YEARBOOK of ANTITRUST and REGULATORY STUDIES
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Peer-reviewed scientific periodical, focusing on legal and economic issues of antitrust and regulation.

CARS Centre for Antitrust and Regulatory Studies
Centrum Studiów Antymonopolowych i Regulacyjnych
Centre for Antitrust and Regulatory Studies, University of Warsaw, Faculty of Management
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Concurrence of wills – a necessary ingredient of an agreement restricting competition. Case comment to the judgment of Court of Competition and Consumer Protection of 8 February 2011 – *ZST Gamrat S.A. v President of the Office of Competition and Consumer Protection* (Ref. No. XVII Ama 16/10)

Introduction

The case in question represents just one of several legal actions that ZTS Gamrat and its distributors undertook against the decision of the Polish national competition agency, the President of the Office of Competition and Consumer Protection (hereafter, UOKiK President, after the Polish acronym). This legal battle commenced in 2005 and still has not been resolved, as the judgment of the Court of Competition and Consumer Protection (hereafter, the SOKiK) discussed in this comment has been appealed by the UOKiK President. The Court of Appeals, in its judgment of 20th October 2011 (ref. no. VI ACa 564/11), referred the case back to the SOKiK due to the invalidity of the trial before that Court. Hence, the pronounced judgment was set aside and the proceeding before the SOKiK will be repeated. Nonetheless, while keeping in mind that the judgment is under reconsideration, it is worth taking a closer look at the judgment originally issued as it tackles the interesting question of the legal prerequisites of an agreement restricting competition contrary to competition law.

Facts

In 2005, the UOKiK President launched an investigation with regard to an agreement allegedly restricting competition concluded by the following entities: ZTS Gamrat SA, PPHUS Gamrat SA, Śląskie Centrum Handlowe PVC Gamrat sp. z o.o., Budmech WT, Polskie Składy Budowlane S.A. It was alleged that named entities entered into a price-fixing agreement.

ZTS Gamrat S.A. (hereafter, ZTS Gamrat) is a producer of drainage systems for construction purposes. ZTS Gamrat's products are distributed in Poland through a network of authorized distributors. It was established that ZTS Gamrat concluded individual cooperation agreements with the above-mentioned entities. A few years

into their cooperation, each authorized distributor signed an annex to the cooperation contract which governed relations between the producer and the dealer. In particular these annexes included provisions on rebates granted by the producer to the dealer, as well as fixing the amount of rebates on further re-sales of the drainage system in question. In other words, the annexes indicated the maximum amount of the rebate a distributor could grant on further re-sale.

In the hearing in front of the UOKiK President, key proof that an agreement contrary to competition law was entered into was deemed to be a letter addressed to ZTS Gamrat indicating that ZTS Gamrat controlled the other parties to the agreement by verifying whether the fixed rebate/discount for resale was complied with.

The UOKiK President found that by fixing the maximum discount, ZTS Gamrat in fact influenced the market price of the drainage system. According to the UOKiK President, the fact that the contract with distributors included provisions on the resale price of the drainage system resulted in a reduction of competition between distributors in terms of price on the market. The agreement thus had a direct impact on the level of competition in the relevant market i.e. the market for the domestic distribution of the drainage system. It was also stated that the agreement, whose object was to determine the resale price of the drainage system in question, affected the situation of the consumer.

As a result of the above, ZTS Gamrat was found to have concluded an unlawful agreement by virtue of which it fixed prices on the resale of a drainage system[1]. It follows from the case-law that agreements relating to rebates and discounts, which directly or indirectly influence or fix the resale price of goods, shall be deemed unlawful price-fixing agreements under competition law. The UOKiK President's decision stated that determination of the maximum rebate that a distributor could apply when selling the drainage system was in fact indirect price fixing, inasmuch as it specified a minimum price for sales of the system, under which distributors could not sell the product.

It must be underlined that agreements which, directly or indirectly, alone or in combination with other factors, dependent on the parties, have as their object the restriction of a sale price, by imposing a minimum or a specified amount of (fixed) prices for goods covered by the agreement, are generally regarded as among the most severe restrictions on competition.

The decision was appealed by ZTS Gamrat S.A. to the Court of Competition and Consumer Protection.

