

# The Influence of the “Important Public Interest” Clause on the Competitiveness of Undertakings in Poland

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**Abstract:** In Poland, the public interest clause plays an important role in the legal order, including in delimitating the scope of freedom of the economic activity. The important public interest clause implies and includes the protection of values highly appreciated. The Constitution of the Republic of Poland indicates that values highly appreciated are: security of a state, public order, protection of the natural environment, protection of health or public morals and protection of freedoms and rights of other persons. There will be indicated, what other values may be considered as values highly appreciated. When grading the importance of public interest, there may appear conflicts of law and conflicts of interest which may need weighing. One of the possible field of conflict is the limitation of the freedom of competition. This publication covers legal analysis of the impact of the important public interest clause on the competitiveness of entrepreneurs.

**Keywords:** Competitiveness, Economic activity, Important public interest, Limitations of economic activity; Poland, Public interest; Undertakings, Values highly appreciated.

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## I. INTRODUCTION

Freedom of economic activity in Poland is one of the constitutional principles. Article 32 item 1 of Constitution of the Republic of Poland [1] provides that the taking up, conducting and ending economic activity is free for everyone on equal terms, subject to the conditions laid down by law. The postulate of basing the free market economy on free competition results from the essence of the principle of social market economy regulated in article 20 of Constitution. The scope of the freedom of economic activity is further clarified in the several statutes. The main statute regulating the undertaking above constitutional requirements is the Act on Freedom of Economic Activity [2]. It must be stressed out, that the freedom of economic activity principle is not unlimited and does not mean arbitrariness in its conduct. There are different legal bases for limiting conduction of economic activity. The establishment of the possibility of limiting the constitutional principle of freedom of economic activity in often done by the “important public interest” clause.

The purpose of this article is to determine the influence of the important public interest clause on the competitiveness of undertakings in Poland. In order to do so, the identification of the legal regulations which introduce a justified limitation of freedom of economic activity must be done. These are those legal regulations, which limit this freedom, because of the need to protect values highly appreciated. On the basis of the above considerations, a legal analysis of the impact of the relations of the limitations of economic activities, resulting from the use of the important public interest clause on the competitiveness and innovativeness of entrepreneurs, will be carried out.

## II. THE SCOPE AND MEANING OF THE “IMPORTANT PUBLIC INTEREST” CLAUSE

In Poland, the public interest clause plays an important role in the legal order. It must be noted, that there are two main public interest clauses in the Polish law: one that can be called “ordinary” public interest and important public interest. So, the question must be raised: what is the difference between these clauses?

First of all, when looking at the two clauses, it’s noticeable that the public interest referred to is somehow “important”. This implies, that there exists a public interest, which is not important. This is not a true assumption, the proper explanation would be that the important public interest is more meaningful and significant than the usual, “ordinary” one. The usual public interest clause is used in the administrative law or public economic law. For example, when dealing with anticompetitive agreements between undertakings or cases of abuse of a dominant position on the relevant market [3].

Secondly, the acts in the Polish law system rarely define public interest. One of the exceptions is the act on planning and spatial development [4]. The importance and scope of the term has been a subject of research interest for a long time [5], also in Poland [6], drawing attention to the various implications for shaping public policy, sometimes even treating the theory of public interest as anachronism [7]. It is generally treated in the literature as a legal clause, but sometimes – interestingly – as political or sociological in nature [8].

Thirdly, there is the question whether "important public interest" and "public interest" are identical. It can be stated that since the legislator distinguishes these two concepts, by adding the adjective "important" to the term "public interest", both terms will not be of identical meaning. Due to the existence of the concepts of "public interest" and "important public interest" the question about catalogs of values which underline these various public interests arises. It must be said that not all public interest can be considered as “an important public interest” [9]. Consequently, the next question can be posed immediately: what determines that the public interest is gaining an additional "validity", what suggests that it is a concept that is distinct from "ordinary" public interest?

