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## PURPOSIVE INTERPRETATION OF THE TERM “UNDERTAKING” AS DEFINED UNDER POLISH ANTITRUST LAW – SOME OBSERVATIONS

**Abstract.** This paper assesses whether the purposive (functional) interpretation of the term “undertaking” is used by decision-makers in antitrust cases. This article presents a short summary of this research regarding cases related to the abuse of a dominant position. As a rule, priority must be given to the direct meaning of a text. There are, however, important exceptions to the supposed rule. A concise examination of the jurisprudence shows that purposive interpretation is used where the provision in question is open to several interpretations. This article relates in some form to the problems that arise from the EU-oriented purposive interpretation of the term “undertaking” as defined under Polish antitrust law. The article considers some of them.

### 1. Introduction

Polish antitrust law of the interwar period obviously was not applied after World War II in socialist Poland, even though it was not formally repealed by the legislature. (Rzepliński, 1999, p. 18). Interrupted Polish story of antitrust law<sup>1</sup> was continued by the Act of 1987 on counteracting monopolistic practices in the national economy, (ustawa z 28 stycznia 1987 o przeciwdziałaniu praktykom monopolistycznym w gospodarce narodowej (Dz. U. z 1987, Nr 3, poz. 18)), which was replaced by the Act of 1990 on counteracting monopolistic practices and protection of consumer interests (ustawa z 24 lutego 1990 o przeciwdziałaniu praktykom monopolistycznym (Dz. U. z 1990 Nr 14, poz. 88 z późn. zm.)). (More: Skoczny, 2003, p. 351). The latter was replaced by the Act of 2000 on competition and consumer protection (ustawa z 15 grudnia 2000 r. o ochronie konkurencji i konsumentów (Dz. U. z 2000 Nr 122, poz. 1319 z późn. zm.)). As the years went by more and more legal provisions came into being for the purpose of protecting both competition and consumers.

On February 16, 2007 the new Act on competition and consumer protection (Ustawa z 16 lutego 2007 r. o ochronie konkurencji i konsumentów (Dz. U. z 2007 Nr 50, poz. 331 z późn. zm.)) – hereinafter referred to as CCP Act<sup>2</sup> was passed. It has provided for equally high level of competition and consumer protection as law of the European Union (EU). But the application of the CCP Act has not been free of problems.

However, the body of case law under the CCP Act (and its predecessors) seems now more and more considerable. It consists of decisions of the President of the Office of Competition and Consumer Protection (Urząd Ochrony Konkurencji i Konsumentów, UOKiK) and ordinary courts.<sup>3</sup> These decision-makers continue to exert an influence on how provisions of the CCP Act are understood. Many problems in connection with the CCP Act naturally remain unsolved. One can hardly believe that six years have already passed since the adoption of the CCP Act and it has not been substantially revised to clarify its unclear language, resolve the lacunas in the legislation, exclude its weaknesses and enhance the strengths of the public antitrust enforcement. Ultimately, it is decision-makers who must take responsibility for how they interpret provisions of the CCP Act. They take into consideration various aspects of legal interpretation.

This article discusses two issues: first, are any examples of purposive (functional) interpretation of the term “undertaking” to be found in decisions by decision-makers we have mentioned so far and, if so, is purposive interpretation used in favour of parties suspected of the anticompetitive conduct or against them? Second, do decision-makers refer to purposive (functional) interpretation in notes (justifications) of decisions?

The first question is much more difficult than it was in earlier years for while we must begin our search for examples of purposive interpretation, case law may well be unapproachable. I do not mean decisions of the UOKiK President (Prezes Urzędu Ochrony Konkurencji i Konsumentów) as they are presented in the internet database.<sup>4</sup> But there appears to be no exhaustive, exact information as to the courts’ case law. The last-mentioned database contains only “orders” and not “notes” of court decisions.<sup>5</sup> Pursuant to Article 32 of the CCP Act (Dz. U. z 2007 Nr 50, poz. 331 z późn. zm.), the UOKiK President shall issue the Official Journal of UOKiK (Dz. Urz. UOKiK) and judgments of courts may be published therein. However, they have not published any single judgment in the Official Journal since April 2011. Moreover, the UOKiK President drafted and the Council of Ministers sent to the Sejm (*Sejm*) the draft bill to amend the CCP Act and the draft proposes not to publish the Official Journal at all. Other sources of courts’ case law on antitrust are rather

poor. A detailed survey of case law on the antitrust issues needs first to ask courts to help us obtain their relevant judgments because we can build up only approximate picture of the courts' case law on antitrust from published databases as well as from published records of the UOKiK President.

