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PUBLIC INTEREST AND A PLACE FOR NON-COMPETITION CONSIDERATIONS IN POLISH COMPETITION LAW

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1. Introduction

For some time one can observe growing discussion as to whether antitrust scrutiny based on economic reasoning and market analysis should also include broader, external considerations.[1] The question is, whether public interest goals not directly linked to consumer welfare or market integration, in the case of EU competition law, can or should be pursued by competition law. This article presents the experience of Polish competition law in this context. In particular, attention is focused on the meaning public interest invoked in Article 1 of the Polish Competition Act.[2] We study the case law of Polish courts to the extent it offers any suggestions as to whether non-competition considerations make part of the assessment under the Polish Competition Act. In particular, we analyse if public interest is associated, in the context of applying the Competition Act, only with economic competition law goals (consumer welfare) or if it is related to other goals that can be pursued in the public interest, such as protection of public health or protection of environment. We also study whether

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1 See A. Ezrachi: Sponge. *Journal of Antitrust Enforcement*, vol. 5, n. 1, (2017) 49–75.

2 Act of 16 February 2007 on competition and consumer protection, *Journal of Laws* of 2015, item 1634.

courts are ready to stop antitrust intervention because the anticompetitive practice at stake pursues other public interest goals. Since developments in Polish competition tend to be inspired by EU competition law approaches, the place for non-competition considerations in EU competition law is also discussed. The question here is, whether the Polish approach under Article 1 of the Competition Act diverges from the EU one.

The scope of the article is limited to agreements restricting competition and abuse of dominance cases. The control of concentration, particularly an extraordinary consent for concentration, is not covered.[3] Block exemptions are also beyond the analysis.[4]

2. Non-Competition Considerations in the EU Competition Law

Article 101 of the Treaty on the Functioning of the European Union (hereinafter: "TFEU")[5] prohibits anti-competitive agreements that have as their object or effect the restriction, prevention or distortion of competition within the EU and which have an effect on trade between EU member states. On the basis of Article 101(3) TFEU it is possible to exempt an agreement, if the procompetitive benefits outweigh the negative effects.[6] However, the question arises to what extent non-competition interests can play a role in such assessment. The role of economic analysis in the application of EU competition law has grown significantly since the late 1990s. The economisation of EU competition law reflects this trend.[7] According to this new paradigm, restrictive practices should be assessed on the basis of their potential effects on competition and their impact on consumer welfare. Although the notion of

[3] The non-competition goals are only directly mentioned in the Competition Act only in Article 20(2) that regulates the extraordinary consent for concentration (Art. 20(2)). Under this provision, the UOKiK can clear anticompetitive concentration if justifiable, and in particular if the concentration: 1) is expected to contribute to economic development or technical progress; and 2) it may have a positive impact on the national economy. In practice, the extraordinary consents were issued a couple of times concerning the need for strengthening the production capacity and efficiency of the Polish arms industry, as well as the electro-energy sector. Public security was considered a goal worthy of protection in these cases. Still, enhanced efficiency also played a role in the UOKiK analysis. See T. Skoczny: *Zgody szczególne w prawie kontroli koncentracji* (Special Clearances in Merger Control Law). Warszawa, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2012. 182–204.

[4] See A. Jurkowska — T. Skoczny (eds.): *Wyłączenia grupowe spod zakazu porozumień ograniczających konkurencję we Wspólnocie Europejskiej i w Polsce* (Block Exemptions from the Prohibition of Restrictive Agremeents in the EC and Poland). Warszawa, Studia Antymonopolowe i Regulacyjne, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2008.

[5] Consolidated Version of the Treaty on the Functioning of the European Union, 2008. OJ C 115/47, [hereinafter: TFEU].

[6] Article 101(3) TFUE contains four cumulative conditions: (i) the agreement must create efficiencies; (ii) the benefit of the efficiency gains must be passed on to consumers; (iii) the agreement's restrictions of competition must be indispensable to the attainment of the efficiencies; and (iv) the agreement must not eliminate competition.

