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DOMINIK WOLSKI[1]

Conditional Decisions in Merger Control Cases and the Principle of Autonomy of the Entities of Civil Law[2]

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Abstract

In recent years, it has been a relatively common practice for the Polish antitrust authority – the Office of Competition and Consumer Protection (the OCCP) – to issue conditional decisions in merger control proceedings. Actually, this is not a practice known only to the Polish antitrust authority, as such decisions are also issued by the European Commission. Consents granted following this procedure allow participants to a planned concentration (also referred to as merger) to proceed, but under certain conditions – behavioural or structural. Several important issues arise especially with regard to the latter type of conditions, particularly in terms of the permissible degree of interference in the sphere of private legal rights and obligations of one or both participants in the concentration, and the consequences of failure to comply with the condition under which the concentration has been approved. These issues are the subject of this paper, which ends with conclusions and implications regarding the judicial practice of the Polish antitrust authority in the area in question.

Keywords: concentration control, conditional decisions, autonomy.

[1] Dominik Wolski, PhD – Kozminski University (Poland); e-mail: dwolski@kozminski.edu.pl; ORCID: 0000-0003-0721-4573.

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Introduction

The merging of businesses as well as acquisitions of some businesses or parts thereof by other business or, finally, the establishment of joint ventures undertaken to strengthen or increase market position – also known as consolidations or concentrations of entrepreneurs – are natural trends occurring in any free market economy. Under certain conditions, where a concentration leads to an enterprise gaining significant market power, these processes can lead to a restriction of competition in the market. In light of the above, they are subject to scrutiny both by national competition authorities – in Poland, it is the President of the Office of Competition and Consumer Protection, and in the EU, it is the European Commission.

Where a concentration leads to an unacceptable restriction of market competition, the competition authority refuses to approve it. However, both European Union law – especially Regulation 139/2004[3] – and the Polish Competition and Consumer Protection Act[4] allow the competition authority to give conditional approvals for a concentration.[5] This means that entrepreneurs can form concentrations, however, after fulfilling certain conditions indicated in the consent to form it, which, in fact, has the effect of modifying the intention of the originally planned merger.[6] The conditions imposed on entrepreneurs in the consent decisions in question can generally take two forms – the so-called behavioural conditions, which means imposing an obligation on the entrepreneur to perform a certain action or omission, and the so-called structural conditions, which involve changing the structure or assets of an enterprise (e.g. by divesting certain assets).[7]

The structural conditions that occur relatively often in the practice of the Polish antitrust authority can be considered particularly interesting.[8] This is because they

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3 Council Regulation (EC) no. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.01.2004, pp. 1–22, hereinafter: Regulation 139/2004).

4 Act of 16 February 2007 on Competition and Consumers Protection (uniform text in the Journal of Laws of the Republic of Poland (hereinafter: JLRP) of 2024, item 594, hereinafter: the CCPA).

5 On conditional consents in EU law, which are generally outside the scope of this paper, see: T. Skoczny, *Zgody szczególne w prawie kontroli koncentracji*, Warsaw 2012, pp. 266-267, and S. Dudzik, D. Aziewicz, [in:] A. Jurkowska-Gomułka, A. Piszcz (eds.), *System Prawa Unii Europejskiej, Prawo konkurencji, Tom 9*, Warsaw 2024, p. 787 et seq.

6 See also: T. Skoczny, *Zgody szczególne…*, pp. 263–264.

7 See more: ibidem, pp. 299–301 and M. Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, Warsaw 2012, pp. 299–300.

8 T. Skoczny, *Zgody szczególne…*, pp. 299–300.

always involve – regardless of the achievement of the goal of preventing an excessive restriction of market competition – a far-reaching interference in the sphere of private law rights and obligations of the participants in the concentration. Participants in a concentration also usually act on the grounds of a previously concluded agreement that is to be the foundation of a future concentration. As a result, the conditional decision issued must have an impact on the rights and obligations of the parties to that agreement and on their fulfilment. The fulfilment of structural conditions usually takes the form of a legal act taken based on civil law. After all, how else can a condition involving e.g. the division of an enterprise or the divestiture of certain assets be fulfilled if not by a legal act? In practice, it most often becomes a contract of sale or a contract for the transfer of rights and obligations.[9]

Statistically speaking, there are not many such decisions. This paper considers the period of the last five years (2019–2023), while also taking into account one decision issued in 2024. During the period under review, the President of the OCCP issued a total of fourteen decisions granting consent to concentrations upon fulfilment of the condition specified in the decision (2019 – 5[10], 2020 – 1[11], 2021 – 4[12], 2022 – 1[13], 2023 – 3[14], and one issued in 2024[15]). Taking into account that in the aforementioned years, 261 (2019)[16], 242 (2020)[17], 295 (2021)[18], 326 (2022)[19], 307 (2023)[20] unconditional approvals were issued consecutively, it should be considered that the OCCP relatively rarely makes use of the opportunity to reduce the impact of the planned concentration on the restriction of competition, while allowing it to take effect. The aforementioned decisions most often included conditions of a structural nature, obligating the entrepreneur to divest an asset or part of their enterprise.

