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Possible objective justification of a network monopoly's refusal to conclude an agreement on an interconnected market : case comment to the judgement of the Supreme Court of 14 January 2009 - Rychwał Commune (Ref. No. III SK 24/08)

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Facts

In the decision RPZ-18/2006 issued on 5 July 2006, the President of the Office of Competition and Consumer Protection (hereafter, UOKiK) stated that the practices of the Rychwał Commune constituted an abuse of its dominant position held on the local market for liquid waste services. The practice consisted of the refusal to conclude an agreement with an entrepreneur for the receiving of liquid waste from the residents of the Commune. Rychwał refused to conclude the contract on technical grounds stating that the amount of liquid waste that could be received by their refinery was limited by the amount inflowing through their sanitary sewage system. The Commune invoked also the refinery's exploitation manual and stressed that the facility's limits were filled by those entities that were already providing such services in its territory, seeing as the Commune has previously signed several of such contracts with other entities.

According to the UOKiK President, Rychwał's conduct violated Article 8(1) and (2)(5) of the Act of 15 December 2000 on competition and consumer protection¹, replaced by the Act of 16 February 2007 on competition and consumer protection², since it precluded the creation of conditions necessary for the emergence or development of competition on the local market of no-outflow emptying tanks and the transport of liquid waste. In the opinion of the UOKiK President, the conduct of the Commune was meant to eliminate a potential competitor on an interconnected market establishing an entry barrier that was impossible to overcome, hence illegal. Such conduct was not directed towards rising service standards or lowering prices and resulted in a restriction of competition. In consequence, the entrepreneur has been forced to use less convenient facilities making its business less prosperous than the Commune and other competitors that managed to sign similar contracts with the Commune.

¹ Consolidated text: Journal of Laws 2005 No. 244, item 2080, as amended.

² Journal of Laws 2007 No. 50, item 331, as amended.

Rychwał appealed the UOKiK decision to the Court of Competition and Consumer Protection (SOKiK). SOKiK rendered its judgment on 11 May 2007 (XVII Ama 96/06) changing the original decision. According to the Court, the refusal to conclude the contract was *objectively justified* in this case by the lack of technical facilities for receiving a larger amount of waste. SOKiK's judgment was appealed by the UOKiK President but the Court of Appeals rejected it on 22 February 2008 (VI ACa 985/07) confirming SOKiK's ruling and stating that the refusal was justified by the lack of available facilities. The UOKiK President filed a cassation request as a result of which, the Supreme Court quashed the judgment of the Court of Appeals and referred the matter back for trial.

The Supreme Court confirmed that the refusal by a network monopolist to conclude an agreement with a partner, which acts as its competitor on an interconnected market, may sometimes be justified by technical considerations. According to the Supreme Court, the lack of technical facilities to receive a larger amount of waste, exceeding its nominal values, can be treated as an example of such justification. In this case however, the Court stated that the amount of liquid waste that may be delivered in a certain period of time is not dependent on the number of entities active on the market – the total of liquid waste produced and delivered on the local market is constant irrespective of the number of entities active on this market. Therefore, the contractual determination of the amount of liquid waste to be delivered does not have to result in an increase of the total received by the tank. It could lead however to a different allocation of deliveries.

Still, the Supreme Court stated also that in order to establish a restriction of competition, the anticompetitive effects of the scrutinized practice would have to be analyzed. In the Court's opinion, the mere constraint by a monopolist of another's freedom of business activity may not be sufficient to accept that such conduct limits competition. For that reason, the impact of the refusal to contract with a particular partner would have to be compared to its position and the position of other contractors, in order to evaluate the alleged anti-competitiveness of the given practice. Moreover, it is vital to determine here whether such refusal concerned an essential facility. The first and second instance judgments were thus overruled by the Supreme Court because they did not contain such an evaluation.

After the re-examination of the case, the Court of Appeals issued a judgment on 23 June 2009 (VI ACa 580/09) quashing the first instance judgment and referring the matter back for trial. After the renewal of the proceedings, SOKiK ruled on 9 June 2010 (XVII Ama 152/09) to reject Rychwał's appeal. Unlike in its original judgment, SOKiK found here that the actions of the Commune did indeed constitute a violation of Article 8(2)(5) of the Competition Act because they prevented a competitor from commencing and conducting business on the local market for waste disposal. Such conduct was treated as a limitation of competition. During the re-trial, the technical justification invoked by Rychwał in order to legitimize its refusal to conclude the contested agreement appeared to be false. Contrary to its claims, it was found that the Commune did not abide by the quantitative limits it invoked and concluded contracts with other entities which exceeded them.

