

The role of the competition protection authority in the French legal system¹

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Abstract:

Aim: The purpose of the paper is presentation of a French body - Autorité de la concurrence - responsible for protecting competition. The paper will discuss its role, characteristic features and judiciary instruments available to the body. Furthermore, the aim of the paper is to place the above-mentioned body of the French economic administration in the pan-European system for protecting competition and pinpointing the competition policy mechanisms it uses. It is essential to analyse available legislation which applies to the institution.

Design / Research methods: The core research method applied in the paper is a formal and dogmatic method which allows for identifying the content of applicable legal standards (including the rights and obligations of the body described in the paper and the entities administered by the body) as well as the rules (presented from the point of view of directives and/or with their description) which form the basis for the standards. In addition, the functional analysis method used to analyse how law works in practice was also used. Sources of French law and literature on the competition law were also analysed.

Conclusions / findings: The author concluded that the complexity of economic mechanisms requires an extended and transparent system for maintaining correct operation of the competition protecting authorities and bodies in France. He believes that it is one of the foundations of a contemporary democratic state of law which guarantees delivery on the principles of legality and economic freedom. It was demonstrated that the mechanisms available to the French Competition Office comply with the European competition law and may have a positive impact on entrepreneurs' behaviour on the market.

Originality / value of the article: The author believes that the topic of the paper is pertinent and original. So far, only few representatives of the public commercial law doctrine devoted their thoughts to the operation of the European competition bodies. What is more, conclusions from the paper may offer some suggestions to the Polish legislator who may adapt solutions used in French law and create a model of competition and sectoral regulation bodies.

Implications of the research: An analysis of French legal standards may contribute to continuing research in the commercial administration and to the application of a comparative method in order to formulate some interesting conclusions. In addition, it may also encourage Polish researchers to take up the topic related to the operation of competition bodies also in other EU states.

Keywords: Autorité de la concurrence, French law, regulation
JEL: K10, K21, K22

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1. Introduction

The competition and consumer protection system in European Union member states employs a number of legal solutions with the aim to implement the basic rules related to the correct functioning of market economy (Maurice-Vignal 2017: 25; Bellis 2017: 15). The European Commission - in cooperation with national authorities in multiple areas - plays the key role in this field. The effectiveness of the competition and consumer protection system depends on the efficient operation of these authorities in terms of the implementation of the EU law (cf. Van Den Bergh, Camesasca 2001: 15). Furthermore, it enables the pursuit of fundamental values of the European Union and may contribute to the strengthening of the integration between the member states. The article presents the role and place of the French authority responsible for the correct functioning of competition - the Competition Authority (Autorite de la concurrence).

2. Competition policy

To start with, one should outline the basic assumptions of competition policy. The competition policy pursued by the European Commission and member state authorities aims at the development of efficient competition on the common market exerting active influence on its functioning (cf. http://ec.europa.eu/competition/consumers/institutions_en.html). Importantly, "the need to engage in competition forces undertakings to cut the production costs and improve efficiency, which makes the European economy more competitive, especially in direct dealings with its key trade partners. Competing companies offer products and goods that are competitive both in terms of price and quality" (Monti 2002: 4). The European Commission supervises: agreements restricting competition entered into by undertakings: cartels and other illegal agreements by which undertakings decide to abstain from competing with one another and try to establish their own rules; cases of dominant position abuse - when a large subject tries to eliminate its competitors from the market; mergers and other formal agreements under which undertakings permanently or temporarily join their forces. These practices are legal on condition that they

contribute to market development and bring benefits for consumers; attempts to open markets to competition (liberalisation) in such areas as transport, energy, postal services and telecommunications. Previously, many of these sectors had been controlled by state monopolies. In consequence, it is important to ensure that the old monopolies do not gain an unfair advantage in the liberalisation process. Financial support (state aid) for undertakings granted by the governments of member states is admissible as long as it does not distort fair and effective competition between undertakings in member states and is not detrimental to the economy.

Moreover, the European Commission cooperates with national competition protection authorities in the EU member states, which are also responsible for the implementation of elements of the competition policy; Autorité de la concurrence is in fact such an authority in France (European Commission, http://ec.europa.eu/competition/consumers/what_en.html).

To sum up this part of this paper, we may conclude that the European Commission, in cooperation with national competition authorities, strives to prevent and eliminate practices that distort competition. It directly enforces the EU law in this field, while taking care of the European economy. The Commission makes sure that entrepreneurs do not divide markets between themselves and do not attempt to exclude potential competitors from the market. Furthermore, it can impose financial penalties (European Commission, https://europa.eu/european-union/topics/competition_en).

