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ECN+ DIRECTIVE AND PROJECTED CHANGES IN POLISH COMPETITION LAW: TOWARDS THE POLITICAL AND JUDICIAL INDEPENDENCE OF THE POLISH COMPETITION AUTHORITY

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Abstract:

The ECN+ Directive aims to create a 'homogeneous' plane for the operation of antitrust authorities in the EU. Therefore, it is intended above all to harmonise the functioning of the national competition authorities in all the Member States, so that they can exercise the same powers and apply identical legal instruments when enforcing EU competition law. This article describes how to implement the ECN+ Directive into Polish antitrust law. Ensuring objective standards for the appointment of the President of the Office of Competition and Consumer Protection is the basic way to achieve this goal.

Key words:

ECN+ Directive, independence, accountability, President of the Office of Competition and Consumer Protection

INTRODUCTION

Apart from empowering national competition authorities to directly apply the EU rules on competition, the purpose of Regulation 1/2003[1] was to lay down how national competition laws should be implemented in parallel in such cases (Articles 3 and 35 of Regulation 1/2003), while harmonising only selected aspects of the operation of such authorities.[2] Regulation 1/2003 was meant to make it possible for national competition authorities to co-enforce, together with the European Commission, the EU rules on competition. However, it did not provide for any procedural solutions on how to apply these rules, which translated into a wide range of solutions being adopted in individual Member States. A dozen or so years after the introduction of the system for the decentralised enforcement of EU competition law regarding competition-restricting practices,[3] a new legislative act was passed that announced far-reaching changes in this respect. A central premise underlying the adoption of Directive 2019/1 of 11 December 2018 (the ECN+ Directive)[4] was to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. The ECN+ Directive sets out common systemic and procedural standards for all national competition authorities (Chapter III of the ECN+ Directive).[5] The main purpose of the ECN+ Directive is to make competition authorities more efficient in the enforcement of Article 101 or 102 the Treaty on the Functioning of the European Union, predominantly by increasing the powers available to the authorities, adding to their independence, allowing them to take coercive measures and imposing financial penalties where necessary. The ECN+ Directive is focused on harmonising certain aspects of the antitrust procedure, strengthening the role of national competition authorities and providing such authorities with minimum resources and instruments to efficiently enforce Articles 101 and 102 TFEU (without ruling out the possibility of delegating to the competition authorities powers going beyond those provided for in the directive – see Recital 9 of the preamble). So, as pointed out by K. Kowalik-Bańczyk, it is intended,

1 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001, 04/01/2003, p. 001-0025.

2 KOWALIK-BAŃCZYK, K. (2012) Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings, *Yearbook of Antitrust and Regulatory Studies*, 6, pp. 220–222.

3 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5/12/2014, pp. 1-19.

4 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14/11/2019, p. 3-33.

5 See also: SINCLAIR, A. (2017) Proposal for a Directive to Empower National Competition Authorities to be More Effective Enforcers (ECN+). *European Journal of Competition Law*, 8(10), p. 625 et seq.; WILLS, W.P.J. (2017) The European Commission's "ECN+": Proposal for a Directive to Empower the Competition Authorities of the Member States to be More Effective Enforcers. *Concurrences*, 4, p. 60 et seq..

above all, to harmonise the operation of national competition authorities so that in all Member States they have the same powers and use identical legal instruments when enforcing EU competition laws.[6]

On the one hand, the solutions adopted in the ECN+ Directive are designed to counteract the provisions of national laws that sometimes make the effective enforcement of competition laws impossible (e.g. the inconsistent implementation of leniency programmes, low or varying punishments for antitrust offences). On the other hand, they are also to ensure that the same guarantees and instruments are in place for EU law when it is applied in parallel with national law. Thus, through the backdoor, so to speak, the ECN+ Directive accomplishes the partial harmonisation of national antitrust procedures, regardless of whether EU law is applied or not. The ECN+ Directive also aims at making it possible for national competition authorities to use each other's support when bringing cross-border indictments and enforcing antitrust penalties between Member States and European Economic Area countries.[7]

The scope of changes is a result of analysing how efficient the system for the decentralised enforcement of EU competition law is.[8] As it appears from Directive 2019/1, the guarantees and powers form a prerequisite for the effective enforcement of EU competition law, or a decentralised application of Articles 101 and 102 TFEU.[9] With such guarantees in place, national competition authorities obtain effective tools to find evidence of violation of Articles 101 and 102 TFEU.