Key legal problems of the case and key findings of the Court

In its judgment, the Supreme Court raised several important questions of substance and procedure. First, Article 9(2)(5) of the Competition Act 2007 (replacing Article 8(2)(5) of the Competition Act 2000) imposes a duty on dominant undertakings to behave in a way that will not create barriers limiting the ability of others to effectively compete on the free market³. The Supreme Court confirmed that for a proper application of Article 8(2)(5) of the Competition Act 2000 (now Article 9(2)(5) of the Competition Act 2007), a network monopolist should have the opportunity to invoke an objective justification for its conduct, which would normally constitute an abuse.

The concept of an objective justification has its roots in the decisions of the European Commission and the jurisprudence of the European Court of Justice (ECJ). Notwithstanding the general abuse prohibition, both the Commission and ECJ have started in the 1970ties to use the so-called 'rule of reason' in order to incorporate this concept into the European competition law regime. Both institutions agreed that an objective justification should be treated as a factor taken into consideration when the actions of a dominant entity do not amount to a practice limiting competition due to objective, external reasons. Some sources stress that beside the use of an objective justification in order to preclude the finding of an abuse, entrepreneurs can also rely on the competition meeting defence or efficiency concept. In consequence, the disputed conduct would not violate the basic values of the rules on competition protection⁴. The concept of an objective justification can be perceived as a negation of the over formalistic per se evaluation of the abuse of dominance. This new approach pays less attention to the objective evaluation of the conduct and more to the factual circumstances, including market conditions, of the particular case⁵.

Nonetheless, the concept of an objective justification has not always been accepted by the Commission and the ECJ. Although it has been adopted by the ECJ in *United Brands v Commission*⁶, *Centre Belge d'études de marché – Télémarketing (CBEM) v Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)*⁷, *Hilti v Commission*⁸, *Tetra Park International v Commission*⁹ or *British Airways*¹⁰,

³ E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on competition and consumer protection. Commentary]*, Warszawa 2002, s. 113.

⁴ Zob. T. Skoczny, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on competition and consumer protection. Commentary]*, Warszawa 2009, p. 619 et seq.

⁵ E. Piontek, 'Reforma stosowania art. 82 Traktatu o ustanowieniu Wspólnot Europejskich' ['Reform of the application of Article 82 TEC'] [in:] C. Banasiński (ed.), *Prawo konkurencji – stan obecny oraz przewidywane kierunki zmian [Competition law – a current state and anticipated directions of changes]*, Warszawa 2006, pp. 50–91.

⁶ Case 27/76 [1976] ECR 425, at para. 184.

⁷ Case 311/84 [1985] ECR 3261, at para. 27.

⁸ Case T-30/89 [1990] ECR II-163, at para. 102-119.

⁹ Case T-83/91 [1994] ECR II-755, at para. 136 and 207.

¹⁰ Case C-95/04 P [2007] ECR I-2331, at para. 69 and 86.

the Court of First Instance (currently the General Court) stated in *Metropolie Television* that the rejection of the *per se* evaluation of the market conduct of dominant undertakings is not tantamount to the acceptance of the rule of reason in the domain of community competition law.¹¹ It seems that the notion of an objective justification has now been accepted as part of the EU competition law regime. It was indeed confirmed in point III(D) of the Communication of the Commission: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty (currently Article 102 of the Treaty on the Functioning of the European Union – JJ) to abusive exclusionary conduct by dominant undertakings¹². The Commission explicitly stated in this act that a dominant undertaking can invoke an objective necessity or an increase in efficiency, provided that such a justification is applied proportionally. An increase of efficiency can be raised before EU institutions under the following conditions: the efficiencies have been or are likely to be realized as a result of the conduct; there must be no less anti-competitive alternatives to the conduct capable of producing the same efficiencies; the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets; the conduct does not eliminate effective competition by removing all or most existing sources of actual or potential competition.

The Polish Supreme Court has accepted the institution of an objective justification in competition law cases. Its general applicability was confirmed in the judgment of 20 June 2006 (III SK 8/06¹³) even though the Court found in that case that justifications based on the need to fight media piracy were insufficient for the preclusion of the wrongfulness of the anticompetitive practices (an additional requirement to paste holograms on phonographs). In later practice, an objective justification was rejected in the judgment of 6 December 2007 (III SK 16/07¹⁴) due to the lack of sufficient evidence but accepted in the judgment of 15 July 2009 (III SK 34/08¹⁵) with respect to the refusal to provide transfer services due to the necessity to protect the local energy sector. Importantly, the Court affirmed in the latter case that an entrepreneur can effectively invoke the necessity to protect its own economic interests in order to defend itself from abuse charges. A similarly affirmation can be found in the judgment of 16 October 2008 (III SK 2/08¹⁶).