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9 See also: A. Piszcz, *Sankcje w polskim prawie antymonopolowym*, Białystok 2013, p. 200.

10 *Sprawozdanie z działalności UOKIK – rok 2019*, p. 32. Available from: https://uokik.gov.pl/publikacje?kategoria=5 (accessed: 25.06.2024).

11 *Sprawozdanie z działalności UOKIK – rok 2020*, p. 38. Available from: https://uokik.gov.pl/publikacje?kategoria=5 (accessed: 25.06.2024).

12 *Sprawozdanie z działalności UOKIK – rok 2021*, p. 26. Available from: https://uokik.gov.pl/publikacje?kategoria=5 (accessed: 25.06.2024).

13 *Sprawozdanie z działalności UOKIK– rok 2022*, p. 20. Available from: https://uokik.gov.pl/publikacje?kategoria=5 (accessed: 25.06.2024).

14 *Działalność UOKiK w 2023 roku*, https://uokik.gov.pl/dzialalnosc-uokik-w-2023-roku (accessed: 4.05.2024).

15 *Zgoda warunkowa na rynku kabli i przewodów*, https://uokik.gov.pl/zgoda-warunkowa-na-rynku-kabli-i-przewodow (accessed: 4.05.2024).

16 *Sprawozdanie z działalności UOKIK – rok 2019…*, p. 32.

17 *Sprawozdanie z działalności UOKIK – rok 2020…*, p. 38.

18 *Sprawozdanie z działalności UOKIK – rok 2021…*, p. 26.

19 *Sprawozdanie z działalności UOKIK – rok 2022…*, p. 20.

20 *Działalność UOKiK w 2023 roku…*

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As a result, given the civil law effects of a decision issued by the OCCP on the grounds of public law, a whole series of questions arise regarding the permissibility of such interference and its limits, as well as the effects of this interference on the parties, their rights, obligations, and liability based on civil law. This is all the more important because sometimes the conditions imposed on an entrepreneur in decisions may go beyond what is necessary to maintain (or restore) effective competition.[21] Therefore, such an issue as the relationship of the aforementioned condition and its fulfilment with the private legal sphere of the participants in a planned concentration is a matter worth considering and discussing.

Given the above, the purpose of this article is to examine the conditions imposed by the Polish Office of Competition and Consumer Protection on the participants in a planned concentration in a civil law context. Consequently, the purpose of the study conducted is to analyse the civil law aspects of the abovementioned decisions, in particular by 'confronting' the principle of autonomy of civil law subjects with the objectives pursued by public competition law in the control of concentrations. This serves as the background for questions regarding the permissible degree of the OCCP's interference with the aforementioned autonomy – also from the perspective of the practical 'enforceability' of the conditions imposed on participants in a concentration.

Legal grounds for issuing conditional decisions

The legal grounds for a decision granting conditional approval for a merger is Article 19 section 1 of the CCPA, according to which the President of the OCCP grants, by way of a decision, approval for a concentration when – after the entrepreneurs intending to concentrate fulfil the conditions specified in section 2 – the market competition is not significantly limited, in particular as a result of the creation or strengthening of a dominant position in the market.[22] The conditions indicated in section 2 (the President of the OCCP may impose an obligation on the entrepreneur or entrepreneurs intending to form a merger or accept their obligation) are both behavioural, ordering the entrepreneur to behave in a certain way, and structural.[23] The President of the OCCP specifies the deadline for the fulfilment of the set conditions in the decision referred to in section 1. Moreover, the entrepreneur or

21 Zob. T. Skoczny, *Zgody szczególne*…, pp. 282–284.

22 See also: M. Błachucki, op. cit., p. 294.

23 An important aspect to highlight here is that the list of conditions contained in Article 19 section 2 of the CCPA is open, non-exhaustive, and provided for reference purposes only (see e.g. T. Skoczny, *Zgody szczególne*…, pp. 290–291; M. Błachucki, op. cit., p. 295).

entrepreneurs shall provide the President of the OCCP with information on the fulfilment of the condition in question, as stipulated in Article 19 section 3 of the CCPA. In addition, an issue important from the point of view of the implementation of this type of decision, at the request of the entrepreneur, the information on the deadline imposed on the entrepreneur or entrepreneurs to meet the relevant conditions is not made available until the date of fulfilment of these conditions, and the related decision may not be made accessible under the procedure of access to public information.[24]

Polish competition law also in this case, as in principle also in the remaining part, is founded on the merger control model adopted in EU law. Therefore, also the EC may find a reported concentration compatible with the common market, but after certain modifications made by the companies concerned. In addition, the EC may make its decision include conditions and obligations aimed at ensuring that the companies concerned comply with the commitments made to the Commission to make sure that the concentration is compatible with the common market.[25]

Conditional decisions issued by the Polish competition authority in merger control cases

The President of the OCCP's decisions granting conditional approval for concentration during the period under review concerned various sectors of the economy, starting with the market for retail sales of liquid fuels and the pharmaceutical market (2019)[26], through the market for cable television and access to the internet (2020)[27], the market for food supermarkets, the pharmaceutical market, local medical service markets, and the market for medical services financed by the National Health Fund (2021)[28], the market for wholesale and retail sales of natural gas (2022)[29], the pharmaceutical market and the market for sales of ceramic and cement tiles (2023)[30], ending with the market for wholesale sales of electrical goods

24 Act as per the provisions of the Act of 6 September 2001 on Access to Public Information (uniform text in the JLRP of 2022, item 902).

