Product Substitutability in Defining the Relevant Market and Expert Evidence: Comments on the Judgment of the Polish Supreme Court of 29 July 2020 (I NSK 8/19)

by

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CONTENTS

Abstract

In one of the court proceedings concerning a cassation appeal, brought against the decision of the President of the Office of Competition and Consumer Protection (UOKiK), the Polish Supreme Court expressed in its judgment of 29 July 2020 (I NSK 8/19) a view on the role of expert evidence in the definition of the relevant market, and more specifically, in the determination of product substitutability. By dismissing the corporate applicant's cassation appeal, the Court stated that admission of expert evidence was not necessary, given that the substitutability of products is

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decided mainly by customer adoption and not their chemical composition. This article aims to present the arguments cited to this end by the Supreme Court and to analyze them through the prism of defining the relevant market and the specificity of expert evidence in determining the boundaries of the relevant market for the purposes of applying competition law.

Résumé

Substituabilité des produits dans la détermination du marché pertinent et preuves d'expertise – commentaires sur la base de l'arrêt de la Cour suprême du 29 juillet 2020. (I NSK 8/19). Dans l'une des procédures concernant un pourvoi en cassation formé dans une affaire contre une décision du président de l'Office polonais de la concurrence et de la protection des consommateurs, la Cour suprême, dans son arrêt du 29 juillet 2020 (I NSK 8/19) a exprimé son point de vue sur le rôle des preuves d'experts dans la définition du marché pertinent, et plus particulièrement dans la détermination de la substituabilité des produits. Rejetant le pourvoi en cassation du commerçant, il a déclaré qu'il n'était pas nécessaire de procéder à l'expertise demandée dans le cadre d'une procédure judiciaire, car l'élément décisif pour déterminer la substituabilité des produits est leur perception par les acheteurs et non leur composition chimique. L'objectif de cet article est de présenter l'argumentation de la Cour suprême et de l'analyser sous l'angle de la définition du marché pertinent et de la spécificité des preuves d'experts dans le contexte de la détermination du marché pertinent pour l'application de la loi antitrust.

Key words: relevant market; relevant product market; substitutability; expert evidence; court proceedings.

JEL: K21, K41

I. Introduction

A proper definition of the relevant market is fundamental for the successful application of competition law. By admitting, and later dismissing in the judgment of 29 July 2020 (I NSK 8/19), a cassation complaint brought by a corporate claimant in one of the appeal proceedings against the decisions of the President of the Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumentów*; hereinafter: President of the UOKiK), the Polish Supreme Court expressed its view on the role of expert evidence in defining the relevant market, and specifically, in determining product substitutability. In that particular context, this amounted to stating that the admission of expert evidence requested by the applicant was not necessary,

given that the substitutability of goods is decided mainly by customer adoption and not their chemical composition. This article aims to present the arguments cited to this end by the Supreme Court and to analyze its stance through the prism of defining the relevant market and the specificity of expert evidence.

II. Case overview and the Supreme Court's stance

The judgment of the Polish Supreme Court refers to a cassation complaint brought against the ruling of the Court of Appeal in Warsaw. Among the claims, the corporate claimant included the allegation of an infringement of procedural provisions in the form of Article 378 § 1 of the Civil Procedure Rules[1] in conjunction with Article 382 of the same act, Article 380 of the Civil Procedure Rules, and Article 391 § 1 of the Civil Procedure Rules in conjunction with Article 217 § 1, 2 and 3 of the same act, Article 227 of the Civil Procedure Rules and Article 278 § 1 of the Civil Procedure Rules, by approving the evidentiary errors of the first-instance court, consisting of the dismissal of the claimant's application for expert evidence, in the field of construction and building materials, to determine the product distinctiveness of specialty cement (manufactured and sold by the applicant) in relation to gray cement, despite the purposefulness of this evidence having been clearly due to the personal opinion expressed by the applicant in the procedural fairness letter dated 3 January 2013, and the difference in the use of these two types of cement products recognized by the courts of both instances and the defendant. The consequence of this judicial error was the failure to derive accurate factual findings with regard to the market relevant to the applicant, which resulted in an excessive fine imposed on the latter, among other damages.

