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Settlement of Conflicts of Values in the Area of Public Commercial Law. Comments in Relation to European Union Law

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Abstract: The author identifies two ways in which value conflicts can be solved in the area of public commercial law and proves that the method of weighing values and finding a compromise solution is predominant because of the strong politicization of public commercial law and the need to respond to dynamic changes in the economy. He also makes other suggestions on the values present in public commercial law and raises issues, among others, of Europeanisation of law and the impact of European Union law on the resolution of value conflicts, as well as the problems of economization of law and judicial review of decisions that are carried out in conditions of strong politicization.

1. Introduction

It is evident that public commercial law is an area of conflict of values. In fact, the laws, policies and other spheres of social life are implementing the formulas of justice adopted in a society, which are designed to determine how goods and burdens are to be distributed in society. As Zygmunt Ziembiński, an outstanding Polish law theorist, once said, very complex justice formulas are used in practice. Defining these formulas of justice is complex, but depends primarily on how society is organized. It is different in communities where important decisions related to actions of a group or

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community are taken by one-man or by a small group of individuals – in these communities, there is so-called monocentric governance – and in communities where there is polycentric governance and decisions are being shaped in multiple centres, although there must also be an agreement between these independent decision-making centres to some extent[12]. From this point of view, it is interesting that when the market method is the basic method of determining what is right in the economy so, in other words, it is a reference point for the assessment of economic processes, then there is a certain highly polycentric order in the area of the economy in which management processes are the result of an unimaginable number of economic decisions, relatively insignificant decisions. Thus, a certain social order is created where the needs of people are met in some way. At the time, Fryderyk Hayek was very fascinated by this spontaneously realized market order that he named catallaxy[3]. In his assessment, the great advantage of such a market-based order and society is that there is no existing prioritization of objectives, no specific common objectives, but everyone can act for their own purpose[4]. The situation is changing as the State enters into the functioning of the market mechanism, when the State undertakes to achieve specific common objectives and assumes responsibility for managing economic processes. Then we are moving toward a monocentric order and, at the same time, economic goals are becoming secondary. Kazimierz Styczkowski, another outstanding Polish lawyer, has rightly pointed out that the value system (axiology) adopted in the current legal order instrumentalizes the economy, which is no longer oriented solely by economic objectives. In this context, this author argued that the model of social market economy in the meaning of the Polish Constitution[5] is not

1 Zygmunt Ziembiński, *O pojmowaniu sprawiedliwości* (Lublin: "Daimonion", 1992), 33.

2 Ziembinski, *O pojmowaniu sprawiedliwości*,157–158.

3 The term catallaxy was used by Friedrich Hayek to describe the order brought about by the mutual adjustment of many individual economies in a market – Friedrich August von Hayek, *Prawo, legislacja i wolność: Nowe sformułowanie liberalnych zasad sprawiedliwości i ekonomii politycznej*. Translated by Grzegorz Łuczkiewicz (Warsaw: Wydawnictwo Aletheia, 2020), 351–353.

4 von Hayek, *Prawo, legislacja i wolność*, 353–354.

5 See Article 20 of The Constitution of the Republic of Poland, Journal of Laws 1997, no. 78, item 483, as amended.

only an economic order but also a social order[6]. The problem is, however, that there are plenty of values and objectives pursued in the economic policies of the State and consequently in the commercial law and the question arises of how to resolve all these value conflicts. Kazimierz Strzyczkowski concludes that the functioning of public commercial law depends on the existence of a clear hierarchy of values[7]. However, we may ask, in what sense can one speak about the hierarchy of values in public commercial law? Does this involve some permanent way or one method of resolving value conflicts? Wojciech Jankowski once asled a straight question: Is it possible at all to obtain a universal and effective way (model) of resolving conflicts of value? He posed that question in the context of the par excellence commercial case when the Polish Constitutional Tribunal ruled on the unconstitutionality of the provision prohibiting the slaughter of animals for ritual reasons[8].