25 See: S. Dudzik, D. Aziewicz, op. cit., p. 787 et seq.

26 *Sprawozdanie z działalności UOKIK – rok 2019…*, pp. 33–34.

27 *Sprawozdanie z działalności UOKIK – rok 2020…*, p. 42.

28 *Sprawozdanie z działalności UOKIK – rok 2021…*, pp. 28–29.

29 *Sprawozdanie z działalności UOKIK – rok 2022…*, p. 22.

30 *Działalność UOKiK w 2023 roku…* and A. Jurkowska-Gomułka, *Ochrona konkurencji w Polsce AD 2023*, [in:] *Ochrona konkurencji w Polsce 2023. Subiektywny przewodnik*, Warsaw, https://www.modzelewskapasnik.pl/files/ochrona-konkurencji-w-polsce-2023-subiektywny-przewodnik.pdf (accessed: 4.05.2024), p. 10.

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(2024)[31]. This means that while the decisions issued in this way clearly do not apply to all relevant economic sectors, they do represent a fairly representative sample. These include both traditional markets, such as the distribution of liquid fuels and natural gas or grocery stores, and sectors dealing more with new technologies, which include the cable TV and internet access markets, as well as the electronic goods market, where entities to participate in a planned merger operate in an omnichannel model, offering sales via an online store, mobile app, email, telephone, as well as through its sales offices and agents.[32]

The aspect that should be taken into account here, especially in the context of the main theme of the considerations in this paper, is the nature of the conditions applied by the President of the OCCP in the decisions in question. It is hard not to notice that given the range of possibilities indicated in Article 19 section of the CCPA, the OCCP has developed a particular 'taste' for structural measures[33]. So, for example, one of the conditions was that an entrepreneur was required to sell two gas stations in the indicated area.[34] In another case, an entrepreneur was required to sell their chain stores they in selected locations and to create three new companies to which they were to transfer the assets from each of the indicated locations – including subscriber plan contracts, telecommunications infrastructure, employee contracts, accounting and technical documentation, and subscriber databases, and then the companies were to be sold to an independent investor.[35] A condition set under a decision concerning the pharmaceutical market was the sale of a pharmacy located in the location[36] mentioned in the decision. Another decisions concerning the same market required the entrepreneur to dispose – in a permanent and irreversible manner – of an organised set of tangible and intangible assets intended for the operation of business in the form of a pharmacy opened in the location indicated in the decision.[37] There was also a case of the grocery market, where the entrepreneur was required to reduce the floor area of one of the stores.[38] In the case of the approval of a concentration in the market for the sale of natural gas, the condition imposed by the President of the OCCP was that the entrepreneur

31 *Zgoda warunkowa na rynku kabli i przewodów…*

32 Ibidem.

33 See: T. Skoczny, *Zgody szczególne…*, pp. 299–300 and D. Wolski, *Wybrane zagadnienia z zakresu wydawania i realizacji decyzji udzielających warunkowej zgody na dokonanie koncentracji przedsiębiorców*, "Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2012, 2(1), p. 39.

34 *Sprawozdanie z działalności UOKIK – rok 2019…*, p. 34.

35 *Sprawozdanie z działalności UOKIK – rok 2020…*, p. 42.

36 *Sprawozdanie z działalności UOKIK – rok 2021…*, pp. 28–29.

37 President of the OCCP's decision of 18 September 2023 no. DKK – 206/2023.

38 *Sprawozdanie z działalności UOKIK – rok 2021…*, pp. 28–29.

sell the company that manages gas storage facilities.[39] Another condition was that the entrepreneur should sell the store located in the indicated location, which also included transferring onto the new owner the lease of the store's space, rights and obligations under employee contracts, accounting and business records, as well as the customer base of the Zielona Góra wholesaler.[40] In addition, the divestment of the company's assets or shares indicated above could only be made to an independent investor, with the prior approval of the buyer by the President of the OCC where such an additional condition was introduced in the decision.

The above examples of conditions make it clear that, in fact, structural conditions definitely prevail, and only exceptionally there occur conditions involving the imposition of an obligation on the entrepreneur to act in a certain way on the market, which, for example, can be considered an obligation to maintain prices at the level indicated in the decision within the period indicated in the decision, and to guarantee non-discriminatory access to diagnostic imaging services for a certain group of patients[41]. Another characteristic of the conditions imposed is their rather high degree of complexity, as illustrated by the sale of a store with the transfer of all employee rights and obligations, accounting and business records, and customer bases; or by the establishment of companies to which subscriber contracts, telecommunications infrastructure, employee contracts, accounting and technical records, and subscriber bases were to be transferred, followed by the subsequent sale of these companies. In addition, the sale could only take place to an investor previously approved by the OCCP President, making an already complex and time-consuming transaction even more complicated. All of the elements indicated above are relevant to the relationship between the goals of competition law – particularly those from the public law sphere, pursued by the President of the OCCP, and the autonomy of civil law subjects, which continue to be the entrepreneurs covered by decisions granting conditional approval of mergers.

