

Right to Be Heard or Protection of the Confidential Information? Competing Guarantees of Procedural Fairness in the Proceedings Before the Competition Authority

by

Maciej Bernatt*

CONTENTS

- I. Introduction
- II. Right to be heard and its limitations
 1. Limitation of access to evidence contained in case files
 2. Protection of the right to be heard under Polish competition law
- III. Right to be heard v protection of business secrets
 1. Approach of Polish courts – is there a proper balance?
 2. Looking for good examples – practice in the EU
- IV. Distinction between business secrets and other confidential information as the solution?
 1. Business secrets and other confidential information
 2. Other confidential information can be revealed, business secrets cannot?
 3. Proposed solution
- V. Conclusions

Abstract

The concept of procedural fairness plays an important role in the enforcement of competition law, which must not only be effective but also fair. Thus, legal institutions should guarantee a proper level of protection of the values of procedural fairness. This paper is dedicated to the possible conflict between the guarantees of procedural fairness that find their expression in the right to be heard and in the protection of confidential information.

* Maciej Bernatt, PhD candidate at the Jean Monnet Chair on European Economic Law, Faculty of Management, University of Warsaw; assistant of a judge of the Polish Constitutional Court.

Both guarantees, the right to be heard on the one side, and the protection of confidential information on the other, should be properly balanced. Unlike EU law, Polish legislation and jurisprudence proves to be inefficient in this respect. Article 69 of the Competition Act fails to show clearly what the limits of the protection of confidential information are in situations when the right to be heard of other parties of antitrust proceedings is at stake. Business secrets are predominantly protected over the right to be heard also in the jurisprudence of Polish courts. By contrast, the Competition Act does not seem to properly protect confidential information other than business secrets. Such situation poses a risk for the adequate level of protection of procedural fairness in Polish antitrust enforcement. Moreover, neither Polish legislation nor jurisprudence explains to companies what shall prevail in the case of a concrete conflict between the protection of business secrets and the right to be heard. An answer to this questions is needed seeing as proof of a competition law infringement which should be accessible to the parties, can at the same time constitute a business secret.

Résumé

Le concept de l'équité procédurale joue un rôle important dans le renforcement de la loi de la concurrence, qui, outre d'être efficace, doit aussi être équitable. Pour cela, les institutions légales devraient garantir le niveau de protection de l'équité procédurale nécessaire. L'objet de cet article est d'étudier les conflits possibles entre les garantis de l'équité procédurale qui trouvent leur expression dans le droit d'être entendu et dans la protection des données confidentielles.

Classifications and key words: procedural fairness; right to be heard; protection of business secrets; confidential information; right of defence; antimonopoly (antitrust) procedure.

I. Introduction

The protection of free competition must be effective. Thus, the public authority responsible for the protection of free competition should be equipped with proper tools to combat antitrust infringements. On the other hand, procedural fairness must be guaranteed during proceedings that might lead to the finding of an infringement and the imposition of a sanction (fine). Procedural rules need to protect the values of procedural fairness, process values¹, especially by providing

¹ In this respect see R. Summers, 'Evaluating and Improving Legal Process – A Plea for "Process Values"' (1974) 60 *Cornell Law Review*.

proper guarantees such as: the right to be heard, the right of defence, the right to protect confidential information and the right to judicial review.

The legal guarantees of the values of procedural fairness limit the power of a competition authority. They can also be in conflict with the pursuit of effective competition law protection. For example, in the case of an inspection carried out by the officials of an antitrust authority, the consideration for the right of defence and the privilege against self-incrimination can restrict the possibility of finding facts confirming an antitrust violation. Nonetheless, this approach is correct – the power of the state is balanced here with the rights and freedoms of private entities (including undertakings).

The problem intensifies when the pursuit of effective protection of free competition is confronted with procedural fairness values that are in conflict with each other. The competition authority, which acted before as if it was a prosecutor, must act in such situations as if it was a judge – it has to decide which value should prevail or the guarantees of which value can be limited to a greater extent in a given situation. This problem is well illustrated by the conflict of the right to be heard of one party to the proceedings with the protection of confidential information (such as business secrets) of another. Both parties have a legitimate expectation to have their interests protected by the competition authority. The realisation of the rights of one of the parties can lead to the limitation of the rights of the other - the protection of business secrets can result in the limitation of the right of access to evidence.

This article focuses on this possible conflict discussing the deficiencies of the current legal solutions in the context of Polish antitrust procedure. Proposals are also made meant to solve, or at least limit, the problems identified in this context by showing how to balance the right to be heard with the protection of confidential information. In this respect a comparison with EU competition law procedure is made.