The harmonisation of both EU and national situations is a result of the European Commission having concluded that, at least in some of the Member States, the enforcement standard of competition law was not necessarily satisfactory, and certainly not homogeneous.[10] As mentioned in the preamble of the directive, such differences may have some effect on certain businesses. Since national competition authorities have been empowered to obtain all information, including in digital form, on businesses that

6 KOWALIK-BAŃCZYK, K. (2012) p. 221.

7 EC, Commission staff working document SWD(2014) 230/2, Ten years of antitrust enforcement under Regulation 1/2003 accompanying the document communication from the Commission to the European Parliament and the Council: Achievements and Future Perspectives {COM(2014) 453} {SWD(2014) 231}. Available from: https://ec.europa.eu/competition/antitrust/swd_2014_230_en.pdf [Accessed September, 12 2020]; EC, Commission staff working document, Brussels, July, 9 2014, SWD(2014) 231 final. Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues Accompanying the document Communication from the Commission to the European Parliament and the Council. Ten years of antitrust enforcement under Regulation 1/2003: Achievements and future perspectives {COM(2014) 453 final} {SWD(2014) 230 final}, point 43. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0231&from=EN [Accessed September, 12 2020].

8 KOWALIK-BAŃCZYK, K. (2019) Dyrektywa ECN+ – sposób na podwyższenie ochrony prawnej przedsiębiorców w postępowaniach antymonopolowych?. *Europejski Przegląd Sądowy*, 10, p. 5.

9 Ibid.

10 THOMAS, S., DUEÑAS, M. (2018) The Draft Provisions on Antitrust Fines in the Commission's ECN+ Proposal, *Zeitschrift für Wettbewerbsrecht*, 1, p. 2.

are subject to the antitrust procedure, such authorities, in order to be effective, should also be able to use the same possibilities at an earlier stage, e.g. when launching an investigation under national law. It was also necessary to provide national competition authorities with identical powers of scrutiny, regardless of whether they apply EU law or only national law. Similar to Article 6 clause 3 of the ECN+ Directive, Recital 31 of the ECN+ Directive states that 'the Directive should not prevent Member States from imposing the requirement to have such scrutiny pre-authorised by a national judicial authority'. Recital 4 indicates, however, that the 'modernisation' of antitrust procedure in EU Member States, as accomplished by the ECN+ Directive, has two major goals: to make the competition authorities more effective when enforcing EU and national competition law, and to ensure better, more efficient cooperation between competition authorities in individual Member States.[11] Without clearly defining a procedural framework for national antitrust proceedings, it has been made possible to use the EU standard for the protection of entrepreneurs' rights.

So the ECN+ Directive aims to create some 'level playing field' for the operation of antitrust authorities in the EU. Therefore, it is intended, above all, to harmonise the functioning of national competition authorities so that, in all the Member States they exercise the same powers and apply identical legal instruments when enforcing EU competition law.

INDEPENDENCE OF THE NATIONAL COMPETITION AUTHORITY: A PLAN FOR THE FUTURE UNDER POLISH LAW

The changes aimed at making national competition authorities more efficient, should also consider their independence. Chapter III of the directive contains provisions that are intended to protect the independence of national competition authorities when applying Articles 101 and 102 TFEU from 'external interference and political pressures' (Recital 14 of the Preamble). The Member States are obliged to provide, in their respective national laws, solutions to promote the independence of officials and members of competition authorities (Article 4): (a) to make them independent from any political pressures and other external influences when performing their duties; (b) to exclude the possibility of them consulting or being instructed by public authorities and any other parties. The final draft of the directive is a result of trade-offs and reveals certain weaknesses. As far as the independence of national antitrust authorities is concerned, some doubts can be raised about the lack of a clear requirement in Article 4 that such authorities be appointed for terms of office, or a failure to precisely define in Article 5 when human, financial and technical resources are sufficient. Nevertheless, the ECN+ Directive should be considered positive. It will force an increase in the level of guarantee of independence of the authorities.