Consequences of failure to implement the decision

An important matter in the context of conditional approvals issued by the President of the OCCP are the sanctions that the authority may impose on an entrepreneur who has not fulfilled the condition set in the decision issued. In this regard, meaning in the area governed by the President of the OCCP's decisions having the nature

39 *Sprawozdanie z działalności UOKIK – rok 2022…*, p. 22.

40 *Zgoda warunkowa na rynku kabli i przewodów…*

41 *Sprawozdanie z działalności UOKIK – rok 2021…*, p. 29.

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of measures of the so-called repressive supervision[42], it seems necessary to mention first the power granted under Article 21 section 1 of the CCPA to revoke a previously issued decision granting conditional approval for a concentration in the event that the decision is based on unreliable information or if the conditions set forth in the decision are not fulfilled.[43] Moreover, in the above cases, if the concentration has already been formed and it is not possible to restore competition in the market, the President of the OCCP may use the far-reaching measures of so-called structural interference listed in Article 21 section 2 of the CCPA. These measures can involve the OCCP ordering the split of the merged enterprise, the divestiture of all or part of the enterprise's assets, or the disposal of shares that ensure control over the enterprise. Importantly enough, the above range of measures is provided for reference purposes and not exhaustive, so the OCCP President may also apply other measures not listed in Article 21 section 2 of the CCPA.[44] Such a wide scope of measures of interference of the antitrust authority in the constitutionally guaranteed economic freedom of entrepreneurs raises doubts, which are expressed in the literature dealing with the subject.[45] The aforementioned selection of measures granted to the OCCP President in the event of an entrepreneur's failure to comply with a condition imposed under Article 19 section 1 of the CCPA is surely an important preventive factor, discouraging businesses from violating the provisions of a decision granting conditional approval of a concentration. This form of the regulation sanctioning the implementation of the aforementioned decision, which also includes the possibility of the antitrust authority's interference with the structure and assets of the company (so-called restitution measures[46]), is also important in the context of the possibility of implementing the conditions imposed by the decision under certain market conditions. This raises the question of how much this particular form of regulation is justified by the goal of protecting competition, especially given the vagueness of the criterion of the inability to restore competition in the market by other means, which is set forth in Article 21 section 2 of the CCPA.[47]

If an entrepreneur fails to comply with the conditions indicated in the decision issued under Article 19 section of the CCPA by the set deadline, the OCCP President may also impose the penalty indicated in Article 107 section 1 item 1 of said

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42 See: M. Wierzbowski, K. Karasiewicz, R. Stankiewicz, [in:] M. Kępiński (ed.), *System Prawa Prywatnego, Prawo konkurencji*, vol. 15, Warsaw 2014, p. 1096 and extensive remarks in: A. Piszcz, op. cit., p. 200 et seq.

43 See: T. Skoczny, *Zgody szczególne…*, p. 431 and M. Błachucki, op. cit., p. 343.

44 C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów, Komentarz*, Warsaw 2009, p. 383; A. Piszcz, op. cit., pp. 203–204.

45 M. Wierzbowski, K. Karasiewicz, R. Stankiewicz, op. cit., p. 1099; A. Piszcz, op. cit., pp. 203–204.

46 A. Stawicki, [in:] A. Stawicki, E. Stawicki (red.), *Ustawa o ochronie konkurencji i konsumentów, Komentarz*, Warsaw 2011, p. 515.

47 See also: M. Wierzbowski, K. Karasiewicz, R. Stankiewicz, op. cit., p. 1099.

act. The penalty is incremental, similar to that stipulated in Article 107 of the CCPA in its previous wording (equivalent to €10,000 for each day of delay in the implementation of the decision).[48] In accordance with the wording of the current Article 107 section 1 of the CCPA, in order to force an entrepreneur to comply with the obligations imposed on them, the OCCP President may punish that entrepreneur, by way of a decision, with a periodic penalty in an amount not exceeding 5% of the entrepreneur's average daily turnover achieved in the fiscal year preceding the year in which the penalty was imposed, for each day of delay. There have been two changes compared to the previous wording of Article 107 of the CCPA. First, there was a change from a fixed amount to a percentage of turnover, which is expected to result in a greater degree of relevance of the penalty imposed to the scale of the company's operations as reflected by turnover. Second, the term 'default' ('culpable delay') has been replaced by 'delay', which is a subjective element, independent of the presence or absence of fault on the part of the entrepreneur failing to fulfil the condition on time. The aforementioned change (introduction of 'delay' in place of 'default') is important from the point of view of the ability of the OCCP President to impose sanctions for untimely implementation of a conditional decision, although it seems that the difference pointed out above was not recognised under the rule of the previous version of Article 107 of the CCPA and the concept of default and delay was used interchangeably in this context.[49] It also seems reasonable to mention at this point in light of Article 21 section 1 of the aforementioned CCPA it appears that in the case of failure to implement the decision on time, it is irrelevant whether this occurred due to the entrepreneur's fault or in the absence of fault.[50] However, this matter, especially in light of the previous wording of Article 107 of the CCPA, referring to the concept of 'default', has given rise to some discussion.[51] Also, the standpoint referring to strict liability is mitigated in the case of non-implementation of the decision for objective reasons beyond the entrepreneur's control, which, according to the author, should lead to an extension of the deadline for implementation of the decision if there is a chance to implement the decision in the future.[52]

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48 See: A. Stawicki, op. cit., p. 1182; A. Piszcz, op. cit., p. 382; M. Błachucki, op. cit., p. 344.

