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Does an undertaking's reputation affect its market power on the relevant market? : case comment to the judgment of the Supreme Court of 2 April 2009 - PPKS (Ref. No. III SK 30/08)

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Facts

In a decision (RDG 46/2005) issued on 30 December 2005, the President of the Office of Competition and Consumer Protection (UOKiK) established an infringement of Article 8(2)(1) of the Act of 15 December 2000 on Competition and Consumer Protection¹ by the state-owned Motor Transportation Enterprise (PPKS) in Słupsk². According to this rule, an abuse of a dominant position may consist of a direct or indirect imposition of unfair prices, including predatory or glaringly low prices, delayed payment terms or other trading conditions. In the discussed case, the practice involved the indirect imposition of unfair travel fares by way of a 'major fare reductions' scheme as of November 2004 in order to eliminate a given Competitor. According to UOKiK, PPKS abused its dominating position as a commuter bus line operator with bookings based on one-off and monthly tickets. The relevant market was specified as the bus commuter route between the 'S' and 'G' municipalities.

The decision stated that PPKS abused its dominant position on the relevant market in order to impose 'unfair' prices on the competitor. The UOKiK President fined PPKS and decided that the challenged practice had ceased as of 1 July 2005. According to the UOKiK President, the 'unfairness' of the prices consisted of their 'gross understatement'. The fares were imposed indirectly, as a result of the following sequence of events: 1) in October 2004, the said Competitor was licensed to provide commuter services between the two municipalities 'S' and 'G' (the relevant market); 2) the Competitor charged 'promotional' fares lower than those charged by PPKS; 3) PPKS introduced a new timetable with 34 new services and intended to continue reducing its fares in spite of increasing fuel prices and the financial problems it was experiencing at that time; 4) the Competitor reduced its activity on the relevant market.

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

² The same forms of abuse are currently listed in Article 9 of the new Act of 16 February 2007 on Competition and Consumer Protection (Journal of Laws 2007 No. 50, item 331, as amended).

PPKS appealed the decision to the Court of Protection of Competition and Consumers (SOKiK). The operator argued that commissioning additional commuter lines was meant to provide regular, inexpensive, fast, easily accessible and cost-effective public service. PPKS claimed that the promotional fares were intentionally introduced for the autumn-spring seasons that are particularly inconvenient to local communities. The continuation of the promotion to cover the summer of 2005 was targeted at the great number of tourists visiting the area of PPKS's operations. The fares were 'within the tariff limits', not substantially different from those charged by others. PPKS stated that its tariffs were never of a dumping nature. Notwithstanding the arguments of PPKS, SOKiK dismissed the appeal. The operator appealed SOKiK's ruling to the Court of Appeals resulting however in another dismissal. PPKS petitioned finally the Supreme Court for the reversal of the initial UOKiK decision but the submission was also dismissed.

Key legal problems of the case

Recognizing the market position of the undertaking as a dominant position

UOKiK's first charge was based on the alleged breach of section 4(9) of the Competition Act 2000 (currently Article 4(10) of Competition Act 2007). According to the UOKiK President, PPKS abused its dominant position by indirectly imposing 'inconvenient' fares. According to Polish competition law, a 'dominant position' means a position which allows an undertaking to prevent effective competition within a relevant market thus enabling it to act to a significant degree independently of its competitors, contracting parties and consumers. An at least 40% market share is presumed to provide such position. Still, the addition of this legal presumption (*iuris tantum*)³ to the definition of dominance is being challenged by doctrine⁴. Issuing an injunction order against an abuse depends on the establishment of a dominance position. Thus, a unilateral behaviour of an undertaking can be recognized as a banned practice only when it is proven that the company holds a dominating position⁵.

³ See L. Mering, [in:] A. Powałowski, S. Koroluk, L. Mering, *Prawo ochrony konkurencji [Competition law]*, Warszawa 2004, p. 33; K. Kohutek, [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz [Act on competition and consumer protection. Commentary]*, Warszawa 2008, p. 31.

⁴ T. Skoczny, 'W sprawie modernizacji stosowania zakazu nadużywania pozycji dominującej' ['On modernization of an application of a prohibition of an abuse of a dominant position'] [in:] C. Banasiński (ed.), *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej (studia prawnno-ekonomiczne) [Competition and consumer protection in Poland and the European Union (economic and legal studies)]*, Warszawa 2005, p. 105; A. Jurkowska, D. Miąsik, T. Skoczny, M. Szydło, 'Nowa uokik z 2007 r. – krytyczna analiza niektórych rozwiązań' ['New Act on Competition and Consumer Protection – a further step to improve the basis of public protection of competition in Poland'] (2007) 5 *Przegląd Ustawodawstwa Gospodarczego*.