Moreover, the term "important public interest" is a general clause, an indeterminate term. The source of the addition of “importance” derives from the article 22 of Constitution, which article allows for the limitation of freedom of economic activity because of an important public interest. The important public interest clause implies and includes the protection of values highly appreciated. The Constitution of the Republic of Poland directly indicates that values highly appreciated are: security of a state, public order, protection of the natural environment, protection of health or public morals and protection of freedoms and rights of other persons. It means that the existing or future need to protect these values indicates the existence of the important public interest [10]. What about the values, which are outside the scope of article 31 item 3 of Constitution mentioned above? The answers of that question can be found in the jurisprudence of the Constitutional Tribunal. According to consequent judgements of the Constitutional Tribunal, any case of necessity for the protection of the goods mentioned in article 31 item 3 of Constitution (security of a state, public order, protection of the natural environment, protection of health or public morals and protection of freedoms and rights of other persons) falls within the clause of "important public interest" within the meaning of article 22 of Constitution. What is more, it also applies to values not mentioned in article 31 item 3 of Constitution [11]. It should be also noted that the values highly appreciated are not only legal but also non-legal. The most obvious example is the morality mentioned in Constitution. The prerequisite of "public morality", however, allows for legal interference in such activities which are commonly considered socially harmful [12]. The possible values, which could be considered as underlying the important public interest are: issues relating to human dignity, the protection of minors and vulnerable adults and animal welfare; the preservation of the financial balance of the social security system; the prevention of fraud; the protection of creditors; safeguarding the sound administration of justice; road safety; the protection of intellectual property; the promotion of the national language. However, in order to recognize a given value as a justification the application of the important public interest clause, the proper provision or judgement must be issued. This has not happened so far.

In the light of the above considerations, it should be concluded that the fact that a given good has not been included in the catalog of article 31 item 3 of Constitution does not prejudice that other protected goods are deprived of the qualification of "importance" [13]. An example of such good can be the energy security [14]. The Constitutional Tribunal in its Judgment of 25 July 2006 [15] pointed out that access to energy resources is essential in terms of the existence of society and individuals, sovereignty and the independence of the state - and thus the protection of human and civil liberties and rights. According to the above judgement, managing of energy resources determines the possibility of realizing the common

good mentioned in article 1 of the Constitution. The Constitutional Tribunal then argues that in the field of energy management there is the interaction of various constitutional values and principles, including freedom of economic activity (article 22 of the Constitution), but also the security of citizens and the principle of sustainable development (article 5 of the Constitution) and the principle of environment protection (article 74 item 1 and 2 of the Constitution).

Thus an important public interest can be perceived as the first and most important of the values highly appreciated, in a sense "consuming" other values and forming the basis for legal protection of other values. What is more, any of the values which is already legally protected is dictated by an important public interest. Also, the other values that do not fulfill the requirements of an important public interest may indeed be worthy of legal protection but cannot constitute a prerequisite for the limitation of freedom of economic activity. During introducing new limitations of economic activity in turn, the state must be guided by an important public interest [16].

Therefore, the important public interest clause must remain an open clause. The task to determine what an important public interest is, belongs to the legislator, or jurisprudence. The interpretation in this regard must be done taking into account the constitutional provisions.

### **III. SOME REFLECTIONS ON THE STATE'S IMPACT ON THE COMPETIVENESS OF UNDERTAKINGS FROM THE LEGAL POINT OF VIEW**

When analyzing the state's impact on the competitiveness of undertakings the duality of the role of the state emerges. The first role is that the state acts as the organizer of the economic market. This role is not solely organizing (meaning creating legal conditions for competitive market economy, but also including stimulating, regulating and supervising. In order to do so, the state has several available legal means. These include property management, by providing: land for building, public facilities, building and sharing infrastructure. Another legal means are planning acts, including short- and long-term economic plans and land planning acts. There are of course different fiscal instruments, f.e. differentiation of taxes and fees, setting prices for provided property and rendered services of general interest. Different acts on protection and development of competition and competitors can be enacted as well. The creation of competition can be supported by direct and indirect incentives. The direct incentive could be providing financial resources for start-ups and creation of the special economic zones. The example of indirect incentive could be imposing import duties. The functioning of the competition and monitoring the market is ensured by the various authorities, whose activity is regulated by the appropriate acts.

In its second role, the state acts as an active participant on the market. This part of the activity is on a far smaller scale than the first one. This kind of activity could be assessed positively as this activity should be limited to the situation where it is necessary to meet the priority needs of the population and the public interest [17]. This kind of activity can be done by f.e. by means of public private partnerships.