3. Competition protection authorities

Currently, competition and consumer protection authorities play an important role in the economic administration structure. These entities should apply the law in a fair manner, ensuring that all their actions are legal. There is no doubt that whenever such authorities operate correctly, they can contribute to the reinforcement of stable and competitive markets. Importantly, it is in social market economy that competition protection authorities play a special role (Hoff 2008:49). What is more, it is worth noticing that the concept itself "rejects the traditional, liberal dualism between economy and the state. On the other hand, this concept does not embrace the idea of a

state as the only (total) sovereign in the area of economy, centrally planning and managing (directing) all economic processes" (Szydło 2005: 5).

European Union member states are obliged to guarantee independent competition protection authorities. Obviously, fair competition can be guaranteed by an independent authority only. Furthermore, it is worth mentioning that the correct development of state economy requires decisions of regulatory authorities to be made in a transparent manner. The requirement of independence of competition authorities from the government aims at protecting the regulation of infrastructural sectors from the influence of government policy, ensuring political neutrality of decisions made by regulatory bodies.

One should also add that the independence of national competition authorities boosts the trust on the part of investors in regulated undertakings based on the objective and transparent regulation of the authority (Szydło 2013: 112). It contributes to the development of the economy of a state and market efficiency (cf. Swora 2012: 56ff).

The judicial review of legal forms in which such authorities operate is also of major importance. Judicial review has a positive impact on the limitation of shortcomings that appear in these crucial fields. The review is carried out by an independent court and may result in the challenged decision being repealed and sent to the local regulatory authority for re-examination. Alternatively, the decision can be repealed and the substance of the case may be adjudicated by the court. Independent, impartial court can ensure the implementation of the fair competition rule and contribute to the development of the state in a long run (cf. Decker 2009).

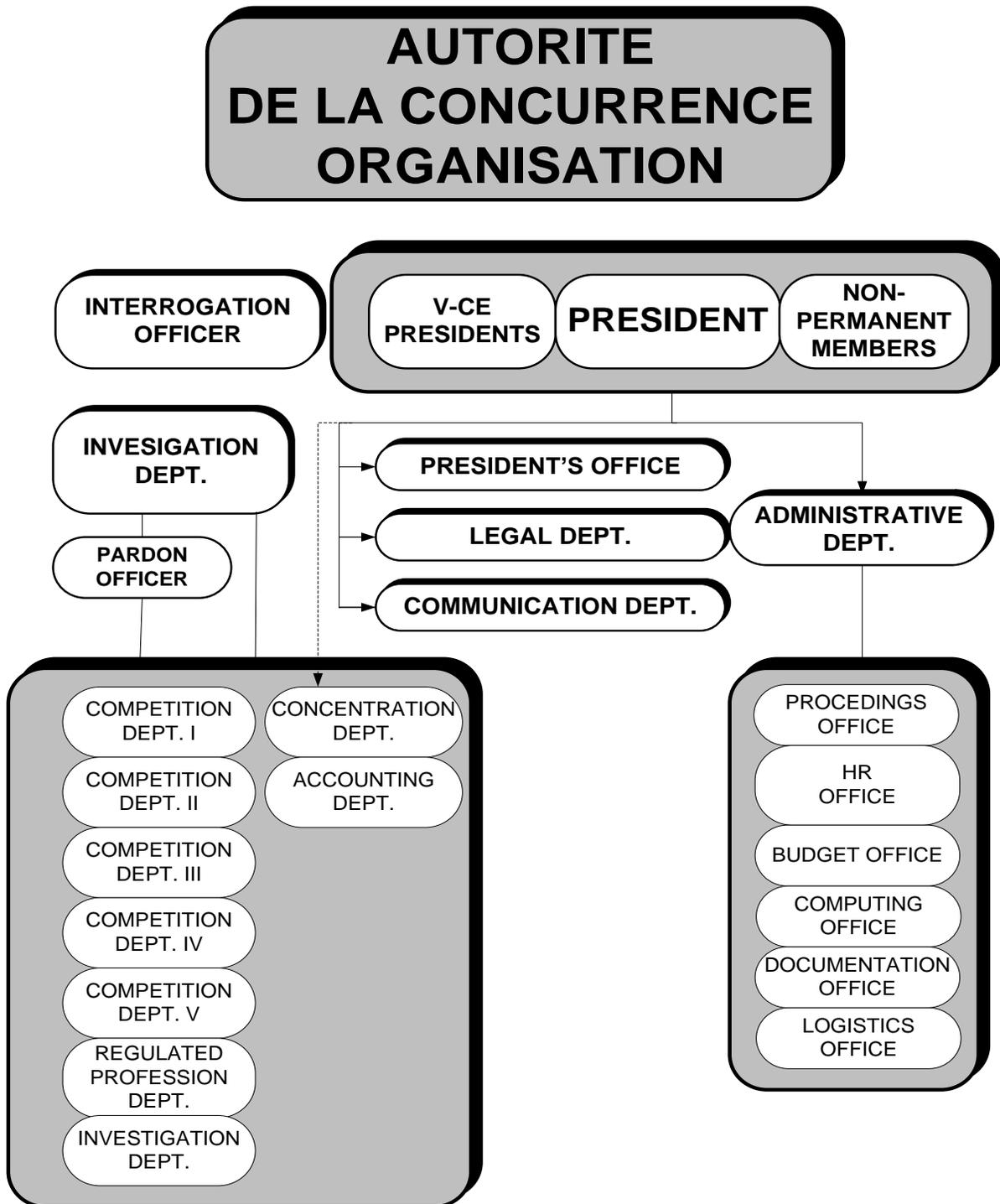
4. Competition Authority (Autorité de la concurrence): structure