The same line of reasoning has been adopted recently by the UOKiK President. For instance, in the decision issued on 31 December 2009 (RBG–24/2009), the refusal to conclude a contract was not found to be abusive due to the existence of an economic justification for such market practice. Previously, in the decision issued on 26 August 2009 (RBG–11/2009), the UOKiK President stated that the conduct of a dominant

¹¹ Case T-112/99 [2001] ECR II-2459, at para. 72.

¹² OJ [2009] C 45/7.

¹³ (2007) 13-14 *OSNP* 208.

¹⁴ UOKiK Official Journal 2008 No. 2, item 21.

¹⁵ Not yet reported.

¹⁶ Not reported.

company cannot be treated as a practice limiting competition on the basis of the 'meeting competition defence'.

The possibility to preclude the wrongfulness of conduct which would normally constitute a competition limiting practice was unequivocally confirmed in the Rychwał judgment. The argument that the disputed amount of liquid waste was over the technically acceptable limit of the facility was said to be applicable as an objective justification for the refusal to conclude a contract.

The issue of the evaluation of the anticompetitive effects of a scrutinized market practice was also considered by the Supreme Court in the Rychwał case. As a result of the notion of an objective justification, the Court stressed the duty of the competition protection organ to prove a practice's actual and tangible impact on competition. The Supreme Court rightly pointed out that in order to establish anticompetitive effects of a refusal to conclude a contract, it would be necessary to determine to what an extent could such a refusal affect the competitiveness of the entrepreneur's offer in comparison to the situation of those that were able to secure such contracts. In the opinion of the judges, an assumption that a larger number of entities having access to the tank belonging to the Commune would improve the functioning of the market is not sufficient. In other words, the Supreme Court seemed to support the effect based approach. Such reasoning can be perceived as another example of the use of the economic approach¹⁷ by the Supreme Court. Based on its judgment, it is possible to accept that in cases of exclusionary practices, it is not enough to apply the presumption of a negative impact on competition. Now, an economic evaluation would also be required.

Moreover, the Supreme Court rightly admitted the relevance of the *essential facilities* factor. Ownership rights must be taken into consideration in evaluating the character of the refusal of access to an essential facility. However, the courts should be able to force the owner of an essential facility to allow access to its competitors. EU jurisprudence¹⁸ as well as national courts¹⁹ developed the following criteria for the evaluation of access refusal to essential facilities. The courts impose a duty to grant access to additional facilities, firstly, when there is no alternative facility and secondly, when there is a risk that a refusal would result in the entrepreneur's exclusion from the market. Such a situation requires also the analysis of the applicable objective justifications. This kind of analysis was not conducted by any of the courts which considered the Rychwał case. Considering that the Commune administers the only waste refinery in the region and consequently, that it is a local network monopoly with

¹⁷ Economic approach is visible in case T-203/01 *Manufacture française des pneumatiques Michelin v Commission* [2003] ECR II-4071.

¹⁸ Judgment of the ECJ of 26 November 1997, C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* [1997] ECR I-07791; judgement of the CFI of 12 June 1997, T-504/93 *Tiercé Ladbroke SA v Commission* [1997] ECR II-923.

¹⁹ Judgement of SOKiK of 7 December 2006, XVII Ama 11/06, not reported.

respect to liquid waste, the refusal to conclude the disputed contract is tantamount to a refusal to grant access to an essential facility.

It is worth noting in conclusion that the Supreme Court raised also in this case some civil procedure issues that may impact competition law cases. The Supreme Court followed here the more liberal interpretation of Article 398³ of the Polish Code of Civil Procedure whereby its prohibition (concerning the limitation of the arguments in cassation cases that can be raised at this stage of the proceedings) only concerns arguments based on either the statement of facts or the evaluation of the evidence made by the second instance court, rather than the very essence of the findings which are necessary for the proper application of the norm of substantive law. Accordingly, this prohibition should be interpreted strictly.

Final remarks

The commented judgment can be perceived as a continuation of Polish jurisprudence on the subject of an objective justification or essential facilities.

The approach adopted by the Supreme Court deserves approbation. The Court perceived the evaluation of the legality of exclusionary practices through the lens of the effects-based approach. The Rychwał judgment exemplifies therefore the rejection by the Supreme Court of the *per se* qualification of competition limiting practices, which are mentioned in Article 9 of the Competition Act 2007 and a move further towards the use of the economic approach to antitrust. An economic analysis requires the consideration of the conditions present on the relevant market and, in that sense, follows the line of reasoning adopted by EU competition protection organs with regard to the current Article 102 TFEU.

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