II. Right to be heard and its limitations

1. Limitation of access to evidence contained in case files

Under Article 69(1) of the Act of 16 July 2007 on Competition and Consumers Protection² (hereafter, the Competition Act), the President of the Office of Competition and Consumers Protection (hereafter, the President of UOKiK) is entitled to limit evidence access to an indispensable extent. This rule relates to evidence attached to the case file in situations where rendering such evidence

² Journal of Laws 2007 No. 50, item 337 as amended.

accessible would entail a risk that business secrets, or any other secrets protected by separate legal provisions³, might be revealed⁴. The UOKiK President may adopt an order on the limitation of the access to evidence on request submitted by an undertaking the business secrets of which might be revealed or *ex officio*. A decision in that matter can be appealed directly under Article 69(3) of the Competition Act to the Court of Competition and Consumers Protection⁵ (hereafter, SOKiK) by both the undertaking that has claimed the protection of its business secrets (or other secrets protected by the law) and by the undertaking, party to the proceedings, that has been subjected to the limitation⁶.

Article 69 of the Competition Act provides a clear basis under Polish competition law for the limitation of access to evidence contained in case files⁷. The only premise under this provision for such limitation is the risk for a business secret to be revealed, or indeed any other secret protected by the law. There is no mention here of the need to protect the right to be heard of those parties to the proceedings that were subjected to a limitation. However, the expression that the limitation is permissible only ‘to the extent indispensable’ suggests that there are values other than confidentiality that the UOKiK President should take into consideration while making the decision on the limitation of evidence access.

2. Protection of the right to be heard under Polish competition law

The right to be heard is one of the most important guarantees of procedural fairness. Polish law accepts that procedural fairness, a notion deriving directly from the principle of a democratic state of law⁸ (Article 2 of the Constitution

³ On the notion of other secrets see point III.1.

⁴ Article 69(1) of the Competition Act replaced Article 62(1) of the Act of 15 December 2000 on Competition and Consumers Protection (Journal of Laws 2005 No. 244, item 2080 as amended) under which, the limitation on access to evidence could also take place when it was demanded by public interest. Such a possibility could have resulted in the arbitrary limitation of access to evidence by the UOKiK President – order of SOKiK of 31 August 2004, XVII Amz 35/04, not reported.

⁵ Order of SOKiK of 14 May 2003, XVII Amz 11/03, not reported.

⁶ See order of SOKiK of 30 May 2006, XVII Amz 21/06, not reported; order of SOKiK of 21 June 2006, XVII Amz 13/06, not reported; order of SOKiK of 13 August 2003, XVII Amz 17/03, not reported.

⁷ The limitation can only refer to the evidence of the case and never to the statements of the parties expressed during the proceedings (order of SOKiK of 16 December 2002, XVII Amz 17/02, not reported) or to the information about the collection of the evidence (order of SOKiK of 13 August 2003, XVII Amz 17/03).

⁸ See the judgments of the Constitutional Court of 15 December 2008, P 57/07 (2008) 10/A OTK ZU, item 178 and of 22 September 2009, P 46/07 (2009) 8/A OTK ZU, item 126 and

of the Republic of Poland), is applicable to proceedings before administrative bodies⁹. Thus, its guarantees are reflected in administrative procedure and especially in Article 10 of the Code of Administrative Procedure (hereafter, KPA) that establishes the principle of active participation in administrative proceedings. It includes the right of the parties to the proceedings to be heard with regards to evidence collected and objections raised during their course. An important guarantee of Article 10 is provided by Article 81 KPA whereby the facts of the case can be considered to be proven only if the parties have been given the opportunity to comment on the evidence on the basis of which the facts are being established. Article 10 KPA is wholly applicable to proceedings before the UOKiK President¹⁰ and so is Article 81¹¹. It is also reflected directly in the Competition Act and especially in its Article 74. In its light, the UOKiK President can base his/her decision only on those objections raised against a given undertaking to which that undertaking has been given the opportunity to comment on.

These arguments prove that the right to be heard must be wholly respected in the procedural practice of the UOKiK President. This is especially true considering the extensive powers of that body and its mixed function whereby it acts as the authority notifying the objections as well as the body deciding on their validity¹². But this means also that Article 69 of the Competition Act must be interpreted in a way that does not exclude the right to be heard of parties whose access to evidence is being limited. In other words, the protection of business secrets must not disproportionately limit or completely exclude others' right to be heard.

the judgment of the Supreme Administrative Court of 19 October 1993, V SA 250/93 (1994) 2 *ONSA*, item 84.

⁹ See Z. Kmiecik, 'Idea sprawiedliwości proceduralnej w postępowaniu administracyjnym (Założenia teoretyczne i doświadczenia praktyki)' (1995) 10 *Państwo i Prawo* 55–63.

¹⁰ See Article 83 of the Competition Act.

¹¹ It can be said that Article 81 KPA is not applicable to the proceedings before the UOKiK President as the provisions of the Code of Civil Procedure (not the one of the Code of Administrative Procedure) regulate *per analogiam* the hearing of evidence before the UOKiK President (see Article 84 of the Competition Act). Such an approach is not correct because Article 10 KPA cannot be considered to be respected when the facts are established in the decision of the administrative body on the basis of evidence which the party has not been given the possibility to comment on. The Code of Civil Procedure does not provide the parties with proper guarantees in this respect because in civil procedure it is for the party (so the undertaking, not the UOKiK President) to prove the facts (see Article 232 of the Code of Civil Procedure).

