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Does a selection of contractors in a public tender constitute an infringement of a prohibition of competition restricting agreements? Case comment to the judgment of the Supreme Court of 25 April 2007 – *STALEXPORT – TRANSROUTE* (Ref. No. III SK 3/07)

Facts

The judgment of the Supreme Court of 25 April 2007 (Ref. No. III SK 3/07) must be supported. Assessed was primarily the relationship between Polish legislation concerning toll motorways and road traffic and the former Act of 15 December 2000 on competition and consumer protection (hereafter, Competition Act 2000)[1]. The Supreme Court had to determine most of all whether it was possible to evaluate the actions of a motorway operator in the light of Article 3 section 1 of the Competition Act 2000[2] as well as, whether the use of a public tender procedure (Article 70^{1-5} of the Civil Code) justified the restriction of competition that occurred on the basis of the agreement that was concluded between the motorway operator and provider selected by the tender.

In a decision of 23 January 2003 (No. RTK 6/2003), the President of the Office of Competition and Consumer Protection (hereafter, UOKiK) found that the contracts that the motorway operator STALEXPORT – TRANSROUTE Autostrada S.A. concluded with several accident assistance providers constituted a set of competition restricting agreements. The Authority established that the parties have:

(a) fixed the prices that consumer would have to pay for accident assistance services on the relevant part of the local road system, which constituted a breach of Article 5 section1 item 1 of the Competition Act 2000;
(b) divided the market for accident assistance services on the toll section of the A4 motorway, which constituted a breach of Article 5 section 1 item 3 of the Competition Act 2000; and

[1] Journal of Laws 2003 No.. 86, item 804 as amended. The judgment of the Supreme Court remains fully valid also on the grounds of the new Competition and Consumer Protection Act dated 16 February 2007.

[2] In accordance with this provision "*(…) this Act shall not be applicable to any restriction on competition permitted under separate law*".

(c) limited access to the market for non-selected service providers, which constituted a breach of Article 5 section 1 item 6 of the Competition Act 2000.

The President of UOKiK imposed a fine on the parties for restricting competition on the relevant market. The parties were also charged with the costs of the proceedings. All of the fined companies submitted appeals requesting for the antitrust decision to be amended by declaring that the disputed agreements did not restrict competition. The Court for Competition and Consumer Protection (hereafter, SOKiK) dismissed the appeals on 24 March 2004. The motorway operator submitted a cassation appeal to the Supreme Court against the judgment of SOKiK, seeking to repeal it in its entirety and refer the case to SOKiK for reconsideration. The motorway operator claimed that many provisions of substantive law as well as numerous procedural rules were breached.

In its judgment of 14 December 2005, the Supreme Court[3] remanded the cassation appeal as an ordinary appeal to be reassessed by the Court of Appeal. In its judgment of 20 September 2006, the Court of Appeal dismissed the appeal once again in the light of Article 385 of the Polish Civil Procedure Code. The second-instance court agreed with SOKiK's earlier assessment of the facts of the case as well as of its legal basis. The motorway operator submitted another cassation appeal to be assessed by the Supreme Court requesting that the judgment of the Court of Appeal be repealed in its entirety and remand for reassessment. The cassation appeal was once again based on allegations of breaches of the provisions of substantive law and procedural rules.

Key legal problems of the case

Relevant market and exclusivity clauses

There was no doubt that the lower instance courts have correctly determined the market position of the motorway operator[4] as well as the relevant market in its product and geographic dimension[5]. It was also clear that the disputed agreements contained an exclusivity clause and that they fixed prices for the assistance services available to consumers on the toll section of the A4 motorway[6]. It should be emphasised however,

[3] Due to amendment to the Polish Code of Civil Procedure that was applicable to the original proceedings.

[4] The courts found that the motorway licensee holds a 100% share in the relevant market.

[5] The courts of all the instances correctly stated that the relevant geographic market in this case was a section of the A4 Katowice-Krakow motorway; the product market included motor accident assistance services. Since the toll section of the motorway is used by drivers (consumers paying a certain fee), they are able to travel the distance from Krakow to Katowice in a fast and comfortable way; neither public roads nor express roads can be regarded as a substitute for this motorway since their features cannot be compared to the toll section of the A4 motorway.