49 Cf.: A. Stawicki, op. cit., p. 1183.

50 M. Błachucki, op. cit., p. 345.

51 See: e.g. A. Piszcz, op. cit., pp. 387–888 and J. Łukawski, G. Materna, *Głos w sprawie racjonalizacji stosowania zgód warunkowych w sprawach koncentracji przedsiębiorców (o możliwości zmiany decyzji o zgodzie warunkowej)*, "Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2017, 5(6), p. 131.

52 Ibidem, p. 513.

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Condition in the context of the principle of autonomy of civil law entities

One of the fundamental principles in the field of civil law is the principle of autonomy of civil law entities. According to this principle, the autonomy of entities is understood as the so-called private autonomy (autonomy of will), which means the ability of the parties themselves to shape legal relations according to their will.[53] There are at least two reasons for this principle to appear in the context of this paper. First of all, it should be pointed out that a conditional consent to a concentration, especially one that includes structural conditions (e.g. an obligation for an enterprise to divest certain assets), but also sometimes behavioural conditions (e.g. refraining from business relations with a certain category of entities or in a certain market), will always constitute a significant interference in the sphere of private-law rights and obligations of the subjects who are participants in the planned merger. Thus, even keeping the above division into private and public law spheres in mind, when analysing the issues covered by this study, it is impossible to ignore the fact that a planned merger (transaction) that has been originally agreed upon by the parties thereto, acting within the aforementioned autonomy, is modified as a result of the interference of the antitrust authority, which uses its powers to enter the autonomous sphere of relations described above. Moreover, and this is where we arrive at the second, no less important reason, the line drawn between public law and private law outlined above has been increasingly blurred for many years now, and public law has become integrated into private law to a greater extent. This is often justified by the pursuit of socially and economically desirable public-private goals, which are also listed in Article 1.1 of the CCPA. In the case we are dealing with here, this is motivated by the goal of ensuring the proper functioning of competition in the market – especially of counteracting competition-restricting practices, but nevertheless the significant interference with the rights and obligations of subjects enjoying autonomy in the sphere of civil law is unquestionable. This, in turn, results in the aforementioned progressive blurring of the once clearer line between public law and private law.[54]

Given the abovementioned interpenetration of the public-legal and private-legal spheres in the area in question, it would seem that since public law and the authorities that uphold the observance of the principles it guarantees (here – protecting competition) encroach on the private-legal rights and obligations of autonomous

[53] See: A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne, Zarys części ogólnej*, Warsaw 2020, p. 24.

[54] See: comments on this matter in the area of competition protection law in: D. Wolski, *Cywilnoprawna odpowiedzialność za naruszenie prawa konkurencji – uwagi na tle aksjologii i zasad prawa cywilnego*, [in:] J. Pisuliński, J. Zawadzka (eds.), *Aksjologia prawa cywilnego i cywilnoprawna ochrona dóbr*, Warsaw 2020, p. 55 et seq.

entities, such a relationship cannot have a one-way effect only. A manifestation of this claim should take the form of the authorities responsible for enforcing public competition law acknowledging to the greatest extent possible the principles inherent in private law in situations in which these authorities decide to interfere as indicated above. One effect should be to encroach on the autonomy of civil law subjects as little as possible, pursuing the goals of the public competition protection law following the rule of proportionality. The times we are living in today, especially the global political, social, and economic processes, prove that also competition law and market competition itself does not exist in a 'void', but should take into account the broader context, the bigger picture, so to speak. It seems reasonable to recall here the comments made with regard to the rapidly growing and changing market for digital services in terms of EU competition protection policy. Indeed, one of the goals of this policy is to ensure economic efficiency, but it should be implemented in such a way that it does not create barriers to innovation and does not have the effect of impeding economic growth.[55] This is all the more important in the case of conditional approval of a concentration of entrepreneurs granted by the President of the OCCP, since it is not a case of an entrepreneur's violation of the law, especially in light of a practice restricting competition, but the entity in question, following one of the basic trends in the market economy (the desire to consolidate entrepreneurs and strengthen market power[56]), addresses the antitrust authority with a request to allow it to carry out the intended transaction under the conditions indicated in the request. Another aspect worth mentioning here is that any restriction of an entrepreneur's rights, and such is surely the modification of the original intention of concentration covered by the request, should be consistent with the rights guaranteed by the Constitution,[57] where one of the basic rights is economic freedom (Article 22 of the Polish Constitution).[58] Thus, since public law and the authorities applying it encroach on the private-law sphere of business entities, this interference should be carried out in such a way as to respect the principles inherent in the private-law sphere to the maximum extent possible.