[7] L. Parret: Do we (still) know what we are protecting? *TILEC Discussion Paper*, April 2009. 24.

consumer welfare is not clearly defined[8] and the Court of Justice has not embraced it as a single standard for EU competition law, it is currently the dominant approach advocated by the European Commission.[9] If the national competition authorities (NCAs) of Member States also embrace this concept**,** it becomes difficult for them to consider other values than competition in itself. Such difficulties stem from the fact that non-competition interests are difficult to quantify by economists and lawyers undertaking competition analyses.[10]

The adoption of the Regulation 1/2003 also influenced the debate whether non-competition interests can play a role in the competition law assessment.[11] Before the decentralization of 1 May 2004, solely the European Commission resolved conflicts based on balancing non-competition and competition interests. In theory, the new decentralized model of competition law enforcement in the EU allowed the NCAs to balance those interests. However, the Commission adopted a rather strict approach with regard to the ability to consider the non-competition interests. In the guidelines on the application of Article 81(3) (now 101(3) TFEU) of the Treaty, the Commission states that, "[g]oals pursued by other Treaty provisions can be taken into the account to the extent they can be subsumed under the four conditions of Article 101 (3) TFUE (ex Art. 81(3) EC)".[12] A similar approach is visible in EU courts judgments.[13] Since the NCAs often apply national competition laws in parallel with EU competition rules, the position of the Commission and the EU courts potentially limits the ability of NCAs to balance non-competition considerations against competition ones.

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8 K. J. Cseres: The Controversies of the Consumer Welfare Standard. *Competition Law Review*, Vol. 3, No. 2, (2006) 121–173.

9 In 2004, the Commission presented consumer welfare and allocative efficiency as the goals of Article 101 TFEU in the notice on the application of the former Article 81(3) EC. More recently, in the 'Commission Staff Working Paper Accompanying the Report on Competition Policy 2011' SWD (2012), the Commission stated that, "EU competition policy aims at achieving three main objectives: i) protecting competition on the market as a means of enhancing consumer welfare, ii) supporting growth, jobs and the competitiveness of the EU economy and iii) fostering a competition culture." Available at: http://ec.europa.eu/competition/publications/annual_report/2011/part2_en.pdf; For more on the issue of consumer welfare from the European Commission perspective see: V. Daskalova: Consumer Welfare in EU Competition Law: What Is It (Not) About? *The Competition Law Review*, Vol. 11, Issue 1, 131–160.; *TILEC Discussion Paper* No. 2015-011. Available at SSRN: https://ssrn.com/abstract=2605777.

10 A. Gerbrandy – R. Fransen: *Non-competitive interests are no competition for 'Market Europe': does EU competition law hamper civil society's political rights?* Report for EU-citizen – Workpackage 8, deliverable 8.2, 2016. 4., available at https://dspace.library.uu.nl/handle/1874/348450.

11 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 1, 04. 01. 2003. 1–25.

12 Guidelines on the application of Article 81(3) of the Treaty, par. 42.

13 Judgment of the ECJ of 3 July 1985, C-243/83 Binon, ECLI:EU:C:1985:284, par. 43–46.; Judgment of the Court of First Instance of 18 September 2001, T-112/99 TPS, ECLI:EU:T:2001:215, par. 106–107.; Judgment of the General Court of 28 June 2016, T-208/13 Telefónica/Portugal Telecom, ECLI:EU:T:2016:368, par. 102–104.

Today, Article 101(3) TFEU remains the only treaty-based method for potential balancing of competition and non-competition interests within Article 101 TFEU. The consumer welfare approach advocated by the Commission has considerably reduced the types of non-competition interests in such analysis.[14] Advantages of an agreement must include economic benefits for the actual consumers and not society at large. Some of the non-competition interests may have an economic efficiency facet and so lead to some pro-competitive consumer benefits. Other non-competition interests that cannot be quantitatively measured seem unable to justify an Article 101(3) exemption. On one hand, such approach prevents the risk of arbitrary application of competition law. On the other, it has further downgraded the role of Article 101(3) TFEU. It should be noted that Article 101(3) was discussed only three times and the exemption was never granted during the first ten years of Regulation 1/2003.[15]

Nevertheless, there has been debate as to what extent the Commission approach[16] is in harmony with the system of EU competition law. First of all, some authors argued that since the Lisbon Treaty modified the EU Treaty and the EC Treaty in a way that competition policy was not mentioned in the new list of goals in Article 3 TEU, it gave more room for non-competition considerations.[17] Others pointed out that the Lisbon Treaty has enhanced the importance of policy-linking clauses because of the wording of Article 7 TEU, "[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account".[18] Some of the discussions centred on the judgments of the ECJ in *Glaxo Smith Kline* and *T-Mobile*.[19] Although the ECJ did not address non-competition issues as such in those judgments, it stated that market integration and competition, along with consumer welfare, are core goals of competition law. The Commission should therefore be aware of the possibility for conflict between different objectives. In such a case, appropriate balancing of objectives shall be allowed.[20] A slightly different resolution of conflicting objectives is based on the ECJ judgment in *Wouters*.[21] One commentator proposed avoiding the import of non-competition and non-economic concerns into the substance of Article 101(3) TFEU, and advocated balancing them against Article 101 TFEU as a whole.[22]

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14 Guidelines on the application of Article 81 EC to horizontal agreements, OJ 2001 C 3/2, par. 31–36.; Guidelines on Article 81(3), par. 33.

