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The legal status of foreign undertakings – could undertakings with a registered seat abroad be regarded as undertakings entitled to file a request for the institution of antimonopoly proceedings under Polish antitrust law? Case comments to the judgment of the Supreme Court of 10 May 2007 – *Netherlands Antilles* (Ref. No. III SK 24/06)

Facts

By the judgment of 10 May 2007 (III SK 24/06)[1], the Polish Supreme Court ended an over decade-long debate concerning the anticompetitive practices of the Polish incumbent telecoms operator Telekomunikacja Polska S.A. (hereafter, TP) on the national market for audio-text services. In this judgment, the Supreme Court interpreted the provisions of the Act of 24 February 1990 on Counteracting Monopolistic Practices[2] (hereafter, Antimonopoly Act). However, in its assessment of the general principles of the case, the Court also made reference to the Act of 15 December 2000 on Competition and Consumer Protection[3] (Competition Act 2000), which replaced the Antimonopoly Act. The Supreme Court ruled that a firm's entry, or lack thereof, into the Register of Entrepreneurs of the National Court Register does not prejudice its status as "an undertaking" within the meaning of Article 4(1) of the Competition Act 2000 – decisive in this context was said to be the conduct of an economic activity, rather than the fact of registration. Both the principle and the line of reasoning contained in the judgment remain valid, partly at least, under the current Act of 16 February 2007 on Competition and Consumer Protection[4] (Competition Act 2007).

In 1995 TP blocked the possibility for consumers to make an automatic connection with foreign audio-text operators – consumers who wished to use their services had to dial the required number through an operator, which was inconvenient and costly. Simultaneously, consumers could dial directly the numbers of national audio-text service providers. Almost at the same time that automatic access to foreign audio-

1 (2008) 9-10 OSNP, item 152.
2 Consolidated text - Journal of Laws 1995 No. 80, item 405, as amended.
3 Journal of Laws 2005 No. 244, item 2080, as amended.
4 Journal of Laws 2007 No. 50, item 331, as amended.

text services was blocked, the first entertainment telecoms company was created in Poland, which shared profits with TP.

In 1997 two companies from the Netherlands Antilles, Antillephone N.V. and Antelecom N.V., accused TP of abusing its dominant position, which hindered their activities on the Polish market of audio-text services. Following their request for the institution of antimonopoly proceedings against TP, the President of the Office of Competition and Consumer Protection (hereafter, UOKiK) opened such proceedings in accordance with the Antimonopoly Act. The authority ultimately decided that the actions of TP constituted a competition restricting practice, which resulted in the elimination of foreign providers from the national market of audio-text services, depriving consumers of their free choice. By the decision of 15 September 2000, the President of UOKiK ordered TP to stop the illegal practices and imposed a penalty of PLN 1 million (about EUR 260,000).

Key legal problems of the case

TP appealed the decision of the President of UOKiK to the Court of Competition and Consumer Protection (hereafter, SOKiK) asserting, *inter alia*, that the President of UOKiK failed to establish that the applicants were "undertakings" within the meaning of the Antimonopoly Act and the Economic Activity Act of 23 December 1988[5] (hereafter, the Economic Activity Act). According to the appeal, the applicants did not possess the legal status of an undertaking since they were not listed in the Register of Entrepreneurs of the National Court Register. Thus, as companies with their registered seat abroad, they could not be protected by Polish law. By the judgment of 18 December 2002 (XVII Ama 19/01)[6], SOKiK dismissed the appeal approving both the factual and legal findings of the President of UOKiK. However, SOKiK also pointed out that according to Article 113 of the Competition Act 2000, proceedings instituted under the Antimonopoly Act should be conducted under the new Act. TP filed a cassation appeal to the Polish Supreme Court claiming that the judgment violated material and procedural laws. In the judgment of 24 May 2004 (III SK 41/04)[7], the Supreme Court held that the case should be decided pursuant to the Antimonopoly Act, hence, the evaluation of the legitimacy of the request for the institution of antimonopoly proceedings should be performed in accordance with the provisions of the earlier Act.

By the judgment of 3 August 2005, SOKiK once more dismissed the appeal. It confirmed that both applicants did fall within the definition of "an undertaking" contained in the Antimonopoly Act and in accordance with the definition of "an economic activity" contained in the Economic Activity Act (proven by the extracts from the Netherlands Antilles' commercial register). As a result, the applicants were indeed

[5] Journal of Laws 1988 No. 41, item 324, as amended.
[6] UOKiK Official Journal 2003 No. 2, item 260.
[7] (2005) 13 OSNP, item 199.

entitled to request the institution of antimonopoly proceedings against TP. SOKiK performed once more a substantive evaluation of the defendant's actions, upholding its previous position in terms of the anticompetitive nature of the practices of the incumbent.

