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The Dominant Position of Regional Facilities for the Processing of Municipal Waste

Introduction

On February 6 2015, the Act of 15 January 2015 amending the Waste Act and certain other acts came into force.[1] Article 5 of this act imposes on the regional assemblies of the voivodeships the obligation to update the voivodeship Waste Management Plans,[2] and the resolutions concerning their implementation by 30 June 2016. As a consequence, all the voivodeships are now intensively working on updating and adopting these documents. Due to the still insufficient number of facilities in the country that fulfil the requirements necessary for granting them the status of a Regional Municipal Waste Processing Facility,[3] there will undoubtedly be regions of the waste management industry where the number of RMWPF facilities does not ensure the fulfilment of the conditions of full competition. In this context, the provision Article 9, section 1, item 2 of the Maintenance of Cleanliness and Order in Municipalities Act of 13 September 1996,[4] in accordance with which mixed municipal waste and green waste have to be processed at a facility with RMWPF status. It is therefore rather likely that, in certain cases, a RMWPF operator will have a very strong position on the market of this kind of waste treatment, which will constitute a dominant position in accordance with the provisions of the Competition and Consumer Protection Act of 16 February 2007.[5] In this paper, the authors discuss the conditions that must be met in order to be able to assert that the

1 Dz.U. of 2015, item 122, hereinafter: WA.
2 Hereinafter referred to as WMP.
3 Hereinafter also: RMWPF These requirements are specified in detail in Article 35 section 6 of the Waste Act of 14 December 2012 (Dz.U. of 2013, item 21 as amended). They concern, *inter alia*, the facilities' guarantee that certain waste treatment processes are in place, that appropriate technology or technology is available, and that a specific capacity is available to service a region inhabited by at least 120,000 residents..
4 Dz.U. of 2016, item 250, hereafter also referred to as MCOM.
5 Dz.U. of 2015, item 184, hereafter also: CCPA.

management entity of a given municipal waste treatment facility has a dominant position, indicating in particular the two most 'drastic' cases, namely the situation where in a given municipal waste management area there are only one or two facilities operating with RMWPF status.

A dominant position as defined by the Office of Competition and Consumer Protection

The problem to be tackled at the outset, before further discussion of the issue, is one of definition, i.e. in which situations can it be said that a given entity holds a dominant position in a particular market, according to the Competition and Consumer Protection Act?

As a starting point, we must refer to Article 4, item 10 CCPA, wherein it is stated that an undertaking holds a dominant position when its position "allows it to prevent effective competition in a relevant market by enabling it to act to a significant degree independently of its competitors, contracting parties and consumers". The same article also contains the assumption that if the market share of an undertaking in the relevant market exceeds 40%, then the undertaking holds a dominant position. Further to this, Article 4, item 9 defines a 'relevant market' as the market in goods

> which by reason of their intended use, price and characteristics, including quality, are regarded by the buyers as substitutes and are offered in the area in which, by reason of the nature and characteristics of such goods, the existence of market barriers, consumer preferences, significant differences in prices and transport costs, the conditions of competition are sufficiently homogeneous.[6]

At this point, therefore, it has to be said that such a definition of a market can certainly cover the market designated – in the geographical sense – by the areas of all the municipalities included in the appropriate voivodeship plan for the municipal waste management region.

6 It is worth mentioning that the President of the Office for Competition and Consumer Protection expressed the view that the concept of a relevant market refers to all types of goods (services) of one kind which, because of their specific characteristics, differ from other products (services) in such a way that there is no possibility to exchange them. A relevant product market covers all the goods that meet the same needs of buyers, have similar characteristics, similar prices, and represent a similar level of quality. An essential element of the relevant market is also its geographical dimension, which means the need to indicate an area where the conditions of competition applicable to certain goods are the same for all competitors. Therefore, in order to designate a relevant market, a particular activity is analyzed from the product (range) and geographical point of view (RWR 30/2009 and RWR Decision 17/2013).

