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Gratuitous transfer of ownership of energy transmission infrastructure as an abuse of a dominant position. Case comment to the judgement of the Supreme Court of 16 October 2008 – *Kolej Gondolowa* (Ref. No. III SK 2/08)

Facts

In the decision no. RKR - 8/99 of 24 March 1999, the President of the Office of Competition and Consumer Protection (UOKiK) did not agree with the complaint submitted by Kolej Gondolowa Jaworzyna Krynicka S.A. (KGJ). As a result, the UOKiK President refused to declare that the Energy Supplier used monopolistic practices and thus abused its dominant position in the local electricity supply market. KGJ complained that the Supplier had imposed a requirement upon KGJ to surrender the ownership of energy transmission facilities constructed mostly at the expense and by the effort of KGJ. The original antitrust proceedings in this case were conducted pursuant to the Act of 24 February 1990 on Counteracting Monopolistic Practices and the Protection of Consumer Interests[1] which is no longer in force.

KGJ and the Energy Supplier were parties to two contracts: a) an investment agreement entered into on 28 June 1996; and b) an agreement on the gratuitous transfer of energy transmission facilities to the Supplier entered into on 11 April 1997. The Supplier made the activation of the energy supplies conditional upon the conclusion of the latter agreement.

The dispute among KGJ, the UOKiK President and Energy Supplier in question is one of the longest in the history of Polish antitrust jurisprudence – Polish courts have made their position on this matter known as many as eight times, four of which were Supreme Court judgments[2].

[1] Consolidated text: Journal of Laws 1999 No. 52, item 547.

[2] Background: 22 November 2000 – the Antimonopoly Court dismisses KGJ's appeal; 24 April 2003 – the Supreme Court issued a judgement in favour of KGJ's final appeal; 19 May 2004 – the Competition and Consumer Protection Court dismissed KGJ's appeal; 7 December 2005 – the Supreme Court issued a ruling resolving a legal question; 6 April 2006 – the Warsaw Appeals Court dismissed KGJ's appeal; 5 January 2007 – the Supreme Court issued a judgement in favour of KGJ's final appeal; 5 July 2007 – the Warsaw Appeals Court issued a judgement changing the UOKiK President decision and confirming the abuse of the dominant position by the Energy Supplier; 16 October 2008 – the Supreme Court dismissed the final appeal of the Energy Sup-

Ultimately, it was decided[3] that the Energy Supplier had abused its dominant position in the local market of electricity supplies by imposing onerous contract terms and conditions on KGJ. The contested practice took the form of an agreement on the gratuitous surrender of infrastructure built mostly at the expense and by the effort of KGJ without providing any financial compensation for the service. This legal assessment was upheld by the Supreme Court in the judgement under consideration here. However, before this ruling, various views were presented by Polish courts and the UOKiK.

Key legal problems of the case and key findings of the Court

In the opinion of the UOKiK President, the Energy Supplier did not force the terms and conditions of the agreements concluded in 1996 and 1997 upon the plaintiff (KGJ). The antitrust authority held the view that these terms were neither onerous nor did they generate any unjustified benefits to the Supplier. Investment costs were settled by way of a civil-law agreement respecting the equality of its parties. The contribution of KGJ to the joint investment amounted to 53%, while the Supplier covered 47% of the total. The latter was additionally burdened with future operating and maintenance costs.

The Supreme Court disagreed with that position in its judgement of 24 April 2003 because this approach could be considered to be correct only if the gratuitous surrender of the facilities had an impact on a corresponding reduction of the electricity prices charged to KGJ. A gratuitous surrender of expensive infrastructure in return for the possibility of receiving energy supplies, charged however at a full price, was a *prima facie* onerous contractual condition. The Supreme Court compared it to a car manufacturer who, in addition to charging the price of a car, would also request buyers to gratuitously participate in the cost of building and equipping the car assembly facility. According to the Supreme Court, access to the energy supply source needed by the buyer to conduct his business cannot be considered in a market economy as a fair equivalent of a gratuitous surrender of property assets. The Supreme Court also noted that the "imposition" in question may also be an expression of the lack of choice available to KGJ. To assess whether onerous contractual terms had been indeed imposed, the Competition and Consumer Protection Court should consider whether a reasonable electricity customer would enter into such an agreement (obliging it to gratuitously surrender facilities build by the customer) if the Supplier operated in