In the above context, the occasionally emerging concept of a decision granting conditional approval of a concentration as a type of contract (agreement) between

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55 See: A. Szmigielski, *Rola polityki antymonopolowej Unii Europejskiej w erze cyfrowej – wyzwania oraz praktyczne implikacje*, "Refleksje. Pismo Naukowe Studentów i Doktorantów WNPiD UAM" 2017, 15, pp. 147–148 and quoted therein: W. Szpringer, *Dwu-(wielo)-stronne modele e-biznesu a prawo konkurencji*, "Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2013, 1, p. 81.

56 See: also on the matter: T. Skoczny, *Zgody szczególne*…, p. 13 et seq.

57 A. Piszcz, op. cit., p. 215.

58 Constitution of the Republic of Poland of 02.04.1997 (JLRP of 1997 no. 78, item 483 as amended).

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the entrepreneur and the antitrust authority seems worthy of a mention.[59] In the literature on the subject, once this concept is invoked, it is almost immediately rejected[60] – and even strongly criticised.[61] Such strong criticism is surely undeserved. It is true that the parties are engaged in mutual arrangements leading to agreements, and the mere fact that – as those who criticise the concept claim – these are not conversations between equal partners does not yet determine that an arrangement made cannot be qualified as a type of contract in the conditional decision. If, as a result of the negotiations that occur between the parties, an agreement is reached, there is no reason why – in a civil law sense – such an agreement cannot be classified as a less ordinary (because concluded under the rules of public law) type of contract. Also, the argument that the arrangements made between the antitrust authority and a party (entrepreneur) derive their force only from the decision in which they are included[62] is somewhat misguided. It should be noted that the public-legal regime of the decision does not exclude the application of civil law, as evidenced e.g. by the liability for damage caused by the action or omission of a public administration body,[63] or the obvious fact that many contracts entered into in the public-legal sphere, including those where parties thereto are administrative bodies and entrepreneurs, fall within the area of civil law and produce effects specific to the contractual regime.

Taking the above into account, it seems reasonable to view the concept of a decision granting conditional approval of a concentration as a kind of specific, unusual agreement made under the public law regime of Article 19 of the CCPA. It is all the more sensible if we bear in mind both the principle of autonomy cited in the title of this chapter and the rules governing the conclusion and performance of agreements, taking into account not only the formal and legal, but also the practical ways of drawing up the content of a decision granting conditional approval of a merger. Indeed, even the formal rejection of the concept of a conditional decision as an agreement does not change the fact that we are actually dealing with a type of agreement. Since it is pointed out that an element of the issuance of a conditional decision is cooperation between an authority and a party to the proceedings, which involves a kind of negotiation during which arrangements are made between the authority and the entrepreneur, how else can such a process be qualified if not the working out of an agreement? Subsequently, the content of this agreement will be reflected

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59 See: T. Skoczny, *Zgody szczególne…*, p. 274 and the literature quoted therein.

60 Ibidem.

61 M. Błachucki, op. cit., p. 295.

62 Ibidem.

63 Extensively on the matter: Z. Banaszczyk, *Odpowiedzialność za szkody wyrządzone przy wykonywaniu władzy publicznej*, Warsaw 2015.

in the decision to be issued. In competition law terms, this will be a unilaterally issued administrative decision by an authority, which will become grounds for the conditions worked out beforehand to draw their force. However, in civil law terms, this clearly results in a kind of agreement (contract) concluded between the parties involved. This applies at least to the conditions (included in the decision) which, once fulfilled by entrepreneur, will make it possible to form the planned concentration as modified by the decision issued by the authority. It should be mentioned here that this is not an entirely new concept, as it is part of the already well-known so-called negotiated model of applying competition law, within which the granting of conditional consent to form a concentration is listed as one of the basic examples to which the negotiated model applies.[64] Following the above assumptions, both the entrepreneur who undertakes to fulfil certain conditions and the antitrust authority, which has at least agreed to such a condition, should cooperate to perform a jointly concluded agreement – even if it is only part of the antitrust authority's decision, and therefore only to the extent of the conditions indicated therein. Of course, this performance should take into account the roles taken on by these entities, in particular the role of the antitrust authority responsible for ensuring the proper functioning of competition and the pursuit of the public interest. This is a public interest (general public interest), and competition is a general interest that requires protection under public law.[65] Thus, in a broad sense, it is also the interest of all entrepreneurs operating in a given market – including the entrepreneur forming the merger covered by the decision granting conditional approval. As a result, according to the author of the article, the role of the competition authority is much more important in the case of a decision granting conditional approval compared to a decision granting unconditional approval of a concentration. Indeed, in the case of a conditional decision, the role should not be limited to that of a "supervisor and enforcer" of the conditions indicated in the decision. The degree of complexity of the conditions applied by the competition authority, such as e.g. the approval of the buyer or the content of the contract to be concluded by the entrepreneur obliged to fulfil the condition, as well as the need to meet other additional criteria indicated in the decision, makes it[66] impossible in practice to fulfil the condition without the cooperation of the authority. Thus, the competition authority should participate

64 See: extensive comments on the negotiated application of the competition protection law, including the main areas of its application, in: T. Skoczny, *Negocjacyjne stosowanie prawa ochrony konkurencji – rzeczywistość, istota, problemy*, [in:] idem (ed.), *Prawo konkurencji 25 lat*, Warsaw 2016, p. 443 et seq.