It is obvious that with regard to the notion of "dominant position" it is possible to find numerous statements of the judiciary[7] and the representatives of the doctrine.[8] Drawing on these resources for the purposes of this article/paper, the following can be assumed:

- a dominant position is a position which, due to an undertaking having access to technical knowledge, raw materials or capital, entails that the undertaking can set prices or control the production and/or distribution of essential products[9];
- a dominant position is "thus qualified and defined in the legal category of market power;"[10] whereas the economic sense of dominant position "is expressed by the undertaking's market power in the relevant market;[11]" this entails that market power should be identified with the effective exercise of influence on prices, supply, innovation, the variety and quality of goods and/or other parameters over a long period of time; in addition, the notion of dominant position can be associated with the phenomenon of "institutional monopoly," the source of which can be legal and non-legal (factual) barriers to market entry;[12]
- the legal definition of dominant position contained in Article 4, item 10 of CCPA indicates three structural elements of this notion: the first being the possibility of preventing effective competition on the relevant market, the

7 V. for example the judgement of the CJEU of 1.02.1978, 27/76, United Brands Company and United Brands Continental BV v Commission of the European Communities, Court Reports p207, or the judgement of CJEU of 13.02.1979, 85/76, Hoffmann-La Roche & Co. AG v Commission of the European Communities, Court Reports, p. 461. On the other hand, in the Polish context, for example, the judgement of the High Court of 19.10.2006, III SK 15/06, OSNAPiUS 2007, no. 21–22, item 337, or the judgement of the High Court of 16.10.2008, III SK 8/08, Legalis.

8 V. for example N. Szadkowski, *Drapieżnictwo cenowe w teorii ekonomii i w praktyce orzeczniczej polskiego organu antymonopolowego*, in *Konkurencja w gospodarce współczesnej*, ed. C. Banasiński, E. Stawicki, Warszawa 2007; A. Brzezińska-Rawa, *Dyskryminacja jako przejaw nadużycia pozycji dominującej w unijnym prawie konkurencji*, PiP 2011, no. 1; *eadem*, *Zakaz nadużycia pozycji dominującej we wspólnotowym i polskim prawie antymonopolowym*, Toruń 2009; M. Szydło, *Nadużywanie pozycji dominującej w prawie konkurencji*, Warszawa 2010; M. Sieradzka, *Pozew grupowy jako instrument prywatnoprawnej ochrony interesów konsumentów z tytułu naruszenia reguł konkurencji*, SIP LEX 2012; K. Kohutek, *Praktyki wykluczające przedsiębiorstw dominujących. Prawidłowość i stosowalność reguł prawa konkurencji*, SIP LEX 2012.

9 B. Majewska-Jurczyk, *Dominacja w polityce konkurencji Unii Europejskie*j, Wrocław 1998, p. 51. Cf. M. Bernatt, *Orzecznictwo Trybunału Sprawiedliwości Wspólnot Europejskich w sprawach gospodarczych*, Warszawa 2006, p. 337.

10 M. Szydło, *op. cit.*, p. 79.

11 M. Bernatt, A. Jurkowska-Gomułka, T. Skoczny, *Zakaz nadużywania pozycji dominującej*, in *Prawo konkurencji. System Prawa Prywatnego*, vol. 15, ed. M. Kępiński, Warszawa 2014.

12 *Ibidem*. On the issue of market power, v. *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, ed. T. Skoczny, Warszawa 2009, p. 233.

second – the ability to act to a large extent independently of competitors, contractors or consumers, whereas the third is the legal presumption of a dominant position based on a quantitative criterion;[13]