plier. Moreover, the Supreme Court judgement of 5 January 2007 was voted twice (in favour) – see K. Kohutek, "When will the imposition of the requirement to co-finance the construction of necessary facilities constitute an abuse of a dominant position? Case comment to the judgment of the Supreme Court of 5 January 2007 – Kolej Gondolowa (Ref. No. III SK 17/06)" (2008) 1(1) *YARS* and K. Kohutek, *Commentary to the Supreme Court Judgement of 5 January 2007 (III SK 17/06)*, Lex/el 2008.

[3] By the Warsaw Appeals Court's judgement of 5 July 2007, which was upheld in effect on the basis of a commented ruling.

a competitive environment and the customer had the possibility of choosing among several supply sources.

After a re-examination of the case, the Competition and Consumer Protection Court issued a judgement on 19 May 2004 rejecting KGJ's appeal against the UOKiK decision. The court decided that the assessment of whether a monopolistic practice had taken place should cover both mutually independent agreements signed by the Supplier with KGJ. The Court stated that such an assessment could not be performed with respect to the first agreement, because the administrative proceedings were initiated after the lapse of the period specified in the Polish antitrust statute of limitations (one year after the end of the year in which the contested practice ceased). With respect to the 1997 agreement, the Competition and Consumer Protection Court stated that the act of concluding it was a performance arising from the commitments specified in the contract of 28 June 1996. In other words, the Supplier did not impose the terms of the agreement dated 11 April 1007 on KGJ. One could speak of an "imposition", at most, with reference to the 1996 contract since the second agreement was nothing more than the execution of the first. Consequently, a hypothetical abuse could have occurred, at the latest, at the time of signing the first agreement (June 1996). According to the Court, there were therefore no grounds for the UOKiK to initiate proceedings due to the lapse of the period identified in the relevant statute of limitations.

The Supreme Court rejected the above argumentation in its judgement of 5 January 2007. When KGJ entered into the 1997 agreement, it had no freedom of choice, not as much because it had entered into the 1996 contract, but because of the monopolistic position of the Supplier on the energy supply market and due its conduct. For this reason, the Supreme Court considered that the limitations period should be counted from the moment of entering into the second agreement rather than from the first. Therefore, the UOKiK proceeding had been initiated within the deadline specified in the statute of limitations. The Supreme Court also asserted that if the market in which the parties operated had been competitive, the energy buyer would not have been obligated to build energy transmission facilities using his own resources and then surrender them gratuitously to the energy supplier since this would be economically unreasonable. Furthermore, the Supreme Court expressed the opinion that the conduct of the Energy Supplier could be treated as an abuse of its dominant position also by virtue of the use bundling.

In its judgement of 16 October 2008, which is the subject of this commentary, the Supreme Court essentially agreed with the argumentation presented earlier by the various courts. At the same time, it initiated a new thread in the matter – the issue of public interest which, in the opinion of the Supreme Court, had indeed been breached.

The Supreme Court stated that the Supplier which held a dominant position had to pay KGJ equivalently for taking over the ownership of the energy transmission facilities used to supply energy to KGJ and built with a 53% participation of the latter. By coercing KGJ into the agreement on a gratuitous transfer of ownership, the Supplier committed an act of an abuse of its dominant position evidenced by the imposition of onerous terms of that agreement.

The assessment of the judgement

In my opinion, the Supreme Court finding of an abuse of a dominant position by the Energy Supplier was incorrect. On the other hand, I agree with its interpretation of the notion of public interest and of the provision of the antitrust statute of limitations.

Doubts raised by the judgement

First, what should have been clarified before considering any other aspects of the case (not done by any of the courts involved in this case) is the civil-law nature of the infrastructure taken over by the Supplier. According to predominant (until 2006) interpretation of Article 49 in connection with Article 191 of the Civil Code, facilities used for the transmission of energy provided by the supplier become its property by virtue of the law on their hook-up[4]. This would mean in this case, that the Energy Supplier would become the owner of these facilities by virtue of the law. The conclusion of the 1997 agreement, which confirmed that fact, would only be of declaratory nature. Consequently, the Supplier should have been charged with an abuse of its dominant position because it refused to pay for these facilities (by virtue of the law and confirmed by the agreement) rather than because it coerced KGJ into their gratuitous surrender. The establishment of these civil-law circumstances would have eliminated the need for the Supreme Court's speculations[5] if it was possible to treat the conduct of the Supplier as illegal bundling and to assume, that the gratuitous surrender of the necessary facilities by the energy buyer was not linked in any way to the object of the energy sales agreement.

