interests or claims of the individual and a broader circle of participants affected by the practice. It was explicitly pointed out that "from the point of view of the admissibility of the application of the Act on Competition and Consumer Protection, the number of entities affected by a restrictive practice is irrelevant, as it is sufficient that the behaviour of the entrepreneur exhausts the characteristics of an anti-competitive practice."

The legal justifications of decisions relating to the interpretation of the concept of public interest do not cite doctrinal views, nor does the President of the OCCP – Bydgoszcz Branch present his own assessment of the issue. Resolutions in this regard are based entirely on case law, with the position presented being in accordance with the views prevailing therein.

4. Public interest as a premise for antitrust intervention in a case

The public interest takes on the form of a general clause referring to extra-legal rules and assessments. This allows the President of the OCCP to make decisions

[20] Decisions of the President of the OCCP of 5 December 2011, RBG-21/2011 and of 7 December 2011, RBG-23/2011.

based on a specific state of fact and with reference to the current normative state. Both in the President's decisions and in the literature, the judgments of the Antitrust Court are repeatedly cited, pointing out that the concept of public interest is not fixed and uniform, and in each case it should be determined and defined in detail.[21] The public interest needs to be continuously defined according to changing violations of antitrust law norms.[22] This view, which is otherwise correct and follows from the assumption that it is impossible and inexpedient to formulate an immutable abstract definition of public interest, does not accord with the jurisprudential practice of the President of the OCCP – Branch in Bydgoszcz. In the detailed sections of the legal justifications of the decisions under review, following the section on general considerations of the essence of the public interest, findings are made on the violation of the public interest in a specific case. It might seem that the need to take into account the specifics of a particular case would make the findings individual in nature. Meanwhile, these parts of justifications are also prepared according to accepted templates. This is because there seems to be one model of justification for each type of competition-restricting agreement or one type of case. One of these models was used in cases of violations of the prohibition on agreements that restrict market access, while another was used in situations where vertical price agreements were made regarding the distribution system for goods and the setting of their resale prices. In addition, identical justifications have been applied to cases similar in subject matter. In cases involving price agreements between entrepreneurs operating in the taxi passenger transport market, as well as agreements restricting access to the funeral services market, the differences between the justifications were found only in the names of the entities involved in the agreement. The reasoning contained in the detailed part of the justifications, which is repeated in the case of subsequent cases and applied in the decisions issued in them, is necessarily also of a general nature. It is pointed out that the type of agreement at issue in this case is one of the grave violations of antitrust law and its effects are detrimental and lead to distortions in the market. The negative consequences of banned practices for other entrepreneurs in the market and for consumers are also described. The use of the same wording, or even whole sections of the justifications of one decision in subsequent decisions, demonstrates that the public interest is not established and defined in detail in every case.

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21 See, among others, Judgment of the Antitrust Court of: 22 May 2002, XVII Ama 53/01; 4 July 2002, XVII Ama 108/00 and 23 October 2002, XVII AmA 133/01.

22 C. Banasiński, *Powstanie, podstawy prawne, zakres i cele prawa antymonopolowego*, in: *Polskie prawo antymonopolowe. Zarys wykładu*, ed. C. Banasiński, Warszawa 2018, p. 41.

In the course of antitrust proceedings, the analysis of a given entrepreneurial practice in terms of the violation of the public interest appears to be purely a formality. Each decision carves out a section of the legal reasoning devoted to this issue, but a closer examination of their content leads to the idea that a violation of one of the competition rules set forth in Article 6 (1) of the Act automatically implies the condition of violation of the public interest. In light of the systemic and linguistic interpretation of Article 1 (1) of the Act, antitrust intervention is permissible upon the combined fulfilment of two conditions: violation of one of the statutory prohibitions and violation of the public interest.[23] If the opposite were adopted, i.e. that failure to comply with statutory norms would be synonymous with a violation of the public interest, the legal regulation of Article 1 (1) of the Act would be pointless.[24] In practice, therefore, the obligation to examine both of these prerequisites is fulfilled by referring to them in the legal justification for the decision, but attention is paid primarily to examining the fulfilment of the first one. The scale of the use of template legal justifications for decisions leads to the conclusion that in the practice of the Bydgoszcz Branch of the OCCP, the public interest performs primarily a jurisdictional function. Assessment of competition-restricting agreements in terms of the violation of the public interest is made only at the stage of deciding whether it is justified to initiate antitrust proceedings. Once it is determined that there are no obstacles to it, the proceedings then move on to examining violations of the prohibition on restrictive agreements. The function of evaluating the public interest[25] is not taken into account and it is assumed that since its application was found at the beginning of the proceedings, it continues and is contained in the decision made.[26]

When analysing the application of the public interest as a premise for antitrust intervention in the jurisprudential practice of the Bydgoszcz Branch of the OCCP, one should take into account not only decisions recognising the behaviour of an entrepreneur as a practice restricting competition, but also otherwise ending the proceedings. Determination in the course of the proceedings of the absence of

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23 K. Kohutek, in: *Ustawa o ochronie*…, Commentary on Article 1, p. 57.

