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

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Centre of Antitrust and Regulatory Studies, University of Warsaw, Faculty of Management
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A local government's right to determine the conditions of operating on the market for communal waste collection. Can such conditions lead to an anticompetitive foreclosure of that market?
Case comment to the judgement of the Supreme Court of 14 November 2008 – *City Kalisz* (Ref. No. III SK 9/08)

Facts

In the decision (no. RPZ-40/2005) issued on 30 December 2005, the President of the Office of Competition and Consumer Protection (UOKiK) established an infringement of Article 8(2)(5) and (8) of the Act of 15 December 2000 on Competition and Consumer Protection[1] by the Kalisz city borough[2] (Miasto Kalisz, hereafter MK). The abuse took the form of preventing the creation of conditions necessary for the emergence or development of competition and market sharing. The same forms of abuse are currently listed in Article 9 of the new Act of 16 July 2007 on Competition and Consumer Protection[3] (hereafter, Competition Act). Miasto Kalisz made the granting of a permit to collect communal waste from property owners subject to the possession of a technical base situated in the territory of MK or a neighbouring district. The UOKiK President ordered MK to cease the contested practice and imposed upon MK a fine.

Miasto Kalisz appealed the decision to the Polish Court of Competition and Consumer Protection (SOKiK) claiming that the UOKiK President infringed the listed above provisions of the Competition and Consumer Protection Act of 2000. The Court upheld the UOKiK decision. Miasto Kalisz appealed the ruling to the Court of Appeal in Warsaw. The appeal was dismissed. Miasto Kalisz filed a cassation request. The Supreme Court settled the dispute on 14 November 2008 in favour of the UOKiK stating that the cassation was not justified in this case.

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

[2] Kalisz city borough acted as a plaintiff in this case.

[3] Journal of Laws 2007 No. 50, item 337; see Article 9(2)(5) and (7) of the Competition Act.

The key legal problems of the case and key findings of the Supreme Court

Relevant markets

Two relevant **product markets**[4] were determined:

- the market for the organisation of services of a public utility nature in the form of maintaining tidiness and order within a borough (**upstream market**). The city borough is liable for the organisation of such services[5] (simultaneously the provisions of Polish antitrust law are applied to their activity[6]). Miasto Kalisz (plaintiff) held the position of a **(legal) monopolist**[7] on that market;
- the market for communal waste collection from property owners (**downstream market**). The plaintiff not only conducted an economic activity on that market but also held a **dominant position** on it.

The **geographical scope** of these two **related** relevant markets comprised the territory **of the Kalisz city borough**. Miasto Kalisz was charged with the abuse of its dominant position on the downstream market. However, the abuse derived from the fact that MK exercised its substantial[8] market power ("regulating power") on the upstream market by leveraging it onto the downstream market.

Anticompetitive foreclosure of the communal waste collection market

The main claim of MK that was examined by the Supreme Court concerned the infringement of **Article 9(2)(5) of the Competition Act**[9] – counteracting the creation of conditions necessary for the emergence or development of competition. The Supreme Court rightly did not find that the UOKiK President violated of this provision. For an infringement of Article 9 to occur, the dominant firm's conduct must create significant barriers to entry or expansion[10]. The existence of such barriers practically excludes

[4] Within the meaning of Article 4.9 of the Competition Act.

[5] See Article 1 and 3 of the Act of 13 September 1996 on Maintaining Tidiness and Order within Communes [Ustawa o utrzymaniu czystości i porządku w gminach], Journal of Laws 2005 No. 236, item 2008.

[6] Local authority units (i.e. city boroughs) possess the status of an "undertaking" within the meaning of Polish antitrust law (see Article 4.1a of the Competition Act); see also M. Bernatt, "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 judgement of Supreme Court of 5 January 2007 (Ref. No. III SK 16/06)" (2008) 1(1) *YARS* 220.

[7] The execution of the tasks determined in the Act of 13 September 1996 on Maintaining Tidiness and Order within Communes has been exclusively entrusted to boroughs.

[8] I.e. arising from the position of a legal monopolistic (on the upstream market).

[9] And also the infringement of Article 9(2)(7) of the Competition Act ("[m]arket sharing according to territorial, product, or entity-related criteria"). The scope of that case comment is however limited to remarks concerning the form of abuse defined in Article 9(2)(5) of the Competition Act.

[10] This approach is shared by recent judgments; see e.g. the judgment of the Supreme Court of 19 February 2009, III SK 31/08 (unpublished), where the court stated that the application

the possibility of the emergence or development of competition on a given market; thus their creation justifies the assumption of **market foreclosure**.

The contested practice of MK created a significant barrier to enter the market for communal waste collection from property owners or to expand their activities on that market.

That barrier took the form of a requirement to **possess,** by the undertaking apllying for a permit to operate on that market, a **technical base situated within MK or the territory of a neighbouring district**. Such requirement, which simultaneously constituted one of the prerequisite of that permit, was introduced by an order of the President of MK (No. 529/2003). The plaintiff's argument should be rejected in which MK saw this condition as neither discriminatory nor anticompetitive (exclusionary), because it was applicable to all undertakings – both those already rendering services of communal waste collection and those applying for the required permit.