It seems that the way to deal with conflicts of values in law is an extremely complex issue and that it is difficult to talk about some abstract hierarchy of values. However, we can point out that, firstly, conflicts of values are settled within a certain institutional system, i.e. by the authorities or bodies designated by the State, which operate following certain procedural rules. It can be seen that this institutional system is becoming more and more complex, which is certainly because more and more difficult issues as regards values are being dealt with[9]. Secondly, it is rather not possible to talk about a single way or method of resolving conflicts of values in law. At most, we can distinguish two methods of resolving conflicts of values in law. One method is that we are giving priority to one value over another value in some abstract way. The second method is that we weigh values and try to find the best solution under the specific circumstances of the case. It seems that the scope of the latter method is much wider under public commercial law[10], which is probably a general

6 Kazimierz Strzyczkowski, *Prawo gospodarcze publiczne* (Warszawa: LexisNexis, 2008), 35.

7 Strzyczkowski, *Prawo gospodarcze publiczne*, 34.

8 Wojciech Jankowski, "Krowy i kury prawa nie mają," Essay, in *Fascynujące ścieżki filozofii prawa 2*, ed. Jerzy Zajadło and Kamil Zeidler (Warszawa: Wolters Kluwer, 2021), 112.

9 For example, related to genetic engineering or artificial intelligence

10 A similar conclusion is reached by Rafał Blicharz – See Rafał Blicharz, "Ważenie wartości w publicznym prawie gospodarczym," Essay, in *Aksjologia publicznego prawa gospodarczego*, ed. Andrzej Powałowski (Warszawa, Poland: Wydawnictwo C.H. Beck, 2022), 32.

trend in contemporary law, but also stems from the specific features of public commercial law. In particular, it is recognized in legal science that there is a move away from the syllogistic model of application of legal rules toward the so-called argumentation model of the application of the law[11]. As regards the specific feature of public commercial law, this law is, firstly, driven by the dynamics of change in economic life, i.e. it is assumed that public commercial law should respond adequately to the needs of the economy and should be flexible. Secondly, public commercial law is the law of state interventionism in the economy[12] and the prevailing doctrine of state interventionism in the economy is characterized by the fact that there are many objectives, tasks and values to be achieved, and they are pursued in a parallel way. Therefore, public commercial law appears to be an area where there are many conflicts of values and the weighting of these values and finding compromise solutions plays a particularly important role. We observe, therefore, that the science of public commercial law has a constant interest in the question of conflicts of values.

It can also be said that in the area of public commercial law evaluations are to a large extent carried out at the level of the law enforcement bodies, i.e. the entities of public authority which are responsible for applying the law are very much looking for the values to which the legislator refers and they weigh these values. They are therefore equipped with the appropriate competencies. Consequently, there is also a problem of judicial control in this regard, if the bodies applying the law set values and balance values. In particular, there is a problem with the scope of judicial review of the decisions of these bodies. The point is that judicial control relating to the concepts of 'fairness' or 'purpose' always makes problems. Finally, it is interesting to note the context of the European Union law and, in this respect, it is

11 Lech Morawski, *Główne problemy współczesnej filozofii prawa: Prawo w toku przemian* (Warszawa: LexisNexis, 2006), 199–208.

12 Likewise, Jan Grabowski considers that the subject of public commercial law is the behaviour of public authorities, which are based on the State's intervention powers, with which the clean market mechanism is adjusted and limited. The market mechanism itself is based solely on the criterion of individual economic efficiency – Jan Grabowski, "Przedmiot i Zakres Publicznego Prawa Gospodarczego," Essay, in *System prawa administracyjnego. Publiczne prawo gospodarcze*, Tom 8a, ed. Roman Hauser, Zygmunt Niewiadomski and Andrzej Wróbel (Warszawa, Poland: Wydawnictwo C.H. Beck, 2018), 23.

noteworthy that in the conflicts of values that occur in public commercial law, the basic principle of preference is to maintain and deepen integration within the European Union. This rule can be reconstructed on the basis of the principles of European Union law: sincere cooperation, the effectiveness of European Union law, solidarity between the European Union and the Member States.