- the aforementioned "possibility of preventing effective competition" derives from a privileged position on the market (market power), whether this results from a monopoly, or from a sufficient economic advantage over other market players (mainly competitors); significantly, a monopoly (exclusivity) can derive from the law (legal monopoly), from an administrative decision, e.g., a concession (administrative monopoly), from a natural characteristic of a given branch of the economy (natural monopoly), or from the undertaking having at its disposal (*de iure* and/or *de facto*) networks and/or facilities that are necessary for the provision of services on the relevant market or relevant markets associated with it (network monopoly); these networks and devices are 'essentials facilities' for these markets![14]
- in this respect, Skoczny emphasizes that when an undertaking holds a monopoly it is in a position to inhibit effective competition on every other market that it operates on, if that market is connected to the market over which it holds a monopoly;[15]
- in order to be recognized as possessing a dominant position on a market, an undertaking must be possessed of the power to 'operate independently' of other market players, that is, be able to implement its own individual market strategy, and must therefore be able to unilaterally set prices, *inter alia*, as well as the terms of contractual relations with other market participants, such as contractors;[16]
- the presumption of an undertaking holding a dominant position, if the undertaking has a market share exceeding 40%, has the character of a rebuttable presumption.[17] Its rebuttal is possible by demonstrating that despite the fact that the undertaking has a strong market position, at least one of the require-

13 *Ibidem*. On the issue of the quantitative presumption of dominant position cf. *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, ed. C. Banasiński, E. Piontek, Warszawa 2009, pp. 129–131; This problem was also addressed by European case law, v. the judgement of the CJEU 3.07.1991 in the case 62/68 AKZO Chemie BV v Commission of the European Communities, Court Reports 1991, p. I-3359.

14 *Ustawa...*, *op. cit.*, ed. T. Skoczny, p. 238; cf. the judgement of the CJEU of 29.04.2004 in the case C-418/01 IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG, Court Reports 2004, p. I-05039.

15 *Ustawa...*, *op. cit.*, ed. T. Skoczny, p. 239.

16 Ibidem, p. 242; cf. the judgement of the High Court of 16.10.2008, File ref. no. III SK 8/08, unpublished.

17 *Ustawa...*, *op. cit.*, ed. T. Skoczny, p. 243.

ments, as indicated in the above points related to the existence of a dominant position, is not fulfilled.[18]

In the context of these arguments, it should be noted that the assessment of whether a given undertaking holds a dominant position on a particular market must be carried out on a case-by-case basis, through consideration of the particular circumstances of the case. At the same time, it must be emphasized that the mixed waste management market, with which this paper is concerned, is an unusually specific market, subject to strong regulation. Thus, despite this qualification, it can be argued that when, in accordance with a resolution of the regional assembly authorities on the implementation of a waste management plan, there is only one installation with RMWPF status in a given waste management region, this entity will have – *de facto* and *de iure* – a dominant position.

A single RMWPF facility in the region

The above assertion is to a large extent based on an analysis of selected provisions of the Maintaining Cleanliness and Order in the Municipality Act, or the Waste Act. From the former of these normative acts, the provision previously mentioned in the introduction should be referred to again, namely Article 9e, section 1, which obliges the entity collecting municipal waste from property owners to: firstly, transfer segregated municipal waste to the recovery and disposal facility in accordance with the waste management hierarchy; secondly, transfer mixed municipal waste collected from property owners, as well as green waste and the stored residues from the sorting of municipal waste, to a RMWPF facility.[19]

In turn, it is clear from the regulations of the Office of Competition and Consumer Protection that, with the division into municipal waste management regions, together with the designation of municipalities belonging to these regions, and the designation of regional municipal waste treatment facilities in particular municipal waste management regions, and those facilities stipulated for replacing services in these regions, should there

18 *Ustawa..., op. cit.*, ed. C. Banasiński, E. Piontek, p. 129; K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2008, p. 201.