15 D. Bailey: Reinvigorating the role of Article 101(3) under Regulation 1/2003. *Antitrust Law Journal*, vol. 81, n. 401, (2016) 120–123.

16 The approach advocated by the European Commission implied that NCAs should solely or mainly focus on arguments related to competition, market structure, efficiencies and consumer welfare while applying competition law.

17 Parret (2009) op. cit. 7–9.

18 C. Townley: *Article 81 EC and Public Policy.* Oxford, Hart Publishing, 2009. 68–70.

19 European Court of Justice, *GlaxoSmithKline*, C-501/06 P; Court of First Instance, *Glaxo Smith Kline* T-168/01, ECR (2006), *T-Mobile*, C-8/08, *Wouters*, C-309/99.

20 Parret (2009) op. cit. 46–47.

21 European Court of Justice, C-309/99, *J. C. J. Wouters and Others v. Commission*, 2002, ECR I-1577.

22 A. P. Komninos: Non-competition Concerns: Resolution of Conflicts in the Integrated Article 81 EC. *Working Paper* (L) 08/05, Oxford, Oxford University, 2005. 10.

Such balancing could be considered at a prior stage, leading to the exemption from the scope of Article 101 TFEU. Following the classic constitutional rules on resolving conflicts would protect the purity of the antitrust analysis. However, such approach appears inconsistent with the Commission guidelines on the application of Article 81(3) EC.

It is also notable that the Commission developed the concept of objective justification under Article 102 TFEU. The Commission states in its Guidance paper on enforcement priorities for applying Article 102 TFEU that a dominant undertaking may also justify conduct leading to foreclosure of competitors on the ground of efficiencies similar to Article 101(3) TFEU.[23] Therefore, it is arguable that Article 102 TFEU is open for non-competition interests to the same extent as Article 101 TFEU.[24]

3. Public interest in Polish competition law

3.1. Introduction

Polish competition law replicates the structure and the content of Article 101(1), Article 101(3) and Article 102 TFEU in Articles 6, 8 and 9 of the Competition Act, respectively. In addition, Polish law contains a general clause in Article 1 that the Competition Act regulates the development and protection of competition, as well as rules governing the protection of the public interest of undertakings and consumers. The public interest premise plays two main functions: jurisdictional and evaluative. Jurisdictional function limits potential scope of intervention by the President of the Office of Competition and Consumer Protection (Polish NCA, hereinafter "UOKiK") by obligating him to specify what public interest justified the intervention with regard to the specific practice in each case. In other words, any antitrust intervention aimed at protecting competition must pursue public interest (and not purely a private one). The evaluative function of public interest influences the application of competition rules in the Competition Act. This is related to the fact that public interest is a broad and elastic concept and allows for clarification of the actual scope of the competition act.[25] It also helps to define the primary and secondary goals of competition law.[26] This function also plays a role in accurate implementation of the competition policy

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[23] Communication from the Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings', OJ 2009 C45/7, para 28–30.

[24] T. Käseberg: *Intellectual Property, Antitrust and Cumulative Innovation in the EU and the US*. Vol. 1. Oxford–Portland, Oregon, Hart Publishing, 2012. 168.

[25] For the understanding of jurisdictional and evaluative functions of the public interest clause see M. Bernatt – A. Jurkowska-Gomułka – T. Skoczny: Interes publiczny w ochronie konkurencji. In: M. Kępiński (ed.): *System prawa prywatnego Prawo konkurencji tom 15*. Legalis/el., 2014.; T. Skoczny (ed.) *Ustawa o ochronie konkurencji i konsumentów. Komentarz*. Lex/el., 2009.

[26] T. Skoczny – D. Miąsik: Commentary on Article 1. In: T. Skoczny (ed.): *Ustawa o ochronie konkurencji i konsumentów. Komentarz*. Legalis/el., 2014. Nb 38.

by the UOKiK given the limited resources of the competition authority and the resulting inability to intervene in every case.