Before the ECN+ Directive was adopted, no formal requirements for the independence of competition authorities were established by EU legislation. Such requirements

11 KOWALIK-BAŃCZYK, K. (2019), p. 4.

are missing from Regulation 1/2003, although such a requirement can be deduced, even if only indirectly, from this regulation's principle of ensuring the effective enforcement of Articles 101 and 102 TFEU. However, EU competition law does not impose a single institutional model upon the Member States respecting the procedural autonomy of the latter.

The ECN+ Directive does not force Member States to adopt a specific institutional model to be implemented as part of its enforcement, but it may affect how the internal functioning of national competition authorities will work. Firstly, the ECN+ Directive stresses that differences in the functioning and the scope of guarantee of procedural fairness could adversely affect the consistency of the whole system for the enforcement of EU competition law. Secondly, the directive explicitly associates the efficacy and consistency of enforcing Articles 101 and 102 TFEU with the operational independence of national competition authorities (see Recital 17 of the directive), setting out requirements for the impartiality and independence of authorities responsible for enforcing competition law. The efficient enforcement of substantive competition law is strictly related to the proper institutional constitution of the relevant authorities and the provision thereof with appropriate legal instruments. For without a systemic model and procedural rules being properly established, substantive law is unable to bring about the achievement of its underlying objectives.[12]

It should be noted that the independence of the competition authority is enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). For this article reads that, in the determination of his civil rights and obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. According to the prevailing view, proceedings regarding practices restricting competition should be seen as a semi-criminal procedure.[13] As a result, it is essential to ensure a higher standard of procedural fairness, similar to that applied in traditional criminal law.

Although the issue of the minimum rights for businesses being a party under Article 6 of the ECHR is admittedly not explicitly addressed in the ECN+ Directive, both factors, namely 'independence' and the protection of the minimum rights of businesses, seem to be closely interrelated as far as this independence is concerned. So it can be assumed

12 PODRECKI, P., MROCZEK, M., MENSZIG-WIESE, K. (2019) O potrzebie zastąpienia Prezesa UOKiK kolegialnym organem ochrony konkurencji. *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 5, p. 13.

13 BERNATT, M. (2012) Ustawa o ochronie konkurencji i konsumentów – potrzeba nowelizacji. Perspektywa sprawiedliwości proceduralnej. *internetowy Kwartalnik Antymonopolowy i Regulacyjny,* 1, p. 87; BŁACHNIO-PARZYCH A. (2012) The Nature of Responsibility of an Undertaking in Antitrust Proceedings and the Concept of 'Criminal Charge' in the Jurisprudence of the European Court of Human Rights, *Yearbook of Antitrust and Regulatory,* 5, p. 54; KRÓL-BOGOMILSKA, M. (2013) *Zwalczanie karteli w prawie antymonopolowym i karnym*. Warszawa: Scholar, p. 205 et seq.

that, before the deadline for the implementation of the directive (i.e. by 4 February 2021) elapses, it will become necessary to thoroughly assess the system that currently exists in Poland from the point of view of these two factors together.

The question arises here: how do we define 'independence'? There is no doubt that the independence of the body requires the creation of appropriate mechanisms to protect against political influences and business organisations.[14] As G. Materna emphasises, the independence of the body forms the basis of many specific legal guarantees.[15] Therefore, the aspect of organisational, financial and decision-making independence should be pointed out. Organisational independence should be understood as a location in the hierarchical structure of the public administration of a given body that ensures the person performing the function of the body will not be subject to 'external' pressure from his superiors, as well as the business environment. In turn, financial independence is the formation of the body's financing rules in a way that enables the full implementation of the tasks entrusted to the given body. Finally, decision-making independence means the possibility to autonomously take decisions, without being influenced by other entities on individual decisions. This is expressed in the prohibition of members of decision-making bodies and staff from asking for and taking instructions from other institutions, bodies or organisational units.

