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## Are the rights and obligations arising from a license transferable under Article 40 of the Privatization and Commercialization Act? : case comment to the judgement of the Supreme Court of...

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## **Are the rights and obligations arising from a license transferable under Article 40 of the Privatization and Commercialization Act? Case comment to the judgement of the Supreme Court of November 20, 2008 (Ref. No. III SK 13/08).**

### **Facts**

The judgement of the Supreme Court here described refers to the acquisition of rights arising from a license by an entity which has acquitted a state enterprise as a result of direct privatization, pursuant to Article 40 of the Act of 20 August 1996 on Privatization and Commercialization<sup>1</sup> (hereafter PCA). In the event the aforementioned acquisition occurs, the purchaser shall become the subject of the rights and obligations under the license; *inter alia* the purchaser is eligible to request performing the amendment of the decision which granted the license under Article 155 of the Code of Administrative Procedure (hereafter: CAP).

Therefore the crucial issue of this judgement is general succession in the event of the direct privatization of a state enterprise, in light of Article 40 of the PCA. In our opinion, the Supreme Court finding referring to the facts of the case was correct and appropriate.

The President of the Energy Regulatory Office (hereafter, URE), acting as a defendant, granted the trade license for liquid flues to the state enterprise in the decision dated February 20, 2001. Subsequently, the state enterprise was acquired by a legal entity which was a limited liability company. The purchaser of the state enterprise, acting as a claimant (hereafter, Purchaser or Claimant) acting on the grounds of Art. 40 of the PCA in connection with Article 155 of the CAP, applied for an amendment to the aforementioned decision consisting in a replacement of the licensee.

The URE President did not agree with the request submitted by the Purchaser. Consequently, in the decision dated May 17, 2006, the URE President refused the amendment arguing that the request cannot be accepted due to the fact that the Claimant was not a party to the licensing proceedings and did not acquire the rights to the license. In the opinion of the URE President merely the administrative side of the licensing proceedings has a right to the claim, on the aforementioned grounds, to

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<sup>1</sup> Consolidated text in the Journal of Laws 2002 No. 171, item 1397 with subsequent amendments.

the amendment of a final administrative decision, hence the Claimant cannot demand changes to the concessions under Article 155 of the CAP.

The Claimant appealed the decision to the first instance Court of Competition and Consumer Protection (hereafter, SOKiK). The Court reversed the applied decision<sup>2</sup>. The first instance Court found that the Claimant is the legal successor of the licensee. The Claimant went in all the rights and obligations of the state enterprise, regardless of the nature of the legal relationship in which those rights or obligations had arisen, due to the fact that the Claimant acquired the state enterprise, according to Article 40(1) of the PCA.

The URE President appealed the judgement issued by SOKiK to the Court of Appeal. The Court of Appeal changed the verdict of the first instance Court dismissing the appeal<sup>3</sup>.

The Claimant appealed the judgement to the Supreme Court submitting a cassation appeal, claiming that the Court of Appeal infringed the substantive law (Article 40 in connection with Article 39(1)(3) of the PCA and in connection with Article 2(3) and Article 55<sup>1</sup> of the Civil Code<sup>4</sup>) and the procedural law which had a significant impact on the trial result.

### Key legal problems of the case

First, it should be indicated that Article 40(1) of PCA stated that, unless the Act provides otherwise, the buyer or transferee of an enterprise enters into all the rights and obligations of the state enterprise, regardless of the nature of the legal relationship from which the rights and obligations arise. At the same time, Article 155 of CAP stated that a final decision by which a party acquired the rights may be amended at any time upon the consent of the party.

The main problems assessed by SOKiK and the Court of Appeal were as follow:

- 1) whether the rights and obligations issued from the license are transferable under Article 40 of PCA;
- 2) subsequently, whether the acquirer is entitled to submit an application for the amendment of the license.

As indicated above, SOKiK ruled in favour of the Claimant, although the second instance Court rejected the SOKiK's argumentation.

The Court of Appeal stated that the concession may not be the subject of succession. According to the court, the divestiture of the state enterprise produced effects in the sphere of civil law, however, it has no influence on the sphere of administrative law.

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<sup>2</sup> Judgement of SOKiK of 17 April 2007, Ref. No. XVII AmE116/06.

<sup>3</sup> Judgement of the Court of Appeal of 5 December 2007, Ref. No. VI Aca 1074/08.

<sup>4</sup> The Journal of Laws 1964 No. 16, item 93 with subsequent amendments.