Second, it seems that the Supreme Court upheld the view expressed in its earlier judgement of 24 April 2003 whereby the conduct of the Supplier could not be justified by the long-term nature of the return on investment because "[a] short or long-term nature of an investment can impact the magnitude of benefits associated with it but has little to do with the legitimacy of their acquisition".

In my opinion, this view is both incorrect and detached from economic realities. In addition, it breaks away from other jurisprudence. A completely different assertion was made by the Supreme Court in its judgement of 27 May 1998[6]. On that occasion, the Court assumed that the assessment of whether benefits obtained by a dominant undertaking are unjustified should take into account of the burdens arising from the long-term nature of the intended (accomplished) investment. This particular case involved an analogous situation to the dispute at hand – the participation in the cost

[4] See, for example, the Antimonopoly Court judgement of 16 June 1999 (XVII Ama 22/09) and the Constitutional Tribunal judgement of 4 December 1991. It seems that this jurisprudence was permanently changed by the Supreme Court resolution of 8 March 2006, III CZP 105/2005, (2006) 10 *Orzecznictwo Sądu Najwyższego Izba Cywilna* 159, (2007) 7–8 *Orzecznictwo Sądów Polskich* 84.

[5] See the Supreme Court judgement of 5 January 2007, III SK 17/06 (unpublished), in which the court pronounced itself on the matter at hand for the third time.

[6] I CKN 702/97, (1999) 7–8 *Orzecznictwo Sądów Polskich*, item 139.

of building a power grid by the energy supplier and user. In the earlier case, the Supreme Court decided that an assessment of the equivalency of the energy supplier's performance needed to take into account the period needed to recoup the grid expansion investment outlays. In my view, this approach is correct. Any assessment of investment costs must take into account the time needed to recoup them. The longer that time, the higher the investor's estimate of the cost of his performance. In my opinion, not taking into account the time needed for the Supplier to cash in on the investment is an omission showing the absence of an economic approach to the examined case.

The third key element of this judgement is burdened with similar defects. In my opinion, the charge of having imposed adverse contractual terms has not been substantiated, but made plausible at most. The reasoning of the Court was based on the following premise: the Supplier gained an unjustified benefit because it received gratuitously at least part of the infrastructure needed to sell energy. At the same time, there was no equivalency between the performance of the Supplier (supply of energy and the construction of 47% of the infrastructure) and of KGJ (payment for energy, construction of 53% of the infrastructure and gratuitous surrender of its ownership to the Supplier). This approach, which is likely to reflect the true trade relationship between the parties, unfortunately suffers from the absence of economic considerations.

It seems that in constructing this reasoning, the Supreme Court based itself on the principles of logical thinking and life experience rather than on a specific economic analysis. For example, such an analysis should juxtapose the cost of building the facilities, against potential profits generated by the Supplier from energy sales. If the investment cost to be incurred by the Supplier was so high that the sale of energy would not generate a fair profit, then a gratuitous transfer of ownership of these facilities could be economically justified. After all, one cannot expect the Energy Supplier to finance a business venture which will not yield an income[7]. In my view, these circumstances should have been examined by the courts on the basis of evidence taken from an expert opinion[8]. Since this was not the case, the imposition by the Supplier of onerous contractual terms was made plausible only through the application of the principles of logical thinking and life experience, rather than proven by a sound economic analysis. The above example is characteristic of Polish jurisprudence. In my view, economic analysis, which should be conducted on the basis of appropriate

[7] It should be noted that the Polish energy law was changed after 1997 by a provision obliging the energy supplier to enter into a supply agreement under which the energy buyer guaranteed to cover the supplier's expense involved in constructing or expanding the supply grid in an amount ensuring that the supplier's future revenues from that buyer would be higher than that expense (A. Walaszek-Pyzioł, W. Pyzioł, *Prawo energetyczne. Komentarz* [*Commentary on Energy Law*], Warszawa 1998, p. 40–41). Before 1997, i.e., under the legal order binding for the case under examination, that provision did not exist.