2. Balancing values in public commercial law

If we look at how conflicts of values in law are handled, then we can see that there are essentially two methods. One method is that one value takes precedence over another value. For example, economic freedom understood as an individual's right is such a value that must give way to an important public interest, i.e. this value is limited by an important public interest under Article 22 of the Constitution of the Republic of Poland and in the area of limitation the person concerned may not invoke a personal right. The second method is to come to an agreement on values and find the best solution in the specific circumstances of the case. The values which clash with one another are weighed and we try to realize these values together in the circumstances of the case. In other words, none of the norms that contain conflicting values is prioritized, but a compromise resolution is sought in the specific circumstances of the case. We are looking for the possibility to maintain the validity of each value. The circumstances of a particular case become important to find the best solution and we can also say that a weighting of value takes an important role. There are therefore two methods for resolving value conflicts, the tertium non datur. By the way, this observation has become the basis for Ronald Dworkin to distinguish rules and principles. Let us recall that this distinction implies that there are such legal norms (principles) when conflicts need to be resolved to take into account the relative importance of each norm and in such situations, there is no precise method of measurement for decision-making and decisions that one norm is more important than others are controversial. The situation is different in the case of legal norms, which contain rules. These norms have such specificity that if such norms clash, one of them cannot be enforced[13].

[13] Ronald Dworkin, *Biorąc prawa poważnie.* Translated by Tomasz Kowalski (Warszawa: Wydawnictwo Aletheia, 2021), 68–69.

There is no need to assess which method of resolving conflicts of values in law is better, but generally, the latter method seems to be more widely used in the current legal situation. This is the opinion of many legal theory representatives. For example, Lech Morawski, when analyzing the fundamental problems of applying the modern law, noted that the procedures for applying the law are now evolving from the syllogistic model of application of legal norms toward the so-called argumentation model of the application of the law. He added that for the latter model, the idea of "reconciliation over judging" was an inspiration[14]. Also Marek Zirk – Sadowski noted that after Poland joined the European Union, the ideology of the law is changing and therefore he talks about a new type of law, which he calls a responsive law (in polish: prawo responsywne). The characteristic feature of this law is that the law aims to have a diverse and adaptive impact on social reality, that the law is "open" for social needs and aspirations, that the legal rules and subject to legal principles and "open", and the rationale for legal decisions is teleological[15]. Furthermore, it also appears that the specific nature of public commercial law itself causes value conflicts to occur in this area with increased severity and it is relatively more important than in other fields to balance the values. Public commercial law is, after all, the law of state interventionism in the economy, the law of an active state in the economy, which takes responsibility for economic processes and related social relations, and the scale of the state's intervention in the current economy is nowadays very broad. Cezary Kosikowski analysed the objectives of modern government (state) economic interventionism in the economy and the associated legal instruments and he concluded that, at present, economic interventionism is pursuing more far-reaching social and civilizational objectives than it was before[16]. We are therefore dealing with regulations that set the objectives of sustainable development, development policy, closed-loop economy, environmental or climate protection,

14 Lech Morawski, *Główne problemy współczesnej filozofii prawa: Prawo w toku przemian*, 11.

15 Marek Zirk-Sadowski, "Ideologie wykładni prawa administracyjnego," in *System prawa administracyjnego. Wykładnia w prawie administracyjnym. Tom 4*, ed. Roman Hauser, Zygmunt Niewiadomski and Andrzej Wróbel (Warszawa: Wydawnictwo C.H. Beck, 2015), 175.

16 In this connection, Cezary Kosikowski talks about the theory of the "active civilizational interventionism" – Cezary Kosikowski, *Współczesny interwencjonizm* (Warszawa: Wolters Kluwer, 2018), 502.

competition protection, etc. These values are included in the legislation in different ways and the specific forms of action, plans and economic programs are also linked to them[17].