The answer to the second question is simple (in as much as it is assumed that case law is accessible), for apart from a few decisions, one is unable to find any references to the type of legal interpretation referred to in my questions.

## **2. Legal interpretation in general**

This concise survey must be preceded by an explanation of the basic types of legal interpretation together with an outline of their characteristics, advantages and disadvantages.

Among the interpretive activities occurring in courts and other public domains, the most important is determination of the direct meaning of the legal provisions. This concept has traditionally occupied the central position in the Polish system of legal interpretation (Wróblewski, 1991, p. 23) and could be found in virtually every European country.

However, systems of legal interpretation go far beyond any direct meaning of a text. When the “literal” meaning is unclear (not plain enough) in a given situation, then as an inevitable consequence, one must use the interpretive directives, i.e. the rules which channel interpretive behaviour and/or are used for justifying the interpretive decision. (Wróblewski, 1991, p. 23–24). They are two-dimensional (their orders may be called the dimensions; or, perhaps more appropriately, levels). The first level of the interpretive directives concerns determination of the elements of the semantically relevant contexts of legal rules that will play an important part in subsequent interpretive processes. There are three contexts of legal rules considered as semantically relevant, namely linguistic, systematic (systemic) and purposive (functional). In this respect there are three types of legal interpretation: linguistic, systematic (systemic) and purposive (functional) ones. (Jabłońska-Bonca, 2004, p. 178–181).

In the ideal situation, the results of each type of legal interpretation coincide with one another. In other words, there is unity and agreement among them. If there appears to be no common meaning of the interpreted provision shared by all three versions of interpretation, then one has to use the second level interpretive directives that provide for resolution of any

conflicts among the results of different types of legal interpretation. These directives determine how to choose between the conflicting versions and how to justify this choice.

About the choice and the justification thereof there may be different opinions depending on ideology of legal interpretation: the static ideology or the dynamic ideology. Essential to this differentiation is a classification of theories of legal interpretation into the subjective theory of legal interpretation and the objective theory of legal interpretation. The subjective theory (static ideology) revolves around the assumption that the meaning of the legal text is the will of the historical lawmaker and the opposing theory (dynamic ideology) suggests that the meaning of the legal text is independent of the historical lawmaker and may change according to many factors, e.g. the will of the current lawmaker, or some teleological, sociological and/or axiological features ascribed to the legal text in the process of interpretation. (Dascal, 2003, p. 355).

The subjective theory of legal interpretation seems unattractive. According to the subjective theory, legal interpretation has little power of development. This is partly because the purposive interpretation is relegated to an only secondary role and is referred to the historical lawmaker (while at the same time the subjective theory does not deny the leading part played in legal interpretation by the linguistic and systematic interpretations).

While performing a systematic interpretation, one interprets a legal text as part of:

- the legal system as a whole,
- components of the legal system such as a branch of law,
- a normative act,
- any other set of legal rules or even a single legal rule.

No one can deny the validity of the linguistic and systematic contexts of legal rules<sup>6</sup> but legal interpretation without the purposive context referring to the current lawmaker seems to be only partial.

On the other hand, the objective theory employs such a purposive (functional) context. While performing a purposive (functional) interpretation, one has to identify the current fundamental values of the legal system, the purposes (aims, objectives) of the legal rule and, drawing upon this work, select the meaning of the legal text that best fulfils these values and purposes. (Jabłońska-Bonca, 2004, p. 180–181). Apart from these, one should also assess how the current lawmaker would behave and if there can be seen any peculiar attitude of the lawmaker toward the subject. If the current lawmaker wrote legal provisions on the same subject matter, what would they be like?

