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Competition Law And Media Plurality: Regional Court in Warsaw Intervenes In Media Merger Cleared By The Polish NCA

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In February 2021, the Polish Competition Authority (Prezes Urzędu Ochrony Konkurencji i Konsumentów, UOKiK) [cleared](#) the media merger between Polska Press sp. z o.o. and PKN Orlen S.A. The Polish Commissioner for Civil Rights Protection had concerns about the impact of the concentration on media plurality. He appealed with the Competition Division of the Regional Court in Warsaw and additionally filed for a suspension order. In April 2021, the Court [granted](#) the suspension. However, the decision itself is based on competition law grounds. The Court did not touch the question of media plurality.

A handful of procedural clarifications

The Competition Division of the Regional Court in Warsaw, hearing all challenges against the decisions and orders adopted by the UOKiK does not grant injunctive reliefs very often. One of the reasons – and probably the most important one – is the fact that the decisions of the national competition authority in Poland are in principle not immediately enforceable, save for interim measures in administrative proceedings concerning practices restrictive of competition or consumer protection. Acting on general principles of administrative procedure, UOKiK may decide to immediately enforce its other decisions in urgent instances, including an imminent threat of a grave loss for the national economy.

By way of explanation, the plaintiff (appellant) may seek duplicate interim judicial protection against the public enforcement of competition law. The reason being the competition dispute is adjudicated by the general judiciary rather than the administrative courts whose powers to make interlocutory orders in Poland are limited to a *référé-suspension*.

The first possible form of injunctive order is the one made on general terms for non-pecuniary claims. This gives the Court the possibility to grant tailored provisional remedies as the catalogue thereof is open-ended. An application for injunctive relief can be submitted even ahead of the filing of the appeal (challenge) against the contested decision or order, arguably directly to the Court. The injunctive order is normally made *in camera* and *a parte*, and is always reviewable. The grant of the injunction is primarily premised over a chance of success of the action in the main proceeding as well as the applicant's legal interest (risk of loss – not necessarily elevated to the

threshold of irreparable harm).

The appellant may also seek the suspension of operation (execution, enforcement) of the challenged act, which is a dedicated provisional remedy set out specifically for disputes arising out of the public enforcement of competition law. The suspension request lacks comprehensive regulation in the Polish Code of Civil Proceedings. While authors agree that such an application should be held to a test similar to the one conducted by the administrative judiciary, two important points are slightly more blurry. First, the suspension order is not appealable, although some authoritative scholars believe it should be reviewable (by analogy to similar orders made with respect to payment orders in a document-based procedure). Second, the timeline of the filing is less obvious, but in practice, the applicant should be able to make the suspension request directly to the Court before the case file is relayed by the authority.

Background of the case at hand

By a decision of 5 February 2021 no. DKK-34/2021, UOKiK gave his consent to a concentration involving the acquisition of control over Polska Press sp. z o.o. by PKN Orlen S.A. Polska Press is a publisher of ca. 20 regional dailies, 120 local weeklies and some free magazines, e.g. for farmers. It also runs a website integrating news from c.a. 500 local units across Poland. PKN Orlen is a state-controlled listed entity, operating in various segments and parts of the value chain of the chemical industry (from prospecting and extracting, through refinement to trade, both wholesale and retail through petrol stations). Through recently acquired RUCH, PKN Orlen also operates in the retail segment, including the distribution of press (network of kiosks).

At the administrative phase, the Commissioner (Ombudsman) for Civil Rights Protection (Rzecznik Praw Obywatelskich, RPO) already concerns about the impact of the concentration on media plurality.

The Commissioner then challenged the above decision by filing an appeal against the decision on 5 March 2021. Additionally, on 8 March 2021, the Ombudsman applied directly to the Court to suspend the enforcement of the said decision, including a request for injunction from exercising any shareholding rights from the shares acquired as part of the implementation of the concentration, in particular the right to vote.

According to the Commissioner's [public statement](#), he had submitted the challenge for the fear of restriction of the freedom of the press. The Ombudsman believed UOKiK should have taken other public policy goals and concerns into consideration, not only competition law concerns.

Court decision

By its order made on 8 April 2021, the Regional Court in Warsaw decided to suspend the clearance decision of the competition law enforcer.

The Court concluded that the stay of execution of the decision pending a judgment in the main case was necessary and indispensable, in particular in order to preserve the ex-ante nature of the control of concentrations. The Court also noted the risk of irreversible anti-competitive effects which

might arise out of the implementation of the contested decision.

The Court further stated that it was not possible to determine whether the implementation of the concentration would not result in a significant restriction of competition on the market, in particular through the creation or strengthening of a dominant position on the market.

Open questions

Quite surprisingly no reference was made in the Court's order to media plurality, freedom of the press, journalistic independence and other such values. Instead, the order seems to merely indicate that it was the Court's intention to safeguard the possibility of *de facto* repeating the scrutiny which at the administrative stage did not give rise to UOKiK's concerns. The question is whether the order, in this case, is meant to protect the public interest the Ombudsman was seeking protection for or conserve the Courts competence. The formulation of the Court's order is vague and reflective of the language of legislative acts.

The order is a classic suspension order, not an order on the grant of interim measures. No measures were directly addressed to the parties to the merger notification procedure. The parties could have relied on the administrative decision from the moment it was served onto them as from this moment the NCA was bound by its own decision *vis-à-vis* the parties. This flaw, although seemingly procedural, might have rendered the court order in fact non-enforceable.

It is also at least debatable if such an order should be made without hearing the opposing party, the competition law enforcer, and the undertaking(s) concerned. There are no compelling arguments in favour of a strictly *a parte* decision. A failure to allow the opponent to submit their pleading in writing (rebuttal, written observations) or frustrates the [right of defence](#).

The fact that a judicial order producing such far-reaching effects on the business is not appealable raises concerns both from a viewpoint of protection of UOKiK independence as well as a right to an effective remedy. The suspension order made *a parte* and *in camera* can be appealed against neither by the NCA nor by the undertaking concerned (addressee of the challenged decision), which violates the "equality of arms" principle (*Waffengleichheit*). It is meant to produce far-reaching consequences and be relatively durable, long-lasting (until the judgment has been handed down), which is objectionable from a viewpoint of the effectiveness of a system of remedies.

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This entry was posted on Thursday, August 12th, 2021 at 11:00 am and is filed under [Media](#), [Merger control](#), [Poland](#)

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