

IN POLAND COMPANIES MAY CHALLENGE THE COMPETITION COURT'S DECISION ALLOWING THE OCCP TO CARRY OUT A DAWN RAID

On 16 January 2019, in the case P19/17, the Polish Constitutional Tribunal found that the absence of the right to appeal against a decision of the CCCP to permit the OCCP to carry out a dawn raid of an undertaking in cases relating to practices restricting competition is unconstitutional.¹

According to the judgment of the Polish Constitutional Tribunal, a two-stage judicial review will extend not only to the legality but above all to the reasons behind a dawn raid carried out by the OCCP.

The President of the Office of Competition and Consumer Protection ("OCCP") has, at his disposal, various investigative powers that he uses to identify competition law infringements, on the terms set out in the Act on Competition and Consumer Protection of 16 February 2007 (the "Act"). One of such powers is the right to carry out a dawn raid of an undertaking, in a private dwelling or in other premises, property or vehicle. The dawn raid – which is aimed at finding evidence of an infringement – may take place, as a rule, only in the course of antimonopoly proceedings or explanatory proceedings, and in the latter case only if there is reasonable suspicion of a major infringement of the Act. However, in any case, the OCCP must obtain the prior consent of the Court of Competition and Consumer Protection ("CCCP" or the Court of Competition) to a dawn raid. At the same time, under the Art. 105n sec. 4 second sentence of the Act which was the subject of the challenge, there had been no right of appeal against a decision of the CCCP to grant consent to a dawn raid until now.

The lack of the right to appeal against the CCCP's decision raised doubts with the Appeal Court in Warsaw (the "AC"), which was examining an appeal against an OCCP dawn raid carried out by the OCCP in January 2017. This was in connection with the suspected existence of an anti-competitive arrangement between undertakings operating gym facilities or offering access to sports and recreational facilities. Due to these doubts, in August 2017 the AC submitted a legal query to the Polish Constitutional Tribunal (the "Tribunal"), in which it pointed to the imbalance between the procedural position of the OCCP compared to that of the undertaking being subjected to the dawn raid. The undertaking does not participate in the proceedings before the CCCP that precede the granting of consent to the dawn raid, i.e. the undertaking is unable to present its standpoint. Therefore, the inability to appeal against the CCCP's decision completely deprives the undertaking of the right to a fair trial in this

¹ The challenged provision ceased to be effective upon the publication of the Constitutional Tribunal's judgment in the Journal of Laws, i.e. on 22 January 2019.

respect. Therefore, in the AC's opinion, it violates the two-stage rule (which is expressed in Art. 78 of the Constitution of the Republic of Poland) and the right to a fair trial (expressed in Art. 45 of the Constitution of the Republic of Poland).

The Tribunal agreed with the AC's arguments and confirmed that the protection of an undertaking's rights must be ensured by an effective and unlimited judicial review. A court should therefore be able to verify not only the legality of the particular actions taken by the OCCP as part of the dawn raid (which already stemmed from the Act) but also the scope of the dawn raid to which the CCCP consents, and its justifiability (i.e. the facts that were the basis of the OCCP's application to the CCCP for consent to a dawn raid).

The Tribunal pointed out that "the absence of the right to appeal concerns indirectly a procedural remedy that by nature deeply interferes with the sphere of an undertaking's rights" because a dawn raid by the OCCP interferes with the freedom of economic activity and the constitutionally protected right to privacy and right of ownership to a greater extent than, for example, an inspection carried out pursuant to the Act on Undertakings. Therefore, in the case of a dawn raid conducted by the OCCP, the nature of the OCCP's interference and the type of rights to which this interference relates justify the application of the standards of protection of rights provided for under the criminal procedure.

At the same time, as pointed out by the Tribunal in an oral justification, the filing of an appeal does not need to suspend the actions pending, and consequently it is possible to retain the element of surprise which has a material impact on the effectiveness of the dawn raid as an investigative tool. Therefore, it is possible to maintain a balance between the effectiveness of the proceedings (public interest) and the protection of the right of defence and the rule of proportionality.

Commentary

The challenged provision, ruling out the ability to lodge an appeal against a decision of the CCCP consenting to the dawn raid of an undertaking, has been the subject of criticism for years, both among practitioners and in the academic community.

As a result of the Tribunal's judgment, undertakings and other entities will be able to benefit from a more effective defence against any arbitrariness and abuse of investigative powers by the OCCP, and in particular against cases involving so-called fishing expeditions. If a court finds the undertaking's appeal to be justified, the OCCP will be unable to use the evidence collected during the dawn raid that was challenged.

At the same time, there have been some comments that, as a result of the judgment handed down by the Tribunal, the OCCP will be carrying out fewer dawn raids and more inspections pursuant to Art. 105a of the Act, for which the OCCP does not have to obtain CCCP's prior consent. It should, however, be considered whether the protection standards provided for under criminal procedure should not apply to the OCCP's inspections as well (and not only to the OCCP's dawn raids), which de facto can also interfere deeply with the sphere of the undertakings' rights. This would make a full judicial review possible, also as regards the OCCP's authority to carry out an inspection of an undertaking.

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