¹² In this respect see a critical opinion of T. Skoczny: 'Polish Competition Law in the 1990s – on the Way to Higher Effectiveness and Deeper Conformity with EC Competition Rules' [in:] 'Spontaneous Order, Organization and the Law. Roads to a European Civil Society' (2001) 2:3, 2:4 *European Business Organization Law Review* 791.

III. Right to be heard v protection of business secret

1. Approach of Polish courts - is there a proper balance?

Courts should scrutinize whether the protection of business secrets was properly balanced with the right to be heard of the parties to the proceedings when dealing with appeals against the orders of the UOKiK President made on the basis of Article 69 of the Competition Act. They are correct to believe that the antitrust authority is not bound by the scope of a request for the limitation of evidence access¹³. From the perspective of other parties, it is important that the UOKiK President is obliged to precisely specify in his/her decision to which pieces of evidence does the restriction of access refer to (especially to which documents contained in the case file)¹⁴. As to the documentary evidence (such as contracts), it should be possible for the parties to be recognised even if their content is considered by the UOKiK President to be confidential (containing business or other secrets protected by the law)¹⁵. With respect to a contract that is part of the case file, the authority is expected to specify if it is considered to be a business secret (or other secret) in its entirety, or only some of its parts¹⁶.

The UOKiK President has surely the right to disagree with the opinion of an undertaking that a given piece of information deserves confidential treatment. Thus, the authority can decide to place a document outside the scope of the business secret category even in light of the opposition of the said undertaking. This very issue is what the UOKiK President (as well as SOKiK in appeal proceedings) is focusing on when preparing and justifying decisions issued according to Article 69 of the Competition Act.

In principle, the interpretation accepted by the Courts is that the limitation of evidence access can take place only to the extent indispensable. In one of its decisions, the Antimonopoly Court (the predecessor of SOKiK) stated that it is the openness of case files that constitutes the rule here and not its secrecy¹⁷. In other words, limiting access to evidence contained in the case file should be considered the exception rather than the rule¹⁸. Doctrine also stresses that the right of a party to have evidence access (the right to be

¹³ Order of the Antimonopoly Court of 15 May 1996, XVII Amz 1/96, not reported.

¹⁴ Order of SOKiK of 13 August 2003, XVII Amz 17/03.

¹⁵ Ibidem.

¹⁶ Ibidem.

¹⁷ Order of the Antimonopoly Court of 15 May 1996, XVII Amz 1/96. Similarly, when it comes to the court proceedings, the Court of Appeals in Warsaw in the order of 16 April 2009, VI ACa 1577/07, not reported.

¹⁸ Order of SOKiK of 16 December 2002, XVII Amz 17/02.

heard in the broader sense of the term) can indeed be limited but never completely excluded¹⁹ and that the restriction of this right must not extend to information vital in the given case, provided they are not simultaneously important business secrets²⁰.

The analysis of SOKiK's jurisprudence proves that the general principle of openness of case files to the parties of antitrust proceedings is very often not followed in its juridical practice. This realisation can raise doubts whether the right to be heard is respected to a satisfactory degree in Polish competition law cases.

In an order of 13 August 2003, SOKiK saw as irrelevant the fact that the limitation of evidence access was impeding, or indeed eliminating the possibility of a party to comment on the given evidence²¹. According to SOKiK, the protection of the interests of the parties is realised by the UOKiK President acting in the public interest²². These two statements should be considered as both wrong and impossible to maintain. They are incorrect because they deny the necessity of taking into consideration the right to be heard of the parties to antitrust proceedings when delivering a decision on the limitation of evidence access. They are inaccurate also because they misinterpret the role of the UOKiK President. As an institution, the authority is undeniably responsible for the protection of free competition in the public interest. But the fact that the UOKiK President is acting in the public interest is irrelevant to the parties accused of having breached competition law provisions – the UOKiK President, even if acting in the public interest, cannot substitute an undertaking in its own defence²³. When defending itself, the accused entity should possess a maximally broad access to evidence – referring clearly to the evidence upon which the facts proving an infringement are being established. It is not for the competition authority to decide if a given piece of evidence is useful or not for the defence of a particular undertaking²⁴. EU jurisprudence is known to have criticised a situation when a competition authority acts as both the entity notifying the objections as well as the body deciding the case, having at the same time a more detailed knowledge of the case file than the

¹⁹ K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2008, p. 841.

²⁰ S. Gronowski, *Ustawa antymonopolowa. Komentarz*, Warszawa 1996, p. 365.

²¹ Order of SOKiK of 13 August 2003, XVII Amz 17/03. These statement was made by the Court despite mentioning in the same order the principle of the openness of case file.

²² *Ibidem*.

²³ See the CFI judgments of 29 June 1995 in the case T-30/91 *Solvay v Commission* [1995] ECR II-1775, para. 83 and of 17 December 1991 in the case T-7/89 *Hercules Chemicals NV v Commission* [1991] ECR II-171, para. 54.

²⁴ See T-30/91 *Solvay v Commission*, para. 83.

defence²⁵. This is the reason why the right to be heard cannot be exercised by the UOKiK President instead of the undertaking concerned.

