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Freedom of competition or environmental safety - what should a municipality prioritize? Case comment to the judgment of the Supreme Court of 3 March 2010 - Katowice Commune (Ref. No. III SK 37/09)

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**Freedom of competition or environmental safety
– what should a municipality prioritize?
Case comment to the judgment of the Supreme Court of 3 March 2010
– *Katowice Commune*
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Introduction

The Supreme Court delivered on 3 March 2010 an important judgment that concerns competition in local markets for waste management. According to this ruling, the limitation by a municipality of the number of landfills where municipal waste can be disposed of does not constitute an abuse of its dominant position. The Supreme Court held that such an action is justified by the Act on Waste¹ whereby priority in determining the number of usable landfills should be given to the best technology available rather than distance from the place where waste was created. The judgment concerns the relationship between the Act of 16 February 2007 on Competition and Consumer Protection² (hereafter, Competition Act) and other Polish legislation – an issue which has been dealt with by the Supreme Court on a number of occasions already. The interest level of this particular case is high because it relates to the hierarchy of the responsibilities of municipalities for ensuring the competitiveness of local markets and their responsibility for environmental safety.

Facts

The amended Act on Waste, which entered into force on 13 October 2005³, obliged municipalities to adopt their own rules to maintain tidiness and order within 3 months from the date of its entry into force. Mayors were also obliged to determine within 6 months the requirements to be met by a business seeking a permit to collect municipal waste from local property owners. Pursuant to the Regulation of the Mayor of Katowice of 13 April 2006, a business is required to prove the readiness to accept waste from the city of Katowice by waste disposal utilities (landfills) listed in the Provincial waste

¹ Journal of Laws 2010 No. 185, item 1243, as amended.

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

³ Act of 29 July 2005 amending the Act on waste and amending certain other laws (Journal of Laws 2005 No. 175, item 1458, as amended).

management plan (hereafter, Provincial Plan) and the Waste Management Plan for the City of Katowice (hereafter, Municipal Plan). The Municipal Plan adopted on 25 July 2005 by Katowice City Council determined that its waste will be stored at 2 out of the 11 landfills specified in the Provincial Plan: Siemianowice Śląskie and Tychy Urbanowice. In making its decision, the Council followed the criteria set out in Article 9 Paragraphs 3 and 4 of the Waste Act, i.e. the requirement to dispose unsorted municipal waste recovered or treated in the Silesia Province and the fact that the facility intended for the recovery or treatment meets the requirements of best technology available.⁴

The President of the Office of Competition and Consumer Protection (in Polish: *Prezes Urzędu Ochrony Konkurencji i Konsumentów*; hereafter, the UOKiK President) issued a decision⁵ stating that the limitation of the number of usable landfills (2 out of the list of 11) constituted an abuse of the Katowice municipality's dominant position on the market for organizational activities to maintain tidiness and order in this municipality. The abuse was said to have taken the form of: 'acting counter to the creation of the conditions necessary for competition to emerge or develop' [Article 9(1) and (2) of section 5 of the Competition Act]. The municipality appealed the decision of the UOKiK President to the Court of Competition and Consumer Protection (in Polish: *Sąd Ochrony Konkurencji i Konsumentów*; hereafter, SOKiK). SOKiK repealed the decision stating, inter alia, that the relevant market on which the municipality operates is considered a 'regulated' market and as such, service provision therein is largely determined by central and local government authorities. Since the competition restriction at hand arose from national legislation, a municipality acting in accordance with its provisions cannot be accused of a breach of the Competition Act. However, the SOKiK judgment was quashed by the Court of Appeal on 27 May 2009 on appeal lodged by the UOKiK President. Ultimately, the municipality brought a cassation to the Supreme Court against the entirety of the judgment of the Court of Appeal.

