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The control of Polish courts over the infringements of procedural rules by the national competition authority. Case comment to the judgement of the Supreme Court of 19 August 2009 – *Marquard Media Polska* (Ref. No. III SK 5/09)[1]

Facts

The President of the Office of Competition and Consumers Protection (hereafter, UOKiK) issued a decision on 2 June 2006 (RKT-35/2006) finding that *Marquard Media Polska* has abused its dominant position (breach of Article 8(2)(1), (5) and 7 of the Act of 15 December 2000 on Competition and Consumers Protection[2]) by imposing unfair prices, counteracting the formation of conditions necessary for the emergence or development of competition and market sharing. Marquard Media was ordered to refrain from the said conduct and fined 1.972.600 złoty (approx. 500.000 euro).

Marquard Media appealed the UOKiK decision to the Court of Competition and Consumers Protection (hereafter, SOKiK) as the court of first instance and then again appealed the SOKiK judgement[3] to the Court of Appeals in Warsaw. In its appeal, Marquard Media claimed that the UOKiK President has committed a number of alleged breaches of procedural rules. The plaintiff argued that these procedural violations should be controlled by the court and result in the revocation of the UOKiK decision. The appeal claimed: (1) the lack of verification of the correctness of the antitrust proceedings by SOKiK in a situation where the court bases its judgment exclusively on the evidence collected during these proceedings; (2) non-annulment of the UOKiK decision despite it being imprecise; (3) arbitrary evidence assessment by SOKiK especially when it comes to the evidence collected by UOKiK and the evidence presented by Marquard Media in juridical proceedings. The plaintiff argued also that in a situation where new evidence presented in

[1] The case comment is limited to the procedural issues of the judgment. For the question whether selective, above-cost price cutting in the newspaper market shall be qualified as an anticompetitive exclusion see below the case comment by Konrad Kohutek.

[2] Journal of Laws 2005 No. 244, item 2080. The same forms of abuses are also listed under the new Act of 16 July 2007 on Competition and Consumers Protection (Journal of Laws 2007 No. 50, item 337; hereinafter, Competition Act); see Article 9(2)(5) and Article 7 of Competition Act.

[3] The judgment of 24 July 2007, No. XVII Ama 48/06, not reported.

court cannot remedy all of the procedural irregularities of the administrative proceedings, the UOKiK decision shall be quashed (annulled[4]) by the court. Marquard Media argued also that the court should scrutinize all of the alleged procedural irregularities and thus exercise full control over the administrative proceedings. Despite the arguments raised by the plaintiff, both SOKiK and the Court of Appeals in Warsaw upheld the UOKiK decision dismissing all of its procedural objections[5]. In consequence, Marquard Media filed a cassation request to the Supreme Court quoting the aforementioned procedural arguments (concerning especially the extent of control exercised by the Courts over the UOKiK proceedings). In its judgment, the Supreme Court quashed the ruling of the Court of Appeals and remanded the case for re-examination.

The Supreme Court judgement

The Supreme Court dismissed most of the procedural objections raised by Marquard Media. Accepted was only the argument that procedural provisions were violated when it comes to the wrongful formulation of the conclusion of the original decision and when it comes to the lack of proper justification of the imposition of the rigor of its execution.

The judgment of the Supreme Court on the crucial procedural issues was not in favor of the plaintiff. The judges described first the position and the role of SOKiK. According to the Court, the task of SOKiK is to decide on the merits of a dispute between the UOKiK President and the appealing undertaking in order to establish if the provisions of the Competition Act were breached, to legally qualify the infringement and to decide on sanctions. SOKiK shall asses the arguments and evidence presented by the parties and decide, whether the measures applied by the UOKiK President were legal and proportional. However, the Supreme Court did not specify which administrative measures shall be assessed. Taking into account its further statements, it seems that those undertaken by the UOKiK President during the proceedings (such as inspections) are not included. In its judgement, SOKiK is entitled both to change the original decision and to quash it. For that reason, it should not limit itself to finding the defectiveness of a UOKiK decision. Instead, it should repair ('heal') the irregularities of the administrative decision as long as that is possible in the circumstances of the case and the evidence collected.

