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Between exercising of public powers and economic activity. The latest findings on the notion of entrepreneur made in the process of judicial review of the decision of the President of the Office of Competition and Consumer Protection

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Abstract:

Aim: There is no doubt that public authorities may be directly or indirectly involved in economic activity. A traditional way of distinguish state activity which is not subject to the rules of the market is to decide when the state acts as public authority. In case of state activity two category of situations should be distinguished: these where the state is engaged in an economic activity (sphere of dominium) and these when the state acts by exercising of public powers (sphere of imperium). In the opinion of the author of the article, the distinction between imperium and dominium is still relevant. According to the Competition and Consumer Protection Act of February 16, 2007, an entrepreneur is inter alia natural and legal person, as well as an organisational unit without a legal status to which legislation grants legal capacity, organising or providing public utility services which do not constitute economic activity in the meaning of the provisions on freedom of economic activity. The President of the Office of Competition and Consumer Protection found that public authorities exercising their administrative powers (sphere of imperium) may be classified as entrepreneurs. In the recent decisions which were subject of judicial review the President of UOKiK decided that the National Health Fund – a state authority responsible for organization and management of health care services in Poland – is an entrepreneur in the meaning of the Polish law (act on competition and consumer protection). The aim of this article is to answer the question whether competition rules should be applied to the state activity in the imperium sphere. This article will focus on the notion of an entrepreneur (undertaking) in polish and EU law in the context of the activity of the state.

Design / Research methods: The objective of the article is achieved through doctrinal analysis of the relevant rules of the Polish and EU law and analysis of the recent decisions issued by the President of UOKiK, as well as judgments of the EU Courts, concerning the possibility of qualification of the widely understood state as an undertaking (entrepreneur).

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Conclusions / findings: From the analysis of the same concept applied in polish and EU law clearly follows that public entities acting 'by exercising public power' or 'in their capacity as public authorities' (imperium sphere) should not be classified as entrepreneurs (undertakings) in the meaning of competition law. The main scientific value added of the article are the conclusions that the provisions on the protection of competition should be applicable only to the activity of the state in the dominium sphere and that the definition of an entrepreneur and business (economic) activity should be connected to the existence of a market.

Originality / value of the article: Paper should be interesting for public authorities, as well as for lawyers, dealing with problems concerning of qualification of public entities in the context of the competition law. The results of the research may be applied for example in the decisions that would be taken by the President of UOKiK. The consequences of application of the findings of the research to practice may be a change of approach to qualification of public entities in the context of the provision of competition law.

Keywords: economic activity, undertaking (entrepreneur), imperium, dominium, National Health Fund.
JEL: K22, K29

1. Introduction

The idea for this paper came from the findings made by the President of UOKiK (Office of Competition and Consumer Protection) in his decision: the National Health Fund, public payer for healthcare services in Poland, should be classified as an entrepreneur in the meaning of Polish provisions on the protection of competition, even though it does not meet the conditions set forth in the definition of an undertaking in the EU law (cf. the decision of the President of UOKiK of December 31, 2013, file ref. no. RŁO-57/2013; the decision of the President of UOKiK of December 23, 2013, file ref. no. RWR 42/2013; the decision of the President of UOKiK of December 28, 2011, file ref. no. RKT-51/2011; the decision of the President of UOKiK of July10, 2009, file ref. no. RWA 9/2009). This finding was confirmed by a judicial review of President's of UOKiK decision of July 10, 2009 (in this respect, see: the judgement of SOKiK of April 20, 2004, file ref. no. XVII AmA 201/09; the judgement of the Court of Appeal in Warsaw of May 23, 2012, file ref. no. VI A Ca 1142/11; the decision of the Supreme Court of September 24, 2013, file ref. no. III SK 1/13).

At this point it is necessary to explain why I consider this finding to be "new". In the end of definition of an entrepreneur in the law on the protection of competition is anything but new. It is also not a novelty to classify various bodies performing public services as undertakings. And the case itself, discussed by me below, is not particularly new. Yet I believe it deserves to be treated as a novelty.