[6] Attached to the disputed agreements was a fixed pricelist agreed between the selected assistance providers and the motorway licensee; the fees were two times higher than the prices

that the exclusivity clauses protected mainly the interests of the accident assistance service providers. The contracts resembled therefore exclusive distribution agreements where exclusivity is granted for a given territory (the toll section of the A4 motorway) and the obligation to guarantee exclusivity rests with the supplier (the operator of the toll motorway)[7]. To additionally strengthen the exclusivity clause, competition was prohibited between the selected providers on certain sections of the motorway and all the nearby police units were required to call for assistance only those providers that were authorised by the motorway operator. As a result, the selected accident assistance providers were given absolute territorial protection in their relevant market[8].

Antitrust authorities are known to strongly disapprove of such market practice[9] since absolute exclusivity allows the selected providers to act in a state of no competition[10]. The Supreme Court correctly noted therefore that, as a result of the disputed agreements, all possible competition was eliminated by dividing the market in an illegal manner and restricting access to it to the detriment of consumers and independent assistance providers. As a result, consumers (the users of the motorway) were deprived of the opportunity to choose their service provider and were obliged to pay a high flat rate fee for accident assistance services as fixed in the disputed agreements.

The possibility of excluding the application of antitrust provisions under separate laws

When considering the possibility of excluding the application of antitrust rules based on separate legal provisions (Article 3(1) of the Competition Act 2000), it is worth referring to the Community legal practice and specifically, to the jurisprudence of the European Court of Justice (hereafter, ECJ). There are no provisions in European law that exclude the application of antitrust rules in certain areas (sectors), which is similar to the Polish legal system. The ECJ assesses the possibility of applying Article 81 or Article 82 EC by analysing the notion of an "undertaking" and an "economic activity". In this respect the ECJ considers an economic activity to be any activity

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charged by independent local providers.

[7] R. Poździk, *Dystrybucja produktów na zasadzie wyłączności w Polsce i Unii Europejskiej* [*Exclusive distribution of products in Poland and the European Union*], Lublin 2006, p. 11 and 106.

[8] The fact that in extraordinary circumstances (such as a pile-up), certain authorised service providers could provide assistance on other motorway sections does not affect their absolute territorial protection. Such an exception did not restrict the exclusivity granted to the selected service providers but aimed to ensure that customers receive adequate assistance in the case of a pile-up. Services providers authorised to act on a given section were otherwise not permitted to provide assistance to consumers involved in an accident on other sections of the motorway.

[9] Ibidem, p. 107.

[10] See D. Miąsik, [in:] R. Skubisz and others, *Prawo europejskie. Zarys wykładu* [*European Law. Framework of lectures*], Lublin 2006, p. 353.

consisting in offering goods or services on a given market[11], regardless of its legal form and the way in which it is financed[12]. If these conditions are met, antitrust law should be applied irrespective of whether such economic activity is associated with sports[13], regulated professions[14] or with public roads. However, according to the jurisprudence of the ECJ, EC antitrust rules do not apply to an activity which, by its nature, aim and the rules to which it is subject, does not belong to the economic sphere[15] or, which is connected with the exercise of the powers of public authorities[16].

The Polish Supreme Court was right therefore to state that the application of antitrust rules could not have been excluded in this case by the obligation of the motorway operator (contained in its licence agreement) to organise the accident assistance services, even though this obligation was not contractual but rather was imposed on motorway operators under Article 31 section 2 item 5 of the Act dated 20 June 1997 the Road Traffic Law Act[17], § 7 of the Regulation of the Council of Ministers dated 25 September 2001 on General Directions of the Cooperation between a Road Licensee, the Road Administration, the Police, the Ambulance Service and the Fire and Rescue Service[18] in connection with Article 62 of the Act dated 27 October 1994 on Toll Motorways and the National Road Fund.[19] Under these provisions, a licence agreement for the operation of motorways should include an obligation of the licensee to ensure the safety of road users, provide continuous access to the motorway and

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[11] See, in particular, the judgments of the ECJ dated 18 June 1998 in case C-35/96 *Commission v. Italy* [1998] ECR I-3851, para. 36; and the judgment dated 12 September 2000 in joint cases C-180/98 to C-184/98 *Pavlov and others* [2000] ECR I-6451, para. 75.

