YEARBOOK of ANTITRUST and REGULATORY STUDIES
www.yars.wz.uw.edu.pl

Peer-reviewed scientific periodical, focusing on legal and economics issues of antitrust and regulation.

CSAiR
Centre of Antitrust and Regulatory Studies, University of Warsaw, Faculty of Management
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A courier service as a postal universal service – can a court asses the correctness of a legal qualification of a service of a courier company that was not contested by the company in an earlier decision taken by the postal regulator?
Case comment to the judgment of the Supreme Court of 25 April 2007 – *Courier services* (Ref. No. III SK 2/07)

Facts

The President of the Polish Regulatory Office for Telecommunication and Post (hereafter, URTiP) issued in 1994 a decision prohibiting the shipping and transport company A., which was previously granted a concession for the provision of certain shipping services, from providing postal services (collection, transport, and delivery of inland post under the 500 grams weight limit) charged at a "per unit" fee that was five times lower than the fee charged by the public operator of universal postal services for the collection, transport, and delivery of postal items of the lowest weigh and fastest delivery category described in the public operator's tariff. The decision was adopted under the Communications Law Act of 23 November 1990[1] (*Prawo Komunikacyjne*, hereafter, PK), which was later replaced by the current Postal Law Act of 12 June 2003[2] (*Prawo Pocztowe*, hereafter, PP). Company A. did not appeal this decision.

The President of URTiP issued on 20 January 2004 another decision concerning the same company. This time the firm was found to have breached Article 47(2) PP by providing services that were reserved for the public postal operator. The President of URTiP claimed that according to the PP Act, the courier services that were being provided by company A. (on the basis of concession No. 3/96) fell into the scope of universal services as defined by the new legislation. Company A. was instructed to cease those activities. The firm did not appeal the decision.

However, in the context of the second decision, the President of URTiP asked company A. to additionally submit its financial data concerning the firm's revenue in 2002. The regulator informed the company that unless such documentation was delivered, the amount of the fine that was to be imposed on the firm would have

[1] Consolidated text: Journal of Laws 1995 No. 117, item 564 with amendments.
[2] Journal of Laws No 130, item 1188 with amendments.

to be estimated, rather than precisely calculated on the basis of the company's actual revenue. The requested documents were not delivered. On 3 March 2004, the President of URTiP issued a decision imposing a fine of 22,622 PLN on company A. The decision was appealed to the Court of Competition and Consumer Protection (hereafter, SOKiK) on the basis of the claim that a breach of Article 2, 22, 23 of Polish Constitution and Article 68(2) and 88 PP took place. The appeal was dismissed in its entirety. SOKiK's judgment was appealed once again to the Court of Appeal however, its verdict was sustained. Finally, company A. submitted a cassation appeal which was dismissed by the Supreme Court as unfounded[3].

Key legal problems of the case

I. Company A. claimed in its appeal that it could not be obliged to pay a fine as the decision that the fine was connected with was based on a misinterpretation of the PP Act of 2003. The company stressed that the President of URTiP infringed Article 67(1(3)) PP (in connection with Article 46.1, 47.2, 88.1) by applying an interpretation of the concept of courier services that was too broad and thus considering them to be universal postal services[4]. In the company's opinion, the monopolistic status of the public operator referred only to reserved services and not to all the services of collection, transport, and delivery of postal items that met the weight criteria set out in the PP Act. Therefore, the plaintiff claimed that a misapplication of Article 3.25 and Article 47(2) PP took place.

In response, the President of the Polish Office of Electronic Communications (UKE) – the institutional successor of URTiP since January 2006– stressed that the actual circumstances of the case showed that the plaintiff conducted its business within the activity area reserved to the public operator in Article 47 PP. This fact was confirmed in the decision of 20 January 2004, which the company did not appeal.