In my previous publication (Jarecki 2015: 101–118) I referred to the EU law, European Commission's decisions, EUCJ case law and its definition of an undertaking and pointed to

numerous cases of illogical reasoning and incoherence, as well as to the dangerous – in my opinion – blurring of the lines between the performance of state tasks (exercising of public powers) and running economic (business) activity, excessive reliance on neoliberal ideas, heavily compromised after the recent economic crisis, naive belief that competition is always and everywhere necessary and that market and competition offer an answer to virtually every problem. I am deeply convinced that this approach weakens already weak European states which, at their own will and without any positive effects, have been eliminating mechanisms enabling an effective performance of state tasks (state influence on the economy). There is no doubt that competition is valuable and desirable, it requires nourishment and protection, but only where it can actually exist and generate benefits, certainly not in the area of public authority.

Already at the preliminary stage of the work on this article I concluded that the approach to this issue in Poland should be considered even more illogical and incoherent than at the UE level. Polish legislator has been unable to choose one definition of an entrepreneur, reasonably define the concept of economic activity, is lagging behind the dynamically changing reality and the EU law and, what is worse, confuses the *imperium* and *dominium* spheres, which is best manifested by the practice of the President of UOKiK in terms of his decisions, as well as the definition, or – speaking more broadly – attitude to public services. One of the conclusions that can be drawn from the commentary by Maciej Etel to the decision of the Supreme Court issued in the analysed case is that "the purpose of the definition of the concept of an entrepreneur included in the Competition and Consumer Protection Act (CCPA) is not to identify the entities considered entrepreneurs, but to identify the entities bound by the act" (Etel 2014: 75). This sentence speaks volumes of the issue I decided to discuss in this paper. Since there is no controversy as to the fact that certain entities governed by the provisions on the protection of competition are not entrepreneurs in the common or even (substantially) legal sense, why do we call them in this way and why are these laws applicable? And, finally, is it the right solution? Another conclusion from the same commentary reads: "there is no obligation to interpret the concept of an entrepreneur in CCPA in a pro-EU way in a situation where the competition protection authority did not apply simultaneously the provisions of the EU and national anti-monopoly law" (Etel 2014: 75). It means that the fact that an entity is not an entrepreneur in view of the EU law does not mean it cannot be classified as an entrepreneur pursuant to Polish law. This view is also interesting. I do not refer to the substance of this finding, but to the comparison of Polish law and the EU law and legal

literature: why are certain entities classified as entrepreneurs pursuant to Polish law on the protection of competition, but not under the EU law? What are the conclusions from the comparison of the Polish and EU approach in this respect? Is it possible to point out to the more appropriate one and why? Does the comparison prove one of the approaches wrong? Should one of these legal regimes inspire or serve as a model for the other? This article will focus on the notion of an entrepreneur (undertaking) in polish and EU law in the context of the activity of the state. The first section of the article will deal with the concept of an entrepreneur in the polish law. In the second section will be presented decisions issued by the President of UOKiK in the subject matter of the article. Third section will focus on the distinction of the activities of the state on the *imperium* and *dominium* spheres. In the fourth section, a EU approach to the notion of undertaking (entrepreneur) will be examined. A last section will conclude on the topic of this article and formulate a proposal.

2. The concept of an entrepreneur

Before I attempt an answer to the questions presented above, it is necessary to recall, at least for organizational purposes, the definition of an entrepreneur included in the Competition and Consumer Protection Act of February 16, 2007 (consolidated text: Dz.U. [Journal of Laws] of 2015, item 184) which served as a basis to classify the National Health Fund as an entrepreneur. There are several different definitions of an entrepreneur in Polish law – both in private and public law acts. Apart from the Competition and Consumer Protection Act, this term is also defined in the Act of July 2, 2004 on the Freedom of Business Activity (consolidated text: Dz.U. [Journal of Laws] of 2013, item 672 as amended) and the Civil Code of April 23, 1964 (consolidated text: Dz.U. [Journal of Laws] of 2014, item 121). One of the key elements of the definition of an entrepreneur included in the Act on the Freedom of Business Activity and the Civil Code is business (economic) activity that the entity must run. Meanwhile, one of the inherent features of business activity in Polish law is its for-profit nature. It is necessary to add, however, that an activity is classified as for-profit if it is conducted with the aim of generating profit, while the actual presence of profit or the lack of it is not important (Sieradzka 2013). By this feature the definitions included in the foregoing acts differ from the definition in the Competition and