This is not to mean that the need for the protection of business secrets is being denied here but that it should be properly balanced with the right to be heard of other parties. Unfortunately, SOKiK is not seeking such balance. In an order adopted on 29 April 2003, the Court changed an UOKiK decision that was based on the assumption that the restriction of evidence access would exclude the right of the parties to consult documents upon which the authority was likely to base its final decision²⁶. So the decision of the UOKiK President was changed by SOKiK to the disadvantage of the right to be heard of the parties to the administrative proceedings.

SOKiK went even further in its order of 21 June 2006²⁷. The undertaking that lodged the appeal in this case was of the opinion that the decision of the UOKiK President on the limitation of evidence access had infringed the principle of active participation in administrative proceedings (Article 10 KPA). The company claimed also that this decision has made the defence of not participating in the competition restricting agreement impossible. SOKiK dismissed the appeal. The Court was of the opinion that for an undertaking, in order to duly exercise its right of defence, it is not indispensable to have access to information about the actions of others (the business secrets of whom were being protected) when it comes to the commercial relations with their business partners. Having said that, SOKiK noted that an undertaking's claim to gain full evidence access can be considered 'as a one-sided interpretation' meant to evade that entity's liability for an antitrust violation. Even if the information at stake was not crucial for the defence of the scrutinised undertaking, a fact that should be proven by UOKiK, the competition authority and the court that exercises juridical control over it, cannot justify the decision on the limitation of evidence access by denying that undertaking the possibility of exercising its right to be heard. With such an approach, the protection of business secrets will always prevail over the right to be heard. It seems that SOKiK is wrong to presume that a disagreement of an undertaking with a decision issued by the UOKiK President on the limitation of evidence access always proves that it wants to uncover the business secrets of others rather than simply exercise its own right to be heard²⁸.

The UOKiK President has made some suggestions concerning the correct understanding of the notion 'to the extent indispensable' – the concept that

²⁵ Ibidem.

²⁶ Order of SOKiK of 29 April 2003, XVII Amz 34/02, not reported.

²⁷ Order of SOKiK of 21 June 2006, XVII Amz 13/06.

²⁸ See the order of SOKiK of 30 May 2006, XVII Amz 21/06 and the order of the Antimonopoly Court of 30 October 1996, XVII Amz 3/96, LEX No. 56452.

specifies the permissible scope of the restriction of evidence access. It was stressed that to answer the question whether a given limitation is indispensable, it is crucial to assess whether the party has the ability to access most of the evidence collected²⁹. SOKiK put it slightly differently when it found that the lack of importance of a given piece of evidence can justify (in itself) the limitation of access to the case file with respect to this particular piece of evidence³⁰.

This opinion opened a discussion whether the importance of a given piece of evidence is the premise of the limitations falling under Article 69(1) of the Competition Act³¹. It is of relevance for the problem discussed in this article only when it comes to the conclusion that the limitation of access to evidence cannot refer to such data which is of key importance to the proceedings seeing as it constitutes the only proof of an infringement (and is a business secret or other secret protected by the law)³². From this perspective, the UOKiK President should, before delivering a decision under Article 69(1), also assess if the evidence the limitation of access to which is being requested (as a business secret or other secret protected by the law) is of such importance that it could be seen as the proof of the infringement of the Competition Act by the undertaking subjected to the limitation³³.

²⁹ See the opinion of the UOKiK President referred to in the order of the SOKiK of 29 April 2003, XVII Amz 34/02.

³⁰ Order of SOKiK of 30 May 2006, XVII Amz 21/06; order of the Antimonopoly Court of 6 December 1995, XVII Amz 2/95, not reported.

³¹ Compare the negative opinion on that [in:] G. Materna, 'Ograniczenie prawa wglądu do materiału dowodowego w postępowaniu przed Prezesem UOKiK' (2008) 4 *Przegląd Prawa Handlowego* 32-33. It was noted in jurisprudence that information that is not of importance to the proceedings cannot be considered to be evidence at all – order of SOKiK of 19 April 2004, XVII Amz 4/04, not reported; order of SOKiK of 22 June 2006 r., XVII Amz 67/05, not reported. It seems from this perspective, that the use in such a situation of Article 69(1) of the Competition Act would be irrelevant as it refers to the limitation of access to information that is considered to form part of the evidence of a given case – M. Bernatt, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009 (Art. 69, Nb 26).

³² See point III.3. below.

³³ For this reason, the opinion of the UOKiK President should be supported that the decision on the limitation of access to evidence cannot be issued if this results in the violation of the Article 74 of the Competition Act, that is, in a situation when the restriction would make it impossible for the undertaking to comment on the evidence upon which the charges in the case are based. Unfortunately, SOKiK did not share this opinion of the UOKiK President - see the order of SOKiK of 29 April 2003, XVII Amz 34/02. Still, SOKiK has in one of its decisions accepted that the business secrets that are protected as a result of a decision under Article 69(1) of the Competition Act, cannot be of big importance to the case - SOKiK order of 10 March 2004, XVII Amz 2/04, not reported.