In the context of the competition authority's activity, the notion of 'independence' should be associated with the authority being so formed as to take decisions under the guidance and within the bounds of law, and protected against external pressures exerted by both politicians and private individuals. 'Independence' means taking decisions without any undue influence, based on available data and with careful consideration of various interests.[16] Independence understood in this way serves the rule of law and democracy.[17] Independence is ensured by clear-cut rules governing the recruitment of individuals for managerial positions, their appointment for a defined term only, and the introduction of a closed-end and objective list of premises that could be used to justify their dismissal. In this context, it relates to a set of mechanisms designed to make sure that officials can pursue institutional goals without having to compromise their own interests.[18]

14 MATEUS, A.M. (2007) Why Should National Competition Authorities be Independent and How Should They be Accountable?. *European Competition Journal,* 1, p. 17–30.

15 MATERNA, G. (2019) Gwarancje niezależności organu ochrony konkurencji w dyrektywie ECN+ a status Prezesa UOKiK. *Europejski Przegląd Sądowy*, 10, p. 20.

16 OTTOW, A. (2015) *Market and Competition Authorities: Good Agency Principles*. Oxford: OUP, p. 74.

17 BERNATT, M. (2019) Niezależność polskiej administracji. Czas zmian. *Rzeczpospolita* of February, 8 2019.

18 BECKER, T.E. (1998) Integrity in Organizations: Beyond Honesty and Conscientiousness. *Academy of Management Review*, 23, p. 154.

The degree of independence also depends on the expertise and experience of management, the authority's budgetary autonomy, the size of the budget and levels of remuneration. Only a few research studies have been published in the Polish literature so far.[19] What is worth noticing here is, above all, M. Błachucki's monograph[20], in which author enumerates four dimensions of independence: organisational, regulatory, financial and personal.[21] The author also deals with the notion of what is termed the 'reversal of independence', namely 'accountability'.[22] However, the issues of both independence and accountability, which act as prerequisites for the proper functioning of the authorities, are better covered by the literature outside of Poland.[23] So what is 'accountability', in the context presented above? Accountability as such consists in the possibility of verifying the actions taken by an authority. When an authority has to provide explanations for its conduct, that can be instrumental in holding it liable,[24] including ordering it to change any of its decisions. The sequence of accountability is as follows: there is a relationship between a party and the forum where the party is active; the relationship obliges the party to explain and justify its conduct; in response, the forum can ask questions and make evaluations, and the party can be held liable.[25]

The principle of accountability relates to the financial, procedural and substantive aspects of actions taken by authorities. Hence, accountability is not only about how an authority discharges its responsibilities, but also how it uses the resources assigned thereto, including the transparency of its financial policy. This also applies to compliance with procedural standards, which should be fair, transparent and impartial.[26] Accountability adds to the legitimisation of what an authority does and the fairness of both the authority and its officers.

Instruments that ensure accountability are mechanisms of notifying supervisory bodies, parties and stakeholders. If such mechanisms are effective, they make the authorities and the way in which they act more credible.[27]

19 KOZAK, M. (2019) Raz, dwa, trzy, niezależny będziesz ty... O konieczności szerszego spojrzenia na niezależność polskiego organu antymonopolowego w świetle dyrektywy ECN+,. *internetowy Kwartalnik Antymonopolowy i Regulacyjny,* 6, p. 25.

20 BŁACHUCKI, M. (2019) *Ponadnarodowe sieci organów administracji publicznej oraz ich wpływ na krajowy porządek prawny (na przykładzie ponadnarodowych sieci organów ochrony konkurencji)*, Warszawa: ILS PAS, p. 354 and subseq. Available from: http://www.doi.org/10.5281/zenodo.1494958.

21 Ibid, p. 354-355.

22 Ibid, p. 359.

23 Kozak, M. (2019) p. 25.

24 BŁACHUCKI, M. (2019) p. 359.

25 BOVENS, P., CURTIN, D., HART, M. 't (2012) The EU's Accountability Deficit: Reality or Myth?. In: Bovens, P., Curtin, D., Hart, M. 't (eds.) *The Real World of EU Accountability What Deficit?*. Oxford: OUP, p. 37.