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

Disposal of waste with the best technology available

This dispute surrounded the issue whether the municipality applied properly the selection criteria for landfills specified in the Act on Waste. Pursuant to its Article 9(1) and (2), waste should first be recovered and treated at its source, and if that is not possible, it should be transported to the closest place where it can be recovered or treated with the use of the best technology available. In the Supreme Court's opinion, Article 9(2) of the Act on Waste specifies that the choice of the usable landfill should

⁴ The most effective technology to achieve a high general level of environmental protection meets specific requirements set out in Article 143 of the Environmental Protection Act of 27 April 2001 (consolidated text: Journal of Laws 2008 No. 25, item 150).

⁵ Decision of the UOKiK President of 8 November 2007, RKT-54/2007.

be determined primarily by reference to the best technology available, rather than the distance to the landfill from the place of the waste's origin. The distance criterion is of secondary importance, especially since the Act on Waste does not specify how to identify the closest facility. In determining the requirements to be met by undertakings applying for an authorization to collect municipal waste, the municipality must indicate the landfill assigned for the particular service area in the Provincial Plan⁶. At the same time, the Supreme Court ruled that the municipality may indicate an additional landfill if it offers better technology than the landfill assigned to the municipality in the Provincial Plan⁷. The Supreme Court held also that it is justified to limit the number of usable landfills not only in order to reduce environmental risks and transport costs, but also to ensure an adequate network of landfills to meet the proximity principle at the provincial level. A limitation of the number of sites which can accept waste from given municipalities allows local governments to control the flow of local waste and increase the efficiency of their waste management system.

According to the Supreme Court, if waste from one municipality could be transported to all landfills available in the province (as expected by the UOKiK President), the municipality would lose control over the flow of waste from its territory, would have no incentives to reduce its amount (since waste could be stored in other municipalities) nor the motivation to expand or create new landfills within their own area or in neighboring municipalities. As a result, sustainable waste management would be impossible. Given the circumstances, the Supreme Court ruled that a municipality may limit the number of landfills which may be used for waste disposal by providers of municipal waste collection services. Such actions shall not constitute an abuse of a dominant position of the municipalities.

Threats to competition

The Katowice municipality holds a legal monopoly in the relevant market for organizational activities undertaken to maintain tidiness and order in the area including Katowice. As part of this monopoly, the municipality determines the conditions for the provision of municipal waste collection services from property owners in the Katowice municipality (interdependent market). The municipality issues permits to provide waste collection services and determines the requirements that are to be met when applying for a permit. To be approved, a service provider must provide evidence in its application that a landfill designated by the municipality to receive its waste is ready to do so⁸.

According to the UOKiK President, businesses involved in the waste collection services in Katowice should have the right to choose freely which landfill to use (located within the province of Silesia). Their choice should thus not be limited to the

⁶ In this case, it was a landfill in Siemianowice Śląskie.

⁷ In this case, it was a landfill in Tychy Urbanowice.

⁸ Article 7(1) and (6) of the Act of 13 September 1996 to maintain order and cleanliness in the municipalities (Journal of Laws 2005 No. 236, item 2008, as amended).

2 sites designated by the municipality. Such limitation restricts businesses in the scope of municipal waste collection from local property owners and creates barriers for the development of unrestricted competition between waste collection service providers, to the detriment of the end users of these services. Since the service providers can choose between 2 landfills only, price competition is reduced. The effects of this limitation affect all businesses currently engaged in the collection and transport of waste in Katowice or seeking to enter this market. As a consequence, consumers suffer because they must choose from among a smaller number of providers. In addition, the restriction of competition in the waste collection market adversely affects the quality and price of the services.

According to the UOKiK President, favoring the owners of the Siemianowice Śląskie and Tychy Urbanowice landfills created barriers to the development of undistorted competition in landfills in the province of Silesia. The choice made by the City of Katowice allowed those managing the 2 designated landfills to dictate contract conditions for the storage and disposal of waste. As a result, price competition was limited, an essential component of which is the cost of waste offtake. Market mechanisms cannot function properly, and all pressure to offer lower prices or better service terms is removed from the privileged landfills.