In the statement of reasons, the Supreme Court addressed this claim in detail, in particular by explaining why the expert evidence requested by the applicant was not relevant to the market determination: 'The alleged violation of art. 278 of the Civil Procedure Rules is irrelevant. In the case-law of the Supreme Court, a plea of infringement of art. 278 Civil Procedure Rules can be raised in a cassation appeal in a situation where, in a judgment under appeal, the court has independently ruled on issues requiring specialized knowledge with disregard to expert evidence (judgments of the Supreme Court of: 24 October 2018, II CSK 623/17; 21 March 2017, I CSK 447/15; 4 October 2017, III SK 49/16; 8 September 2015, I UK 430/14; 24 June 2015 I UK 345/14; 5 February 2014, V CSK 140/13; 19 December 1990, I PR 148/90). This,

[1] Act of 17 November 1964 – Civil Procedure Rules (consolidated version: Journal of Laws 2020, item 296 as amended).

however, was not the case in the present lawsuit, as it was not necessary to obtain specific information on the chemical differences between the different grades of cement in order to establish the relevant market. The President of UOKiK has determined the relevant market based on the product – gray cement, and the geographic area – the territory of Poland. When defining the market, the competent authority used the applicable standards and therefore distinguished a group of common cement products (according to harmonized European EN 197-1, approved in 2002 in Poland as PN-EN 197-1: 2002) and a group of specialty cement products (according to standards PN-B-19707:2003 and PN-EN 197-1:2002/A1 2005 standards), regarding them collectively as gray cement. The President of UOKiK has emphasized that, despite numerous types of gray cement differing in terms of properties, depending on the proportions of their constituent components and on the adopted production process, gray cement is a homogeneous product that does not require narrower segmentation. This view is further justified by the fact that: (i) the production is based on one common product, (ii) in general use, individual grades of gray cement can be used interchangeably, (iii) the final product must meet the norms resulting from established standards, (iv) there are no known products that could be regarded as substitutes for gray cement. As rightly pointed out by the first-instance court, whose view was shared in full by the second-instance court, the admission of expert evidence to demonstrate other chemical properties of clinker would not have affected the definition of the product market, as it is ultimately up to consumers to decide the substitutability of a product, or lack thereof. Furthermore, the applicant has failed to address the extent to which their market definition would serve to exclude any actual impact of the cartel on the specialty cement market. The assertion that specialty cement belongs to a different product market does not in any way invalidate the fact that the agreement constituted a one-off infringement without distinguishing the cement grades.'

III. Appraisal of the Supreme Court's arguments

1. Relevant market definition – general issues

First and foremost, let us recall that, in accordance with the legal definition of the relevant market in Article 4 point 9 of the Polish Competition Act[2] (hereinafter: PCA) this refers to a market of goods which, based on their

[2] Act of 16 February 2007 on Competition and Consumer Protection (consolidated text Journal of Laws 2021, item 275 as amended).

intended use, price and properties, including quality, are considered by customers as substitutes and are offered in an area where, due to their type and properties, existing market-access barriers, consumer preferences, significant price differences and transport costs, similar conditions of competition prevail. This legal definition emphasizes two aspects of the relevant market, which relate to the product market and the geographic market.

Incidentally, such a definition of the relevant market corresponds with the Commission Notice on the determination of relevant market[3] applied in EU competition law. Let us also note that the relevant market should be defined *in concreto*, with account for the circumstances of the case. As accentuated under European competition law, the Commission 'is required to carry out an individual appraisal of the circumstances of each case, without being bound by previous decisions concerning other undertakings, other product and service markets or other geographic markets at different times. Thus, the applicant is not entitled to call the Commission's findings into question on the ground that they differ from those made previously in a different case, even where the markets at issue in the two cases are similar or identical'.[4] This view is echoed in the literature (Anusz, 2020) and should also be incorporated into deliberations within the boundaries of national law.

2. Product substitutability as the basis for defining the relevant market

The basic obstacle to defining the relevant market in terms of substitutability (product market) is the fact that the appraisal of substitutability is made from the perspective of customers. As observed in a number of judicial decisions to date, a relevant product market encompasses all goods that serve the same customer needs, have similar features, similar prices and represent a similar level of quality. For this reason, the product purpose and properties, together with the classification of goods as substitutes from the customer standpoint, seem crucial. Products which are suitable for the same use, and which are therefore regarded as interchangeable, should form part of the same market.[5]

In the literature and case-law alike, two opposing approaches to defining the relevant market have emerged. One opts for a narrow market delimitation

[3] Commission notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372/5).

