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Which authority is competent to decide when a power company is abusing monopolistic power: the President of the UOKiK or the President of the URE? Case comment to the judgement of the Supreme Court of April 2, 2009 – *ENION S.A.* (Ref. No III SK 36/08).

Facts

By the decision of July 10, 2006 (No. RKT-42/2006), the President of the Polish Office for Competition and Consumer Protection (hereafter, UOKiK) found that the practice of the Częstochowa Power Company, a branch of ENION SA based in Kraków (hereinafter ENION SA), was restricting competition by abusing its dominant market position in the transmission and distribution of electricity by making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. The UOKiK President imposed a fine on ENION SA of 100 000 zł.

ENION SA appealed the contested decision alleging, in particular, that the UOKiK President had violated provisions of the Act of 10 April 1997 – the Energy Law[1] – by contempt and had also violated provisions of the Act of 16 July 2007 on Competition and Consumer Protection[2] through his erroneous interpretations. ENION SA indicated that the UOKiK President has no power to decide on the unjustified suspension of supplying electricity by the energy company. ENION SA also claimed that the fee for illegal consumption of electricity has a substantial or customary relation with the contract for supplying electricity.

The Competition and Consumer Protection Court in Warsaw[3] on June 4, 2007 issued a judgement in which it dismissed the appeal of ENION SA indicating that the contested decision concerns the evaluation of large-scale, applied general practice in the defined relevant market, not just an individual practice of the current recipient of an energy company. The Court emphasized that the proceeding initiated by the

[1] Journal of Laws 2006 No. 89, item 625 with amendments.

[2] Journal of Laws 2007 No. 50, item 331; amendments: Journal of Laws 2007 No 99, item 660; Journal of Laws 2007 No. 171, item 1206.

[3] In Poland this court delivers the judgements as a court of the first instance.

UOKiK President sought to determine whether it was violated the public interest. The Court pointed out that in this case there is an abuse of ENION SA's dominance, since the fee charged for illegal consumption of electricity is not a provision that customarily related to the subject of the contract, which is to sell electricity. The court emphasized that the charge is a penalty fee and it is not in fact payment for purchased energy or service.

ENION SA appealed this judgement to the Court of Appeal in Warsaw. In its judgement of April 8, 2008, the Court of Appeal upheld the judgement of the Competition and Consumer Protection Court in Warsaw. The Court of Appeal pointed out that the trial court had correctly interpreted the law – the Energy Law Act – and the Act on Competition and Consumer Protection by recognizing that the UOKiK President is competent to assess whether certain conduct is an abuse of the power company's dominant position. The Court shared the opinion of the trial court by stating that the penalty fee for illegal consumption of electricity was neither substantially nor customarily related with the subject of the contract for the supply of energy and that the obligation to pay for the electricity obtained is not the same as the penalty fee for illegal consumption of energy. The Court stated that the penalty fee contains an element of compensation, but it is not a charge for the energy actually delivered.

Against the above judgement of the Court of Appeal in Warsaw ENION SA filed a cessation appeal to the Polish Supreme Court alleging violation of the rules of substantive law in the interpretation of the Act on Competition and Consumer Protection and Energy Law. The complainant stated that the Appeal Court had incorrectly recognized that the UOKiK President is competent to decide on the above practice of the power company and that the penalty fee for illegal consumption of electricity has no substantial connection with the subject of the contract for the supply of electricity.

Key legal problems of the case

Which authority is to deal with the case?

In the cessation appeal ENION SA pointed out that the Court of Appeal had misinterpreted the rules of the Act on Competition and Consumer Protection and the Energy Law. According to ENION SA Article 8 Paragraph 1 of the Energy Law regulates the same matter as Article 8 Paragraph 2 point 4 of the Act on competition and consumer protection. Therefore, the legal norm contained in a provision of the Energy Law is the specific regulation and should have primacy over the general regulation contained in the provision of the Act on Competition and Consumer Protection. In conclusion ENION SA pointed out that if the facts of a case apply to both of the above acts, the application has only a specific norm and hence the competence to deal with this case rests only the President of the Energy Regulatory Office (hereafter, URE).

The Supreme Court indicated that ENION SA had interpreted the rules incorrectly. According to the Court, we are dealing in this case with the practice of an electricity company which holds a monopoly position on the relevant market. Such practice is general, addressed to an undetermined group of recipients, and consists in using its monopoly position by making the resumption of electricity supply dependent on payment of fees set by the power company for illegal consumption of electricity. The Supreme Court stressed that this practice was a repeated practice as it was determined in an internal instruction as a rule of conduct in restoring energy supply.

This means that the whole case is not only an individual dispute between the power company and the customer for the preservation of energy, but a case which deals with a practice of the energy company that uses monopolist position to refuse to supply electricity to customers, not because of the suspicion of illegal consumption of electricity in the future, but due to non-payment of a penalty fee for illegal consumption of energy in the past. The Supreme Court pointed out that the facts of the case and its effect – depriving the household electricity supply, which is a necessary element of the standard equipment of civilization – indicates that provisions that prohibit abuse of a dominant position should be used. As a result of the presented findings about 'practice' and the existence of the public interest in its counteracting, the authority responsible for dealing with such cases is the UOKiK President.