24 P. Korycińska-Rządca, *Ochrona tajemnic strony postępowania antymonopolowego w sprawach praktyk ograniczających konkurencję*, Warszawa 2020 [Legalis database], Chapter I § 3.

25 The evaluative function of the public interest means that it is an instrument for determining the actual scope of the provisions of the Act on Competition and Consumer Protection as an act from the sphere of public law. This allows to define the goals of competition protection and build its axiology, M. Bernatt, A. Jurkowska-Gomułka, T. Skoczny, *Podstawy i zakres*…, pp. 738–743; also R. Blicharz, K. Horubski, M. Pawełczyk, *Prawo konkurencji w systemie publicznego prawa gospodarczego*, in: *System Prawa Administracyjnego*, vol. 8B. *Publiczne prawo gospodarcze*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2018, p. 683.

26 M. Bernatt, A. Jurkowska-Gomułka, T. Skoczny, *Podstawy i zakres*…, pp. 738–739.

a violation of the public interest would be synonymous to the necessity of issuing a decision to discontinue the proceedings on the basis of Article 105 of the Code of Administrative Procedure.[27] Such a case, however, did not occur, since "none of the antitrust proceedings in the field of restrictive practices conducted by the Branch of the OCCP in Bydgoszcz has been discontinued."[28] This confirms the conclusion reached above about treating the premise of a finding of a violation of the public interest as a formality and prejudging the nature of a violation of Article 6 (1) of the Act. In addition, this can be evidenced by the fact that 44 antitrust investigations[29] (including the abuse of a dominant position) were initiated during the effective period of the Act, and the number of decisions made in these cases finding violations of the Act is higher. This means that most or all of the investigations lead to the initiation of antitrust proceedings, each of which is concluded by a decision declaring the practice to be restrictive of competition.

5. Judicial review of the decisions of the President of the OCCP – Bydgoszcz Branch

Decisions issued by the President of the OCCP, concluding the proceedings before him, are administrative in nature. They can be reviewed on appeal before the Court of Competition and Consumer Protection. Entrusting substantive control of the antitrust authority (i.e., a public administration body) to a public court is an expression of judicialisation, but also provides an argument for considering proceedings before the President of the OCCP as hybrid proceedings.[30]

Appeals against the decisions of the President of the Office of Competition and Consumer Protection – Bydgoszcz Branch in cases of competition-restricting agreements were filed in 11 cases (out of 15 antitrust proceedings). So far, verdicts have been reached in eight cases. In two cases, orders have been issued dismissing the appeal, and in one case the trial is still pending. The Court of Competition and Consumer Protection has decided to dismiss the appeals seven times, thereby

27 Code of Administrative Procedure of 14 June 1960, consolidated text: Journal of Laws 2022 item 2000 as amended.

28 Information from the Legal Department of the Office of Competition and Consumer Protection dated 13 December 2022, obtained through access to public information.

29 Ibidem.

30 R.R. Wasilewski, *Postępowanie dowodowe przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów*, Warszawa 2020 [Legalis database], Chapter VI, point 3.

upholding previous decisions. The verdicts were later upheld by the Court of Appeal in Warsaw. This means that the violation of public interest in these cases was not challenged. Finding its absence would be synonymous to failing to meet one of the prerequisites for antitrust intervention and would require revocation of the decision. Only one justification of the verdict included discussion of the public interest.[31] In his appeal, the entrepreneur raised the charge of "issuing the decision against the public interest and the legitimate interest of citizens," and therefore the Court had to address it. In his view, competition should be understood broadly as "the process of market competition among independent entrepreneurs also competing for access to cheaper and better means of production." Enlarging farms, increasing acreage translates into increased opportunities for development and improved product quality, hence the tender for the sale of agricultural property can be a "competitive battlefield of entrepreneurs to acquire such a measure. These opportunities should not be limited by agreements between entrepreneurs involved in collusive bidding that put competitors not involved in the collusion at a disadvantage." The court concluded its analysis by stating that "the violated public interest consisted in ensuring proper conditions for the operation of the land market."

In one case, the Court of Competition and Consumer Protection overturned the decision of the President of the OCCP in its entirety, and this ruling was upheld by the Court of Appeal in Warsaw.[32] However, this did not follow from finding that no public interest was involved. Instead, it was mentioned as a side note to the consideration of the possibility of attributing the status of competitors to entrepreneurs. The court referred to the frequently cited, including in the literature, decision of the Supreme Court of 21 June 2013, according to which the premise of public interest has a corrective function. It allows the court hearing an appeal against a decision to verify the advisability of antitrust intervention in a particular case. It also allows an assessment of the justification of the measures applied, including fines, providing a benchmark for the limits of the OCCP President's discretion in exercising this power.[33]

The analysis of the content of court rulings in antitrust proceedings conducted by the President of the OCCP – Bydgoszcz Branch leads to the conclusion that his assessment of the premise of public interest is correct and does not raise any objections.