The primacy of environmental safety over free competition

The Supreme Court held that even though the action of the municipality may hinder competition, it is justified in this case by the rules determining their responsibilities as regards environmental safety. Thus, the Supreme Court referred to the place of the Competition Act in Poland's overall legal system. It ruled that the Competition Act 'is applicable to conduct business to such an extent that the legislature has allowed the operation of the market mechanism, leaving market participants autonomy of will to shape their own market behavior. This means that in the case of an activity which consists of organizing the market, as in this case, the Act applies only to those activities of the market organizer, to which it can use a certain margin of freedom. In this light, the provisions of the Act to Maintain Tidiness and Order in municipalities and the Act on Waste may affect the ability to effectively allow the claimant to abuse a dominant position as the market organizer'.

Is purely hypothetical harm to competition sufficient?

The judgment of the Supreme Court is of interest also because it considered the standard of proof that the UOKiK President must present in order to deem a practice a violation of Article 9(2)(5) of the Competition Act⁹. The doctrine challenges the legitimacy of this premise, because due to its wide scope, it may cover other premises included in Article 9(2) of the Competition Act. The exact forms of antitrust violations

⁹ A. Stawicki, E. Stawicki (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on Competition and Consumer Protection. Commentary]*, Warszawa 2011, p. 349.

covered by Article 9(2)(5) of the Competition Act are thus expected to be clarified by the decision-making practice of the UOKiK President and the jurisprudence of the Polish courts. In this case, the Supreme Court concluded that the UOKiK President did not meet the standard of proof required because the antitrust decision did not demonstrate that the scrutinized behavior had run counter to the creation of the conditions necessary for competition to emerge or develop. Indeed, following earlier jurisprudence, the decision of the UOKiK President was based solely on the finding that ‘(...) for it to be considered an anticompetitive practice, including the practice indicated in Article 9(2)(5) of the Competition Act, it is not necessary for a negative effect of the use of market power in conditions of limited competition to arise. It is sufficient that there was a threat of such an effect’¹⁰.

According to the Supreme Court, the analysis of the UOKiK President should go further than finding *a priori* an anti-competitive effect of the actions of the Katowice municipality – it should have relied on a deeper economic analysis instead. In the Supreme Court’s opinion, a restriction of competition could be demonstrated if a wider choice of landfills could significantly affect the possibility of existing and potential new entrants providing waste collection services inside the municipality as well as affect the price level for waste disposal and for waste offtake services. The UOKiK President could have compared the costs of providing communal waste offtake services by the Siemianowice Śląskie and Tychy Urbanowice landfills with the prices charged at alternative sites and show whether they were so high that they prevented the offtake of waste or substantially restricted its financial viability. The Court clarified therefore that the application of Article 9(2)(5) of the Competition Act should not only be based on purely hypothetical assumptions, but on a competition analysis of the local market. It is striking that the Supreme Court seems to have challenged the traditional approach applied by the UOKiK President whereby ‘(...) merely an attempt by an undertaking with a dominant market position to achieve a particular effect constitutes an anticompetitive practice’¹¹. It is apparent from the judgment that the Supreme Court found it insufficient to merely show that there was an attempt to achieve a certain effect. The UOKiK President must show in addition, by means of an economic analysis, that the risk of a certain anti-competitive effect was high.

Final remarks

According to the ruling under review, the Katowice municipality was allowed to prioritize environmental safety over free competition while determining the number of landfills to be used for the disposal of municipal waste. The position of the Supreme Court in this case is consistent with its earlier ruling of 15 July 2009 (Ref. No. III SK 34/08)¹² where it was stated that other legislation may affect both the extent of the anticompetitive practices that the UOKiK President may object to as well as clear

¹⁰ Decision of the UOKiK President of 8 November 2007, RKT-54/2007.

¹¹ Decision of the UOKiK President of 8 November 2007, RKT-54/2007.

¹² (2011) 7-8 *OSNP* 117.

a business from a charge that it has abused its dominant position. The commented ruling demonstrates however that it is often inherently difficult for municipalities to clearly determine which values may legally justify a limitation of competition. Hence, municipalities are exposed to a significant risk of breaching the Competition Act.

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