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Lack of a Price Reduction Despite a Decrease in Service Quality as an Unfair Price and Abuse of a Dominant Position. Case Comment to the Judgment of the Supreme Court of 13 July 2012, *Autostrada Malopolska* (Ref. No. III SK 44/11)

The Polish Supreme Court delivered in 2012 an important ruling with respect to the definition of unfair prices charged by a dominant firm. Imposing unfair prices was so far generally associated in Polish jurisprudence with either excessive prices (exploitive practices) or predatory pricing (exclusionary practices)[1]. The Supreme Court held here, instead, that the lack of a reduction in a set service fee (toll) despite a decrease in quality of the service provided by a dominant company can also count as imposing unfair prices.

1. Facts of the case

The case at hand concerns the fees charged for the use of the A-4 toll dual-carriageway leading from Cracow (point X) to Katowice (point Y) managed by Stalexport Autostrada Małopolska S.A. (hereafter, Stalexport or plaintiff). Stalexport holds a concession which places the company under a duty to operate and maintain this section of the A-4 dual-carriageway.

It was found in the framework of the investigation that Stalexport charged car drivers a fixed fee of 13 PLN for the use of the toll road irrespective of the fact that its substantial part was periodically being renovated, leading to numerous traffic problems and reduced utility for car drivers. The Polish Competition Authority, the President of the Office for Competition and Consumer Protection (hereafter, UOKIK President) found this behaviour to be an abuse of a dominant position and imposed a fine of 1.300000 PLN (309.524 EUR) on Stalexport. The company appealed the decision to the Court of Competition and Consumer Protection (hereafter, SOKIK). However, SOKIK confirmed in its ruling the position of the UOKIK President. The plaintiff appealed the first instance judgment, but the ruling was once again upheld by the Court of Appeal. The dispute was eventually litigated before the Supreme Court.

[1] Cases of margin-squeeze are exceptionally rare.

2. Key findings of the Supreme Court

A new interpretation of unfair prices

The definition of excessive (and thus unfair) prices is central to the case. Pursuant to the Polish Competition Act[2], imposing unfair prices amounts to an abuse of dominance. Polish jurisprudence follows EU law to a great extend when defining unfair prices. According to a settled interpretation, 'unfair prices' are primarily those that bear no relation to the economic value of the product[3]. There is clear economic reasoning behind this formula: market power translates into prices above the competitive level thereby allowing higher profits to be earned. It is, however, extremely difficult (if not impossible) to determine whether a said price is excessive, given the need to identify what the competitive price level is[4]. That might be the reason why so very few excessive price cases exist under Article 102 TFEU.

Various methodologies have been used so far with respect to excessive prices, none of which is problem free. The most intuitive model relies on a comparison between the price and production costs. The question arises what range of profit is considered to be justified? Here economists cannot provide clear answer. They tend to underline that even in case of competitive markets it's quite plausible for the company to have profits slightlyabove average profits made by the others in the sector. (As model of perfectly competitive markets does not exist in the reality). Moreover, there are also industries where price-costs relations are particularly difficult to measure (like those with intellectual property rights). Similar difficulty concerns industries with cyclical demand[5].

EU case-law developed a method to test for excessive prices on the basis of price comparison models also. In *United Brands,* the Commission made a comparison across different regions and inferred that the price of bananas charged in Germany was excessive by comparison to those charged in Ireland. In *Deutsche Post*[6], a comparison was made across different services offered by the dominant firm. In turn in *Scandlines*[7] the Commission concluded that simple cost-plus approach is insufficient and compared the prices charged for other services provided in the same sea port as well as those charged in other ports.

The reasoning adopted by the Polish Supreme Court in this ruling is based on the notion of a 'reference transaction' – a transaction in which the plaintiff provides clients with full quality service (a full-fledged service) in exchange for a fee calculated so as

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[2] Article 9(1)(1).

[3] Case 27/76 *United Brands Continental BV v Commission (Chiquita Bananas),* [1978] ECR I- 207.

[4] S. Bishop, M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, London 2012 para.6.14-6.19.

[5] Ibidem

[6] Commission Decision COMP/C-1/36.91 *Deutsche Post AG-Interception of cross-border mail,* OJ [2001] L 331/40.

[7] Commission Decision Case COMP/A.36.568/D3 – *Scandlines Sverige AB v Port of Helsingborg*.

to cover the costs incurred by the plaintiff (in connection with the operation of the toll dual-carriageway) increased by a satisfactory rate of return on its investment[8]. With respect to a full quality service, the Court stated that this includes the possibility to drive according certain quality parameters: two driving lanes with an ease to overtake, collusion free junctions, a higher level of security etc. These parameters are meant to result in a shorter travel time in comparison to other types of roads.