SOKiK rulings suggest that the right to be heard is not properly balanced under Article 69(1) of the Competition Act with the protection of business secrets. The Court accepts that it is the task of the UOKiK President to establish whether the information, the limitation of access to which is being requested, is actually a business secret or not. SOKiK does not pay enough attention to the fact that the restriction of evidence access can take place only to the extent indispensable.

It is possible that in the name of the protection of business secrets, parties will not have access to information used by the UOKiK President to establish relevant facts of the case concerning the proof of an infringement, unless the authority conducts a proper analysis of whether revealing a given piece of evidence excludes, or disproportionately limits, the right to be heard. Such a situation would violate not only Article 10 and Article 81 KPA, it would also diverge from the approach applied by EU courts.

2. Looking for good examples - practice in the EU

Before taking a decision under Articles 7, 8, 23 and Article 24(2) of Regulation 1/2003³⁴, the Commission must according to Article 27 of that act give the scrutinised undertakings the opportunity of being heard on the matters to which objections have been raised. Thus, parties are entitled to have access to the Commission's case file subject to the legitimate interest of others as far as the protection of their business secrets is concerned³⁵.

At the same time however, the Commission is not allowed to *use (to the detriment of an undertaking party to the proceedings) the facts, circumstances or documents which it cannot, in its view, disclose. That is so because a disclosure refusal would adversely affect that entity's opportunity to effectively communicate its views on the truth or implications of those circumstances, on those documents or on the conclusions drawn from them by the Commission*³⁶. The right of access to the case file should be designed so as to ensure the effective exercise of the right of defence³⁷. Thus, the protection of confidential information (understood more broadly than business secrets in Polish antitrust

³⁴ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

³⁵ Article 27(2) of Regulation 1/2003.

³⁶ ECJ judgment of 13 February 1979 in case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, para. 14.

³⁷ ECJ judgment of 8 July 1999 in case C-51/92 P *Hercules Chemicals v Commission* [1999] ECR I-4235, para. 76.

procedure³⁸) is better balanced with the right to be heard under EU law³⁹. The preamble to Regulation 773/2004 explicitly states that where business secrets, or other confidential information, are necessary to prove an infringement, the Commission should assess whether the need to disclose each individual document is greater than the harm which might result from it⁴⁰.

Under EU law, the decision on the limitation of access to the case file cannot be directly challenged before the court by the undertaking subjected to such restriction. From this perspective, Polish rules guarantee procedural fairness better than the EU solution seeing as juridical control over administrative proceedings is immediate⁴¹. In fact however, judicial control in the EU, even if it is triggered only after the final decision is issued, is cautious when it comes to the search for the proper balance between the protection of business secrets and the right to be heard – it can even result in the annulment of a decision adopted by the Commission.

The failure to communicate a document constitutes a breach of the right of defence (and the right to be heard) if the undertaking concerned shows, first, that the Commission relied on it to support its objections concerning the existence of an infringement⁴² and that these objections could be proven only by reference to that document⁴³. However, in a case where an exculpatory document has not been communicated, the undertaking concerned must only show that its non-disclosure was able to influence (to its disadvantage) both the course of the proceedings and the decision reached by the Commission – it is sufficient for the undertaking to show that it would have been able to use the exculpatory document in its defence⁴⁴.

³⁸ For comment on this see point IV.

³⁹ See also C.S. Kerse, N. Khan, *EC Antitrust Procedure*, 5th Edition, Sweet & Maxwell, London 2005.

⁴⁰ See point 14 of the preamble to the Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ [2004] L 123/18.

⁴¹ Polish procedure is more accurate than the so called *AKZO procedure* whereby only the undertaking that claimed the protection of its business secrets, or other confidential information, is entitled to appeal the Commission order in this respect – see J.M. Joshua, ‘Balancing the Public Interest: Confidentiality, Trade Secret and Disclosure of Evidence in EC Competition Procedures’ (1994) 15(2) *European Competition Law Review* 77 and the judgment of 24 June 1986 in case 53/85 *AKZO v Commission* [1986] ECR 1965.

⁴² ECJ judgment of 9 November 1983 in case 322/81 *Michelin v Commission* [1983] ECR 3461, para. 7, 9.

⁴³ ECJ judgment of 25 October 1983 in case 107/82 *AEG v Commission* [1983] ECR 3151, para. 24-30; T-30/91 *Solvay v Commission*, para. 58.

⁴⁴ T-30/91 *Solvay v Commission*, para. 68; C-51/92 P *Hercules Chemicals v Commission*, para. 81; judgement of the ECJ of 21 December 2002 in case C-238, 244-245, 247, 250, 251-251 and 254/99 *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, para. 318;

The fact that the Commission takes into consideration both the need for proper protection of confidential information as well as the right to be heard is well illustrated by the fact that under paragraph 47 of the Commission Notice on the rules for access to the Commission files⁴⁵, after having obtained access to the file, the party is entitled to submit a reasoned request to the Commission if it requires knowledge of specific non-accessible information for its defence that are contained in the file⁴⁶. Such a request cannot be general. It has to go into detail with respect to each document the undertaking considers as useful for its defence⁴⁷.