The Court of Appeal quoted the judgement of the Supreme Court of May 8, 1998<sup>5</sup> where the Supreme Court pointed out that the license constitutes a kind of individual authorization which is granted by the public authority to the determined entity who meets statutory criteria. In regard to the above it is not possible to transfer the rights arising from the license to a third party, either in whole or in part. Moreover, the Court of Appeal pointed out that Article 40 of the PCA does not literally indicate a concession. The Court of Appeal found that the presented construction is confirmed by the regulations concerning the assignment of the concessions in case of a merger of companies. The court cited the provisions of Article 494 § 2 of the Commercial Companies Code<sup>6</sup> where the concession is literally indicated by the legislator.

Accordingly, the court found that the license expired upon the date of the removal of the state enterprise from the enterprises register and therefore it was not possible to modify the decision without a prior administrative procedure referring to awarding the concession. Thus, the proceedings before the URE President were irrelevant and therefore had to be terminated.

### **Key findings of the Supreme Court**

As indicated above, the Purchaser submitted the cassation appeal to the Supreme Court which dismissed the appeal on November 28, 2008. The Supreme Court agreed with the views of the first instance court. In the opinion of the Supreme Court the Claimant's argument that the URE President's decision infringed Article 40 of the PCA is correct and merits acceptance.

The wording of Article 40 of the PCA establishes precisely that direct privatization consists in acquiring all of the rights and obligations. The Supreme Court found that in this case it needs to be settled whether the rights and obligations issued from a license are transferable on the grounds of direct privatization, whereas the occurrence of direct privatization is an undisputable fact. The Supreme Court emphasized that Article 40 of the PCA includes the phrase 'unless the Act provides otherwise', which should be understood as follows: exclusion of the concession or the rights and obligations under the concession from the scope of the enterprise and universal succession requires an explicit statutory provision. In light of that, the Claimant entered into all of the rights and obligations which had arisen from the URE President's decision dated February 28, 2001. The Supreme Court noted that the contrary opinion of the Court of Appeal arises from an incorrect construction of the Supreme Court's judgement of May 8, 1998<sup>7</sup>.

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<sup>5</sup> Ref. No. RN 34/98.

<sup>6</sup> The journal of Laws 2000 No. 94, item 1037 with subsequent amendments.

<sup>7</sup> Ibidem.

### Legal analysis and the assessment of the judgement

Firstly, it should be pointed out that the law does not contain a legal definition of a concession. However, the literature suggests that ‘a concession is one of the manifestations of the legal regulation of economic activity consisting in the competent public authority expressing its consent to undertake and perform, in a specific area, economic activity upon the conditions under the concession and under separate legislation’<sup>8</sup>.

The concession is a form of regulation of an economic activity by the state. Thus, it expresses the act of the consent of a public authority to undertake and perform a business activity by the particular entrepreneur. The requirement to obtain a license to perform a particular economic activity on the one hand limits the freedom of this activity, but on the other it is a kind of guarantee for the contractors and the customers that the entrepreneur who is licensed will be operating in accordance with the law and secures the proper performance of the activity.

On the grounds of the Energy Law<sup>9</sup>, all of the activities related to the state energy economy are subject to the duty of obtaining the concession<sup>10</sup>.

The granting of concessions, as well as the refusal to grant, change, or withdrawal takes the form of an administrative decision. It is worth emphasizing that rights and obligations which have an administrative character are related to the person for whom they are established. In light of the judgement of the Supreme Administrative Court of February 6, 1995<sup>11</sup>, a licensee may transfer its rights to perform the activity under the license to a third party neither as a whole nor in part. Moreover, the Court stated that licensing is the exception to the general principle of economic freedom.

This means that only the entrepreneur appointed by the competent authority which granted the concession may undertake and perform economic activity in the areas covered by licensing.

Furthermore, the Supreme Administrative Court pointed out that the rights within the scope of administrative law which are granted by the decision of the competent authority to the individual (specified) entity may not be the subject of a legal transaction between the addressee of the decision and the third party.

Also, in the judgement of May 8, 1998 the Supreme Court accepted the concession’s character as the subjective authorization of public law and therefore, in principle, it is excluded from trading within civil law.

The Supreme Court rightly observed that the Court of Appeals had misinterpreted the judgement cited above; consisting in acknowledgement that neither the concession nor the rights arising from it may be the subject of trading or succession.

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<sup>8</sup> K. Strzyckowski, *Prawo Gospodarcze Publiczne (Economic Public Law)*, Warszawa 2005, p. 261.