II. Moreover, the plaintiff claimed that pursuant to the PP Act, it was deprived of its rights resulting from the concession that the company received in 1996. The concession for the provision of courier services, which was granted according to the rules of the older PK Act, turned into a permit on the basis of Article 88(1) PP. According to the plaintiff, as a consequence of that change, the company actually lost some of its constitutionally protected rights. Simultaneously, the company regarded this fact as an unlawful limitation of its economic freedom, which may be restricted only because of an important social interest. In the opinion of the plaintiff, no such

[3] On court proceedings in the field of postal regulation see: K. Flaga-Gieruszyńska, "Istota postępowania sądowego w sprawach z zakresu regulacji poczty" ["The core of a court proceeding in cases concerning postal regulation"], [in:] R. Czaplewski, K. Flaga-Gieruszyńska (eds.), *Rynek usług pocztowych* [Market of postal services], Warszawa 2008, p. 414-418.

[4] See R. Sowiński, *Podstawy prawne świadczenia usług na polskim rynku pocztowym* [*Legal basis of providing services in the Polish postal market*], [in:] R. Czaplewski, K. Flaga-Gieruszyńska (eds.), *Rynek usług pocztowych…,* p. 283-290; see also the judgment of the Supreme Court of 10 May 2002, IV CKN 1035/00 (2003) 3 OSNC, item 44.

interest existed in this case[5]. On this basis, the company claimed that its constitutional right to the protection of rights already granted as well as its economic freedom was infringed (Article 2, 20 and 22 of the Constitution of the Republic of Poland).

In response to this claim, the President of UKE pointed out that one of the conditions for granting a concession to the plaintiff was that it had to perform its economic activity in compliance with the law being in force in the Republic of Poland. Therefore, it was the plaintiff's duty to adapt the scope and the form of its business to the changing legislation.

III. Regarding the fine, the company stated that in the decision of 3 March 2004 the President of URTiP did not refer to the amount of the imposed fine in terms of the social harm, which the activities of the company could have caused, the scope of its fault or the firm's conduct so far. The decision of the President of URTiP was criticised by the company for the fact that its justification considered merely the financial aspect of the case and the results of the non-provision by the plaintiff of the data required by the authority. According to company A., while deciding on the amount of a fine, the President of URTiP should have referred to the fine setting criteria contained in Article 68(2) PP.

The President of UKE found the above plea to be unfounded as the application of Article 68 PP remains a task of the regulatory body and cannot be applied by courts.

Key findings of the Supreme Court

I. The Supreme Court did not share the opinion of the plaintiff concerning the alleged misapplication of Article 47(2) PP. The Court stated that the only criteria affecting the assessment whether the monopoly rights granted to the public operator were infringed was the weight of the postal items. Pursuant to Article 47(1) PP, a public operator is granted exclusivity for the provision of services such as collection, transport, and delivery of inland postal items under a specified weight limit. The way in which such service is to be performed is irrelevant (for example whether a courier service is used or traditional mail). The monopoly right would have been rendered meaningless especially if another company (not the legal monopolist) intended to collect, transport and deliver postal items weighing less than 500 grams in a way that would correspond with the requirements resulting from the definition of universal postal services.

The Supreme Court stressed that Article 47 PP does not limit the exclusive right of the operator to deliver postal items under 500 grams only to universal postal services. The Court admitted that this fact constituted a fundamental change in comparison

[5] Compare: the judgment of the Polish Constitutional Tribunal of 6 April 2004, SK 56/03 where the Tribunal focused on the fact that the Telecommunications Law of 2000 abolished Article 91 of the Communications Law granting social privileges to employees of telecoms enterprises. Ruling on depriving them of the rights already granted, the Tribunal regarded that as lawful and compliant with the Constitution.

to the legal solution applied in the previous PK Act[6]. Article 3(4) PK restricted the legal monopoly of the public operator to "providing universal postal services in collection, transport, and delivery of postal items inland and abroad (…)". The Supreme Court stated that the interpretation of that provision could have led to a conclusion that the legal monopoly of the public operator had been limited only to universal postal services, not covering services provided by courier companies on the basis of contracts concluded with individual senders. However, the PP Act cannot be interpreted this way, even if a systematic interpretation of the existing rules could confirm the arguments of the plaintiff. In the opinion of the Supreme Court, a literal and a "purposive" interpretation of the law would render different results.

Nonetheless, the Supreme Court stressed that there was actually no need to consider the plaintiffs claim concerning the qualifications of its business activities in the light of the PP Act; this issue was deemed to have been resolved in the decision of the President of URTiP taken on 20 January 2004 seeing as the decision was not appealed by the plaintiff.