TP appealed the second judgment of SOKiK to the Court of Appeal in Warsaw, sustaining its previous charges. By the judgment of 30 June 2006, the Court of Appeal in Warsaw rejected the appeal as groundless. Once more, TP filed a cassation appeal to the Supreme Court claiming that the Court of Appeal incorrectly defined the term "an undertaking" and thus incorrectly assumed that the applicants were entitled to file a request for the institution of antimonopoly proceedings. TP claimed that the two foreign companies did not prove their legal interest in filing such a request, which, in the defendant's opinion, was required by the Antimonopoly Act.

Key findings of the Supreme Court

I. By the judgment of 10 May 2007 (III SK 24/06), the Polish Supreme Court dismissed the cassation appeal in its entirety holding that the applicants were "economic entities" (undertakings) within the meaning of the Antimonopoly Act and that they were legally entitled to submit a request for the institution of antimonopoly proceedings. According to the principle established by this judgment, a firm's entry, or lack thereof, into the Register of Entrepreneurs of the National Court Register does not prejudice its status as "an undertaking" within the meaning of Article 4(1) of the Competition Act 2000 (the conduct of an economic activity constitutes the decisive criterion in this respect).

II. Both the conclusions reached as well as the justification given by the Supreme Court are correct. In the light of the Supreme Court's judgment in case III SK 41/04, there is no doubt that with regard to the case under consideration here, the evaluation of the effectiveness of the request for the institution of antimonopoly proceedings, as well as the legitimacy of such request, should be performed in accordance with the provisions of the Antimonopoly Act. According to Article 21 of this Act, the said proceedings could be instituted on an *ex officio* basis or upon request of an entitled entity. Those entitled to request the institution of antimonopoly proceedings included, among others: economic entities whose business suffered or may suffer as a result of monopolistic practices.

III. In accordance with Article 2(1) of the Antimonopoly Act, an "economic entity" (subsequently replaced by the term "an undertaking") meant "a natural person, a legal person, and an organisational unit, which is not a legal person, conducting an economic activity or organising or performing public utility services, that do not constitute an economic activity in accordance with the Economic Activity Act". As the Supreme Court rightly observed in its justification of the judgment in the III SK 41/04 case, the aforementioned provision of the Antimonopoly Act did not make a reference to the provisions of the Economic Activity Act concerning the definition of an economic entity. The Antimonopoly Act included its own definition of an economic entity (an undertaking), making reference to the provisions of the Economic Activity

Act only with regard to the definition of an economic activity[8]. Therefore, in order to qualify a given entity as an economic entity within the meaning of the Antimonopoly Act, it was not significant whether the entity conducted an economic activity in Poland in accordance with the provisions of the Economic Activity Act or other legislation. Important instead was the fact whether the given entity was a natural person, a legal person or an organisational unit and performed activities, which in the light of the provisions specified in the Economic Activity Act, could be seen as an economic activity.

In accordance with Article 2(1) of the Economic Activity Act, an economic activity meant "a production, construction, trade and service activity conducted in order to generate profit and performed on the own account of the entity conducting the said activity". As the Supreme Court rightly emphasised, these were the only significant criteria that qualified a given entity as an economic entity within the meaning of the Antimonopoly Act – the registration in a specific register should have been of no relevance in this context[9]. It may be added in support of this opinion that the mere fact of fulfilling, or failing to fulfil, the obligation to register (for example: in the Register of Entrepreneurs or the Economic Activity Records) was also not decisive for the Economic Activity Act when qualifying a given activity as an economic activity and an entity conducting that activity as an entrepreneur. Crucial in this context was the fulfilment of statutory prerequisites of the definition of an economic activity and an entrepreneur[10]. The situation is similar under the Act of 2 July 2004 on the Freedom of Economic Activity[11] which replaced the Economic Activity Act.

The broad interpretation of the definition of an economic entity (an undertaking) for the purposes of Polish antitrust law that was accepted in the commented judgment (also generally accepted in the legal doctrine) seems to be additionally supported by Article 1 of the Antimonopoly Act that states that "the Act determines conditions for the development of competition, regulates the rules and measures of counteracting monopolistic practices as well as violations of consumer interests by undertakings and associations thereof, where such practices or violations cause or may cause effects in the territory of the Republic of Poland". On the basis of the principle of extraterritoriality contained in this provision, the Polish Supreme Court rightly assumed (with reference to the justification of the judgments of the first and second instance courts) that if the Antimonopoly Act applied to monopolistic practices bearing consequences within the territory of the Republic of Poland, irrespective of the fact whether the entity responsible for them had the status of an entrepreneur (in accordance with the

[8] S. Gronowski, *Ustawa antymonopolowa – komentarz* [*Antimonopoly law – commentary*], Warszawa 1999, p. 56-57.