<sup>9</sup> Consolidated text in the Journal of Laws 2006 No. 89, item 625 with subsequent amendments.

<sup>10</sup> Article 32 of the Energy Law fully indicates the scope of the energy activities which are subject to the duty of obtaining the concession.

<sup>11</sup> Ref. No. II SA 1835/93.

In the opinion of the Supreme Court, usage of the phrase *in principle* means that civil law permits the possibility of trading rights and obligations under the concession.

Therefore it should be found that the rights under the licenses are generally non-transferable. However this general rule suffers some exceptions, namely statutory provision is needed to change this general rule<sup>12</sup>.

In particular, the exception to the indicated rule is the administrative succession under Article 40(1) of the PCA.

The undisputable fact in this case is that the Claimant had acquired for use against payment the state enterprise by direct privatization, pursuant to Article 39(1)(3) of the PCA. Under Article 39(1) of the PCA, direct privatization consists in the disposition of all tangible and intangible business assets of a state enterprise, by:

- 1) sale of the company,
- 2) lodgement of the company to the company,
- 3) conveyance of the company for use against payment.

However, in accordance with Article 40(1) of the PCA, unless the Act provides otherwise, the buyer or transferee of the enterprise enters into all the rights and obligations of a state enterprise, regardless of the nature of the legal relationship from which the rights and obligations arise<sup>13</sup>.

The wording of the first part of the article, namely ‘unless this Act provides otherwise’, supports the view that the succession may be limited merely by clear legal regulation.

The Supreme Court emphasized that the phrase ‘unless the Act provides otherwise’ should be understood to mean that the exclusion of concessions or the rights and obligations under the concession, from the term of enterprise and of universal succession, requires an express statutory provision. As noted by the Supreme Court, the Court of Appeal did not indicate such a provision.

It should be noted that the PCA does not contain a provision that would place any restrictions on the succession. Additionally, this exclusion or limitation does not include the Energy Law or the others statues (e.g., the Act on Freedom of Conducting Business Activity<sup>14</sup>).

Thus, if there is no provision that explicitly restricts the transfer of all the rights and obligations on the state enterprise’s purchaser as a result of direct privatization, it is not possible to analogously apply the provisions of the Civil Code (Article 55<sup>1</sup>). The construction of the provision of the Civil Code leads to the conclusion that the sale of the enterprise under this provision does not result in the acquisition of administrative law rights, including concessions.

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<sup>12</sup> See Article 494 § 2 of the Code of Commercial Companies; A. Kidyba, *The Code of Commercial Companies – Commentary* (art. 494 *The Code of Commercial Companies*).

<sup>13</sup> The manner of the privatization indicated in Article 40(1) PCA consists in the disposition of all tangible and intangible business assets of the state enterprise, or the company (partnership) which was established as a result of the commercialization. The core of the direct privatization is the aforementioned disposition in order to change the owner.

<sup>14</sup> The Journal of Laws 2010 No. 220, item 1447 with subsequent amendments.

Furthermore, it is crucial that the provisions of the PCA are specific regulations (*lex specialis*) in relation to the Civil Code, which means that in the case of direct privatization sale of the enterprise is assessed pursuant to the provisions of the PCA and not the Civil Code.

An identical assertion was made by the Supreme Court in its decision of December 8, 2006<sup>15</sup>, namely: ‘to the effects of the state enterprise’s privatization, which was completed under the Commercialization and Privatization Act dated 30 August 1996 (Journal of Laws No. 118, item 561, with subsequent amendments), the provisions of this Act shall be applied. As a result of the direct privatization the buyer or transferee of the state enterprise is a general legal successor of the state enterprise’.

The Supreme Court rightly deemed that ‘the general succession in the case of direct privatization of a state enterprise has a specific character, shaped by the Act on Commercialization and Privatization’. Moreover, the Supreme Court held that ‘it is evident that Article 55<sup>1</sup> of the Civil Code is not a legal basis to enter into the rights and obligations of the privatized state enterprise which had arisen from the concession. The exclusive basis for this makes the provision of Article 40(1) of the PCA’.

Moreover, it should be borne in mind that the legal provision’s interpretation should comply with all the constitutional principles. One of the main principles of economic law, expressed in Articles 20 and 22 of the Constitution of the Republic of Poland, is economic freedom. Hence the general succession, defined in Article 40 of the PCA, benefits from constitutional protection expressed in Article 22 of the Constitution.