According to this reasoning, a full quality service is not provided when the carriageway manager fails to provide these features due to renovation works when only one driving lane is open on certain sections of the road, for instance. In such cases, the plaintiff does no longer offer a full-fledged service (so-called reference transaction) seeing as its clients cannot achieve gains traditionally associated with the use of a toll dual-carriageway. Charging a non-reduced fee places them at an economic disadvantage and accounts for an abuse of dominance.

The reasoning adopted by the Court is consistent with the 'equivalency test' which has been applied in Polish jurisprudence in order to examine whether given prices (or contract conditions) are unfair[9]. Accordingly, reduced quality of the toll road (where the latter no longer holds the typical features of a paid-for dual-carriageway), should result in a proportional reduction in the fee which must be paid for its use. Charging the usual toll despite a fall in quality, is not equivalent to the service provided and thus unfair. As the Court emphasized, when such disproportion occurs in typical market conditions, clients can switch to another provider. This was not possible in this case because Stalexport holds not only a dominant, but a monopolistic position on the relevant market. It is the only provider of the scrutinized service – there is only one toll dual-carriageway leading from Cracow to Katowice. Car drivers have therefore no comparable alternative.

Consumer perspective was acknowledged by the Court as central to the case. It noted that the ultimate goal of competition law is to enhance *consumer welfare.* Car drivers have repeatedly lodged complaints demanding a price cut due to road-work related traffic restrictions, all of which were ignored by the plaintiff. State intervention was therefore fully justified. Likewise, the Court rejected arguments that consumers were informed about the renovations and resulting traffic difficulties before they entered the dual-carriageway. In the plaintiff's opinion, they thus accepted a lesser service. The court stressed that in view of lacking alternatives, consumer choice was in any event limited.

Unfair price – the same price irrespective of the service quality

Interestingly, the Court made no reference to any of the usual excessive prices tests. In turn, one of the arguments raised by the plaintiff concerned price calculations. Stalexport claimed that the toll was calculated based on a specific price list (attachment

[8] Commented judgment of the Supreme Court of 13 July 2012 (Ref. No. III SK 44/11), p. 19.

[9] See judgment of the Supreme Court of 25 May 2004 (Ref. No. III SK 50/04); judgment of the Supreme Court of 12 February 2009 (Ref. No. III SK 29/08).

No 6 to the concession agreement). The price list was made taking into account the plaintiff's costs related to the carrying out of the duties conferred upon it by the State as well as the envisaged renovation works and their schedule. The Court dismissed this argument in its entirety. It stated, first of all, that rendering services based on the conditions set in the plaintiff's concession does not preclude the parallel application of competition rules. Stalexport, as a dominant firm, should implement a pricing policy that would ensure equivalency between the quality of the service rendered and its price.

The Court did not analyze the costs of the dominant firm, nor did it attempt to compare the scrutinized prices with another equivalent service. It stressed, however, that Stalexport had the right to set its fees based on maintenance costs increased by a rate of return on its investment. The Court noted also that it did not reach any conclusions on the prices being generally excessive. It pointed out, however, that in order for the transaction to remain equivalent, the deterioration of the passage conditions should have had resulted in a reduction of the usual toll. It noted also that construction works were carried out with varying intensity and thus consumers were faced with different traffic conditions although they paid the same fee. On this basis, the Court concluded that the price should have been reduced with respect to those consumers who had not been provided with a full-fledged service. Consequently, Stalexport abused its dominant position only with respect to those users.

Notwithstanding the fact that the Court repeatedly stressed the importance of a price reduction in light of a lower utility of the toll dual-carriageway, it chose not to define the appropriate size of such discount. On the one hand, this approach seems to be justified as courts cannot act as price regulators. On the other hand, however, lack of clear juridical direction might prove problematic for companies as they then have to decide for themselves how much to reduce the fee by in order to ensure the undisputable fairness of prices charged in times of lower service quality.

Relevant market

The judgment of the Supreme Court is of interest also with respect to its relevant market definition. The UOKiK President defined the relevant product market as the market for paid driving on the A-4 highway from point X to point Y. This definition was then confirmed by the courts, despite the objections of the plaintiff which claimed that the market was defined too narrowly. The Stalexport referred to an analysis of the product market in view of the objective of the service rendered. It thus applied for the broadening of the market so as to include alternative roads from X to Y as well as rail and bus connections.

