Kluwer Competition Law Blog

Polish revolution – far reaching changes to Polish competition law. Part 1 – fines for individuals

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On 10 June 2014, the Polish Parliament adopted a significant set of amendments to the Polish Competition Law Act (the "Act"). Having received Presidential approval on 30 June 2014, the amended Act is now waiting for publication. The changes are expected to come into force relatively soon. The amendments will take effect 6 months after publication, which means that the new law will come into force at the beginning of 2015.

In this and subsequent posts, I would like to briefly analyze some of the most important changes, starting with the change that has been particularly hotly debated i.e. the introduction of the possibility to impose fines on individuals who manage undertakings which entered into competition-restricting agreements.

Who can be fined?

According to the new law, a fine may be imposed on any individual who manages an undertaking who intentionally, by his action or inaction, involved the undertaking in a competition-restricting agreement that infringes Polish or EU competition law. Importantly, this is not limited to cartels, but will also cover other horizontal and vertical agreements including, for example, resale price maintenance arrangements.

Moreover, it is worrying that the definition of an individual who may be liable seems to be unclear. In particular, it applies to persons who "manage the undertaking" i.e. persons performing managerial functions in respect of the undertaking. There is no doubt that this includes members of the management board, but it is uncertain if the definition also covers other persons who "perform managerial functions" in the relevant sense. In addition, it is unclear how to apply this definition to undertakings that do not have management boards.

Fines can be very high

The fines on individuals can be relatively high, at least in principle. The cap will be set at PLN 2,000,000 (approx. EUR 500,000). As already mentioned, a fine can be imposed only for an intentional breach of law. Among the most important factors which the Polish competition authority ("PCA") will consider when imposing a fine are "the degree to which the manager's conduct affected the undertaking's infringement, the manager's earnings from the undertaking, taking into account the duration of the infringement, and the period and market effects of the infringement".

Procedural aspects

If it suspects an illegal agreement, the PCA will run a single procedure. Both the undertaking and its managers will have the status of parties in such proceedings. As a consequence, any fines will be imposed on both the undertaking and its managers in one administrative decision. However, the

managers' liability is secondary to that of the undertaking. As such, a manager may be fined only if the undertaking is held liable and fined. This last aspect is important, because the new law seems to suggest, although this is not crystal clear, that if the full fine is not imposed on the undertaking (i.e. it files a successful leniency application that brings about full immunity or it avoids the fine by making certain commitments), its managers will get away without any fine. The reason is that, in such situation, under the current wording of the new law, there will be no legal grounds for imposing a fine on them or even holding them liable.

The imposition of fines on individuals and the undertaking in one decision (drafted by one case-handler/case-team) may introduce a lot of interesting issues with any appeal procedure. For example, much higher importance could be expected to be given to the proper safeguards of fundamental rights envisaged by the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union. I am not 100% sure if this "side effect" was taken into account when the new law was being drafted. For sure, it will put a much higher procedural burden on the authority. Also, both the administrative procedure before the PCA and the subsequent the appeal process will probably take much longer, as complex aspects of the liability of individuals and the undertaking will be dealt with in a single case.

Leniency for individuals

The introduction of competition infringement liability for individuals required significant modifications to the Polish leniency programme. A preliminary look at these changes illustrates several interesting issues:

• A leniency application filed by an undertaking will no doubt also cover its managers as a matter of course. This is expressly allowed by the law. However, there is a condition: the manager must "cooperate with the PCA, starting when the person takes notice of the application filing". In addition, the fine reduction for the individual will mirror that for the undertaking so, if the undertaking gets a lower reduction because of late filing, the same will happen to its managers.

• Assuming a manager cooperates with the authorities, he or she will retain the benefit of total immunity or a fine reduction, even if the benefit is lost by the undertaking. However, the law is silent on how the fine for the individual will be established in such cases. We can only speculate that the person will receive the reduction that would otherwise have been due to the undertaking had it not lost its leniency status.

• In addition, a manager may file for leniency on his or her own, in which case, the application will not cover the undertaking. However, this will give rise to a major issue with application queuing: Will applications filed by individuals get in the same queue with applications by undertakings, or will we in fact have two different queues? It seems the latter is more likely to be the case. Interestingly, since this issue is not precisely regulated in the new law, it can probably be resolved only in secondary legislation (the law provides that a decree of the Council of Ministers will regulate in detail the procedural aspects of the leniency program), although this legislative solution will certainly raise concerns as to its constitutional compliance, because such secondary legislation is not the right rank to regulate rules for the liability of individuals.

• The new law also requires applicants to obtain the PCA's consent to reveal the fact that they have filed their leniency applications. As the Act offers no exceptions to this rule, we should presume that the rule applies also in relations between an undertaking and its managers, so that the undertaking should not disclose its leniency filing to its managers (this, in many cases, may simply be impossible) and a manager should not disclose his or her individual filing to the undertaking. This is of course highly controversial. Lifting this non-disclosure duty in relations between undertakings and their managers would seem to be a more reasonable solution in the circumstances.

To sum up, the new rules on liability of individuals unfortunately bring about some really

important questions that will most probably only be answered in the decision-making practice of the PCA and jurisprudence of the courts. The PCA should also be aware that, under the new law, a much higher weight will be attached to all procedural aspects of its proceedings (which under the current regime, is not the case i.e. the courts tend to deny that such procedural aspects have any importance and can be a separate ground for appeal). Finally, there is a clear risk that the new law will bring about problems of conflicts of interest between the undertaking and its managers (due, for example, to different grounds for liability or not always clear links between the leniency status of the undertaking and the leniency status of its managers).

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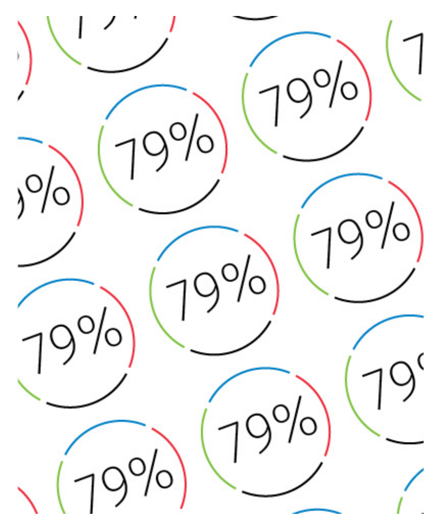

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