The Notice considers that the qualification of a piece of information as confidential is not a barrier to its disclosure if such information is necessary to prove an alleged infringement ('inculpatory document') or could be necessary to exonerate a party ('exculpatory document')⁴⁸. The Commission is correct to believe that the need to safeguard the rights of defence of the parties, through the provision of the widest possible access to the case file, may outweigh the concern for the protection of confidential information of others⁴⁹. This can actually happen after an assessments by the Commission of such elements as: (1) the relevance of the information in determining whether or not an infringement has been committed, and its probative value; (2) whether the information is indispensable; (3) the degree of sensitivity involved (to what extent would the disclosure of the information harm the interests of the person or undertaking in question); (4) the preliminary view of the seriousness of the alleged infringement.

judgment of the ECJ of 6 March 2004 in case C-204/00 P, C-205/00 P, C 211/00 P, C-213/00 P, C 217/00 P i C-219/00 P *Aalborg Portland A/S and Others v Commission* [2004] ECR I-123, para. 74-76; judgement of the CFI of 1 July 2009 in case T-24/07 *ThyssenKrupp Stainless AG v Commission* [2009] ECR II-02309, para. 274.

⁴⁵ Commission Notice of 22 December 2005 on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No. 139/2004, OJ [2005] C 325/07.

⁴⁶ If the services of the Directorate-General for Competition are not in a position to accept the request and if the party disagrees with that view, the matter will be resolved by the Hearing Officer, in accordance with the applicable terms of reference of Hearing Officers – para. 47 of the Commission Notice on the rules for access to the Commission file.

⁴⁷ T-24/07 *ThyssenKrupp Stainless AG v Commission*, para. 267.

⁴⁸ Para. 24 of the Commission Notice on the rules for access to the Commission file.

⁴⁹ *Ibidem*. But see the opinion expressed before the judgment in case T-30/91 *Solvay v ommission* was delivered – C. Lavoie, 'The Investigative Powers of the Commission with respect to Business Secrets under Community Competition Rules' (1992) 17 *European Law Review* 30.

III. Distinction between business secrets and other confidential information as the solution?

1. Business secrets and other confidential information

Unfortunately, business secrets are not set apart from other confidential information in the Polish legal system. Under Polish law, a business secret is the entrepreneur's technical, technological, organisational or other information having commercial value, which is not disclosed to the public and with respect to which, the entrepreneur has taken the necessary steps to maintain its confidentiality⁵⁰. Article 69 of the Competition Act protects other secrets but only those that are liable to protection under separate legal provisions. This notion includes, among other things, an official secret (such as state secrets or professional secrets), a bank secret or an insurance secret⁵¹. Grounds for the restriction of access to evidence contained in the case file are therefore narrow and do not guarantee proper flexibility for the UOKiK President while deciding if a given piece of information can be revealed to the parties for the sake of the right to be heard. There is in particular no clear legal basis in Polish law for the protection of the anonymity of those submitting a written notification to UOKiK concerning a suspicion that competition-restricting practice has been used⁵². The confidentiality of the information sources of the President UOKiK useful when it comes to proving the infringement are in a similar situation⁵³. It can be said that, on the one hand, Polish law excessively protects business secret but, on the other hand, it does not guarantee proper protection of other confidential information that cannot be considered to be a business secret or other secret protected by other laws.

There is a clear distinction in EU law between business secrets and other confidential information. A business secret is a piece of information the disclosure of which could result in serious harm to the undertaking concerned including: technical and/or financial information relating to its know-how, methods of cost assessment, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists,

⁵⁰ See Article 11(4) of the Act of 16 April 1993 on combating unfair competition, *Journal of Laws* 2003 No. 153, item 1503.

⁵¹ See in detail M. Bernatt, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, art. 69, Nb 9.

⁵² See Article 86 of the Competition Act. When it comes to proceedings in cases of practices violating the collective interests of consumer see similarly Article 100 of the Competition Act.

⁵³ Information concerning how the evidence was collected cannot be considered to be a business secret – order of the SOKiK of 13 August 2003, XVII Amz 17/03.

marketing plans, cost and price structure as well as sales strategy⁵⁴. The category of ‘other confidential information’ includes information other than business secrets, which may be considered as confidential insofar as its disclosure would significantly harm a person or undertaking⁵⁵. This may apply to information provided by third parties about an undertaking that is able to place significant economic or commercial pressure on its competitors, trading partners, customers or suppliers⁵⁶. It is also legitimate to restrict the access of an undertaking to certain letters received from its customers since their disclosure might easily expose them to the risk of retaliation⁵⁷. Therefore, the notion of other confidential information may include information that would enable the parties to the proceedings to identify complainants or other third parties that have a justified wish to remain anonymous⁵⁸.

It can be observed that data considered to be protected under EU law as ‘other confidential information’ is not protected under Article 69 of the Polish Competition Act and is thus accessible to the parties (it is clearly part of the evidence contained in the case file). This can pose a serious risk not only from the perspective of procedural fairness (when it comes to the protection of interests of those not party to the proceedings) but also from the point of view of the effectiveness of the protection of free competition in Poland.