65 M. Bernatt, A. Jurkowska-Gomułka, T. Skoczny, [in:] M. Kępiński (ed.), op. cit., p. 731.

66 See: J. Łukawski, *O potrzebie wyjaśnień Prezesa UOKiK w sprawie zgody warunkowej na dokonanie koncentracji przez przedsiębiorców*, "Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2020, 5(9), p. 26.

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in the implementation of the decision, keeping in mind the objectives that guided both parties in agreeing on the content thereof.

The thesis posited above on the qualification of a decision granting conditional approval of a concentration as a kind of agreement leads, consequently, to the responsibility of the parties for the performance of such an agreement, which – from the point of view of the traditional model of applying competition law – is quite novel. In essence, however, this aims to improve the mechanism of competition protection in the public interest. Of course, in each case the main burden and responsibility for the fulfilment of the condition covered by the decision rests with the entrepreneur. However, the author believes that transferring or at least respecting the principle of party autonomy under civil law to the application of competition law to the conditional decisions discussed here would result in a better quality of the decisions issued. Motivated by the autonomy of the parties, the need to respect the will of the entrepreneur reporting the intention of forming a concentration as much as possible on the one hand, and, on the other hand, by a sense of responsibility for the implementation of the decision – even if limited on the part of the authority by the pursuit of the public interest, would have to result in increased efforts to work out the best condition(s) possible. On the one hand, this would ensure an adequate level of competition in the market (in accordance with Article 19 section 1 of the CCPA), and on the other hand, it would also make it possible to achieve the objectives of the entrepreneur participating in the merger formed. Moreover, and perhaps this element is, in fact, the most important, it would make the decisions issued include conditions that are possible to be fulfilled, which is of great significance given the present dynamic market environment, as well as the need to possibly change these conditions in the event that the environment has changed so much that their fulfilment turns out to be objectively impossible – even if the entrepreneur exhausts all options. Such demands have appeared repeatedly in the literature, including in the context of sanctions for failure to implement the conditional decision within the deadline set by the competition authority.[67]

The legal nature of failure to fulfil the condition

The last issue addressed in this paper, although undoubtedly just as important as those already covered – also in the context described in the previous chapter, is the question of the legal nature of the failure to fulfil the condition imposed on the entity intending to form a concentration. This applies in particular to liability

[67] See: A. Piszcz, op. cit., p. 205 and J. Łukawski, G. Materna, op. cit., p. 129.

for failure to fulfil a condition included in the decision within the time frame set by the OCCP President. A great deal has already been written on the subject, and the changing views, ranging from strict liability and liability based on the entrepreneur's guilt, have been accompanied by changes in the law, particularly with regard to Article 107 of the CCPA.[68] Therefore, without repeating the claims cited there, the only part necessary to recall here is that liability for failure to comply with a conditional decision was based on the principle of strict liability. It generally does not take into account the abovementioned possible changes in the market, nor does it consider objective circumstances – ones beyond the entrepreneur's control and often impossible to foresee at the time of the decision under which the condition indicated in the decision is to be fulfilled. This stems from the content of the decision of the President of the OCCP, cited in this context on several occasions, which was upheld in full by the judgements following the appeals filed against it.[69]

However, the liability model mentioned above should at least be discussed in the context of the comments made in the previous chapter. It should be pointed out that, taking into account the cited judicial decisions of both the antitrust authority and the courts, this liability is strict, and from a practical point of view, taking into account the content of the statements of reasons of decisions and judgements, it takes on a model close to the absolute liability known to civil law. It implies the impossibility of invoking any circumstances that would relieve liability. The entrepreneur remains liable in the event of failure to fulfil the condition imposed by the decision, regardless of the objective impossibility to fulfil it, which may also result from changes in the market environment that occur completely beyond the entrepreneur's control. This is because since the entrepreneur agreed to the conditions and did not appeal the decision, it means that now they cannot even invoke an objective failure to comply with them.[70] In addition, the model of administrative tort liability is referred to in this context,[71] which, for the reasons described above, should not be directly applied in this case to liability for failure to implement

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68 See: e.g. A. Piszcz, op. cit., pp. 387–388; M. Błachucki, op. cit., pp. 344–345 and T. Skoczny, *Charakter prawny odpowiedzialności za niewykonanie decyzji Prezesa Urzędu oraz potencjał ekonomiczny jako przesłanka wymiaru kary pieniężnej*, "Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2014, 1(3), pp. 86–87, also: Supreme Court's judgement of 03 October 2013, ref. III SK 51/12 Carrefour Netherland (hereinafter: "the Judgement").

69 See: Office of Competition and Consumer Protection President's decision no. DKK – 58/2009 pf 28 August 2009 in the case of Carrefour B.V., based in Amsterdam (hereinafter "the Decision").

70 See: the content of the statement of reasons for the OCCP President's decision of 28 August 2009, no. DKK – 58/2009, and the theses contained in the statement of reasons for the Supreme Court's judgement of 3 October 2013 in the case ref. III SK 51/12.