At any rate, such an “objective” interpretation can let the interpreter reveal a very complex mixture of values and purposes at stake. It would seem logical therefore, that the interpreter should choose values and purposes considered by him/her as playing the most important part in this “mixture”. But the relationship between values and purposes of law may be more complex than that. Partly this is because of the need to interpret national laws of EU Member States in such a way as to fulfil the purposes of the EU law (formerly EC law). (Jabłońska-Bonca, 2004, p. 180–181). The most striking feature of a generally pro-EU interpretation of laws is that functional interpretation rather than linguistic one should have priority. (Kalisz-Prakopik, 2007, p. 174 and next).

This article briefly exemplifies these issues through a selective analysis of the body of case law that is developing in the area of Polish antitrust law.

### **3. “Undertaking” under the CCP Act**

There are several excellent examples of purposive (functional) interpretation to be found in the case law on antitrust that refer to the word “undertaking” (*przedsiębiorca*). But we must remember that the term “undertaking” has a special meaning under the CCP Act (and had it under the predecessor of 2000). Pursuant to its Article 4(1), for the purposes of the CCP Act (Dz. U. z 2007 Nr 50, poz. 331 z późn. zm.) “undertaking” shall mean, in the first place, an undertaking in the meaning of the provisions on freedom of business activity (i.e. a natural person, a legal person or an organisational unit without a legal status to which legislation grants legal capacity, conducting economic activity on its own behalf; economic activity shall mean profit-making activity related to manufacturing, construction, trading, provision of services and prospecting, identification and extraction of minerals, as well as professional activity conducted in an organised and continuous fashion).<sup>7</sup>

By the word “undertaking” as has already been mentioned above, the CCP Act implies not only those persons and units that are covered by the term “undertaking” in the meaning of the provisions on freedom of business activity, but, as well:

- a) natural and legal person as well as an organisational unit without a legal status to which legislation grants legal capacity, organising or rendering public services, which do not constitute business activity in the meaning of the provisions on freedom of business activity,

- b) natural person exercising a profession on its own behalf and account or carrying out an activity as part of exercising such a profession,
- c) natural person having control, in the meaning of Article 4(4) of the CCP Act (Dz. U. z 2007 Nr 50, poz. 331 z późn. zm.), over at least one undertaking, even if the person does not carry out business activity in the meaning of the provisions on freedom of business activity, if this person undertakes further actions subject to the merger control, referred to in Article 13 of the CCP Act (Dz. U. z 2007 Nr 50, poz. 331 z późn. zm.);
- d) associations of undertakings – for the purposes of the provisions on competition-restricting practices and practices infringing collective consumer interests.

The above definition adds “extraordinaries” to the ordinary pattern of definition of “undertaking”. (More: Etel, 2012, p. 247 and next; Krasnodębska-Tomkiel, Szafranski, 2010, p. 110–111). Legislators tend to regard such a broad definition of the term as congenial to the modern antitrust, typically centred on the wide range of market participants. Which organisations and/or institutions would fit inside these boundaries (not too strict)? From time to time, the UOKiK President and competent courts referred to purposive interpretation as an argument supporting that the term “undertaking” included organisations and institutions such as the National Health Fund (Narodowy Fundusz Zdrowia), the National Chemical and Agricultural Station (Krajowa Stacja Chemiczno-Rolnicza) and the Union of Stage Artists and Critics (ZAiKS) as a collective management organisation.

#### **4. Different outcomes of pro-EU purposive interpretation of the term “undertaking”**

This section focuses on purposive interpretation of the term “undertaking” that led decision-makers to different outcomes in cases regarding the abuse of a dominant position. Under the provisions of 2000 legislation the UOKiK President recognised the National Chemical and Agricultural Station as an “undertaking” pointing out that the legal interpretation used in the case bore a resemblance to the case law of the European Court of Justice – hereinafter referred to as ECJ (decision of December 29, 2008, RBG-45/2008, p. 22). In the analysed decision the UOKiK President quotes from the text of judgment of the Polish Supreme Court (Sąd Najwyższy, SN) – of May 29, 2001 (wyrok Sądu Najwyższego z dnia 29 maja

2001, I CKN 1217/98). According to the Supreme Court, if there is any doubt over the status of an organisation or institution as an “undertaking” then such doubts should be removed by purposive interpretation in order to achieve an outcome consistent with the objective pursued by the EU law. The Supreme Court emphasised that such a consistency could be obtained by referring not only to the letter of the law (legislation) but also to the EU case law.