26 OGUS, A. (1994) *Regulation: Legal Form and Economic Theory.* Oxford: OUP, p. 111.

27 KOZAK, M. (2019) p. 26.

The Commission's working document[28] scrutinises the standing of the competition authorities in various Member States. It stresses that independence means that decisions of authorities are free of any external influence and rely on the use and interpretation of competition rules by invoking legal and economic arguments. With regard to accountability, it notes that almost all national competition authorities are obliged to submit reports regarding their activities in the previous year, predominantly in the form of an annual report to the parliament or the executive power. In addition, some national competition authorities can be heard before a parliamentary commission or submit an annual plan for the following year. It has also been pointed out that a vast majority of national competition authorities enjoy operational, organisational and financial independence. Foreseen for the majority of national competition authorities that are active, operational independence consists in the categorical exclusion of interference from any other government agencies or individuals, the issue of instructions during investigations and the taking of decisions in individual competition cases. A significant number of national competition authorities also decide about their internal organisation and have a separate share in the general budget of the state, for which they enjoy budgetary autonomy. However, although most national competition authorities have a separate budgetary line, some of them generate their own income.

In Poland, the President of the Office of Competition and Consumer Protection (hereinafter the OCCP) is a central authority of government administration. It operates within the limits defined by the Competition and Consumer Protection Act (hereinafter the CCPA),[29] and its activity is funded directly from the state budget. The President of the OCCP is subject to supervision exercised by the Prime Minister. The monocratic nature of this body is a unique solution anywhere in the European Union. Antitrust regulations in the Member States of the European Union usually adopt a solution whereby the body responsible for competition protection matters is a collegiate body, or the collegiate body is an advisory body to the body making the decision. A solution is also accepted that making decisions belongs to internal collegiate bodies with a high degree of independence.[30]

Poland's 2007 Competition and Consumer Protection Act does not provide for a guarantee of independence of the antitrust authority. The President of the OCCP is appointed by the Polish Prime Minister from candidates proposed by a team established by the Head of the Chancellery of the Prime Minister. The team comprises at least three

28 The Commission's EC, Communication from the Commission to the European Parliament and the Council, COM(2014) 453. Ten years of antitrust enforcement under Regulation 1/2003: Achievements and Future Perspectives {SWD(2014) 230}_{SWD(2014) 231}. Available from: https://ec.europa.eu/competition/antitrust/antitrust_enforcement_10_years_en.pdf [Accessed September, 12 2020].

29 The Act on Competition and Consumer Protection of 16 February 2007, Dz.U. 2019, item 369 as amended).

30 See also: SKOCZNY, T. (2011) *Instytucjonalne modele wdrażania reguł konkurencji na świecie – wnioski dla Polski*. *Ruch Prawniczy, Socjologiczny i Ekonomiczny*, 2, p. 77 et seq.

individuals whose expertise and experience give a guarantee that the best candidates will be selected. They will assess the professional experience of the candidate, the expertise necessary to perform the tasks involved, as well as the executive skills,[31] and can commission someone with appropriate qualifications from outside the team to assist with the assessment.[32]

Not only is the antitrust authority not necessarily independent, but the mechanism for dealing with antitrust matters in Poland is long and complicated. The current Polish competition protection system is viewed jointly as proceedings before the President of the OCCP and the common court. Decisions of the President of the Office may be appealed against before the Circuit Court in Warsaw – the Court for the Competition and Consumer Protection (hereinafter called the "Court for the Competition and Consumer Protection") within one month from the date of servicing the decision. The Court of Competition and Consumer Protection acts as the court of first instance, i.e. the court that resolves the matter substantially and from the beginning, and does it in the course of (separate) procedural proceedings. The judgment of the Court of Competition and Consumer Protection may be appealed against to the Court of Appeal in Warsaw, and then a cassation appeal to the Supreme Court.

Several years ago, in an article in a popular legal journal in Poland, the above model was deemed by *Z. Kmieciak* to be a "hybrid procedure". The two-stage structure of the procedure (administrative procedure and subsequent civil court proceedings) is recognised as one of the manifestations of the concept of the hybrid procedure, understood as a model of proceedings combining elements belonging to various procedural regulations. The above terminology is derived from the concept existing in the American legal system.[33] There is no doubt that the proceedings before the President of the OCCP, then finalised by issuing an administrative decision, may close the antitrust case. The party may or may not appeal to the court against the decision of the President of the OCCP. The current model of settling competition cases explicitly assumes the priority of the administrative procedure and the basic importance of the "judicial activity" of the public administration body in these cases.[34]

Although the existing provisions do not enable the Prime Minister or members of the Council of Ministers to exert any pressure on decisions taken by the President of the OCCP, the Act allows the President to be dismissed at any time, without having to provide reasons. So there is, at least theoretically, a risk that the President of the OCCP

31 Art. 29. 3d) Act on competition and consumer protection of 16 February 2007.

32 Art. 29. 3e) Ibid.

33 Kmieciak, Z. (2002) Postępowanie w sprawach ochrony konkurencji a koncepcja procedury hybrydowej. *Państwo i Prawo*, 4, p. 46-47.

