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
www.wz.uw.edu.pl

The legal status of an undertaking – should local governments be treated more favourably in relation to the penalties for breaching Polish antitrust law? Case comment to the judgment of the Supreme Court of 5 January 2007 – *City Ostrołęka* (Ref. No. III SK 16/06)

Facts

In the judgment of 5 January 2007 (III SK 16/06), the Polish Supreme Court confirmed that the source, form and method of financing of fines imposed for the violation of Article 5 and Article 8 of the Act of 15 December 2000 on Competition and Consumer Protection[1] (hereafter, Competition Act 2000) are irrelevant from the point of view of free competition and the role and function of fines within the antitrust law regime. A local government unit, such as a commune, can therefore not be treated in a privileged way in this respect, even if it provides public utility services. This principle also applies under the new Act of 16 July 2007 on Competition and Consumer Protection[2].

The President of the Office of Competition and Consumer Protection (hereafter, UOKiK) issued on 19 December 2003 a decision (RWA – 24/2003) establishing an infringement of Article 8 of the Competition Act 2000 in the form of an abuse of a dominant position by the Ostrołęka city commune. The commune entered into an agreement for cemetery services at the City Cemetery in Ostrołęka with a single firm responsible for the administration of the cemetery. As a result, it was impossible for other undertakings to provide these services. That practice effectively hindered the development of free competition on the market of cemetery services at the City Cemetery in Ostrołęka. The President of UOKiK prohibited to continue the practice and imposed a fine of 12,500 EURO (50,252.50 PLN) on the commune.

Ostrołęka city appealed the decision of the President of UOKiK to the Court of Competition and Consumer Protection[3] (hereafter, SOKiK) in as far as the fine is concerned. SOKiK upheld the decision of the antitrust authority stressing that the

[1] Journal of Laws 2005 No. 244, item 2080.

[2] Journal of Laws 2007 No. 50, item 331; amendments: Journal of Laws 2007 No. 99, item 660; Journal of Laws 2007 No. 171, item 1206.

[3] In Poland this court delivers the judgments as the court of first instance.

fine was adequate and could not be reduced since otherwise its imposition would be deprived of any significance.

Ostrołęka city appealed this judgment to the Court of Appeal in Warsaw. In its judgment of 28 March 2006 (VI Aca 1190/05), the Court of Appeal reduced the fine from 50,252.50 PLN to 25,126 PLN. The Court of Appeal justified its decision by stressing that the amount of the fine set by the President of UOKiK was too high. It suggested that unlike in the case of commercial undertakings, a fine imposed on a local government unit has no effect since it is covered from public funds. The Court of Appeal noted also that Ostrołęka city ceased the practice immediately after the infringement was established and that its fault was limited.

The President of UOKiK filed a cassation appeal to the Polish Supreme Court claiming that the Court of Appeal infringed substantial rules of the Competition Act 2000 (Article 1(1) and Article 4.1) in the light of the principle of equality contained in Article 32(1) of the Polish Constitution. According to the President of UOKiK, this took place because the Court of Appeal found that the fines imposed on a local government unit should be, as a rule, lower than those for commercial undertakings. The President of UOKiK objected also to the view of the Court of Appeal that fines paid from public funds can not fulfil their repressive and educational role.

Key legal problems of the case

The local government unit as an undertaking under the competition law

The definition of "an undertaking" under the Competition Act 2000 is very wide. Its Article 4 para. 1 states that the term shall have the same meaning as under the provisions on the freedom of business activity. Additionally treated as an undertaking shall be organisational units without a legal status, to which the legislation grants legal capacity, organising or rendering services of a public utility nature, which are not a business activity within the meaning of the provisions on the freedom of business activity. The fact that local government units can render business activities, and therefore be considered as an undertaking under antitrust law, has been repeatedly confirmed by the Polish jurisprudence[4].

A local government unit influences the state of competition on its local markets by providing certain services directly. However, a similar influence can occur when it provides services indirectly especially by being responsible for the organisation of the provision of external services (such situation was assessed in the commented judgment)[5]. A local government unit usually organises the way in which public utility

[4] See the decision of the Supreme Court of 19 October 1999, III CZ 112/99 (2000) 20 *Wspólnota,* item 26, decision of the Supreme Court of 12 May 2000, V CKN 48/00, LEX No. 52691, decision of the Supreme Court of 7 August 2003, IV CZ 90/03, unpublished.

[5] Judgment of Antimonopoly Court of 23 April 1992, XVII Amr 7/92, unpublished; judgment of Antimonopoly Court of 8 September 1999, XVII Ama 27/99 (2001) 1 *Wokanda*, item 55. Also K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i*

services are provided in its territory including: cemetery and burial services[6], garbage collection[7] and the organisation of public city transportation, in particular, deciding about the access to bus stops[8].

In the commented judgment, the Ostrołęka city commune had a fine imposed upon itself for the organisation of public utility services. That fact was supported by the direct provisions of the Competition Act 2000 as well as by antitrust jurisprudence. The approach of the Supreme Court must be therefore approved.

The prerequisites to be taken into consideration when imposing a fine under antitrust law

According to Article 104 of the Competition Act 2000[9], when fixing the amount of the fine referred to by Articles 101-103, taken into account should be, in particular, the duration, gravity and circumstances of the infringement of the antitrust rules as well as previous infringements. The use of the term "in particular" means that the catalogue does not have an exhaustive character; jurisprudence has therefore identified two types of additional factors influencing the imposition of antitrust fines. The first one concerns relatively precise circumstances of the case such as: profits resulting from the practice[10], the role of the leader in the practice[11] or the fact that the company ceased the practice[12]. The second group concerns the imprecise motion of the level of the danger to the public interest[13]. It is worth stressing that neither of the two groups can be seen to include the source, form and method of financing of the fines imposed for the violation of Article 5 and Article 8 of the Competition Act 2000 and as such, they cannot be treated as grounds for the justification of giving local government units a privileged treatment in this respect.