In the opinion of the Supreme Court, UOKiK decisions can be quashed only exceptionally when their irregularities cannot be repaired in the given case. The Supreme Court stated therefore that SOKiK is not obliged to refer in detail to the procedural objections raised in the appeal especially, if the submitted irregularities are not likely to be of a kind that influences the UOKiK decision on its merits.

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[4] Article 479^{31a} § 3 of the Code of Civil Procedure states that if the appeal is accepted, the UOKiK decision can be changed or quashed (revoked) by SOKiK whereby the revocation has the same effect as an annulment.

[5] The judgment of 24 July 2008, VI ACa 12/08, UOKiK Offcial Journal 2008 No. 4, item 41.

The Supreme Court specified further that procedural irregularities concerning evidence (it did not specify however how it understands the notion of evidence) should not lead to the revocation of a UOKiK decision provided, that it is in line with the provisions of substantial law. The Court accepted that evidence collected in administrative proceedings can be used in court but that evidence collected by the UOKiK President in violation of the law should be disregard by SOKiK. Moreover, the revocation of a UOKiK decision is possible only if it was delivered without proper legal basis, in violation of substantial law provision, if it was addressed to an entity that was not a party to the original proceedings or, when the issue had already been decided in another decision. Annulment can also take place in a situation when there is a need to determine (in administrative proceedings) all issues indispensable to decide on the case.

The Supreme Court rejected the opinion of Marquard Media that the UOKiK proceedings were out of any judicial control. The judges stated that any objections against the proceedings and decision of the UOKiK President, provided that they are admissible and well-founded, can result firstly in the change of the original decision and secondly, in its revocation.

The notion of 'full jurisdiction' under Article 6 of the European Convention on Human Rights

The jurisprudence of the European Court of Human Rights (the ECtHR) states that decisions taken by administrative authorities which do not satisfy the requirements of Article 6(1) of the European Convention on Human Rights Convention (the Convention)[6] must be subject to subsequent control by a 'judicial body that has full jurisdiction' over questions of facts and law[7]. Full jurisdiction means that the court should be entitled, and actually examine, all the relevant facts[8] as well as have the power to quash the administrative decision[9] in all its aspects (facts and law). When it comes to the assessment of their legality, the ECtHR expects the judiciary to not be limited to assess whether the impugned decision is compatible with substantive

[6] Under Article 6(1) of the Convention in the determination of civil rights and obligations or of any criminal charge, everyone is entitled to a hearing by an independent and impartial tribunal established by law.

[7] Generally see judgments: *Albert and Le Compte v Belgium* of 10 February 1983, no. 7299/75, 7496/76, para. 29; *Gautrin and others v France* of 20 May 1998, no. 21257/93, para. 57; *Frankowicz v Poland* of 16 December 2008, no. 53025/99, para. 60. Specifically for judicial control over administrative bodies see judgments: *Bendenoun v France* of 24 February 2004, no. 12547/86, para. 46; *Umlauft v Austria* of 23 October 1995, no. 15527/89, para. 37–39; *Schmautzer v Austria* of 23 October 1995, no. 15523/89, para. 34; *Janosevic v Sweden* of 21 May 2003, no. 34619/97, para. 81. See also L. Drabek, 'A Fair Hearing Before EC Institutions' (2001) 4 *European Review of Private Law* 561; K. Lenaerts, J. Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) 34 *Common Market Law Review* 561–562.

[8] *Schmautzer v Austria*, para. 35.

[9] *Schmautzer v Austria*, para. 36; *Janosevic v Sweden*, para. 81

law[10]. Courts shall also be empowered to set aside an administrative decision in its entirety or in part, if it is established that procedural requirements of fairness were not met in the proceedings which led to its adoption[11].