[9] Ibidem, p. 56.

[10] See E. Bieniek-Koronkiewicz, T. Mróz, "Kontrowersje wokół pojęcia 'przedsiębiorca'" (2003) 6 *Prawo Spółek* 42.

[11] See A. Powałowski (ed.), *Ustawa o swobodzie działalności gospodarczej. Komentarz* [*Act on Freedom of Economic Activity. Commentary],* Warszawa 2007, p. 39; M. Szydło, *Swoboda działalności gospodarczej* [*Freedom of Economic Activity*], Warszawa 2005, p. 102-103; judgment of the Supreme Administrative Court of 25 October 2006, II GSK 179/06, LEX No. 276729.

laws regulating economic activity of Polish economic entities), then a similar method should apply to the qualification of the entity submitting a request for the institution of antimonopoly proceedings.

If a different approach was taken, a foreign undertaking wishing to submit a request for the institution of proceedings on the basis of the Antimonopoly Act would have had to formally commence economic activities in Poland. It would be wrong to accept an approach that deprived all foreign undertakings, which did not conduct an economic activity in the form stated in Polish laws, of the status of an economic entity within the meaning of the Antimonopoly Act and thereby, of the capacity to file a request for the institution of antimonopoly proceedings. Moreover, if this approach was applied, it would consequently lead to the assumption that such entities had also no capacity to be passive participants in Polish antimonopoly proceedings, in other words, that they could not have had proceedings instituted against them. This would have allowed them to violate Polish antitrust law without bearing any consequences for it.

Justifying its position, the Supreme Court was right to observe that, with regard to the decisions made so far, the possibility of applying the provisions of the Antimonopoly Act to foreign undertakings did not raise any doubts. This opinion is proven by at least two of the many decisions taken in cases concerning foreign undertakings quoted by the Supreme Court: 1) "The Antimonopoly Act also applies to agreements concluded with entities with their registered seat abroad, if their consequences with regard to monopolistic practices occur within the territory of the Republic of Poland"[12]; 2) "In order to assess whether a given action of a foreign undertaking bears the consequences of monopolistic practice within the territory of Poland, which is governed by Polish laws, in accordance with Article 1 of the Antimonopoly Act, we should rely on the market position (power) of the said undertaking on the foreign market where its activity concerning a given product is concentrated"[13].

IV. The objections made against the judgment of the Court of Appeal concerning the potential violation of Article 21(2(1)) of the Antimonopoly Act (accepting the active capacity of the entities to request the institution of the proceedings, despite the claim that they did not prove their legal interest in filling such a request) were also rightly considered to be groundless by the Supreme Court. In accordance with the then generally accepted view that Article 21 (2(1)) was concerned with "actual", rather than legal, interest of the applicant, any firm that decided that its business interests had suffered or may have had suffered from a monopolistic practice could prove actual interest. If the legislator intended here to require proving a legal interest, this rule would have made a direct reference to the definition of "a legal interest" as was the case, for example, in Article 84(1) of the Competition Act 2000.

[12] Judgment of the Antimonopoly Court of 24 January 1991, XV Amr 19/90 (1992) 5 *Wokanda*, item 37.

[13] Judgment of the Antimonopoly Court of 21 January 1998, XVII Ama 55/97 (1999) 2 *Wokanda*, item 48.

Final remarks

Fortunately, in its justification of judgment under consideration, the Supreme Court did not repeat its opinions formulated in the justification of the III SK 41/04 case where it was said “that it can hardly be assumed that, for the purposes of public commercial law (both the Antimonopoly Act, as well as the Economic Activity Act could be included in this particular branch of law), the legislators used the same definition with a different meaning, attributing it with different prescriptive content, in particular, including various types of entities”. This opinion seems to contradict the legislative practice (which is difficult to accept, but unfortunately well established) of defining the same term in different ways in various legal acts, as exemplified by the different legal definitions of the term “undertaking” used in the Antimonopoly Act and the Economic Activity Act[14]. The same situation applies to the Competition Act 2007 and the Freedom of Economic Activity Act 2004.

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[14] It must be noted here that the terms: “an undertaking” under the Antimonopoly Act and “an entrepreneur” under the Economic Activity Act had one and the same Polish equivalent, which was “przedsiębiorca”.