[4] GC judgment of 23.05.2019, Case T-370/17 *KPN BV v European Commission,* ECLI:EU:T:2019:354.

[5] (Warsaw) Court of Appeal judgment of 31.01.2017, VI ACa 1726/15, LEX. See also: GC judgment of 15.12.2016, Case T-169/08 RENV *DEI v European Commissiona*, ECLI:EU:T:2016:733.

(segmentation), while the other draws attention to the need for a broad perception of the concept of the relevant market. Having said that, the relevant market should not be termed either narrowly or broadly, but simply – accurately (Turno, 2015; Skoczny and Szwedziak-Bork, 2014), meaning adequately to its legal definition and the circumstances of the case. In addition, economic analysis in the form of the SSNIP test (SSNIP standing for small but significant and non-transitory increase in price) is often performed in practice when appraising product substitutability (Kostecka-Jurczyk, 2012). Interestingly however, the reliability and usefulness of the SSNIP test is questioned in the literature (Turno, 2015).

Meanwhile, the Supreme Court judgment reviewed in this paper, to the extent to which it explains the groundlessness of the objection concerning the rejection of expert evidence, does not refer to economic analysis at all, including to the SSNIP test. In other words, the Supreme Court approved the definition of the relevant market by the competition authority, as did the courts at the earlier stages of the court proceedings. Let us note, however, that the very statement of reasons raises certain doubts as to the actual substitutability of the analyzed products, given that – according to the adopted standards – both types of cement are subject to separate classifications: one is common cement, and the other is specialty cement. With that in mind, the explanation of the actual differences between these products in order to verify their substitutability by means of expert evidence seemed justified, since the grounds of the judgment do not explicitly state whether the broad delineation of the product market – here, the gray cement market – was correct (that is, not too broad).

3. The issue of relying in appeal proceedings on the definition of the relevant market adopted by the competition authority

In the case heard by the Supreme Court, including at the earlier stages of the court proceedings, the relevant market was defined by the President of UOKiK. However, it is important to remember that, in the event of an appeal being brought against a decision of the competition authority, the proceedings formally become a civil proceeding governed by the adversarial principle. In this case, the burden of proof to define the relevant market rests on the President of UOKiK, who seeks to prove that the corporate applicant has violated competition law provisions, while its final determination rests with the court. Since the applicant questions the statements of the competition authority as to the definition of the relevant market, it becomes necessary to conduct evidentiary proceedings (Wasilewski, 2020). On the other hand, the analyzed ruling seems to imply that the Supreme Court has changed the optics

of the issue of burden of proof, adopting instead the fully challenged position of the competition authority (along with its explanations), and thus reducing the applicant's claim to the latter's failure to explain why expert evidence would lead to a different definition of the relevant market. Meanwhile, it is the competition authority that should strive to address the applicant's claims and provide evidence to support their definition of the relevant market.

4. Expert evidence and specialized knowledge in defining the relevant market

In what concerns competition proceedings, proper definition of the relevant market, including the product market, is the responsibility of the competition authority (in the case of Polish law – the President of UOKiK). Due to the specificity of the definition of the relevant market, namely the criteria for determining the product market, including product properties, intended use or quality, it is permissible for the President of UOKiK to resort to expert evidence. Having said that, it is not permissible to rely on expert evidence for generally formulated circumstance of defining the relevant market (Wasilewski, 2020; Banasiński and Piontek, 2009).