19 The breach of such a warrant is an administrative offense for which the legislator has provided sanctions (Article 9, section 1, item 3 MCOM). In turn, under Article 9l, section 1 the RMWPF operator is obliged to conclude an agreement – for the management of mixed municipal waste, green waste or residues from the sorting of municipal waste for disposal – with all entities that collect municipal waste from property owners whose activity falls within the municipal waste management region. It is worth adding that under Article 9 MCOM, entities running RMWPF facilities face fines, *inter alia*, for not concluding a contract for the management of mixed municipal waste, green waste or residues from the sorting of municipal waste intended for storage with a municipal waste collector from property owners whose activities within the municipal waste management region.

be a malfunction at a facility, or if a facility is unable to receive waste for other reasons, or until such time as a regional facility for processing municipal waste has commenced operation, an instrument such as a Provincial Waste Management Plan is put into effect (see Article 35, section 4 WA). *Nota bene* that although the legislature grants local government assemblies considerable leeway[20] in the process of drawing up such plans, they are not fully autonomous, since Article 34, section 1 WA[21] stipulates that the objectives and purposes of waste management plans should determine the form of the provisions of the plans, as well as the executive decrees which are ancillary to them, which are referred to in Article 38 WA.[22]

In the course of analysing the provisions of the Waste Act, mention should also be made of a part of Article 20, which stipulates that waste, taking into account the waste management hierarchy, should be first subject to processing at its place of origin (section 1), and waste which cannot be processed at its place of origin is to be transferred – into consideration the waste management hierarchy and the best available method, as stated in Article 207 from the Environment Protection Act of 27 April 2001, and technology, referred to in Article 143 of this Act[23] – to the nearest location at which it

20 It is true that in Article 35, section 4 WA the legislator defines in general terms the specific elements a municipal waste management plan should take (i.e. the elements characteristic for this level of planning act). However, it should be noted that not only does it leave the local governments much more leeway in dividing the area of the voivodeship into regions, as well as in designating the facilities, but neither does it provide any specific or precise preconditions on the basis of which this 'designating' process should take place.

21 Article 34, section 1 WA: "To achieve the objectives set in environmental policy – of separating growth trends in the amount of waste produced and its environmental impact from the country's economic growth trends, implementing the waste management hierarchy and the principles of self-sufficiency and proximity, and creating and maintaining in the country an integrated and sufficiently integrated network of waste management systems that meet environmental protection requirements – waste management plans must be developed." Then Article 17 WA introduces the following hierarchy of waste management methods: 1) prevention of waste generation; 2) preparation for recycling; 3) recycling; 4) other recovery processes; 5) neutralization.

22 It is worth mentioning here that this last provision entails, inter alia, that the resolution on the implementation of the municipal waste management plan stipulates the regions for municipal waste management, as well as the regional waste facilities in particular municipal waste management regions, and the facilities specified as replacements in those regions should the installations in question fail or are unable to receive waste for other reasons, and until the launch of a municipal waste treatment facility.

23 Article 143 of the Environmental Protection Act: "The technology used in newly commissioned or substantially revised facilities and equipment should meet the following criteria: 1) the use of substances with low potential risks; 2) efficient generation and use of energy; 3) ensuring rational consumption of water and other raw materials and materials and fuels; 4) use of waste-free and low-waste technologies and the possibility of recovering the resulting waste; 5) type, coverage and size of emission; 6) using comparable processes and methods that have been successfully applied on an industrial scale; 8) scientific and technical progress."

can be processed (section 2); however section 7 also places an unambiguous prohibition on processing the following outside their place of origin: mixed municipal waste, the residue from the sorting of municipal waste, and the residue of mechanical-biological processing of municipal waste, as far as they are designated for storage or green waste. Significantly, importing the waste referred to in section 7 into the region is also prohibited, if it is produced outside this region (section 8).[24]

To sum up these considerations, it is clear from the cited provisions of the Maintaining Cleanliness and Order in the Municipality Act and the Waste Act, which very precisely regulate the market of mixed municipal waste and green waste, that if in a given region of municipal waste management there is only one facility with RMWPF status, considering such a facility as having a dominant position is justified, in the light of the provisions of the Competition and Consumer Protection Act. Undertakings that collect mixed communal waste and green waste are unable to choose an alternative facility to which these types of waste can be transported, and thus they are obliged to make use of the services provided by the sole RMWPF facility.