3.2. The interpretation of the public interest clause in Polish case law: between a quantitative and qualitative approach

The public interest clause now contained in Article 1 of the Competition Act has not been controversy free. Since the introduction of the first Polish contemporary competition law act,[27] the concept has been expressed solely by the judiciary and doctrine. As a result, conflicting interpretations occurred that blurred and altered the notion of public interest. The Antimonopoly Court[28] held in one of its very first judgments that conducting antimonopoly proceedings is permissible only in cases where an economic entity violates public interest.[29] Awareness that competition law is an area of public law with a purpose of protecting the public interest, not the interests of individual entities participating in business transactions already existed in the jurisprudence and legal literature. Therefore, the notion of public interest became an additional, non-statutory requirement for the application of competition law.[30] The subsequent introduction of the concept into the Article 1 of the Competition Act of 2000 was a mere formality.[31] The Antimonopoly Court used an unfortunate phrase in the aforementioned decision of 24 January 1991. It stated that the violation of public interest may occur, for example, where an unlawful practice concerns a "broader scope of market participants." This judgement initiated a mathematical,[32] or quantitative,[33] approach to interpreting the notion of public interest. The "broader scope of market participants" language became a primary and preliminary condition for any intervention by the UOKiK. This begged the question of how many entities is

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[27] Act of 24 February 1990 on counteracting monopolistic practices. *Journal of Laws*, No. 14, item 88.

[28] The Antimonopoly Court was established by the Regulation of the Minister of Justice of 13 April 1990 on the establishment of antimonopoly court (*Journal of Laws*, No. 27, item 157). In 2002, by the Act of 5 July 2002 on amending the Act on competition and consumers protection, the Act – Civil procedural code and the Act on unfair competition (*Journal of Laws*, No. 129, item 1102), the name was changed to "the Court of Competition and Consumer Protection" (hereinafter: the "Competition Court").

[29] Judgment of the Antimonopoly Court of 24 January 1991, XV Amr 8/90, Wokanda 1992, No. 2, 39.

[30] T. Skoczny (ed., 2009) op. cit.; see also: Judgment of the Antimonopoly Court of 3 August 1994, XVII Amr 15/94; Judgment of the Antimonopoly Court of 6 June 2001, XVII Ama 78/00; Judgment of the Supreme Court – Civil Chamber of 29 May 2001, I CKN 1217/98.

[31] Until the introduction of the Act of 15 December 2000 on Competition and Consumer Protection (consolidated text – *Journal of Laws*, of 2005, No. 244, item 2080), the concept of public interest was not indicated *expressis verbis* in Polish competition law. With the introduction of the Act of 2000, the concept was specified in the Article 1 of the Act.

[32] A. Stawicki – E. Stawicki (eds.): *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Lex/el., 2016.

[33] T. Skoczny (ed., 2014) op. cit.; A. Jurkowska-Gomułka: *Publiczne i prywatne egzekwowanie zakazów praktyk ograniczających konkurencję.* Warszawa, 2013. 154.

sufficient for the interest to be considered public.[34] The quantitative approach was very visible in the court judgments stating that UOKiK intervention is pre-conditioned by the impact of the practice on a broader circle of market participants, or by the impact on an entity representing a certain collection of individuals (a community or a cooperative).[35] Soon, this became the dominant approach as the Polish Supreme Court approved it in several judgments.[36] However, after few years, the flaws of such interpretation became apparent. Situations in which it was impossible to identify any entity potentially affected by an anti-competitive practice were considered incapable of violating public interest.

The first departure from such quantitative interpretation of public interest was visible in the 24 July 2003 decision of the Supreme Court.[37] The court stated that the mere threat of distortion of competition is contrary to public interest in contrast with the previous mathematical interpretation. A new qualitative approach emerged in the judicature in the 2003-2008 period. The Supreme Court reiterated in one decision that it is not necessary for the practice to infringe an interest of an individual in order to apply the instruments provided in the Competition Act.[38] It also specified the concept of the public interest, stating that it should be interpreted from the perspective of antitrust axiology.[39] The Court of Competition and Consumer Protection (hereinafter "the Competition Court") also deviated from the quantitative approach. In a judgment of 2005 it defined the objective of the Competition Act as the very existence of competition, namely an environment in which business activity is conducted. According to the Competition Court, the protection of consumers (purchasers of goods and services offered under competitive conditions) takes place by means of protection of competition. The Competition Court emphasised that public interest is violated if the practice has a negative impact on the competition process, even if such negative impact results from practices against individual competitors.[40] The Court of Appeal in Warsaw defined "public" as "affecting the general society" and ruled that a violation of a private interest does not preclude simultaneous violation of the public interest.[41]

The adoption of the qualitative interpretation of the notion of public interest is most discernible in the judgments of the Supreme Court issued in 2008 and subsequent

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34 Jurkowska-Gomułka (2013) op. cit. 151.

35 Jurkowska-Gomułka (2013) op. cit. 152.

36 Judgment of the Supreme Court of 29 May 2001, I CKN 1217/98, OSNC 2002, No 1, item 13; of 28 January 2002, I CKN 112/99, OSNC 2002, No 11, item 144; of 23 July 2003, I CKN 496/01, UOKiK Official Journal of 2004, No 1, item 283.