First, the application of Article 9(2)(5) of the Competition Act is not conditional on finding discriminatory behaviour[11]. Second, the market entry (expansion) barrier raised by the MK President was of economic nature. The fulfilment of the contested condition required significant (additional) costs by the applicant. These costs were necessary for the creation, or move, of a technical base for waste collection/utilisation within MK or a territory of a neighbouring district[12]. Such necessity constituted thus an essential factor discouraging potential competitors from entering the market for communal waste collection from property owners or from continuing their activities by actual competitors of MK. Consequently, this requirement led to the elimination (or at least to significant restriction) of the conditions necessary for the development of effective competition on that market. Such situation simultaneously gave an important advantage to those entities that already had (before the introduction of the disputed requirement) a technical base within MK or a neighbouring district since they did not need to incur any extra costs. This was clearly the case with the plaintiff which conducted an economic activity on that market[13].

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of Article 9(2)(5) of the Competition Act shall be limited to the creation of entry barriers that are of fundamental nature – barriers that concern the conditions necessary to effectively enter and operate on the given market.

[11] In this case, there were no grounds to find merely an instance of "pure" formal discrimination. The discrimination really did take place since it placed at a competitive disadvantage all those undertakings which did not fulfil it on the day it was established; the condition created unequal conditions of competition that favoured those undertakings that already had a technical base in the required territory such as MK. Consequently, the conduct of MK could also be qualified as a discriminating practice defined in Article 9(2)(3) of the Competition Act. However the infringement of that provision was not subject of the judgment of the Supreme Court.

[12] Rightly emphasized by the Supreme Court, which stressed that the undertaking which did not possess a technical base in the prescribed territory but had one elsewhere, would have to consider the profitability of opening a second base within MK or the transfer of the existing base to the prescribed territory. Such activities would have certainly created significant extra costs.

[13] The plaintiff held a dominant position also on that market. By the introduction of the disputed condition, the plaintiff intended to monopolize also that market (or at least

Objective justification (state action doctrine)

The Supreme Court rightly stated that an allegedly anticompetitive conduct could – despite such qualification – be treated as legal, if it is permissible or even required by the law or is objectively justified by other reasons. The undertaking shall not be found liable for a violation of the prohibition of dominant position abuse, if domestic legal provisions or decisions of public authorities impose on that undertaking the obligation of conduct that is incompatible with this prohibition. In such cases, the contested conduct is not considered to be autonomous. Instead, it is the effect of the observance of an order of the national legislator or executive authority (the so called "state action doctrine"[14]).

However, the conditions for the application of the "state action doctrine" have not been met in this case. The contested requirement regarding the localization of waste collection facilities is not provided by the Act of 13 September 1996 on Maintaining Tidiness and Order within Communes or the provisions of the Order of the Minister of Environment Protection of 30 December 2005 on the Detailed Methods of Determining the Requirements to be Met by Those Applying for the Permit[15]. Although the provisions of these acts indeed empower local authorities to determine the requirements for a waste collection permit[16], they do not give them full discretion in defining the conditions necessary to obtain that permit.

First, the required conditions should be formulated in a way that would allow for a proper fulfilment of the objectives of the Act of 13 September 1996 on Maintaining Tidiness and Order within Boroughs and Related Tasks (determined in that act)[17]. The introduction of the contested requirement should thus have contributed to an effective implementation of these objectives. However, the plaintiff failed to demonstrate that the questioned requirement was indispensable to the implementation of the specified tasks and, in particular, for ensuring safe and environmentally friendly communal waste collection from property owners[18]. Indeed, proving the indispensability of that

to strengthen its position on it) by was of an anti-competitive leveraging of its monopolistic position from the *upstream* market (the market for the organisation of services of a public utility nature; see: *Relevant markets*).

[14] The state action doctrine has been developed in the jurisprudence of EU courts; see e.g. case T-513/93 *Consiglio nazionale degli spedizionieri doganali v Commission*, [2000] ECR II-1807; joint cases C-359/95 P and C-379/95 P *Commission and France v Ladbroke Racing*, [1995] ECR I-6265; case T-271/03 *Deutsche Telekom AG v Commission*, [2008] ECR II-477.

[15] Journal of Laws 2006 No. 5, item 33.

[16] For the conduct of activities in the field of communal waste collection from property owners.

[17] See also Article 7(7) of that Act – its provisions (along with secondary legislation) shall safeguard the maximum safety for citizens and the environment of the borough.

[18] The plaintiff claimed however, that if the technical base is removed from the territory from which the waste collection services are to be rendered, the conduct of the waste collection activities could be significantly hindered or even made impossible. The Supreme Court found this argumentation to be speculative stressing that MK failed to demonstrate any concrete examples for its claims.

requirement should be treated as an objective justification for the contested conduct, which would eliminate the possibility of qualifying it as dominant position abuse. The plaintiff did not submit such proof.

Second, the provisions of the aforementioned Regulation of the Minister of Environment Protection include an *expressis verbis* obligation to define the requirements necessary to obtain the permit **in a way which does not restrict competition**.

Final remarks

The disputed requirement established by the MK President was not neutral from the point of view of ensuring equal conditions for commencing and conducting economic activities on that market. It led to an anticompetitive foreclosure of that market. The Supreme Court rightly qualified the contested conduct as an abuse of a dominant position by MK in the form of the prevention of the creation of conditions necessary for the emergence or development of competition (Article 9(2)(5) of the Competition Act).

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