It is significant that this state of affairs is confirmed by the case-law of the President of the Office of Competition and Consumer Protection. It is worth referring to the decision of 27 June 2013,[25] in which the President of the Office of Competition and Consumer Protection stated that the fact that the Chemeko-System partnership was the "administrator of the only RMWPF facility in the first six months of 2013 that received municipal waste from the area of municipalities concerned" was sufficient to conclude that Chemeko-System held a "very dominant position (monopolistic)" on the local market for the treatment and disposal of municipal waste in the designated municipalities. The authority posited that the partnership had such economic power over the market that it was able to prevent not just effective competition, but was also able to operate to a large extent independently from counterparties, and actually to exploit its position on the market at their expense. It was emphasized that no other entity apart from Chemeko-System was entitled to set prices for services provided by a RMWPF facility in Rudna Wielka. In the factual and legal state of this case, the dominance of the company was evident in the power to impose exploitative conditions, including prices, on the counterparties – which in these relationships are companies providing services in the field of collecting mixed municipal waste. Consequently, the authority decided

24 At the same time, the legislator allowed (section 9), in the event of designation of a facility for replacement service in the region, referred to in Article 38, section 2 item 2 WA, outside the area of the municipal waste management region where the waste was generated, bans were not implemented under sections 7 and 8.

25 Ref. no. RWR 17/2013. A similar position was taken by the President of the Office of Competition and Consumer Protection (CCPA) on the grounds of the non-binding waste law of 27 April 2001, in the decision of 13 November 2009 (RWR 30/2009) concerning the Municipal Union of Commerce CZG-12 in with headquarters Dlugoszyn.

that Chemeko-System, having a dominant position on the waste treatment and disposal market in the areas mentioned, has a significant influence on the level of competition on the interdependent market for the provision of services related to the collection and treatment of municipal waste, and is able to set prices in the market, thereby fulfilling the conditions necessary for establishing market dominance, as set out in the previously mentioned Article 4, section 10 CCPA.

Two RMWPF facilities in a region

The situation in the mixed municipal waste and green waste management in a given region takes on a distinctly different shape if two facilities with RMWPF status are operating there. In such a situation, undertakings dealing with waste collection are not obliged to deliver the mixed municipal and green waste to one, specific RMWPF facility, but can choose between two or more facilities which compete with each other, at least theoretically. In this situation, the market for this type of waste should be described as a duopoly. At the same time, even when there is a duopoly, in certain situations it is possible that a dominant position will emerge. However, this is not possible with regard to one undertaking, but rather to the existence of a 'collective dominant position' on a given market. There is no legal definition for this concept in the Polish legal system, however. Furthermore, the concept has not been developed in autonomous case-law by Polish bodies responsible for competition protection. It is therefore important to base the definition on European case-law.

Prior to this, however, two general observations need to be made. Firstly, the notion of collective dominant position is inextricably associated with there being a certain economic relationship between two economic entities on the same, relevant market,[26] allowing them to enter into a so-called 'silent collusion,' which leads to coordinated conduct and a common market strategy through parallel actions.[27] Secondly, when considering the existence of a dominant position, the same qualitative criteria must be met, regarding the possibility of preventing effective competition in the relevant market and acting to a great extent independently of competitors, contractors and consumers.[28]

Turning to European case-law, it has to be mentioned that the concept of collective dominant position evolved over many years. To begin with, on the basis of the case *Société alsacienne et lorraine de télécommunications et d'électronique Alsatel vs. SA Novasam*,[29] the Court of First Instance linked the emergence of collective dominant position with

26 The doctrine indicates that a collective dominant position can only be held by competitors, i.e. entrepreneurs, operating in the same relevant market, v. *Ustawa...*, *op. cit.*, ed. T. Skoczny, p. 251.