Consumer Protection Act. Pursuant to the Competition and Consumer Protection Act, the definition of an entrepreneur stretches to include entities performing public tasks involving the organization or provision of public services, despite the fact that these entities do not have to be entrepreneurs in the meaning of the Act on the Freedom of Business Activity. Typically it is assumed that public services have – as a rule – non-for-profit nature, and therefore, they do not have the quality of business activity. When it comes to the definition of the concept of a public service, lawyers commonly rely on the Act of December 20, 1996 on Municipal Management (consolidated text: Dz.U. [Journal of Laws] 2011, No. 45, item 236 as amended). It has been argued that public services are the services related to the ongoing and uninterrupted satisfaction of common needs of communities. Obviously, this act refers to the functioning of local governments, but this understanding of a public service is applied by analogy to the functioning of other administrative authorities as well. The National Health Fund is a perfect example of such a case, as it has been classified as an entity organising the provision of a public service.

3. Decisions issued by the President of UOKiK

In the practice involving the issuance of decisions, confirmed by judicial review[1], the President of UOKiK classified the National Health Fund as an entrepreneur in the meaning of the Competition and Consumer Protection Act, since the fund is a legal person established under the Act of August 27, 2004 on Health Care Services Financed with Public Funds (consolidated text: Dz.U. [Journal of Laws] of 2008, No. 164, item 1027 as amended). It is responsible for the process of signing contracts with contractors, thereby establishing the terms and conditions for the provision of healthcare services. Due to the public nature of the health insurance system, including the universal nature of health care services provided by health care units, health care services are public services, and, in consequence, the National Health Fund should be classified as the entity in charge of the organization of a public service. Interestingly for me, the President of UOKiK found that the National Heath Fund operates on a market. In the opinion of the President of UOKiK, the

[1] The judicial review referred to in this paper concerned the decision of the President of UOKiK of 10 July 10, 2009, file ref. no. RWA 9/2009. The decision concerned the abuse of the National Health Fund's dominant position involving the use of a specific criterion in the procedure for the award of a public contract for healthcare services. The criterion was the provision by the bidder, on the date of the offer, of specified healthcare services on the basis of a contract with the National Health Fund.

relevant market in this case is the national market of organizing health care services financed with public funds. The President of UOKiK noted in this respect that the National Health Fund runs its activity only in Poland. As it was the legislator's intent, the Fund is the monopolist on this market. Private insurers do not operate on the same relevant market, because they manage private funds and not public funds as the National Health Fund. The National Health Fund, as the statutory monopolist, does not have to compete for public funds, whereas the situation of private insurers is different, etc.

4. *Imperium* and *dominium* spheres

In the case of activities of a broadly construed state, one needs to differentiate between two categories of situations:

– where state activity has the quality of a normal economic (business) activity, and

– where the state acts within the performance of its authoritative competencies (exercising of public powers).

It is a consequence of the fact that it is necessary to distinguish between the sphere where the state operates in terms of *imperium*, i.e. administrative authority, and *dominium*, i.e. property, with the use of which the state competes with other entities on the market (Nykiel-Mateo 2009: 50; opinion of the advocate general Philippe Léger presented on January 14, 2003 in the case Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, with the participation of Oberbundesanwalt beim Bundesverwaltungsgericht). In my opinion, the provisions on the protection of competition should apply only to the first category, i.e. where the state activity is of typical business (economic) nature. Only in such a case can the state activities have the nature similar to or the same as the activities undertaken by private entities acting in order to obtain profit. This is also the only situation where, at least potentially, a broadly construed state can be only of the players, along with private entities, on a specific market. However, one needs to emphasize that such a market can exist also when the state is the only entity running a specific activity, but it behaves like private entities (i.e. its activity has the quality of activity in the *dominium* sphere) or when it is not impossible (in the legal sense) that private entities would appear in this area of activity. In such a case, the application of the law

on competition protection with respect to the state activity is fully justified, at least by the principle of equal treatment of public and private property (public and private sectors). Entities running business activity cannot be – without any objective rationale – treated differently only on the grounds of their public or private status. It is obvious as long as the economy is to be the market economy. However, different treatment of public and private sectors can be justified, or even necessary or desirable in a number of cases. The position and situation of these sectors is not analogous which means that the difference in treatment is not discriminatory in every single case, not to mention objectively unjustified discrimination.

