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Intersection between the activities of two regulators – shall prior actions taken by the National Telecoms Regulator exclude the ability to intervene by the Competition Authority? Case comments to the judgment of the Supreme Court of 17 March 2010 – *Telekomunikacja Polska S.A.* (Ref. No. III SK 41/09)

Background

The commented judgment of the Polish Supreme Court concerns Telekomunikacja Polska S.A. (hereafter, TPSA)[1] and the fines imposed upon the incumbent operator by the President of the Office of Competition and Consumer Protection (in Polish: *Urząd Ochrony Konkurencji i Konsumentów*; hereafter, UOKiK) for the abuse of its dominant position. TPSA is a Polish telecoms provider formally established in 1991. It is a public company – its shares are traded on the Warsaw Stock Exchange with the controlling stake owned by France Télécom[2]. TPSA is often the subject of competition law decisions issued not only by the UOKiK President but also by the European Commission, particularly with respect to dominant position abuse[3].

Facts

The UOKiK President issued on 29 December 2006 a decision[4] (hereafter, Decision) that concluded antitrust proceedings concerning TPSA's conduct. The investigation was initiated by the Competition Authority *ex officio*. The UOKiK President established therein that TPSA infringed Polish competition law provisions contained in the applicable

[1] For more information about TPSA see: http://www.tp.pl/prt/pl/o_nas/o_firmie/profil_dzial?_a=502783.

[2] France Télécom holds about 49,78 % of TPSA shares, for more information about the shareholders of TPSA, see: http://gielda.onet.pl/tpsa,18648,101,7,507,profile-akcjonariat.

[3] UOKiK on its website covered 20 decisions concerning fines imposed on TPSA for abuses of its dominant position. For a recent EU case involving TPSA, see: Press release titled: Commission fines Telekomunikacja Polska S.A € 127 million for abuse of dominant position, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/771&format=HTML&aged=0&language=EN&guiLanguage=en.

[4] Decision DOK–166/06; available at www.uokik.gov.pl.

at the time Act of 15 December 2000 on the Competition and Consumer Protection[5] (entered into force in April 2001; hereafter, Competition Act 2000). TPSA was also found to have infringed the Treaty establishing the European Community (hereafter, TEC)[6], now the Treaty on the functioning of the European Union (hereafter, TFEU).

In particular, the UOKiK President established that TPSA infringed Article 8(2)(5) of the Competition Act 2000. The incumbent was found to have abused its dominant position on the national market for telecoms services provided to consumers via fixed-line public telephone networks because it only offered telephone plans inclusive of connection charges. The UOKiK President established that the said infringement had ceased as of 1 March 2006. As a result, proceedings based on the alleged breach of Article 82 TEC (Article 102 TFEU) were discontinued. The UOKiK President imposed on TPSA a fine for the established offence in the amount of 1.000.000 PLN (approx. EUR 500.000).

In addition, the UOKiK President established that TPSA had violated Article 8(2)(4) of the Competition Act 2000 and Article 82 TEC by abusing its dominant position on the national market for broadband internet services. In this context, the abuse was said to have taken the form of tying arrangement whereby the conclusion of an agreement on broadband internet access (Neostrada TP) was conditional upon the acceptance or fulfillment of a condition having neither substantial nor customary connection with the subject of such contract. The UOKiK President established that TPSA required customers wishing to use Neostrada TP (broadband) to also use the analogue telephone services provided by TPSA. The infringement was ordered to be brought to an end. For this offence, TPSA was fined 10.000.000 PLN (approx. EUR 2.500.000) for this offence.

TPSA appealed the Decision of the UOKiK President to the Court of Competition and Consumer Protection in Warsaw (in Polish: *Sąd Ochrony Konkurencji i Konsumenta*: SOKiK) which acts as the court of first instance for competition law matters in Poland. SOKiK upheld the decision of the UOKiK President in its judgment delivered on 28 February 2008 dismissing all TPSA's objections. The courts held, *inter alia*, that the UOKiK President had the authority to intervene with respect to TPSA's telephone plan because prior actions taken by the telecoms regulator, the President of the Office of Electronic Communications (in Polish: *Urząd Komunikacji Elektronicznej*; hereafter, UKE), approving the tariffs of TPSA (*de facto* charges included in these tariffs)[7] were based on Telecommunications Law and that is why they did not infringe the Competition Act 2000. SOKiK stated subsequently that for consumers to whom TPSA only ever offered telephone plans that already included its connection charges, having to make payments for the use of telephone connections of other operators would simply mean more expenditure. Needless to say, SOKiK found that TPSA customers were reluctant to use other telecoms operator because they would have to pay twice

[5] Journal of Laws 2005 No. 244, item 2080 as amended.