II. In response to the claim that the company's economic freedom was violated, the Supreme Court stressed that to accept the plaintiff's view would preclude the possibility to amend the law because amendments restrict economic activities. The case-law of the Constitutional Tribunal proves also that the constitutional right of protection of rights already granted cannot be applied in cases where an individual should consider legislative amendments. The amendments of the Polish postal law regime were required due to the obligation to adapt the national legal system to EC law[7] as well as due to the necessity to guarantee a continuity of the provision of universal services in order to ensure that the public operator retains the necessary resources to finance its activities. On the basis of Article 88 PP, concessions for courier services granted under the PK Act turned into permits for the provision of postal services according to the PP Act. Since the new legislation came into force, the plaintiff was obliged to conduct its activities according to the rules of the PP Act rather than according to the provisions of its concession.

Moreover, the Supreme Court emphasised that Article 47(2) PP does not deprive courier companies of the right to provide services of collection, transport, and delivery of postal items not exceeding 500 grams provided that they have an appropriate permit

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[6] See judgment of the Supreme Court of 10 May 2002, IV CKN 1035/00 (2003) 3 OSNC, item 44.

[7] At that time, Poland was obliged to adapt its postal law to Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ [1998] L 15/14), as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (OJ [2002] L 176/21). Currently, the legal standard of the postal law in the EC is settled by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ [2008] L 52/3).

and that the fee which they charge for those services is not lower than two and half times the fee set in the tariff for universal postal services of the public operator. In other words, services reserved for the public operator may still be provided by other companies but at appropriate prices.

The Supreme Court rejected therefore the claim that the provisions of the Polish Constitution on economic freedom were infringed.

III. According to the Supreme Court, the decision of 29 March 2004 imposing a fine on company A. did not lack the necessary justification for the actual amount of the fine, as claimed by the plaintiff. In the opinion of the Supreme Court, what was in fact lacking in this decision was reference to Article 68(2) PP. The President of URTiP specifically informed the plaintiff that if the requested documentation was not delivered, the basis for the calculation of the fine (not less than 250,000 EUR) would be estimated in light of Article 68(3) PP. Since the company failed to submit the requested data, the President of URTiP imposed a fine of 2% of the estimated basis. Considering that the plaintiff did not co-operate with the authority, the Supreme Court shared the opinion of the lower instances courts that the President of URTiP was not obliged to explain in detail the way in which the criteria stated in Article 68(2) PP were applied.

Final remarks

The judgment under consideration, is one of the rare examples of a juridical ruling relating to the liberalisation process of the Polish postal sector[8] even though, the judgment refers only indirectly to the liberalisation rules. The key finding in this area was the confirmation that the legal monopoly of the public operator is not limited to universal postal services but covers also services meeting the weight limit criteria set out in the PP Act. That statement will remain true until the postal market is fully liberalised (that is, in 2013); pursuant to Article 3 of the Annex I to Directive 2008/06/EC Poland will use a derogating period for opening its postal market[9].

The judgment mostly influences the procedural aspects of the decision-making process by the national postal regulator (currently: President of UKE). According to the Supreme Court, in appeal proceedings concerning regulatory decisions that imposed fines for the infringement of the PP Act, a court cannot asses the correctness of the legal qualification of the activities of the fined company, if that qualification was presented in the earlier decision, which was not appealed by that company according to the prescribed procedure. Even if the judgment focuses on the postal sector, its key

[8] See: judgment of the Polish Supreme Administrative Court of 16 September 2004, GSK 77/04, unpublished; judgment of the Supreme Court of 10 May 2002, IV CKN 1035/00, (2003) 3 OSNC, item 44.

[9] On the current state of liberalisation of the postal sector in Poland see: *Raport Prezesa UKE o stanie usług rynku usług pocztowych w Polsce w 2007 r.* [*Report of the President of UKE on the state of the services on the postal services market in Poland in 2007*], UKE, Warszawa 2007.

finding seems to have a more universal impact; the legal interpretation given by the Supreme Court could easily be applied to decisions adopted by other Polish sectorial regulators – the President of UKE for the telecoms sector and the President of the Energy Regulatory Office (URE) for the gas and energy sectors.

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