With respect to the sphere of *imperium* – exercising of public powers – the exercise of competencies reserved to the state only, we do not speak of economic (business) activity, there is not competition and therefore no grounds to apply the laws on the protection of competition. It is a consequence of the fact that there is nothing to protect. There is no such thing as the market of exercising public powers, the existence of which – in my opinion erroneously – was asserted by the President of UOKiK and called "the national market of organising health care services financed with public funds". In this situation the state does not compete with other entrepreneurs, as it is the case in the *dominium* sphere.

In my opinion, it is a mistake – not to say pathology – detrimental from the perspective of the system of law as such, to use the tools aimed at the protection of competition to supervise the activity of the state in the area where competition cannot exist. Obviously, it can be argued that the state, acting in the *imperium* sphere, by organising the provision of specific services with respect to which competition does or may exist, may distort the competition. This argument would speak in favour of applying the provisions on the protection of competition to such a state activity to safeguard public interest.

It is obviously true: the state, acting in the *imperium* sphere, may influence competition on the market of the provision of specific services, running specific activity, as it does so by implementing a specific fiscal policy which has impact on the situation on the market (it influences the conditions of running business activity). The question is: does this obvious fact justify the application of the provisions on the protection of competition in this sphere? I will use the example of the rail transport sector. The minister in charge of the matters of transport is the organizer of inter-regional rail transportation. In Poland, the market of provision of rail transportation, including

passenger transport, is substantially open to competition. The minister has selected a specific carrier to provide these services, without any competitive procedure.

Did the Minister influence in this way the market of passenger rail transport? Probably yes. Was the minister authorised to do so? As long as the state decided, within its authority, i.e. *imperium*, by passing relevant legislation, that it can do so, and as long as it is compliant with the EU law – why not? Within its *imperium* the state has the right to decide the areas the market where it is to be active, where it is not, and how much of the market is to be present there. Is the example quoted by me – from many points of view – similar to the activity of the National Health Fund examined by the President of UOKiK? Maybe the President of UOKiK should have the capacity to influence the activity of the minister? In the end the minister organizes rail transport, operates on the market – using President's of UOKiK words – of organizing national passenger rail transport using public funds and on this market it holds a dominant, or even monopolistic position. This example has clearly shown the a-systemic nature of the noble assumption that the application of the law on the protection of competition to entities exercising the competencies of a state (public powers) is to be justified by the fact that such competencies, when exercised, may influence competition on a specific market. Generally speaking, it boils down to a fact that the state, when exercising its competencies, establishes certain entities and gives them the authority to restrict or even eliminate competition in certain areas. At the same time, the state establishes an anti-monopoly body which may find that these entities, using their authority given to them by the very same state, have violated the provisions on the protection of competition. In this way two different realities get intermingled together. This situation lacks coherence.

Obviously, one may argue that the anti-monopoly body supervises the activity of other bodies or – more broadly – administrative entities. The state has decided to introduce competition in a certain area and the anti-monopoly body does nothing else than review whether competent administrative bodies follow this assumption. Once again, the idea is noble. Obviously, supervision is required, but why is it to be exercised by the anti-monopoly body and on the grounds of the anti-monopoly law? Are the instruments not belonging to the *imperium* sphere appropriate to supervise this sphere?

Does the foregoing mean that, in my opinion, the provisions on the protection of competition should never be applied to the activity involving the organization of public services? Absolutely not. These provisions should be applicable whenever the state introduces market

mechanisms to the organisation of provision of certain services, introduces at least potential possibility of a market for certain services, e.g. by selecting entities responsible for the organisation of the performance of specific services by way of competitive procedures (competition for the market of organisation of specific services), or in any other way, ascribing to a specific activity the features of ordinary business activity (e.g. by introducing, at least potentially, the possibility of running exactly the same activity by private entities, thereby introducing a competition between them and the state). In such a case there might be, at least potentially, competition between state and private entities, and such competition may require protection. However, it is not the case when the state has organised the provision of specific services in a way that eliminates the existence of a market for the organisation of such services.