3. Categories of values present in public commercial law

Looking for the categories of values that are present in public commercial law, we can refer to an administrative law doctrine, where issues concerning axiology have been given much space. And so, Jan Zimmermann has distinguished three groups of values based on administrative law rules. The first group comprises the universal values present in all areas of law. These are values somehow beyond the law, which legitimize, for example, the well-being of man, justice. The second group is non-externally derived values, but values created by the law itself to ensure that the bodies applying the law respect certain standards, in particular the standards concerning relations between public administrations and the citizen. These are some firm axiological assumptions, such as the principle of proportionality and legal clarity, but also the principle of rationality and the economic efficiency of legal actions[18]. Interestingly, administrative law scholars also see the danger of the economization of law, which leads to replacing the law with a market mechanism. The term "economization of law" is understood differently, but the concern is mostly that economic instruments are being used improperly or are being abused in the organization of some areas of life, for example in the organization of public services[19]. Such phenomena are observed in public commercial law, for example in antitrust law, but rather they do not raise concerns such as in the administrative law; in antitrust

[17] Cezary Kosikowski notes that modern interventionism uses new forms of action: development strategies, economic programming, multi-annual financial planning, financial support for the economy and entrepreneurs. Such activities occur in addition to traditional forms of control and surveillance, etc.– Cezary Kosikowski, *Współczesny interwencjonizm*, 502. For more information see also Hanna Wolska, "Źródła i podstawy normatywne wartości w prawie gospodarczym publicznym, " in *Aksjologia publicznego prawa gospodarczego,* ed. Andrzej Powałowski (Warszawa: Wydawnictwo C.H. Beck, 2022), 45 and next.

[18] Jan Zimmermann, *Aksjomaty prawa administracyjnego* (Warszawa: Lex a Wolters Kluwer business, 2013), 75.

[19] Jan Zimmermann following Eberhard Schmidt-Assmann says that the risk of economization is to replace the role of the law with market mechanisms – Zimmermann, *Aksjomaty prawa administracyjnego*, 92.

law the „more economic approach" is perceived rather positively[20]. However, the problem is that in this way, legal rules and power of authorities can be used for particular interests[21]. Finally, the third type of values that are present in administrative law are values for which administrative law rules are established for protection or enforcement. This way are achieved targets such as, for example, proper land use, environmental security[22]. This division may raise doubts, but it gives an idea of the different origins and significance of values present in the law.

In the context of the above, we may draw the following conclusions about the values contained in public commercial law:

1) The fundamental value created and protected by this law is the public interest, not an individual interest or a set of individual interests[23].
2) The desirability (value) of efficiency of legal rules plays a relatively high role in public commercial law (it is about ensuring that there are reasonable regulations due to economic processes). This comes from the subject matter of regulation, which is very dynamic economic relationships, and there is a particular risk that regulation will be "impossible" or even economically harmful. It may be added that the demand for the economic viability of the legislation requires desire in particular that:
    a) the law does not call for economically impossible things,
    b) the law is created and applied using economic methods,
    c) the law maximizes social wealth and the proper allocation of resources,

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20 See Anna Piszcz, "Ekonomizacja prawa antymonopolowego," *Zeszyty Naukowe Uniwersytetu Szczecińskiego. Ekonomiczne Problemy Usług 45* (2009): 502–509.

21 On this background, Ilona Przybojewska makes interesting reflections on the "morality" of the emissions trading system – Ilona Przybojewska, *Instrumenty rynkowe w prawie ochrony środowiska Unii Europejskiej* (Warszawa: Wydawnictwo C. H. Beck, 2021), 9–15. She juxtaposes emission permits with the acquisition of emission allowances. In both cases, the problem with such instruments is that a large (richer) company can do more.