### **IV. DOES THE IMPORTANT PUBLIC INTEREST CLAUSE RESTRICT THE COMPETITIVENESS OF UNDERTAKINGS?**

When analyzing the relation between the state and the economy, there is always a question about the limits of this intervention. In the analyzed case, the following question should be asked: why the important public interest clause plays an important role in delimitating the scope of freedom of the economic activity?

The important public interest clause can be regarded as restricting the competition. For example, the limitation of economic activity in the form of the requirement to obtain a license or a permit to carry out such activity is considered constitutionally acceptable if it carries out an important public interest [18]. To be more specific, the limitation of the trade of alcoholic beverages in the form of the requirement to obtain a permit for this trade has found constitutional justification in universally recognized values [19]. The limitations of the sale of alcohol, including the ban on alcohol sales to minors, refer to universally accepted values and do not require a broader justification [20].

The important public interest is also connected with the protection of health, the good of the family, the public order and the security of citizens. The Constitutional Tribunal states that, in the light of Constitution, ensuring the proper development of children and young people and the protection against demoralization resulting from the consumption of alcohol is

"an important public interest" mentioned in article 22 of Constitution. As the Tribunal indicates, although the notion of "important public interest" is an evaluative category, the importance of the public interest which dictated a solution challenged by the court asking the legal question, cannot be ignored. The legislative's striving to limit the sale of alcohol, and in the case of minors even not to limit but to eliminate its consumption, is justified. Full freedom of economic activity in this area could threaten not only the security of the state and citizens, but also public order. Article 72 item 1 of Constitution has undoubtedly affected the interpretation of article 22 of Constitution. According to this provision, the state has the obligation to defend a child (in the constitutional sense the term; "child" means a person under the age of 18) and its rights, not only from demoralization but from against violence, cruelty and exploitation resulting e.g. from the abuse of alcohol by itself and by close people. The social character of the market economy, underlined in article 20 of Constitution constitutes an additional systemic justification for the creation of the limitations of freedom of economic activity [21].

Taking the article 31 of Constitution directly, the highly appreciated values which underlay the use of the important public interest clause constitute the restriction of the competitiveness of undertakings. But, should they really be perceived as restrictions? An alternative approach will be presented below.

## V. CONCLUSION

The existence of the relation between values highly appreciated protected by the statute in economic activity and the competitiveness of undertakings is evident. One of the most important issues determining the answer to the question if the important public interest clause goes together or contradict the competitiveness of undertakings is the observation, that there is a need to preserve values highly appreciated, which were explained above. This necessity of protecting values highly appreciated should justify the existence of a barrier (like the necessity of obtaining a license) in undertaking or conducting the economic activity. The most common case in Poland is that the individual value protected by the statute limits in some way freedom of conducting economic activity in a specific type of activity.

It is important to notice that the influence of state decisions on the need to protect values highly appreciated plays an important role in economic activity. Legal acts that impose the limitations of economic activity because of this protection most often weigh two values, e.g. freedom of economic activity on the one hand and the environment protection on the other, or freedom of economic activity and consumer protection. The result of this weighing in these cases is granting the primacy of a particular value highly appreciated over freedom of economic activity. It is not debatable whether these values should be protected, as it is indisputable. But it is possibly to consider the extent of this protection, i.e. whether further limitation of freedom of economic activity by increasing the scope of protection of statutory protection is or is not justified.

Therefore, the question should be asked to what extent this standard should be implemented. It seems that in this case we cannot talk about minimum standards, precisely because those values are highly appreciated, the guarantee of this protection should be full.

Another issue is that the limitation of the competitiveness of undertakings should not be excessive. What is more, values highly appreciated should be an ultimate goal and boundary of the barriers introduced, they are admissible as long as they are able to guarantee the protection of these values and to the extent that the standard of protection is implemented [29]. If the limitations would be excessive, the competition would be disrupted by the too heavy burdens, so it would not be possible to create or maintain competition. Another task for the legislator is to ensure the equality of imposed limitations for all entrepreneurs.

Therefore, the important public interest clause should be perceived as a legal frame for undertaking the economic activity and the competitive behavior of undertakings. The undertakings can conduct their activities, as long as they don't exceed that frame. If the values are treated together, they create conditions for conducting the economic activity.

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