5. EU approach

In this context it might be useful to examine the approach to this issues in EU law, case law and legal literature. EU law does not use the term "entrepreneur", but applies the term "undertaking" instead. However, these concepts should be treated as identical. The term "undertaking" has not been defined in the EU law. The definition of this term is not included in TFEU (Nicolaides, Kekelekis, Buyskes 2005: 14; Casteele, Hocine 2008: 247). The EU doctrine and case law assume that an undertaking is any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (judgement of ECJ of September 12, 2000 in the combined cases C-180-184/98 Pavel Pavlov et al. v. Stichting Pensioenfonds Medische Specialisten, 2000 [ECR], p. I-06451, item 75). The approach of EU courts to this issue is functional in the sense that the courts focus on the activity performed by a specific entity, and not on the entity itself. This concept is based on the assumption that the scope of application of the EU competition rules cannot depend on the classification of a specific entity performed on the grounds of the national law or on the grounds of the national mechanism governing the financing of the entity, but only on the basis of the entity's capacity to take actions that bring about effects that the Treaty provisions on competition are to prevent (Casteele, Hocine 2008: 247). The concept of economic (business) activity in the European Union is understood very broadly. The Court of Justice of the EU has defined economic activity as any activity involving the offering of goods or

services on a specific market. In the EU law, the concept of economic activity comprises any production, trade or service-related activity, conducted for profit or not. The economic or non-economic nature of an activity is not determined by the private or public status of the entity running the activity or its profitability (judgement of ECJ of December 19, 2012 in the case C-288/11 P Mitteldeutsche Flughafen AG et Flughafen Leipzig-Halle GmbH v. European Commission, electronic Reports of Cases [Court Reports – general], item 50). In consequence, in the EU law also entities that run activity which is *not profit-oriented* may be considered undertakings. One of controversial recent EUJC judgement in the *Leipzig-Halle* case, concerning public financing of transport infrastructure, provides that the economic nature of activity involves the provision of services for remuneration – in particular remuneration from the users of services – leading to the mutual exchange of performances. Economic activity takes place whenever a specified entity operates in a commercial manner, which happens in every case when specific services are not provided free of charge in public interest, but in exchange for a fee paid by the users (judgement of ECJ of March 24, 2011 in the combined cases T-455/08 Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG v. Commission and T-443/08 Freistaat Sachsen and Land Sachsen-Anhalt v. Commission, [2011] ECR, p. II-01311, item 93–94).

In the EU law the division in to the spheres of *imperium* and *dominium* is fully applied, and, in consequence – pursuant to the EU law – we do not deal with an undertaking when the state acts "exercising its public powers" or when public bodies act "in their capacity as public authorities". An entity may be deemed to act exercising public powers where the activity in question forms part of the essential function of the state or is connected with those functions by its nature, its aim, and the rules to which it is subject. Substantially, an activity which inherently belongs to the competence of public authority and is exercised by the state is not classified as economic activity. Examples of such activity include: army and police activities; air navigation safety and control; maritime traffic safety and control; anti-pollution surveillance; organization, financing and enforcement of prison sentences; public education; social security or healthcare (cf. the Communication from the Commission – Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU, 2016, item 17). At the same time – as already mentioned above – the EU law takes account of the manner of organisation of specific activity: whether it is organised on the basis of authority – if so, it belongs to the *imperium* sphere – or maybe the state has introduced market mechanisms by which a specific activity has acquired the qualities of a

typical economic activity, and as such should be classified as belonging to the *dominium* sphere. The foregoing may be exemplified by the approach to the organisation of the healthcare system as a whole. As the European Commission has noted, in some member states, public hospitals are an integral part of a national health service and are almost entirely based on the principle of solidarity. Such hospitals are directly funded from social security contributions and other state resources and provide their services free of charge on the basis of universal coverage. The Union Courts have confirmed that, where such a structure exists, the relevant organisations do not act as undertakings. In consequence, the activity is classified as belonging to the *imperium* sphere. In many other member states, hospitals and other health care providers offer their services for remuneration, be it directly from patients or from their insurance. In such systems, there is a certain degree of competition between hospitals concerning the provision of health care services. Where this is the case, the fact that a health service is provided by a public hospital is not sufficient for the activity to be classified as non-economic. Such cases may be classified as belonging to the *dominium* sphere (Communication from the Commission – Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU, 2016, items 24–27).