22 Zimmermann, *Aksjomaty prawa administracyjnego*, 75.

23 The public interest is based on values, needs or objectives that are objectives of existing government policy. The public interest is defined differently in that policy – See Artur Żurawik, *Interes publiczny w prawie gospodarczym* (Warszawa: C. H.Beck, 2013), 200–203.

d) the law promotes the minimization of costs associated with the exchange of goods[24].

3) Among the leading values of public commercial law, there are social market economy, social justice, economic freedom, development policy, sustainable development and economic and social cohesion. Understanding these values is difficult because they often come from complex economic and social doctrines.
4) Among the values that come from outside the law, but are recognised by the law, we can distinguish the value of integration within the European Union, which is expressed by legal principles such as sincere cooperation within the European Union, the effectiveness of EU law, the principle of solidarity between the European Union and the Member States. Maintaining and developing the integration of states within the European Union has become the basic value preference that we apply when we choose between values or when we weigh values in specific circumstances.

4. Conflicts of values with European Union law and judicial review

The last conclusion made in the preceding chapter, which concerns EU integration, may be surprising, so it is worthwhile explaining it. We can note that when there is a conflict between the policy of a Member State and the policy of the European Union, the latter always takes precedence and is not, in fact, subject to an examination of what this policy is going to do and what this policy provides. It is settled case law that, under the principle of primacy of EU law, which is an essential feature of the EU legal order, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State[25]. This is precisely because of the principle of sincere cooperation and its derivative: the principles of the effectiveness of EU law, solidarity and so on. The principle of sincere cooperation as expressed in Article 4(3) of the Treaty on European Union[26]

[24] Zimmermann, *Aksjomaty prawa administracyjnego*, 92.

[25] See CJEU Judgment of 26 February 2013, Stefano Melloni v Ministerio Fiscal, Case C-399/11, ECLI:EU:C:2013:107, point 59.

[26] Consolidated versions of the Treaty on European Union in Official Journal of 26 October 2012, C 326, 1–390.

is based on a general obligation of the parties of the Treaty and the institutions established under it to provide fair and equitable support to each other in achieving the EU's objectives. David Miąsik explains that the principle of sincere cooperation: 1) provides the desired pattern of behaviour of Member States and EU institutions in achieving the Union's objectives, 2) is the basis for the creation of EU law enforcement instruments in national legal systems, 3) is the basis for filling gaps in Member States' obligations[27]. This principle obliges Member States and EU institutions to apply EU policies consistently. Moreover, as indicated by the Court of Justice of the European Union in its judgment in Case C-235/87, Matteucci, each Member State must facilitate the enforcement of a provision of Community law and for that purpose, support any other Member State which has obligations under the Community law[28]. This leads to the conclusion that there is an overall principle of preference for EU values and that even achieving the EU's objectives has become a goal in itself[29].

Finally, let us consider judicial control of decisions which are the result of the valuation made by law enforcement authorities. For instance, if we look at the powers of the president of the Office of Competition and Consumer Protection, we will note that this body makes numerous choices between values and thus creates a State policy in a certain domain, for example, this authority must balance the value of market competition with the collective interests of consumers. This raises the question of how a court should review its decision, because, as we know, political decisions spiral out of judicial review, which means it is hard to make a "complete" judicial review with the principle of responsibility for the political decisions of the government, administration or executive authority. It is fair to say that this problem has been present in various areas of law for a long

27 Dawid Miąsik, *Zasady i prawa podstawowe. System prawa Unii Europejskiej. Tom 2* (Warszawa: Wydawnictwo C. H. Beck, 2022), 139.

28 Judgment of the Curt of 27 September 1988, Annunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium, Case 235/87, ECLI:EU:C:1988:460, point 19.