The eponymous Competition Authority (Autorité de la concurrence; hereinafter: AC) plays a crucial role in the French model of competition protection. Its activity and organisational structure can be considered exemplary for many EU member states. It is worth emphasizing that AC is very efficient and correctly fulfils the functions assigned to it by the French parliament (cf. Dolata 2014: 93-106).

T. Skoczny noted that the model represented by the French system of competition protection is a monistic-monocratic model with certain elements of independent decision making. As the author was right to point out, "there are countries where there is only one institution in charge of enforcing the rules of competition in the entire administration (monistic model), performing tasks that make up to a complete chain of protection measures, but with an internal structure construed in such a way so as to ensure that decision-making is entrusted to a separate body, acting more or less independently from units in charge of evidence-taking or the head of such an institution" (Skoczny 2011: 86). In the French system, the "separation of particular competition protection functions is ensured exclusively by internal solutions. The decision to institute the proceedings is made by the General Reporter (Rapporteur General), who is the head of the special Investigation Service of the Authority. The decisions ending the proceedings are made by the collegial Board of the Authority" (Skoczny 2011: 88).

AC was established as a result of the transformation of the Competition Council in 2009 (Autorité de la concurrence 2014, 2016). It operates based on the rules laid down in the French Commercial Code (see Article L410-1 ff. of Code de commerce). The Code is one of the basic acts of law in the French business law. It is important to emphasize that AC is an independent administrative body of collective nature, composed of 17 members: the chairperson, vice-chairpersons and the remaining 12 members. AC works during plenary meetings, but also in sections and permanent commissions. Its members are appointed for a term of five years based on the decree issued by the President of the French Republic. The term of a member can be renewed only once. In exceptional situations, members can be dismissed by the minister for the economy. AC is a public administration body in charge of controlling anti-competitive practices. Its tasks include the preparation of expert opinions on the functioning of the market and concentration control. AC runs administrative proceedings in matters concerning anti-competition agreements, the abuse of dominant position and concentration control. What is more, AC is the authority that can be approached for consultations on competition protection law.

Chart 1. Competition Authority



Source: Author's own elaboration based on Autorité de la concurrence, 2016.

5. Competition Authority (Autorité de la concurrence): activity

Proceedings before AC are instituted either at request or *ex officio*. A quorum is required to make a decision. In the case of plenary meetings, decisions can be made if at least eight members are present, while in the case of permanent commissions and sections the presence of at least three members is required (Article L410-1 ff. of the Code de commerce).

During the administrative proceedings, AC may discontinue the procedure or dismiss a motion for the institution. AC can also declare a violation and impose a financial penalty on the perpetrator, order a practice to be discontinued, issue an interim injunction or an obligation to change the practice in the future from the subject concerned. Importantly, in matters concerning concentration control, AC issues decisions authorising, banning and conditionally allowing concentration.

Pursuant to the Court of Justice of the European Union, it is necessary to guarantee the right to appeal. One should note that the right to appeal to a court is one of the fundamental rights of the European Union that cannot be waived to ensure effectiveness of a regulation. The control exercised by an independent court can result in repealing the challenged decision and sending the case to the authority for re-examination or in repealing the challenged decision and adjudicating on the matter on the case. The control exercised by an independent court can result in repealing the challenged decision and sending the case to the authority for re-examination or in repealing the challenged decision and adjudicating on the matter on the case (Szydło 2013).

Decisions issued by AC can be appealed against to the Appellate Court in Paris (Cour d'Appel de Paris) (cf. judgement of the Conseil d'État dated May 15, 2009, no. 311082). Meanwhile, a decision on concentration can be appealed against to the Council of State (Conseil d'État) (cf. Berlin 1995: 259).