6. Conclusions

In my opinion, the provisions on the protection of competition should be applicable only to the activity of the state in the *dominium* sphere. The solution applied in the Competition and Consumer Protection Act is difficult to justify; it ruins the order of the legal system sometimes leading to absurd conclusions. It has been argued that the division into the spheres of *imperium* and *dominium* has lost its importance or has even become useless. This critique is presented in the context of the process of privatisation of public tasks. However, I do not agree with this view and find this division as useful as 20 or 30 years ago. It organises the system of law, setting borders between what is absolutely reserved to the state and the area where the state, at least potentially, may compete with private entities. The privatisation of public tasks has no impact on the usefulness of this division. One may claim, however, that the classification of a specific activity may be complicated – it is simply no longer possible to automatically determine that a specific task belongs to the *imperium* or *dominium* sphere on the basis of the task's name only, for instance based on the

fact that a task involves the organisation of health care. The principle only allows to determine that a specific task does not belong to the *imperium* sphere, but not the other way round. It is necessary to analyse the way in which a state has organised the performance of the task, i.e. whether there has been liberalization, opening to competition and thereby creation of a market or not.

The definition of an entrepreneur and business activity should be connected to the existence of a market. It would facilitate, among other things, the classification of entities dealing with the organisation of the provision of certain services – if there is a market for the organisation of certain services, the entities are entrepreneurs, but if no such market exists, they are not entrepreneurs. I think it needs not be added that such a connection is generally logical – to call an activity economic (business) activity, and the entity performing it an entrepreneur, a market on which the activity is performed must exist.

It is also necessary to introduce one, universal definition of an entrepreneur. In this respect I agree with the conclusion presented by Maciej Etel, who pointed out that the practice of introducing different definitions of the same term, making Polish law incoherent and intra-contradictory, is – from the perspective of legal theory and science – inacceptable (Etel 2014: 81). What is more, if we accept the abovementioned postulate that the provisions on the protection of competition be applicable only to the *dominium* sphere, and if we take into account changes to the organization of public services, it makes no sense to keep a separate definition of an entrepreneur in the provisions on the protection of competition. At this point it is worth noting that – as it seems – one of the reasons for the construction of a separate definition of an entrepreneur for the purposes of the provisions on the protection of competition was to classify public services as non-for-profit activity, and exempt them from the scope of the definition of business activity included in the Act on the Freedom of Business Activity. This would mean that the entities providing such services would not be entrepreneurs in the meaning of this act. Today the view that public services are not for-profit services for the entities that perform them is no longer true. Under the influence of the EU system, these services have clearly become for-profit services for the entities that offer them. These entities are not only entitled to receive the reimbursement of costs, but also a reasonable profit. According to the most recent EU documents, the organizers are even obliged to grant operators compensation covering also a reasonable profit (In this respect, cf. Decision of the European Commission of December 29, 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to the state aid in the form of public service compensation

granted to certain undertakings entrusted with the operation of services of general economic interest, EU OJ 2012 L 7/3; Communication of the European Commission Framework rules of the European Union on state aid in the form of public service compensation (2011), EU OJ 2012 C 8/15; Communication of the European Commission Framework rules of the European Union on state aid with respect to the compensation for the operation of services of general economic interest, EU OJ 2012 C 8/4; Regulation of the European Parliament and the Council No. 1370/2007 of October 23, 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, EU OJ 2007 L 315/1; Communication of the European Commission on interpretative guidelines to the regulation (EC) 1370/2007 on public passenger transport services by rail and by road, EU OJ 2014 C 92/1). In such a case, one can hardly speak of a lack of economic activity. What is more, it has become clear that this approach will be extended to other types of activity classified in the Polish law as non-economic activity. These include cultural activity,[2] with respect to which the EU law also includes the concept of reasonable profit (in this respect, see in particular Article 53 of the Regulation of the Commission (EU) 651/2014 of June 17, 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, EU OJ 2014 L 187/1). At this point one could venture into the reasoning on the need to change the approach to the definition of public services in Polish law, but such a dilemma goes beyond the scope of this work. Current works on the draft act Business Activity Law seem to be a good occasion to organise the situation in this respect and introduce one, universal definition of an entrepreneur.

Finally, it is important to ensure maximum coherence of the definition of an entrepreneur and business activity in Polish law with relevant definitions in the EU law. The approximation of Polish and EU definitions will increase legal certainty for entrepreneurs and will facilitate their operations. What is more – and hence the relationship I mentioned earlier – the reliance on EU law, obviously with necessary modifications (resulting from the differences between Polish and EU legal systems) will allow for the postulates I presented above to be largely met.