34 There is no doubt, however, that most of the explanatory actions that were specified in the literature on the subject in relation to antitrust matters 'full cycle of competition protection'– i.e. the initiation of proceedings, activities at the explanatory (evidence) phase, adjudication (by issuing administrative decisions) and application of sanctions in the competition protection system are the competence of the public administration body.

will avoid taking decisions that could expose him to criticism from ruling politicians, or lead to a conflict with influential companies.

Following the adoption of the ECN+ Directive, in October 2018 the OCCP proposed a draft amendment to the Competition and Consumer Protection Act,[35] but one that barely satisfies even the truncated postulates of the ECN+ Directive. There have been many negative comments, primarily about the pace at which changes are happening, and the lack of in-depth discussion about the role of the President of the OCCP and the OCCP itself, as well as their organisational empowerment.[36] This negative assessment is obviously justified. There has been no resumption of parliamentary work on this project in recent months. It remains unclear whether it will be taken into consideration or not. The ongoing erosion of the independence of the judiciary suggests rather a reverse direction of changes in the legal culture of Poland, and the lack of legal regulation and in-depth discussion of how to ensure independence does not make it easy to build an efficient system for the enforcement of competition laws.[37]

There is no doubt that complying with the provisions of the ECN+ Directive should be contingent on an independent competition of candidates, who should be tested for their aptitude for the office they are applying for. Key changes involve the introduction, in Article 29 of the CCPA, of a six-year term of office for the President of the OCCP and the compilation of a closed-end catalogue of grounds for dismissal. The proposal should undoubtedly be deemed legitimate. Concerns, if any, boil down to abolishing the open and competitive recruitment without setting any merit-based criteria in the law, and giving up the election of Vice-Presidents of the OCCP through an open and competitive recruitment process.[38]

The publicly disclosed draft amendment does not address the remaining issues, including, but not limited to, the introduction of a code of integrity and a guarantee of employment for and of the impartiality of the personnel of the OCCP. The draft amendment ignores the need to ensure sufficient resources for the effective enforcement of both Articles 101 and 102 TFEU and national regulations. This last gap poses a major hindrance to the efficient functioning of Poland's OCCP and the provision of officers with market-based employment and remuneration conditions. Finally, the draft amendment completely leaves out *the reverse* of independence, which is accountability, and this applies in relation to both the President and the personnel of the OCCP. M. Blachucki stresses that "the numerous guarantees of independence contrast with

35 Adopted by the Council of Ministers on 6 June 2019. Sejm print No. 3542.

36 Comments of the SPK to the Draft of January 22, 2019. ACT of [...] amendments to the Act on competition protection and certain other acts, Warsaw January, 30 2019. Available from: http://www.spk.com.pl/uploads/pdf/2019-01-31/190130_Uwagi%20SPK%20do%20nowelizacji%20uokik.pdf [Accessed September, 12 2020].

37 BERNATT, M. (2019).

38 BŁACHUCKI, M. (2019) p. 329.

a minimum number of instruments to hold the antitrust authority accountable"[39] and the dependence of the incumbent of the authority on his or her political base.

The lack of a comprehensive approach to the policy of the OCCP is reflected at least in the failure to set any large-scale goals to be pursued by this authority. An analysis of the recent legislative activities and the increasingly wider powers of the OCCP show that they are merely an ad hoc response to occurring problems, but not a component of any strategy roll-out. There is no doubt that the President of the OCCP has already launched a large-scale information campaign regarding his or her activity. However, there are still some doubts as far as proceedings before the President of the OCCP are concerned, e.g. with regard to the right to access the file,[40] which may affect the scope of the right to a defence. Instead of strengthening his or her role as an expert necessary to achieve economic goals, the proposed regulations will undoubtedly lead to further bonding the incumbent with his or her support base.