⁵ See judgment of the Anti-monopoly Court of 11 June 1997, XVII Ama 17/97 (1998) 7 *Wokanda*.

PPKS operates more than 100 bus lines including 3 that partly overlap with the routes of the Competitor. According to the Supreme Court, the realization of PPKS's dominance of the relevant market is crucial for the resolution of the dispute. The fares charged by PPKS on the scrutinized lines before the market entry of the Competitor were much higher than those set in the aforementioned promotion. As a consequence, the Competitor was compelled to reduce its offer provided on the relevant market because its services would become unprofitable if it was to compete with the lower fares 'imposed' by PPKS.

PPKS claimed in its petition to the Supreme Court that it did not hold a dominating position on the local market. It stated that dominance cannot be established based on its over 40% share in the local market consisting of a number of bus routes not served by its competitors. Moreover, although PPKS had indeed a significant market share, its position could not be described as dominant because it did not control the issuing of transport licenses and thus anybody could enter the market. In addition, PPKS claimed the weight of the market share criterion for the establishment of its dominance should be reduced as the population of the relevant market favoured PPKS for its reputation owed to more than 50 years of service provision.

The Supreme Court challenged PPKS stating that its 'reputation' arguments re-affirm rather than defeat the statutory presumption of dominance. The ruling is correct in its finding that the popularity of the state-owned carrier, as highlighted in the petition, is unlikely to diminish PPKS's influence on the market. That is true even more so considering that PPKS unquestionably holds a major share of the market. Moreover, according to the Supreme Court, the fact that the issuing of transport licenses is beyond PPKS's control or that any business can enter the market, does not undermine the findings of the UOKiK President. PPKS admitted that because of its economic strength, it can operate without any control from its business partners or consumers for a prolonged period of time.

The Supreme Court stressed therefore that the statutory presumption of dominance did indeed apply to PPKS. However, the presumption is challengeable and so PPKS could overturn it by proving that its dominance was in fact 'nominal' rather than 'actual'. In this case however, the ability to affect the market was a manifestation of dominance. This finding re-affirms existing jurisprudence and the 'patrimony of the doctrine'. As pointed out by T. Skoczny, the burden of overturning the presumption of dominance of a company holding a market share above 40% lies with the entity itself, rather than the authorities. Since the presumption is based on market shares (quantitative measure), such proof must be based on other quantitative measures of market power⁶. Finally, the Supreme Court shared the view of the UOKiK President that PPKS responded to the market entry of the Competitor with an aggressive pricing policy. Aware that the Competitor could not follow its fare reductions, PPKS challenged it with its grossly understated fares at the expense of its assets.

⁶ 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. 243.

Protection of public interest

PPKS claimed that the pursuit of this case was not in the public interest because, first, the fare reduction was temporary and second, PPKS added services at more convenient times. The argument that PPKS acted to the benefit of commuters did not convince the Supreme Court which rightly recognized it as biased. According to the Court, protecting the public interest – so important for the interpretation of antitrust law – involves the protection of not only consumers but also business organizations. The benefit from the temporary fare reduction and additional services was apparent but their ultimate result was the elimination of competitive bus services. This stance of the Supreme Court should be regarded as fully correct. With respect to restrictive practices, competition law states that there is no point in protecting the public against practices that have no significant effect on competition. According to Article 1(1) Competition Act 2000 (even Competition Act 2007), the Act determines the conditions for the development and protection of competition as well as the rules on the protection of interests of undertakings and consumers, undertaken in the public interest.

The deliberated judgment re-affirms the increasing number of court rulings that associate the notion of public interest with the suppression of competition or with the causing of (potentially or actually) adverse effects on the market⁷. According to the judgment of the Supreme Court of 5 June 2008⁸, every market practice aimed at the mechanism of competition is harming the public as defined in Article 1 of the Competition Act 2000. For the above reasons, the mechanism of competition should be understood as the controlling mechanism of market behaviours. This approach is correct in assuming that public interest can be harmed if the challenged practice affects, and disrupts, the very phenomenon of competition. That is so even if the negative effect is a consequence of the activities aimed at a single competitor or their small number.

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⁷ See judgment of the Supreme Court of 27 August 2003, I CKN 527/01, not reported; judgment of the Supreme Court of 28 January 2002, I CKN 112/99 (2002) 11 *OSNC*, item 144; judgment of the Supreme Court of 26 February 2004, III SK 1/04 (2004) 18 *OSNP*, item 323 and others.

⁸ Judgment of the Supreme Court of 5 June 2008, III SK 40/07 (2009) 19-20 *OSNP*, item 272.