6. Conclusion

The complexity of economic mechanisms requires an extensive and transparent system to maintain the correct operation of competition protection authorities. The establishment of such a system and ensuring its effectiveness must be regarded one of the pillars of a contemporary

democratic state of law that guarantees the implementation of the rule of law and economic freedom. This paper contains an outline of one of the competition protection authorities in the European Union - Autorité de la concurrence. However, legal mechanisms at its disposal and the systemic issues that underpin its operations can be a model for other states in Europe (Combe 2016: 67; Autorité de la concurrence: rapport annuel 2014, La documentation française).

Moreover, it is important to note that to ensure the correct operation of competition protection authorities, it is necessary to engage in prevention meaning a broad range of measures aimed at preventing unwanted practices, such as, for instance, the abuse of a dominant position (Olszewski 2004: 43). Prevention consists of a wide array of activities undertaken by institutions, state services, social organisations and other public subjects which play the preventive role. Their main task is also to make the public aware of activities which, when undertaken or omitted, generate specific threats. One needs to emphasize the obvious connection between the state control of compliance with the law and this issue. I am of opinion that prevention of threats can be treated as a system consisting of certain legal, economic, educational and social measures (Olszewski 2004: 43).

In a democratic state of law, the activity of competition protection authorities is coherently coupled with the duty to observe and implement fundamental rules of economic freedom. These rules bind the authorities to act in a manner that manifests the respect for the basic rights of businesses. Unquestionably, fair competition is such a rule.

In consequence, one can conclude that the control by regulatory authorities plays a major role in the social market economy. It enables the correct development of businesses operating in the energy, telecommunications, railway and aviation sectors. Judicial revision has a positive impact on the limitation of shortcomings that appear in these crucial fields. An independent court can ensure the implementation of the fair competition rule fostering economic development.

To conclude, one should emphasize that supporting fairness in society is necessary to maintain the correct operation of competitive mechanism. Otherwise, even the best legal solutions may fail to perform their function.

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Rola organów ochrony konkurencji we francuskim systemie prawnym

Streszczenie

Cel: Celem artykułu jest przedstawienie funkcjonowania francuskiego organu Autorité de la concurrence, który odpowiedzialny jest za ochronę konkurencji. Zostanie omówiona jego rola, cechy charakterystyczne oraz instrumenty jurydyczne, którymi się posługuje. Celem opracowania jest również umiejscowienie wskazanego organu francuskiej administracji gospodarczej w paneuropejskim systemie ochrony konkurencji oraz wskazanie wykorzystywanych przez niego mechanizmów polityki konkurencji. Istotną kwestią jest analiza aktów prawnych odnoszących się

Metoda badawcza: Podstawową metodą badawczą zastosowaną w artykule jest metoda formalno-dogmatyczna, która pozwala na ustalenie treści obowiązujących norm prawnych (w tym praw i obowiązków tytułowego organu oraz podmiotów przez niego administrowanych), a także zasad (w ujęciu dyrektywalnym, czy też opisowym), na których się one opierają. Uwzględniono także funkcjonalną metodę analizy, która pozwala badać prawo w działaniu. Przeanalizowane zostały źródła prawa francuskiego oraz literatura z zakresu prawa konkurencji.

Wnioski/ustalenia: Autor doszedł do wniosku, że złożoność mechanizmów gospodarczych wymaga rozbudowanego i przejrzystego systemu utrzymania prawidłowości działań organów ochrony konkurencji we Francji. Jego zdaniem jest to jeden z fundamentów współczesnego demokratycznego państwa prawa, gwarantujący realizację zasad legalności oraz wolności gospodarczej. Wykazano, że mechanizmy jurydyczne, którymi dysponuje francuski Urząd ds. Konkurencji są zgodne z europejskim prawem konkurencji oraz mogą wpłynąć pozytywnie na funkcjonowanie przedsiębiorców na rynku.

Oryginalność / wartość artykułu: Zdaniem autora temat jest aktualny i oryginalny. Dotychczas niewielu przedstawicieli doktryny prawa gospodarczego publicznego zajmowało się istotą funkcjonowania europejskich organów konkurencji. Ponadto wnioski wskazane w opracowaniu mogą stanowić pewną propozycję dla polskiego ustawodawcy, który może przyjąć rozwiązania prawa francuskiego tworząc model organów konkurencji i regulacji sektorowej.

Implikacje badań: Przeanalizowanie francuskich norm prawnych może stanowić przyczynek do dalszych badań nad administracją gospodarczą oraz do stosowania metody komparatystycznej do formułowania ciekawych wniosków. Ponadto może zachęcić badaczy do podjęcia tematyki związanej z funkcjonowaniem organów konkurencji również w innych państwach Unii Europejskiej.

Słowa kluczowe: *Urząd ds. Konkurencji, prawo francuskie, regulacja*

JEL: K10, K21, K22