The analysed decision by the UOKiK President was appealed against to the Court of Competition and Consumer Protection (Sąd Ochrony Konkurencji i Konsumentów, SOKiK) and its judgment was appealed to the Appeal Court (Sąd Apelacyjny, SA) in Warsaw. The Appeal Court tone was one of scepticism to purposive interpretation. In its judgment of May 24, 2011 (VI ACa 1394/10)<sup>8</sup> the Appeal Court stated that the term “undertaking” included organisations and/or institutions organising public services and decided that the National Chemical and Agricultural Station could be classified as such provided that it had been involved in economic relations. But, to the contrary, the Station was involved in exercising public powers. The court stated that antitrust law did not apply to functions and activities relevant to public authorities. Its purposes do not extend to diagnosing compatibility of the exercise of public powers with competition rules. (Piszcz, 2012, p. 72–73). The courts set aside the decision issued by the UOKiK President. This conclusion was as advantageous to the alleged violator as it was possible to be.

The same could not be said to be true of other pieces of scrutinised case law such as decisions adopted in the ZAiKS case. In the decision of July 16, 2004 (RWA-21/2004), the UOKiK President referred to the above mentioned well known judgment of the Supreme Court of May 29, 2001 (I CKN 1217/98) concerning purposive interpretation. The UOKiK President tried to decide what Polish interpreter performing a pro-EU purposive interpretation should choose – values and purposes of Polish antitrust law or EU antitrust law. Should values and purposes of Polish antitrust law be treated as a means to attain other “greater” end for which EU antitrust law is designed? The UOKiK President reminded parties to the proceedings:

- of the principle crystallised in the EU case law under which EU Member States are obliged to apply domestic laws in compliance with the EC Treaty<sup>9</sup> purposes;
- but not of the ends which EU antitrust law is supposed to serve.

The CCP Act comprises two various elements which each have a separate function within the overall system: competition (antitrust) law and consumer law. Not only Article 1 of the CCP Act stipulates it (Dz. U.

z 2007 Nr 50, poz. 331 z późn. zm.), but even the title of the CCP Act itself – the Act on competition and consumer protection (ustawa o ochronie konsumenta) suggests it. However, not only consumer law, but also antitrust law safeguards consumer interests. Polish antitrust law is primarily concerned with protection of competition (increasing economic efficiency) and protection of consumers as ends in themselves. On the other hand, purposes of EC antitrust law (currently EU antitrust law) have related, in turn, to partially different values. It has served two masters – not only competition but also the functioning of the internal market. (Jones, Sufrin, 2007, p. 42). This has distinguished it from national competition laws. In the 1990's consumer protection has joined these purposes.

Referring to the ECJ's judgment in case *Walt Wilhelm*,<sup>10</sup> the UOKiK President clarified that EU Member States were not allowed to apply their national competition laws to the extent that the activities prohibited by EC antitrust law (currently EU antitrust law) could be legalised. According to the decision-maker's viewpoint, in practice, exclusion of collective management organisations from the scope of the term “undertaking” would protect such organisations from subjecting their activities to the regime of antitrust. It would mean *ex ante* legalisation of their activities from an antitrust point of view and would violate the obligations of Poland as EC (now EU) Member State. The analysed decision was confirmed by the SOKiK and the judgment of the latter was confirmed by the Appeal Court in Warsaw in its judgment of November 29, 2006 (wyrok Sądu Apelacyjnego w Warszawie z dnia 29 listopada 2006, VI ACa 504/06). The Appeal Court referred to the same Polish courts' case law regarding pro-EU purposive interpretation. The Court also mentioned some decisions by the European Commission.