[2] Pursuant to the definition of cultural activity included in the Act of October 25, 1991 on Cultural Activity (consolidated text: Dz.U. [Journal of Laws] of 2012, item 406 as amended), this activity involves the creation, dissemination and protection of culture and does not form business activity in the meaning of separate provisions.

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Stefan Akira JARECKI

Pomiędzy wykonywaniem prerogatyw państwa a działalnością gospodarczą. Najnowsze ustalenia dotyczące pojęcia przedsiębiorcy poczynione w ramach sądowej kontroli decyzji Prezesa UOKiK

Streszczenie:

Cel artykułu: Nie ulega wątpliwości, że władze publiczne mogą być bezpośrednio lub pośrednio zaangażowane w prowadzenie działalności gospodarczej. Tradycyjny sposób odróżnienia działalności państwa, która nie podlega regułom rynku, polega na ustaleniu, czy państwo działa jako organ publiczny. W przypadku działalności państwa należy odróżniać dwie kategorie sytuacji – te, w których państwo jest zaangażowane w prowadzenie działalności gospodarczej (sfera *dominium*), oraz te, w których państwo działa sprawując władze publiczną (sfera *imperium*). W opinii autora artykułu podział na sferę *imperium* i *dominium* jest nadal użyteczny. Zgodnie z Ustawą z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów (Dz.U. nr 50, poz. 331 z późn. zm.) przedsiębiorcą jest m.in. osoba fizyczna, osoba prawna, a także jednostka organizacyjna niemająca osobowości prawnej, której ustawa przyznaje zdolność prawną, organizująca lub świadcząca usługi o charakterze użyteczności publicznej, które nie są działalnością gospodarczą w rozumieniu przepisów o swobodzie działalności gospodarczej. Prezes UOKiK stwierdził, że władze publiczne, wykonujące przypisane im funkcje administracji publicznej (sfera *imperium*), mogą być uznane za przedsiębiorcę. W swoich ostatnich decyzjach Prezes UOKiK uznał, że Narodowy Fundusz Zdrowia – władza publiczna odpowiedzialna za organizowanie i zarządzanie usługami opieki zdrowotnej w Polsce – jest przedsiębiorcą w rozumieniu prawa polskiego (ustawy o ochronie konkurencji i konsumentów). Celem artykułu jest udzielenie odpowiedzi na pytanie, czy reguły konkurencji powinny znajdować zastosowanie w odniesieniu do działalności państwa w sferze *imperium*. Artykuł skupia się na pojęciu przedsiębiorcy (przedsiębiorstwa) w prawie polskim i unijnym w kontekście działalności państwa.

Metoda badawcza: Cel artykułu jest realizowany poprzez doktrynalną analizę właściwych przepisów prawa polskiego i unijnego oraz analizę wydanych ostatnio decyzji Prezesa UOKiK, a także orzeczeń sądów unijnych, dotyczących możliwości kwalifikacji szeroko rozumianego państwa jako przedsiębiorstwa (przedsiębiorcy).

Wnioski: Z analizy tej samej koncepcji zastosowanej w prawie polskim i unijnym jasno wynika, że podmioty publiczne działające „sprawując władzę publiczną" lub „w charakterze organów publicznych" (sfera imperium) nie powinny być traktowane jako przedsiębiorcy (przedsiębiorstwa) w rozumieniu prawa konkurencji. Główną naukową wartością dodaną artykułu są konkluzje, że przepisy o ochronie konkurencji powinny znajdować zastosowanie wyłącznie do działalności państwa w sferze dominium, a także że definicja przedsiębiorcy i działalności gospodarczej powinna być powiązana z istnieniem rynku.

Oryginalność/wartość artykułu: Artykuł powinien budzić zainteresowanie władz publicznych, a także prawników, zajmujących się problematyką kwalifikacji podmiotów publicznych w kontekście prawa konkurencji. Wyniki badań mogą zostać zastosowane na przykład w decyzjach podejmowanych przez Prezesa UOKiK. Konsekwencją zastosowania wyników niniejszych badań w praktyce może być zmiana podejścia do kwalifikacji podmiotów publicznych w kontekście przepisów prawa konkurencji.

Słowa kluczowe: działalność gospodarcza, przedsiębiorca (przedsiębiorstwo), *imperium, dominium,* Narodowy Fundusz Zdrowia.

JEL: K22, K29