Kluwer Competition Law Blog

Proposed far-reaching changes to Polish competition law

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In March 2013, the President of the Polish Office of Competition and Consumer Protection ("OCCP") published a new draft amendment to the Competition Act. If approved by the Council of Ministers, the draft will be sent to parliament and is likely to become effective by the end of this year.

The changes are far-reaching and are likely to have a direct impact on business activity in Poland. The main aim of the changes is to strengthen the enforcement powers of the competition authority, in particular through the imposition of individual liability for infringement, leniency programme modification, the introduction of leniency plus, as well as a system of public warnings for practices which threaten the interest of consumers. Some of the changes will also facilitate business activity like, for example, the introduction of a two-phase merger control procedure.

Regulations facilitating business activity

The bill introduces a two-phase merger control in Poland. The first phase is intended for non-complicated mergers and should be completed within a month. The second phase, which is significantly longer as it can last up to four months, is required for more difficult transactions which may significantly restrict competition or which require a detailed market analysis. It is within the sole competence of the OCCP to decide whether a second phase is necessary, and undertakings are not entitled to challenge the OCCP's decision, once made.

Currently, the same procedural rules apply to all mergers. Under the existing Competition Act, merger review proceedings should last no longer than two months. However, the "stop the clock" rule, under the timetable is suspended while additional information is sought, can cause significant delays. The OCCP's present practice in difficult merger cases shows that the parties often have to wait for a decision for up to six months, and even as long as nine months on certain occasions. If the new bill is passed, the "stop the clock" rule will be preserved. However the introduction of the two phase procedure is likely to significantly speed up proceedings in the case of mergers which do not raise competition issues..

The bill also provides for new exemptions from mandatory merger notification. For instance, the creation of a joint venture by undertakings with a small turnover in Poland (not more than €10,000,000 in any of the two preceding years) will not be subject to merger control.

New institutions strengthening the powers of the authority

One of the most controversial proposed changes is the introduction of personal liability for individuals who perform managerial functions or who are members of the management bodies of companies. The imposition of a fine on individuals will have to be dealt with in a similar way to criminal proceedings, and consequently the safeguards applicable to criminal proceedings under article 6 of the European Convention of Human Rights and Fundamental Freedoms will apply. Individuals may be subject to personal liability if they intentionally allow for an infringement by their company of the prohibition of anticompetitive agreements. If the OCCP fines a company for an anticompetitive agreement it will also have the right to impose a fine up to PLN 2 million (approximately € 500,000) on individuals. Technically, the fines for individuals and for the company will be imposed during the same proceedings within a single decision. However, liability of individuals has a secondary character to that of the liability of a company. In this respect, a manager may be fined only if the company is held liable.

The definition of an individual who may be liable is unclear as it includes a person who is managing the whole undertaking i.e. a member of the managing board and a person performing managerial functions in an undertaking. In practice, it is easy to qualify who is a member of the managing board, but it may be difficult to qualify who is performing managerial functions. Thus, the OCCP has a broad discretion concerning the qualification of which company employees can be held liable for infringement. It is worth noting that former employees can also be held liable. Managers can be fined, not only for horizontal cartels, but also for illegal vertical agreements. The bill provides a very broad definition of agreements which may trigger liability for individuals. This includes price fixing (including resale price maintenance); limiting or controlling production, market, or technical development; market sharing; applying dissimilar conditions to equivalent transactions; tying transactions; and hindering access to the market (for example, exclusivity clauses). The list is not limited to severe hard-core restrictions, but can also encompass agreements which can be qualified as illegal only if their anticompetitive effects occur on the market. Thus, the concerned individuals can be fined even though it was not possible to assess at the time of signing the contract whether certain clauses were capable of bringing about anti-competitive effects on the market. Luckily, the OCCP abandoned their initial idea of introducing fines for individuals in addition for abuses carried out by companies in dominant positions. In our opinion, it would be advisable to narrow the catalogue of agreements which may trigger the liability of individuals only to horizontal agreements which are qualified as anti-competitive by their object and not by their effect. We consider that the implementation of the current bill could make the corporate decision-making process extremely complex in many companies, especially for those who have a business model of distribution based on contractual exclusivity.

In this respect it is worth emphasizing that the bill provides the same maximum value of fines for individuals participating in vertical as well as for horizontal agreements. Taking into account that, in general, horizontal agreements (cartels) are regarded as the most detrimental for consumer welfare we assume that the establishment of the same ceiling is not proportionate. We believe that, using the analogy of criminal law, actions of differing harm should be subject to sanctions of differing severity. In comparison to liability of undertakings, individuals are granted additional safeguards such as the right against self–incrimination i.e. they are not obliged to deliver to the OCCP documents and information which may be used against them. Individuals can only be held liable if the infringement by the undertaking has not ceased as of the day of entry into force of the new legislation.

Leniency and Leniency Plus

The Leniency programme has been operating in Poland since 2004. The statistics show that only 22% of proceedings instigated between 2004 and 2012 are an outcome of a leniency application regarded horizontal relationships. The OCCP wishes to introduce changes which aim to increase the efficiency of the leniency policy against illegal horizontal agreements. The OCCP has therefore decided to make a number of provisions more precise and to modify the conditions necessary in order to grant immunity from being fined. Under the new law an undertaking filing for leniency will not be obliged to show that they were not the initiator of the agreement, but instead will have to show that they did not urge other undertakings to participate in the agreement. The change has been welcomed as, in practice, it was difficult to establish who the initiator of an agreement actually was. The OCCP has also abandoned the condition that an undertaking should stop participating in the agreement not later than the moment of filing the leniency application. In accordance with the bill, the undertaking should cease participating in the agreement immediately after filing the application.

The changes also concern leniency applications submitted after the first application on which basis the OCCP can only reduce a fine. The OCCP proposes to change the current provisions which specify the maximum fine (as a maximum percentage of turnover) that can be imposed on an undertaking. Instead, the OCCP wishes to include a provision that will reduce a fine by the specified percentage which would have been imposed had the undertaking not filed a leniency application.

The OCCP has proposed also “leniency plus”. If an undertaking, which is party to proceedings and has filed a leniency application on the basis of which it might receive a reduction of a fine, files a leniency application in relation to another agreement which is unknown to the OCCP, it can receive a further reduction of the penalty in pending proceedings and immunity from penalty in future proceedings.

Early information about threats to consumers

The bill includes a provision whereby the OCCP will be entitled to inform the public about the behaviour of an undertaking and its probable effects where there is a high probability that an undertaking’s behaviour has violated the collective consumer interest and may result in significant losses or adverse effects to a wide circle of consumers. The information can be passed to the public before an administrative decision has been issued. In the current version of the bill this provision aims only to protect against violations of the collective interests of consumers which usually are more straight forward cases than anti-competitive behaviour.

Conclusion

The Polish competition authority has undoubtedly significantly strengthened its enforcement powers. However, the final impact of the new tools will depend on OCCP policy and the way in which the OCCP eventually chooses to use its powers. Whilst the bill is not yet final, it is unlikely to change before it enters into force. If any further changes were possible, we would encourage a revision to ensure that individuals could only be held personally liable for horizontal agreements (cartels) rather than also for vertical arrangements.

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