The decision of the UOKiK President of July 10, 2009 (RWA-9/2009) reflects, in some sense, the other side of the coin. In this decision, on one hand, the UOKiK President referred to its own decision issued in the ZAiKS case and confirmed that interpretation of the personal scope of the prohibition of practices restricting competition (horizontal agreements and/or concerted practices, vertical agreements and/or concerted practices, abuse of a dominant position) should be in line with *acquis communautaire*. On the other hand, the UOKiK President stated that, undoubtedly, such a pro-EU legal interpretation could not lead to an interpretation *contra legem*. In other words, the obligation to interpret national law in conformity with *acquis communautaire* cannot serve as the basis for an interpretation of national law *contra legem* and EU law cannot compel the national decision-maker to give an interpretation against the law. In the UOKiK President's opinion, even if under EC Treaty (currently TFEU) the National Health Fund did

not have the attributes of an undertaking (which is not obvious because neither the European Commission nor the EU courts have assessed it so far), under Polish antitrust law the Fund would be regarded as an undertaking due to Article 4(1)(a) of the CCP Act. (Dz. U. z 1997 Nr 50, poz. 331). This provision clarifies that an undertaking is a person or an organisational unit that organises public services. The Fund organises such services, therefore it is an undertaking.

In the closing lines of this section, I would like to mention the problem of interpretation of the term “joint undertaking” (*wspólny przedsiębiorca*) which has not been scrutinised and resolved by Polish antitrust case law to this day. This term appears in Article 13(2)(3) of the CCP Act (Dz. U. z 2007 Nr 50, poz. 331 z późn. zm.), referring to the merger control and identifying the types of mergers. Traditional forms of legal interpretation urge us to direct our focus toward a definition of “undertaking” contained in general provisions of the CCP Act. On the other hand, a pro-EU purposive interpretation may lead us in a much different direction, that is, toward a European notion of “joint venture”.<sup>11</sup> In my opinion, interpreting the term “joint undertaking” through the lens of a definition of “joint venture” would be *contra legem*. (See also: Błachucki, 2012, p. 104–106). The economic independence is essential to the term “joint venture” while the term “joint undertaking” – in particular when construed in conjunction with Article 4(1) of the CCP Act – includes legally independent entities. (Dz. U. z 2007 Nr 50, poz. 331 z późn. zm.). Therefore, these two notions only partially overlap and this is one of the reasons why interpretation of the Polish notion cannot even supplementarily refer to the European one.

## 5. Conclusions

A final area of this analysis concerns some conclusions. Purposive interpretation has been sketched above in terms of the current fundamental values of law and the purposes of a given legal rule. So, the purposes of antitrust law influence the way the law in books becomes the law in action. (Miąsik, 2008, p. 34). The differences in the purposes of antitrust laws may result in identical or very similar rules being applied differently in different jurisdictions, for instance Polish jurisdiction and EU jurisdiction.

The first conclusion which I draw from the above concise review of Polish case law is that from time to time decision-makers refer to purposive (functional) interpretation in notes (justifications) of decisions. Frequently, it is pro-EU purposive interpretation of national antitrust law. Such an

interpretation seems to have two dimensions: a good as well as a bad influence on interpretation of the term “undertaking” as defined under Polish antitrust law. Its good influence can be seen from the decision-makers’ perspective in that it allows to “seal” the personal scope of the prohibition of anticompetitive practices. It is mainly due to the prohibition of legalising activities prohibited by EU antitrust law. Perhaps this concept could be proclaimed a masterpiece of antitrust enforcement but in undertakings’ eyes this would seem an over-statement because the concept does not work both ways. Even if under EU antitrust law activities were legal, under Polish antitrust law they could be illegal (pursuant to the EC Regulation 1/2003, Member States are allowed to adopt and apply on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings – stricter than Article 102 TFEU<sup>12</sup>). But one can get the impression that Polish competition authority more frequently uses purposive (functional) interpretation of unclear national provisions against parties suspected of the anticompetitive conduct than in favour thereof (like in case of the National Chemical and Agricultural Station).