37 Judgment of the Supreme Court of 24 July 2003, I CKN 496/01, UOKiK Official Journal of 2004, No 1, item 283.

38 Judgment of the Supreme Court of 7 April 2004, III SK 27/04, OSNP 2005, No 7, item 102.

39 Judgment of the Supreme Court of 27 August 2003, I CKN 527/01, LEX No. 137525.

40 Judgment of the Court of Competition and Consumer Protection of 16 November 2005, XVII Ama 97/04, UOKiK Official Journal of 2006, No 1, item 16.

41 Judgment of the Court of Appeal in Warsaw of 5 June 2007, VI ACa 1084/06, Lex No. 1641001.

years. The Supreme Court departed from the quantitative or mathematical approach by stating that, "the number of entities affected by the effects of an anticompetitive practice is irrelevant from the point of view of the admissibility of the application of the Polish competition act."[42] The judgment of 5 June 2008 is considered revolutionary in the legal literature.[43] In this judgment, the Supreme Court summarised existing case law, including the two opposing approaches (quantitative and qualitative), and firmly upheld the correctness of the qualitative approach. This judgment is now the standard primary point of reference for interpretation of public interest. Today, this approach is accepted in the legal literature[44], even if with some exceptions.[45]

Currently, it is assumed that qualitative interpretations of the public interest correspond with the understanding of competition as a mechanism to control the behaviour of market participants.[46] It also allows the identification of the ultimate competition goal on a case-by-case basis.[47] The relationship between the axiology of the competition protection act and the qualitative understanding of public interest is based on the "reciprocal connection." The reciprocal connection means that the axiology should be reflected in defining the public interest and the axiological assumptions of the act should be decoded by referring to the concept of the public interest.[48] It is generally accepted that the ultimate goal of Polish competition law is consumer welfare.[49] Therefore, although competition is equated with rivalry among independent undertakings, competition law should be concerned with the effects of such rivalry and not with the process itself. The question remains whether there is any room for non-economic considerations, unrelated to competition, when evaluating such effects.

3.3. A place for non-competition considerations in Polish competition law

The question whether there is a place for the inclusion of non-competition considerations in the competition law analysis has not attracted much attention in Polish legal scholarship. The discussions, which followed developments in the Supreme Court case law, focused on how to understand the Article 1 public interest

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42 Judgment of the Supreme Court of 16 October 2008, III SK 2/08, LEX No. 2551023.

43 Bernatt–Jurkowska-Gomułka–Skoczny: op. cit.; Judgment of the Supreme Court of 5 June 2008, III SK 40/07, OSNAPiUS 2009, No 19–20, item 272.

44 See for example Stawicki–Stawicki (eds., 2016) op. cit.; See A. Bolecki, A. Bolecki – S. Drozd – S. Famirska – M. Kozak – M. Kulesza – A. Magała – T. Wardyński: *Prawo konkurencji*. Warszawa, 2011. 27–28.

45 At times, the quantitative approach is still considered the primary approach. See, for example: K. Różiewicz-Ładoń: *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję.* Warszawa, 2011. 71.; and Judgment of the Court of Appeal in Warsaw of 16 January 2014, VI ACa 830/13.

46 Skoczny–Miąsik (2014) op. cit. Nb 53.

47 Skoczny–Miąsik (2014) op. cit. Nb. 58.

48 Jurkowska-Gomułka (2013) op. cit. 152.

49 See for example Skoczny–Miąsik (2014) op. cit. Nb. 65.

clause in its pure competition law context. In 2008 the opinion was still expressed that "neither the subject matter of Polish competition law nor the wording of its substantive provisions support the consideration of non-economic arguments when declaring a certain conduct as anticompetitive or when justifying it."[50] It was observed that prior to 2008, the courts only accidentally saw the application of competition law in the public interest in a broader perspective.[51] One instance involved the assessment of farmer protests against pricing policy as an indication of conduct violating competition.[52] In another case, restrictive practices adopted by the incumbent Polish telecom operator were seen as positive due to improvements to network coverage in Poland.[53] However, two recent cases discussed below show that courts believe that there is a place for balancing public interests pursued by competition law with other public interests goals. The court approach is instantly discernible from the approach of the UOKiK that focused on classic competition law goals. The court approach gives no deference to the UOKiK's interpretation of Article 1 of the Competition Act.