The Supreme Court rejected this view stating that such criteria as service characteristics and price should prevail over the purpose of the service. It also expressly recognized that the only substitute for the scrutinized toll dual-carriageway from X to Y can be another toll road leading from X to Y with similar quality parameters. The Court went on to state that what allows for the qualification of a specific toll road as a separate product market is the payment that must be made for using it together with its higher driving standard as compared to other national roads. The Supreme Court

referred to rulings of foreign authorities and courts in that matter – a similar view was presented in a decision of the Portuguese competition authority DOPC-22/2005, *Via Oeste (Brisa)-Auto-Estradas do Oeste/Auto-Estradas do Atlântico* of 10 April 2006) as well as a US court judgment (*Endsley III v. City of Chicago*, 30 F.3d 276).

In accordance with the Court's rationale, unlike freely available national roads, toll dual-carriageways are distinctive as they are a paid-for service offered on a commercial basis. They offer to consumers more benefits than traditional roads do (e.g. possibility to drive substantially faster, freely overtake etc.).

The Polish legal doctrine raised doubts, however, with respect to the existence of those added benefits[10]. Whereas in typical conditions the toll dual-carriageway from X to Y managed by Stalexport had all of the above characteristics, it had hardly any of them during construction works (only one driving lane, no possibility to overtake.). The question, therefore, arises whether a national roads on the way from X to Y should not have been considered as a substitutes to the scrutinized paid-for dual-carriageway during the periods of its lower service quality. Both the Court of Appeal as well as the Supreme Court stressed that the scrutinized toll road bore none of its usual characteristic during renovation periods. It is thus also possible to argue that consumers had an alternative to the services provided by Stalexport in those periods – a freely available public road. Still, neither of the courts decided to consider those arguments when determining the possible relevant market definition.

Fee as a price and not a public tribute

Another interesting point in the judgment concerns the character of the prices charged by Stalexport. The plaintiff repeatedly argued that it runs its activities based on a concession conditionsas well as on the Act on toll carriageways, which imposes upon it the obligation to charge fees for the use of the dual-carriageway it manages. Stalexport's actions are thus, in its view, beyond the scope of the Competition Act. The Court rejected this argument in its entirety. It acknowledged the plaintiff's right to charge fees, but at the same time stressed that competition rules apply in full to the pricing policy of the dominant firm.

Likewise the Court rejected the plaintiff's other claim which stated that the toll is a form of a public tribute rather than a price in terms of civil law. Stalexport referred to the mandatory character of the fee, imposed by the State and meant to cover the costs of the construction and maintenance of Polish paid-for roads. The Court stressed that the only conclusion that can be drawn from the mandatory character of the toll is that the mere fact of charging a fee does not, as such, constitute a practice restricting competition.

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[10] K. Kohutek, 'Cena nieobniżona mimo pogorszenia parametrów jakościowych usługi ceną nieuczciwą w rozumieniu art. 9 ust. 2 pkt 1 uokik Glosa do wyroku Sądu Najwyższego z 13 lipca 2012 r., III SK 44/11 Autostrada Małopolska' ['A steady price despite the fall in service quality as an unfair price under Article 9(2(1)) of the Competition Act'] (2012) 4(1) *iKAR* 102–107.

Similarly, the Court did not agree with the view that the toll was meant to constitute public revenue. It stressed that although the fee is charged within statutory obligations, it still belongs to Stalexport as a private investor that runs an economic activity and bears the financial risk associated with it. The mere fact that a public duty is placed upon a private entity does not classify it as part of the public sector.

Consumer welfare

Last but not least, another interesting argument raised in the comments to this judgment[11] concerned the issue of *consumer welfare* and the real consequences of public intervention into the behaviour of a dominant firm. During the entire administrative and juridical proceedings, Stalexport did not change the amount of the toll it charged – it did not introduce any price reductions for the time periods when construction works were being carried out. Concerns were also raised that the antitrust fine (1.300.000 PLN) could have been, at least indirectly, passed on to consumers seeing as the toll for car drivers now stands at 18 PLN as compared to 13 PLN which it used to be in the past.

Conclusion

According to the ruling under review, the notion of excessive (and thus unfair) prices can be applied to cases where the level of prices remains unchanged irrespective of the decrease in the quality of the service rendered. If this practice is committed by a dominant firm, it can amount to abuse. When determining this practice, reference needs to be made to the model of a full-fledged service (so-called reference transaction). This test largely resembles the 'equivalence test' which compares the price and the value of the service provided in exchange.

The Supreme Court confirmed also the narrow relevant market definition established originally by the Competition Authority as the market for paid driving on the A-4 dual-carriageway from point X to point Y. The adopted reasoning is based on the features of paid-for dual-carriageways, which are largely different to national roads – they provide two driving lines that facilitate a faster driving speed and easier overtaking.

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[11] Ibidem.