[1] The decision was issued on the basis of the Act of 15 December 2000 on competition and consumer protection (consolidated version: Journal of Laws 2005 No. 244, item 2080). This Act was replaced by the Act of 16 February 2007 on competition and consumer protection (Journal of Laws 2007 No. 50, item 331), the latter of which is hereafter referred to as the Competition Act.

Key findings of the Court of Competition and Consumer Protection

ZTS Gamrat claimed on appeal that there was no breach of competition law. It denied the existence of agreements with distributors, stating that the rebate policy was justified by the desire to adapt to the competitive level on the relevant market. It was indicated that the amount of rebates granted was determined and negotiated individually with distributors. ZTS Gamrat identified companies that were chosen as the leading distributors and presented criteria for the selection of such distributors. It also explained that the purpose of indicating a rebate on re-sale was to determine the appropriate level of profit for the distributor. It should be underlined that not all distributors were required to comply with discounts for resale. Moreover, the distributors themselves strongly opposed the concept that they were a part of an agreement on price fixing.

The SOKiK found that when issuing his decision the UOKiK President relied mainly on the wording of annexes concluded by ZTS Gamrat with its distributors, and the fact that all of the annexes except one were concluded on the same date. The UOKiK President was of an opinion that (i) the distributors knew that ZTS Garmat included identical provisions in contracts relating to maximum rebates on resale of the drainage system, and (ii) while having this knowledge, the distributors voluntarily agreed to sign uniform agreements and reduce their autonomy in pricing the drainage system for resale, which violated the interests of consumers and free competition. In the opinion of the SOKiK, the conclusions reached by the UOKiK President were wrong. While the evidence gathered by the President could have created the impression that the entities in question took part in the prohibited agreement, in its analysis of the evidence the SOKiK found numerous discrepancies between the wording of the annexes and the conclusions reached by the UOKiK President. In particular, the SOKiK stated that the rebates on resale were – contrary to what was claimed by the UOKiK President – not binding on the distributors, as they applied various rebates to resale of the drainage system. Nor was there a system of control set up by ZTS Gamrat SA to verify whether the distributors complied with the annexes.

The SOKiK also found that the letter addressed to ZTS Gamrat did not provide sufficient proof that the named distributors had information about arrangements for maximum resale discounts made by ZTS Gamrat with other distributors. The distributors in question not only did not cooperate with each other, but competed intensely against each other in order to gain new clients. In the light of foregoing, the SOKiK found that ZTS Gamrat did not breach competition law.

Commentary

The SOKiK judgment refers to a very important area of competition law, i.e. agreements restricting competition. The Polish Act on competition and consumer protection prohibits agreements between undertakings which have as their object or effect the elimination, restriction or any other infringement of competition in the relevant market which leads, amongst other effects, to price fixing, market sharing,

limiting access to the market, or eliminating from the market undertakings which are not parties to the agreement[2].

However, it must be underlined that agreements between undertakings form a part of day-to-day business activity. Therefore, it is crucial to ascertain which agreements distort competition and which should be deemed neutral or even beneficial for the competition process[3].

First of all, it is crucial to ascertain the legal meaning of the notions 'undertaking' and 'agreement'. The Polish Competition Act states that:

'1) 'undertaking' shall mean an undertaking in the meaning of the provisions on freedom of business activity, including[4]:
   a) natural and legal persons as well as an organisational unit without a legal status to which legislation grants legal capacity, organising or rendering public utility services, which do not constitute a business activity in the meaning of the provisions on freedom of business activity;
   b) natural persons exercising a profession on their own behalf and account or carrying out an activity as part of exercising such a profession;
   c) natural persons having control, in the meaning of subparagraph 4 herein, over at least one undertaking, even if the person does not carry out a business activity in the meaning of the provisions on freedom of business activity, if this person undertakes further actions subject to the control of concentrations;
   d) associations of undertakings – for the purposes of the provisions on competition-restricting practices and practices infringing collective consumer interests.
2) 'agreements' shall mean[5]:
   a) agreements concluded between undertakings, between associations thereof and between undertakings and their associations, or certain provisions of such agreements;
   b) concerted practices undertaken in any form by two or more undertakings or associations thereof;
   c) resolutions or other acts of associations of undertakings or their statutory organs.'