In dominance cases, courts interpret the notion of public interest quite broadly. Courts reason that the violation of public interest should be assessed within a "broader perspective", taking into account all the negative effects of a dominant firm's practice on a particular market.[54] In some cases this may seem to provide leeway for introduction of non-competition considerations into the notion of public interest.[55] However, there are arguments against such approach. The Supreme Court, in the judgment of 16 October 2008, has clarified the meaning of "broader perspective", a term used in the prior judgements.[56] It clarified that "broader perspective" should be interpreted in light of the competition law goals.[57] With a view of that decision, public interest is, for example, violated if the behaviour has impact on quantity, quality,

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[50] D. Miąsik: Controlled Chaos with Consumer Welfare as the Winner – a Study of the Goals of Polish Antitrust Law. *Yearbook of Antitrust and Regulatory Studies,* Vol. 1, n. 1, (2008) 52.

[51] Miąsik (2008) op. cit. 52–53.

[52] Miąsik (2008) op. cit.52–53.; See the judgment of the Supreme Court of 27 August 2003, I CKN 527/01.

[53] Miąsik (2008) op. cit. 52–53. See the judgment of the Antimonopoly Court of 25 January 1995, XVII Amr 51/94.

[54] Judgment of the Supreme Court of 24 July 2003, I CKN 496/01, UOKiK Official Journal of 2004, No 1, item 283; Judgment of the Supreme Court of 27 August 2003, I CKN 527/01, LEX No. 137525; Judgment of the Supreme Court of 16 October 2008, III SK 2/08, LEX No. 2551023; Judgment of the Supreme Court of 19 February 2009, III SK 31/08, LEX No. 503413; Judgment of the Court of Appeal of 1 March 2012, VI ACa 1179/11 LEX No 1167649; Judgment of the Court of Appeal in Warsaw of 20 February 2015, VI ACa 675/12, LEX No. 1683336; Judgment of the Court of Appeal in Warsaw of 17 March 2015, VI ACa 539/14, LEX No. 1667658.

[55] In the Judgment of the Supreme Court of 27 August 2003, I CKN 527/01, the Court found that a wave of farmers protested the pricing policy of the dominant firm.

[56] The term was expressly used in the Judgment of the Supreme Court of 24 July 2003, I CKN 496/01, UOKiK Official Journal of 2004, No 1, item 283, and in the Judgment of the Supreme Court of 27 August 2003, I CKN 527/01, LEX No. 137525.

[57] Judgment of the Supreme Court of 16 October 2008, III SK 2/08, LEX No. 2551023.

price of the goods or the range of choice available to consumers. The 2008 judgement suggests a more economic approach.

The Supreme Court adopted a different approach with a broader explanation in a 27 November 2014 decision.[58] The case concerned the abuse of dominance by a Polish city. The City imposed an obligation on the undertakings operating in the municipal waste collection market to transfer the waste to a single company that became responsible for further transportation of the waste to the final disposal site. The Competition Court did not go beyond 'pure' competition goals in its analysis and did not consider arguments related to environmental protection.[59] In contrast, the Court of Appeal in Warsaw did consider potential positive impact of the city's practice on the environment, but it did not find any beneficial aspects in this respect. The Supreme Court rejected the cassation complaint filed by the City. However, it discussed to what extent different values can be balanced under the Competition Act. The Supreme Court held that the ability to balance different values that are important for lawmakers or society depends on the particular institution of the Competition Act. Following the principle *de minimis non curat praetor*, the legislator sometimes limits the scope of the application of Polish competition law.[60] The application of the Act is also excluded in relation to restrictions of competition allowed under separate acts.[61] In addition, according to the Supreme Court, other values than protecting competition may be taken into account whena case-by-case inquiry is made whether the restriction of competition can be objectively justified and so eligible for an exemption from the abuse of dominant position prohibition. In the Supreme Court's view, such balancing should also exist with regard to the assessment of anticompetitive agreements. Such position is different from the European Commission's opinion expressed in the Guidelines on the application of Article 81(3) of the Treaty.[62] The Court believes that, "the consideration of other values that may interfere with competition protection may also affect the applicability of the premises provided in the Competition Act which justify an exemption from the prohibition of competition restricting agreements".[63] This is also true with regard to fines. The Court is of the opinion that, "it is not possible to exclude references to other categories of public interest at the stage of imposing fines by the UOKiK".[64] According to the Supreme Court, such non-competition considerations should not be analysed at the assessment stage regarding whether the intervention of the UOKiK is justified (jurisdictional function of public interest). Instead, analysis should occur at the stage of assessment of whether given practice is as anticompetitive (evaluative function of public interest). As explained above, the Court of Appeal in Warsaw accepted the importance of the environment protection

58 Decision of the Supreme Court of 27 November 2014, III SK 21/14, LEX No. 1565780.

59 The Judgement of the Competition Court of 22 November 2012.

60 See Article 7 of the Polish Competition Act.

61 See Article 3 of the Polish Competition Act.

62 See Guidelines on the application of Article 81(3) of the Treaty, para. 42 and the supra point 2.

63 Decision of the Supreme Court of 27 November 2014, III SK 21/14.

64 Decision of the Supreme Court of 27 November 2014, III SK 21/14.

concerns in the municipal waste collection case, but did not find them significant enough to justify the alleged anticompetitive practice.[65] While anticompetitive, the additional burdens imposed on the contractors of the dominant entity did not yield any positive results on the protection of the environment in practise.