EU law generally accepts this approach. European courts pointed out that the decision of the Commission shall be subject to judicial control not only from the point of view of its legality but also when it comes to the correctness and importance of the facts established by the Commission[12]. Traditionally however, European courts focus on whether the Commission has infringed essential procedural requirements – if a violation is established, the decision of the Commission is annulled. This happened, for example, when the Commission relied on the interpretation of a number of documents upon which parties had no chance to comment on[13]; when the Commission failed to properly explain charges contained in a statement of objections[14]; or where its decision lacked proper justification[15].

The assessment of the Supreme Court's judgement

The judgment of the Supreme Court raises serious doubts from the point of view of the requirements of 'full jurisdiction'. It seems in particular that SOKiK does not exercise full jurisdiction with respect to procedural infringements over the proceedings before and the decisions of the UOKiK President.

The judgment confirmed that SOKiK is a first instant court the role of which is not limited to the assessment of the legality of the appealed decision[16] but rather, to decide the case on its merits[17]. This realisation is certainly true. One has to disagree however with the opinion of the Supreme Court that in consequence, SOKiK shall not concentrate on

[10] ECtHR judgment in case *Potocka and others v Poland* of 4 October 2001, no. 33776/96, para. 55, 58.

[11] Ibidem.

[12] CFI judgment of 11 March 1999 in case T-156/94 *Siderugica Aristrain Madrid SL v Comission* [1999] ECR II-645, para. 115. See also A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham, Northampton 2008, p. 152.

[13] CFI judgment of 29 June 1995 in case T-30/91 *Solvay v Comission* [1995] ECR II-1775, para. 81.

[14] Judgment of the Court of 23 October 1974 in case 17/74 *Transocean v Comission* [1974] ECR 01063, para. 13-20; judgement of the Court of First Instance of 30 September 2003 in case T-191/98 *Atlantic Container Line AB and others v Comission* [2003] ECR II-3275, para. 113 i 162.

[15] CFI judgment of 22 September 2005 in case T-101/03 *Suproco NV v Comission* [2005] ECR II-3839, para. 20.

[16] See also the Supreme Court judgment of 13 May 2004, III SK 44/04 (2005) 9 *OSNP*, item 136 and the Supreme Court judgment of 20 September 2005, No. III SZP 2/05 (2006) 19–20 *OSNP* 2006, item 312.

[17] See also Supreme Court judgment of 18 September 2003, No. I CK 81/02, LEX no. 359427 and the Court of Appeal in Warsaw judgment of 20 December 2006, VI ACa 620/06, not reported.

the possible infringements of procedural rules[18]. The Polish 'hybrid' procedure[19] whereby SOKiK is dealing with the case *ab initio* and is formally considered as the first instance court, cannot mean that full judicial control over administrative proceedings does not exist in practice. The Supreme Court seems instead to accept such a situation stating directly that SOKiK is not obliged to refer in its judgment to the procedural objections raised by the plaintiff against the UOKiK proceedings. As a result, control over possible procedural infringements is becoming an exception rather than a rule. This would be acceptable only if UOKiK proceedings and decisions were not to have any importance for the judicial proceedings. In practice however, they are of great importance.

The Supreme Court was right stating that not every procedural error committed by the UOKiK President should lead to its decision being quashed. It is also correct to say that SOKiK should repair, if possible, such errors especially by introducing and hearing new evidence. If an undertaking claims, for example, that a witness was heard during the administrative proceedings in violation of procedural requirements, SOKiK can disqualify such evidence and hear the witness again. This means however, that SOKiK has to first check if such requirements were actually followed.

However, the Supreme Court noted that there are some procedural errors that cannot be 'healed' by the judiciary. It must be argued that a UOKiK decision should indeed be quashed if it infringes essential procedural requirements. Generally speaking, this should refer to a situation when the values of procedural fairness were not respected before the UOKiK President. The violation of the right to be heard, right to defence or right to privacy during administrative proceedings must be seen as a reason for annulling a decision in its entirety. In cases of such violations, the possibility of SOKiK to disqualify the evidence collected in breach of these rights cannot be seen as a sufficient guarantee especially because SOKiK does not scrutinize UOKiK proceedings from their procedural point of view.

