

Franchise networks under siege from the Polish competition authority over alleged RPM arrangements

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In its decision of 25 June 2013, the Polish competition authority (Prezes Urzędu Ochrony Konkurencji i Konsumentów, the "PCA") has fined Sfinks Polska the amount of PLN 464,228.92 (approximately €107,000) for imposing fixed resale prices on its franchisees. It is worth noting that, while it is just one of many PCA decisions regarding vertical pricing restraints, it is the first regarding pricing restraints in franchise agreements (although the franchise concept has been used in Poland since the early 1990s). Sfinks Polska is one of the largest restaurant chains operating in the casual dining sector in Poland and Europe.

In December 2012, the PCA instituted proceedings which examined not only the agreements used by Sfinks Polska with its franchisees, but also investigated the broader rules of operation of the chain of Sphinx restaurants. According to the PCA, the proceedings revealed that, since 2000, Sfinks Polska has infringed the Polish Act on Competition and Consumer Protection in many different ways including, for example, by imposing fixed resale prices on its franchisees with respect to products offered in Sphinx restaurants, or by demanding approval for many promotional activities undertaken by its franchisees. Moreover, Sfinks Polska has closely monitored franchisees' compliance with these obligations and, in the event of failure to observe them, franchisees faced risks of contractual penalties or even termination of their franchise agreements.

In the PCA's view, the infringement committed by Sfinks Polska represents a gross violation of competition law because, in principle, it is unlawful to set fixed prices by undertakings operating within a vertical relation e.g. within a franchise arrangement. Due to the fact that franchisees operate as independent undertakings bearing their own risk, they must have freedom in shaping their own pricing policies. The franchisor is only entitled to recommend resale prices (but they cannot be obligatory for a franchisee), and to set maximum prices (and the franchisees have to be free to charge lower prices) provided that these arrangements do not ultimately function as fixed prices. Moreover, the PCA pointed out that Sfinks Polska has not followed the European Commission's Guidelines on Vertical Restraints. Specifically, under the Guidelines, fixed or minimum RPM clauses in franchise relationships are allowed only for short-term, low-price campaigns of up to six weeks, and only where they are actually beneficial to the customers. However, under the provisions of the Sphinx franchise agreements, price promotions may last from two weeks to several months.

The decision is not final. Sfinks Polska has lodged an appeal with the Court of Competition and Consumer Protection.

The Sfinks Polska case is undoubtedly another example of the PCA's very formal approach towards vertical pricing restraints. Again, fixed or minimum RPM has been classified by the PCA as an object restriction without any detailed economic analysis of whether there is a good case for switching it from the "object box" to the "effect box". Of course, it is true that imposing fixed and minimum prices on franchisees limits access to offers of varied prices that may in turn affect consumers. However, it must be borne in mind that there is fierce inter-brand competition with regards to the casual dining sector in Poland. As a result, customers have a really wide range of restaurants to choose from and they can easily patronise another place if they are not satisfied with the prices offered. In addition, uniform pricing is something that may be expected by consumers in restaurants operating under the same brand (i.e. chain). The PCA seemed to completely ignore these factors. Moreover, while stating that the intra-brand pricing competition is as important as inter-brand pricing competition, the PCA did not prove any harm to consumer welfare. This means that, in Poland, we are still far from a real economic approach towards vertical restraints and, for now, in practice every fixed or minimum RPM seems to be per se illegal.

This decision requires every franchise undertaking in Poland to review its franchise agreements and to avoid any vertical pricing restraints that will not be "block exempted". Otherwise, applying such restraints may pose serious legal risks including very significant financial penalties and potential nullity of such clauses. In this context, it is worth mentioning that the PCA is currently conducting other proceedings to investigate the potential violation of competition law by other franchise-based restaurant chains.

This article has been co-authored by Dr. Bartosz Turno.