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POLAND: Draft guidelines on commitment decisions – harder times for infringers?

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Shortly after revealing proposed amendments to the Competition and Consumer Protection Act (for details, please see my post from May 22), the Polish Competition Authority (the President of the Office for Protection of Competition and Consumers) published draft guidelines on commitment decisions ("Guidelines").

Since PCA nowadays uses commitment decisions increasingly often (125 such decisions were adopted in 2011, being 35 more than in the previous year), it is important for the undertakings operating in Poland to have a clear guidance on how to offer commitments and avoid fines. This post is an attempt to identify possible key practical consequences of the new policy of the PCA, as they might be somehow puzzling.

Act fast, really fast or it will be too late

In general, commitment decisions may be issued at PCA's own discretion under two conditions: (i) the infringement is probable and (ii) the undertaking agrees to take or discontinue certain actions in order to prevent the infringement.

The Guidelines emphasize that an alleged competition law infringement does not have to be proven with certainty for commitments to be accepted. It is sufficient for the purpose of the commitment decision procedure that an infringement is found to be highly probable from the Polish Competition Authority's perspective. Whether or not an infringement is highly probable is assessed according to evidence on file, such as information submitted by the undertaking in question or by third parties.

The foregoing assumption leads the PCA to a conclusion that the investigated undertaking should make a commitment proposal to the PCA at a very early stage of the proceedings, preferably in response to the authority's letter formally initiating the procedure. Timing is crucial in this case since the sooner a commitment proposal is submitted, the more likely it is that the PCA does not have strong evidence to declare infringement and will accept it on the balance of probabilities. In the past, we already saw a tendency to deny commitments simply because they were proposed "too late". But now it seems that the policy will be even stricter, as the appropriate application should be filed already at the very beginning of the procedure. It remains open if this is a right direction. A commitment decision is good for both sides, it spares the PCA time and resources, so I do not think that the simple fact that a proposal is made at a later stage should impede settlement of the case. Also, not everything is usually clear-cut in competition law. In many situations the best strategy for the undertaking in

question is to present its case and the supporting legal analysis to justify its behavior, and do not offer commitments until it turns out that the Authority remains unconvinced. Now, under the new Guidelines, there is a risk that such a strategy will not work, as the PCA expects the commitment proposal to be filed as early as practically possible.

Commitments are not always the right way

The Guidelines specify that the commitment procedure has a very limited ("exceptional") applicability to certain types of anticompetitive agreements. Agreements which have as their object or effect price fixing, market sharing, tender collusion or limiting or controlling production, sale, technical development or investments are regarded as hard-core restrictions on competition. Since those agreements are extremely harmful for competition, commitment proposals in such cases will be very closely scrutinized by the PCA and the Guidelines suggest that a leniency application will be a preferred way to escape fines in such situations. This simple declaration may have a "side effect". Leniency is available in Poland also for vertical agreements and not only for hard-core cartels. Until now, in certain situations, e.g. ones involving resale price maintenance in vertical relations, some cases have been resolved by commitments and some by leniency applications (in the latter case, the distribution network organizer would usually file a leniency application "against" its own distributors, which is probably not the best possible approach from the business perspective ...). With the Guidelines, settlement will not be available, meaning that the leniency application will be the only way to avoid or at least lower the fines. This may without any doubt improve leniency statistics in Poland, but there is an open question if those are really the cases for which leniency programs are made for.

Harder times are coming

The two examples show that the PCA intends to apply a stricter policy to commitment decisions. It is a pity as this is a very flexible and efficient tool which facilitates finding optimal and immediate solutions for most cases. As it will be harder to get off the hook soon, it might be the right time to screen your Polish operations and make sure everything is under control.

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