INDEPENDENCE OF THE POLISH COMPETITION AUTHORITY: *DE LEGE FERENDA* CONCLUSIONS

Below are suggestions for possible changes in the organisational shape of the competition protection system in Poland, which may help increase the authority's independence. The independence of the Polish competition authority should move closer to the form of organisational, financial and decision-making independence.

The process of implementing the assumptions of the ECN+ Directive in the scope of increasing the independence of the competition protection authority will depend on the implementation of changes concerning primarily the political and financial independence of the President of the OCCP. It seems, however, that these are not sufficient factors when changing the constitutional law in this respect. First, it seems reasonable to maintain the monocratic nature of the competition authority. However, the system of competition protection model in Poland could be regulated in such a way that the President of the OCCP would be entrusted with only explanatory functions in the course of conducted proceedings, and decisions would be taken by adjudicating teams (panels).

At the same time, a strict term of office for the President of the OCCP should be put in place. The dismissal of the President of the OCCP would only be possible after meeting strictly defined, qualified conditions. It would also be necessary to strengthen the independence of officials employed at the competition authorities. Creating greater independence of the body would also be possible by ensuring its financial (budgetary) independence. It is also necessary to develop a code of conduct for officials.

Secondly, ending the way in which decisions are verified through a specific action before a common court and the introduction of a model of administrative court control over all the activity of these bodies means that antitrust (regulatory) cases would remain

39 Ibid, p. 401.

40 KOZAK, M. (2019) p. 26.

only in the sphere of activity of public administration, and only the administrative court will be able to control of this activity, based on the legality criterion.

The most appropriate solution seems to be to create a separate administrative appeal body whose task would be to consider verification measures against the decisions (or inaction) of the antitrust authority and market regulators. Some thought should be given to changing the way in which decisions issued by the President of the OCCP are verified. The move should be to an administrative and legal mode, with a further transition to the court-administrative procedure. The current model, which is in fact an exception to the assumed method of verifying the administrative authority's decision, does not meet the needs; indeed the thesis about its lack of consistency or even effectiveness can be put forward.

There are no grounds to claim that transferring the analysed cases to the administrative courts would mean that the standard required by Article 6 of the European Convention on Human Rights and Fundamental Freedoms would be considered as unfulfilled. Of course, the administrative court may only carry out limited evidentiary proceedings. Administrative courts examine the correctness of establishing the legal and actual state of affairs by administrative bodies, not accepting administrative matters for final settlement and not replacing administrative bodies. The process of extending the jurisdiction of the administrative courts in Poland by granting them the power to take reforming decisions in a given scope, and applying additional protection measures also applies to the Polish administrative judiciary.

Therefore, the optimal solution would be to end the verification procedure model based on the civil procedure, and to replace it with an administrative and legal way of verifying the decisions issued by the President of the OCCP. The establishment of a collective public administration body responsible for examining appeals against decisions of the President of the OCCP should be considered a positive solution (it could be called the Competition Protection and Sector Regulation Council). Such a body would have the powers of a higher level body within the meaning of the Code of Administrative Procedure. This body would be composed of individuals distinguished by practical knowledge and practical experience in the field of competition protection (lawyers, economists) appointed by the Prime Minister. The committee would adjudicate in three-person formations. Decisions issued in proceedings before the appeal administrative body would then be subject to a complaint to the administrative court. The adoption of a full administrative model, based at the same time on the established system of judicial control of administrative activity, seems reasonable and would be, in addition, consistent with the overall structure of the government administration system in Poland and the assumed responsibility of specific entities of that administrative apparatus for individual segments of government policy. The full participation of public administration in making imperious decisions in matters related to competition protection and sector regulation creates the possibility of more effective protection

(undertaken in the public-law interest) of competition on the market, which ensures that other objectives of the antitrust regulation are met.

The ECN+ Directive merely indicates that the establishment of a competition authority should be carried out using transparent and objective procedures. It seems that the need to strictly regulate the way in which the selection board functions should be set out in the act. The committee should include representatives of the Prime Minister as well as independent experts who do not conduct business or provide legal services in relation to competition protection.