Despite this, SOKiK has on one occasion reduced the fine believing that it would have affected the fulfilment of the Polish Football Association's public duties that

---

konsumentów, Komentarz [*Act on competition and consumer protection. Commentary*], Warszawa 2008, p. 106.

[6] Judgment of the Court of Competition and Consumer Protection of 1 December 2004, XVII Ama 70/03 (2005) 11 *Wokanda*, item 53.

[7] Judgment of the Court of Competition and Consumer Protection of 3 December 2003, XVII Ama 139/02 (2004) 11 *Wokanda*, item 50.

[8] Judgment of the Court of Appeal in Warsaw of 8 January 2008, VI ACa 481/07, unpublished.

[9] Article 111 of Competition Act 2007.

[10] Judgment of the Supreme Court of 27 June 2000, I CKN 793/98, Lex No. 50870.

[11] Judgment of the Court of Competition and Consumer Protection of 17 June 2004, XVII Ama 39/03 (2005) 7-8 *Wokanda*, item 106.

[12] Judgment of the Court of Competition and Consumer Protection of 10 April 2006, XVII Ama 88/04 UOKiK Official Journal 2006 No. 3, item 44.

[13] Judgment of the Supreme Court of 27 June 2000, I CKN 793/98, Lex No. 50870; judgment of the Court of Competition and Consumer Protection of 7April 2004, XVII Ama 46/03 (2005) 5 *Wokanda*, item 52; judgment of the Court of Competition and Consumer Protection of 21 March 2005, XVII Ama 16/04, UOKiK Official Journal 2005 No. 2, item 27.

relied on such funding[14]. On several occasions, the courts have nevertheless refused to reduce fines just because they would have been covered from public funds, even when the funds were meant to be spent on local investments[15]. In some cases, the courts did not even consider the source of the funding while imposing the penalty[16].

Key findings of the Supreme Court

The Supreme Court approved the cassation appeal submitted by the President of UOKiK due to the very low quality of the justification of the judgment of the Court of Appeal. In the opinion of the Supreme Court, the Court of Appeal based its judgment on general observations only, without proper reference to the legal basis or facts of the case. The Supreme Court noted that Article 101(2(1)) of the Competition Act 2000, which lists the circumstances that have to be taken into consideration while imposing a fine, does not include the character or structure (public or private) of the entity that is to be fined. The fact was stressed, that the Court of Appeal failed to precisely show on which legal grounds it decided to reduce the fine.

In more general terms, the Supreme Court confirmed that a local government unit is an undertaking from the point of view of antitrust law and thus, the fact that the fine would be covered from public funds is irrelevant to the imposition of the fine. The Supreme Court further clarified that a fine fulfils its repressive and educating role regardless of whether it is paid from private or public funds. It was said in addition that the source, form and method of financing the fine imposed for a violation of the Competition Act 2000 are not relevant from the point of view of free competition protection and the role and function of fines within the antitrust law regime. Thus, a local government unit, such as a commune, cannot be treated in a privileged way in this respect, even if it provides public utility services.

Final remarks

The judgment of the Supreme Court of 5 January 2007 (III SK 16/06) finally confirmed that the sources, form and method of financing of the fines imposed for the violation of the provisions of the Competition Act 2000 are irrelevant to their imposition[17]. When determining the level of the fine, the President of UOKiK must take into account the grounds specified directly in the Competition Act 2000 (now

[14] Judgment of the Court of Competition and Consumer Protection of 14 February 2007, XVII Ama 98/06, unpublished.

[15] Judgment of the Court of Competition and Consumer Protection of 7 April 2004, XVII Ama 48/03, UOKiK Official Journal 2006 No. 3, item 311.

[16] Judgment of the Court of Appeal in Warsaw of 24 November 2005, VI ACa 361/05, unpublished; judgment of the Court of Competition and Consumer Protection of 23 June 2005, XVII Ama 44/04, UOKiK Official Journal 2005 No. 3, item 43.

[17] The doctrine approves this approach. See comments to the Supreme Court judgment by G. Materna, "Czynniki wpływające na kary pieniężne za naruszenie przez jednostkę samorządu terytorialnego zakazów praktyk ograniczających konkurencję" ["Factors influencing penalties for

Article 111) or those identified by jurisprudence. It is not correct to determine the amount of the fine on the basis of the presumption that local government units should have their fines reduced because they would cover them from public funds. To ensure effective protection of free competition on local markets and the general function of antitrust fines, the same rules must apply to the penalisation of antitrust infringements committed by private undertakings and local government units. In fact, local government units are also "undertakings" even in cases where they merely organise public utility services. A different approach would have discriminative effects for other entities conducting their business activities on the same markets. Unequal treatment could also prove disadvantageous for consumers, for whom access to services provided by competing firms guarantees their proper quality and price.

Considering all of the above, the judgment of the Supreme Court must be supported.

Maciej Bernatt
PhD student at the Jean Monnet Chair on European Economic Law,
Faculty of Management, University of Warsaw;
Member of the Strategic Litigation Program, Helsinki Foundation for Human Rights

an infringment by a local government unit of prohibitions of practices restricting competition"] (2008) 1 *Glosa*.