[6] See: Consolidated version of EC Treaty, OJ [2002] C 325.

[7] The basis for the actions taken by the UKE President is the Article 48 of the Telecommunications Law of 16 July 2004 (Journal of Laws 2004 No. 171, item 1800, as amended).

for the same service. SOKiK confirmed moreover the correctness of the relevant market definition formulated by the UOKiK President. TPSA's argument that tying arrangements (internet and telephone) are common in other countries was found inadequate in as far as the Polish social-economic situation is concerned.

TPSA appealed SOKiK's judgment to the Court of Appeals in Warsaw. The second instance court confirmed however the earlier judgment using similar arguments to those presented by SOKiK. The Court of Appeals declared that the UOKiK President conducted an *ex post* control of Polish telecoms markets and assessed the results of the implementation of the conditions set forth in the tariffs and regulations previously approved by the telecoms regulator (UKE President). TPSA's objections as to the definition of the relevant market concerning the tying arrangements were also dismissed.

TPSA filed a cassation appeal to the Polish Supreme Court claiming that the Court of Appeals infringed both procedural as well as material rules. The Supreme Court ultimately dismissed the cassation as unfounded.

Key legal problems of the case

The Supreme Court considered three legal issues in light of the circumstances of the case. The first consideration was of procedural nature and referred to Article 228 § 2 of the Polish Code of Civil Procedure[8] (in Polish: *Kodeks Postępowania Cywilnego*; hereafter KPC). According to its provisions, facts known to courts *ex officio* do not require proof. Courts are nevertheless obliged to draw the attention of the parties to the proceedings to those facts at a hearing so that they can submit their own observations on those facts. The Supreme Court answered the question whether courts may, without infringing KPC, recall in their judgments (justifications) circumstances that were not the subject matter of a hearing. The second issue considered by the Supreme Court was of a greater overall importance and concerned the intersection between the scopes of the activities of two regulators – the UKE President and the UOKiK President. The Supreme Court analyzed, in particular, whether prior actions taken by one regulator, namely the UKE President, preclude another regulator, the UOKiK President, from also taking actions. Finally, the Supreme Court considered whether there is a customary relation between broadband internet access and telephone service in fixed networks in the context of tying arrangements.

Key findings of the Supreme Court

The Supreme Court agreed with the opinion of TPSA (plaintiff) concerning the alleged procedural infringement of Article 228 § 2 KPC by the Court of Appeals.

The Supreme Court stated that the provisions of KPC was breached by a court not recalling at a hearing facts to be subsequently declared as known to that court *ex officio*. As a result, recalling by the court in its judgment (justifications) circumstances

[8] Journal of Laws 1964 No. 43, item 296, as amended.

that were not the subject matter of a hearing, infringed Article 228 § 2 KPC. The Supreme Court established in this context the conditions applicable to the recalling at a hearing of facts considered to be known to a given court *ex officio*. Accordingly, courts must meet three separate requirements: (i) to recall a particular fact; (ii) to indicate the case where this fact was established and; (iii) to let the parties know that the court intends to treat this fact as known to the court *ex officio*.

In response to the claim of the plaintiff, the Supreme Court stated that the Court of Appeals did not meet the aforementioned test. The Court of Appeals was said to have only briefly let the parties know that it intended to use a particular decision issued by the UKE President. The remaining two conditions were omitted altogether.

The Supreme Court proceeded to determine whether the established violation of Article 228 § 2 KPC has in fact affected the outcome of the case. The Supreme Court analyzed therefore how the procedural infraction affected the factual basis of the subsequent judgment. The Supreme Court found in this context that the facts recalled by the Court of Appeals in its judgment (a particular decision and report of the UKE President), helped the second instance court to establish that TPSA's market share in the relevant market exceeded 40%. As a result, it was possible for the Court of Appeals to determine that TPSA held a dominant position in the relevant market, based on the presumption resulting from Article 4(9) of the Competition Act 2000. The Supreme Court found also however that even if the contested sources were not recalled in the judgment, the Court of Appeals would have been in the position to establish that TPSA holds a dominant position on the basis of other facts. Therefore, the proven violation of the provisions of KPC had no actual effect on the outcome of the case.

