Kluwer Competition Law Blog

Poland: a grand new opening?

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(1) Significant changes to the Polish Competition Law are on the way.

One could probably not imagine a better case for a debut in this blog. The Polish Competition Authority, or PCA (the President of the Office for Protection of Competition and Consumers), revealed last week details of the awaited proposal of far-reaching changes to the Polish competition law. A review of this document leaves the reader with mixed feelings. Most of the proposals are definitely a step (or even a few steps) in the right direction, some may not work as desired if implemented in their proposed form, and at least one should cause a deep concern among businesses. See below for first impressions on key changes.

(2) Merger control – two-staged procedure at last.

It looks like Poland will finally have a two-staged merger review procedure, something that has been desired since the first competition legislation was adopted in 1990. As soon as the new rules come into force, all non-problematic concentrations will be cleared in a simplified procedure that should last one month (except that PCA can stop the clock each time it asks questions or requires new data or documents to be provided in the course of the proceedings). Cases that can cause competition concerns will go to a second phase review, which means a four months' extension of the process (here, too, the clock stops when a question is asked). The PCA expects that approximately 80% of cases will qualify for the simplified procedure, meaning that the stand-still period should be shorter for most transactions. The criteria for qualification of cases to the two-staged procedure have not been made known to the public so far.

(3) Settlements & Leniency Plus – new tools in the toolbox.

Effective enforcement is a key success factor for any competition authority, so it comes as no surprise that the PCA intends to add new tools to its already well-equipped toolbox. They might prove to be an interesting option, subject however to a few important alterations.
The proposed amendment offers settlement with the PCA in exchange for a 10% reduction in the financial penalty. This is good, in principle, but the devil is in the details – I truly believe that this instrument will not work well if implemented in its presented form. Firstly, the PCA expects that it will not issue a "statement of objections" until after the parties' initial acceptance of the settlement. This is a wrong order. The undertakings should be aware of the risks before they make the decision to settle and not when this decision is already made. Secondly, the proposal requires undertakings to issue a formal settlement statement under which they are obliged, inter alia, to assume liability for breach of competition law; at the same time, the PCA will be able to withdraw from the

settlement at any time, including after the statement has been issued. This seems to pose too much risk on the parties to make the whole thing work. Finally, a 10% reduction might not be enough to induce wrongdoers to admit the quilt and waive the right to appeal, especially as the settlement (and the decision issued on its basis) may later be relied upon to pursue damages claims.
In addition, the proposal suggests that the PCA will operate a Leniency Plus program available for those undertakings who do not qualify for full leniency (100% reduction of the fine). Such undertakings, if they provide information about other, unknown competition infringements, will qualify for an additional 30% reduction in the original case and for a 100% reduction in the new case, which may be a good deal. The proposal suggests fine tuning of the leniency regime and this is the real key to success (current rules are sometimes ambiguous and there is no room for ambiguity when leniency applications come into play).

(4) Legal Professional Privilege – long awaited but is it enough?

What may come as a surprise for many readers, it is only with the changes of the law that Legal Professional Privilege ("LPP") will be officially recognized in Poland. This is good news. The personal scope of the rule, which will cover also in-house lawyers (as long as they are admitted to practice in Poland as advocates (adwokat) or legal counsels (radca prawny)), is not bad news, either. The rest is definitely less bright, as the only advice covered will be that rendered in course of the PCA proceedings for the purpose of the defense. No other legal advice will qualify for protection, so such protection is rather illusory. The scope of LPP should definitely be broader.

(5) Fines for individuals – a bridge too far.

Last but not least, the "trendy" part – financial penalties for individuals. According to the proposal, a fine may be imposed on key managers of any undertaking which breaches competition law. This possibility is not limited to cartels, it will also cover vertical agreements and even cases of abuse of a dominant position. The fines will be imposed in one decision, at the end of the proceedings. They can be relatively high, as the cap is set at the level of 500,000 EUR. The key questions is: are we ready for this? In my opinion, we are not. Just one example: at the moment Polish courts refuse to resolve cases of alleged procedural violations during PCA proceedings. Can you imagine fines being imposed on individuals in a procedure whose formal elements are outside jurisdiction of the courts? I think the rights of individuals should be protected even more than those of companies, which means that the whole system of appeal would require a large change to adapt to this new eventuality. Without radical changes, the new law may leave us with some bitter taste in our mouths.

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This entry was posted on Tuesday, May 22nd, 2012 at 3:17 pm and is filed under Source: OECD“>Competition
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