27 M. Modzelewska de Raad, T. Skoczny, *Kolektywna pozycja dominująca*.

28 M. Bernatt, A. Jurkowska-Gomułka, T. Skoczny, *Zakaz nadużywania...*

29 Zbiory Orzecznictwa Trybunału Europejskiego 1988, p. 5987, items 21–22.

the existence of structural links, such as capital or contractual relations. In subsequent years, however, European authorities moved away from such a narrow understanding of the concept of collective dominant position, as in the judgment of the Court of First Instance in *Gencor Ltd v Commission of the European Communities*,[30] where it was stated that there is no reason why in establishing collective dominant position 'economic links' should be restricted to 'structural links.' The court indicated that the confirmed existence of collective dominant position also facilitates 'ordinary' economic interdependence, without structural links.[31] Nevertheless, it was only in the subsequent judgments of the Court of First Instance, such as *Airtours plc v Commission of the European Communities*, or *Laurent Piau v Commission of the European Communities* that enabled the development of the three conditions that must be fulfilled in order for the existence of such market dominance to be confirmed. On their basis, so as to establish the emergence of a collective dominant position, it is necessary to demonstrate:

- sufficient incentives for a company to enter into silent collusion; collective dominant position can thus be confirmed when every member of an oligopoly can know how the other members conduct themselves, and thereby confirm whether or not they employ a common strategy; the market must therefore be sufficiently transparent in order for its participants to react quickly and precisely to the conduct of others;
- the chance that this collusion will endure; the situation of silent collusion (implementing a common strategy) must endure for a certain time, i.e. there must be sufficiently effective (harsh) penalties for derogating from the common strategy;
- lack of opportunity for rivals outside the oligopoly or consumers to undermine this collusion; it must therefore be stated that there is no competitive pressure from other participants in this market (competitors, counterparties/buyers and consumers), including potential participants.[32]

Furthermore, it should be reiterated that, in order to establish the existence of a collective dominant position as defined by CCPA, all the qualitative conditions pertaining to Article 4, section 10 CCPA must be met.

30 Zbiory Orzecznictwa Trybunału Europejskiego 1999, p. II-753.

31 This position was also confirmed in subsequent judgments by both the Court of First Instance in *Compagnie maritime belge transports SA (C-395/96 P)*, *Compagnie maritime belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v Commission of the European Communities*, and of the European Court of Justice in the joined cases *Compagnie maritime belge transports SA (C-395/96 P)*, *Compagnie maritime belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v Commission of the European Communities.*

32 *Ustawa...*, *op. cit.*, ed. T. Skoczny, N.B. 441 regarding Article 4 CCPA.

To sum up the above considerations, according to the doctrinal indications,[33] it is possible to distinguish two situations in which the existence of a collective dominant position can be confirmed, fulfilling all the qualitative conditions of Article 4, section 10 CCPA:

1. A situation of collective dominance based on capital ties or agreements;
2. A situation of collective dominance resulting from economic interdependence, without structural links, that is, 'ordinary silent collusion.'

Therefore, it should be emphasized that it follows from both the views of the European authorities and the indigenous doctrine of competition protection law that the occurrence of a collective dominant position is inextricably linked to the fact of there being an understanding between at least two undertakings that operate on the same relevant market. It must thus be unequivocally stated that only the existence of such an agreement could lead to the conclusion that undertakings operating on a market of a duopoly nature have a 'collective dominant position'. It cannot be said that there is such a position in a situation when undertakings do indeed compete with each other, without co-ordinating their activities or implementing a common market strategy.