Using expert evidence to define the relevant market is permissible both under EU law and Polish law. Regarding the responsibilities of the Commission, it has been clearly stated that '[t]here is a range of evidence permitting an assessment of the extent to which substitution would take place. In individual cases, certain types of evidence will be determinant, depending very much on the characteristics and specificity of the industry and products or services that are being examined. The same type of evidence may be of no importance in other cases. In most cases, a decision will have to be based on the consideration of a number of criteria and different items of evidence. The Commission follows an open approach to empirical evidence, aimed at making an effective use of all available information which may be relevant in individual cases. The Commission does not follow a rigid hierarchy of different sources of information or types of evidence' (Commission, 1997). Also in the evidentiary proceedings before the President of UOKiK, there is an open approach to evidence, whereas for specialized knowledge (product properties, among others, should be viewed as such), expert evidence is of primary significance (Wasilewski, 2020). Importantly, the admissibility for the President of UOKiK, as well as for courts in appeal proceedings, to rely on expert evidence is confirmed in the Supreme Court's judicial practice.[6] This

[6] Let us note, for example, that in the Supreme Court judgment of 05.11.2015, III SK 7/15, it was indicated that evidence in those court proceedings was obtained through expert evidence in order to determine barriers to market entrance and therefore product substitutability: 'The

is especially important if we consider that, while in the case of proceedings before the competition authority itself it is possible to attribute lack of such evidence to the specialized nature of that body[7] (Wasilewski, 2020), the court in appeal proceedings is not awarded such status and, as per the *iura novit curia* principle, is 'the only expert of the law' and so any specialized knowledge must be derived from the evidence obtained by court experts, pursuant to Article 278 of the Civil Procedure Rules (Wasilewski, 2020).[8]

IV. Conclusion

The Supreme Court judgment reviewed in this paper does not deserve full approval. Contrary to the rationale behind that ruling, it should be stressed that the burden of proof concerning the definition of the relevant market (and therefore also relevant product market, product substitutability) rests with the competition authority. Hence, the challenging of the findings of the President of UOKiK in the appeal proceedings should trigger evidentiary

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expert evidence has found that the costs associated with switching from the provision of radio- to television-signal broadcasting within the same broadcasting facility constitutes a significant economic barrier, as it necessitates the purchase of transmission equipment and the rebuilding of infrastructure elements, such as power supply and air-conditioning. The height of the mast could also be a potential barrier, as it might not allow for the installation of emission equipment other than that of the current signal. This barrier of significant costs constitutes a lack of supply substitutability.'

[7] See: Court of Competition and Consumer Protection (*Sąd Ochrony Konkurencji i Konsumentów*, hereinafter: SOKiK) judgment of 02.04.2003, XVII AmA 46/02.

[8] At this point, it is worth noting the stance of the Supreme Court, according to which 'from the generally accepted principle that the court is the highest expert, one cannot infer that the court can replace an expert, which means that whenever special information is required to ascertain findings that would bring the case closer to a resolution, the court must not seek such findings per se, even if it had the appropriate substantive qualifications to do so; having such competences should instead only facilitate the appraisal of expert evidence. In a situation where the parties represented by qualified attorneys do not submit such evidence to the court due to the adversarial principle, there is no requirement to conduct evidentiary proceedings *ex officio*. The court may then consider that the issues relevant to the claimant's statement of claim or the defendant's statement of defense have not been proven and draw appropriate procedural consequences. If, however, the court decides to establish findings and appraisals in matters requiring specialized knowledge, it should seek expert opinion *ex officio*. This opinion will help the court to conduct assessments, and at the same time will enable the parties to challenge its arguments if need be, for otherwise, the parties can only appeal directly against the court's ruling, which is undoubtedly a procedural difficulty not only for themselves, but also for the higher-instance court hearing the appeal.' (Supreme Court judgment of 20.01.2016, I PK 196/15).

proceedings. In what concerns specialized knowledge, the court is required to seek expert opinion, while specialized knowledge in the case at hand should be the knowledge of the defining elements of the relevant market included in the legal definition (Article 4 point 9 PCA). The court seems to have jumped into conclusions by supporting in the appeal proceedings – and without activating evidentiary proceedings – the competition authority's definition of the relevant market when the applicant disputes those very findings. Neither do there seem to be any legal grounds for burdening the applicant in an adversarial process with the necessity to demonstrate irregularities adopted by the relevant authority in order to justify the need for expert evidence. The implications arising from questioning these findings, and the lack of sufficient evidence, should be borne not by the applicant seeking legal protection against the authority's decision but by the competition authority itself, assuming the latter's inaction regarding the evidence initiative. Last but not least, the court alone, without the opinion of experts, is not competent to produce determinations in the field of specialized knowledge, which are necessary to define the relevant market.

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