A distinction must be made between the unilateral conduct of an undertaking and co-ordination of behavior or collusion between undertakings. The type of co-ordination of behavior or collusion between undertakings falling within the scope of competition law is that where at least one undertaking undertakes, *vis-à-vis* another undertaking, to adopt a certain conduct on the market that, as a result of contacts between them, eliminate or at least substantially reduce uncertainty as to their conduct on the market[6].

[2] Article 6 of the Competition Act.

[3] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [*Act on competition and consumers protection. Commentary*], Warszawa 2011, p. 211

[4] Article 4(1) of the Competition Act.

[5] Article 4(5) of the Competition Act.

[6] Joined cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95,

Under competition law an agreement does not necessarily have to be in writing. It has been held on numerous occasions that a 'gentleman's agreement' and simple 'understandings' are to be regarded as agreements, even though neither is legally binding nor in writing. Guidelines issued by one person that are adhered to by another can amount to an agreement, and circulars and warnings sent by a manufacturer to its dealers may be treated as part of a general agreement existing between them[7]. The same is true of an agreement which has expired or lapsed in time, but the effects of which continue to be felt on the market[8]. The challenge for the competition authorities is to uncover the operation of such cartels[9].

Moreover, it must also be noted that the prohibition of agreements restricting competition applies to both horizontal and vertical agreements. Therefore, an agreement between a producer and its independent distributors may be found anti-competitive. Agreements between undertakings which might distort competition within a relevant market fall under the scrutiny of the competition authorities regardless of whether such agreements are concluded between a producer and his distributors or between two or more undertakings operating at the same level on the market chain.

An agreement also need not necessarily be express. It can be tacit. For an agreement to be capable of being regarded as having been concluded by tacit acceptance there must be an invitation from one undertaking to another undertaking, whether express or implied, to fulfill a goal jointly[10].

In certain circumstances an agreement may be inferred from and imputed to an ongoing commercial relationship between the parties. However, the mere fact that a measure adopted by an undertaking falls within the context of on-going business relations is not in and of itself sufficient[11]. In each case it is necessary to examine the facts underlying the agreement and the specific circumstances in which it operates[12].

An important factor constituting an agreement is the existence of a concurrence of wills, sometimes also called 'meeting of minds', between the parties to an agreement. As A. Jones and B. Sufrin indicate: 'proof of an agreement must be founded upon the existence of the subjective element that characterizes the very concept of the agreement, that is to say **a** concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct

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T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and others v Commission of the European Communities*, ECR [2000] II-491, paras. 1849 and 1852; joined cases T-202/98, T-204/98 and T-207/98 *British Sugar and others v Commission of the European Communities*, ECR [2001] II-2035, paras. 58 to 60.

[7] *Anheuser-Busch Incorporated-Scottish & Newcastle*, OJ [2000] L 49/37; *Volkswagen,* OJ [2001] L 262/14.

[8] R. Whish, *Competition Law*, London 2004, pp. 92–93.

[9] A. Jones, B. Sufrin, *EC Competition Law, Text, Cases, and Materials*, Oxford 2004, p. 127.

[10] See, in this respect, joined Cases C-2/01 and C-3/01P, *Bundesverban der Arzneimittel-Importeure EV and Commission v. Bayer AG*, [2004] ECR I-00023; [2004] 4 CMLR 653, pp. 141–145.

[11] Guidelines on the application of Article 81(3) of the Treaty, OJ [2004] C 101/97. p. 15.

[12] Guidelines on the application of Article 81(3) of the Treaty, OJ [2004] C 101/97. p. 6.

on the market'[13]. R .Whish points out that even a protocol which reflects a genuine concurrence of wills between the parties is sufficient to constitute an agreement[14].

In other words for there to be an agreement within the meaning of competition law it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way[15]. Therefore, in order to find a price-fixing agreement, the competition authority must establish that the parties to such an agreement have acted intentionally[16].

In this regard it is instructive to note that the SOKiK overruled the decision of the UOKiK President on the basis that the UOKiK President did not establish sufficient proof that there were intentionally committed actions between the entities in question. In the opinion of the SOKiK, the UOKiK President did not show that distributors of ZTS Gamrat's drainage system knew about the fact that rebates were coordinated. The Court concluded that an examination of the attitude and actual conduct of the distributors showed that the UOKiK President had no factual basis for claiming that entities in question aligned themselves to any policy by ZTS Gamrat to observe fixed rebates and therefore influence the resale price and maintain the price at a similar level.