In light of the discussed Supreme Court's decision of 27 November 2014, balancing various interests within the assessment of anticompetitive practice falls within the evaluative function of public interest and should be considered appropriately at the regular anticompetitive practice analysis stage. Still, the decision falls short in explaining who bears the burden of raising and analysing non-competition considerations. It seems that this should be the role of the defendant rather than the UOKiK. The clear role of the UOKiK is to protect competition and so it should be not obliged to consider other non-competition factors on an *ex-officio* basis. The Supreme Court's observation that non-competition considerations could form part of an individual exemption analysis under Article 8 of the Competition Act (the counterpart of Article 101(3) TFEU) requires further elaboration. Neither the limited practice of applying Article 8,[66] nor its language suggests that there is a strong basis for inclusion of non-competition considerations under Article 8 analysis. It is noteworthy that Article 8 invokes only economic efficiencies (contributions to improving the production or distribution of goods) and contribution to technical or economic progress as potential justifications for the anticompetitive agreement. For this reason, potential non-competition factors would need to form part of the demonstrated economic benefits.

Another case in which such non-competition interests were considered concerned the prohibition by the Polish Chamber of Physicians and Dentists (hereinafter: "NIL") of homeopathic products in Poland. In 2011, the UOKiK found that NIL violated competition law by adopting a policy prohibiting doctors from prescribing homeopathic products and imposed a fine.[67] The decision by the UOKiK is considered an example of an effect-based approach.[68] The decision was based on a pure competition analysis. The issue of whether homeopathic products actually have

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65 Judgment of the Court of Appeal in Warsaw of 19 September 2013, VI ACa 170/13.

66 Only one instance of the UOKiK applying the individual exemption exists. It concerned the decision of an association of raftsers on the Dunajec river to fix prices of rafting services. In 2011, the UOKiK regional office in Katowice exempted the agreement on pure efficiency grounds in holding that the decision facilitated the distribution of rafter services among travel agencies and individual consumers. The UOKiK believed that not doing so would result in higher prices and longer waits for tourists. See the UOKiK decision of 4 November 2011, RKT-33/2011.

67 The UOKiK decision of of 25 July 2011 r., DOK-6/2011.

68 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 (iKAR),* vol. 1, n. 1, 2012. 39.

positive effects for patient health was beyond the interest of the UOKiK.[69] Regarding the competition concerns, the UOKiK believed that consumers were deprived of choice and access to homeopathic products that they may have been interested in obtaining. Additionally, the threat of initiating disciplinary proceedings against those doctors who would prescribe homeopathic products strengthened the potential anticompetitive impact of the NIL decision. The Competition Court annulled the decision in 2014.[70] According to the Court, the UOKiK did not act in public interest. The reasoning of the judgment suggests that the Competition Court believed that the quantitative aspect of public interest was fulfilled but the qualitative was not. The Court analysed the impact of the NIL position and stated that the positive effects of competition in the health services market were demonstrated in the right of patients to be treated consistent with current medical knowledge, and not in the right to be treated by any lawful products, including those without therapeutic value. The Competition Court clearly put the protection of health above competition law concerns. It held that the NIL correctly prohibited homeopathic products as they can have adverse health effects. The Court also stated that it is the responsibility of doctors to select and prescribe adequate medicine, not patients. The Court clearly stated that it would be unacceptable if competition was the determining factor on the health services market. The NIL policy served goals, such as health and life of patients, that Competition Court viewed as more important than mere protection of competition. The UOKiK appealed the Court decision and although for different reasons, the Court of Appeal in Warsaw found the UOKiK decision unfounded.[71] The Court of Appeal in Warsaw did not consider the notion of public interest and based its decision on classic antitrust analysis. It also distanced itself from the Competition Court's firm belief that homeopathic products might have adverse health effects. This judgement may suggest that the Court of Appeal in Warsaw believed that the public interest was present in the case, even if the UOKiK failed to prove the anticompetitive nature of the NIL policy.