2. Other confidential information can be revealed, business secrets cannot?

The lack of a distinction between business secrets and other confidential information has significant consequences also for the safeguards of the right to be heard in the proceedings before the UOKiK President.

In proceedings before the Commission, the protection of ‘other confidential information’ is not seen as absolute and thus the need to safeguard the right to be heard may outweigh it⁵⁹. The threshold for disclosure is much higher

⁵⁴ Para. 18 of the Commission Notice on the rules for access to the Commission file.

⁵⁵ Para. 19 of the Commission Notice on the rules for access to the Commission file.

⁵⁶ *Ibidem*.

⁵⁷ *Ibidem*. See also judgments mentioned in the Commission Notice on the rules for access to the Commission file in case T-65/8 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389; case C-310/93P, *BPB Industries and British Gypsum v Commission* [1995] ECR I-865, and when it comes to merger cases judgments in case T-221/95 *Endemol v Commission* [1999] ECR II-1299 and case T-5/02 *Laval v Commission* [2002] ECR II-4381.

⁵⁸ Para. 19 of the Commission Notice on the rules for access to the Commission file.

⁵⁹ A. Erlandsson, ‘The Defendant’s Right of Access to Commission’s File in Competition Cases’ (1994) 2 *Legal Issues of European Integration* 159-160; M. Levitt, ‘Access to the File: the Commission’s Administrative Procedures in Cases under Articles 85 and 86’ (1997) 34 *Common Market Law Review* 1424-1427.

for business secrets, although even here it does not go over reasonable limits. Hence, confidentiality could be lifted if a given piece of information, despite being a business secret, would be also decisive for the determination of whether or not an infringement has taken place. The Commission may also decide that even if given data falls in to the business secret category, the fact that it will be revealed will not greatly harm the interests of the undertaking in question⁶⁰. However, business secrets must never be disclosed to third parties⁶¹. The protection in this respect is absolute.

The lack in Article 69 of the Competition Act of the notion of ‘other confidential information’ complicates the situation of the UOKiK President. Unlike the European Commission, the Polish antitrust authority may not simply classify a given piece of information as not being a business secret but as ‘other confidential information’ (where the harm resulting from its disclosure is smaller) and, in order to safeguard the right to be heard, to decide to disclose it to the parties.

3. Proposed solution

Not having the aforementioned possibility, the UOKiK President should properly apply the concept specifying the permissible scope of the limitation of access to evidence, that is, the notion of ‘to the extent indispensable’.

(1) First, the UOKiK President is supposed to check if the request for confidentiality at all refers to a business secret (or any other secret). (2) If yes, the authority should look for a reconciliatory solution that would make it possible to avoid revealing the business secret, for example, the confidential parts of the documents can be blacked out⁶². (3) If, however, this would exclude or disproportionately limit the right of the parties to be heard, the

⁶⁰ For example, as a general rule, the Commission presumes that information pertaining to the parties’ turnover, sales, market-share data and similar information which is more than 5 years old is no longer confidential – para. 23 of the Commission Notice on the rules for access to the Commission file. In this respect see T-24/07 *ThyssenKrupp Stainless AG v Commission*, para. 258.

⁶¹ 53/85 *Akzo v Commission*, para 28. When it comes to the protection of business secrets of the undertakings that were not found in breach of competition law but were mentioned in the decision – see CFI judgment of 12 October 2007 in case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission* ECR [2007] I-7723. See also M. Bernatt, ‘Ochrona tajemnicy przedsiębiorstwa’ [in:] Z. Brodecki (ed.), *Europa Urzędników*, Warszawa 2009, pp. 216–217.

⁶² In this respect see K. Lenaerts, J. Vanhamme, ‘Procedural Rights of Private Parties in the Community Administrative Process’ (1997) 34 *Common Market Law Review* 544.

UOKiK President must consider if the disclosure of a given business secret⁶³ will seriously harm the economic interest of the undertakings at stake. If not, such information must be disclosed. (4) When such harm is likely to happen, the UOKiK President should examine if it is possible to prove the infringement without the use of the business secret in question. (5) Finally, if that is not possible, the information that falls into the business secret category but constitutes the proof of the infringement must be revealed⁶⁴. Otherwise, a violation of Article 10 KPA would take place which, unless corrected by SOKiK on appeal (under Article 69(3) of the Competition Act), should result in the quashing of the final decision issued by the UOKiK President seeing as such a mistake could not be repaired during the appeal proceedings⁶⁵.

IV. Conclusions

Polish antitrust procedure needs to change in order to properly ensure the right to be heard of the parties to the proceedings before the UOKiK President when business secrets of other undertakings are at stake. Both the UOKiK President and SOKiK should always remember that limiting the access to evidence is permissible only to the extent indispensable. Thus, the limitation cannot extend to information that, even if it is a business secret, constitutes proof of the infringement of competition law⁶⁶. The question whether the limitation of evidence access under Article 69(1) of the Competition Act results in a disproportional restriction, or even exclusion of the right to be heard, must always be assessed before delivering a decision on that matter. Thus, the competition authority should follow the example of the approach used in the proceedings before the Commission, and not limit its analysis to the assessment whether a given piece of information is a business secret or not.