29 This is not completely acceptable in all Member States – See, for example, Polish Constitutional Tribunal, Judgment of 7 October 2021, Ref. no. K 3/21, accessed Februrary 10, 2023, https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej.

time. For example, the Constitutional Court cannot rule on the substantive relevance of the legislative measures adopted by the legislator, since it is up to the legislator to adopt legal arrangements which, in his view, will best serve the political and economic objectives he has chosen[30]. In the area of administrative law, this problem can be found in the form of a question about the scope of judicial control of so-called administrative discretion. Zbigniew Kmieciak and Joanna Wegner-Kowalska show what problems administrative courts face in controlling administrative discretion, and this leads them to the conclusion that little has changed since administrative discretion was completely excluded from judicial control[31]. This is also a matter of public commercial law since the implementation of a broad economic policy by the State authorities leads to wide discretion. Furthermore, public commercial law is largely governed by EU law and in the European Union the question of judicial review of political decisions is also on the agenda. The case law of the EU courts takes the view that the judicial review of the economic assessments made by the EU Commission should be limited to the fact that the court must respect the discretion of those assessments and cannot substitute the authority competent to carry out these assessments[32]. Also in the area of regulation of so-called infrastructure sectors, it is also pointed out that the specificities of such sectors require that the regulatory authorities have a margin of discretion in taking regulatory measures to attain their objectives[33]. In public commercial law, therefore, we are facing the issue of judicial review of executive decision-making. Executive decisions are based on different policy assumptions and complex economic evaluations. Scholars of administrative law in Poland are even raising such far-reaching demands that it is necessary to introduce

30 See, for example, Polish Constitutional Tribunal, Judgment of 7 January 204, Ref. no. K 14/03, reported in: OTK-A Journal 2004, Edition 1, Pos. 1.

31 Zbigniew Kmieciak and Joanna Wegner-Kowalska. "O ułomności formuły sądowej kontroli uznania administracyjnego," *Przegląd Prawa Publicznego* 5 (2016): 30.

32 See, for example, Judgment of the Court of First Instance (First Chamber) of 25 October 2002, Tetra Laval BV v Commission of the European Communities, Joined Cases T-5/02 DEP, T-80/02 DEP, ECLI:EU:T:2002:264, point 119.

33 CJEU Judgment of 15 September 2016, Koninklijke KPN NV and Others v Autoriteit Consument en Markt (ACM), Case C-28/15, ECLI:EU:C:2016:692, point 36.

or develop forms of control over the exercise of discretion[34]. In the case of the president of the Office of Competition and Consumer Protection whose decisions may be challenged before the Court of Competition and Consumer Protection and should be reviewed by the court on a substantive basis – the matter is only prima facie clear, because, as Marek Szydło pointed out, it can be questioned whether there is indeed a qualitative difference between the control exercised by the Court of Competition and Consumer Protection and, in principle, a limited control exercised by administrative courts over the decision of the administrative authorities in Poland[35].

5. Conclusion

Public commercial law is an area of conflict of different values and there is no single way to resolve these conflicts. At most, two methods can be distinguished for resolving these conflicts, and it seems that the dominant method is to weigh values in the legislative and enforcement process so as to find a compromise solution. The method of weighting values in specific circumstances is becoming increasingly important due to the exceptional politicising of public commercial law and the dynamics of economic relations. The basic value of public commercial law is a somehow defined public interest, not an individual interest or a set of individual interests. Among the many values present in the area of public commercial law, the value of preserving and developing integration within the European Union is exceptionally important. This value of EU integration sets a general preference rule when there is a need to select or weigh values. In the context of the many values present in public commercial law and the need to continuously resolve the conflicts of values, key are questions about the extent of discretion left to the authorities applying the law and the scope of the judicial review thus exercised.

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34 Kmieciak and Wegner-Kowalska. "O ułomności formuły sądowej kontroli uznania administracyjnego," 30.

35 Marek Szydło, "Sądowa kontrola decyzji prezesa UOKiK w świetle prawa unijnego i prawa polskiego." *Europejski Przegląd Sądowy 7* (2015): 16. In The polish administrative court shall decide only on legality of the administrative acts. The jurisdiction of the Court of Competition and Consumer Protection in theory goes further and is directed towards a complete reconsideration of the matter.

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