The Competition Court judgement in the homeopathic case has already faced criticism[72] One criticism is the risk of inconsistent analysis in competition law that would indirectly allow decisions of professional self-governing bodies to practically

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[69] Małgorzata Krasnodębska-Tomkiel, then President of UOKiK, stated "UOKiK is not the party to discussions on the effectiveness of homeopathic products. This issue was not at all subject of our interest. We found that the practice of the Polish Chamber of Physicians and Dentists is a violation of competition by restricting market access to undertakings selling products approved for legal trade, and thus the availability of these products for consumers", UOKiK Press release (2011.08.05), available at: https://uokik.gov.pl/aktualnosci.php?news_id=2828&print=1.

[70] Judgment of the Court of Competition and Consumer Protection of 30 December 2014, XVII AmA 163/11.

[71] Judgment of the Court of Appeal in Warsaw of 11 July 2016, VI ACa 397/15. In particular, the Court believed that the NIL policy had neither an anticompetitive object (it did not have a truly binding character) nor anticompetitive effect.

[72] J. Sroczyński: Spór o homeopatię (czyli o władzę nad rynkiem). *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*, vol. 5, n. 8, 2016.; A. Jurkowska-Gomułka: Znachor czyli SOKiK

be exempted from any antitrust scrutiny.[73] Our concern relates to the Competition Court's understanding of public interest. First, the Competition Court did not state the legal grounds for balancing competition law related interests against public health considerations. This was an anticompetitive agreement case and the Court could have considered, consistent with the Supreme Court's suggestion discussed above, whether public health considerations could be included under the individual exemption provided in Article 8 of the Competition Act (Article 101(3) counterpart). Second, the Court did not expressly allow for such balancing and it did not directly point out that other interests fall within the interpretation of public interest prescribed in Article 1 of the Polish Competition Act. The Court narrowly focused on the result of this judgment, and did not provide any guidance for future cases. Third, the Court did not appear to consider the Supreme Court decision of 27 November 2014. Although the decision was only final for just over a month, it concerned the essence of the problem and could have been taken into account.[74] While it is rather unlikely that consideration of the Supreme Court decision would have changed the outcome, it would have contributed to greater legal certainty in the future. For example, at the moment it is unclear why the Competition Court believed that the UOKiK did not act in the public interest whatsoever. The Supreme Court decision of 27 November 2014 suggests that public interest in competition law may potentially be balanced with other public interest goals. In its light, it seems more appropriate to consider both conflicting interests while assessing the undertaking's practice and decide which should prevail.

4. Conclusions

The article tried to answer the question to what extent can non-competition considerations play a role in the application of public interest under Article 1 of the Competition Act Recent cases show that despite the focus by competition authority and academics on considering public interest contained in Article 1 only in the competition law context (public interest in competition law), courts might be ready to balance different public interests as part of their antitrust analysis. However, clear legal framework in this respect is missing. It seems that despite the Supreme Court decision of 27 November 2014, the notion of public interest mentioned in Article 1 of the Competition Act should be concerned only with the goals pursued by competition law, the goals for which the UOKiK is responsible. Such position does not exclude the

o homeopatii. *Modzelewska&Paśnik Blog*, available at: http://www.modzelewskapasnik.pl/pl/blog/36/26/znachor-czyli-sokik-o-homeopatii.

[73] Sroczyński (2016) draws attention to the fact that depriving the competition authority. UOKiK, of the power to scrutinize the activities of professional self-government bodies may lead to adverse effects for the protection of competition and consumers, such as limitating market access for the undertakings and legal product and service access for consumers.

[74] Similarly, the Decision of the Supreme Court of 27 November 2014 was not included in the later judgment of the Court of Appeal of 11 July 2016.

permissibility of the Supreme Court's proposal being understood as a possibility to balance public interests in competition law with other public interests, such as public health and environmental protection, if raised as a defence by the undertakings involved. Still, further judicial interpretation in this respect is necessary. In particular, it could be clarified that the defendant, rather than the competition authority, bears the burden of proof that a given practice may be objectively justified in light of non-competition considerations. In addition, since consistency in competition law is a value, the courts should not refrain from clarifying which existing legal concepts or institutions serve as a base for such balancing. As hinted at by the Supreme Court, individual exemptions under Article 8 of the Competition Act could be applicable in case of anticompetitive agreements. Or, the objective justification doctrine could be used in dominance cases. Still, this would be certainly not free of controversies and potential non-competition factors would likely have to make part of economic benefits shown.

In any event, a reference to other public interests should be the exception rather than the rule in competition law analysis. Traditional competition analysis should be exhausted before the competition authority, or courts, embark on risky balancing exercises. In fact, the homeopathic case Judgement of the Court of Appeal in Warsaw demonstrates that the case might have been decided by the court of first instance within by object/by effect analysis without needing to raise controversies as to whether public health considerations should trump competition law considerations.