A change to the current solution can also be achieved by the introduction into the content of Article 69(1) of the Competition Act of the right to be heard as a premise to be taken into consideration when deciding about the indispensable

⁶³ Similarly, however, as in the UE business secrets can never be disclosed to third parties or to the public at large.

⁶⁴ Some scholars claim that the essence of the practice restricting competition cannot be considered to be a business secret – C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 669.

⁶⁵ See judgment of the Supreme Court of 19 August 2009, III SK 5/09, not reported, and M. Bernatt, 'The control of Polish courts over the infringements of procedural rules by the competition authority. Case comment to the judgement of the Supreme Court of 19 August 2009 - *Marquard Media Polska* (No. III SK 5/09)' (2010) 3(3) *YARS*, p. 300.

⁶⁶ See point III.3.

extent of an access limitation. This is however a proposal of a *de lege ferenda* character. Such amendments could be avoided if the interpretation of Article 69(1) of the Competition Act changes in the suggested way both in the case of the enforcement practice of UOKiK and jurisprudence of SOKiK.

There is however a clear need for the introduction into Article 69 of the protection of confidential information other than business secrets that would cover a broader, more flexibly understood notion of information the disclosure of which would harm the undertaking's interest to an extent smaller than business secrets. Included in this category should also be the information that needs to be protected to ensure the effectiveness of the protection of free competition (e.g. data relating to the identity of those notifying a suspicion of a competition law violation and information on the sources of the UOKiK President's evidence).

The introduction of the notion of 'other confidential information' would be helpful also when it comes to the search for an appropriate overall balance between the right to be heard and the protection of confidential information. In the case of business secrets, refusal to limit the access to evidence of other parties could take place only exceptionally. In the case of other confidential information, access could be given more often considering their less important nature.

Changes of both interpretation and the content of Polish legal rules should be accompanied by broader reforms. Especially in the organisational framework of the UOKiK President's office, an independent functionary could be created responsible for the realisation of the right to be heard and to guarantee a high level of protection of business secrets and other confidential information. Moreover, the authority's intended practice concerning access to its case files and the way it classifies information could be published in a separate set of guidelines⁶⁷. This would improve legal security for undertakings.

Literature

Banasiński C., Piontek E. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2009.

Bernatt M., 'Ochrona tajemnicy przedsiębiorstwa' ['Protection of business secret'] [in:] Brodecki Z. (ed.), *Europa urzędników [Europe of Officials]*, Warszawa 2009.

⁶⁷ Guidelines describing i.a. the UOKiK President's leniency policy has already been published. There are no obstacles to continue this practice with regards to other issues connected with the proceedings before the UOKiK President.

- Bernatt M., 'The control of Polish courts over the infringements of procedural rules by the competition authority. Case comment to the judgement of the Supreme Court of 19 August 2009 - *Marquard Media Polska* (No. III SK 5/09)' (2010) 3(3) *YARS*.
- Erlandsson A., 'The Defendant's Right of Access to Commission's File in Competition Cases' 1994 (2) *Legal Issues of European Integration*.
- Gronowski S., *Ustawa antymonopolowa. Komentarz [Antimonopoly law. Commentary]*, Warszawa 1996.
- Joshua J.M., 'Balancing the Public Interest: Confidentiality, Trade Secret and Disclosure of Evidence in EC Competition Procedures' (1994) 15(2) *European Competition Law Review*.
- Kerse C.S., Khan N., *EC Antitrust Procedure*, 5th Edition, Sweet & Maxwell, London 2005.
- Kmieciak Z., 'Idea sprawiedliwości proceduralnej w postępowaniu administracyjnym (Założenia teoretyczne i doświadczenia praktyki)' ['The concept of procedural fairness in the administrative proceedings (Theoretical grounds and practical experience)'] (1995) 10 *Państwo i Prawo*.
- Kohutek K., Sieradzka M., *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2008.
- Lavoie C., 'The Investigative Powers of the Commission with respect to Business Secrets under Community Competition Rules' (1992) 17 *European Law Review*.
- Lenaerts K., Vanhamme J., 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) 34 *Common Market Law Review*.
- Levitt M., 'Access to the File: the Commission's Administrative Procedures in Cases under Articles 85 and 86' (1997) 34 *Common Market Law Review*.
- Materna G., 'Ograniczenie prawa wglądu do materiału dowodowego w postępowaniu przed Prezesem UOKiK' ['Limitation of access to evidence in the proceedings before UOKiK President'] (2008) 4 *Przegląd Prawa Handlowego*.
- Skoczny T., Jurkowska A., Miąsik D. (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2009.
- Skoczny T., 'Polish Competition Law in the 1990s – on the Way to Higher Effectiveness and Deeper Conformity with EC Competition Rules' [in:] 'Spontaneous Order, Organization and the Law. Roads to a European Civil Society' (2001) 2:3, 2:4 *European Business Organization Law Review*.
- Summers R., 'Evaluating and Improving Legal Process – A Plea for "Process Values"' (1974) 60 *Cornell Law Review*.