Any exclusions from this rule should be treated as exceptions justified by extremely important public interest. The aforementioned was clearly stated in the judgement of the Supreme Court of 12 September 2008<sup>16</sup>, namely ‘any limitation on the principle of freedom of business activity (...), acceptable in light of the statutory grounds with a view to the (significant) public interest, are the exception and must be considered strictly, not broadly. Therefore, their existence cannot be implied, presumed or taken for example by way of analogy’.

No doubt the Supreme Court rightly observed that from the clear contents of Article 55<sup>1</sup> of the Civil Code it appears that the concession is a part of a state enterprise. Article 40(1) 1 of the PCA delivers a similarly unequivocal answer that the acquirer of the state enterprise enters into all the rights and obligations of the state enterprise, regardless of the nature of the legal relationship from which the rights and obligations arise. Adopting a position that universal succession does not include the rights and obligations under the license would pose an unacceptable restriction on freedom of performing economic activity.

The enterprise definition included in Article 40 of the PCA is identical with the definition included in Article 55<sup>1</sup> of the Civil Code<sup>17</sup>. Thus, the relation between the aforementioned provisions is unquestionable.

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<sup>15</sup> Ref. No. V CSK 368/06.

<sup>16</sup> Ref. No. I PK 27/08.

<sup>17</sup> Pursuant to art. 55<sup>1</sup> of the Civil Code, the enterprise is an organized group of tangible and intangible assets designed to undertake and perform the business activity.

In this regard, the Supreme Court was correct in its statement that the company is being acquired under direct privatization, as the enterprise within the meaning of Article 55<sup>1</sup> of the Civil Code encompasses, *inter alia*, the trade license for liquid flues.

The functional interpretation of Article 40 of the PCA allows us to assume that the legislature – when speaking about entering into all of the rights and obligations of the converted company without any limitations or exclusions – regards all the rights in the broad sense. Entering into all the rights and obligations constitutes the general succession (such a view was expressed by the Supreme Court, e.g., in the ruling of the decision of December 8, 2006<sup>18</sup>).

The wording of Article 40 of the PCA leaves no doubts in the scope of interpreting the language. In the interpretation of legal texts the priority is given to the literal interpretation, also referred to as grammatical or linguistic. In a law-respecting country, citizens have the right to rely on what the legislature said in a legal text, not on what it is going to say or what it would potentially say if new circumstances were known.

The interpretation should not have a creative character, e.g., it should not create new standards on any pretext of interpretation, hence, it should be within the permissible lexical meaning. In addition, assuming the rationality of the legislature, the following rule finds justification: “where a distinction is not made by the legislature, the commentator is not allowed to do it and is not allowed to interpret the legislation in such a manner that some fragments are treated as unnecessary”<sup>19</sup>.

For the foregoing reasons, the Supreme Court rightly referred to the linguistic and grammatical interpretation and emphasized the usage of the phrase ‘all the rights and the obligations’ and the phrase ‘regardless of the legal relationship from which these rights arise’. These phrases no doubt contain the rights and obligations which have arisen from the concession granted by the URE President. Consequently, the purchaser of the state-owned company is the general successor of the state-owned enterprise (as a result of the direct privatization).

With respect to the functional and teleological interpretation of Article 40 of the PCA used by the Supreme Court, it should be added that a rational legislature aims for socially approved purposes and does not constitute unnecessary norms. The undoubted intention of Article 40 of the PCA is the continuation of existing economic activities. The rights resulting from administrative decisions, such as licenses, permits, or patents (Article 55<sup>1</sup>(5–8) of the Civil Code) may determine the possibility of performing that activity, such that their exclusion would cause the acquisition of companies to be ineffective.

Crucial in this context – as was stressed by the Supreme Court – is also the substance of the agreement dated December 29, 2004. It states that the will of the parties to this contract was that of the Claimant joining in all of the rights and obligations of the merging enterprise.

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<sup>18</sup> Ref. No. V CSK 368/06.

<sup>19</sup> L. Morawski, *Wstęp do prawoznawstwa (Introduction to the Law)*, Toruń 2002, pp. 171–174.



**Final remarks**

The judgement of the Supreme Court herein considered settled an important issue related to the transfer of the rights which arise from concession. It concerns both the regulations of the PCA and Article 55<sup>1</sup> of the Civil Code. In our opinion the question whether the rights and obligations issued from a license are transferable on the grounds of Article 40 of the PCA is solved. Considering all of the above, this judgement should be supported as correct and consistent with the idea of the lawful state.

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