The Supreme Court did not agree that in this case Article 8 Paragraph 1 of the Energy Law should be used. That provision states that in litigation matters including e.g., the case of wrongful withholding of energy fuels, the URE President is to decide at the request of the party. Under that provision, the URE President has gained only limited powers to adjudicate on civil matters[4]. Jurisdiction of the URE President in such cases is the result of the request of a party and applies to the specific, individual interest of the applicant, which is subject to dispute about unjustified withholding energy supply. However, in this case we are dealing with abuse of a dominant position in the relevant market as defined in the Act on Competition and Consumer Protection. Protection against such practices is carried out by the above act, which created a special body to counteract this – namely, the UOKiK President. It should be added that the purpose of this Act is to protect the public interest, not private interest[5]. However, in this case, since the practice of the electricity company was directed against an unspecified group of recipients, there is public interest.

Practice having connection with the subject of an agreement

ENION SA in the cessation appeal alleged that the court misconstrued the question that the practice has no customary or substantial connection with the subject of an agreement within the meaning of Art. 8 Paragraph 2 point 4 of the Act on

[4] M. Czarnecka, T. Ogłódek, *Prawo energetyczne. Komentarz [Energy Law. Commentary]*, Warszawa 2009, p. 173.

[5] Judgement of Antimonopoly Court [now Competition and Consumer Protection Court] of 24 January 1991 r., XV Amr 8/90, Wokanda 1992, No 2, item 39.

Competition and Consumer Protection. In the opinion of the Supreme Court two situations should be distinguished: the first in which a refusal to supply electricity is based on an agreement concluded between the parties, and the other where the refusal to supply energy is due to a demand of payment of a penalty fee for illegally downloaded energy. These two situations according to the Court shows difference between these two practices: the first is the "ordinary" practice resulting from a contract, and the second is a practice particularly involving the illegal consumption of energy and as the consequent of paying the penalty fee[6].

The second above-mentioned situation is governed by Article 57 of the Energy Law, which provides for the fact that the power company charges for illegally downloaded energy in the amount specified in the tariffs, or seeking damages in general. The tariff includes a flat fee for the illegal download of energy[7]. The court pointed out that regulation has a compensatory character: moreover energy companies are entitled to collect that penalty fee using administrative enforcement proceedings. This means that the legislature established the legal means for collecting penalty fees for illegal energy consumption. The court emphasized that the energy company which enforces payment of penalty fee by withholding energy, until the fee was paid, conducts illegal practice[8]. It is the advantage of the power company, which is a monopoly on the relevant market, that allows for the imposition of this duty to customers, although the law provides for a totally different form for the collection of such a penalty fee.

It is worth mentioning that Article 6 Paragraph 3 point 2 of the Energy Law allows the power company to suspend the supply of electricity if the result of an audit found that there was illegal download of electricity. However at the same time, the power company according to Art. 6 Paragraph 3b of this Act is obligated to immediately resume electricity supply if the reasons for the suspension of the supply cease. This means that the duty by public law to resume electricity supply had been imposed on the energy company when the reasons for suspension no longer exist[9]. Thus the Energy Law in a casuistic indicates the cases in which the company may suspend the supply of energy, implying the obligation to restore the supply when the condition of suspension of deliveries will disappear.

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[6] In judgement of May 25, 2005 (Ame XVII11/04) Court for Competition and Consumer Protection indicated that the fee charged by the power company for the illegal consumption of energy is not a "payment for downloaded energy, but the penalty fee for violation of the terms of electricity download".

[7] The Energy Law in Article 3 point 18 defines that the illegal consumption of energy is the energy consumption without a contract, with total or partial exclusion of the measurement system or through interference in the measurement and billing system.

[8] The Court for Competition and Consumer Protection in judgements of 9 May 2005 (Ame XVII 46/04) and of 25 May 2005 (Ame XVII 11/04) pointed out that for obvious reasons, the cause of suspension of electricity supply may not be a recipient's failure to pay charges for illegal consumption of energy, therefore, that the determination of its height and the obligation to pay arises only after disclosure of illegal consumption of energy.

[9] M. Czarnecka, T. Ogłódek, *Prawo energetyczne*…, p. 137.

It is certainly right that the Supreme Court stated that there is neither a substantial nor customary relation between the practice of ENION SA and the subject of the contract for the supply of energy. These restrictions do not result from the contract for supplying energy, but they affect it.

It is therefore necessary to point out that under Article 8 Paragraph 2 point 4 of the Law on Competition and Consumer Protection it is defined that the prohibited practice is the practice involving the abuse of a dominant market position by making the contract subject to acceptance or fulfillment by the other party of another performance, having neither a substantial nor customary relation with the subject of the contract. Thus, the practice described above is simply a manifestation of abuse of dominant position under the Act on Competition and Consumer Protection.

Final remarks

The Supreme Court judgement presented here clearly affirmed that the UOKiK President, not the URE President, is the competent authority in matters of the practice of a power company abusing its dominant position by making the supply of electricity dependent on paying a penalty fee for illegal consumption of energy. Clearly there is public interest in fighting such practices, which are addressed to unspecified recipients of energy and such interest is determined by the Act on Competition and Consumer Protection. Thus, the Court pointed out that precisely this type of abuse of a dominant position is counteracted by the special antitrust body – the UOKiK President.

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