At this juncture, it is necessary to point out that a collective dominant position is in practice the only type of dominant position that can exist on a market that functions as a duopoly, because Polish antitrust case-law has consistently found that one entity does not have a dominant position in a market structured as a duopoly. To confirm this thesis, it is worth referring to the judgment of the Antitrust Court of 6 April[34] that is often cited in subsequent case-law[35]. In this judgement, the Antitrust Court indicates that "a duopoly justifies rebuttal of the supposed dominant position held by them [undertakings functioning on a relevant market], as referred to in antitrust law. The duopoly type market, where competing entities have a similar share, is characterized by significant competition. Neither of the two competitors" has the ability – which is a characteristic ability for a dominant position on the market – to prevent effective competition that would leading to a rival sugar plant having a reduced market share, nor the ability to undertake other independent actions without taking into account the behavior of competitors and customers. "In principle, when there is a duopoly any new market proposal of one competitor is met with the immediate counter-proposal of the other, and the actual

33 E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2002, pp. 45–47 and 56; *Ustawa...*, *op. cit.*, ed. T. Skoczny, N.B. 442 regarding Article 4 CCPA.

34 XVII Amr 52/93.

35 This judgement is referred to in the Decision of the President of the Office of Competition and Consumer Protection (CCPA) no. RBG 2/2001, of the President of the Office of Competition and Consumer Protection (CCPA) RKR-39/2005, of the President of the Office of Competition and Consumer Protection (CCPA) no. RGD.8/2003, of the President of the Office of Competition and Consumer Protection (CCPA) no. RKR-71/2007, and also in the Judgement of the Antitrust Court of 25.07.2001, XVII 96/00.

competition of the entrepreneurs refutes the presumption of them holding a dominant position."

Such a position, put forth in the case-law of an antitrust authority concerning duopoly markets, is an extraordinarily strong argument in support of the conclusion that, in a situation where two facilities with RMWPF status are operating in one municipal waste management region, it will not be possible to claim that either of the undertakings managing the facilities actually holds a dominant position. However, it is worth reiterating that it is possible to establish the existence of a dominant position if there is an agreement between the entities running the RMWPF facilities, for example concerning setting prices for receiving certain types of waste to the facilities. Such an agreement would entail that the market could be accurately described as being characterized by a collective dominant position.

Conclusions

In conclusion, it is clear that the existence of a dominant position on the mixed municipal waste management market, and green waste management market, in a given area of municipal waste management, can be confirmed with certainty when there is only one facility granted with the statuss of regional facility for processing municipal waste. This results from the lack of choice with regard to the facility to which mixed municipal and green waste can be delivered, as stipulated in the Waste Act and the Maintaining Cleanliness and Order in the Municipality Act. These provisions introduce the necessity of delivering this type of waste to a RMWPF facility, and consequently *de facto* set up a monopoly on their processing, should only one RMWPF facility operate in the given region.

However, if in a given waste management region there two (or more) competing facilities with RMWPF status, it cannot be said that the entities running either (or any) of them holds a dominant position on the market. Such facilities can actually compete to receive the delivery of the same types of waste. In such a situation, a dominant position is only possible in the form of 'collective dominant position', for which the existence of an agreement between the entities managing the facilities in the region is essential.

Lastly, it is necessary to emphasize that the mere holding of a dominant position on a given market by an entity does not in itself result in an automatic breach of the provisions of the Competition and Consumer Protection Act. According to Article 9, section of this normative act, only abuse of a dominant position on the relevant market is prohibited. Undoubtedly, however, as the case-law European Court of Justice highlights, an entity having such market power bears a special responsibility for the risks that its position pose to the proper functioning of the market.[36]

36 The judgement of the CJEU of 13.02.1979, 85/76, Hoffmann La Roche v. the Commission, Court Reports 1979, p. 461.

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SUMMARY

The Dominant Position of Regional Facilities for the Processing of Municipal Waste

This paper addresses the issue of the functioning of regional facilities for the processing of municipal waste in the light of the provisions of the Competition and Consumer Protection Act of 16 February 2007. The authors seek answers to the question of whether in certain specific situations it is possible to conclude that a given facility holds a dominant position on the market in which it operates. Two situations will be subjected to close analysis, namely those in which only one or two facilities with RMWPF status operate in a given region of municipal waste management.

Keywords: waste management, competition protection, dominant position, municipal waste, maintenance of cleanliness and order in a municipality, voivodeship waste management plans

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