

The Polish competition authority applies the principle of in dubio pro reo in the case concerning a cartel on the domestic certification market (and refuses to use lie detecting devices)

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On 29 December 2017, the Polish competition authority – the President of the Office of Competition and Consumer Protection (the “OCCP President”) – penalised a cartel of two undertakings i.e. Istituto Italiano del Marchio di Qualita S.P.A. and Dekra Certification Sp. z o.o. The two companies divided markets as well as customers and colluded on terms and conditions of the offers submitted in tenders. The cartel affected the Polish market for issuance of the ISO certificates.

There were no doubts as to the existence of the illegal collusion as both companies – just after the initial procedural measures taken by the authority – filed leniency

applications, admitting to the wrongdoing. The first to submit its application was Dekra (on May 14, 2014). The application of the competitor – Instituto Italiano – was submitted 6 days later (on May 20, 2014).

In such circumstances, the status of the “initiator” of the cartel quickly became a key question. It was so, as under the Polish law only an entity that was not an initiator of an illegal arrangement may be granted full immunity. As a result, disqualification of the initiator guarantees immunity to the undertaking that is second in the row.

Easier said than done, as the evidence of the existence of the cartel came down to the testimonies of the witnesses (employees of the undertakings concerned) which, as one would expect, were contradictory. Dekra’s employee claimed that it was Instituto Italiano that was the initiator of the agreement while Instituto’s employee’s claim was directly contrary – that it was Dekra’s employee who came up with the idea to resort to unlawful methods of acquiring clients. In short – one’s word against the other.

Interestingly, lie detection did not result in a breakthrough, as the OCCP President rejected the motion for conducting polygraph tests. In the opinion of the authority, and in accordance with the Polish jurisprudence, such tests are not a reliable proof.

Being unable to determine the key factual circumstances, the Polish competition watchdog faced a serious dilemma. Ultimately, due to the quasi criminal nature of the proceedings regarding practices that restrict competition, the authority decided to apply the principle of *in dubio pro reo* that is used in the criminal law. That meant that the doubts should be resolved in favour of the “defendant”. Therefore, as it was not possible to prove that Dekra (which submitted leniency application first) was the cartel initiator, the OCCP President granted immunity to this company and released it from the obligation to pay the fine. The second in row was granted a 50% fine reduction.

The application of the principle of *in dubio pro reo* to a cartel fine is an interesting legal solution. The reasoning of the authority clearly seems to favour the attractiveness of the leniency program, as the alternative would be to deprive both companies of full immunity as none of them was able to demonstrate that it was not the initiator of the cartel. Such a scenario would put more emphasis on preventive and deterrent nature of the competition law, however, with all certainty

it would result in a situation where the entrepreneurs that violate the law would be less eager to co-operate with the OCCP President.

Looking at the case from a broader perspective, one should ask one more question - was the Polish competition authority fully aware of the consequences when deciding that the principle of *in dubio pro reo* is applicable to competition law proceedings? In this specific case, its application allowed to issue a ruling good for the attractiveness of the Polish leniency program but there is no doubt that in all future proceedings - regarding various types of violations - there will also be reasonable doubts as to the factual circumstances of cases. Such doubts, as the OCCP President stated, would have to be resolved to the entrepreneurs' advantage and this can make the authority's life harder.

Another positive message for potential violators is that they will not be subject to polygraph tests...at least not in Poland.