Bearing in mind the fact that the concept of an agreement centers around the existence of a concurrence of wills[17], the SOKiK's stance seems to be in line with the judgments of the European Union courts (both the Court of Justice and the General Court), which have stressed that the competition authority may not decide that unilateral conduct by a manufacturer, in the context of its contractual relations with its retailers, forms the factual basis of an anticompetitive agreement unless it establishes express or implied acquiescence by the retailers in the attitude adopted by the manufacturer[18].

The SOKiK's judgment is also in line with certain concepts highlighted in the judgment in *Bayer AG v Commission*, issued by the EU General Court (formerly Court of First Instance)[19]. In that case the Commission dealt with the issue whether the concept of an agreement contrary to competition law may be read into unilateral conduct. It follows from that judgment that a distinction has to be drawn between cases in which a genuinely unilateral measure has been adopted (without the express or implied participation others) and those in which a unilateral measure receives at least a tacit acquiescence[20]. In its judgment, the Court in *Bayer AG v Commission* underlined

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[13] A. Jones, B. Sufrin, *EC Competition Law…*, p. 127.

[14] R. Whish, *Competition Law…,* p. 92 .

[15] Case 41/69 *ACF Chemiefarma v Commission of the European Communities*, ECR [1970] 661.

[16] A. Stawicki, E. Stawicki (eds.), *Ustawa…*, p. 122.

[17] Case T-41/96 *Bayer AG v Commission of the European Communities*, ECR [2000] II-3383, [2001] 4 CMLR 126; p. 69.

[18] Case T-208/01 *Volkswagen A.G. v Commission of the European Communities,* ECR [2003] II-5141; Joined Cases C-2/01 and C-3/01P *Bundesverban der Arzneimittel-Importeure EV and Commission v Bayer AG*, [2004] 4 CMLR 653, pp. 141–145.

[19] Case T-41/96 *Bayer AG v Commission of the European Communities*, ECR [2000] II-3383, [2001] 4 CMLR 126; p. 69.

[20] A. Jones, B. Sufrin, *EC Competition Law...*, p. 138.

that the concept of an agreement 'centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention'[21].

It is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party to fulfill that goal jointly. Proof of the agreement has to be based on a finding (direct or indirect) of a meeting of minds between the operators. It is accepted that the mere signature of the dealership agreement cannot in and of itself be regarded as implied acceptance, given in advance, of anticompetitive initiatives[22].

The SOKiK found that in this particular case there was no concurrence of wills, as the distributors had no knowledge about the rebate scheme employed by ZTS Gamrat within its distribution network, nor about the fact that they were as a group supposed to follow this rebate scheme initiated by ZTS Gamrat. Moreover, it was apparent to the SOKiK that the distributors not only did not abide by or obey the rules indicated by ZTS Gamrat regarding the maximum resale rebates, but employed different rebates in order to attract new contracting parties. The UOKiK President did not prove any factual acquiescence by the dealers. It follows from the case-law that in the absence of unequivocal evidence establishing the fixing of or a strict set of rules regarding retail prices and discounts, the infringement is not sufficiently established in law[23].

On the basis of evidence gathered in the case the SOKiK concluded that the decision of the UOKiK President should be dismissed.

Conclusions

The analysis conducted by the Court of Competition and Consumer Protection places great importance on whether a concurrence of wills was reached within the framework of an agreement contrary to competition law. Such an approach seems to be in line with the concepts of 'agreement' under the competition law of the European Union, which requires a consensus of the parties in order to form an agreement contrary to competition law.

However, it must also be noted that the burden of proof placed on the competition authority to establish the intention of the parties to form an unlawful agreement may turn out to be, in certain cases, so burdensome as to be close to impossible to meet.

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[21] Case T-41/96 *Bayer AG v. Commission of the European Communities,* ECR [2000] II-3383, [2001] 4 CMLR 126; p. 69.

[22] Case T-208/01 *Volkswagen A.G. v Commission of the European Communities,* ECR [2003] II-5141, p. 68.

[23] Case T-67/01 *JCB Service v Commission of the European Communities*, ECR [2004] II-00049, pp. 121–133.