71 Ibidem.

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a conditional decision defined in Article 107 section 1 of the CCPA. These reasons include e.g. the cooperation of the authority and the entrepreneur in determining the content of the condition included in the decision, or the fact that there is no violation of the rules of competition stipulated in Articles 6 and 9 of the CCPA on the part of the entrepreneur. On the contrary, the entrepreneur participates in the development of a solution to preserve effective competition, which, for reasons beyond their control, may turn out to be objectively infeasible after the decision has already been issued. Another important factor to take into account in the context of the predictability of changes in the market, which can affect the enforceability of the decision, is that also the authority agrees to include certain conditions in the decision, being aware of certain market conditions. Thus, imposing strict liability, independent of external factors and not subject to any exclusions, solely on the entrepreneur does not seem to be an action consistent with the rules of justice – including the principle of citizens' trust in state bodies.[72]

Consequently, the concept of strict liability cited above needs to be re-examined. It is true that after the amendment of Article 107 of the CCPA, the term 'delay' (culpable delay) replaced the term 'default' (delay regardless of fault). However, just as default was not an obstacle to adopting the principle of strict liability in the aforementioned rulings, so delay should not be an obstacle to mitigating liability viewed in the traditional manner, independent of any external factors.[73] Such an absolutely objective model of liability is incompatible with the abovementioned concept of a conditional decision as a specific form of agreement, worked out taking into account the principle of autonomy of subjects to the furthest possible extent, limited only by the pursuit of goals of the competition law. This claim is supported by opinions advocating the possibility of amending the conditional decision if the condition turns out impossible to be fulfilled.[74] It also seems that a simplified form of materialisation of this claim, perhaps more effective to some extent, would be to ease the liability for complying with the condition by taking into account the realities of the market. This is because the point is not to punish the entrepreneur, but to maintain an appropriate level of effective competition in the market. The threat of punishment should be a means to that end, and punishing the entrepreneur should not be an end in itself, to the exclusion of all – including objective – factors

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72 On this topic, e.g.: R.M. Duda, *Konstytucyjna zasada zaufania obywateli do organów państwowych i próba jej realizacji w przepisach ustawy z dnia 6 marca 2018 r. – Prawo przedsiębiorców (Dz.U. z 2018 r., poz. 646)*, "Folia Iuridica Universitatis Wratislaviensis" 2019, 8(1), pp. 91–106.

73 See: OCCP President's decision of 28 August 2009, no. DKK – 58/2009 and the Supreme Court's judgement of 3 October 2013 in the case ref. III SK 51/12.

74 J. Łukawski, op. cit., p. 28 and the literature quoted therein.

beyond the entrepreneur's control, which made the decision issued non-implementable, so to speak.

Conclusions and implications

Decisions granting conditional approval for mergers are not common in the juridical practice of the President of the OCCP. However, both the process leading to this type of decision and the decision itself are much more complex compared to decisions granting unconditional approval or denying approval. Working out the conditions to be contained in such a decision requires the cooperation of the antitrust authority and the entrepreneur, which leads to the modification of the original intention of concentration. As a result of the issuance of such a decision, there occurs a somewhat automatic interference with the sphere of autonomy of the subject due to the need to modify the rights and obligations of the participants in the concentration in a manner different from that shaped by the will of the parties – the participants in the concentration – in the original intention submitted to the President of the OCCP. Also, the implementation of a conditional decision, in the case of both behavioural conditions and the more common structural conditions, requires the use of the instruments provided by civil law, but with the need to meet the requirements of the decision of the President of the OCCP. This situation is further evidence of how public law and private law intersect in competition law, which has traditionally been viewed as a public law domain.

The factors briefly mentioned above mean that the application of competition law in the area described in this paper (decisions granting conditional approval of concentrations) requires a paradigm shift – or at least an adjustment. The new perspective should take into account the circumstances under which the conditions included in the subsequently issued decision are determined, the rights and obligations of the entrepreneur intending to form the concentration in the context of not only public law, but also civil law, and not only the theoretical, but also the practical feasibility of the conditions contained in the decision in terms of changing market conditions, which both the entrepreneur and the antitrust authority could not foresee at the time of determining the content of the decision and of its issuance. This requires a somewhat novel economic and certainly more flexible approach on the part of the antitrust authority as well. The encroachment on the subject's autonomy with regard to their ability to shape rights and obligations independently, obviously justified by the goals of competition law, must have limits – including those motivated by the proportionality of the measure used in relation to the objective to be achieved, which is the preservation of effective competition in the public interest.

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Of course, the modification advocated in this paper may be hindered by the existing long-established practice as reflected in the literature and judicial decisions cited herein. But this does not mean that the practice may not change as it has many times in the past, and it is the duty of legal and economic theorists and practitioners to analyse and discuss the current practice – and to propose recommended or essential changes to it. This is especially the case where practice is out of step with changing economic realities, and the close ties between competition law and economics, the economy, and the market are more than obvious. As a result, any juridical practice and the views expressed in the literature – including in the field discussed here, should be subject to constant review along the lines of the falsification of claims known in science.[75] All of this is to serve to develop an optimal solution, which should be to guarantee effective competition in the market.

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[75] See: K.R. Popper, *Logika odkrycia naukowego*, Warsaw 2016.

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