[8] There was no taking of such evidence despite the fact that both KGJ and the Energy Supplier had applied for it. The court could have also taken that [economic] evidence *ex officio* – in this respect, see the Supreme Court judgment of 4 September 2002, I CKN 461/01, (2003) 3 *Orzecznictwo Sądów Polskich*, item 17.

expert opinions, does not play a sufficient role in the decisional practice of the UOKiK President or in the jurisprudence of common courts.

On the other hand, I agree with the following conclusions of the Supreme Court:

Interpretation of "public interest"

An issue that arose only at the final stage of the proceedings was whether, in view of the fact that the Supplier had used the contentious practice only towards a single undertaking, there was cause for invoking a breach of public interest and thus engaging the antitrust authority in the case rather than a common court. The answer to this question was in affirmative.

The Supreme Court decided that a breach of public interest occurs when a company's conduct has, or can have, a harmful effect on the market by influencing the quantity, quality and price of goods or the extent of the choice available to consumers and other buyers. The number of companies affected by the practice is irrelevant in terms of the admissibility of applying antitrust legislation.

That viewpoint is correct. The fact that the Supplier's conduct affected only one company is irrelevant because KGJ would compensate for its weakened financial position (caused, among others, by not having been paid for the surrendered infrastructure) by increasing the price that it would charge its own customers[9]. Relevant here is also the Supreme Court's judgement of 24 July 2003[10], which stated that an assessment of whether the terms of free competition are breached or threatened in a relevant market should not be restricted to examining the potential injustice caused to direct business partners of the undertaking that dominates that market. A broader outlook is required, one that takes into account the issue of how the actions of a dominant undertaking impact the interests of ultimate consumers.

It should be noted however that judicial decisions differing from that line of argumentation (i.e. associating public interest with direct impact on a wider circle of market participants) are also present in Polish jurisprudence. However, it seems that their importance has diminished[11].

Interpretation of the antitrust statute of limitations

The Supreme Court was right to state that the limitations period, after which antitrust proceedings could not have been initiated, has not lapsed in this case.

Two differing approaches were presented during the course of the proceedings concerning this issue: a formalistic and an economic one.

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[9] See also K. Kohutek, *Commentary to the Supreme Court Judgement of 5 January 2007 (III SK 17/06)*, Lex/el 2008.

[10] I CKN 496/01.

[11] See more on this subject: D. Miąsik, 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. 49;* see also Supreme Court judgements of 5 June 2008, III SK 40/07 (unpublished) and 26 February 2004, III SK 1/04, (2004) 18 *Orzecznictwo Sądu Najwyższego - Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych* 323.

It is true that from a formalistic point of view, KGJ was obligated to enter into an agreement on the gratuitous surrender of infrastructure ownership already in 1996. That obligation was only acted upon in 1997 by virtue of entering into a subsequent agreement. This line of reasoning placed the moment of the abuse of dominance in the year 1996; hence, at the time of the initiation of the UOKiK proceedings, the case was already past the period specified in the statute of limitations (under this variant, the prescription period lapsed on 31 December 1997).

Nonetheless, looking at the issue from an economic perspective, it is difficult to disagree with the notion that KGJ entered into the 1997 contract not so much because of having concluded the 1996 agreement, but because of the monopolistic position held by the Supplier, which existed, and in the Court's opinion, was abused at the time of entering into the 1997 contract. In other words, the only reason why the parties entered into agreements of that particular content was that the Supplier held a dominant market position.

Until the considered case, Polish jurisprudence rarely considered the antitrust statute of limitations. The manner of interpreting the limitations period in this case may indicate a trend toward broadening its interpretation. However, this would be at odds with the doctrine stating that where in doubt, the interpretation of limitations provisions should lead toward a shortening, rather than a lengthening, of the period which needs to lapse before the UOKiK President can no longer initiate proceedings[12].

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[12] D. Miąsik, T. Skoczny [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa*…, p. 1328.