[12] See, in particular, the judgment of the ECJ dated 23 April 1991 in case C-41/90 *Höfner and Elser* [1991] ECR I-1979, para. 21; the judgment dated 17 February 1993 in joint cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, para. 17 and the judgment dated 16 November 1995 in case C-244/*94 Fédération française des sociétés d'assurance and others* [1995] ECR I-4013, para. 14.

[13] See the judgments of the ECJ dated 12 December 1974 in case 36/74 *Walrave and Koch* [1974] ECR 1405, para. 4; the judgment dated 15 December 1995 in case C-415/93 *Bosman* [1995] ECR I-4921, para. 73 and the judgment dated 18 June 2006 in case C-519/04 P *Meca-Medina and Majcen v. Commission* [2006] ECR I-6991, paras. 22 and 28.

[14] See, with respect to medical doctors, the judgment of the ECJ dated 12 December 2000 in joint cases C-180/98 to C-184/98 *Pavlov and others* [2002] ECR I-6451, para. 77 and with respect to lawyers, the judgment of the ECJ dated 19 February 2002 in case C-309/99 *J.C.J. Wouters* [2002] ECR I-1577.

[15] See, the judgment of the ECJ dated 17 February 1993 in joint cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paras. 18 and 19, concerning the management of the public social security system.

[16] See the judgment of the ECJ dated 19 January 1994 in case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, para. 30 concerning the control and supervision of air space, and the judgment of the ECJ dated 18 March 1997 in case C-343/95 *Diego Calì & Figli* [1997] ECR I-1547, paras. 22 and 23, concerning anti-pollution surveillance of the maritime environment.

[17] Journal of Laws 2005 No. 108, item 908 as amended.

[18] Journal of Laws No. 118, item 1251.

[19] Journal of Laws 2001 No. 110, item1192 as amended.

ensure its suitability for driving. However, when performing their statutory obligations, the parties to the licence agreement should always comply with competition rules. However, it is only possible to apply Article 3 section 1 of the Competition Act 2000, if the legislation governing a specific subject matter (*lex specialis*) allows *expressis verbis* for exclusion or restriction of competition. There is no direct restriction of competition under the Act on Toll Motorways.

Tender procedure and the restriction of competition

The courts of the first and second instances were in agreement that the fact that the motorway operator held a public tender did not affect the assessment of its actions under Competition Act 2000.[20] This view is not correct since using a public tender for the conclusion of an agreement may be important for the determination whether an exclusivity clause is applied in a valid and correct way.[21] Selecting the best offer neither restricts competition purposefully nor results in the restriction of competition. However, as it was correctly indicated by the Supreme Court in the justification of its judgment, the organisation of a public tender does not justify any restrictions of competition introduced by the motorway operator in its contracts with the selected accident assistance providers.

Key findings of the Supreme Court

The Supreme Court dismissed the final cassation appeal. In the opinion of the Supreme Court, the main legal issue in this case was the assessment of the relationship between the statutory provisions concerning toll motorways and road traffic (and the obligations of a motorway operator arising from these provisions) and the rules of the Competition Act 2000. The Supreme Court rejected the basic claim contained in the cassation appeal stating instead that a motorway operator is bound by the limitations set out in certain provisions of the Competition Act 2000 even in the light of its specific statutory obligations. The Supreme Court agreed with the views of the lower instance courts that the infringement of the prohibition of competition restricting agreements was not evaded by the fact that the selection of the providers took the form of a public tender seeing as a tender cannot, on its own, be seen as an acceptable form of competition in this market. In the opinion of the Supreme Court, the fact that the service providers were selected by means of a public tender did not justify the disputed agreements considering that the contracts made it possible for the motorway operator to use the road users' obligation to inform the motorway operator of their need of assistance to call upon only the selected service providers and, to enable the

[20] The organisation to select accident assistance service providers via a public tender was one of the obligations contained in the A-4 Katowice toll motorway licensee agreement with STALEXPORT S.A.

[21] See the judgment of the Anti-Monopoly Court dated 6 December 1995, case ref. No.. XVII Amr 44/95.

service providers to charge consumer a fee that significantly exceeding its actual market value.

Final remarks

The motorway operator would not have breached antitrust rules if the disputed agreements secured only its specific statutory obligations (to ensure the flow of the traffic on the motorway and the roads suitability for driving, allowing consumers to call for assistance on independent accident assistance providers for typical events occurring on public roads). Evidently, it was inadmissible that a fee for such assistance services was fixed in these agreements.

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