The alternative is to appeal the decision to courts. They seem to have a much more common sense approach to purposive interpretation, in particular if severe fines, amounting to 10% of an undertaking’s annual turnover, await the alleged violator or other adverse effect on his/her financial interests may result from the decision. In this context, it is worth remembering the outcome of the *Telekomunikacja Polska S.A. (TP S.A.)* case in 2008. In 2005, during the course of proceedings regarding the abuse of a dominant position, the UOKiK President decided to adopt an interim measures decision for the specified period (decyzja Prezesa Urzędu Ochrony Konkurencji i Konsumentów z dnia 10 października DOK-127/05). In 2006 the decision-maker adopted a further decision (decyzja Prezesa Urzędu Ochrony Konkurencji i Konsumentów z dnia 10 marca 2006 DOK-19/2006) amending the first decision and extending its validity for a further period, which was appealed by TP S.A. The courts of lower instances adopted the formula that the case initiated by the appellant should have been discontinued just after the UOKiK President had issued a decision on the merits of the case in relation to the abuse of a dominant position (decyzja Prezesa Urzędu Ochrony Konkurencji i Konsumentów z dnia 30 maja 2006 DOK-53/06). It was the Supreme Court who valued systemic and purposive interpretation above everything else and brought fresh ideas as well as new thinking into the case (postanowienie Sądu Najwyższego z dnia 14 listopada 2008, III SK 11/08). It took into account both the place of a rule allowing the extension of an interim measures within legislation and the purpose of this rule. The Supreme

Court ruled that the lower courts should not have discontinued proceedings because the extension decision could have adverse effect on financial interests of TP S.A.

Such an approach deserves wider application. But on the other hand it is inexplicable why anyone should be convinced that antitrust law could be reformed just by reforming its interpretation. I do not deny its capacity for constant development but amendments to the CCP Act are obviously needed. The draft bill to amend the CCP Act shows that an amending act is going to cover only chosen issues and not a comprehensive reform of antitrust rules. The vast majority of the drafted amendments are apparently to the benefit of decision-makers and do not contribute to supporting the rights of parties to antitrust proceedings. We enjoy decision-makers' own enjoyment of crossing Polish boundaries by EU law which allowed them to use EU-oriented purposive interpretation of antitrust law. But this pro-EU purposive interpretation has the disquieting feature of being used against the alleged violators. I would rather suggest more frequent search for a compromise between the methods of purposive interpretation and legitimate interests of undertakings (or alleged undertakings) instead of using it only in the public interest.

## N O T E S

<sup>1</sup> I have adopted the convention that by antitrust laws are meant areas of public laws protecting competition other than state aid regulation (an EU-style convention). The European Commission has in the last years started using the term “antitrust” alongside the traditional term “competition law”; (Wils, W., P., J., 2007). Is Criminalization of EU Competition Law the Answer? In Ehlermann, C. D., Atanasiu, I. (Eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, p. 278. According to an American-style convention, by antitrust laws are meant areas of laws protecting competition other than merger control and state aid regulation.

<sup>2</sup> English version at: [www.uokik.gov.pl/download.php?plik=7624](http://www.uokik.gov.pl/download.php?plik=7624), accessed November 27, 2012.

<sup>3</sup> The Court of Competition and Consumer Protection (17th Division of the Regional Court in Warsaw), the Appeal Court in Warsaw and the Supreme Court. More (Piszcz, 2011, p. 2011, 51–52).

<sup>4</sup> From [http://www.uokik.gov.pl/decyzje\\_prezesa\\_uokik3.php](http://www.uokik.gov.pl/decyzje_prezesa_uokik3.php), accessed November 27, 2012.

<sup>5</sup> The order sets out the court's decision (conclusion) and the note (justification) shows how and why the court came to that decision.

<sup>6</sup> Some researchers consider systematic interpretation as occupying a position that is both privileged and in some way grounding, in relation to the different particular methods of interpretation; see (Kerchove, Ost, 1994, p. 3).

<sup>7</sup> The same term is defined in different ways in various legal acts; see (Molski, 2008, p. 235).

<sup>8</sup> Not yet reported.

<sup>9</sup> Renamed as Treaty on the Functioning of the European Union (as of December 1, 2009), hereinafter referred to as TFEU.

<sup>10</sup> ECJ judgment of February 13, 1968, C-14/68, Walt Wilhelm et al. v. Bundeskartellamt, European Court reports 1969, p. 00001.

<sup>11</sup> See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation); OJ L 2004, No 24, p. 1; Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 2008, No 95, p. 1).

<sup>12</sup> Council Regulation (EC) No. 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 2003/1/1.

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