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31 Judgment of the Court of Competition and Consumer Protection of 28 May 2015, XVII AmA 21/14.

32 Judgment of the Court of Competition and Consumer Protection of 27 March 2015, XVII AmA 82/12 and Judgments of the Court of Appeal in Warsaw of 6 December 2016, VI Aca 969/15 and of 23 January 2019, VII Aga 1408/18.

33 Decision of Supreme Court of 21 June 2013, III SK 56/12, LEX no. 1341693. See also: E. Stefańska, in: *System Postępowania Cywilnego*, vol. 6. *Postępowania odrębne*, ed. A. Machnikowska, Warszawa 2022, p. 506.

6. The concept of public interest in the jurisprudential practice of other OCCP Branches

Conclusions drawn from the analysis of the rulings of the President of the OCCP Branch in Bydgoszcz need to be verified. For this purpose, 219 decisions issued in other Branches during the effective period of the Act of 16 February 2007 were examined. Most of them, as many as 115, concerned the fixing of prices and the agreement of other conditions for the purchase or sale of goods (price agreements as defined in Article 6 (1) (1) of the Act). 84 decisions were issued in cases of agreement on the terms of bids submitted in tenders (tender collusion under Article 6 (1) (7) of the Act), while the other cases regulated by Article 6 (1) of the Act appeared sporadically in the decisions of the President of the OCCP: there were 9 cases of market sharing agreements, 5 cases of agreements restricting access to the market, and 3 agreements specified in point 2 of Article 6 (1) of the Act.[34]

An analysis of the rulings of the President of the OCCP issued in Branches in the rest of the country confirmed the findings of the study of the practices of the Bydgoszcz Branch. Attention is drawn in particular to the high repetition of legal justifications for decisions in the part related to public interest. The President of the OCCP relies in these cases on case law and cites entire excerpts from judgments of the CCCP, the Courts of Appeal and the Supreme Court.[35] The differences arise only from the selection of rulings. References to the views of representatives of science are rare, namely they appeared in 38 decisions. Also, the detailed part of the justifications, by design devoted to examining the violation of the public interest in a specific case, is not individual. More detailed considerations in this regard can be found in the eight decisions that found violations of Article 6 (1) of the Act (without specifying a point in that paragraph). Since these cases do not match with the catalogue provided by the legislator, the President of the OCCP was obliged to explain how the entrepreneur's behaviour violates the Act. Thus, it is reasonable to conclude that the analysis of a given entrepreneurial practice in terms of violation of the public interest appears to be purely a formality. This phenomenon has been particularly evident in recent years. The examination of the public interest is shorter and more general compared to the justifications for decisions issued in the first years after the

34 The charges in some decisions were based on two or more legal bases.

35 The most frequently cited Judgments are Supreme Court Rulings of: 5 June 2008, III SK 40/07, OSNAPiUS 2009, no. 19–20, item 272; 29 May 2001, I CKN 1217/98, OSNC 2000, no. 1, item 13; 16 October 2008, III SK 2/08, LEX no. 599553; 24 July 2003, I CKN 496/01, Legalis no. 65610 and Judgment of the Court of Competition and Consumer Protection of 27 June 2011, XVII AmA 92/00 and others.

enactment of the 2007 Act. Excerpts from court decisions are still used, but in most cases they are no longer accurately indicated in footnotes.

It can be concluded that the way of interpreting the concept of public interest as applied by the President of the OCCP – Bydgoszcz Branch does not differ from that adopted by other Branches. The jurisprudential practice of the President of the OCCP in this regard is consistent.

Conclusion

The concept of public interest occupies a prominent place in competition law, justifying the OCCP President's authoritative interference in economic relations and setting limits on the behaviour of entrepreneurs. An examination of the rulings of the President of the OCCP Branch in Bydgoszcz made it possible to determine that the interpretation of this concept is not carried out through independently made considerations or references to the rich literature on the subject. The views of the doctrine are not reflected in the decisions issued, which means that there is a separation between practice and theoretical analysis. The concept of public interest, on the other hand, is clarified by numerous references to judgments of the Court of Competition and Consumer Protection and the Supreme Court. Thus, based on case law, it is assumed that the public interest consists in ensuring proper conditions for the functioning of competition and ensuring the protection of the interests of entrepreneurs and consumers as institutional, collective phenomena. At the same time, it is stressed that the public interest should be determined and defined in detail in each case. This contradicts the content of the legal justifications contained in the decisions. Explanations of what constitutes a violation of the public interest by a particular practice are based on repeated patterns, both in the general justification part and in the case-specific part, where a single model of justification seems to apply for each type of restrictive agreement or one type of case. This leads to the conclusion that despite the formal examination of the admissibility of antitrust intervention in each case, the efforts of the President of the OCCP are focused on demonstrating that the entrepreneurs have concluded a competition-restricting agreement in violation of Article 6 (1) of the Act. Assessment of these practices in terms of the violation of public interest is made only at the stage of deciding whether it is justified to initiate antitrust proceedings. This means that public interest serves primarily a jurisdictional function.

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