It must also be borne in mind in this context that a predominant part of the evidence upon which SOKiK's judgments are based is collected during the administrative proceedings. It is clear that the court, as opposed to the UOKiK President, is not entitled to inspect the premises of an undertaking or send an information requests to other market participants. Breaches with respect of procedural rules of substantial character, such as the violation of the privilege against self incrimination or a disproportional character of inspection when it comes to the violation of privacy, should thus result in the annulment of the decision. It seems however, in the view of the judgment of the Supreme Court, that it is not possible for SOKiK to quash the decision in such situations[20] because procedural irregularities concerning evidence do not lead to the revocation of the decision, provided it is in line with the provisions of substantial law.

[18] In this respect see also SOKiK judgments of 24 July 2007, No. XVII Ama 84/06, not reported and of 22 June 2005, No. XVII Ama 55/04, UOKiK Official Journal 2005 No. 3, item 42.

[19] See in details: Z. Kmieciak, 'Postępowanie w sprawach konkurencji a koncepcja procedury hybrydowej' ['Proceeding in competition cases and a concept of hybryd procedure'] (2002) 4 *Państwo i Prawo* 31-47.

[20] This is the opinion of the Court of Appeal in Warsaw – see the judgment of 17 June 2008, VI Aca 1162/07, not reported.

The judgement of the Supreme Court lacks clarity when it comes to the statement that SOKiK is not obliged to refer in detail to the procedural objections raised in the appeal especially, when it is not proven that the irregularities are of a kind that influences the decision on its merits[21]. Moreover, the word 'especially' suggests that SOKiK is not obliged to refer to such objections also in other situations. It seems however, that according to the Supreme Court, when the undertaking has not proven that the irregularities influence the UOKiK decision on its merits, they are outside of judicial control[22]. One cannot agree with this approach – infringements of procedural fairness should be examined by the courts *per se* irrespective of their influence on the final outcome[23]. Thus a breach of the right to be heard, for instance by denying access to certain pieces of evidence, should result in the revocation of the decision even if the undertaking has not enough arguments to discredit the evidence it was not given access to.

The list of situations when the decisions can be quashed is to narrow as it is lacking direct indication of substantial breaches of procedural requirements. When opportunity presents itself in the future, the Supreme Court should clarify its approach in order to allow the revocation of administrative decisions in cases of serious procedural infringements (1) even if it is not proven that the violations have a direct effect on the outcome of the decision, (2) even if the decision is in accordance with the provisions of substantive law and (3) also with respect to breaches in matters of evidence. The Supreme Court should also stress that SOKiK has to pay attention to the objections of procedural character raised by the undertakings.

When it comes to the violation of procedural rules concerning evidence, SOKiK should disregard such evidence and, in cases where not enough evidence is left to prove a violation of the Competition Act, it should change the UOKiK decision by not establishing an infringement. Such an approach seems to be in accordance with the commented Supreme Court judgment. SOKiK should be ready to quash an UOKiK decision in cases when it is established that the undertaking was deprived of the opportunity to defend itself during the administrative proceedings (*per analogiam* Article 379(5) of the Code of Civil Procedure), that is, in a situation of a violation of a requirement that is indispensable for the validity of proceedings[24].

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[21] SOKiK judgment of 20 February 2007, XVII Ama 95/05, not reported.

[22] This opinion was expressed directly in the judgement of the Court of Appeal in Warsaw of 24 July 2008, VI ACa 12/08. See also the Supreme Court decision of 29 April 2009, III SK 8/09, not reported.

[23] Compare: R. Summers, 'Evaluating and Improving Legal Process – A Plea for "Process Values" (1974) 60(1) *Cornell Law Review* 11–14.

[24] Supreme Court in the ruling of 29 April 2009, III SK 8/09, suggested that the violation of the requirements that are indispensable for the validity of the proceedings can be the ground for the revocation of the UOKiK President decision.