On the other hand, TPSA's claim that the Court of Appeals has also comitted a violation of substantive law was declared as unfounded by the Supreme Court.

It was stated, on the basis of an earlier Supreme Court judgment of 19 October 2006 (III SK 15/06), that prior actions taken by a sectoral regulator exclude the ability to intervene by the Competition Authority to the extent that its intervention would address issues covered by the earlier regulatory decision. In line with the treatment of the tariffs of energy undertakings, the Supreme Court declared therefore that it would be unacceptable for the UOKiK President to treat the price list (tariffs) already approved by the UKE President as a competition restriction. All this notwithstanding, the Court of Appeals determined in the case at hand that the abusive practice contested by the UOKiK President referred to the fact that TPSA's offer did not contain a price list for telecoms access only (its offer contained only a combination of telecoms access and connections). According to the Supreme Court, the fact that TPSA's tariffs were approved by the UKE President did not exclude the possibility of actions being taken by the UOKiK President according to the Competition Act 2000 for services (only telecoms access) not actually included in the pre-approved tariffs.

The Supreme Court agreed on the other hand with the methodology suggested by TPSA for the determination of the relevant market. The Supreme Court declared however that the case concerns the market situation for broadband internet access services existing in a specified period of time and that the relevant market was

determined properly in relation to the time period under assessment, because the Court of Appeals explained what factors it relied upon while determining the relevant market (e.g. differences in installation, operation, mobility, operating costs, noise, and safety) for broadband internet access service.

Finally, the Supreme Court did not share the opinion of the plaintiff that there is a relevant customary relation between broadband internet access and telephone services provided via fixed networks. According to the Supreme Court, there is no doubt that they constitute two separate commodities (services) designed to meet diverging consumer needs. A customary relation can be shown with reference to the practices common in a given market but with the exception of situations where the source of the practice lies in the behavior of a dominant undertaking. The Supreme Court agreed in this respect with the position of the lower instance courts whereby it is insufficient in this context to show customary relations by reference to foreign markets. The practice in question must be a custom adopted in the very relevant market (relevant markets) in which tying actually occurs[9].

Final remarks

The Supreme Court judgment under consideration raised at least three important issues. First, it confirmed its position expressed in the Supreme Court ruling of 19 October 2006 which deals with the intersection between the scopes of the activities of the UOKiK President and the UKE President. It stressed that prior action taken by the telecom regulator (the UKE President) preclude the Competition Authority (the UOKiK President) from intervening to the extent that it would address issues covered by the decision of the telecoms regulator. The ruling under consideration here confirms therefore the rules to be applied when establishing the authority to act of two separate regulators – the UOKiK President and the UKE President. By doing so, it establishes a sound scheme for the division of their competences and improves legal certainty for interested telecoms undertakings.

Second, the judgment established that three separate requirements must be fulfilled by a court with respect to recalling at a hearing of facts considered by that court to be known to it *ex officio*. As a result, all courts must: (i) recall a particular fact; (ii) indicate the case where this fact was declared and; (iii) let the parties know that the court intends to use this fact as known to it *ex officio*. However, even if a court violates the above requirements, its findings with regards to these facts shall be upheld unless they were established as the basis for the ruling.

Finally, the Supreme Court addressed the issue of customary relation (link) between broadband internet access and telephone service in fixed networks in the broader context of tying arrangements. It concluded that a customary relation may be shown by the practice generally applied in the relevant market with the exception of

[9] The Supreme Court recalled the judgement of the Court of First Instance in the *Microsoft* case, where it was found that there can be no formation of trade customs when the entity applying tying has a strong dominant position (T-201/04 *Microsoft v Commission*, ECR [2007] II-3601, para. 940).

situations where the source of that practice is the behavior of an undertaking holding a dominant position. Moreover, the aforementioned practice must be established in so far as each relevant market is concerned. In line with European level decisions[10], the Supreme Court declared that it is impossible to establish a customary relation with respect to an entity holding a dominant position and using tying arrangements.

Although the Supreme Court decision was based on the Competition Act 2000, especially with respect to tying arrangements, it is equally applicable in the light of new Competition Act of 16 February 2007[11].

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[10] T-201/04 *Microsoft v Commission*, para. 940; C-333/94 *Tetra Pak v Commission*, ECR [1996] I-5951.

[11] Journal of Laws 2007 No. 50, item 331, as amended.